



**REPORTABLE**

CASE NO: SA 79/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**DIETMAR DANNECKER**

**Appellant**

and

**LEOPARD TOURS CAR AND CAMPING HIRE CC**

**First Respondent**

**BARBARA HAUSNER**

**Second Respondent**

**MANFRED HAUSNER**

**Third Respondent**

**Coram:** MAINGA JA, SMUTS JA and FRANK AJA

**Heard:** 1 June 2018 and 13 July 2018

**Delivered:** 31 August 2018

**Summary:** The appellant is a foreigner who entered into a car hire agreement with the first respondent, a close corporation. The second and third respondents are the members of the first respondent. The appellant sued the first respondent, alternatively the second and third respondents jointly and severally, in the court *quo* for repayment of N\$168 963, 41 and N\$28 653, 00 in respect of damages he

allegedly caused to a vehicle hired for use on a safari in Namibia. The court *a quo* found that the respondents made material representations regarding the insurance offered to the appellant. However, the court *a quo* rejected the submission by the appellant alleging that the second and third respondents should be held liable jointly and severally with the first respondent under the Close Corporation Act, because that was not the case of the appellant. The court *a quo* further found that the appellant failed to discharge his onus in proving that the respondents' insurance covered the loss to the vehicle arising from him driving through a riverbed on an unmarked road, not authorized by the appellant. Regarding the appellant's alternative claim of unjust enrichment, the court *a quo* found that the respondents failed to produce proof of repairs to the damaged vehicle and that first respondent therefore was enriched at the appellant's expense. In respect of the claim of N\$28 653, the court *a quo* found that the appellant's arguments were meritless as this amount was clearly itemized by the respondents as expenses they incurred in order to extract the vehicle from the riverbed. Lastly, on the issue of whether the second and third respondents should be held jointly and severally liable with the corporation for the amount of N\$168 963,41, the court *a quo* found no basis for such liability on the case as pleaded.

Aggrieved, the appellant now appeals against the finding of the High Court that second and third appellants were not liable, jointly and severally with first respondent in respect of the claim based on enrichment. Subsequently, the respondents cross-appealed against the finding of the High Court, that the respondents have been enriched at the expense of the appellant.

The appeal in this court was to be heard on 1 June 2018. However on that day the appellant's legal representative raised the issue that the respondents failed to tender security for costs in terms of rule 14(2). The court accordingly decided to postpone the matter to a date to be arranged with the registrar for the respondents to address the point belatedly taken without any forewarning. The respondents were directed to file a condonation and reinstatement application explaining their failure to file the said security and why their cross-appeal should be heard. The matter was postponed and subsequently heard on 13 July 2018.

Although the condonation application remained unopposed, the court held that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation and that such application should be lodged without delay. Based on the authority of *Kleynhans v Chairperson of the Council for the Municipality of Walvisbay and others*, this court found that although security was offered on 1 June 2018 and the wasted costs were tendered by the respondents, the application resurrecting the cross-appeal was filed five weeks later and the explanation tendered in respect of the delay was neither sufficient nor satisfactory and a flagrant disregard of this court's rules. The application to reinstate the cross-appeal is therefore refused.

The only issue for determination on appeal is whether the second and third respondents should be held jointly and severally liable for repayment of the amount of N\$168 963,41. The appellant submitted that it was not necessary for him to have pleaded that the respondents acted in violation of the Close Corporation Act, as the violation was evident from the facts and the documents

filed of record. However, counsel submitted that if it was at all necessary to plead same, an amendment to the plea should be granted, because there would be no prejudice to the respondents. This was so as the appellant in his evidence reiterated the fact that at all times he was not aware that he was dealing with a separate legal entity, but rather gained the impression that he was trading with a family business due to the fact that none of the documentation exchanged between the parties contained the correct name of the entity together with the capital abbreviation "CC". On behalf of the respondents it was contended that it was never the appellant's case and if the appellant intended on relying on the alleged contravention of a provision in the Close Corporation Act, he should have pleaded it in clear terms with reference to the specific provisions in the Act.

*Held* that the court *a quo* correctly came to the conclusion that one of the prime functions of pleadings is to clarify the issues between the parties and to enable the other party to know what case he has to meet.

*Held* that the appellant should have specifically and unambiguously pleaded the provisions the respondents violated in the Close Corporation Act, and on which he relied to hold the second and third respondents personally liable with the first respondent jointly and severally, and not have left it to be inferred from documents filed and/or discovered by the parties.

*Held* that the appellant had ample opportunity to amend its pleadings when he placed the facts before the court *a quo*, especially considering the fact that during

cross-examination of the respondents, they admitted to transgressions of the Close Corporation Act.

*Held* that the argument that the appellant did not know exactly with whom he was transacting, holds no merit.

The appeal is accordingly dismissed.

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### APPEAL JUDGMENT

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MAINGA JA (SMUTS JA AND FRANK AJA concurring):

#### Introduction

[1] This is an appeal against an order of the High Court dismissing appellant's claim based on enrichment against second and third respondents with costs for the recovery of the amount of N\$168 963, 41 less 15% tax paid to first respondent and against all three respondents for the recovery of the amount of N\$28 653 which claim has since been abandoned. The respondents cross-appealed against that portion of the judgment that found that the first respondent has been enriched at the expense of the appellant.

#### Background

[2] The appellant who was the plaintiff in the court below, sued the first respondent, alternatively the second and third respondents, as defendants in the court below, jointly and severally for the repayment of the amounts of N\$168 963, 41 and N\$28 653, 00 in respect of damage allegedly caused negligently by him to

a vehicle he had hired for use while on a safari in Namibia. When he attempted to cross a river at a place called 'Baaidjie' he got stuck and a strong water current overturned the vehicle. The damages related to the recovery of the vehicle and the damages caused to it by this incident.

[3] The first respondent is a Close Corporation duly registered with its principal place of business at Gloudina street 109, Ludwigsdorf, Windhoek which is also the residential address of the second and third respondents. The appellant alleged in his particulars of claim that the plaintiff's claim is against the first respondent, alternatively the second and third respondents jointly and severally, who were at all relevant times acting in partnership under the name and style of Leopard Tours.

[4] Appellant's particulars of claim in more detail are in this form:

'6. In or about the 25<sup>th</sup> of January 2004, First Defendant represented by Second and Third Defendants alternatively Second and Third Defendants personally representing their partnership known as Leopard Tours made representations to Plaintiff by way of their 8 page internet prospectus stating among other allegations the following:

6.1 that they were letting out 4x4 camping vehicles to tourists visiting Namibia;

6.2 that they are not the cheapest but the best suppliers of vehicles equipped for safaris in Namibia;

6.3 that there are no "hidden or extra" costs if one enters into a contract with them for the hire of a 4x4 camping vehicle;

6.4 that included in their all inclusive daily tariff there is a **super** insurance cover including CDW, TLW and ACDW insurance cover providing a 95% protection and a reduction of the excess to € 1500,00;

6.5 that the vehicles are specifically equipped for "Africa Tours".

7. Relying on and being persuaded by first alternatively second and third defendants' representations, plaintiff entered into a hire contract with first alternatively second or third defendants for the hire of a 4x4 camping vehicle at a daily rate of € 148, 90 for a period of 28 days for the period 1 November 2004 to 28 November 2004 with the purpose of using the said vehicle for a safari trip in Namibia.
8. Plaintiff took delivery of the said vehicle with registration number N 72140 W on the 1<sup>st</sup> of November 2004.
9. On taking delivery of the vehicle, plaintiff was required to sign defendants "rental contract agreement", (a copy of the agreement was attached to the particulars of claim).'

[5] Paragraph 10 of the particulars of claim is a detailed reflection of the vehicle hire contract, which contains the insurance the first respondent provided and exclusions from the insurance, particularly excluded were glass breakage, sandblasts, fuel, tires, undercarriage, damages caused by driving through water, repatriation after accidents, damage to the vehicle or breakdowns in remote areas and personal property.

[6] The particulars of claim continued to allege that:

- '11.1 On Thursday, the 18<sup>th</sup> of November 2004, at approximately 11:00 AM plaintiff in attempting to cross a river at a place called "Baaidjie" got stuck with his vehicle in the river. Subsequently, the river came down in flood and overturned the vehicle and caused substantial damage to the vehicle.
- 11.2 Plaintiff was not negligent in taking the decision to try and cross the river in particular for the following reason:
- a) the river was not in flood at the time when the attempt to cross it was made although there was some water in the river;
  - b) the vehicle was a 4x4 vehicle of which the defendant had made representations that it is suitable for safaris in the African bush which includes the crossing of rivers;
  - c) Plaintiff walked through the river to test the road;
  - d) Plaintiff saw that other vehicles had passed through the river;
  - e) The damage to the vehicle was not caused by Plaintiff's conduct but by the subsequent event, namely that the river unexpectedly came down in flood;
12. The vehicle was subsequently transported to Windhoek by the defendant at a claimed cost of N\$28 653, 00.
13. First defendant represented by second and third defendants, alternatively second and third defendants personally representing the partnership known as Leopard Tours demanded from plaintiff;
- a) payment of the alleged transport costs of the said vehicle from "Baaidjie" to Windhoek in the amount of N\$28 653,00;



- b) the alleged costs of repairing the damages caused to the said vehicle and to the camping equipment with which the vehicle was fitted in the amount of N\$168 963, 41.
14. Plaintiff paid both amounts referred to in para 13 above to the defendants. The amount of N\$168 963, 44 was paid in or about May 2005.
14. A When making the representations contained in paras 6.4 and 10 above, the defendants knew same to be false in that the defendants knew that the first defendant had no such insurance cover which it could offer to the plaintiff, alternatively the defendants were negligent in making these representations as aforesaid in that the first defendant at all relevant times hereto was never registered as a short term insurer.
14. B Further plaintiff avers that any form of insurance so offered by the first defendant to the plaintiff was invalid and/or unlawful in that it did not comply with the peremptory provisions of the Short Term Insurance Act, 1998 *inter alia* for the reasons that at all relevant times hereto the first defendant was never registered as a short term insurer in terms of the said Act as a consequence of which it could not offer and/or give any insurance cover to the plaintiff.
14. C When the defendants made this representation they intended the plaintiff to act thereon and to *inter alia* pay the first defendant the rates so charged by it.
14. D In addition to the aforesaid the defendants further made this representation and on such basis induced the plaintiff to pay the first defendant the sum of N\$168 963, 41 ostensibly because the plaintiff's conduct had the result that he no longer enjoyed any insurance cover, well knowing that the plaintiff had no cover at all in the first place.
14. E Plaintiff was induced by the representations so made as aforesaid and furthermore made the payment of N\$168 963, 41 whereas, had he known the true facts, he would not have made any payment to the defendants at all.

14. F In and as a result of the aforesaid misrepresentations the plaintiff has suffered damages in the sum of N\$168 963, 41.
15. The payments were made by plaintiff as a result of plaintiff's *bona fide* and reasonable but mistaken belief induced by defendants that plaintiff was under a contractual, alternatively delictual obligation to pay the said sums referred to in para 13 above to defendants. After plaintiff had paid the said amounts to defendant and after plaintiff had obtained legal advice on plaintiff's contractual and delictual responsibilities towards the defendants based on the representations made by defendants and the facts of the case, it transpired that plaintiff had overpaid to defendants the said amount of N\$28 653, 00 and N\$168 963, 41 which amounts was not due and payable to the Defendants.
- 15(a) On the 3<sup>rd</sup> of November 2009, plaintiff became aware for the first time that defendants repaired and renovated the said motor vehicle camper with registration number N 72140 W at a cost substantially lower than the said N\$168 963,44 claimed by defendants from plaintiff and paid by plaintiff to defendant as costs of repair of the vehicle.
16. In the circumstances, first alternatively second and third defendants have been unjustly enriched at the expense of the plaintiff and plaintiff is entitled to the repayment of the said amounts of N\$28 653,00 and N\$168 963,41, alternatively the amount by which the amount of N\$168 963,41 paid by plaintiff to defendants exceeds the actual costs of repairs of the said vehicle.
17. On the 3<sup>rd</sup> of July 2006 plaintiff demanded from defendants to refund to plaintiff the amounts of N\$28 653,00 and N\$168 963,41 but the defendants have failed and/or refused to refund to plaintiff the said amounts.

**WHEREFORE** PLAINTIFF REQUESTS JUDGMENT AGAINST THE FIRST, ALTERNATIVELY SECOND AND THIRD DEFENDANTS JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED, ALTERNATIVELY JOINTLY:

1. Payment in the amount of N\$168 963,41;

**Alternatively**, the amount by which the amount of N\$168 963,41 paid by plaintiff to defendants exceeds the actual costs of repair of the said vehicle.

2. Payment in the amount of N\$28 653,00;
3. Interest on the abovementioned amounts of N\$168 963, 41 and N\$28 653,00 at the legal rate of 20% per annum calculated from the 3<sup>rd</sup> of July 2006 to date of payment;
4. Costs of suit;
5. Further and/or alternative relief'.

[7] In their plea, the respondents admit that first respondent is a duly registered Close Corporation and that the appellant at all relevant times contracted with the first defendant and aver that second and third respondents were misjoined to the proceedings. They further deny that they acted in their personal capacities nor having contracted with the appellant as members of a partnership under the name and style of Leopard Tours.

[8] Respondents admit that they advertised first respondent on the internet, but deny any misrepresentation in the advertisement. The respondents, based on para 8 of the rental contract pleaded that 'Insurance excludes . . . damage caused because of driving through water' and consequently pleaded that the appellant was responsible and liable to pay to the respondents the amounts for damages incurred as a result of the appellant's attempt to drive through a water logged river.

[9] Respondents admitted that first defendant was not registered as a short-term insurer, but pleaded that the insurance cover so offered to the appellant at the time was comprehensive and all embracing as represented and not dependent upon whether first respondent was registered as a short term insurer or not. They pleaded further that the insurance so offered by the respondents to the appellant could not have been invalid and/or unlawful for the reason that it did not comply with the provisions of the Short Term Insurance Act as such Act does not prohibit any other form of insurance such as self-insurance. Respondents further pleaded that the rental agreement concluded between the appellant and respondents clearly stipulates that damages sustained to a rented motor vehicle as a result of having driven through water, could not be covered by any form of insurance but that the party causing such damages by driving through water, was responsible for the damages so caused and that appellant breached the terms and conditions of the agreement and therefore personally liable for the damages sustained.

[10] The respondent further pleaded that appellant agreed to pay the amount so assessed by Harry Riegel, after he himself requested an assessment report.

#### The proceedings in the High Court

[11] The appellant testified and called a witness and the second and third respondents or the Hausners testified and called two witnesses. The court *a quo* found that the second and third respondents made material representations regarding the insurance offered to the appellant and that in the process they acted in breach of the Close Corporation Act in material ways and adumbrated the said

violations in para 47 of the judgment<sup>1</sup>. On that score, the court *a quo* found that the second and third respondents gave contrived and implausible interpretations of their actions and conduct on representations made to the appellant about insurance and found them not to be credible witnesses on that point and the court preferred the version of the appellant as more plausible.

[12] Notwithstanding the credibility findings above against the second and third respondents, the court *a quo* rejected the submission by the appellant that the respondents should be held liable based on the misrepresentations, regardless of whether the plaintiff breached the terms of the rental agreement. Consequently the court found that the appellant failed to prove that the insurance offered by the respondents covered the loss to the vehicle arising from him driving through a riverbed, on an unmarked road and at a point on the river where there were no vehicle marks as this would be contrary to the express terms of the rental agreement. However, on the alternative claim based on unjust enrichment, the court found that the respondents failed to produce proof of repairs which justified

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<sup>1</sup> *Dannecker v Leopard Tours Car & Camping Hire* (I 2909/2006) [2016] NAHCMD 381 (5 December 2016) para 47.

[47] Besides, it became apparent during the cross-examination of the Hausners that:

- a) The online prospectus on the strength of which the first defendant allegedly dealt with the plaintiff was in the name of Leopard Tours Car and Camping Hire CC, which is not the same name under which the property registered Close Corporation (Leopard Tours Safaris CC);
- b) The second defendant's admission of the citation of the first defendant as Leopard Tours Car and Camping Hire CC was improperly made;
- c) None of the email correspondence written to the plaintiff by the second defendant complied with the peremptory provisions of Section 22, 23, and 82 of the Close Corporation Act;
- d) The payments made by the plaintiff in respect of the car's rental were all into the private account of the second and third defendants;
- e) The invoices generated in demand of payment by the plaintiff for the car's rental were not in the name of the first defendant, and materially, were in violation of the Close Corporations Act in that the registration number was not stated, nor were the names of the members provided;
- f) The document on which the defendants rely for the allegation that the plaintiff was warned about not driving through water and to keep to the marked roads, was not in the name of the registered close corporation.

the inference that they did not repair the vehicle and were therefore not entitled to the payment made to them by the appellant based on Riegel's estimate and therefore the first respondent was enriched at the appellant's expense, a finding amongst other things, the respondents appeal against. As for the claim of N\$28 653 in respect of the recovery of the vehicle, the court *a quo* found that appellant's refusal to accept the liability of that amount is clearly meritless, as that amount was expenses incurred to extract the vehicle from the river, which expenses were clearly itemised by the respondents.

[13] On the question whether the Hausners should be held jointly and severally liable with the close corporation, the court *a quo* was not satisfied that appellant made out a case for such liability based on misrepresentation. The court went on to say:

[72] To succeed in attaching personal liability to the Hausners under the alternative claim, (I agree with Mr Mouton that) the plaintiff would have had to allege in his particulars of claim a violation, by the Hausners, of the Close Corporations Act such as would render them personally liable for the debts of the close corporation as contemplated in s 63 of the Close Corporations Act. (*Van der Berg v Chairman of the Disciplinary Committee supra*). The plaintiff also had to prove that in regard to the alternative claim the provisions of s 63 find application, in other words that the payment as made to the close corporation without there being compliance with that provision; and that the payment for the estimated damage was done to the first defendant with the Hausners authorizing or "knowingly" permitting the omission of such abbreviation. He so had to allege and prove as plaintiff that it was in consequence of such omission that he was not aware that he was dealing with a close corporation. Such allegation and proof is lacking.'

[14] Consequently the court gave the following order:

- ‘1. The plaintiff’s claim against second and third defendants in their personal capacities is dismissed with costs, such costs to include costs consequent upon the employment of one instructing and one instructed counsel;
2. Plaintiff’s claim against the first defendant succeeds in part and the first defendant is ordered to pay the amount of N\$168 963, 41 less 15% to the plaintiff.
3. Plaintiff is awarded interest on the amount of N\$168 963,41 less 15% at the legal rate of 20% per annum calculated from the 3<sup>rd</sup> of July 2006 to date of payment.
4. In respect of the order in paragraph 3 above, the plaintiff is awarded costs of suit against the first defendant consequent upon the employment of one instructing and one instructed counsel.
5. Plaintiff’s claim against first, second and third defendants for the recovery of N\$28 653 is dismissed.’

### The Appeal

#### *Condonation*

[15] In this court the matter was called and was to be heard on the first day of term (1 June<sup>2</sup>). Counsel for the appellant without notice or warning to the respondents’ legal practitioners and counsel appearing raised the issue of the failure on the part of the respondents to tender security for costs in terms of rule 14(2), notwithstanding the fact that the legal practitioners for the respondents were reminded by way of a letter(s) to tender such security by appellant’s legal practitioners. The failure to comply with rule 14(2) had the consequence that the cross-appeal was deemed withdrawn or had lapsed. The court felt that counsel for

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<sup>2</sup> Reference to June and July means June or July 2018.

the appellant should have warned his colleague for the respondents that he was going to raise the point. As a result, the court postponed the case to a date to be arranged with the Registrar of this court and the legal practitioner for the respondents was put on notice by the court to file an application for reinstatement of the cross appeal based on this court condoning the late filing of the security. Subsequently, the matter was enrolled still within the term, but on the last day of the term (13 July) and a letter from the Deputy Registrar dated 15 June addressed to both parties or their legal practitioners confirmed the enrollment of the matter.

[16] On 28 June the heads of argument for both parties were received by the Registrar of this court. In paras 12 – 18, counsel for the appellant raised *in limine* the issue of the failure by the respondents to file an application for condonation reinstating the cross-appeal as directed by the court on 1 June. On 2 July a document showing that a bond of security was tendered on 1 June by respondents' legal practitioner was received by the Registrar of this court. The application for condonation was only received on 6 July. The only reason for the respondents' initial non-compliance with rule 14(2) was that there was an oversight to file security for costs despite the legal practitioner acknowledging that he was notified by the appellant's legal practitioners on 5 February 2018 to tender security for costs. There is no indication why the application was not filed immediately after the matter was postponed on 1 June. In fact the heads of argument for the respondents are silent on the application for condonation, but counsel for the respondents from the bar argued that counsel for the appellant had undertaken not to oppose the application for condonation. Indeed Mr Strydom, for the appellant, despite having raised the issue in his heads of argument did not seem to oppose



the application, neither was there an affidavit opposing the application for condonation. Mr Mouton, for the respondents, further argued that a bond of security was tendered on 1 June, the day the case was postponed, that his instructing legal practitioner had undertaken a journey after the postponement and that there was no date fixed for the hearing of the case until the parties were informed of the date on 15 June 2018 by the Registrar. In any case, given the circumstances I have sketched above, the instructing attorney did not have to wait for a date of hearing to file the application. An application for condonation is required to be made as soon as the party concerned realizes that the rules have not been complied with.<sup>3</sup> The undertaking Mr Strydom made not to oppose the application for condonation is not binding on us, it is for this court to decide whether a proper explanation has been advanced.<sup>4</sup> It was more than a year late from the time the cross-appeal was noted. In as far as the initial delay was concerned, it was argued that the instructing attorney forgot to tender security for costs and that forgetting happens to every lawyer or to everyone else and that there was no prejudice to the appellant.

[17] In *Aymac CC and Another v Widgerow*<sup>5</sup> the following was said:

[40] There is a further reason why the court should not grant condonation or reinstatement in the face of gross breaches of the rules. Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated Employers Fire & General Insurance Co Ltd and Another v Mckenzie*

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<sup>3</sup> *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D.

<sup>4</sup> *P E Bosman Transport Works Committee and others v Piet Bosman Transport* 1980 (4) SA 794 (A) at 797G.

<sup>5</sup> 2009 (6) SA 33 (W) at 452 para 40.

1969 (3) SA 360 (A) at 363A in which Holmes JA said the following concerning the late filing of a notice of appeal:

“The late filing of a notice of appeal particularly affects the respondent’s interest in the finality of his judgment – the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns’ Executors v Gaarn* 1912 AD 181 at 193, in which SOLOMON JA said:

“After all the object of the Rule is to put an end to litigation and to let parties know where they stand.”

[18] There was a potential that the case would have been postponed to the third term or even next year, extending the finalisation of the case and further inconveniencing the judges seized with the matter who would have had to relook at the record again. The fact that the other party was compensated for the postponement makes no difference in applications of this kind. That a date was secured in this term was rather fortuitous.

[19] Rule 14(1) which provides for security in case of appeals reads:

**‘Security in case of appeals**

14. (1) If the judgment appealed from is carried into execution by direction of the court appealed from, the party requesting execution must, before such execution, enter into good and sufficient security *de restituendo*.

(2) If the execution of a judgment is suspended pending appeal, the appellant must, before lodging copies of the record, enter into good and sufficient security for the respondent’s costs of appeal, unless –

- (a) the respondent waives the right to security within 15 days of receipt of the appellant's notice of appeal; or
- (b) the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant's notice of appeal or such longer period as that court on good cause shown, has allowed the appellant to be released wholly or partially from that obligation.

(3) If the execution of a judgment is suspended pending appeal, the appellant must, when copies of the record are lodged, inform the registrar in writing whether he or she –

- (a) has entered into security in terms of this rule; or
- (b) has been released from that obligation, either by virtue of a waiver by the respondent or release by the court appealed from, as contemplated in subrule (2),

(4) Failure to inform the registrar in accordance with subrule (3) within 21 days is deemed to be a failure to comply with the provisions of that subrule.

(5) The registrar of the court appealed from must, whenever the parties are unable to agree as to the amount of security to be entered into under this rule, determine and fix the amount.

(6) ...

(7) ...'

[20] It is now settled law that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation and that a litigant should launch a condonation application without delay. In *Petrus v Roman Catholic Archdiocese*<sup>6</sup>, O' Regan AJA spelt it as follows:

[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v Swabou and Others*, case No 14/2010, the principles governing condonation were once again set out. Langa AJA noted that 'an application for condonation is not a mere formality' (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been failure to comply with the rules (at para 12). The affidavit accompanying the condonation application must set out a 'full, detailed and accurate' (at para 13) explanation for the failure to comply with the rules.

[10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of 'flagrant' non-compliance with the rules which demonstrate a 'glaring and inexplicable disregard' for the processes of the court (*Beukes* at para 20).

[21] In the matter of *Kleynhans v Chairperson of the Council for the Municipality of Walvisbay & others*<sup>7</sup>, this court referred with approval the sentiments of Friedman AJA where at 281G and 281J-282A said<sup>8</sup>:

"An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101; *Mbutuma*

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<sup>6</sup> 2011(2) NR 637 (SC) at 639 para 9-10.

<sup>7</sup> 2013 (4) NR 1029 at 1031D-F.

<sup>8</sup> Footnote 3 above.

*v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A-B. Inasmuch as an applicant for condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays have occurred.”

“As far as the prospects of success on appeal are concerned, the appeal in the present case would not appear to be without merit. However, where the non-observance of the Rules has been as flagrant and as gross as in the present case the application should not be granted, whatever the prospects of success might be. See *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J.”

[22] The legal practitioner’s explanation for the delay in tendering security for costs is neither sufficient nor satisfactory. That explanation is aggravated by the fact that when the matter was postponed on 1 June, the legal practitioner did not find it necessary to file the condonation application as per the direction of the court immediately, as it would be expected given the delay that had occurred. While the bond for security was tendered on 1 June, the application resurrecting the cross-appeal was filed five weeks later and no explanation was offered for the further delay. In the legal practitioner’s own words he only discovered the letter from the appellant’s legal practitioner reminding him to tender security for costs recently when he prepared for the notice of motion seeking reinstatement of the cross-appeal. The possibility exists that that application was filed after the legal practitioner perused appellant’s heads of argument. Even then the application was filed a week later. Whether or not there was an undertaking by the opposing party not to oppose the application, rule 14(2) requires that it had to be filed accompanied by a sufficient explanation for the delay, more so when the court had so directed. In *PE Bosman Transport Works Committee and others v Piet Bosman*

*Transport (Pty) Ltd* above Muller JA<sup>9</sup> declined to opine on the merits and proceeded to say:-

‘In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.’

‘In the present case the breaches of the Rules were of such a nature, and the explanation offered in many respects so unacceptable or wanting that, *even if virtually all the blame can be attributed to the applicants’ attorneys*, condonation ought not, in my view, to be granted.’

[23] The legal practitioners’ explanation for his delay in lodging the application for condonation cannot be said to be sufficient to warrant the grant of condonation. It is a disregard for the rules of this court and amounts to flagrant disregard for them. In these circumstances the application to condone the late filing of the security and reinstate the cross-appeal is declined and it is not necessary to express opinion on the prospects of success of the cross-appeal<sup>10</sup>.

#### The question for determination

[24] The only issue which remains for determination (the appeal against the recovery of the amount of N\$28 653, 41 having being abandoned) is whether the second and third respondents should be held jointly and severally liable with the first respondent for the payment of the amount of N\$168 963, 41.

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<sup>9</sup> Footnote 4 above at 799D and H.

<sup>10</sup> *Aymacc CC* above at 452F-G.

## Submissions

[25] Mr Strydom for the appellant reiterated the submission he raised in the court *a quo* that the second and third respondents should be held personally liable, jointly and severally together with the first respondent, for payment of the appellant's claim as set out in the particulars of claim. He further submitted that the court *a quo* erred in law and/or on the facts when it held that it was necessary for the appellant to have pleaded and allege in his particulars of claim a violation of the provisions of Act 26 of 1998 by the second and third respondents, whereas such violation was unequivocally evident from the documents filed of record during the trial and was further admitted by the second and third respondents, *albeit* on the basis of being ignorant of the law. That the evidence of the appellant throughout remained consistent of the fact that he never knew he was trading with a separate corporate entity and that throughout his dealings with the respondents he was under the impression that he was trading with a family business. That the provisions of s 63 require anything more than what the section provides<sup>11</sup>. That nowhere in the present case did the correct name of the close corporation together with the capital abbreviation of "CC" appear on any documentation exchanged between the parties. Thus the court *a quo* erred when it failed to find that the second and third respondents are personally, jointly and severally liable together

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<sup>11</sup> **Liability of members and others for debts of Close Corporation**

63. Notwithstanding anything to the contrary contained in any provision of this Act, the following persons shall in the following circumstances together with a corporation be jointly and severally liable for the specified debts of the corporation:

- (a) Where the name of the corporation is in any way used without the abbreviation CC or BK as required by section 22(1), any member of the corporation who is responsible for, or who authorized or knowingly permits the omission of such abbreviation shall be so liable to any person who enters into any transaction with the corporation from which a debt accrues for the corporation while he, in consequence of such omission, is not aware that he is dealing with a corporation;

with the first respondent for the claim of the appellant in the amount of N\$168 963,41.

[26] Counsel for the respondents contended the contrary and the thrust of his argument is that what appellant contended for is not the appellant's case as pleaded. Appellant should, so the argument ran, if he intended to rely on the alleged contravention of the Close Corporation Act 26 of 1998, for his intention that the second and third respondents be held personally liable with the first respondent jointly and severally for the payment of the amount in question as a cause of action or a defence, must have pleaded in clear terms with reference to the statute and provisions therein relied upon and that the appellant has not in his particulars of claim in any way whatsoever referred to or made reliance on the Close Corporation Act. Counsel further contended that appellant's denials that he was not aware that he contracted with a Close Corporation or another separate entity begs the question how appellant issued summons against the first respondent citing it in its capacity as a Close Corporation. This argument counsel for appellant countered by contending that it was unnecessary to plead the relevant provisions of the Close Corporation Act but added that, if it was necessary an amendment of the plea should be granted, there being no conceivable prejudice to the respondent.

[27] In my view the learned Judge President was fully justified in coming to the conclusion in para [13] above and I am not prepared to differ from him on the conclusion to which he came. One of the prime functions of pleadings is to clarify



the issues between the parties<sup>12</sup>, and to enable the other party to know what case he has to meet<sup>13</sup>. In *Robinson v Randfontein Estates G.M. Co. Ltd*<sup>14</sup>, Innes CJ succinctly spelt it out this way:

‘The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.’

[28] A pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another<sup>15</sup>. The reliance on the alleged contraventions of the Close Corporation provisions to hold the second and third respondents personally liable with the first respondent jointly and severally must have been specifically and unambiguously pleaded, and not left to be inferred from documents filed and/or discovered by the parties. In paras 5 and 6 of the particulars of claim it is clear that the claim was against the first respondent, alternatively against the second and third respondents jointly and severally and throughout the body of the claim, the second and third respondents are referred to in the alternative. Paragraphs 5 and 6 are in this form.

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<sup>12</sup> *FPS Ltd v Trident Construction (Pty) Ltd* 1989(3) SA 537 AD at 541J. In *Burbach v Fairway Hotel Ltd* 1949(3) SA 1081 (S.R.) at 1082 it was said ‘the whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed’.

<sup>13</sup> *Niewoudt v Joubert* 1988(3) SA 84 (SELLD) at 89J.

<sup>14</sup> 1925 AD 173 at 198.

<sup>15</sup> *Kali v Incorporated General Insurance Ltd* 1976(2) SA 179(D) at 182A.

- '5. Plaintiff's claim as hereinafter set out is against the First Defendant alternatively against Second and Third Defendants jointly and severally, who were at all relevant times acting in partnership under the name and style of Leopard Tours.
  
6. In or about the 25<sup>th</sup> of January 2004, First Defendant represented by Second and Third Defendants personally representing their partnership known as Leopard Tours made representations to Plaintiff by way of their 8 page prospectus stating among other allegations the following.'

[29] The trial commenced on 20 November 2013 and continued intermittently, judgment was delivered on 5 December 2016. It is a span of three years, the record runs into 14 volumes of 1695 pages. The parties have had the opportunity to place their facts before court. The second and third respondents were cross-examined *ad nauseum* on the alleged transgressions of the Close Corporation provisions, which to a great extent they admitted, but citing ignorance of the law. There is no reason why an amendment was not sought, except that the claim was against the first respondent and the insistence on wanting to hold the second and third respondents jointly and severally liable, which was the only ground of appeal to this court, lacks merit and as already said I do not intend to depart from the conclusion of the court *a quo* on that point. It was not pleaded and it should fail.

[30] In addition the bold assertion on behalf of appellant that there will be no prejudice to respondents if an amendment is granted at this late stage is problematic. As is evident from s 63, joint liability will only arise where the relevant transaction from which the debt accrued to the corporation was a consequence of the omission to use the abbreviation "CC". In other words the appellant's lack of knowledge that he was dealing with a close corporation must have been caused

exclusively as a result of the non-use of the abbreviation. It is clear from the evidence that the abbreviation “CC” was mentioned in the documentation provided to the appellant (albeit that the abbreviation was not in capital letters) and was neither dealt with in the evidence-in-chief nor cross examination in the context of whether the relevant transaction could be said to have been exclusively caused by the non-use of the abbreviation.

[31] If appellant thought the words “CC”, which he acknowledges he saw, denoted something else, it cannot be blamed on the respondents. There are various documents which carried the words and that argument stands to be rejected. Furthermore a question arises as to what transaction is the relevant one. The entering into of the rental agreement or the entering into the agreement relating to the quantum of damages. When the appellant entered into the latter agreement he knew he was dealing with the close corporation. It is clear if this issue had been pleaded, respondents would have had potential defences to it which would have resulted in them conducting the case in a different manner. The question of potential prejudice to respondents if an amendment is granted at this late stage is thus a real one and the submission to the contrary on behalf of the appellant cannot be accepted.

[32] In a nutshell, the argument that the appellant throughout demonstrated that he was not aware that he was dealing with a Close Corporation, lacks merit.

### Costs

[33] The only other issue is that of costs. The rule is trite, costs follow the result and there is no reason to deviate from this rule in the present matter. I do however indicate the proportion of time spent by the appellant and respondents on the appeal and condonation application on this court to access the taxing master.

### Order

[34] I make the following order:

1. The condonation application seeking to reinstate the cross-appeal is refused with costs.
2. The appeal is dismissed with costs.
3. The costs awards above shall include the costs of one instructing and one instructed counsel.
4. For the guidance of the taxing official it is mentioned that 90% of the time spent at the hearing of this matter was on issues raised in the appeal.

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**MAINGA JA**

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SMUTS JA

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FRANK AJA

APPEARANCES:

Appellant:

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Windhoek

Respondents:

C J Mouton

Instructed by Mueller Legal  
Practitioners, Windhoek