



REPORTABLE

CASE NO: SA 2/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WOLFGANG HANS FISCHER

Appellant

and

**HENNING ASMUS SEELNBINDER
FISCHER SEELNBINDER ASSOCIATES CC**

**First Respondent
Second Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

Heard: 27 October 2020

Delivered: 4 December 2020

Summary: This appeal emanates from events that started with the appellant (Fischer) giving the first respondent (Seelenbinder) a notice to retire (allegedly in terms of an agreement between the parties) as a member of Fischer Seelenbinder Associates CC (FSA) a civil engineering practice in which Fischer and Seelenbinder were equal members. An application in the court *a quo* by Fischer resulted in the court giving judgment on 10 November 2017 upholding Fischer's contention, and ordering Seelenbinder to 'retire from [FSA] by 31 March 2016'. The court *a quo* gave

further orders as to the valuation of Seelenbinder's member's interest as at that date and ordered that Seelenbinder be paid the amount of his member's interest as determined, as well as his loan account.

Armed with the court order of 10 November 2017, Fischer insisted that Seelenbinder vacate his office at FSA but the latter refused to do so. In essence, Seelenbinder's stance was that he remained a member until he received payment in respect of his membership and his loan account – whereafter, he would then vacate the premises of FSA. A number of applications were filed between the parties against each other (ie Fischer brought an application in terms of rule 103(1)(c) of the Rules of the High Court asking the court *a quo* to clarify its 10 November 2017 order - which application Seelenbinder opposed (this application was subsequently withdrawn by Fischer); and when Fischer locked out Seelenbinder from the offices of FSA, Seelenbinder launched a spoliation application on an urgent basis in the court *a quo*. The court *a quo* granted the order compelling Fischer to restore possession of the offices to Seelenbinder.

Upon withdrawing the rule 103(1)(c) application, Fischer launched an eviction application against Seelenbinder seeking certain ancillary relief and compelling Seelenbinder to return certain assets belonging to FSA and interdicting him from using the offices of FSA.

The court *a quo* determined the eviction application on the basis that the order compelling Seelenbinder to retire meant that 'once Seelenbinder is paid what is due to him he will lose his membership in FSA'. The court *a quo* further found that because 'the terms on which Seelenbinder had to retire from the close corporation had not been complied with' it could not grant the relief sought by Fischer. The application was accordingly dismissed with costs.

This appeal is against the court *a quo*'s judgment and order declining the eviction application.

On appeal, the court must determine the following: (1) considering Fischer's legal practitioner's version of events (as set out in the judgment below), whether the appeal was filed outside the prescribed time period as alleged by the registrar of the Supreme Court and a condonation application and reinstatement of appeal was necessary before the matter could be heard; (2) whether, despite Fischer appealing the valuation of Seelendinder's member's interest, this appeal has become moot because Seelendinder has since been paid his 50 percent member's interest and loan account and has vacated the premises of FSA; and finally, (3) how must the court *a quo's* order of 10 November 2017 be interpreted?

Held, since Fischer's legal practitioner only received notice of the order on 17 December 2018 (without reasons being given), the notice of appeal was filed on 10 January 2019, within 21 days of the judgment being pronounced. Further, the amended notice of appeal with the grounds of appeal was filed on 8 February 2019, within the 14 days prescribed time period in terms of rule 7(3)(a) of the Rules of the Supreme Court when reasons were released to the parties on 21 January 2019.

Held, where an order or judgment is made without reasons, the notice of appeal should nevertheless be filed within 21 days of such order. Such notice should simply indicate that the grounds of appeal will follow once the reasons are forthcoming. An amended notice of appeal should then be filed containing the grounds of appeal within 14 days of receipt of such reasons.

Held, there is thus no need for an application for condonation and reinstatement of appeal.

Held, inference cannot be made as to Fischer's intention in appealing the valuation of Seelenbinder's member's interest. Further, Fischer's intention in that appeal is irrelevant to the present subject matter of interpreting the order of the court *a quo* in this appeal.

Held, this appeal is not moot. The mootness point falls to be dismissed as there is no suggestion that Seelenbinder vacated the premises of FSA prior to the judgment *a quo* or prior to the filing of either the notice of appeal or the amended notice of appeal, or that the matter, somehow and in the meantime, became settled between the parties on the merits and the costs.

Held, the clear and unambiguous meaning of the order must be considered in its context and not just semantically without regard to the context.

Held, the association agreement between Fischer and Seelenbinder that the latter will retire on six months' notice was one falling under s 44(3) of the Close Corporation Act 26 of 1988.

Held, due to the retirement date predating the valuation date, the court *a quo* intended for the order of 10 November 2017 to operate sequentially and not simultaneously. The agreed retirement notice was given effect to by the court *a quo* and also a subsequent cessation of membership of Seelenbinder as it was impossible for these two members to continue operating as such together. In other words, whether Seelenbinder had to retire from the service of FSA in terms of the order and his membership would only terminate once payment of his member's interest (and loan account) in FSA had been made or whether Seelenbinder's membership of FSA ceased on his retirement date and payment of his member's interest (and loan account) would follow later made no difference to the fact that he was not entitled to possession of the offices of FSA subsequent to the retirement judgment.

Held, on retirement, Seelenbinder no longer had any rights to the offices in FSA so as to carry on the business of FSA.

The appeal succeeds.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and DAMASEB DCJ concurring):

Introduction

[1] The appellant (Fischer) appeals against the judgment and orders dismissing his application for the eviction of first respondent (Seelenbinder) from the offices of second respondent, Fischer Seelenbinder Associates CC (FSA). The appeal is opposed by Seelenbinder.

Background

[2] Fischer and Seelenbinder are both civil engineers and practised as such as equal members of FSA.

[3] The relationship between the members of FSA was a cordial one for about eight years when Fischer, relying on an agreement allegedly entered into between the members, gave Seelenbinder notice that the latter must retire from FSA. Seelenbinder denied that such an agreement existed and refused to recognise the notice to this effect given to him by Fischer.

[4] Fischer consequently launched an application to compel Seelenbinder to retire. The High Court found in favour of Fischer on this score and on 10 November 2017 ordered that Seelenbinder 'must retire from FSA by 31 March 2016'. The court *a quo*

gave further orders as to the valuation of Seelenbinder's membership interest at that date and ordered that Seelenbinder be paid the amount of his member's interest as determined as well as his loan account.

[5] Armed with the order, Fischer demanded that Seelenbinder vacate his office at FSA. Seelenbinder refused to do so. The stance adopted by Seelenbinder was that the order did not evict him from the premises and that he remained a member of FSA until he received payment in respect of his membership and loan account whereafter he would vacate the premises of FSA.

[6] In January 2018, Fischer launched an application in terms of rule 103(1)(c) of the High Court Rules seeking clarity as to the meaning of the order that Seelenbinder had to retire on 31 March 2016.¹ Seelenbinder opposed this application and at a case management meeting, the managing judge (the same judge that granted the order) strongly indicated that in terms of the judgment, Seelenbinder had no entitlement to continue to use the offices of FSA but nevertheless gave directives as to the filing of an answering affidavit by Seelenbinder.

[7] Bolstered by the comments of the judge at the case management meeting, Fischer locked out Seelenbinder from the offices of FSA. This led to Seelenbinder bringing an urgent spoliation application against Fischer and FSA. This application was successful.²

¹ Rule 103(1)(c) provides that a court may be approached to clear up any ambiguity in an order or judgment.

² This court dealt with the unsuccessful appeal by Fischer against this judgment in *Fischer v Seelenbinder* (SA 31/2018) [2020] NASC (8 June 2020).

[8] Subsequent to the successful *mandament van spolie* application brought by Seelenbinder, Fischer decided to withdraw the rule 103(1)(c) application and launched an eviction application against Seelenbinder which also sought certain ancillary relief compelling Seelenbinder to return certain assets belonging to FSA and interdicting him from using the offices of FSA. The eviction application sought the following relief:

1. Dispensing with the forms and time periods prescribed by the rules of court and hearing this matter as one of urgency;
2. Evicting the first respondent from the business premises of the second respondent at 15 Baugain Villas Centre, Hebenstreit Street, Klein Windhoek, Windhoek, with immediate effect;
3. Interdicting and restraining the first respondent from accessing the above business premises of the second respondent, or making use of such business premises, for any purposes whatsoever;
4. Directing the first respondent to return to the applicant and second respondent;
 - 4.1 any keys granting access to the business premises of the second respondent currently in possession of the first respondent;
 - 4.2 the laptop of the second respondent currently used by the first respondent, subject to the first respondent's entitlement to erase from the laptop whatever personal material he may wish to so erase;
 - 4.3 all files and documentation of the second respondent, including those generated up to 31 March 2016, currently in possession of the first respondent;

5. Declaring that any order made in terms of prayers 2, 3 or 4 above shall not derogate in any manner whatsoever from the entitlement of the parties to implement and give effect to the provisions of paragraphs 4, 5, 6 and 7 of the order made by His Lordship Mr Justice Ueitele on 10 November 2017 in the matter with case number A217/2015;
6. Granting to the applicant any such further and/or alternative relief as this Honourable court may deem fit;
7. Directing the first respondent to pay the costs of this application on the scale as between attorney and own client.'

[9] The orders referred to in the relief sought in para 5 of the eviction application quoted above referring to paras 4, 5, 6 and 7 of the order made in case number A 217/2015 relates to the valuation of Seelenbinder's membership interest and the payment thereof as well as his loan account and the payment thereof by Fischer. I quote this order in para [25] below.

[10] The court *a quo* determined the eviction application on the basis that the order compelling Seelenbinder to retire meant that 'once Seelenbinder is paid what is due to him he will lose his membership in FSA' and as 'the terms on which Seelenbinder had to retire from the close corporation had not been complied with, it thus follows that I cannot grant the relief sought by Fischer'. The court *a quo* accordingly dismissed the eviction application with costs. It is against this judgment and order that the appeal lies.

Condonation application

[11] The court *a quo* on 27 November 2018 handed down an order dismissing the eviction application without giving reasons for this order. The parties agreed that this was the date on which the order was granted despite the fact that the date on the order indicates it was issued on 23 November 2018.

[12] This means that the notice of appeal had to be filed within 21 days from 27 November 2018.³ When the legal practitioner attempted to file a notice of appeal on 10 January 2019, he was informed by the registrar of this court that ‘the appeal had lapsed’ as it was not filed within 21 days from 23 November 2018 and that she would not accept it unless accompanied by an application for condonation and reinstatement of appeal. Rule 7(1) provides for this where it states that a notice of appeal must be filed within 21 days of an order or judgment – or within ‘such longer period as may be allowed on good cause shown . . .’.

[13] As no reasons had been forthcoming prior to the due date for the filing of the notice of appeal, it was impossible for Fischer to comply with rule 7(3) which sets out the requirements in respect of grounds of appeal that must accompany the notice of appeal. The notice of 10 January 2019 quite properly states that once reasons are provided, rule 7(3) will be complied with. This also follows from the provisions of rule 7(3)(a) which expressly states that where an appeal is noted against an order or judgment where the reasons are not yet available, the grounds of appeal in respect of the notice of appeal must be provided within 14 days of receipt of the reasons. The fact that the notice of appeal filed on 10 January 2019 also did not contain grounds of

³ Rule 7(1) of the Rules of the Supreme Court.

appeal, according to the registrar, made it fatally defective and in the circumstances the appellant should have waited for the reasons or the judgment and thereafter file a notice of appeal containing the grounds of appeal.

[14] It is common cause that the judgment containing reasons was only released to the parties on 21 January 2019 (and not 27 November 2018 as indicated on the judgment). The grounds of appeal were filed on 8 February 2019 which complies with rule 7(3)(a).

[15] It follows that only the original notice of appeal which did not contain grounds of appeal because the reasons were not available then, was on the face thereof out of time. The legal practitioner explained the reason for this. When argument on the matter concluded on 31 August 2018 the matter was postponed to 28 September 2018. As the judge was not ready on this latter date, the matter was again postponed to 19 October 2018. The judge's clerk on that date advised the legal practitioner that there would be a further postponement and on 25 October 2018 an order was uploaded on the e-justice system indicating the matter had been postponed to 23 November 2018. Prior to this date, the said clerk again telephonically informed the legal practitioner that the matter would be further postponed and it was not necessary for him to appear in court on 23 November 2018. He thus awaited the e-justice order to see to which date the matter was postponed to. On 14 December 2018 when his office closed for the festive season, no such notice had been received. Whilst on holiday at the coast and on 17 December 2018, he received a notification from the e-justice system on his mobile telephone that an order had been uploaded

on the e-justice system. On his return to his office in Windhoek on 9 January 2019, he saw that the order had purportedly been issued on 23 November 2018. I have pointed out above that it had in fact been issued on 27 November 2018. The original notice of appeal was thus filed the day after Fischer's legal practitioner returned to his office.

[16] As Fischer's legal practitioner only received notice of the order on 17 December 2018, on his version which is not disputed in this application, the notice of appeal was filed within 21 days of the judgment being pronounced. There is thus no need for an application for condonation and reinstatement of appeal.

[17] In summary, the appellant in my view interpreted the relevant portions of rule 7 correctly. Where an order or judgment is made without reasons, the notice of appeal should nevertheless be filed within 21 days of such order and such notice should simply indicate that the grounds of appeal will follow once the reasons are forthcoming. An amended notice of appeal should then be filed containing the grounds of appeal within 14 days of receipt of such reasons.

[18] Before I proceed to the merits, there is one aspect I need to mention. The court *a quo* in its judgment, which is the subject matter of the appeal held that the relationship between Fischer and Seelenbinder deteriorated to such an extent it cannot be expected of them to remain co-members of FSA and found that the common law remedy of *actio communi dividundo* could be applied and that it was not necessary to have regard to s 36 of the Close Corporations Act 26 of 1988 (the Act). It is on this basis that the relief as to the payment of Seelenbinder's membership

interest and his loan account was premised. The order was not appealed and it is thus final as between Fischer and Seelenbinder. This means its correctness or otherwise is not a subject matter of this appeal. This judgment should not be read as expressing any opinion on the court *a quo's* approach in this regard.

Is the appeal moot?

[19] In the heads of argument filed on behalf of Seelenbinder, this court was informed that Fischer sought to set aside the valuation of Seelenbinder's interest in FSA in the High Court which application failed and that this judgment is on appeal. According to the submission, this is mentioned to indicate Fischer 'never had the intention to pay' Seelenbinder. Further references are then made to show Fischer, on many occasions disputed or took issue with Seelenbinder as to the value of the latter's interest in FSA to conclude that 'it has always been Fischer's intention to get Seelenbinder out of the office and not pay him in terms of the retirement judgment'.

[20] Despite the doubtful relevance of these submissions to the determination of the appeal, I raised the following facts which the same legal practitioner placed before this court in the appeal involving the spoliation application between the same parties. In that appeal, the following appeared in the heads of argument filed on behalf of Seelenbinder which facts were not disputed at all by the legal practitioner for Fischer who is likewise the same legal practitioner acting for him in this matter.

'19 Fischer has since then made payment to Seelenbinder of the value of his 50% member's interest as determined in the expert valuation (excluding interest)

and also Seelenbinder's loan account (excluding interest), some two years after the main judgment was delivered.

20 As a result Seelenbinder has transferred his 50% member's interest to Fischer and has vacated the office and the main issue in this spoliation appeal (and the pending eviction appeal) have become moot.'

[21] The legal practitioner for Seelenbinder again confirmed the facts as stated in the heads of argument namely that Seelenbinder has been paid and in fact vacated the offices of FSA but maintained his stance that Fischer, by appealing the valuation and because of the behaviour he referred to in his current heads of argument in this appeal, is acting upon an intention not to pay Seelenbinder what is due to him as determined by the valuation of his interest in FSA. In view of the payment already made, I cannot infer that Fischer is acting with the intention ascribed to him by the legal practitioner for Seelenbinder. Besides this, whatever Fischer's intention, it is irrelevant to the interpretation of the order that is the subject matter of this appeal.

[22] When I pointed out the above (contradictory) stances to the legal practitioner for Seelenbinder, he raised the point that this appeal is moot as Seelenbinder no longer occupies the office of FSA. I must point out this was not raised in the court *a quo* nor in the heads of argument but raised impromptu when I queried him as to what appeared to me to be two contradictory set of facts. It goes without saying that the legal practitioner for Fischer was not forewarned of this mootness point.

[23] There is in any event no merits in this point. There is no suggestion that Seelenbinder vacated the premises prior to the judgment *a quo* or the filing of either

the notice of appeal or the amended notice of appeal or that the matter has somehow, in the meantime been settled on the merits and the costs. Despite the fact that Seelenbinder may have vacated the premises in the meantime because of payment to him, Fischer is entitled to revisit the matter even if the only practical relief remaining is the changing of the adverse costs order of the court *a quo*. It must be pointed out that there is no factual basis to suggest the matter became moot prior to the noting of the appeal and the appeal as of right to this court will, if successful on the merits, result in a different costs order. Whereas the issue of the ejection of Seelenbinder from the offices of FSA may be of academic interest only, the reversal of the costs order certainly will have practical and real consequences.⁴ Thus, even if only the costs order are currently of practical value it cannot be dealt with, without considering the merits of the appeal.⁵

[24] It follows that, the mootness point falls to be dismissed.

The court order in dispute

[25] As the crux of the appeal revolves around the meaning of the order granted on 10 November 2017 in favour of Fischer in which he sought to compel Seelenbinder to retire from FSA, it is apposite that I quote it:

'54 In the result, I make the following order:

⁴ *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 666H and *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1294A-1295F and 1301H-I (*De Vos*).

⁵ See *De Vos and Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 863-864.

- 1 The application to adduce a further supplementary replying affidavit is dismissed with costs the costs to include the costs of one instructing and one instructed counsel.
- 2 I declare that the applicant is entitled to request the first respondent to retire from the close corporation by giving him 6 months' notice to so retire.
3. The first respondent must retire from the close corporation by 31 March 2016.
4. The applicant and the first respondent must, not later than fourteen days from the date of this judgment, appoint a referee, who must determine the value of the close corporation and each party's loan account.
- 5 If the parties fail to appoint a referee as contemplated in paragraph four of this order then and in that event the President of the Law Society of Namibia must appoint not later than seven days from the date that the Law Society is informed of the failure, appoint the referee.
6. For the purpose of giving effect to paragraph four or five of this order the referee:
 - 6.1 Must be a person who holds a qualification in the field of accounting or auditing.
 - 6.2 May call upon either party to produce any books or documents which the referee reasonably require to perform his or her duties. The books or documents must be delivered to the referee within the time period specified by him or her;
 - 6.3 May engage the services of any suitably qualified person or persons to assist him in determining the proper value of any of the assets of the Close Corporation and to pay that person or persons the reasonable fee which may be charged thereof.

- 6.4 Must, if required, afford either party or their legal representatives, the opportunity to make representations to him or her about any matter relevant to his or her duties.
 - 6.5 Must prepare the financial statements of the Close Corporation and determine the value of the Close Corporation as at 31 March 2016, not later than three months from the date of his or her appointment.
 - 6.6 May apply to this Court for any further direction (s) that he or she considers necessary to give effect to his or her obligations in terms of this judgment and the law;
 - 6.7 Is entitled to claim his costs of determining the value of the close corporation and the loan account of each member, from the close corporation.
7. Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, the applicant must pay to first respondent 50% of the value of the close corporation and the value of the first respondent's loan account.
 8. The first respondent must pay 80% of the applicant's costs of this application. The costs to include the costs of one instructing and one instructed counsel costs to include, the costs of one instructing and two instructed counsel.' (sic)

[26] As it is evident from what is stated above in the introduction, Fischer's stance is that the order meant that Seelenbinder had to vacate the offices of FSA immediately and that the process to evaluate his membership interest and loan amount would run its course thereafter. Seelenbinder's stance is that until the valuation process had been completed and he had been paid what this process

determined, he remained a member of FSA and was entitled to occupy an office of FSA and work from the office.

Interpretation of the court order

[27] I have quoted the order above as the order that accompanies a judgment is the executive part of the judgment which stipulates what the court requires to be done or not done. If it is clear and unambiguous it cannot be restricted or extended by anything else in the judgment.⁶ The order must of course be considered in context and this is where the judgment may become relevant.⁷ What cannot be done is to consider evidence to decide whether such evidence, if accepted, will alter the clear and unambiguous meaning of the order.⁸ At the risk of repetition, the clear and unambiguous meaning must be ascertained in the context and not semantically without regard to the context.⁹

[28] The starting point thus is to determine whether the order is clear and unambiguous, because, if it is, and the context does not indicate a different meaning, that is the end of the matter:

‘ . . . the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the

⁶ *Administrator, Cape, & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 716B-C.

⁷ *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-H (*Firestone*).

⁸ *Postmasburg Motors (Edms) Bpk v Peens & andere* 1970 (2) SA 35 (NC) at 39.

⁹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC).

meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it.’¹⁰

[29] There are two main strands evident from the order. The first is that Seelenbinder was ordered to retire from FSA ‘by 31 March 2016’ which is a date nearly two years prior to the date of the judgment of 10 November 2017 which contains the order. It is also apparent from the order that this follows on a notice given to Seelenbinder by Fischer six months prior to 31 March 2016. Second, that after the valuation of FSA, which process had to commence within 14 days after the judgment of 10 November 2017, Fischer had to pay Seelenbinder his membership interest and his loan account in FSA. It is accepted by the parties that this process would lead to cessation of Seelenbinder’s membership in FSA.

[30] It seems to me the fact that the eventual payment to Seelenbinder of his member’s interest (and loan account) in FSA and his membership being terminated caused an unjustified conflation between the two stages envisaged in the order. Thus, Fischer states in his founding affidavit that Seelenbinder’s ‘rights or entitlement of the respondent to be a member of FSA . . . terminated on 31 March 2016’. Seelenbinder’s stance with reference to case law is that he remains a member as long as he is registered as such with all the rights of a member including the right to occupy an office of FSA until he has been paid that was due to him in terms of the order. The court *a quo* also bought into this narrative when dismissing the application

¹⁰ See *Firestone* at 304D-F, see also *SOS Support Public Broadcasting Coalition & others v South African Broadcasting Corporation (SOC) Ltd & others* 2019 (1) SA 370 (CC) paras 52-53.

for the eviction of Seelenbinder on the basis that 'once Seelenbinder is paid what is due to him he will lose his membership . . . '.

[31] To retire from FSA is not the same as to cease to be a member of FSA. Normally a member of a close corporation is entitled to participate in the day to day activities and the management of such a corporation. This is however not an absolute entitlement. The members of such corporation can agree between them (ie in an association agreement) that one or only some of them will manage such corporation. The general rule is thus: but for an association agreement to the contrary a member of a close corporation is entitled to participate in the day to day activities and the management of the corporation.

[32] In terms of s 46(a) and (b) of the Act every member 'in so far as . . . an association agreement . . . does not provide otherwise' is entitled to 'participate in the carrying on of the business of the corporation' and . . . 'shall have equal rights' with every other member 'in regard to the management of the business of the corporation . . . '.

[33] It follows that an association agreement can provide for one or some of the members only to be involved in the activities indicated in s 46(a) and (b) of the Act. The members excluded from participation in the carrying on of the business or in respect of the management of the business will be akin to ordinary shareholders of a company. This distinction between members and management is also indicated in s 47 of the Act which disqualifies certain persons, from being involved in the

management of close corporations despite such persons being members of such a close corporation.

[34] In terms of s 44(3) of the Act, an agreement expressed or implied between members of a corporation which may be included in an association agreement shall be binding between them despite the fact that it does not comply with the formalities prescribed for an association agreement. Such agreement terminates when a party thereto ceases to be a member of the corporation.

[35] It follows that the agreement between Fischer and Seelenbinder that the latter will retire on six months' notice was one falling under s 44(3) of the Act. It further follows that Seelenbinder had to retire on 31 March 2016 and that this agreement would terminate on him ceasing to be a member of the corporation when he would in any event have no other rights as a member.

[36] The only question is what rights Seelenbinder retained as a retired member? This is so because once it is accepted that Fischer could give Seelenbinder notice to retire in terms of the agreement between them, Seelenbinder was a retired member of FSA from 1 April 2016. Because of the fact that it was evident to the court that the two members of FSA would not be able to continue as such as there was no agreement between them on how the retirement would affect Seelenbinder's rights as a member, the court decided that Fischer had to buy out Seelenbinder so that he would cease to be a member of FSA.

[37] The common meaning of 'to retire' is to no longer do the job, profession or conduct the business one did prior to the retirement. This sense of withdrawal from an occupation, leave an office or employment lies at the heart of the word 'retire' in a work context.¹¹ Thus to retire in the context of this matter means that Seelenbinder had to, in terms of the agreement he had with Fischer, cease from practising as a civil engineer connected with FSA and not that he ceased to be a member of FSA. This is why the retirement took place on 31 March 2016 already. He would however remain a member of FSA, without the right to participate in, at least, the carrying on of the business, until he had been paid as envisaged in that part of the judgment dealing with this latter aspect. If this was not what the order intended as submitted on behalf of Seelenbinder, what was the point of stating a retirement date that was long before the payment process had even started? Thus, the agreed retirement notice was given effect to by the court *a quo* and also a subsequent cessation of membership of Seelenbinder as it was impossible for these two members to continue together as such. In other words, Seelenbinder had to retire from the service of FSA in terms of the order, but his membership would only terminate once payment for his interest (and loan account) in FSA had been made. Obviously, on retirement Seelenbinder no longer had any rights to an office in FSA so as to carry on the business of FSA.

¹¹ *Shorter Oxford English Dictionary 1993*: 'Withdraw. esp. to or from a specified place, position, or occupation, . . .'. 6 ed vol 2 – N – Z.

Macmillan English Dictionary: 'To stop working . . .'.

<https://www.macmillandictionary.com/dictionary/british/retire>. Accessed on 26 October 2020.

Collins English Dictionary: . . . 'they leave their job and usually stop working completely.'

<https://www.collinsdictionary.com/dictionary/english/retire>. Accessed on 26 October 2020.

Cambridge Dictionary: 'To leave your job or stop working . . .'.

<https://dictionary.cambridge.org/dictionary/english/retire>. Accessed on 26 October 2020.

Merriam-Webster English Dictionary: 'To withdraw from one's position or occupation: conclude one's working or professional career.' <https://www.merriam-webster.com/dictionary/retire>. Accessed on 26 October 2020.

[38] Is there anything in the context of the judgment that accompanies the order that indicates a contrary interpretation to that spelt out in the order? The answer is in the negative. It gives effect to an agreement between Fischer and Seelenbinder in terms whereof Fischer was entitled to give Seelenbinder six months' notice as the date of retirement is premised on such agreement. The judgment points out that the agreement entitling the six months' notice to Seelenbinder did not provide for any modalities to arrange for the relationship between the members of FSA subsequent to such retirement. The judgment records that the relationship between Fischer and Seelenbinder had deteriorated to such an extent that they 'cannot be expected to remain co-members of the close corporation' and then determines the manner in which Seelenbinder's interest (and loan account) must be paid for. There is simply no indication that the retirement and cessation of membership of Seelenbinder had to be accomplished simultaneously. In fact, the consideration that they could no longer remain co-members and that the date of retirement predated the valuation process makes it clear that these are two different matters that would be implemented sequentially and not simultaneously.

[39] The legal practitioner for Seelenbinder submitted that the conflation between the retirement of Seelenbinder and the cessation of his membership referred to above came about because this is the way the application for eviction was framed and it would thus not be correct to interpret the court order in the above context where reference is made to a retirement that goes hand in glove with a cessation of membership.

[40] From the judgment, it is clear that Fischer, at least, regarded the fact that Seelenbinder had to retire as a step that would lead to the cessation of the latter's membership in the FSA. Thus, it is clear from the relief claimed and mentioned in the judgment that Fischer did intend that what he termed the 'retirement or resignation' from FSA would also lead to Seelenbinder ceasing to be a member of FSA. This context is thus relevant for consideration in the interpretation of the order as submitted by the legal practitioner for Seelenbinder.

[41] In the above context where Fischer in essence sought the termination of the membership in FSA of Seelenbinder the problem for Seelenbinder remains, namely that he had 'retired' from FSA by 31 March 2016 and the valuation process of his membership interest which had to be completed prior to the payment to him of that interest only had to commence within 14 days from 10 November 2017, ie about 20 months after his retirement. This means either that, retirement was meant in its ordinary sense and cessation of membership would take place later or that Seelenbinder's membership ceased on 31 March 2016 and that the payment for his membership would follow later.

[42] It is impossible to simply ignore the expressed provisions of the order which stipulate that the two events (retirement and payment) would occur around two years apart. To suggest that the retirement date of 31 March 2016 was simply the date on which the valuation of his membership and loan account had to be done cannot be correct.

[43] The court *a quo* knew that Seelenbinder regarded himself as a member up to the time of the judgment, namely 10 November 2017 and if the two aspects had to be dealt with simultaneously, why did the order, if it was only relevant to the valuation and had no effect on membership, not run from 10 November 2017?

[44] Furthermore, if the date of valuation was to be about two years prior to the judgment and it was envisaged that Seelenbinder would remain an active member pending the finalisation of the valuation of his interest, how would the increase or decrease in value of FSA subsequent to the retirement date be dealt with between the two members? The order, makes sense only in the context of separating the time when Seelenbinder would cease to be an active member and the time for payment of his interest. The retirement date as valuation date by necessary implication means that Seelenbinder would thereafter not contribute to the value of FSA. To maintain the contrary is to suggest that Seelenbinder could add to or detract value from FSA but that this would not be calculated for his benefit or to his detriment when the calculation would be done. The idea with a date of valuation is to freeze the calculation on such date.

[45] Thus, even if the retirement date was simply to set the date for the calculation of Seelenbinder's interest in FSA, it follows by way of necessary implication that Seelenbinder would not be allowed to carry on with the business activities of FSA after this date and in so doing, make the valuation exercise a moving target instead of it being fixed at a specific date. Surely, if it was intended that the status *quo* in FSA would remain intact until Seelenbinder has been paid for his interest, a cut-off date for

valuation would not have been stated years prior to the valuation process which would totally ignore the changes in value brought about by the fact that Seelenbinder remains an active member. It was clearly intended that subsequent to the cut-off date of 31 March 2016, Seelenbinder would have no further role to play in FSA as his future activities would have no effect on the valuation of his interest in FSA.

[46] In short, there is no suggestion in the order or the judgment that despite the fact that the retirement took place by 31 March 2016, this had no effect on the relationship between the parties prior to the payment process being completed and payment to be made to Seelenbinder. Why would the court *a quo* refer to the date of 31 March 2016 as the date of retirement if it would be totally irrelevant in the process leading to the termination of Seelenbinder's membership? In such case, it would have been easy to stipulate that Seelenbinder had to retire upon the completion of the payment process. It is clear that the court *a quo*, once it found that there was an agreement between Fischer and Seelenbinder in terms whereof Fischer could give Seelenbinder six months' notice to retire, decided to enforce the agreement and hence the reference to the date of 31 March 2016. This reference must have some meaning and effect. To suggest that a specific date in the past with intended consequences (retirement) would be conditional on a certain date to be ascertained in the future and which would render the specific date irrelevant, seems to me a very farfetched exercise in legal gymnastics rather than an exercise in contextual interpretation.

[47] There has been some debate about the provisions in the Act that provide for a change of membership only to take effect when this has been registered per an

amending founding statement.¹² In my view, this is irrelevant to the interpretation of the judgment and order. Firstly, the court *a quo* made an order that is binding between the parties which includes FSA and whether or not this will eventually lead to an amended founding statement which will give notice to the world that there is a change in membership cannot change the binding effect of the judgment between the existing members and FSA *inter se*. In other words, the order is effective as between the parties thereto and if, say, Seelenbinder acts contrary thereto, he will be personally liable for any damages caused to FSA and/or Fischer. Secondly, even if Seelenbinder sells his membership to a third party based on the existing founding statement without informing the purchaser of the order, the purchaser will be unable to become a member as Fischer (as co-member) will not consent thereto.¹³ This discussion, in any event, does not in my view take the matter any further as it is clear that the retirement took place per the agreement between the parties by 31 March 2016, whereas the process to pay for the membership of Seelenbinder would only take place later – whatever the date would be, when Seelenbinder is no longer reflected as a member of FSA has no bearing on the retirement by 31 March 2016. In terms of the internal relationship between the members and the corporation, Seelenbinder would cease to represent FSA from retirement which took place six months from being given the requisite notice in this regard.

[48] In my view, there is thus, even if taking into account that Fischer saw retirement as a hand in glove process with cessation of membership, no basis to

¹² Section 15 of the Act and *Geaney v Portion 117 Kalkheuwel Properties CC & others* 1998 (1) SA 622 (T).

¹³ Section 37 of the Act.

construe expressly stated sequential effects to mean one simultaneous process which would only have an effect once the later process has been finalised.

[49] The legal practitioner for Seelenbinder in his submission that the retirement and cessation of membership had to be considered as a simultaneous process made references to the application and the statements contained in the affidavits filed on behalf of Fischer. Due to the fact that this approach was evident from the judgment it was not necessary to consider the affidavits to which the legal practitioner referred and it is thus not necessary to decide whether it is admissible to refer to such evidence as part of the 'context' when interpreting an order or judgment.

[50] It follows that Seelenbinder in July 2018 when the eviction application was launched against him, had no defence to it as he was not entitled to utilise the offices of FSA without the consent of Fischer and by then had to return the keys and other assets belonging to FSA which he used for the purposes of his work. Fischer also sought an interdict against Seelenbinder prohibiting him from accessing the premises in FSA for any purpose whatsoever. This, in my view, is too wide and premature as there is no suggestion that Seelenbinder would act contrary to an eviction order in the future.

[51] It follows that Fischer's appeal is upheld and the following order is made:

- (a) The appeal succeeds. The order of the court *a quo* is set aside and the following order is substituted for that order:

- (i) The application is granted in terms of prayers 2, 4 and 5 of the notice of motion as set out in para 8 above.
- (ii) The first respondent is to pay the costs of the application including the costs of one instructing legal practitioner and one instructed legal practitioner.'
- (b) The costs on appeal are to be paid by the first respondent, including the costs of one instructing legal practitioner and one instructed legal practitioner.

FRANK AJA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES

APPELLANT:

T A Barnard

Instructed by Behrens & Pfeiffer,
Windhoek

FIRST RESPONDENT:

R Heathcote (with him S J Jacobs)

Instructed by Van der Merwe-Greeff
Andima Incorporated, Windhoek