



REPORTABLE

CASE NO.: SA 61/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANDREW IMALWA IMALWA

1ST APPELLANT

PAULINE NAUSIKU IMALWA

2ND APPELLANT

ROLF WILHELM PAUL HANS BÜCKING

3RD APPELLANT

ONESMUS SHIKONGO AKWENYE

4TH APPELLANT

JÜRGEN GEORG MENGE

5TH APPELLANT

and

JULIUS GAWESEB

1ST RESPONDENT

COUNCIL OF THE MUNICIPALITY OF WINDHOEK

2ND RESPONDENT

SENIOR BUILDING INSPECTOR

3RD RESPONDENT

Coram: DAMASEB DCJ, HOFF JA *et* ANGULA AJA

Heard: 13 OCTOBER 2020

Delivered: 01 MARCH 2021

Summary: This appeal stems from the decision of the court *a quo* in respect of two competing applications concerning the approval and subsequent cancellation of building plans by the second and third respondents (the Municipality) in respect of a

property belonging to the first respondent (Mr Gaweseb). The Municipality initially approved Mr Gaweseb's building plan, but subsequently revoked it, for alleged non-compliance with the Municipality's Building Regulations and Town Planning Scheme.

Consequently, the first respondent approached the court *a quo* by way of an urgent application and obtained an interim interdict which was later abandoned after the appellants intervened and opposed it being made final. The Municipality opposed Mr Gaweseb's application and the appellants who own properties adjacent to that of first respondent made common cause with the Municipality. The appellants filed a conditional counter-application, wherein they sought two-pronged relief, firstly, that the approved building plan be declared unlawful, null and void and be set aside. Secondly that Mr Gaweseb be interdicted from proceeding with the construction work on the property in furtherance of the approved building plan, on the ground that it had expired after the lapse of 12 months in terms of the applicable building regulation and building permit.

The court *a quo* dismissed the declaratory and review relief sought by the appellants on the ground that they failed to seek it within a reasonable time. Although the court *a quo* observed that Mr Gaweseb was not entitled to just restart the construction work as the building permit had 'in all probability' expired, the court considered it unnecessary to decide if Mr Gaweseb's construction work was unlawful. The appellants are aggrieved by that conclusion which led the court *a quo* not to consider the interdict they sought.

The issue on appeal is whether the court *a quo* acted properly in not granting the appellants an interdict against Mr Gaweseb.

The appeal had lapsed as the record was filed outside the prescribed time limits, and thus appellants filed an application for condonation and reinstatement of the appeal. Mr Gaweseb opposed the application. The explanation furnished by appellants is that they were delayed in their efforts to obtain the submissions made in the High Court to include it in the record, as they deemed it necessary for this court to see what was argued and what the High Court was therefore called upon to decide but did not do. Mr Gaweseb maintained that the inclusion of the written submissions was

unnecessary under the rules of the Supreme Court and that the appellants did not offer a satisfactory explanation for the delay.

Held that unreasonable delay is not a basis on which to decline a claim for interdictory relief, and that one does not forfeit a right only because he or she delayed in enforcing it. The circumstances must be such that the enforcement of the right would be an act of bad faith.

Further *held* that the Municipality's Building Regulation 10 is clear. Once approved, a building plan must be executed within 12 months. In addition, the building permit issued to Mr Gaweseb made clear that he required an extension if 12 months lapsed from the date of approval. He was therefore clearly in breach of regulation 10. That breach was actionable at the instance of the appellants by way of an interdict.

Held that the appellants established all the requirements for an interdict, and that it was not demonstrated that it would be unconscionable for them to seek to interdict further construction on the property until due process has been allowed to both Mr Gaweseb and them.

Held that appellants are granted an interdict, subject to and until such time as the Municipality afforded both Mr Gaweseb and the appellants the opportunity to exercise their rights under the Municipality's Building Regulations and Town Planning Scheme.

Held that the appellants had good prospects of success on appeal; that there is no absolute bar to including heads of argument in the record of appeal, and that the appellants made out a case for condonation and reinstatement of the appeal.

Held that the appeal succeeds in part and the order of the High Court in respect of the counter application is set aside.

APPEAL JUDGMENT

DAMASEB DCJ (HOFF JA and ANGULA AJA concurring)

[1] This appeal arises from the High Court's decision relating to two competing applications concerning the approval and subsequent cancellation of building plans by the second and third respondents (the Municipality) in respect of erf 506, Pionierspark, Windhoek (the property) belonging to the first respondent (Mr Gaweseb).

[2] The appeal record was filed outside the time period prescribed in the rules of this court. For that reason, the appellants brought an application for condonation and reinstatement of the appeal which has become opposed. For the reasons I fully set out in paragraphs [72] – [82] below, the application for condonation and reinstatement of the appeal should be granted.

Background

[3] The Municipality approved Mr Gaweseb's building plan on 29 December 2015 and he commenced construction work on the property and continued with it until October 2017.

[4] On 25 October 2017, the Municipality wrote a letter to Mr Gaweseb in the following terms:

'The latest building plans approved on erf 506 Pionierspark, Building Permit no 3005/2015, had been processed without the required signatures of consent of the immediate involved neighbours. The Town Planning Scheme requires that any proposed building, encroaching into the 3 metres building restriction area and in the case of double storey buildings, which encroaches into the 5-metre building restriction line, need to be consented to in writing, by the immediate involved neighbours. Further to the above, objections regarding the proposed buildings were received and should have been investigated before approval could have happened.

In the light of the above, approval of the said plan is therefore revoked with immediate effect. You are herewith ordered to cease all construction on erf 506 Pionierspark, immediately, until further notice.'

[5] It is apparent from the revocation letter that when the building plans were approved in respect of the property, property owners adjacent to it had not consented to a deviation from the permissible building restriction line, including for double-storey buildings.

[6] After receiving the letter of revocation, Mr Gaweseb instructed Messrs Sisa Namandje and Co. to write a letter to the Municipality demanding that the revocation be withdrawn as he had not been granted *audi* and that it was not legally competent to undo a completed administrative act which only a court could set aside. The Municipality failed to reverse the revocation.

[7] Mr Gaweseb thereupon approached the High Court by way of an urgent application and obtained an interim interdict preventing the Municipality from implementing the revocation decision of 25 October 2017 and also restraining the Municipality from interfering with the construction activities on the property.

[8] The urgent application contained a 'Part B' which was an ordinary review application in terms of which Mr Gaweseb sought the following relief:

(a) Reviewing, correcting, and setting aside the decision taken by the Municipality on 25 October 2017;

(b) Declaring that the Municipality's decision to cancel the approved building plans is unlawful, irregular, null and void and setting aside such decision.

[9] The Municipality opposed Mr Gaweseb's application. First to fifth appellants (the appellants) who own properties adjacent to that of Mr Gaweseb made common cause with the Municipality in opposing Mr Gaweseb's application and, by way of a conditional counter-application, sought an order declaring unlawful and reviewing and setting aside the approved building plan and an order interdicting Mr Gaweseb from continuing the construction work on the property.

[10] The predicate for the counter-application is that the approval of the building plan in respect of the property and Mr Gaweseb's construction work thereon are in violation of the Municipality's Building Regulations 1969¹ (as amended) and the Town Planning Scheme² (TPS). I will return to the applicable regulation and TPS in due course.

[11] It bears mention that the appellants sought two-pronged relief when they intervened in the proceedings initiated by Mr Gaweseb against the Municipality. First, that the approved building plan be declared unlawful, null and void and be set aside. Secondly that Mr Gaweseb be interdicted from proceeding with the construction work on the property in furtherance of the approved building plans.

[12] After the dispute on the interim relief fell by the wayside the court *a quo* proceeded to consider the substantive relief sought by either side and entertained full argument. Having done so it granted Mr Gaweseb an order declaring as unlawful

¹ Municipality's Building Regulations Government Notice No 57 of 1969 in Government Gazette No 2992 of 28 April 1969.

² Windhoek Town Planning Scheme as amended (Original Scheme approved by virtue of Proclamation No 16 of 1 July 1976).

the revocation of the approved building plan. The High Court made the following orders:

'Main Application':

1. The decision by the [Municipality] on 25 October 2017 is set aside.
2. The decision by the [Municipality] to revoke building approval under Building Permit nr. 3005/2015 is irregular and null and void and is therefore set aside with costs.
3. Costs to include cost of two legal practitioners.

[Counter] Application:

4. The conditional counter application by [the appellants] dismissed with costs.
5. Costs to include the costs of two legal practitioners.
6. The matter is referred back to the [Municipality] to consider and comply with the principles of natural justice and *audi alteram partem* rule.'

[13] In other words, the High Court rejected the defence raised by the Municipality that the revocation was not reviewable. The court *a quo* dismissed the relief sought by the appellants on the ground that it was unreasonably delayed. It did not consider the merits of the appellants' conditional counter-application.

[14] The High Court took the view that the revocation was unlawful as Mr Gaweseb was not afforded a hearing and that the Municipality was *functus officio* in relation to that decision.

[15] The counter application was dismissed on the ground that the appellants were aware of the alleged unlawful conduct by Mr Gaweseb but failed to seek relief from court within a reasonable time.

[16] In its judgment the High Court observed that the building permit in respect of the property had 'in all probability' expired and that Mr Gaweseb could not continue without it being renewed. As regards the appellants, the court *a quo* observed:

'[41] This decision of the [Municipality] clearly adversely affects the rights of [Mr Gaweseb] because even if the building permit lapsed effectively preventing [him] from continuing with construction, where does it leave [Mr Gaweseb] in respect of the partially constructed building when the permit is revoked. There is no prayer by the respondents that the partially constructed building be demolished. The counter application of the [appellants] if successful would therefore be academic in nature.

[42] [Mr Gaweseb] would effectively have a partially constructed building that for all intents and purposes would be unlawful as the original building permit, which was lawfully issued, is revoked'.

[17] The appellants are aggrieved by the outcome *a quo*. There is no cross-appeal by Mr Gaweseb.

The issue

[18] The issue on appeal has become quite narrow. It is whether the High Court acted properly in not granting the appellants an interdict against Mr Gaweseb. The evidence to be considered in that context falls within a narrow compass and is largely common cause or incontrovertible.

[19] The proceedings that led to the present appeal are motion proceedings which are intended for the resolution of common cause facts.³ Where there are disputes of fact which have not been referred to oral evidence, the facts deposed to by the applicant and which are not denied are considered as admitted. The version

³ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 at 290 para 26.

of the respondent is to be accepted unless it is found to be untenable or so far-fetched that it can be rejected on the papers.⁴

[20] The appellants seek a final interdict and are therefore required to, first, establish a clear right, secondly, that such right has been interfered with in the sense that they suffered an injury and, thirdly, that they have no other satisfactory remedy to protect themselves from unlawful interference with their rights.⁵

[21] The issues that have arisen in the appeal can be resolved by reference to the common cause or incontrovertible facts as appear on the affidavits relative to the counter-application which is now the only live issue between the parties. In that application, Mr Gaweseb is the respondent and the appellants are the applicants. If there are disputes of fact, the court can still grant the final interdict if the facts deposed to by the applicants and the admissions and facts alleged by the respondent justify such an order. If certain facts are not formally admitted, but it is clear that they cannot be denied, the court must regard them as admitted.⁶

What is the appellants' case?

[22] Before the return date of the interim interdict, the High Court granted the appellants leave to intervene.⁷ In so far as it is relevant to the present appeal, the appellants were granted leave to file answering affidavits in Mr Gaweseb's Part B

⁴ *Bahlsen v Nederlof and another* 2006 (2) NR 416 para [30] and *Mostert v The Minister of Justice* 2003 NR 11 at 21 G-I.

⁵ *Bahlsen v Nederlof and another* 2006 (2) NR 416 para [30].

⁶ *Bahlsen* at para [31].

⁷ The interim interdict was never made final. After the appellants intervened and contested the interim interdict, the parties came to an agreement which the court on 1 February 2018 made an order of court in the following terms: '1. The interim interdict against [the Municipality] in terms of Court order dated the 15th day of December 2017 is hereby abandoned by [Mr Gaweseb]; 2. Any construction activities on [Mr Gaweseb's property] are hereby stayed pending the determination of the review in Part B of [Mr Gaweseb's review application against the Municipality] and the Counter Application filed on record by the [appellants].'

application and to file a substantive conditional counter-application. The appellants filed a single affidavit in support of both. The fourth appellant (Mr Imalwa) deposed to the affidavit on behalf of all the appellants.

[23] Mr Imalwa's evidence can be briefly stated. As owners of properties adjacent to the property they were not consulted when the building plans in respect of Mr Gaweseb's property were 'purportedly approved' and that they were denied the right to be heard as regards the construction work on the property - in particular, the encroachments on the building lines as required by clause 20 of the TPS.

[24] Mr Imalwa averred in justification of the interdict:

'54. The applicant [Mr Gaweseb] has now put up a slab on his structure. On 11 January 2018, they poured the concrete and once that has cured we expect that they will forthwith proceed with the construction of the first floor.

55. It is now common cause that the construction had been stopped because of the decision of the local authority, and resumed after the order of [the High Court] of 15 December 2017. It is ongoing, and any lull therein must be attributed to the subsequent order of stay and the fact that the slab must be allowed to cure.' (My underlining)

[25] According to Mr Imalwa, the encroachment is apparent from the approved plan in that:

- (a) Mr Gaweseb is constructing an entertainment area with a balcony on the property that will overlook the neighbours' properties in a way that will compromise their privacy;
- (b) Persons on the property who find themselves on the balcony of the elevated (first floor) entertainment area 'will have a direct line of sight' to parts of the neighbours' properties in a manner that compromises their right to privacy.

[26] He added:

'It is accordingly clear that insofar as the immediate adjacent neighbouring properties are concerned, our right to privacy is severely affected by this development. Furthermore, if the property is to be used as an accommodation establishment as intended by the applicant, it is clear that various strangers who will be accommodated there will also have direct line of sight to our various properties... [which] is a severe violation of our right to privacy. We were entitled to a proper hearing before the plans were approved.'

[27] The other ground relied on by the appellants is that Mr Gaweseb continued with the construction work on the property after the expiry of 12 months and without a valid building permit in violation of regulation 10. The appellants maintain that they have 'a legitimate expectation' that the Municipality will enforce its own rules, and where necessary, require the requisite consents or objections and to fairly consider those objections.

Mr Gaweseb's answer to the appellants' case

[28] Mr Gaweseb denied that the approved building plan expired after the expiry of 12 months. He maintained that all 'that was required is that I should start construction within the period of 12 months.' He added that in 'any event, the officials of the [Municipality] ...at all relevant times were aware of my continued construction on the basis of that building permit, until the purported cancellation on 25 October 2017 . . . and that the Municipality had [in the alternative] tacitly extended such permit and it was an existing permit both in fact and law'.

The Municipality's stance

[29] On behalf of the Municipality, the third respondent deposed to an affidavit in opposition to Mr Gaweseb's application. That affidavit forms part of the appeal record. As far as it is relevant to the appeal, he alleged that Mr Gaweseb's construction on the property continued after the expiry of 12 months from the date of the approval of the building plans, contrary to regulations 9⁸ and 10.

The grounds of appeal

[30] The appellants assert in their grounds of appeal that the High Court committed an error in failing to consider their prayer for interdictory relief while having found that Mr Gaweseb's building permit had expired and that he carried on the construction work in breach of the Municipality's building regulations.

[31] The notice of appeal further states that the High Court misdirected itself by 'failing to appreciate, alternatively ignoring the fact that unreasonable delay is not a basis on which to decline a claim for interdictory relief'.

Main submissions on appeal

The appellants

[32] It will be recalled that the High Court concluded that the appellants' declaratory and review relief was unreasonably delayed. Because of that finding, as I read the judgment in context, the High Court considered it unnecessary to decide the

⁸ Regulation 9 states: '9. The approval by the Council of any plans for the construction of a building shall expire if such erection shall not have been commenced within twelve months after the date of such sanction: Provided that an extension of the period during which building operations must be commenced with, may be granted if the Council is satisfied that it was for some sound reasons not possible to do so before the period of one year had expired.'

parties' conflicting views on the proper interpretation of regulation 10 as regards whether Mr Gaweseb was acting unlawfully in continuing construction work on the property after the expiry of 12 months from the date the building permit was issued.

[33] The following finding made by the learned judge *a quo* therefore became the focus of the appellants' attack on appeal:

'I fully agree that at first glance it would appear that the building permit expired or lapsed but this matter does not turn on that fact. The parties are not in agreement as to the interpretation of regulation 10 of the Building Regulations but for purposes of this judgment I would not be required to deal with the interpretation of this regulation'.

[34] Mr Narib for the appellants submitted that this was a misdirection and that in view of the indisputable violation of regulation 10, the court was obliged to consider the interdictory relief and that it 'erred in law by failing to appreciate; alternatively ignoring the fact that unreasonable delay is not a basis on which to decline a claim for interdictory relief'.

[35] According to Mr Narib, the High Court was required to interpret regulation 10 so as to arrive at the conclusion whether the building plans and the permit had expired and whether Mr Gaweseb's continuing building operations were lawful or not and whether or not the interdict ought to be granted.

[36] Counsel submitted that the appellants had a clear right to the interdictory relief given the unambiguous terms of regulation 10. On that view, according to counsel, the 'continuing building operations were unlawful, and would adversely affect the right to privacy of the owners of the neighbouring properties, when the first floor of the structure which was being built is completed'.

[37] Counsel added that the grant of an interdict was not conditional upon them seeking an order of demolition and that an interdict would 'constitute substantial success' in regard to the counter application.

[38] Mr Narib submitted that the High Court's dismissal of the declaratory and review relief on the ground that it was unreasonably delayed was no longer being challenged on appeal. The focus for the appeal, as Mr Narib put it is:

'Appellants' real interest ... in [Mr Gaweseb] not proceeding with the construction of the first floor and a balcony which overlooks their neighbouring properties and also encroaches on the five (5) meter building line. Towards this end, the interdictory relief will suffice.'

[39] Counsel submitted that the appellants had on the papers made out a case for a final interdict and ought to have succeeded *a quo*. According to counsel, it was not in dispute that Mr Gaweseb's construction activities on the property was being carried out whilst:

- (a) He did not possess a current and valid building plan;
- (b) He did not possess a valid and current building permit.

[40] Mr Narib concluded that the building plans previously issued to Mr Gaweseb were unlawfully approved in contravention of the second respondent's by-laws as the appellants as owners of adjacent properties had not been afforded the opportunity to object to the proposed building plans. As neighbours, Mr Narib submitted, the appellants' rights to privacy were infringed by Mr Gaweseb's construction of an elevated entertainment area with a balcony overlooking their properties - potentially exposing them to prying eyes.

For Mr Gaweseb

[41] On behalf of Mr Gaweseb, Mr Namandje submitted that the appellants had not made out a case for condonation and reinstatement of the appeal and that it should be struck off from the roll; alternatively, that they had not made out the case for the grant of a final interdict.

[42] According to Mr Namandje, considering that the neighbours no longer seek a declaration and review, interdictory relief standing alone was academic and not necessary. Mr Namandje argued that in any event the interdict was 'overtaken by events' in view of the High Court's conclusion that Mr Gaweseb was not entitled to 'pick up from where he ended, and that he needs to comply with the Regulations.' In other words, that the High Court made clear to Mr Gaweseb that the construction work cannot continue unless he obtains extension of the expired building permit. That Mr Namandje submitted, makes an interdict 'being sought at this stage . . . unnecessary and wholly academic.'

[43] It is clear from Mr Namandje's latter submission that Mr Gaweseb accepts that the court *a quo* in effect decided that he may not proceed with the construction on the property without obtaining an extension of the expired building permit.

[44] Mr Namandje further submitted that the High Court had a discretion whether or not to entertain the question of the interpretation of regulation 10 and that it was not shown by the appellants to have improperly exercised that discretion.

Common cause and undisputed facts

[45] The process of approval of Mr Gaweseb's building plans, it is common cause, was subject to the Municipality's Building Regulations 1969 (as amended)⁹ and the TPS. The relevant provisions are contained in regulation 10 and clause 20 of the TPS.

[46] Regulation 10 states:

'10. The erection of any building must be completed within twelve months after the commencement of building operations. If for any reasons a building cannot be completed within a period of twelve months authority for extension of the period shall be obtained from the Council before the twelve months have elapsed.'

[47] According to clause 20 of the TPS

'(1) Except with the consent of Council or as otherwise provided for in this Scheme, no building or structure or any portion thereof shall be erected nearer than three (3) metres to any lateral or rear boundary common to an adjoining erf. A lateral boundary is defined as a boundary with at least one end on a street boundary, a street boundary is any boundary common to a street, and a rear boundary is any boundary other than a street or lateral boundary. In the case of a dwelling unit or residential building the three (3) metre requirements shall apply to single storey units and shall increase by two (2) metres for each additional storey. The minimum requirement shall be measured from the external walls of the building under consideration.

(2) The Council may, subject to any conditions it deems necessary, relax the provisions of clause 20(1).'

⁹ GN 57 of 1969 in GG 2992 of 28 April 1969.

[48] The Municipality on 29 December 2015 approved building plans submitted by Mr Gaweseb in respect of the property. Following the approval of the building plans, it issued a building plan in respect of the property as follows:

'With reference to your application of 2015/9/25 you are hereby notified in terms of regulation 8 of Council's Building Regulations that the plans submitted showing the proposed ADDITION to be carried out on [the property] have been approved subject to [the condition that] THE PERMIT WILL BE VALID FOR TWELVE MONTHS FROM THE DATE OF APPROVAL.'

That was clearly in conformity with regulation 10.

[49] On Mr Gaweseb's own version, construction work on the property continued for a period of two years after the approval - until 25 October 2017 which is the date on which the Municipality revoked it under the hand of the third respondent.

[50] It is not in dispute that after the expiry of 12 months from the grant of the building permit, Mr Gaweseb did not obtain a renewal or extension as required by regulation 10 and the building permit.

[51] The Municipality on affidavit by the third respondent made it clear that the approved building plan had expired after 12 months and that it had not been renewed.

[52] Save for the assertion that the appellants were aware of the construction work on his property but failed to take remedial steps, in none of the affidavits forming part of the appeal record is there a credible denial by Mr Gaweseb of the appellants' allegation that construction on the property included a double storey building with an entertainment area overlooking the properties of the appellants nor

that such building exceeds the 3 metre or 5 metre building lines fronting the respective properties of the appellants. It will be recalled that in the revocation letter the third respondent asserts that the 3 metre and 5 metre building line restrictions were being violated by Mr Gaweseb. That allegation is similarly uncontested.

Discussion

[53] According to Mr Namandje an interdict will be academic but the difficulties confronting counsel in that regard are insurmountable. The first is that there was no acceptance under oath by Mr Gaweseb that he was not entitled to proceed with the construction unless he obtains an extension. In fact, he disputed that interpretation and the High Court confirmed as much. Secondly, there is no order in existence directing Mr Gaweseb not to continue with the construction work. It means Mr Gaweseb can proceed with construction work unless specifically interdicted from doing so.

Have appellants established an act of interference?

[54] This requirement entails the presence of an act actually done by an alleged offending party that shows some interference with an applicant's ability to exercise a right or the existence of a reasonable apprehension that acts that may interfere with the applicant's ability to exercise a right will be committed by the respondent.¹⁰ A reasonable apprehension of injury is one which a reasonable man might entertain when faced with the facts which the court find to exist on a balance of probabilities. It is not necessary for the applicant to establish on a balance of probabilities that the injury will occur, the applicant only need establish that on a balance of probabilities he or she has grounds for a reasonable apprehension that his or her rights will be detrimentally affected.

¹⁰ CB Prest, *The Law and Practice of Interdicts* (2016) 44.

[55] That Mr Gaweseb continued construction work on the property after the expiry of the building permit is beyond dispute. The only question that arises is whether that entitled the appellants to a final interdict. The appellants' allegation that part of the construction on the property includes an elevated first floor overlooking their respective properties and comprises an entertainment area with a balcony is equally incontrovertible. So too is the appellants' assertion that the location of the entertainment area potentially compromises their privacy. Not least, the appellants' assertion that they were not afforded the opportunity to object in view of the 3-metre or 5-metre building line is to be accepted in their favour in view of the clear statement to that effect by the Municipality.

Disposal

[56] The High Court appears to have been influenced by three considerations which prevented it from considering whether Mr Gaweseb violated regulation 10. The first is that it would be academic because demolition was not sought. Secondly, that because no earlier step was taken by the appellants to halt it, the construction work was quite advanced. Thirdly, and perhaps most importantly, the court *a quo* took the view that since the declaratory and review relief failed, it was not necessary to determine whether or not Mr Gaweseb had breached regulation 10 – yet that determination was necessary in relation to the interdictory relief sought by the appellants.

[57] I will demonstrate that none of those three factors was a bar to the consideration of the interdictory relief that the appellants sought. No authority was cited to us why an interdict without demolition relief is not an appropriate remedy.

The critical consideration appears to me to be the common cause fact that although the slab was laid, no further construction was carried out in light of the revocation by the Municipality. We are therefore concerned with a building that has not been completed. As far as delay goes relative to the fact that, as the court put it, the construction was 'advanced', the test is whether because of the delay it is unconscionable for the appellants to be granted an interdict.

[58] As a general rule, one does not forfeit a right only because he or she delayed in enforcing it. The obvious exception is a debt which may prescribe. *Zuurbekom Ltd v Union Corporation Ltd*¹¹ is authority for the proposition that mere delay does not deprive an aggrieved party the right to an injunction. The circumstances must be such that the enforcement of the right would be an act of bad faith.

[59] In *Director-General of the Namibian Central Intelligence Services v Haufiku*¹² this court said:

‘The court retains a discretion to refuse a final interdict if its grant would cause some inequity and would amount to unconscionable conduct on the part of the applicant.’

Have appellants established an act of interference?

[60] Although a party does not lose the right to apply for an interdict owing only to a delay in bringing the application, the court retains a general discretion in deciding whether to grant a final interdict.

¹¹ *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 536.

¹² *The Director-General of the Namibian Central Intelligence Services v Haufiku* (SA 33-2018) [2019] NASC (12 April 2019).

[61] Mr Namandje argued that in opting not to consider if regulation 10 was breached by Mr Gaweseb and therefore whether or not the interdict should be granted, the learned judge *a quo* exercised a discretion and that the appellants failed to establish that it was improperly exercised.

[62] That proposition is undermined by clear authority from this court. Mtambanengwe AJA made clear in *Village Hotel (Pty) Ltd v Chairperson of the Council for the Municipality of Swakopmund and others*¹³ that where a party seeks main and alternative relief and fails in the former, it is a misdirection for a first instance court to fail to consider the alternative relief which is independent and does not depend for its success on the decision on the main issue.

[63] The appellants sought an interdict against Mr Gaweseb in the event that he succeeded against the Municipality, which he did. It then became incumbent upon the High Court to consider the interdict which it could only do by considering the import of regulation 10.

[64] Those misdirections leave this court at large to consider the interdictory relief sought by the appellants.

[65] The High Court recognised in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and others*¹⁴ that in an appropriate case an affected resident may seek to enforce a town planning scheme. In *Village Hotel v Chairperson for the Municipality of Swakopmund*¹⁵ the Supreme Court put it beyond

¹³ 2015 (3) NR 643 (SC) at paras [38] and [39].

¹⁴ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and others* 2011 (2) NR 437 (HC) at par [29] and [30].

¹⁵ *Village Hotel v Chairperson for the Municipality of Swakopmund* 2015 (3) NR 643 (SC) paras [38] and [39].

doubt that a person for whose benefit a statutory provision was enacted has the necessary standing to enforce it, even by way of an interdict.

[66] The fact that an adjacent neighbour's consent is required if construction encroaches a 3 metre or 5 metre building line is a clear indication that the relevant building regulations of the Municipality vested enforceable rights in adjacent property owners. Such a right is enforceable by way of interdict, subject to the courts discretion to refuse it in an appropriate case. It matters not that a consequential demolition order is not sought.

[67] The appellants therefore established a clear right. That they suffered actionable harm follows from the fact that Mr Gaweseb begun to construct a building which potentially compromised their privacy rights. Once completed the elevated first floor overlooking the appellants' properties will become a permanent fixture which will render the appellants' privacy rights meaningless. In other words, they had shown that they would have no other alternative remedy.

[68] Regulation 10 is clear. Once approved a building plan must be executed within 12 months. The *vires* of the regulation is not the subject of challenge in the proceedings giving rise to the appeal and it is therefore valid in law and enforceable.

[69] In addition, the building permit issued to Mr Gaweseb made clear to him that he required an extension if 12 months lapsed from the date of approval. He was therefore clearly in breach of regulation 10. That breach was actionable at the instance of the appellants by way of an interdict.

[70] The appellants have, as I already demonstrated, established all the requirements for an interdict. Besides, it has not been demonstrated that it would be unconscionable for them to seek to interdict further construction on the property until due process has been afforded to both Mr Gaweseb and them. It is not an irrelevant consideration that the interdict the appellants seek was conditional upon Mr Gaweseb succeeding against the Municipality in his declaration and review. The two sets of relief were therefore anticipated to co-exist and Mr Gaweseb has not demonstrated otherwise.

[71] Had the High Court addressed its mind to the question whether or not Mr Gaweseb unlawfully continued construction work after the expiry of 12 months from the date of approval of the building plan, there is ample material on the record to show that he did. In the absence of an extension of the building plan he was in law not entitled to do so. As affected parties, the appellants had the necessary standing to seek enforcement of regulation 10 by way of an interdict.

Condonation application

[72] It is apparent from the above that the appellants have good prospects of success on appeal. What remains to consider is if they have provided a satisfactory explanation for the delay. It is to that issue I now turn.

[73] In terms of the rules of this court, an appeal record has to be filed within 3 months from the date of judgement,¹⁶ which means such record had to be filed by the 28th of January 2019. The appeal record was however only filed on the 08th of March 2019, being about 5 weeks and 2 days late.

¹⁶ Rule 8(2)(b) of the Rules of the Supreme Court.

[74] The appellants' explanation is that they were delayed in their efforts to obtain the submissions made by the parties in the High Court so that they could include it in the record. Mr. Gaweseb opposes the condonation and reinstatement application and maintains that in terms of the rules of this court, legal submissions ought not to form part of the record. The appellants therefore failed to furnish a satisfactory explanation for the delay and should fail in the condonation and reinstatement application.

[75] The appellants retort that if regard is had to the basis for their appeal, it was necessary for this court to see what was argued and what the High Court was therefore called upon to decide but did not do.

[76] The appellants' stance is not without merit. First, there is no absolute bar to including heads of argument in the record of appeal. The relevant rule reads:

'Requirements for record

11 (8) . . . Unless it is essential for the determination of an appeal the record must not contain –

- (a) heads of argument, a transcript of oral argument and opening addresses;
- (b) discovery affidavits and similar documents;
- (c) identical duplicates of any documents; and
- (d) documents not proved or admitted ...' (My underlining)

[77] Secondly, the basis on which the appellants impugn the High Court's judgment is that it failed to decide an issue which squarely felt for decision. They found it necessary therefore to include the submissions in the appeal record. One may disagree with them on whether it was strictly necessary but that is not the test in my view. Based on the appeal grounds they wished to pursue they formed a value

judgment that it was necessary to include the heads of argument. They applied their minds to that issue and took a conscious decision to deviate from the rule which is not cast in stone.

[78] The events leading up to the late filing were: The appellants' legal practitioner approached Hibachi Transcription Services Pty (Ltd) (Hibachi) on the 11th of December 2018 to submit the indexed bundle for the appeal record and requested the transcription of the court record. On that day, the appellants' legal practitioner was informed by an employee of Hibachi that they would only be able to attend to the request from the 14th of January 2019. The request was then submitted on the 14th of January 2019, on which date the legal practitioner was advised that as the hearing that needed to be transcribed was only 2 hours same would take only a few days. After numerous follow ups at the office of Hibachi the record was only finalized on the 21st of February 2019.

[79] After the failed attempts to get the record from Hibachi and in anticipation that the record would not be done in time for filing, on the 24th of January 2019 the appellants' legal practitioner addressed a letter to the legal practitioners for the first respondent requesting indulgence for an extension to file the appeal record on a later date. The said letter also explained why there would be an inability to comply with the Rule 11(8) and (10) without the transcribed record at hand. The request was unsuccessful.

[80] The complete record was finalized on the 25th of February 2019, collected by appellants' practitioner on the 27th of February 2019 after payment of the invoice, and subsequently filed on the 8th of March 2019.

[81] From the above it is clear that the delay in filing the record cannot be apportioned to the appellants or their legal practitioners as it is a result of a third party's inability to deliver and was contributed to by the unfortunate circumstance that there was a 1 month of recess that fell within the 3-month timeline.

[82] I am satisfied therefore that the appellants made out a case for condonation and reinstatement of the appeal.

Appropriate remedy

[83] The order this court makes must take account of the fact that neither party has appealed the order of referral made by the High Court. That order therefore remains valid and binding on the parties. Its effect is that the revocation of the building plan is subject to Mr Gaweseb being afforded the opportunity to be heard before it can take effect. In other words, the order assumes that Mr Gaweseb has the right to satisfy the Municipality that he be allowed to continue the construction work in the form that it has begun and continued until its revocation. What this court cannot do is to effectively close the door by granting an order to the appellants that has the effect of foreclosing the possibility of the Municipality permitting Mr Gaweseb to continue with the construction work subject to the building regulations being complied with.

[84] It is not unusual for the court to fashion a final interdict to have effect for a limited period of time.¹⁷

¹⁷ L Van Winsen, AC Cilliers and C Loots, (M Dendy ed) *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (1997) at 1064.

[85] The High Court's referral order is, of necessity, qualified by this court's conclusion that the interdict should have been granted. That implies that the appellants' rights to object in accordance with the applicable building regulations and the TPS are preserved and should be given effect to alongside Mr Gaweseb's right to *audi*.

[86] The order I propose to make therefore is to grant an interdict to the appellants, subject to and until such time as the Municipality has afforded both Mr Gaweseb and the appellants the opportunity to exercise their rights under the Municipality's applicable building regulations.

Costs

[87] Mr Narib submitted on behalf of the appellants that should his clients be successful in the appeal, each party bear its costs *a quo* and that costs in the appeal however follow the result. There is merit in that approach and I will make such an order.

The Order

[88] In the light of the order I propose to make in respect of the counter-application, it is necessary to reword the surviving parts of the High Court's order to avoid confusion and misunderstanding.

[89] It is ordered that:

1. The application for condonation and reinstatement of the appeal is granted, with costs, including costs consequent upon the employment of one

instructing legal practitioner and one instructed legal practitioner.

2. The appeal succeeds in part and the order of the High Court in respect of the main application and the counter application is set aside and replaced by the following order:

‘(i) The revocation on 25 October 2017 by the Municipality (first and second respondents in the main application) of the approved Building Permit No.: 3005/2015 for erf 506 Pionierspark, Windhoek, is declared irregular, null and void and hereby set aside.

(ii) The matter is referred back to the Municipality to consider and comply with the principles of natural justice and *audi alteram partem* in respect of the intended revocation of the approved Building Permit No.: 3005/2015.

(iii) The Municipality must have due regard to the rights of third to seven respondents in the main application (applicants in the counter-application) in giving effect to the orders in (ii) and (iii) above.

(iv) Mr Gaweseb is interdicted from continuing with construction work on erf 506 Pionierspark, Windhoek, pending the outcome of the representations to be made by the parties as contemplated by paras (ii) and (iii) above.

(v) The Municipality shall bear the costs of Mr Gaweseb in the main application, to include the costs of two legal practitioners.

(vi) Each party shall bear its own costs in the counter application.’

3. The appellants are granted costs in the appeal consequent upon the employment of one instructing legal practitioner and one instructed legal practitioner.

HOFF JA

ANGULA AJA

APPEARANCES:

Appellants:

G Narib

Instructed by Delport Legal Practitioners

Windhoek

1st Respondent:

S Namandje

Of Sisa Namandje & Co

Windhoek