



**NOT REPORTABLE**

CASE NO: SA 61/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**GABRIEL OTLELAMANG SEROGWE**

**Appellant**

and

**QUEEN MPHO SEROGWE**

**First Respondent**

**ANNA ITISENG BERENG**

**Second Respondent**

**G & B SEROGWE FARMING CC**

**Third Respondent**

**Coram:** SHIVUTE CJ, SMUTS JA and FRANK AJA

**Heard:** 17 October 2022

**Delivered:** 28 October 2022

**Summary:** First and second respondents, succeeded in an unopposed application (in terms of s 36 of the Close Corporation Act 26 of 1988 (the Act)), against the appellant for the cessation of his membership in the third respondent, a close corporation. The court *a quo* further granted ancillary relief appointing a referee to determine the value of the close corporation and each member's loan account for the purpose of determining what the first and second respondent should pay the appellant for his membership. Despite not opposing the application, the appellant filed a notice of appeal against the order, raising a number of points.

The appellant further brought an unopposed condonation application for the non-compliance and late filing of the rule 11(10) report of the Rules of the Supreme Court (the rules). Appellant's explanation in support of the condonation application was that upon realising that he failed to comply with the obligation contained in rule 11(10), the appellant's legal practitioner belatedly arranged the required meeting, attended it and filed a report. The entire record of appeal comprised of a single volume.

The appeal dealt with technical points owing to the fact that the appellant did not put up any factual basis in opposition to the application.

*Held that*, the failure to conduct the meeting timeously and to take steps to eliminate unnecessary portions of the record not relevant for the appeal have fortunately not given rise to any prejudice, given the short record. This lack of prejudice is further evidenced from the fact that the application was unopposed. Despite the inadequate explanation provided which is at odds with the frequent admonitions of this court concerning the need for practitioners to properly acquaint themselves with the rules of this court - condonation is granted by reason of the lack of prejudice in this specific matter.

*Held that*, each of the technical points raised on appeal are without merit and must fail.

The appeal is dismissed with costs. These costs exclude the costs in relation to the respondents' written argument due to their heads of argument delivered very late and without any application for condonation (Counsel for the respondents considered that this was not required because he had incorrectly assumed on a misreading of an authority that the appeal had lapsed. He correctly accepted during oral argument that the appeal had not lapsed and that a condonation application was required).

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## APPEAL JUDGMENT

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SMUTS JA (SHIVUTE CJ and FRANK AJA concurring):

### Introduction

[1] The first and second respondents succeeded in an application in terms of s 36 of the Close Corporation Act 26 of 1988 (the Act) against the appellant for the

cessation of his membership in the third respondent, a close corporation. The High Court also granted ancillary relief appointing a referee to determine the value of the close corporation and each member's loan account for the purpose of determining what the first and second respondent should pay the appellant for his membership. This order was granted on an unopposed basis by the High Court.

[2] Despite failing to oppose the application, the appellant filed a notice of appeal against the order, raising a number of points in his notice of appeal.

[3] The appellant however failed to comply with rule 11 (10) of the rules of this court and seeks condonation for that non-compliance. That aspect is first dealt with.

#### Application for condonation

[4] Rule 11 sets out the requirements for appeal records. Rule 11(10) reads:

'Parties to an appeal or their legal practitioners, if they are represented, must –

(a) within 20 days of the noting of the appeal, hold a meeting about the record with the view to eliminating portions of the record which are not relevant for the determination of an issue on appeal; and

(b) within 10 days of conclusion of that meeting submit to the registrar a written report about the meeting.'

[5] This sub-rule was not complied with. The reason given for this failure was that the appellant's legal practitioner 'failed to notice' the obligation contained in the sub-rule. This is further explained:

'8.2 It was only on 9<sup>th</sup> September 2020 after the clerk drawing the files had put the file on his table that my attorney of record then took a more than cursory look at the rules, for the purpose of preparing the appeal record; and, it was then that he embarrassingly realised that he had made a grave error of judgment in his approach to preparing the appeal record.'

[6] After making this discovery, the appellant's legal practitioner belatedly arranged the required meeting, attended it and filed a report.

[7] The explanation in the application for condonation is not addressed by the respondents who do not oppose condonation.

[8] The entire record in this matter comprises a single volume. The failure to conduct the meeting timeously and to take steps to eliminate unnecessary portions of the record not relevant for the appeal have fortunately not given rise to any prejudice, given the short record. This lack of prejudice is further evidenced from the fact that the application was unopposed. Despite the inadequate explanation provided – at odds with the frequent admonitions of this court concerning the need for practitioners to properly acquaint themselves with the rules of this court<sup>1</sup> - condonation is granted by reason of the lack of prejudice in this specific matter.

### The appeal

[9] The grounds of appeal mostly raise technical points owing to the fact that the appellant did not put up any factual basis in opposition to the application. Each of the points raised on appeal is however without merit.

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<sup>1</sup> *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) para 47. Also see *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others* 2013 (4) NR 1029 (SC) at 1031D-F. See also *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) para 5. *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 4.

[10] It was firstly argued that the resolution attached to the application did not meet the requirements of s 48(1) and (2) of the Act. In his written argument, this point, like the others raised by the appellant was mounted without specifying in which respects the resolution was non-compliant. Written argument cannot merely be confined to a recitation of grounds of appeal without specifying their application to the appeal. In oral argument it was contended that it had not been established that all members had notice of the meeting and supported the resolution. Despite the failure of the appellant to properly contest the facts set out in the founding affidavit which remain unchallenged, the point was raised because the appellant, having a 50 per cent member's interest, had not supported the resolution to bring the application on behalf of the close corporation. This point does not avail the appellant as all three members of the corporation were before court and the close corporation was also cited as a party. It was not necessary for the close corporation to join as an applicant as long as it was cited in the proceedings – which it was – and as were all members of the corporation. All the parties were thus before the court. This point has no merit.

[11] The appellant also submitted that the allegations concerning the manner in which the appellant ran the affairs of the close corporation 'raised some serious questions about (their) accuracy . . . '. It was argued that the respondents failed to put credible and sufficient evidence before the court below concerning the appellant's conduct. The factual allegations of financial abuse and a lack of accountability made out in the papers remain unchallenged including the appellant using the close corporation's assets as security for his own debt. This certainly established sufficient cause for the court to exercise its discretion as contemplated under s 36.

[12] The appellant also argued that the first and second respondents were unable to comply with the order granted by the High Court. Again, this ground of appeal was not supported by specifying in which respects the respondents were allegedly unable to comply with the order. It was however stated in oral argument that the first and second respondents may not have the means to buy out the appellant in respect of his interest. This ground, like the next, is based on speculation and fails to take into account that the first and second respondents actually sought (and were granted) an order to the effect that they be given leave to pay the appellant for his member's interest after it had been duly determined. This ground is also without substance.

[13] It was also contended that the failure of one of the deponents to sign on the designated line for her signature and doing so with a signature which appellant's counsel contended raised questions about that deponents' literacy. This extraordinary submission is again entirely speculative and without any basis in fact and also falls to be roundly rejected. This is apart from being denigrating and demeaning of the deponent without any factual basis to do so.

[14] The appellant also argued that the formalities of the regulations promulgated under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 had not been complied with. Like many of his other contentions, there was no specificity to this argument. It was also entirely unsubstantiated. The commissioner of oaths provided the date of commissioning the affidavit, her full names, capacity and address. The stamp used to provide certain of these details indicated it was used for the certification of copies. This superfluous information did not detract from the commissioner meeting the requisites of the regulations and certainly does not invalidate the commissioning.

[15] Finally, it was contended that the order was vague 'in material respects' because a specific timeline was not provided for in the order for the payment to the appellant for his member's interest (by the first and second respondents). In the absence of a time period, a reasonable period would apply. The failure to set out a time period did not mean that the judgment would be liable to be set aside on appeal. This ground likewise fails.

[16] It follows that the appeal is without merit and must fail.

[17] As far as costs are concerned, the respondents' heads of argument were delivered very late without any application for condonation. Counsel for the respondents considered that this was not required because he had incorrectly assumed on a misreading of an authority that the appeal had lapsed. He correctly accepted during oral argument that the appeal had not lapsed and that a condonation application was required. The authority relied<sup>2</sup> upon however concerned an already lapsed appeal where a condonation and reinstatement application was brought but the applicant failed to file heads of argument on time which meant the condonation and reinstatement application had lapsed as well, because the Chief Justice had ruled that rule 17 applied to the filing of those heads of argument. As was stated by this court:

'As I have demonstrated in para [6] above, the practice of this court is to subject an application for condonation and reinstatement to the same regime as an appeal proper on the merits. Once an appellant whose appeal has lapsed has applied for condonation and reinstatement and a date has been allocated, heads of argument must be filed in terms of rule 17 and if an applicant fails to do so it spells the end of the application for condonation and reinstatement. The court's indulgence is required for the matter to proceed further. The court does not *mero moto* condone non-compliance with its rules.'

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<sup>2</sup> *De Sousa v Alexia Properties CC* (SA 84/2019) [2021] NASC (27 July 2021).

[18] There was no condonation application in that matter for the failure to file heads of argument timeously which meant that the matter had lapsed and that the respondent in that matter was not expected to prepare for that matter. Those circumstances differ materially from this appeal.

[19] The cost order will thus exclude the costs of the respondent's written heads of argument.

[20] The following order is made:

- (a) The appeal is dismissed with costs.
- (b) The order as to costs excludes the costs relating to the respondent's written argument.

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**SMUTS JA**

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**SHIVUTE CJ**

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**FRANK AJA**



## APPEARANCES

APPELLANT:

L B Mokhatu

Of du Pisani Legal Practitioners

RESPONDENTS:

N Tjombe

Of Tjombe-Elago Legal Practitioners