



**REPORTABLE**

CASE NO: SA 33/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JOHANNA HALLELUYA SHIKONGO  
BONGOLA INVESTMENTS PROJECTS CC**

**First Appellant  
Second Appellant**

and

**LEE'S INVESTMENTS (PTY) LTD**

**Respondent**

**Coram:** MAINGA JA, SMUTS JA and HOFF JA

**Heard:** 28 June 2022 and 3 October 2022

**Delivered:** 15 November 2022

**Summary:** The approach by this court in condonation applications is restated. A litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. The condonation application must be launched without delay as soon as a litigant becomes aware that there has been non-compliance with a rule or with rules.

The affidavit accompanying the condonation application must set out a 'full, detailed and accurate' explanation for the failure to comply with the rules. The court will also consider the litigant's prospects of success on the merits, save in cases which demonstrate a 'glaring and inexplicable disregard' for the processes of the court.

The applicant failed to file the record of appeal within the time period prescribed by rule 8(2) of this court and failed to provide any explanation of what had happened for a period of about nine weeks after the notice of intention of appeal was filed. The applicant only started with the preparation of the appeal record after security for costs had been paid into court, which left the applicant with insufficient time to prepare and file the appeal record.

The applicant's legal practitioner was familiar with the time within which to file the appeal record but failed in his duty as legal practitioner to apply the rule correctly by miscalculating the last day on which the appeal record had to be filed. No explanation was provided for what prompted the miscalculation.

The legal practitioner of the appellant failed to apply for condonation soon after he had been informed of appellant's non-compliance with rule 8(2), by the registrar.

The appellant also failed to apply for condonation for the failure to comply with the rule which requires a litigant to inform the registrar in writing that he or she had entered security for costs in spite of the fact that such non-compliance was brought to the attention of the appellant.

*Held*, that the explanation proffered was inexplicable, unpersuasive and amounted to a negligent and unreasonable non-observance of the Rules of this Court.

*Held*, in respect of the prospects of success on the merits, it was found that there was no prospects of success on appeal in respect of the merits.

*Held*, the application for condonation and reinstatement of the appeal is refused and the matter is struck from the roll with costs.

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## APPEAL JUDGMENT

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HOFF JA (MAINGA JA and SMUTS JA concurring):

### Introduction

[1] This is an appeal against an order of the High Court of Namibia (the court *a quo*) in which the first appellant was ordered to pay the respondent an amount of N\$550 000 with interest, and in which the court *a quo* ordered the agreement between the parties dated 20 November 2012, as well as an addendum dated 31 March 2014, be cancelled. The first appellant was ordered to pay respondent's costs.

### Background

[2] The first appellant is an adult female technical consultant employed in the Property Procurement Department of the Social Security Commission in the Republic of Namibia. The second appellant is a Namibian registered close corporation of which the first appellant is a member. The respondent is a private company, duly registered and incorporated in accordance with the applicable company laws of the Republic of Namibia.

[3] On 20 November 2012 the respondent duly represented by Mr Cheng Yuan Lee, and the first appellant acting in person, concluded a written consultancy agreement (the agreement) in terms of which the first appellant would secure the sale

of Erf/RE 2621 Avis, Windhoek (the property) to Landscape Development CC from the Council of the Municipality of Windhoek, for the purpose of the establishment of a mixed development.

[4] Upon signature of an agreement of sale between Landscape Development CC and the Council of the Municipality of Windhoek, the first appellant would become entitled to a fee of N\$1 million provided that the purchase price was less than N\$15 million.

[5] Subsequent to a Municipal Council meeting, Landscape Development CC was informed by the Council of the Municipality of Windhoek that its application (amongst several others received) by way of a private treaty, was successful, subject to certain conditions. The property was offered at an upset price of N\$14 983 000.

[6] Prior to the notification to Landscape Development CC that its application was successful, the first appellant had presented to the respondent quotations for various expenses, under the name of the second appellant, during the period 6 August 2012 to 26 September 2012. This included services for advising the respondent on policy framework to acquire the property, liaising with and assigning a technical team for researching, and for preparing an application to the Council of the Municipality of Windhoek for the development of the property. The total costs for these services was N\$11 270. This amount was paid by way of two instalments of N\$5635 each into the bank account of the second appellant, as provided on the quotation.

[7] The agreement between the first appellant and the respondent signed on 20 November 2012 contained a non-variation clause. On 31 March 2014 the parties concluded an addendum in which it was confirmed that the first appellant was entitled to a consultancy fee of N\$1 million and as it had been agreed that the respondent would pay the N\$1 million on the date of signature by both parties (Landscape Development CC and the Council of the Municipality of Windhoek) in the agreement of sale in respect of the property, the parties further agreed that payment would be effected as follows:

- '(a) N\$50 000 on 28 November 2013 (already paid)
  
- (b) N\$500 000 on 31 March 2014
  
- (c) N\$450 000 as soon as the Deed of Sale between Landscape Development CC, CC/2012/4728 and the Municipality of Windhoek has been signed by both parties in respect of Erf 2621 Avis.'

[8] It is common cause that the first and second appellants received the amounts of N\$50 000 and N\$500 000 respectively in terms of the agreement and the addendum.

[9] It is also common cause that the resolution by the Council of the Municipality of Windhoek to approve the sale of the property to Landscape Development CC was advertised as required by the provisions of the Local Authorities Act 23 of 1992, (the Act) in view of the objections received from members of the public to the intended sale of the property.

[10] It is further common cause that the Minister<sup>1</sup> refused to approve the intended sale of the property with the result that no agreement of sale was signed between Landscape Development CC and the Council of the Municipality of Windhoek in respect of the property.

[11] Subsequent to being informed by the first appellant that no agreement of sale in respect of the property could be concluded, the respondent insisted on and demanded a refund of the amount of N\$550 000 from the first appellant on the basis that the first appellant was not entitled to payment under those circumstances.

#### The pleadings

[12] In an action instituted by the respondent in the court *a quo*, the respondent pleaded in the main claim that in terms of the agreement, the first appellant was liable to refund the respondent in the sum of N\$550 000 which amount was due, owing and payable. Alternatively, the first appellant had, by failing to repay the said amount, breached the agreement concluded between the parties and thereby occasioned damages to the respondent in the aforesaid amount.

[13] Further alternative claims were *inter alia* based on the repudiation of the agreement by the first appellant, and on unjust enrichment.

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<sup>1</sup> The Minister of Regional, Local Government and Housing.

[14] The first appellant defended the action and denied that she was liable to refund the respondent in the amount of N\$550 000. The first appellant pleaded that the subject matter of the agreement was to secure the *approval* of the sale and purchase of the property; that in terms of the consultancy agreement the first appellant was never under any obligation to effect the registration of transfer of the property into the name of Landscape Development CC; and that should the court *a quo* for any reason find that the first appellant was under an obligation to conclude a written sale agreement in respect of the property, that the first appellant was unable to perform such obligation due to circumstances beyond her control, namely that the action, intervention or decree of the Minister to refuse approval of the sale, constituted a supervening impossibility and/or force majeure as contemplated in the agreement between the parties.

[15] The first appellant pleaded that she was entitled to remuneration for consultancy work done in terms of the agreement and that the N\$50 000 paid to her was a 'mobilisation' fee to enable her to commence work.

[16] The first appellant also pleaded that she incurred expenses for her own account in providing consultancy services to the respondent, therefore she was entitled to the N\$500 000.

[17] In replication, the respondent pleaded that the basis for respondent's main claim was for specific enforcement of the terms of the agreement in that the first appellant was to repay the amount of N\$550 000, since no written sale agreement

was concluded between the Council of the Municipality of Windhoek and Landscape Development CC.

[18] It was pleaded that the basis for the first alternative claim was for damages, in that the first appellant had breached the material terms of the agreement *inter alia* by not securing the sale of the property by the Council to Landscape Development CC, and by not securing the signing of a written agreement of sale of the property by the Council to Landscape Development CC.

[19] In the alternative, respondent averred that the nature of the dispute between the parties as pleaded in the respondent's amended particulars of claim and the first appellant's plea, is a purely legal dispute.

Proceedings in the court *a quo*

[20] In terms of a pre-trial report some of the facts were common cause *inter alia*:

- (a) that the respondent represented by Lee and the first appellant concluded a written agreement on 20 November 2012;
- (b) that on 31 March 2014 the parties concluded a written addendum agreement;
- (c) that in terms of the written agreement of 20 November 2012:

' . . . The first defendant would at her own cost make all technical representations and technical motivations with respect to the establishment of



the mixed development. In so far as the technical services may require the first defendant to hire other technical partners to render such services, such costs would be the first defendant's own costs . . . .'

and

'Each party's liability would only cease on the fulfilment and completion of their respective duties and obligations in terms of the agreement or on termination of the agreement . . . .'

- (d) that the respondent paid the sum of N\$550 000;
- (e) The sale and transfer of the property would comply with the statutory requirements detailed in the Local Authorities Act 23 of 1992 (as amended), including the obtaining of the approval by the Minister of Regional, Local Government and Housing;
- (f) That subsequent to 31 March 2014 alternatively during 2015, the Minister in terms of the provisions of section 30(1)(t) read with the provisions of section 63 of the Act, refused to provide the required authority for the sale of the property by the Council to Landscape Development CC. As a consequence, no written sale agreement could be concluded between the Council and Landscape Development CC and no registration of transfer of the property could occur in the name of Landscape Development CC.

[21] Two witnesses testified on behalf of the respondent, namely Lee and his wife. The witnesses were called to testify regarding the background circumstances and the context which led to the signing of the agreement.

[22] Lee, the director of the respondent testified how he met the first appellant, namely at an inspection of the property during 2012. At this occasion the first appellant indicated to Lee that she could assist the respondent as a consultant to obtain approval for the sale and registration of the property. The first appellant indicated during a discussion that she would charge a fee for the preparation of the application and for making the necessary presentations to the Council of the Municipality of Windhoek for the approval and sale of the property. The first appellant also indicated that should the application be successful, she would want commission on the successful approval and sale.

[23] Lee testified that during their discussion, the first appellant informed him that it would be easier for a different entity than the respondent to purchase the property and told him that although he has permanent residence in Namibia, he would still be perceived as a foreigner and for that reason, it would be better if the property is sold and registered in the name of Landscape Development CC, a close corporation in which he would have the majority membership. The remaining membership would be held by various other previously disadvantaged individuals, who were recommended by the first appellant.

[24] Lee testified that during August 2012, the first appellant submitted a written proposal for mixed-use development of the property on behalf of Landscape Development CC to the Council of the Municipality of Windhoek. According to Lee, he intended to develop the property similar to that of 'Chinatown'.

[25] According to Lee, the first appellant also submitted to the respondent a quotation and an invoice for the proposal that had been prepared. The quotation was dated 6 August 2012 and the invoice 26 September 2012. The invoice was in the name of the second appellant. This invoice was paid by the respondent.

[26] During November 2012, the first appellant provided him with a draft written agreement for consultancy work incorporating the commission that the first appellant would be entitled to if she successfully carried out her mandate. After the draft agreement had been scrutinised by a legal practitioner, the agreement was signed by the parties on 20 November 2012.

[27] At some point after the first appellant had submitted the written proposal to the Council, the first appellant invited Lee and his wife to attend a public Council meeting during which various proposals in respect of the property were being considered and debated. It may have, according to Lee, occurred during 2013. The proposal was approved.

[28] During 2013, the first appellant approached Lee and his wife and asked for an advance on the commission agreed to in terms of the agreement. Lee testified that at

that time the Council had approved the sale and it appeared to him that the sale and registration of the property would be concluded without any difficulty. It was agreed by the respondent and the first appellant that an amount of N\$50 000 would be paid as an advance. The payment was made during November 2013. According to Lee, he was at that time not aware that the Minister first had to consent to the sale of the property in order for the sale and registration of the property to be completed.

[29] Lee testified that towards the end of March 2014, the first appellant approached him for a further advance in the amount of N\$500 000 on the commission. At this point it still appeared to him that everything was on track for the sale and registration of the property. Because of the large amount involved, he approached a legal practitioner to prepare an addendum to the agreement in respect of the payment and the advances to the first appellant. The addendum was concluded on 31 March 2014. Payment was made to the first appellant's nominee, the second appellant, on the request of the first appellant.

[30] During April 2014, shortly after the payment of N\$500 000 was made by respondent, a letter was received from Council recording that the sale of the property had been approved and that certain formal requirements had to be complied with as set out in the letter, dated 3 April 2014. The conditions of sale enumerated in the letter were accepted by the first appellant on behalf of Landscape Development CC.

[31] Lee's testimony was that sometime during 2015, the first appellant informed him and his wife that the Minister had refused to authorise the sale of the property as

approved by the Council. Thereafter the relationship between the respondent and the first appellant deteriorated and discussions between him, his wife and the first appellant would end in an argument about the monies the first appellant had already received and about the sale and the registration of the property.

[32] It was Lee's testimony that during the year 2015 whilst in his motor vehicle in the company of his wife, he had a telephonic conversation with the first appellant during which she told him that there was nothing further she could do to secure the sale and registration of the property to Landscape Development CC. Lee testified that he informed the first appellant to repay the monies already advanced which resulted in a significant argument between him, his wife, and the first appellant.

[33] Cheng Mei-Jane Lee testified that she is a businesswoman, shareholder of the respondent and married to Lee. Her testimony corroborated that of Lee.

[34] The first appellant testified on behalf of the appellants. She is employed as a property controller at the Social Security Commission and a member of the second appellant. She confirmed that she and Lee inspected the property. She testified that during August 2012, Lee asked her to draft a proposal on the property to be submitted to the Council of the Municipality of Windhoek.

[35] She provided Lee with a quote which he accepted and for which he paid N\$11 270. She testified that she had agreed with Lee that the project would consist of two phases ie, one in respect of the quotation, and the second phase would consist of

technical representations and technical motivations to the Council of the Municipality of Windhoek before a formal written agreement was to be concluded between them.

[36] A draft consultancy agreement was submitted to Lee during November 2012, which was subsequently signed by Lee and herself on 20 November 2012. In terms of the agreement, the first appellant was to secure the sale of the property by Council of the Municipality of Windhoek to Landscape Development CC for which services, the first appellant would be entitled to payment of N\$1 million.

[37] The first appellant testified that she engaged the Council of the Municipality of Windhoek and engaged Mrs Ritta Khiba, a town planner, as a technical consultant. The proposal was submitted for approval and on 27 November 2012 at a Council meeting, at which the technical motivations were accepted and the sale of the property to Landscape Development CC was approved.

[38] According to the first appellant, the same evening after the meeting, she informed Lee that her duties pertaining to the agreement had been exhausted and fulfilled. The next morning she was informed by Lee that he was experiencing cash flow problems and could give her only N\$50 000 for the time being. She received a cheque in the amount of N\$50 000.

[39] Sometime during early March 2014, Lee informed her that he had N\$500 000 he wanted to pay as part of the remaining consultancy fee. She was concerned that Lee might default and asked him if they could sign an amendment to the agreement,

amending the payment terms and period, to which he agreed. The addendum was prepared by and signed in the office of Lee's legal practitioner.

[40] The first appellant testified that an amount of N\$500 000 was paid to her by cheque on 31 March 2014 and that Lee indicated to her that although her obligations in terms of the agreement had been fulfilled and that he was satisfied with her work, he would implore her to give him more time until such time that he signs the deed of sale with the Council of the Municipality of Windhoek, to which she agreed as she did not anticipate that it would take long for the deed of sale to be signed by the parties.

[41] The first appellant testified that sometime in 2014, Lee asked her to purchase the day's newspaper. She subsequently came to learn that an entity objected to the sale of the property when it was advertised in terms of the provisions of the Local Authority Act. She could hear on the phone that Lee was angry. Thereafter she lost contact with Lee. She was shocked when she received a letter from a legal firm demanding the refund of monies paid to her by the respondent.

[42] The first appellant testified that she was never under any obligation in terms of the consultancy agreement to conclude or sign a written sale agreement between Landscape Development CC and the Council of the Municipality of Windhoek or to effect the registration of transfer of the property in the name of Landscape Development CC. According to the first appellant, the conclusion of a written sale agreement and registration of the property are subject to approval by the Minister who refused to grant approval and that she had no control over the Minister's decision.

Her services would only have extended up to the approval of the sale. This objective she achieved much to the delight of Lee.

The applicable terms of the consultancy agreement

[43] It is necessary to refer to some of the applicable terms of the consultancy agreement. The written agreement starts off with a preamble which reads as follows:

**'PREAMBLE**

**WHEREAS LEE'S INVESTMENTS** is a registered company in the Republic of Namibia and wishes to engage the services of a Technical Consultant – **JH Shikongo** in the establishment of a Mixed Development for **LEE'S INVESTMENTS** in launching and securing the approval of the sale of an Erven/Property from **THE MUNICIPAL COUNCIL OF WINDHOEK** for establishment of a Mixed Development by **LANDSCAPE DEVELOPERS CC**.

**AND WHEREAS JH Shikongo** agreed to be the Technical Consultant for **LEE'S INVESTMENTS** in respect of the establishment of a Mixed Development on ERF/RE 2621 AVIS and any such related matters.

**NOW THEREFORE**, in the pursuance of these objectives the Parties have agreed on the terms and conditions as stipulated as follows:

Article 1 contains definitions/interpretations.

**ARTICLE 2**  
**DURATION**

2.1 The Agreement shall commence on date on which the Technical Consultant receives a written confirmation from Du Toit and Associates on the fulfilment of clause 3.2(2) below, to a Date upon which the Technical Consultant successfully concludes



the agreement with respect to the Erven / Property upon which the Mixed Development ON ERF/RE 2621 AVIS or any other Erven as may be agreed between the MUNICIPAL COUNCIL OF THE CITY OF WINDHOEK and LANDSCAPE DEVELOPMENT CLOSE CORPORATION. This agreement is subject thereto the Special Conditions in Clause 3.1.

### **ARTICLE 3 CONTRACTUAL SPECIFICATIONS**

#### **Special Conditions –**

3.1 It shall be a special condition of this agreement that the Technical Consultant shall be paid an amount of One Million Namibian Dollars (**N\$1 000 000,00**) in respect of her services rendered for securing the Erven / Property to establish the Mixed Development on ERF/RE 2621 AVIS, providing the Purchase Price is **N\$15 000 000,00 (Fifteen Million Namibian Dollars)** or less. . . . The Technical Consultant shall, at her own cost, make all technical presentations and technical motivations with respect to the establishment of the Mixed Development. The technical services may require that the Technical Consultant – hires at her own costs, other Technical Partners to render the required services. . . .

3.2 (1) LEE'S INVESTMENTS, shall effect payment to the Technical Consultant, any amount specified under *clause* 3.1 supra free of any deductions to the Technical Consultant within three (3) days after an Agreement of Sale has been signed between LANDSCAPE DEVELOPMENT CC and THE MUNICIPAL COUNCIL OF WINDHOEK in respect of ERF/RE 2621 AVIS or any other Erf as may be agreed between the Council OF THE MUNICIPALITY OF WINDHOEK and LANDSCAPE DEVELOPMENT CC, Registration no. CC/2012/4728.

(2) LEE'S INVESTMENTS shall pay the amount of N\$1000 000,00 (One Million Namibia Dollars) into the trust account of Du Toit Associates, after fulfilment of the Technical Consultants obligations in terms of the provisions of 2.1 herein above. Du Toit Associates shall pay the said amount to the Technical Consultant after obligation in terms of provisions of 3.2(1) above has been fulfilled. If transfer of

ERF/RE 2621 AVIS or any other Erf is not registered in the name of LANDSCAPE DEVELOPMENT CC due to the cancelation of the Agreement of Sale by THE MUNICIPAL COUNCIL OF WINDHOEK, then in such event the Technical Consultant will refund the consulting fee as per 3.1 to LEE'S INVESTMETNS on demand.

3.3 LANDSCAPE DEVELOPMENT CC, will give 3 months sole mandate to the Technical Consultant for the sales/leases/rentals on the development.

#### **ARTICLE 4 CONSULTANCY FEE**

4.1 The parties agree that the amounts payable to the **Technical Consultant** per *clause 3.2* shall not be altered in any manner whatsoever unless such changes are specifically agreed in writing between the parties and same is added as an *addendum* to this agreement.

#### **ARTICLE 5 LIMITATION OF LIABILITY**

5.1 Each Party's liability shall only seize upon the fulfilment and completion of their respective duties and obligations in terms of this Agreement and or upon termination of this Agreement. All claims arising out of this agreement, during or after the operation of this agreement shall be subject to arbitration proceedings in terms of Article 8 and 9.

#### **ARTICLE 6 BREACH AND TERMINATION**

6.1 Without prejudice to any other remedies which either of the Parties may otherwise have in terms of the Agreement or at law either of the Parties shall be entitled to terminate the Agreement by written notice to the other in the event that the alleged breach is not capable of being remedied or that the aggrieved Party will not have sufficient recourse besides raising a penalty for default, provided that . . . .'

The findings of the court *a quo*

[44] In a concise judgment the court *a quo* applying 'the law of interpretation and common sense' to the facts and disputes between the parties, recorded its findings. I shall refer to some of them.

[45] The court *a quo* found that the main purpose of the 20 November 2012 agreement and the addendum of 31 March 2014, was the coming into existence of a written agreement of sale between the Council of the Municipality of Windhoek and Landscape Development CC in respect of an erven for mixed development and that such an agreement was never concluded.

[46] The court *a quo* found that, in context, the words or phrase 'securing the Erven/Property to establish the Mixed Development of ERF/Re 2621 Avis' meant nothing else than at least the signing of an agreement of sale between the Council of the Municipality of Windhoek and Landscape Development CC. That without such a signed agreement, no payment was due by the plaintiff (respondent) to the first defendant (first appellant), and that the consultancy fee already paid was refundable on demand.

On appeal

*The condonation application*

[47] The appellants brought an application in which they sought the condonation for the late filing of the appeal record as well as for an order reinstating the appeal which

was deemed to have been withdrawn in terms of the provisions of rule 9(4) of the Rules of this Court.

[48] The instructing counsel on behalf of the appellants deposed to an affidavit in support of the condonation application. This condonation application was opposed by the respondent.

[49] In his founding affidavit, the deponent sets out the reasons for the late filing of the appeal record. He explained that after the notice of appeal was filed, he was solely responsible for carrying out the remainder of the appeal processes. He stated that on 15 June 2020 he addressed a letter to the instructing counsel of the respondent in which he proposed payment of security for costs of the appeal in the amount of N\$50 000. This was not acceptable and a counter proposal of N\$200 000 was made. The parties reached an impasse and the matter was referred to the registrar in order to determine the amount of security to be paid. On 3 July 2020 security was fixed in the amount of N\$144 900 which security was paid on 11 July 2020.

[50] The deponent stated that on 20 July 2020 he commenced on the 'long and arduous task' of going through the voluminous e-justice case file and the office case file in order to identify the documents required to be part of the appeal record. This process he completed on 29 July 2020 and he prepared a draft index which was forwarded to respondent's instructing counsel. On 31 July 2020 the index was accepted.

[51] The deponent expressed the view that he could not have commenced with the preparation of the index and the filing of the record of appeal until such time that the necessary security was established and paid into court.

[52] The deponent explained that after the security was paid on 11 July 2020, he was unable to commence with the document identification process and the preparation of the index because he was engaged in a criminal trial in Katima Mulilo on 16 and 17 July 2020.

[53] From Katima Mulilo he proceeded to Rundu Military Base to represent four military officers before a General Courts Martial on 20 July 2020. From Rundu he proceeded to Otjiwarongo Magistrate's Court for a criminal trial until 24 July 2020. Whilst in Otjiwarongo he started to work on the record and index and was able to complete the work on 29 July 2020.

[54] On Monday 3 August 2020, he submitted the index and record of appeal bundle to Hibachi Transcribers and was informed that it would take about two weeks to do the typing, the pagination and the binding of the different volumes of the record of appeal. The record of appeal was collected on 19 August 2020 and filed the same day.

[55] Much to his surprise on 31 August 2020 he received a letter from the registrar informing him that the registrar's record reflect that the applicants (appellants) had not

complied with rule 8(2) in that up to then, no record of appeal was filed and further that the office of the registrar had not received any correspondence of consent as provided for by rule 8(2)(c). In the light of these failures he was informed that the appeal was deemed to have been withdrawn.

[56] The deponent stated that according to his initial calculation the due date for filing the record of appeal was 21 August 2020. Counting from 5 May 2020 and due to the Covid-19 regulations and the Chief Justice's Directives made thereunder, he assumed that there might have been an error of sorts on the part of the registrar and responded by informing the registrar that the record of appeal had already been filed on 19 August 2020.

[57] On 9 September 2020 the registrar served a letter on their offices in response to his letter of 31 August 2020, which according to him, he received on 14 September 2020, in which the registrar informed him that the last day for filing the appeal record was 6 August 2020.

[58] According to the deponent of appellants' founding affidavit this was a shocking revelation and he immediately started to recalculate the time period, discovered that the registrar was correct and that he was 'gravely mistaken'. He miscalculated the last day for filing the appeal record resulting in the appeal record being filed 13 days late.

[59] The deponent stated that he did not even consider the procedure laid out in rule 8(2)(c) because he did not anticipate it would be required as in his mind he was still in time.

[60] The deponent unreservedly apologised and submitted that his non-compliance with the rules was not due to callous disregard for the Rules of this Court but as a result of human error and implored this court to accept his explanation as reasonable in the circumstances.

[61] In respect of the prospects of success on the merits the deponent tabulated and discussed various misdirections of the court *a quo* concluding that there exist good prospects of success on appeal.

[62] Lee deposed to an answering affidavit in opposition to the condonation application. In the answering affidavit Lee stated that he had been advised that upon a proper calculation, the appellants' notice of appeal was filed late and that the appellants did not seek condonation for the late filing of the notice of appeal.

[63] Lee stated further that he had been advised that despite the apparent payment of the amount for security which had been determined by the registrar, the appellants also appear not to have complied with the provisions of rule 14(3) in that when the record was filed by the appellants on 19 August 2020, the registrar was not informed in writing by the appellants that they had entered security, and that the appellants did not address this non-compliance.

[64] According to Lee, as advised, even considering the extraordinary circumstances created by the countrywide stage 1 lockdown that had occurred during April 2020, the appellants at best had three months from 5 May 2020 to file the record, that by 20 July 2020 more than two months had already lapsed and the appellants had less than 14 days left within which to prepare and file the record. Lee pointed out that no steps were taken by the appellants at this stage to seek an extension of the period for the filing of the record.

[65] Lee avers that the record of appeal was due to be filed on 6 August 2020 and that the appellants for the first time only on 3 August 2020 approached the transcribers for the transcript of the record to be prepared – three days before the record was due to be filed.

[66] In respect of the prospects of success on appeal, Lee stated that he had been advised that on the evidence that was tendered in the court *a quo*, the judgment handed down was proper and correct. Lee further stated, as advised, that the first appellant knew that she had not complied with her obligations in terms of the agreement, otherwise she could have sued the respondent in the High Court action for payment of the outstanding amount of the N\$1 000 000. According to Lee, the first appellant and her nominee, the second appellant were not entitled to the N\$550 000.

#### Submissions on appeal

##### *The condonation application*



*On behalf of the appellants*

[67] The instructing legal practitioner addressed this court on the reasons for the late filing of the appeal record and the instructed counsel addressed the court on the prospects of success on appeal.

[68] The instructing legal practitioner who deposed to the founding affidavit in the condonation application, attempted to give an explanation, in response to a question by this court as to why a condonation application was not immediately filed when he realised that the appeal record was filed late, by averring that it only came to their attention that it was late when the registrar wrote to them and informed them the date by when the record should have been filed. He stated that there was an error in the calculation of the days since he laboured under the mistaken belief that the appeal record was due to have been filed on 22 August 2020 – this was why the record was filed on 19 August 2020. He only realised that the record was due to have been filed on 6 August 2020 when the registrar alerted them to that effect.

[69] In response to the question by the court as to what caused the miscalculation the deponent replied that he was 'equally baffled' as to how he could have made such a mistake, since he knew that the counting of the period of three months within which the appeal record had to be filed started to run from 5 May 2020.

[70] Counsel submitted that the period of the late filing of about nine days was not inordinately long, and that the respondent would not have been prejudiced since an amount of security for costs was set and that 'there were engagements concerning the compilation of the record'.

[71] Counsel submitted that in view of costs implications, they decided to wait until after the appellants had secured and paid the security for costs to begin the process of compiling and preparing the appeal record.

[72] In respect of the prospects of success on appeal, instructed counsel concentrated on the language in the preamble of the agreement, and in particular that the first appellant was to secure the '*approval*' of the sale of the property. Counsel submitted that the only obligation of the first appellant in terms of the agreement was therefore to secure the approval of the sale, not the deed of sale, ie, she had to secure the Municipal Council's approval to sell the property to Landscape Development CC – this was the first appellant's limited obligation. It was submitted that the first appellant met this obligation since the required approval was obtained.

[73] In response to questions by this court, counsel was reluctant to concede that the parties (the Council of the Municipality of Windhoek and Landscape Development CC) intended to conclude an enforceable agreement. He submitted that the agreement was not enforceable because the Minister did not approve the agreement. It was further submitted that whether what the Council of the Municipality of Windhoek had agreed to was enforceable or not, fell outside the 'realm of obligations' of the first appellant. Counsel cautioned the court to be careful not to embellish the contract with material terms which were never part of the agreement.

[74] Counsel submitted that the first appellant had a 'solid' defence because she was not obliged, in terms of the contract, to refund the money to the respondent, since she had earned the money paid to her by the respondent, legitimately.

[75] In this regard, it was submitted that in terms of the agreement, the first appellant was obliged to refund the money only in the instance where the Council of the Municipality of Windhoek had cancelled the agreement and as the Council of the Municipality of Windhoek had not cancelled the agreement (the Minister disapproved the agreement), the first appellant was not obliged to refund the money paid to her.

[76] In response to a question by this court if the first appellant had met her obligations in terms of the contract, as contended, she would have been entitled to the full consultancy fee of N\$1 million; consequently, why she did not institute a counter-claim for the amount of N\$450 000, it was submitted, firstly, that in terms of the addendum, that amount was only payable to her on the conclusion of the written sale agreement (which event did not occur), secondly, that it was her option to sue for the N\$450 000 which she did not do, because all she was focussed on at that stage was to defend the action instituted against her.

[77] In response to a question by this court why the first appellant accepted the conditions of sale on behalf of the respondent, it was submitted that the first appellant did so because the Council of the Municipality of Windhoek required a response within 30 days and she signed an acceptance letter on behalf of the respondent

because she was worried that the offer by the Council of the Municipality of Windhoek would expire after the 30 day period.

*On behalf of the respondent*

[78] Counsel on behalf of the respondent submitted that there was no explanation for the alleged miscalculation as well as no explanation for what transpired between 5 May 2020 and 24 July 2020.

[79] It was pointed out that before the agreement had been concluded, the respondent received a quotation and invoice for work done by the first appellant, which had been paid.

[80] It was submitted on a proper interpretation of clauses 2.1, 3.1, 3.2.1 and 3.2.2 of the agreement, which was actually the mandate for the first appellant, that payment could only be made when the sale agreement had been signed between the Council of the Municipality of Windhoek and Landscape Development CC and not before that. In the absence of a signed agreement in respect of the sale of the property, the first appellant was not entitled to any payment. It was submitted that the intention between the parties was to conclude an enforceable contract.

[81] It was submitted that the letter from the Council of the Municipality of Windhoek of 3 April 2014 in which the sale of the property was approved subject to specific conditions, and the acceptance of those conditions, did not constitute an enforceable agreement. This, in essence, only recorded the resolution of the Council

of the Municipality of Windhoek as well as the conditions of sale. A sale agreement still had to be concluded.

[82] The addendum, it was submitted, mirrored the condition in the main agreement that the amount of N\$1 million would have been paid within three days of the signature of the sale agreement, but that the amount of N\$550 000 was paid 'at the request and the behest' of the first appellant and therefore there was a change in the timing of the payment.

[83] It was submitted that if the first appellant had been entitled to the payment of N\$550 000 as testified by her during cross-examination because she had already fulfilled her 'performance', one would have expected her to have taken steps to claim the outstanding balance. It was submitted that the first appellant did not claim this amount because of the fact that she had not complied with her obligations in terms of the agreement, and that the payment she received was an advance payment.

[84] It was submitted that in terms of the provisions of clause 3.1 of the agreement, the first appellant was excluded from deducting any costs relating to her rendering services in terms of the agreement.

[85] It was submitted that the first appellant was required to refund the respondent in the amount of N\$550 000 on the basis of a breach of her obligations in terms of the agreement, and that the respondent was entitled to repayment or had suffered damages as found by the court *a quo*.

Post appeal development

[86] A notice of motion was filed with the registrar on 17 October 2022 in which the first appellant sought an order to place 'fresh evidence' (new facts) before this court. This new fact was that the Minister of Urban and Rural Development granted approval, on 20 September 2022, to the Council of the Municipality of Windhoek to sell the property to Landscape Development CC at the price of N\$14 983 000.

[87] The further purpose of the application was to seek leave for this court to consider the fact of the said Ministerial approval and consequently to uphold the appellants' appeal against the order of the court *a quo*, in the interests of justice.

[88] The first appellant emphasised that if this court was to find that the appeal may not succeed, it would severely prejudice the appellants in circumstances where it was the refusal to grant approval by the Minister which led to the cause of action by the respondent. It was contended that since Ministerial approval has been obtained, it changes the legal and factual landscape and the appeal should be upheld on that basis.

[89] In the alternative, it was contended that if this court were minded to dismiss the appeal, then it would be just and equitable for this court to make an order directing that the appellants should not repay the amounts claimed against them by the respondent as set out in the order of the court *a quo*.

[90] I shall deal with this application when I consider the submissions on appeal hereunder.

### Evaluation

[91] I shall briefly refer to the legal principles relevant to an application for condonation for the non-compliance with the rules of court.

[92] In the matter of *Petrus v Roman Catholic Archdiocese*<sup>2</sup> the following remarks were made:

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

[10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable disregard” for the processes of the court (*Beukes* at para 20).<sup>1</sup>

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<sup>2</sup> *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) para 9 and 10.

[93] And in *Arangies t/a Auto Tech V Quick Build*<sup>3</sup> on the subject of condonation applications the following was said:

[5] The application for condonation must thus be lodged without delay, and must provide a “full, detailed and accurate” explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include –

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent’s (and where applicable, the public’s) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”<sup>4</sup>

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been “glaring”, “flagrant” and “inexplicable”.<sup>5</sup>

#### The explanation for non-compliance with the rules

[94] It is common cause that calculated from 5 May 2020, the last day on which the appeal record was due to be filed was on 6 August 2020. The deponent to the first appellant’s founding affidavit in support of the condonation application stated that he was in Otjiwarongo Magistrate’s Court for a criminal trial until 24 July 2020, and whilst

<sup>3</sup> *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5.

<sup>4</sup> See *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 68.

<sup>5</sup> *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC (5 November 2010) para 13.



there he started to work on the record and the index. Save to state that he was engaged in a criminal trial in Katima Mulilo on 16 and 17 July 2020; that he attended a General Courts Martial on 20 July 2020 in Rundu; and engaged in another criminal trial in Otjiwarongo until 24 July 2020, no explanation is proffered what had transpired during the period 5 May 2020 until 16 July 2020.

[95] The allegation that the deponent could not have commenced with the preparation and filing of the appeal record until such time that the security was paid into court is untenable. If this argument is taken to its natural conclusion it means that where a litigant in an appeal pays security only a day before or on the last day the record is due, such a litigant would be entitled to start with the preparation of the record of appeal only after security for costs had been paid into court. This would, in effect, defeat or subvert the provisions of the rule which requires that the record of appeal must be filed within three months of the date of the judgment or order appealed against.

[96] The deponent to the supporting affidavit was fully aware that the record of appeal, calculated from 5 May 2020, had to be filed within three months, however he stated that his initial calculation for the filing of the record would have been on 21 August 2020. During oral submissions he stated that it would have been on 22 August 2020. What was significant was that he did not explain, neither in his supporting affidavit nor during oral argument what prompted this miscalculation. There is thus no explanation at all for his miscalculation.

[97] It appears to me that this court may, in these circumstances, conclude that the appeal record was filed on 19 August 2020 to fit in with the narrative that the appeal record was due on 21 or 22 August 2020 and that the deponent was under the impression that the appeal record was filed in time.

[98] It is trite that a litigant must launch, without delay, a condonation application as soon as such litigant becomes aware of the non-compliance with a rule or Rules of this Court. The deponent to the supporting affidavit was informed by the registrar of the appellants' non-compliance with rule 8(2), on 31 August 2020. At this stage no condonation application was launched. The deponent did also not at this stage, as he should have, recalculated the time period within which the appellants had to file the appeal record. He was only jolted into action 14 days later when he received another letter from the registrar in which letter he was informed that the last day for the filing of the appeal record had been 6 August 2020. The deponent to the supporting affidavit offered no explanation as to what had happened during a period of more than 9 weeks (ie, from 5 May 2020 until 16 and 17 July 2020). This makes the explanation for the non-compliance with rule 8(2) insufficient.

[99] The respondent in its opposing affidavit contended that the appellants had failed to comply with another Rule of this Court; namely rule 14(3), in that the registrar was not informed in writing that they had entered security for costs, and that appellants did not address this non-compliance. The appellants should have in such circumstances addressed non-compliance in a condonation application. This was not

done. The appellants did not file a replying affidavit in which this non-compliance could have been explained.

[100] This court has cautioned in the past<sup>6</sup> that not only is it of cardinal importance that legal practitioners familiarise themselves with the Rules of this Court but also to apply them correctly. The deponent to the supporting affidavit failed in his duty as legal practitioner to apply the rules correctly.

[101] This court has stated<sup>7</sup> that the fate of a condonation application 'is the discretion of the court, and a condonation application will, amongst others, only be granted when a cogent and persuasive explanation has been furnished. To take a relaxed approach to these matters is to do one's client great disservice'. I am of the view that the explanation proffered on behalf of the appellants is inexplicable, unpersuasive, and amounts to a negligent and the unreasonable non-observance of the Rules of this Court. The application for condonation is doomed to fail on this basis alone.

[102] I shall now nevertheless briefly consider the prospects of success in respect of the merits of the appeal.

#### Prospects of success on appeal in respect of the merits

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<sup>6</sup> *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) para 6.

<sup>7</sup> *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 31.

[103] The primary submission made on behalf of the first appellant was, as indicated hereinbefore, that the first appellant was required to only secure the *approval* of the sale of the property.

[104] The golden rule in the interpretation of contracts is to ascertain the intention of the parties at the time of the conclusion of the contract and that one must have regard to the nature, purpose, and context of the contract as a whole.

[105] It has been held that 'a purposive construction rather than a purely literal one derived from applying it to the kind of meticulous verbal analysis in which legal practitioners are too often tempted by their training to indulge'.<sup>8</sup> This case is a good example of such meticulous verbal analysis of one clause in the agreement and a reluctance to look at all the terms of the agreement in context.

[106] The approach of this court in the interpretation of documents was recently expressed in the matter of *McLean v Botes*<sup>9</sup> by Damaseb DCJ as follows:

'In *Total Namibia v OBM Engineering* O'Regan<sup>10</sup> JA set out the proper approach to the interpretation of documents generally. The construction of a contract or a document is a matter of law, and not of fact. Interpretation is therefore a matter for the court and not for witnesses. Interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing the contract. The court engaged upon its construction must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the document itself . . . Where more than one meaning is possible, each possibility must be weighted in the light of all

<sup>8</sup> *Catnic Components Ltd & another v Hill & Smith Ltd* [1982] RPC 183 (HL) at 243; See also *Venter & others v Credit Guarantee Insurance Corporation of Africa Ltd & another* 1996 (3) SA 966 (A) at 973D.

<sup>9</sup> *McLean v Botes* (SA 54/2019) [2022] NASC (17 May 2022) para 120.

<sup>10</sup> *Total Namibia v OBM Engineering* 2015 (3) NR 733 (SC).

these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or one that undermines the apparent purpose of the document . . .’.

[107] I shall examine the contention that the only obligation of the first appellant was to secure the approval of the sale of the property, in the light of the contract as a whole, and in view of the disagreement between the parties as to at what stage the first appellant became entitled to payment of the consultancy fee.

[108] The first observation which needs to be made is that the provisions of the preamble which contains the words: ‘. . . securing the approval of the sale . . . ,’ do not stipulate at all when the first appellant would have been entitled to the payment of the consultancy fee. Therefore, in order to determine this issue, one has to examine the other clauses of the agreement. I must add that where an agreement or contract consists of more than one document, as in this instance, those documents must be considered together.

[109] Clause 3.2(1) explains very clearly and unambiguously the circumstances under which the first appellant would have been entitled to payment. This was ‘within three (3) days after an Agreement of sale has been signed’ between Landscape Development CC and the Council of the Municipality of Windhoek in respect of the property. It is common cause that a sale agreement was never signed between the parties.

[110] I shall demonstrate hereunder that the payments received by the first appellant, as reflected in the addendum, did not modify or amend the provisions contained in clauses 3.2(1) and 3.2(2). It merely brought forward the time when partial payment was to be made.

[111] Clause 3.2(2) seems to emphasise clause 3.2(1) by stating that the respondent 'shall pay the amount of N\$1 000 000' . . . 'after fulfilment of the . . . obligations in terms of the provisions of 2.1 herein above'.

[112] Another clause relevant in the interpretation of the question when the first appellant would have become entitled to the payment of the consultancy fee is clause or article 2, which deals with the duration of the agreement. This provides that the agreement would come to an end upon a date on which the first appellant '*successfully concludes the agreement*<sup>11</sup> with respect to' the property as may be agreed between the Council of the Municipality of Windhoek and Landscape Development CC.

[113] The addendum confirms that payment would have been made to the first appellant '. . . on the date of signature by both parties . . .'.

[114] The fact that the addendum provides that the remaining N\$450 000 was to be paid as soon as the deed of sale between Landscape Development CC and the Council of the Municipality of Windhoek has been signed by both parties, is in my

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<sup>11</sup> Emphasis provided.

view, consistent with the intention of the parties at the time the agreement was signed, namely that the first appellant would only have become entitled to payment of her consultancy fee upon the successful conclusion of a deed of sale in respect of the property.

[115] The submission by counsel that the first appellant had a 'solid' defence and was not obliged in terms of the contract to refund the amount of N\$550 000 to the respondent since she earned it legitimately, is misconceived and contrary to the explicit provisions contained in the agreement. The first appellant's plea that she was entitled to the monies received because she incurred expenses for her own account in providing consultancy services, is also contrary to the unambiguous provisions of the agreement.

[116] In terms of the pre-trial report, it was common cause that one of the terms of the written agreement<sup>12</sup> of 20 November 2012 was that the first appellant would '*at her own costs* make all technical representations and technical motivations with respect to the establishment of the mixed development insofar as the technical services may require the first defendant to hire other technical partners to render such services, such costs would be first defendant's own costs . . . '.

[117] It is further not disputed by the first appellant that she had presented the respondent with quotations for various expenses<sup>13</sup> and that the respondent had paid her the amount of N\$11 270 for these services.

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<sup>12</sup> Contained in clause 3.1.

<sup>13</sup> Enumerated in para [6] of this judgment.

[118] In my view, it is disingenuous for the first appellant to contend that she legitimately earned the amount of N\$550 000 in the face of very clear provisions in the agreement to the contrary, an agreement signed by her personally. The first appellant has no defence at all.

[119] The submission that in terms of the agreement<sup>14</sup> the respondent had reached consensus with first appellant that the amount of N\$1 000 000 would become due and payable only at the event of the mere approval of the sale by the Council of the Municipality of Windhoek is in view of the very clear provisions of the agreement, simply untenable.

[120] The respondent would, if such an interpretation is to be accepted, be obliged to pay such an amount to the first appellant without fulfilling the purpose of the agreement, and that was to eventually acquire the property. There would, in such an interpretation, be no *quid pro quo* for the respondent. The respondent would in effect donate an amount of N\$1 000 000 to first appellant (for services not rendered). Such an interpretation, in my view, makes no business sense and is absurd. On this version the respondent would have been prevented from enforcing the conditions of the agreement in circumstances where the first appellant had breached a material condition of the agreement. Such a result could never have been the intention of the parties when the agreement was concluded and signed on 20 November 2012.

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<sup>14</sup> In particular the preamble.



[121] If the mandate of the first appellant was only to secure the approval of the sale and nothing further, the first appellant would have been entitled to and certainly would have claimed the payment of the balance of the consultancy fee of N\$450 000 upon approval of the sale. In my view the fact that she did not counterclaim supports the fact that she had not carried out her mandate. The explanation that she had the option not to counterclaim and was concentrating on defending the claim by the respondent sounds hollow and unconvincing.

[122] In my view, the first appellant's claim that it was impossible to successfully conclude her mandate because of the Minister's disapproval of the sale, is without merit, since she signed the agreement with the full knowledge and understanding that the Minister's approval of the sale would be vital for the successful conclusion of the sale of the property between the parties.

[123] In conclusion, the first appellant breached the agreement by failing to facilitate the successful conclusion of an agreement of the sale of the property between Landscape Development CC and the Council of the Municipality of Windhoek, and was therefore not entitled in terms of the agreement to have received a consultancy fee.

[124] The court *a quo*, in my view, did not err or misdirect itself in its finding that no payment was due by the respondent to the first appellant (or her nominee) and that the consultancy fee (or part thereof already paid) was refundable to the respondent on demand.

[125] In respect of the notice of motion received after the appeal was heard the following observations need to be made:

- (a) One of the powers of this court on the hearing of any appeal is to receive further evidence.<sup>15</sup> This court will allow the leading of further evidence on appeal only in exceptional or special circumstances since it is in the public interest that there should be finality to a trial.<sup>16</sup> The evidence sought to be adduced must also be weighty and material and such that 'it would be practically conclusive, for, if not, it would still leave the issue in doubt and the matter would still lack finality.'<sup>17</sup>
  
- (b) In response to the notice of motion and supporting affidavit, Lee filed an answering affidavit opposing the relief sought in the notice of motion. I need not fully deal with the answering affidavit except to point out that Lee disputes the allegations in the supporting affidavit and emphasises the fact that presently no agreement exist between the first appellant and the respondent. This agreement was cancelled.

[126] Importantly, Lee states that he has 'no interest in obtaining or developing the erf'.

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<sup>15</sup> In terms of the provisions of s 19(a) of the Supreme Court Act 15 of 1990.

<sup>16</sup> *Trust Bank v Voges* 1963 (3) SA 841 SWA at 845-846. See also *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 NmHC at 488H-489A.

<sup>17</sup> *SOS Kinderdorf* quoting with approval from *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 427H-428.

[127] To allow the first appellant to adduce further evidence would have no practical benefit or advantages to either the first appellant or to the respondent since the agreement remains cancelled after eight years of litigation.

[128] However, the first appellant faces a more fundamental obstacle, and that is the fact that a condonation application is before this court for adjudication. So where, as in this instance, the condonation and reinstatement application is refused on the basis that the explanation provided is inexplicable and the prospects of success on the merits need not be considered, it would be fatal for the applicant (first appellant) to lead further evidence since such evidence would be superfluous.

[129] I have indicated hereinbefore in respect of this condonation application and the application for reinstatement of the appeal that the explanation for the non-compliance with the Rules of this Court is inexplicable and unpersuasive and that there are no prospects of success on appeal in respect of the merits. In these circumstances the application to lead further evidence has become irrelevant and is accordingly, in view of the lack of exceptional circumstances, refused.

#### Conclusion

[130] In the result the following order is made:

- (a) The condonation application and application for the reinstatement of the appeal is refused and the matter is struck from the roll with costs, such costs to include the costs of one instructing and one instructed legal practitioner.



- (b) The application to lead further evidence is refused with costs.

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**HOFF JA**

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**MAINGA JA**

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**SMUTS JA**

APPEARANCES

APPELLANTS:

T C Phatela (with him S Enkali)

Instructed by Kadhila Amoomo Legal

Practitioners

RESPONDENT:

A Van Vuuren

Instructed by Behrens & Pfeiffer