

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA
(MAIN DIVISION), WINDHOEK**

EX TEMPORE RULING

Case No.: HC-MD-CIV-MOT-GEN-2020/00373

In the matter between:

**ROBERT DOUTGAL WIRTZ
WINDHOEK RENOVATIONS CC
APPLICANT**

**FIRST APPLICANT
SECOND**

and

**JOHANNES ERASMUS VAN WYK
HARDROCK EARTHWORKS CC
RESPONDENT**

**FIRST RESPONDENT
SECOND**

Neutral citation: *Wirtz v Van Wyk* (HC-MD-CIV-MOT-GEN-2020/00373)
[2023] NAHCMD 601 (21 September 2023)

Coram: SCHIMMING-CHASE J

Heard: 21 September 2023

Delivered: 21 September 2023

ORDER

1. The applicant's application for condonation is granted.
 2. Leave to appeal to the Supreme Court against the order and judgment of this court dated 20 November 2020 and 8 December 2020 respectively in case number (HC-MD-CIV-MOT-GEN-2020/00373) is granted.
 3. There shall be no order as to costs.
 4. The matter is regarded as finalised and removed from the roll.
-

EX TEMPORE JUDGMENT

SCHIMMING-CHASE J:

[1] This is an application for condonation for the late filing of an application for leave to appeal envisaged in terms of rule 115 (2) of the rules of this court, which requires applications for leave to appeal to be brought together with the grounds for the leave to appeal within 15 days after the date of the order appealed against.

[2] The background facts leading to the application for condonation are set out in the applicants' founding papers, and also appear in the Supreme Court decision of *Wirtz v van Wyk*.¹

[3] The applicants previously approached this court on an urgent basis seeking wide-ranging interim relief in the form of an interim interdict against the respondents pending the finalisation of an action between the parties.

[4] The first respondent (together with the first applicant are sole members of the second and third applicants, which are close corporations in the ratio of 51:49 in respect of the second applicant and an equal membership in the third applicant) instituted an action against the applicants seeking the termination of

¹ *Wirtz and Others v Van Wyk and Another* (SA 105/2020) [2023] NASC 16 (28 April 2023).

the business relationship by terminating his membership of the close corporations against a division of their assets and a range of ancillary relief.

[5] On 20 November 2020, I made an order granting the applicants' certain interim relief and refused certain other the relief sought. The reasons for the order followed on 8 December 2020. The applicants timeously filed their notice of appeal against the order in terms of rule 7(3)(a) of the Supreme Court Rules on 8 December 2020. They however did not file their supplemented notice of appeal within the required 14 day period specified in rule 7(3)(a) – they only did so on 22 January 2021 (some two weeks later).

[6] A condonation application for this non-compliance was only lodged on 6 March 2023 seeking 'to the extent necessary, reinstatement of the appeal' – more than two years later. The condonation application was opposed by the respondents.

[7] The issues for determination by the Supreme Court were whether condonation should be granted for the late filing of applicants' supplementary notice of appeal and reinstating the appeal, and whether the applicants required leave to appeal my order and judgment.

[8] In the judgment delivered on 28 April 2023, the Supreme Court held *inter alia* as follows:

- (a) whilst the delay in filing the supplemented notice of appeal was not excessive, the explanation provided for doing so was weak, lacked specificity and evinced conduct of consciously not complying with the rule, compounded by the failure to bring an application for condonation without delay afterwards.²

² *Wirtz and Others v Van Wyk and Another* (SA 105/2020) [2023] NASC 16 (28 April 2023)105/2020 para 19.

- (b) The delay in bringing the condonation application – of more than two years – merely ascribed to as being an ‘oversight’ was highly unsatisfactory especially in the context of where the practitioner was fully aware of the non-compliance with the rule.³
- (c) Given the dual nature of the requirement of showing good cause in condonation applications (an acceptable explanation and prospects of success), this can mean at times that strong prospects of success can make up for a weak and insufficient explanation, therefore in determination of that application it was appropriate to consider the prospects of success on appeal (whether leave to appeal was required).⁴
- (d) The wide ranging interim relief sought in the urgent application was in essence to put in place temporary measures pending the determination of the main action akin to a dissolution of a partnership when terminating the membership in the close corporations to bring about the termination of the relationship which has gone awry. The nature of the temporary relief and order sought was directed at doing that and was thus interlocutory.⁵
- (e) Having found that the order dismissing the interim relief sought was an interlocutory order, leave to appeal was thus clearly required in terms of s 18(3) of the High Court Act 16 of 1990. The condonation application could therefore not succeed for this reason alone, and the appeal could not be heard without leave.⁶

[9] The respondents oppose the appeal mainly on the basis of the applicants’ dilatory conduct in prosecuting the appeal before the Supreme Court, which the respondents say should be considered in this application for

³ *Ibid.*

⁴ *Wirtz v van Wyk SA 105/2020 paras 22 and 23.*

⁵ *Wirtz v van Wyk SA 105/2020 para 33.*

⁶ *Wirtz v van Wyk SA 105/2020 para 34.*

condonation for the late filing of the application for leave to appeal. It is postulated that the condonation application should be refused because the condonation application was refused in the Supreme Court, and that the sentiments expressed in the Supreme Court regarding the applicants' remissness in taking two years to apply for condonation for the late filing of the supplementary notice are applicable to the application for condonation in respect of the application for leave to appeal, which is before me.

[10] I have considered the Supreme Court judgment. It is true that the applicants were particularly dilatory, and this is evidenced from *inter alia* the following portions of the Supreme Court judgment:

'The explanation thus lacks specificity. But the delay in bringing the condonation application – of more than two years – merely ascribed to as being an 'oversight' is highly unsatisfactory especially in the context of where the practitioner is fully aware of the non-compliance with the rule.'⁷

and

'This remissness and neglect on the part of appellants' practitioner is unacceptable. Given the dual nature of the requirement of showing good cause in condonation applications, (an acceptable explanation and prospects of success), this can mean at times that strong prospects of success can make up for a weak and insufficient explanation. In determining this application for condonation, it is appropriate to consider the prospects of success on appeal.'⁸

[11] It is evident from the above that the Supreme Court did not exercise its discretion to hold the remissness of the applicants against them to the extent that the Supreme Court refused to consider the merits. Condonation was refused for the failure to apply for leave to appeal. At least, this is how I understand the judgment of the Supreme Court.⁹

[12] Instead the merits were still considered, and the applicants were left wanting because they followed the wrong procedure and should have applied for leave to appeal. In this regard, the Supreme Court concluded that

⁷ At para 19.

⁸ At para 22.

⁹ *Solsquare Energy Pty) Ltd v Luhl* (SA-45/2019) [2022] NASC (25 August 2022) para 108.

'...the order dismissing the interim relief sought in paragraph 3.1 and 3.2 is an interlocutory order and ...leave to appeal was required in terms of s 18(3)¹⁰. The condonation application cannot succeed for this reason alone, given that the appeal itself could not properly serve before us without leave. The matter is accordingly to be struck from the roll with costs for this reason alone.'¹¹

[13] To my mind, and based on the judgment of the Supreme Court, the applicants were indeed ill advised to note an appeal instead of applying for leave to appeal. Although the applicants advanced reasons for noting the appeal, the Supreme Court held the applicants to the provisions s18(3) of the High Court Act 16 of 1990.

[14] For purposes of the application for condonation for the late filing of the application for leave to appeal, I note that the applicants acted with due haste and applied for leave to appeal within the period required by rule 115 of this court's rules, after the delivery of the Supreme Court judgment, which was on 28 April 2023.

[15] Accordingly, I do not believe that the delay that the Supreme Court dealt with should be considered in the application before me, as the applicants acted within the necessary time limits after being made aware that leave to appeal is required.

[16] Even if the delay was significant, the prospects of appeal are good, given the sentiments expressed by the Supreme Court on the clearly incorrect application of the test to be applied in factual disputes concerning applications for interim interdicts.¹² The respondents would be hard-pressed to dispute this.

[17] For the above reasons, I am inclined to grant condonation, and grant

¹⁰ High Court Act 16 of 1990.

¹¹ At para 34.

¹² At para 31.

leave to appeal.

[18] As regards the question of costs, and in all fairness, I am not inclined to grant costs in this application. I take into consideration for these purposes only, the delay of the applicants and the opposition, which was not necessary given the prospects of success.

[19] In light of the foregoing, I make the following order:

1. The applicant's application for condonation is granted.
2. Leave to appeal to the Supreme Court against the order and judgment of this court dated 20 November 2020 and 8 December 2020 respectively in case number HC-MD-CIV-MOT-GEN-2020/00373) is granted.
3. There shall be no order as to costs.
4. The matter is regarded as finalised and removed from the roll.

E M SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANTS:

T Barnard

Instructed by Dr Weder, Kauta & Hoveka,
Windhoek

FIRST RESPONDENT:

PCI Barnard

Instructed by Cronjé Inc,
Windhoek