



REPORTABLE

CASE NO: SA 49/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MUNICIPAL COUNCIL OF WINDHOEK

Appellant

and

GERNOT ALBERT BAHR

Respondent

Coram: SMUTS JA, UEITELE AJA and PRINSLOO AJA

Heard: 1 November 2024

Delivered: 14 November 2024

Summary: This appeal is against the granting of an order of absolution from the instance by the court *a quo* after the Municipal Council of Windhoek (CoW) as the plaintiff closed its case in an action for a declaratory order and interdict against the respondent as defendant, relating to the latter's use of immovable property, erf 2253 Windhoek (the property), within the municipal area. CoW alleged that the respondent's use of the property was illegal in that the respondent was operating a mechanical workshop and selling tyres on the property contrary to applicable subordinate legislation relating to its use, represented by the zoning of property within the municipal area. The respondent admitted that the property was zoned residential and fell within the scheme. The respondent further pleaded that no mechanical workshop

activity was being conducted on the property and further pleaded that CoW had on 30 January 2018 resolved to support the rezoning of the property to a zoning of 'office with a bulk of 0.4' subject to two conditions being met. The respondent alleged that he fulfilled both conditions and that CoW neglected to incorporate that rezoning within the scheme, despite being under a statutory duty to do so. CoW admitted to the rezoning of the property from residential to office but pleaded that the respondent had made no application for consent use upon the property, as required by the scheme, and pleaded that the respondents' use of the property conflicted with an office zone. CoW denied any negligence for the failure to incorporate the proposed rezoning in the scheme and in submitting it for approval by NAMPAB. It also denied failing to submit the amended scheme to NAMPAB.

At trial, during the testimony of CoW's only witness Mr Rust, it transpired that the property had become rezoned to office. He further testified that the respondent's activities on the property conflicted with an office zone. Respondent's counsel contended that the case the respondent had to meet per CoW's particulars of claim was that the activities on the property were in conflict with a 'residential' zoning. The court *a quo* correctly pointed out that it was pleaded that the respondent was conducting a business on the property which is in conflict with the scheme – whether the zoning was residential or office.

CoW moved for amendments to the particulars of claim from the bar (and later brought a formal application to amend accompanied by a condonation application for the late filing of the application) – to replace the word 'residential' with 'office' in respect of the zoning of the property and to refer to the rezoning which had occurred. The respondent objected to the proposed amendment citing 'irreparable prejudice to the respondent' and 'his right to a fair trial . . .'. The court *a quo* found that the amendment would 'in essence, if allowed change the whole front in the case'. The court further found that pleadings would need to be re-opened and that the pre-trial process would essentially need to restart from the plea phase. The court *a quo* thus found that there were no prospects of success in the application to amend and for that reason, it proceeded to dismiss with costs the application for condonation with costs. At the close of CoW's case, the respondent moved for absolution from the instance which the court granted in a judgment on 7 June 2022. The appellant is appealing against this judgment.

On appeal, the court is to determine whether the court *a quo* was correct in granting absolution from the instance because it held the view that the evidence led by CoW failed to establish a *prima facie* case for the relief sought because the 'case which the defendant had to meet' was a residential zoning in the absence of an amendment which it could not have granted because it 'would have changed the whole case the respondent/defendant had to meet at a very late stage'. This Court must additionally determine whether this was really the case which the respondent had to meet and if the impact of an amendment was correctly characterized by the court *a quo*. In this appeal, the appellant brought an application for condonation and reinstatement of the appeal for its non-compliance with rule 8(2)(b) of the Rules of the Supreme Court. The respondent has opposed this condonation application.

Held that, the two-pronged nature of the test for condonation applications has been repeatedly stated by this Court, given the frequency with which applications of this nature are directed to this Court.

Held that, the explanation for the delay caused in this appeal is palpably untenable. Rule 8(2)(b) expressly requires records of appeal to be lodged within three months of the High Court judgment. There is no reference to days in the sub-rule. (The required period referred to in rule 8(2)(a) concerning appeals against exceptions or a ruling on striking out, is six weeks. There is thus no reference in rule 8 to 'days'). There is thus absolutely no basis for any ambiguity of meaning for the stipulated period in this sub-rule or a tenable basis to consider that it could conceivably mean 90 court days.

Held that, there are weighty factors present in this matter, ie the public interest nature of the matter where a local authority seeks to enforce subordinate legislation governing land use where a breach is unlawful and can amount to an offense, this is not a proper case to refuse condonation due to the inadequacy of the explanation without considering the prospects of success of the appeal.

Held that, the use of property in the local authority area is governed by and restricted to the use as set out in the zoning accorded to it in the scheme. If a property owner seeks to use the property for a use not permitted by the applicable zoning, it is plainly incumbent upon that owner to seek a rezoning and an amendment to the scheme to

reflect the proposed use. Until and unless that is achieved, it is clearly unlawful for a property owner to engage in land use prohibited on that property.

Held that, it was the respondent's duty to establish which zoning would cover his proposed use and apply for that. The notion that he could simply do as he pleased until he was found out by the local authority flies in the face of the entire statutory scheme and amounts to a form of self-help which, if left unchecked, would result in chaos in urban planning and is abhorrent to the rule of law.

Held that, the protestations of prejudice raised in the opposition to the amendment application (over and above costs which were tendered) were both unsupported and untenable. There could be no real prejudice apart from minor further consequential amendments – all of which could and should have been finalised in the space of an hour or two or a day at the most instead of the massive wastage of court time and costs caused by the approach taken on behalf of the respondent causing unnecessary delay and disruption to the working of the High Court and considerable extra costs where they were not warranted. The objectives of judicial case management (JCM) were grievously undermined by the unduly drawn out application to amend insisted on by the respondent when the issue was self-evidently capable of quick and expeditious resolution in accordance with the objectives of JCM.

Held that, the approach adopted with regard to the amendment application, stemming from an incorrect analysis of the pleadings and viewing the particulars of claim in isolation, was thus unsound and unfortunately permeated the reasoning in thereafter incorrectly granting the application for absolution from the instance.

Held that, applying the test for absolution set out in *Stier & another v Henke* 2012 (1) NR 370, the court held that the pleadings properly viewed as a whole together with the evidence of CoW's witness established on a *prima facie* basis that the respondent's use of the property was prohibited by the scheme. A *prima facie* basis for the declaratory relief and an interdict were thus established on a *prima facie* basis and the court *a quo* erred in granting absolution.

Held that, given the prospects of success of the appeal, condonation was granted and the appeal reinstated.

Held that, the order of the court *a quo* granting absolution from the instance is therefore set aside as there is evidence upon which the court below could or might find for CoW.

The appeal succeeds.

APPEAL JUDGMENT

SMUTS JA (UEITELE AJA and PRINSLOO AJA concurring):

[1] This is an appeal against the granting of an order of absolution from the instance given by the High Court after the Municipal Council of Windhoek (CoW) as plaintiff closed its case in an action for a declaratory order and interdict against the respondent as defendant relating to the latter's use of immovable property (erf 2533, Windhoek) within the municipal area.

[2] The conduct of this litigation has been slovenly. The appeal record was filed late. A condonation application for that non-compliance serves before us to address that. Given the dual nature of the test for condonation, the litigation history is first set out and provides the context for consideration of the condonation application and the merits of this appeal.

Litigation history

[3] The pleadings are central to the issue before this Court. In May 2019 CoW instituted action against the respondent as owner of erf 2533, Windhoek (the property). The action concerns the respondent's use of the property. CoW alleged that the respondent's use of the property was illegal in that the respondent was operating a mechanical workshop on the property and selling tyres on it contrary to applicable

subordinate legislation relating to its use, represented by the zoning of property within the municipal area. CoW issued a notice to the respondent to cease those activities on the property carried on without the consent of CoW.

[4] It was further alleged in the particulars of claim that a subsequent inspection on the property revealed those activities were continuing. It was also alleged that the property was zoned as residential in the Windhoek Town Planning Scheme (the scheme) and that the respondent's workshop on the property, being without municipal consent, was unlawful and constituted criminal conduct because that form of land use is in conflict with the permitted zoning set out in the scheme. A further notice to cease those activities was given without avail and the action was instituted in May 2019. CoW sought the following relief, together with costs:

- '1. Declaring that the Defendant's conduct to operate a workshop selling tyres on erf 2533, Bach Street, Windhoek, Republic of Namibia without such erf being rezoned by the Plaintiff and without the Plaintiff's consent as unlawful.
2. Interdicting the Defendant from continuing to operate a workshop on erf 2533, Bach Street, Windhoek, Republic of Namibia for as long as the aforesaid erf 2533 remains zoned as "residential".
3. Referring the matter to the Office of the Prosecutor-General to consider prosecution as contemplated in section 48 of the Town Planning Ordinance 18 of 1954.'

[5] In his plea filed in August 2019, the respondent admitted that the property was zoned residential and fell within the scheme. The respondent pleaded that no mechanical workshop activity was conducted on the property and denied that he 'personally' sold tyres on the property.

[6] In amplification of his denial, the respondent further pleaded that CoW had on 30 January 2018 resolved to support the rezoning of the property to a zoning of 'office with a bulk of 0.4' subject to two conditions being met. These conditions concerned the payment of a betterment fee by reason of the increased value of the property following a rezoning of the property. The second condition required an absence of an encroachment upon the road. The respondent alleged that he fulfilled both conditions and that CoW neglected to incorporate that rezoning within the scheme, despite being under a statutory duty to do so.

[7] The respondent denied any unlawful use of the property and alleged that the business conducted upon it was not in contravention of the scheme.

[8] Simultaneously with his plea, the respondent, as defendant, filed a counterclaim seeking:

- '1. An order directing the defendant to take all necessary steps in order to submit the rezoning application of the defendant to the Namibian Planning Advisory Board (NAMPAB) within 30 days of granting of this order and to provide the defendant with proof thereof.
2. In the event that the plaintiff fails to comply with prayer 1 above, the defendant will be entitled to, under this proceedings with duly amplified papers, to apply for contempt proceedings (*sic*).'

[9] In support of the counterclaim, the respondent referred to the CoW resolution of January 2018 supporting the rezoning of the property to 'office with a bulk of 0.4', subject to the conditions already referred to. The respondent alleged that he had complied with those conditions.

[10] Despite its statutory duty to submit the amended scheme for approval to NAMPAB, the respondent alleged that CoW had failed to do so. The respondent pleaded the following prejudice:

‘The defendant to date cannot exercise his rights incidental to Office Zonings as defined in Windhoek Town Planning Scheme. In addition to the aforesaid, the defendant is unable to operate a warehouse for purposes of selling tyres in that it (sic) cannot apply for the special consent use of “Business Buildings” (as defined in the Windhoek Town Planning Scheme) under Office Zonings (XII).’

[11] In its replication to the plea, CoW pleaded that the respondent had, without the approval of building plans, constructed a steel canopy on the property. No relief is sought in relation to this but it is contended that the respondent is estopped from denying operating a workshop on the property, having on 3 July 2017 admitted to CoW that he had erected that structure.

[12] CoW further admitted approving the rezoning of the property from ‘residential’ to ‘office’ on 30 January 2018 but denied that it had ever granted consent to use the property for office and further and in any event denied that the respondent’s use of the property was in accordance with an ‘office’ zoning and alleged that the respondent’s use of the property was illegal and in contravention of the office zoning approved by CoW. It also admitted receipt of payment of the betterment fees but denied that the encroachment condition had been met by the respondent. CoW expressly denied that the respondent had applied for a rezoning for ‘business buildings’ as contended by him.

[13] In its plea to the counterclaim, CoW pleaded that its approval of the rezoning application was only in respect of an office zoning and that the respondent had made

no application for consent use upon the property, as required by the scheme. CoW also pleaded that payment of the betterment fees was only made after service of the summons. CoW contended that the respondent continues with his unlawful use of the property which is 'not in line with office rezoning of the erf and that no consent was applied for by the (respondent)' as required by the scheme and that the use of the property was illegal in the absence of consent by CoW. CoW denied any negligence for a failure to incorporate the proposed rezoning in the scheme and in submitting it for approval by NAMPAB. It also denied failing to submit the amended scheme to NAMPAB and further pleaded that it is only obliged to submit the amendment to NAMPAB when the conditions of approval had been complied with.

[14] CoW further specifically denied that the respondent's use of the property was lawful inasmuch as the respondent 'continued to exercise rights incidental to office zonings without consent from (CoW)'. CoW also pleaded that the relief sought in the counterclaim was not competent.

[15] The replication and plea to the counterclaim were filed in September 2019.

[16] The matter then proceeded through various stages of judicial case management (JCM) although very little relating to JCM forms part of the record. This is but one of several unsatisfactory factors relating to the filing of the record which are further referred to below. The only items relating to JCM which form part of the record are the witness statements filed by the respective parties in the period of December 2020 to January 2021. Whilst many items exchanged in the course of JCM may no longer be relevant for the purpose of determining issues on appeal and should

obviously then not form part of the record, this aspect should be properly addressed and form part of the parties' report in terms of rule 11(10).

[17] Whilst the compilation and filing of the record is primarily the responsibility of the appellant, the respondent in an appeal shares the responsibility to ensure that unnecessary items are omitted and that a completed record for the purpose of determining the issues on appeal is provided. That is after all one of the fundamental purposes behind the inclusion of rule 11(10) of the Rules of this Court which provides in peremptory terms:

'(10) 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.'

[18] This sub-rule is of considerable importance to this Court. It was introduced to require that practitioners jointly ensure that a complete record of relevant matter is filed and that unnecessary items and matter which is no longer relevant to the issues to be determined on appeal are omitted. Rule 11 further assists practitioners in expressly pointing out items which do not form part of the record. Despite these provisions, we find all too frequently that records are unduly burdened with items which do not belong there. These include those listed in rule 11(8) as well as mere formal documents and also items provided more than once. Cost orders reflecting this Court's displeasure at the continuous flouting of rule 11 will be given because the repeated warnings of this Court go unheeded.

[19] Certain of the stages in JCM may well no longer be relevant for an appeal as the purpose behind them is to narrow down the issues in dispute between the parties to those which are real and material. But the pre-trial order setting out the issues which remain in dispute between parties plainly forms a vital component of the record, setting out, as it should, the issues which remain in dispute after JCM and how those will be addressed in the forthcoming trial. That vital cog in the machinery of JCM is astonishingly omitted from this record, indicative of the parlous level of legal services provided by both sets of legal practitioners in this matter. More on that subject follows.

[20] Following the closure of the pleadings in September 2019, the matter then proceeded to trial on 18 October 2021.

The trial

[21] CoW's sole witness was Mr H Rust, Section Planner: Urban Policy in its employ. His evidence-in-chief was as set out in his witness statement dated 8 December 2020.

[22] He testified that when the respondent purchased the property, an application for rezoning the property to 'office' was pending and that its zoning in the scheme at the time was 'residential'. Despite this, the respondent proceeded to conduct a tyre business on the property, repairing and selling tyres for motor vehicles.

[23] Mr Rust confirmed that the municipal council approved the rezoning application (on 30 January 2018) to office subject to the payment of a betterment fee of N\$142 220 and the respondent establishing that he was not encroaching upon the road. Mr Rust pointed out that the Ministerial approval was required following the

approval of rezoning application by NAMPAB before a rezoning is incorporated into the scheme under the Town Planning Ordinance 18 of 1954 (the Ordinance).

[24] Mr Rust testified that, after complaints were received concerning the respondent's use of the property, an investigation revealed that a mechanical workshop was being operated and tyres were being sold on the property from four large containers on the property. At the time of that investigation, the property was zoned residential. The first notice to cease those activities was then sent to the respondent. In response to it, the respondent pointed out to CoW that he had made application for rezoning from residential to office. In that correspondence the respondent admitted that he had erected the containers in question.

[25] Mr Rust explained that the permitted use and enjoyment of land in the municipal area was set out in the scheme. He referred to the provisions in the scheme which authorised the notice to cease activities sent to the respondent and the powers of the municipality where parties fail to heed such a notice.

[26] Mr Rust also stated in his witness statement dated 9 December 2020 which formed his evidence-in-chief at the trial on 18 October 2021 that CoW had approved the rezoning of the property from residential to office on 30 January 2018. He explained that 'office' is defined in the scheme to mean 'a building, room, suite of rooms used for administrative work and planning and may include a place for related subordinate draughting work'. He further expanded that the land uses permitted in an office zoning are set out in the scheme and are those listed as primary uses as well as a separate category of consent uses and finally a category of prohibited uses. Consent uses include 'dwelling units, residential buildings, institutions, places of public worship,

business buildings, hotels and restaurants'. The prohibited uses are those not listed as primary or consent uses.

[27] Mr Rust stated that the unlawful activities engaged in by the respondent on the property were more in line with a business zoning under the scheme which permitted 'shops, business buildings, dwelling units, residential buildings and social halls'.

[28] Mr Rust pointed out that the term 'business building' is defined in the scheme as:

'a building designed and/or used as offices, warehouses, medical or dental consulting rooms, laboratories or other purposes but does not include other buildings specifically defined or mentioned elsewhere in this Scheme with the exception of offices.'

[29] He also said that the type of business which the respondent engaged in fell within the definition of 'service station' (and thus outside a 'business building'). A service station is defined as:

'a building used for the purposes of profit or gain for one of the following purposes, namely to maintain or repair motorbikes and motor vehicles or to supply fuel and for related purposes which also includes the parking or storage of motor vehicles, the sale of parts, accessories, fuel and lubrications for motor vehicles, but does not include panel beating, spray painting and the dismantling of motor vehicles and motor bikes (except for minor repair works).'

[30] Following the rezoning of the property to office, Mr Rust stated that this zoning did not provide for the business activities engaged in by the respondent (of selling and repairing tyres).

[31] Mr Rust further stated that CoW would be amenable to consider and grant consent use for business purposes but that alternative premises should be sought by the respondent for trading in tyres and fitting them where those activities are permitted.

[32] Mr Rust concluded that the respondent's use of the property is 'in clear contravention' with the scheme and that CoW was entitled to the orders sought against him.

[33] In amplifying his witness statement, Mr Rust confirmed that the current zoning of the property was 'office with a bulk of 0.4'. He stated that there were no further rezoning applications made and pending in relation to the property.

[34] When Mr Rust gave his evidence of the rezoning of the property to office, no objection was made to that evidence. The application for that zoning was after all clearly pleaded by the respondent and admitted in the replication and plea to the counterclaim (and his evidence of the rezoning was directly foreshadowed in his witness statement filed some ten months previously).

[35] In cross-examination, Mr Rust reiterated that the respondent's activities were not in accordance with an 'office' zoning of the property.

[36] When counsel for the respondent put to Mr Rust that it was not CoW's case that an office zoning had been approved and that the respondent's activities on the property conflicted with an office zone, the court correctly pointed out that it was pleaded that the respondent was conducting a business there in conflict with the scheme, whether the zoning was residential or office.

[37] Counsel for the respondent referred to the particulars of claim and put to Mr Rust that the case his client had to meet was activity in conflict with a 'residential' zoning.

[38] Mr Rust pointed out that the rezoning only became 'official' once it is proclaimed (in the Government Gazette) as an amended scheme. Only after that process is completed, does the property become formally rezoned, according to Mr Rust. That was not put in issue.

[39] Mr Rust also explained in cross-examination that it is incumbent upon property owners to ensure that their activities on municipal properties accord with the applicable zoning of their property.

[40] Mr Rust explained that until the process of rezoning is complete and the new zone is gazetted in an amendment scheme, the existing zone remains applicable which explained why the zoning is referred to as residential in the particulars of claim. He stressed that the respondent's activities were illegal under both residential and office zonings. He further explained that the mere zoning of office was insufficient for the respondent as he would still need to apply for consent for a business building which he had not done.

[41] In the latter stages of cross-examination, counsel for the respondent again stated with reference to the particulars of claim that the case which the respondent had to meet was that the zoning was residential – not office – and that 'the parties were under the *bona fide* mistaken belief that it was residential' until Mr Rust 'came

and testified' and said it was an 'office zone'. This despite the clear terms of the pleadings and Mr Rust's witness statement, filed ten months prior to his evidence.

[42] The court however proceeded to point out that the case the respondent and his counsel were required to meet was in respect of a residential zone and that 'yesterday with the evidence of Mr Rust all that changed to office' and that this was 'prejudicial for the respondent's case'.

[43] Counsel for CoW thereupon expressed an intention to move for an amendment by amending the term 'residential' to 'office' in the particulars of claim with reference to the zoning. The court responded by pointing out that this would not 'remedy the problem' but did not explain why not and directed that a 'proper application for an amendment would need to be filed' and that counsel for the respondent would be afforded time to respond to it but in the interim permitted the cross-examination of Mr Rust to proceed.

[44] In the course of the ensuing cross-examination, the court posited the following proposition to Mr Rust that even if the respondent were to succeed in (dismissing) the action, 'it (would) not change his zoning, he still needed a business zone (for his business)'. Mr Rust responded in the affirmative that the respondent would still have to apply for 'business consent use, the business building consent'.

[45] Respondent's counsel then put it to Mr Rust that 'the zoning will remain office but you will have (to get) business consent'. Mr Rust stated that it would 'remain office and the respondent would need to get an additional business consent'.

[46] The court again proceeded to point out to respondent's counsel that a further process would need to be followed to obtain a business consent on the office zoning. This was acknowledged by the respondent's counsel. This position was yet again put by the court to the respondent's counsel and he again acknowledged it to be correct.

[47] During the course of further cross-examination, it would appear that the amended scheme which included the rezoning of the property was provided by CoW's practitioner to respondent's counsel, together with the gazette proclaiming the amended scheme. Respondent's counsel then adduced the amended scheme, as published in September 2019 and the gazette proclaiming it (in July 2020) to Mr Rust which he confirmed. The amended scheme included the rezoning of the property to 'office with a bulk of 0.4'. It was handed in as an exhibit at the instance of respondent's counsel, as was the government notice published in the gazette of 31 July 2020 which proclaimed that amended scheme.

[48] Despite this, and in response to a question from the court, respondent's counsel stated that the respondent would not withdraw or abandon his counterclaim although he acknowledged it had become academic.

[49] During re-examination, Mr Rust stated that the respondent would have been aware that the activities on the property were illegal at the time it was zoned residential and even after it was rezoned to 'office' in the context of the correspondence he had exchanged with CoW which was referred to and handed in as exhibits.

[50] At the conclusion of Mr Rust's re-examination, CoW's practitioner moved for amendments to the particulars of claim from the bar – to replace the word 'residential' with 'office' in respect to the zoning of the property and to refer to the rezoning itself.

[51] Respondent's counsel vigorously objected to the proposed amendment. He said that a communication, as required by rule 32(9) (of the Rules of the High Court), had been received by him at 09h00 that day, shortly before the resumption of proceedings. He acknowledged that the issue 'had been coming' for a few days. Yet he still sought further time to consider it. When asked by the court how long he would need, the question was evaded until the court offered to adjourn for an hour.

[52] Upon resumption, respondent's counsel then sought further time to respond to the rule 32(9) notice. The matter was then adjourned to the next day, requiring the respondent's response by 16h00.

[53] Prior to the adjournment, further contentions from counsel were entertained during which respondent's counsel indicated that there would be a formal objection to the amendment and the need to file written argument. CoW's practitioner responded that the amendment was necessitated by the evidence, with the court responding, incorrectly, that the evidence was known to CoW when the action was instituted and that this called for an explanation.

[54] On the following day, respondent's counsel recorded that his client objected to the proposed amendment and insisted upon a formal application to amend. He pointed out that the matter had been set down for trial for two further days and when asked by the court concerning timelines for attending to an application, counsel curiously

insisted that CoW should first apply for a postponement of the trial. The court correctly pointed out that no application for postponement had been brought and that there was a need for timelines to address the amendment issue.

[55] In response, respondent's counsel sought the costs of the previous day, that day itself and the following day if the matter were to be postponed and a formal application to amend were to be brought and that his client would be entitled to ten court days to answer that application, complaining that the amendment was very late and foreseeable.

[56] CoW's legal representative indicated that since a formal application was required, a transcript of the oral evidence of Mr Rust was required in order to show the need for the amendment in view of the evidence. The court correctly questioned the need for that but in the end directed that the application to amend was to be brought by 28 October 2021, answering papers by 3 November 2021, and written argument to be filed by 5 November 2021 and that the amendment application would be heard on 9 November 2021.

[57] I have in some detail referred to the manner in which the need to amend the particulars was dealt with by the parties and the court, given its impact upon what subsequently transpired.

The application to amend

[58] Despite the very confined issue involved and the overly generous time period afforded for it, CoW's application to amend was lodged a day late. Condonation was

sought for bringing it late. CoW's written argument was also filed late, underscoring the slovenly manner in which CoW has been represented in this matter.

[59] The notice to amend, the objection, and founding and answering affidavits in the amendment application form part of the record, as do the unduly laborious oral submissions by both sides which were transcribed and inexplicably form part of the record. Having considered these in an attempt to comprehend the protestations of prejudice on the part of the respondent, any real prejudice is difficult to discern. It is certainly nowhere articulated with any coherence. Costs occasioned by the amendment were tendered and it remains unclear to me what further prejudice other than a moderate amount of time to be taken to make consequential amendments after consultations with the respondent and his expert.

[60] The notice to amend merely sought to add, with reference to the zoning, that the property 'was subsequently zoned as an office erf' and that the respondent's workshop on an office zone without consent constitutes an offence. The notice also sought to replace 'residential' with 'office' in prayer 2 of the relief sought.

[61] The objection complained that the amendment was belated and had been sought at an advanced stage of the trial proceedings and was made only after CoW's single witness had testified. The objection claimed 'irreparable prejudice to the respondent' and 'his right to a fair trial . . .' without explaining either.

[62] The objection also complained that the lateness 'compromised' the fixed trial dates and caused delay. The objection also claimed that the amendment sought to 'introduce a new cause of action by effectively abandoning its claim' and that this

caused the respondent prejudice. It further claimed there was a 'complete change of stance' by CoW and it 'would require the parties to revisit pertinent aspects of the matter through pleadings, discovery, witness statements (including further expert witnesses) recalling of the plaintiff's witness for cross-examination on the new issues at a significant cost'.

[63] It was also claimed that the amendment would render the particulars of claim excipiable and not disclose a cause of action without explaining in what respect. It was also claimed that 'if the amendment is allowed, the defendant will be required to revisit and change its entire case . . .' (*sic*). The objection further raised technical issues concerning compliance with rule 32(9) and (10). These themes were expanded upon repetitiously in a rambling answering affidavit which spans some 26 pages, excluding annexures, without any attempt to specify the claims of prejudice in the objection, although there is a suggestion that there would need to be 'further investigations by (his) expert witness, Mr Opperman' although the nature and ambit of those 'investigations' were not specified.

[64] This touches upon an aspect raised both in the answering affidavit and argument which is so misplaced that it calls for comment. It was stated that the respondent's expert witness, Mr Opperman, a town planning expert of Windhoek, drafted his report on the basis that the property was residentially zoned at the time. His witness statement was dated 8 December 2020. Quite how that statement could be made strains belief. I would have thought that a town planner supposedly steeped in knowledge as to the operation of the scheme and professing to provide expert planning advice to a client and to the court would have had regard to the latest published amendment scheme, published already in September 2019 and gazetted in

July 2020, especially after being alerted by the pleadings to the fact that CoW had in January 2018 approved a recommendation to NAMPAB to rezone the property to office and the conditions attached to that. CoW specifically stated that it had submitted that approval to NAMPAB. The failure on the part of the respondent's expert to acquaint himself with the status of the actual zoning of the property is inexplicable and cannot conceivably be raised or considered as prejudice.

[65] Mr Rust in his witness statement dated 9 December 2020 – more than ten months before the trial – expressly stated:

'Erf 2533 is now rezoned for office purposes . . . and that the respondent's activities still contravene the scheme.'

[66] Quite how the respondent's team could have been taken by surprise in any sense at all by his evidence to this effect which, had after all also been published in the gazette in July 2020, is simply unfathomable.

The ruling on the amendment application

[67] The High Court delivered a reasoned ruling on the condonation and amendment application on 3 December 2021. The High Court cited relevant authority, most particularly this Court's judgment in *Municipal Council of Windhoek v Pioneerspark Dam Investment CC*¹ and a full bench of the High Court in *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*² and correctly quoted salient portions of both those judgments, as setting out the principles governing amendment applications.

¹ *Municipal Council of Windhoek v Pioneerspark Dam Investment CC* 2021 (3) NR 670 (SC).

² *IA Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

[68] The court concluded that the amendment sought would 'in essence, if allowed, change the whole front in the case'. This is because the respondent had faced a case that he was conducting a mechanical workshop on premises zoned as residential. The court found that the proceedings were commenced on the wrong premise because CoW's practitioner was never informed of the correct position in that as far back as January 2018 CoW had approved an application to rezone the property to office.

[69] The court stressed the importance of the real issues being determined in trial proceedings and that the pleadings including a counterclaim and witness statements were prepared to answer a 'specific scenario as set out in the particulars of claim'. The court further found that the pleadings would need to be re-opened and that the pre-trial process would essentially need to restart from the plea phase. The court concluded as a result that there were no prospects of success in the application to amend. For this reason, the court proceeded to dismiss with costs the application for condonation for the late filing of the application to amend but made no actual ruling on the amendment application.

[70] The court thereupon postponed the matter to 7 December 2021 to fix a date for the continuation of the trial. The matter was thereafter adjourned to 7 April 2022. CoW closed its case and the respondent moved for absolution from the instance. Argument was heard on that subject on 20 April 2022 and judgment was delivered on 7 June 2022, granting absolution. It is the judgment appealed against. The reasoning in the ruling on the condonation and amendment application is referred to in some detail in it because of its interrelationship with the reasoning employed in judgment on absolution.

The court's ruling on absolution

[71] In the court's judgment on absolution, there was reference to the amendment application, stating that the particulars of claim referred to conducting a business on an erf zoned residential without referring to the fact that the correct zoning for that erf was office. The court acknowledged that an office zoning was not the correct zoning for the conduct of the respondent's business on the property.

[72] The court further found that this zoning only became known at the trial during Mr Rust's unequivocal evidence to that effect, stating the following under the heading 'The application for amendment':

'[6] The problem that arose during the evidence produced by the plaintiff, and which was the subject of an application to amend the particulars of claim, was that the particulars of claim referred to the conducting of a business on an erf with residential zoning and no reference is made to the fact that it was indeed rezoned to office use, which was still not the correct zoning for conducting the defendant's business in its current format. The fact that the erf was indeed rezoned for office use, only became known during the evidence presented by Mr. Rust. This information was however never communicated from the side of the plaintiff to the defendant and neither was he informed that his business cannot be conducted on the said property, although now zoned for office use, as it still needs additional planning permission from the plaintiff.'

[73] With reference to the case to be met by the respondent, the court only referred to the particulars of claim and no further pleadings.

[74] The court after referring to the issues of law to be resolved during the trial as per the pre-trial minute, acknowledged that the respondent was conducting business on the property not correctly zoned for such activities. The court however found that

CoW's investigation which preceded its original notice to the respondent to cease its activities was conducted at a time the property was zoned residential. The court stated that it would have expected a further notice to be given by CoW after the change of zoning and pointing out the need for further additional permission.

[75] The court found that the basis upon which the particulars of claim were drafted was that the property was zoned residential and that an amendment was effectively declined because it would 'change the whole case' which the respondent would have had to meet at a late stage of the proceedings.

[76] Based upon that reasoning, the court granted absolution from the instance with costs.

Application for condonation

[77] As continues to occur with unacceptable frequency, an application for condonation accompanies this appeal. That is because the record was filed late. The record should have been filed on 6 September 2022 to comply with the peremptory injunction in rule 8(2)(b) to file a record within three months of the judgment being delivered.

[78] CoW's deponent states that 'appellant's legal practitioner was informed' (presumably by a junior lawyer assigned to attend to the record) that the deadline for doing so was 12 October 2022 because that lawyer understood the term 'three months' in the rule to mean ninety court days. Quite how such an understanding could conceivably arise in the face of the clear and unambiguous wording of the term 'three months' in the rule is not further explained.

[79] The condonation application is opposed. An unduly lengthy answering affidavit (more than twice the length of the founding affidavit) was filed. A compounding factor to the lengthy and discursive opposing affidavit is that it almost exclusively comprises argumentative matter, replete with an excess of unnecessary adjectives and adverbs describing the conduct of CoW's lawyers, including repeated unsupported allegations impugning the honesty and integrity of CoW's lawyers. Whilst their conduct certainly does not stand up to scrutiny in the respects set out below, which the respondent was plainly entitled to point out, the repetitive level of abuse contained in it is unacceptable, and does not belong in court proceedings.

[80] The purpose of affidavits in application proceedings is after all to place evidence before the court and to define the issues between the parties. Whilst the answering affidavit did attach some evidence (two emails and an earlier draft of the rule 11(10) notice), the other facts referred to mostly appeared from the record or from the correspondence attached to the founding affidavit. Certainly concise contentions may be advanced in pointing out the inadequacy or lack of plausibility of an explanation in condonation proceedings. But for the rest, it was largely argumentative and a tirade of abuse directed at CoW's lawyers.

[81] Whilst there would be a degree of latitude for contentions to be advanced in opposing affidavits in condonation applications with reference to the adequacy of an explanation tendered when challenging it, this unduly lengthy affidavit amounts to a harangue and in my view thus amounts to an abuse. This Court's displeasure with regard to this form of abuse is reflected in the costs order relating to the condonation application.

Principles governing condonation applications

[82] The two-pronged nature of the test for condonation applications has been repeatedly stated by this Court, given the frequency with which applications of this nature are directed to this Court.

[83] An applicant for condonation is firstly required to provide a reasonable and acceptable explanation for the non-compliance in question. In the second instance, there must be reasonable prospects of success on appeal. These requirements are not considered in isolation in the exercise of the court's discretion. Good prospects of success may result in granting condonation even in the face of an unsatisfactory explanation although an explanation found to be 'glaring', 'flagrant' or 'inexplicable' may result in the dismissal of the application without the need to consider the prospects of success of the appeal.³

[84] As was held by the Chief Justice in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others*⁴ with reference to condonation applications:

'In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.'

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

⁴ *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) para 28.

[85] In this instance, the explanation for the delay is palpably untenable. Rule 8(2)(b) expressly requires records to be lodged within three months of the High Court judgment. There is no reference to days in the sub-rule. (The required period referred to in rule 8(2)(a) concerning appeals against exceptions or a ruling on striking out, is six weeks. There is thus no reference in rule 8 to 'days'). There is thus absolutely no basis for any ambiguity of meaning for the stipulated period in this sub-rule or a tenable basis to consider that it could conceivably mean 90 court days.

[86] This Court has repeatedly stressed that it is the duty of practitioners undertaking or assigned work in this Court and not familiar with its rules to take time to study and apply them correctly.⁵ The excuse raised by CoW's practitioners is entirely inconsistent with the rules of this court. The interpretation contended for is so untenable and inconsistent with any reasonable and plausible understanding of the rule that it falls markedly short of being an acceptable and satisfactory explanation.

[87] As in *Namib Plains*, the question arises as to whether CoW should be penalised because of the untenable explanation and lack of diligence on the part of its legal practitioners. As was reiterated in *Namib Plains*, there is a limit beyond which a litigant cannot escape its legal practitioner's remissness.⁶ In *Namib Plains*, it was however found that 'the inadequate explanation for the delay is ameliorated by weighty factors referred to which militate against the refusal'⁷ of condonation on the basis of the inadequacy of the explanation alone.

⁵ *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) para 5-6. *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others* 2013 (4) 1029 (SC) at 1031. *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC). *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another* 2020 (1) NR 19 (SC).

⁶ Paragraph 25.

⁷ Paragraph 25.

[88] In this matter, there are also weighty factors present, given the public interest nature of the matter where a local authority seeks to enforce subordinate legislation governing land use where a breach is unlawful and can also amount to an offence. In doing so, CoW acts in the public interest to enforce prescribed land use in the interest of its residents.

[89] A further related issue of public importance raised by this matter is the principle of legality because it concerns CoW as a local authority seeking to enforce zoning restrictions within its local authority area of jurisdiction. The scheme amounts to subordinate legislation regulating land use within the municipal area. The use of land contrary to the use provided for in its zoning is unlawful (and also constitutes an offence, if persisted with after a notice to cease). CoW approached the High Court to interdict prohibited activities on the property which it asserted to be in conflict with the zoning for that property and thus to uphold the rule of law.

[90] Given the public importance attaching to this matter, we are of the view that this is not a proper case to refuse condonation upon the inadequacy of the explanation without considering the prospects of success of the appeal, as also occurred in *Road Fund Administration v Skorpion Mining Company (Pty) Ltd*.⁸

Submissions on the merits of the appeal

[91] It was argued on behalf of the appellant that the crux of CoW's case against the respondent is that the latter is conducting an illegal mechanical workshop from four large containers selling tyres on the property. It was argued that these activities conflict with a residential zoning as well as an office zoning and are accordingly illegal.

⁸ *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) paras 2-4.

[92] Counsel for CoW pointed out that Mr Rust's evidence that the respondent operates a trade in tyres and mounting, car parts and car rental on the property was unchallenged and that CoW had at no stage given consent to these activities. It was submitted that CoW established illegal activities being conducted on the property and that the court below correctly acknowledged that additional consent was required by the respondent which was lacking. CoW's counsel contended that the court below erred in disregarding the plea in arriving at its conclusion on absolution and that there was *prima facie* evidence on which a court could grant an order interdicting the respondent from continuing to operate a workshop on the property.

[93] Counsel for the respondent argued that CoW did not 'present any evidence that the respondent conducted unlawful activities on the (property)'.

[94] It was contended that Mr Rust could give no direct evidence of the business activities in question. This notwithstanding the respondent's correspondence adduced in evidence confirming the nature of the business and respondent's counsel putting it to Mr Rust that there was trading in tyres on the premises.

[95] Counsel further stated that 'there is no evidence presented by (CoW) that the respondent was afforded an opportunity to apply for business consent on the office zone after the office zone was made official when the amended scheme was promulgated on 31 July 2020' (*sic*). The assumption underpinning this submission negates the structure and operation of the statutory scheme. It is for owners of property in a local authority area to adhere to the zonings applicable to their property and if they want to pursue business and other activities on their property beyond the ambit of its zoning, it is incumbent upon them to ensure that they comply with the scheme – either by applying for a rezoning or for consent use or even for both in

certain instances. Counsel accepted this when it was put to him in oral argument, pointing out that there had been a focus on the provision criminalising non-compliance with the scheme.

[96] Counsel further argued that the claim for interdictory relief was limited to a residential zoning which had not changed (because of the abortive attempt to amend). It was further argued that CoW was bound by its pleadings and that a claim that the business conducted on the property conflicted with an office zoning by reason of a lack of consent 'was only canvassed at the hearing' and not the case the respondent was required to meet. This despite the clear terms of the replication.

[97] Respondent's counsel concluded that this matter 'is a very clear case where the appellant has not made out any case at all, neither in fact or in law. There is no case for the respondent to answer'. Counsel also contended that CoW had failed to identify the right it relied upon in seeking the relief claimed and that the references to the Ordinance and scheme were insufficient.

Should absolution have been granted?

[98] This Court in *Stier & another v Henke*⁹ set out the test to be applied when absolution is to be granted with reference to authority:

'At 92F-G Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of a appellant's case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) at 409G-H:

⁹ *Stier & another v Henke* 2012 (1) NR 370 (SC) para 4.ai b

“(W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T).” (My underlining.)

Harms JA went on to explain at 92H- 93A:

“This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2) Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.”

[99] In order to assess the conclusion reached by the High Court to grant absolution, it is firstly necessary to have regard to CoW’s cause of action and what was necessary to plead and prove in order to substantiate that cause of action. Following the advent of JCM, not only are the pleadings considered but also how the issues crystallised in the course of case management. Secondly, the evidence led on those issues is to be considered.

The statutory scheme

[100] Before considering whether the court was correct in granting absolution, first a word about the statutory scheme of the Ordinance and the scheme upon which the cause of action is based. Although the Ordinance has since been repealed by the Urban and Regional Planning Act 5 of 2018 (the Act) and put into operation on 3

September 2020,¹⁰ s 133 of the Act provides that a town planning scheme in existence at the coming into force of the Act is regarded a zoning scheme approved under the Act. Section 49(2) of the Act provides that a scheme has the force of law and is binding on the local authority, organs of State and all persons.

[101] The Ordinance applied to local authorities. CoW is one such local authority. Under s 5 of the Ordinance, CoW was obliged to prepare a town planning scheme in respect of all land within its local authority area. The intent or purpose of the Ordinance (and a scheme) is set out in s 1:

- ‘1. Every town planning scheme shall have for its general purpose a co-ordinated and harmonious development of the local authority area, or the area or areas situate therein, to which it relates (including, where necessary, the reconstruction and re-development of any part which has already been subdivided, whether there are or are not buildings thereon) in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications.
2. A scheme shall contain such provisions as may be deemed necessary or expedient for regulating, restricting or prohibiting the development of the area to which the scheme applies and generally for carrying out any of the objects for which the scheme is made, and, in particular, for dealing with any of the matters mentioned in the Second Schedule to this Ordinance.’

[102] The scheme was required to ‘contain provisions necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies and generally for the carrying out of the objects for which the scheme is made .

...’,¹¹

¹⁰ Government notice 222/2020.

¹¹ Section 18(1)(a).

[103] The Ordinance authorised a scheme to set out the use or uses to which any land or building may be put.¹² The scheme does this by restricting the use to which buildings or properties may be applied by a process of zoning the land for permitted uses. In doing so, the Ordinance and the scheme restricted the rights which property owners enjoyed under common law to ensure that ownership of land in local authority areas is regulated in a manner which is in the interest of all.¹³ The scheme, in zoning the property within the local authority area of Windhoek, limits and restricts the rights of owners with regard to the use of the property but also with regard to the number of buildings of an erf, their height and density. That fundamental statutory structure (of zoning schemes permitting and prohibiting land use) continues under the Act, although now updated within the context of spatial planning and its principles and standards as set out in the Act.¹⁴

[104] O'Regan ADCJ in *Walele* approved of the following succinct exposition by Lewis AJ of the purpose of zoning schemes in the similarly structured planning legislation in South Africa which deftly describes the position applicable under the Ordinance and the scheme:

[131] The purpose of zoning schemes and the Building Standards Act was aptly described by Lewis AJ in *Odendaal v Eastern Metropolitan Local Council*:

“. . . both the Act and the [town-planning] Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas

¹² Section 19(3).

¹³ *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) for a helpful discussion of similarly structured legislation concerning planning and zoning by O'Regan ADCJ paras 129-131. See generally Felicity !Owoses-/Goagoses *Planning Law in Namibia* (2013) at 41-43 for a thorough and well researched exposition of planning legislation in Namibia.

¹⁴ Sections 2, 3, 17, 20, 21, 31, 32, 33, 41 and 42.

Local authorities are given considerable powers under both Act and Scheme. Onerous duties are imposed on them by both instruments. The essential purpose of the powers afforded and the duties imposed is to ensure that the objectives of the legislative instruments are achieved; that there is a balance of interests within a geographical community. The local authorities are in effect the guardians of the community interest. They are entrusted with ensuring that areas are developed in as efficient, safe and aesthetically pleasing a way as possible. They are required to safeguard the interests of property owners in the areas of their jurisdiction. That is why the powers and rights of owners of immovable property are restricted. Power over one's property has never, under our legal system, been unfettered. The rights of an owner of land have always been limited by the common law in the interests of neighbours. But the rapid urbanization of countries worldwide and the inevitable need for regulation that has accompanied it has had the effect of restricting full dominium even further than the common law ever did.”

[105] The scheme thus embodies a regulated system of land use within the local authority area which limits and restricts rights of ownership and simultaneously confers rights on owners to expect compliance by neighbours with the zoning restrictions embodied in the scheme which continues under the Act. Although not relevant for these proceedings, the scheme is now to be read and understood within the context of the objects of the Act set out in s 2 which stress the need for a ‘uniform, effective integrated regulatory framework for spatial planning in Namibia’ and the principles and standards of spatial planning are set out in s 3 of the Act.

[106] It was (and remains) the responsibility of CoW as the responsible authority to observe and enforce observance of all the provisions of the scheme.¹⁵ Section 28 of the Ordinance required this in peremptory terms and authorised CoW as the responsible authority to take far reaching action where land use is not in accordance

¹⁵ Section 28 of the Ordinance read with clause 4 of the scheme read with s 27.

with the scheme, including removing, pulling down or altering non-conforming buildings, and prohibiting buildings or land being used in conflict with the scheme.¹⁶

[107] Any person who fails to comply with provisions of the scheme or uses any land or building in a manner contrary to any provisions of the scheme also commits an offence in terms of s 48 of the Ordinance. (Section 130 of the Act likewise makes it an offence for a person to develop, sub-divide or consolidate land contrary to a provision in a zoning scheme.)

[108] Finally on the statutory structure and scheme, the Ordinance contemplated that a proposed scheme or an amended scheme was to be submitted after adoption by a local authority council, such as CoW, to NAMPAB to make a recommendation to the Minister responsible for urban and rural development for approval.¹⁷ Following that ministerial approval, the Minister was required to notify that approval by proclamation in the Gazette which is when the scheme or amendment scheme would come into operation.¹⁸

Analysis of the pleadings

[109] CoW's cause of action is essentially for the enforcement of applicable subordinate legislation as set out in the scheme which in turn regulates and prescribes the permissible land use and restrictions on land use on properties in its local authority area. CoW's cause of action derives from the statutory regime of the Ordinance and the scheme adopted in accordance with the Ordinance. Both the Ordinance and the scheme are referred to and relied upon in the particulars of claim.

¹⁶ Similar powers are set out in s 54 of the Act although mostly with reference to the local authority being authority to apply for court orders for those forms of relief.

¹⁷ Sections 21, 22 and 26 of the Ordinance.

¹⁸ Section 26(2) of the Ordinance.

[110] The particulars of claim allege that CoW is a local authority established under Act 23 of 1992 and responsible for regulating the use and zoning of properties within the local authority area. This is admitted in the plea.

[111] It is further alleged that on 27 October 2016, CoW discovered that the respondent was operating an illegal workshop and selling tyres on the property and had then given the respondent notice to cease those activities which were carried out without CoW's consent. CoW further alleged that a site inspection on 14 June 2017 revealed that the workshop was still operational.

[112] It was further alleged that the property is zoned as residential under the scheme and that the respondent's workshop on a residential erf was without the required consent from CoW and is unlawful and constitutes criminal conduct.

[113] The particulars of claim conclude that respondent is liable to cease his illegal activities on the property and seeking the declaratory and interdictory relief already set out was together with costs.

[114] The respondent's plea denied that a mechanical workshop was operating on the property and further denied any illegal conduct or activities were carried out on the property. In amplification of his denial, the respondent pleaded that CoW had by resolution supported the rezoning of the property from residential to 'office with a bulk of 0.4' subject to conditions which have been complied with by him. He further pleaded that a close corporation was operating a business on the property. (What he did not

then disclose was his membership and control of that CC. That eventually emerged in the course of JCM.)

[115] The respondent also pleaded that CoW 'by its own negligence and in spite of the fact that it has a statutory duty to do so', (had) failed to incorporate the proposed rezoning of (the property) into an amended town planning scheme 'for approval by NAMPAB' (*sic*) after CoW had passed its resolution of 30 January 2018 for the rezoning of the property from residential to office.

[116] The respondent sought orders, in addition to costs, in the counterclaim to compel CoW to 'take all necessary steps in order to submit the rezoning application of the defendant to NAMPAB' and in the event of failing to do so, authorising the respondent to apply for contempt proceedings.

[117] In its replication, CoW pleaded that it had approved a rezoning of the property from residential to office on 30 January 2018 but that consent to use the property for office purposes was not granted. CoW pointed out that it had not approved an application for consent for business and that the respondent had not applied for that.

[118] CoW expressly further pleaded in the replication:

2.1.3 The activities carried out by the Defendant on erf 2533, Windhoek are not in accordance with the "office" zoning, approved by the plaintiff and are therefore illegal.

2.1.4 The defendant nevertheless, continues to carry out these illegal activities on the erf, without being in possession of a valid consent in terms of the Windhoek

Town Planning Scheme and in contravention with the zoning approved by the Plaintiff.'

[119] In its plea to the counterclaim, CoW pleaded that the respondent's activities did not comply with an office zoning and that no consent had been applied for by the respondent. CoW also denied that it had failed to submit the amended scheme for approval by NAMPAB and further pleaded:

'6.1 The allegations thereof are denied as if specifically traversed. In amplification of the general denial, the Plaintiff specifically pleads that:

6.1.1 The defendant continues to exercise rights incidental to office zonings without consent from the Plaintiff.

6.1.2 Defendant, claims to have complied with the conditions of the approval but has to date failed to apply for consent use of "business buildings" as defined in the Windhoek Town Planning scheme.

6.1.3 Nonetheless, defendant has been operating illegally without consent since 2017. The defendant is illegally operating a mechanical workshop being operated from four large containers on the erf and tyres being sold from the erf.'

[120] CoW also pleaded that the relief sought in the counterclaim was 'not competent and inconsistent with what is pleaded in the counterclaim'.

[121] The pleadings have been set out in some detail because they demarcated the issues between the parties. These were narrowed down in the course of JCM as to what was factually in dispute in the action.

[122] In the pre-trial order, the following issues of law were identified for resolution at the trial.

- '2.1 Whether the Defendant's workshop, if any, on a residential erf is without the consent of the Plaintiff is unlawful and constitutes criminal conduct.
- 2.2 Whether the Defendant is liable to cease the alleged illegal activities on Erf 2533, Bach Street, Windhoek, Republic of Namibia.
- 2.3 Whether the Plaintiff is entitled to the specific relief i.e. declaratory relief and interdictory relief.
- 2.4 Whether the relief i.e. the referring of the matter to the Office of the Prosecutor-General, is competent in the circumstances; and
- 2.5 Whether the relief sought by the Plaintiff is premature or not.
- 2.6 Whether the Defendant is entitled to the mandamus as per the counterclaim.'

Issues in dispute and the evidence

[123] The elements of the claim are that CoW is a local authority responsible for the enforcement of land use restrictions regulated by the scheme. That was admitted. It was indeed under a duty in terms of s 28 of the Ordinance applicable at the time to enforce the restrictions set out in the zonings contained in the scheme.

[124] The next element, which was also not in dispute, concerns the respondent's acquisition and ownership of the property. Its zoning at the time of the institution of the action was residential and, despite this, it was used as a warehouse where tyres were sold and fitted. Despite respondent's counsel's contention that CoW had not established this and despite the contrived tactical denials by the respondent in the

pleadings, this was sufficiently established on at least a *prima facie* basis by Mr Rust's evidence which included the respondent's correspondence where this was admitted as well as what was put by respondent's counsel to Mr Rust concerning the activities and use of the property.

[125] It is also not in dispute that this use is contrary to a zoning of 'residential' and that the respondent was given notice to cease those activities on his property.

[126] Evidence on all of these elements was given by CoW's Mr Rust. He also testified that the zoning had changed to office since the institution of the action. His evidence, borne out by the provisions of the Ordinance, was that a rezoning only takes effect when an amended scheme has been gazetted. That occurred long after the institution of the action and on 31 July 2020.

[127] Because the property was no longer zoned residential, was the court correct in granting absolution because it held the view the evidence led by CoW failed to establish a *prima facie* case for the relief sought because the 'case which the defendant had to meet' was a residential zoning in the absence of an amendment which it could not have granted because it 'would have changed the whole case the respondent/defendant had to meet at a very late stage'. And was this really the case which the respondent had to meet and was the impact of an amendment correctly described? In my view, the answer to each of these questions is a resounding NO.

[128] In order to discern the case which the defendant had to meet regard is not only to be had to what is set out in the particulars of claim, incorrectly viewed in isolation by the High Court, but the pleadings as a whole. CoW's case concerned activity

conducted on the respondent's erf which was in conflict with the zoning for that property which thus rendered it unlawful and which it sought to interdict.

[129] When the claim was instituted the property was zoned residential and it would appear to be common cause that the activity in question conflicted with that zoning. Evidence to that effect was given by Mr Rust. That zoning only changed on 31 July 2020. At the very minimum, CoW had established a *prima facie* case for the declaratory order sought and costs.

[130] In his plea, the respondent raised the resolution passed by the CoW to recommend the rezoning of the property to an office zoning and that CoW had a duty to further process its resolution so that it would become an amended scheme. The respondent sought a *mandamus* against CoW to do so.

[131] This was not the end to the pleadings. In its replication, CoW admitted that it had on 30 January 2018 approved the rezoning to office but that the respondent's activities and use of the property conflicted with an office zoning in that no consent use had been sought or given and it was therefore allegedly illegal by virtue of that conflict.

[132] The pleadings thus expressly raised the rezoning application for the property (in the plea and counterclaim) to an office zoning which was pending at the time and remained pending after the pleadings closed. The assumption by the court below, that CoW's claim rested on a false premise because rezoning had already occurred when it was instituted, is incorrect. This incorrect assumption permeated the reasoning in expressing a view that the application to amend was bad on this ground, and also the reasoning employed in granting absolution. The replication and plea to the

counterclaim moreover plainly pleaded that the respondent's use remained in conflict with the scheme in the event of such a rezoning to office.

[133] The court below erred in failing to view the pleadings as a whole in considering CoW's case. This fatal flaw to the court's reasoning arose in the approach to the amendment and was carried through in its reasoning in granting absolution.

[134] When the claim was instituted, CoW claimed that the respondent's use conflicted with the zoning in the subordinate legislation governing his property. Even after the rezoning application was raised, CoW's pleaded case remained that the zoning sought in that application, namely office, would still mean that the respondent's activities and use remained unlawful. It sought to interdict that unlawful land use engaged in upon respondent's property, as it is enjoined by statutory scheme to do so. That was expressly pleaded in the replication and overlooked by the court below.

[135] That was also emphatically confirmed by CoW's sole witness in his testimony and not placed in issue in the unduly laborious cross-examination of Mr Rust. It was also acknowledged during that cross-examination by the court *a quo* that the activities of the respondent on the property were not covered by the rezoning to office and thus were contrary to the permitted use set out in the scheme. The court asked Mr Rust after he explained that the property was zoned office:

'Court: Yes but even, can I ask you this, even if the Defendant is successful in this case it will not change his zoning, he still needs the business zone. --- Your Honour yes he will still have to apply, submit to consent use application for the business consent, the business building consent.'

And later:

'Court (addressing respondent's counsel): The process, what I understand the process still will have to be followed to get business consent on office zones.

Mr Boonzaier: On office zones yet but it obviously he cannot (intervention).

Court: It does not matter, it does not matter what the outcome of this process is going to be, it is not going to grant him business consent on office rights.

Mr Boonzaier: Can I quickly take instructions? My Lady I think I have made it clear that, we cannot actually ask for business consent if the business, "ag" the office zoning has been promulgated, that is the point. We cannot ask for it.

Court: No why not?

Mr Boonzaier: Because this processes (intervention)

Court: Can you if you have office zoning, can you apply afterwards for business consent? --- Yes.

Mr Boonzaier: Yes.'

[136] Once the evidence established that the respondent's use of the property conflicted with its current and previous zoning and thus in direct conflict with the scheme, it would follow that a clear right to an interdict was established at least on a *prima facie* basis. The other requisites for a final interdict, namely an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy were also established on a *prima facie* basis at the very least. The evidence included correspondence directed by the respondent to CoW which revealed that respondent was throughout bent on continuing the allegedly unlawful activities on the property.

[137] Given the rezoning of the property to office, if criminal charges were to be pursued given the respondent, there would seem to be the need to give a further notice to cease to the respondent in terms of s 48 of the Ordinance as a precursor to criminal proceedings against him. That is possibly why a referral to the Prosecutor-General was no longer sought by CoW in respect of the current office zoning although it would not have had a bearing on whether the conduct itself constituted an offence at the time when the property was zoned residential and where a notice to cease had in fact been given. But for present purposes, the giving of a s 48 notice had no bearing on the legal question as to what the permissible land use was and the statutory duty upon CoW to prohibit conflicting use and for residents of the local authority area to comply with the permissible land use for their properties. That was correctly acknowledged in respondent's counsel during oral argument. The laying of criminal charges is but one remedy open to CoW. That would not however be a prerequisite to seeking an interdict against the prohibited land use.

[138] It follows that the evidence by CoW made out a *prima facie* case for the declaratory relief sought in prayer 1 of the particulars of claim which seeks an order:

'Declaring that the Defendant's conduct to operate a workshop selling tyres on erf 2533, Bach Street, Windhoek, Republic of Namibia without such erf being rezoned by the Plaintiff and without the Plaintiff's consent as unlawful.'

[139] Whilst the evidence of CoW also established a *prima facie* case for the interdict sought, its wording in prayer 2 of the particulars of claim would require adjustment along the lines of the amendment sought in the abortive amendment application. Prayer 2, as it is currently worded, claims an interdict in these terms:

'Interdicting the Defendant from continuing to operate a workshop on erf 2533, Bach Street, Windhoek, Republic of Namibia for as long as the aforesaid erf 2533 remains zoned as "residential".'

[140] Plainly CoW's evidence at the minimum made out a *prima facie* basis for an entitlement to that relief until the property was rezoned in July 2020 together with its costs to date, a fact overlooked by the court below. CoW obviously sought to interdict the current alleged unlawful conduct of the respondent which was likewise *prima facie* established by the evidence and not put in issue and indeed pointedly and correctly raised by the court below with respondent's counsel.

[141] Can the reasoning describing the attempted amendment to bring about that minor change to the pleadings as a major change of front stand up to scrutiny? In my view, not. The court considered that an application to amend for this reason enjoyed no prospects of success and this approach constitutes a central component of the reasoning underpinning the granting of absolution as reflected in the concluding two paragraphs of the court judgment:

'[14] Throughout the pleadings and also the evidence it was clear that the defendant had to meet a case based on the allegation that the erf on which he conduct his business, is zoned residential and as such not suitably zoned to conduct any business on it. He indeed was aware of an application for rezoning the said property for office rights but was never informed by the plaintiff that as such, the zoning will still not be correct, as they have indeed done at the time that the property was zoned residential in their letter dated 16 June 2017 headed notice to cease illegal activities. The court would have expected the plaintiff to, after the permission to change the zoning from "residential" to "office" was granted, again bring it to the attention of the defendant that the operations he conducted, are not operations that can be accommodated under the "office" zoning but need additional permission concerning the type of business being conducted.

[15] In this instance, the evidence provided by the plaintiff is that the defendant is conducting business activities on a property not correctly zoned for such activities. However, the investigation the plaintiff conducted was conducted at the time when the property was still zoned as “residential” and the plaintiff initially acted on that information and issued the 16 June 2017 warning. This was also the basis as set out in the particulars of claim of the plaintiff, which the plaintiff attempted to amend, and such amendment was not granted by this court, mainly for the reasons that it will change the whole case the defendant has to meet at a very late stage of the proceedings.’

[142] Quite why CoW would need to bring it to the attention of the respondent that his use of the property remained in conflict with the scheme, is not apparent. It is for the respondent to ensure his land use is in accordance with the scheme. Its clear terms show that an office zoning of its own would not cure the illegal use of the property. That was also borne out by Mr Rust’s evidence and accepted by the court below. Certainly if CoW wanted to press criminal charges for contravening an office zoning a further notice would be needed for a conviction after 31 July 2020. But the prohibited use is squarely set out in the scheme and CoW would be entitled to enforce the terms of the scheme by way of interdict and without resorting to criminal charges.

[143] Given the interrelationship between the indirect refusal of the amendment sought and the reasoning in granting absolution, the parties were invited to supplement their written argument to address the reasoning involved in declining the amendment, namely that the granting of the amendment sought would ‘change the whole case’ the respondent had to meet. In doing so this Court expressly pointed out the interlocutory nature of the ruling refusing condonation which meant that it could not be appealed against except with leave which had not been sought or granted. Counsel for both sides made use of that opportunity and the Court is indebted to them for their industry.

[144] It was argued on behalf of CoW that the court erred in effectively declining the amendment application and that this was linked to subsequently granting absolution from the instance. Counsel also argued that there was a material misdirection by the court below on the merits of the amendment application and that it failed to weigh up unsubstantiated prejudice against an appropriate cost order. Despite the court's reference to the interlocutory nature of the order, counsel for CoW sought its reversal in written argument but correctly did not persist with that in oral argument.

[145] Respondent's counsel had correctly pointed out that leave to appeal was needed for this Court to grant such an order. Counsel for the respondent supported the approach of the court below as to why it considered the application to amend as ill-fated. Counsel further contended that CoW 'as an administrative body had the responsibility to properly inform the respondent that the zoning had officially changed, and what the effect was on the use of the erf' and that that the respondent 'must be given an opportunity to respond to the changes of the zoning of the erf and (that the respondent) should have been informed if there are any issues in relation to the use of the property'.

[146] This approach which found some resonance in the approach of the court below in granting absolution unfortunately fails to appreciate the statutory regime and its structure applicable to zoning and land use in a local authority area.

[147] The use of property in the local authority area is governed by and restricted to the use as set out in the zoning accorded to it in the scheme. If a property owner seeks to use the property for a use not permitted by the applicable zoning, it is plainly incumbent upon that owner to seek a rezoning and an amendment to the scheme to

reflect the proposed use. Until and unless that is achieved, it is clearly unlawful for a property owner to engage in land use prohibited on that property. The respondent would appear to have purchased the property at a time when there was a pending application for rezoning to office in the name of the prior owner. It was the respondent's duty to establish which zoning would cover his proposed use and apply for that. The notion that he could simply do as he pleased until he was found out by the local authority flies in the face of the entire statutory scheme and amounts to a form of self-help which, if left unchecked, would result in chaos in urban planning and is abhorrent to the rule of law.

[148] CoW is furthermore not the ultimate decision-maker in a rezoning application. It is the Minister. His decision is proclaimed in the gazette. The respondent was at that time represented by both a town planner and a legal practitioner in relation to the issue.

[149] There is simply no basis whatsoever to contend that the respondent should 'be given an opportunity to respond to the changes' in respect of a rezoning application which he had adopted as his own, as is clear from his plea. He had after all sought that change, as is confirmed by his plea. Quite what that 'opportunity' should entail was not explained. Nor can it be in the context of a statutory scheme. Nor is apparent what he should 'respond to' and quite what is meant by it 'if there are any issues in relation to the property'. These notions are premised on an entirely flawed understanding of the operation of the scheme and land use in that regulated environment.

[150] As for the approach to be taken to the proposed amendment, the principles governing the granting of amendments were recently summarised by this Court in *Municipal Council of Windhoek v Pioneerspark Dam Investment CC*¹⁹ which was also cited and accepted by the court below. Certain of the core principles can be shortly stated.

[151] It is to be stressed that a court may, in the exercise of its discretion, grant an amendment at any stage of the proceedings.²⁰ It has however been made abundantly clear, and rightly so, that the previous liberal attitude of the courts to grant amendments at a late stage no longer applies after the introduction of JCM.²¹ That is because of a shift in approach from doing substantial justice between the parties to the administration of justice overall. This Court however in *Pioneerspark Dam* emphasised that 'doing substantial justice between the parties, although no longer the dominant and primary consideration, remains of considerable importance but is to be considered within the objectives of JCM, with late amendments being subjected to greater scrutiny because of the deleterious effect upon the administration of justice'.²²

[152] This Court also stressed that the seeking of an amendment is an indulgence and requires an explanation as to why it is sought. Requiring that explanation under oath would depend on the circumstances, especially where the amendment is of a substantial nature in the context of the litigation whilst the correction of a typographical error or an obvious error of calculation may not require an explanation under oath.²³

¹⁹ *Pioneerspark Dam* paras 33-40.

²⁰ Rule 52(a) of the Rules of the High Court.

²¹ See *IA Bell Equipment and Pioneerspark Dam* para 35.

²² *Pioneerspark Dam* para 35.

²³ P. T. Damaseb *The Supreme Court of Namibia: Law Procedure and Practice* (2021) at 102-103 as approved of in *Pioneerspark Dam* para 37.

[153] As was also stressed in *Pioneerspark Dam*,²⁴ a party seeking an amendment would, in addition to the guiding principles set out in *IA Bell Equipment*, should show that there was not an undue delay in giving notice to amend after becoming aware of the evidentiary material and also that the amendment raises a triable issue, which if established on evidence foreshadowed by the proposed amendment will be viable or relevant. The court further stated:

'Following the advent of JCM, where an amendment is sought at a late stage of proceedings, an applicant should also be required to indicate how it proposes to establish its amended case and its prospects of succeeding with the new cause would properly be elements in the exercise of the court's discretion, as was expressed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & another*²⁵ where the court concluded, (as is accurately translated in the headnote):²⁶

"The greater the disruption caused by an amendment, the greater the indulgence sought and, accordingly, the burden upon the applicant to convince the Court to accommodate (it)."²⁷

[154] In this matter, the rezoning application was referred to in the pleadings and the consequence of the rezoning is also expressly pleaded – that in the event of rezoning to office the respondent's use of the property remained in conflict with the permissible uses for that property set out in the scheme and was thus unlawful.

[155] The witness statement of Mr Rust given in the course of JCM and made more than ten months before the start of the trial included a statement to this effect:

'Despite the fact that the erf 2533 is now rezoned for office purposes, unfortunately the activities listed as they relate to properties rezoned for office purposes do not make

²⁴ Paragraph 40.

²⁵ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & another* 2002 (2) SA 447 (SCA).

²⁶ At 450C-D.

²⁷ Paragraph 42.

provisions for the type of business activities in which the defendant is engaging in which is predominately the selling and repairing of tyres.' (*sic*)
(Emphasis supplied)

[156] Rezoning occurs when proclaimed in the gazette. That occurred on 31 July 2020, more than a year before the start of the trial and after the closure of pleadings.

[157] CoW's legal practitioner should have been alerted to the need for an amendment to the particulars of claim to reflect the change in zoning after the gazette was published and certainly after Mr Rust's witness statement was minuted and filed in December 2020. A notice to amend should then have been given. But respondent's lawyers were alerted to the change of zoning, expressly adverted to in Mr Rust's witness statement in December 2020. Furthermore that rezoning occurred on 31 July 2020 when published in the gazette. The respondent was at the time legally represented and assisted by an expert witness in planning matters. The rezoning application was moreover itself raised by the respondent in the pleadings. There can be no proper basis for any surprise at this development expressed during Mr Rust's evidence by the respondent and his representatives.

[158] The outcome to the rezoning application (in the form of the amended scheme and gazette) was thus directly foreshadowed in the pleadings (and was of course sought by the respondent) and evidence relating to it was not objected to and in fact was later amplified on behalf of the respondent when the amended scheme and gazette were adduced during cross-examination.

[159] The protestations of prejudice raised in the opposition to the amendment application (over and above costs which were tendered) were both unsupported and

untenable. There could be no real prejudice apart from minor further consequential amendments – all of which could and should have been finalised in the space of an hour or two or a day at the most instead of the massive wastage of court time and costs caused by the approach taken on behalf of the respondent in an exercise of maladroitness which distracted the court below into affording unnecessary time and causing unnecessary delay and disruption to the working of the High Court and considerable extra costs, both private and public, where they were not warranted. The massive advantage brought about by JCM is the flexibility it affords the managing judge to control proceedings so as to ensure that both public and private resources and costs are not wasted by permitting parties to draw out proceedings unnecessarily. The objectives of JCM were grievously undermined by the unduly drawn out application to amend insisted on by the respondent when the issue was self-evidently capable of quick and expeditious resolution in accordance with the objectives of JCM.

[160] There was thus no significant prejudicial ‘change of front’ in CoW’s case which would be brought about by an amendment which had been expressly foreshadowed by the factual allegations made and admitted in the pleadings. Its case remained that the respondent’s use of the property conflicted with the applicable zoning, despite the change in zoning which occurred after the action was instituted. That selfsame use of the property was also, even on the respondent’s case, in conflict with the scheme, given the lack of consent use, and as a consequence was at least on a *prima facie* basis prohibited and to be interdicted.

[161] The approach adopted with regard to the amendment application, stemming from an incorrect analysis of the pleadings and viewing the particulars of claim in isolation, was thus unsound and unfortunately permeated the reasoning in thereafter

incorrectly granting the application for absolution from the instance. The latter is to be set aside as there was evidence upon which the court below could or might find for CoW as set out.

[162] Fortunately the court below has not made a final ruling on the question of an amendment and is not *functus officio* on that question. It merely declined condonation for the late bringing of that application, correctly capping the costs, although expressing views concerning the need for and the impact of an amendment which are incorrect. That aspect can, if the parties are so minded, be addressed in further JCM.

Condonation and reinstatement

[163] Given the merits of the appeal, it follows that condonation for the late filing of the record and reinstatement of the appeal are to be granted.

Costs

[164] There are several unfavourable features relating to the manner in which this litigation has been conducted, reflecting adversely upon the practitioners on both sides. There is the late filing of the record on the part of CoW. There is also the incomplete state of the record with the important pre-trial minute missing and the inclusion of transcribed oral argument for which both parties are to blame, given the terms of the rule 11(10) minute and the joint failure to ensure that a complete and proper record is provided. This Court's displeasure at the blemishes concerning the filing of the record and its state is reflected in the cost order.

[165] A respondent may on occasion be awarded the costs of opposition to condonation where that opposition is not unreasonable. Opposition to condonation

where there is an inadequate explanation would ordinarily qualify for that eventuality. But given his unduly argumentative and abusive answering affidavit, this is not such an occasion. The hopelessly inadequate explanation for the late record and its defects likewise disentitle CoW from being awarded any costs in respect of condonation.

[166] As for the appeal itself, I see no reason to deviate from the general rule that costs follow the result, except with regard to the costs of preparing and filing the appeal record. There were two legal practitioners engaged within the firm representing CoW and I see no reason why the costs of two practitioners should not be granted where they were both engaged, given the ambit of this appeal.

Conclusion

[167] It follows that the appeal succeeds.

Order

[168] The following order is made:

1. Condonation for the late filing of the record is granted.
2. The appeal is reinstated.
3. The appeal succeeds with costs to include the costs of two legal practitioners where engaged, except that the appellant will only be entitled to two-thirds of its costs in respect of preparing and filing the record of appeal.
4. No order as to costs is made in respect of the condonation and reinstatement application.
5. The order of the High Court is set aside and replaced with the following:

‘Application for absolution from the instance is refused with costs.’

6. The matter is referred back to the trial judge for further judicial case management consistent with this judgment.

SMUTS JA

UEITELE AJA

PRINSLOO AJA

APPEARANCES

APPELLANT: E M Angula, with her D Doëseb
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RESPONDENT: M G Boonzaier
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