

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

Case No.:I 4274/2013

In the matter between:

**KRUCOR INVESTMENT HOLDINGS (PTY) LTD  
T/A PROFESSIONAL FARMING APPLICANT**

and

**ESTIE KWENANI (born EBERENZ)**

**RESPONDENT**

Neutral Citation: *Krucor Investment Holdings (Pty) Ltd t/a Professional Farming v Kwenani* (I 4274/2013) [2021] NAHCMD 563 (30 November 2021).

**CORAM: MASUKU J**

**Heard on:** 21 October 2021

**Delivered on:** 30 November 2021

**Flynote:** Civil Procedure - application for stay of execution pending the condonation and reinstatement of an appeal before the Supreme Court – applicant to show that it has prospects of success regarding both the condonation application and appeal – prospects of success considered to be weighty even though reason for non-compliance proves to be insufficient.

**Summary:** The applicant before court lodged an application for stay of execution of an order granted in 2020. However, in the interregnum, the appeal filed in the Supreme Court lapsed. This was because of the applicants' failure to lodge the appeal record on time. The applicant attaches this failure to the lengthy period it took for the judgment sought to be overturned, to be delivered and the delay in the transcription of the record of proceedings. The application is opposed. The court, in considering the parties arguments, found as follows:

*Held:* that the application is two-fold, firstly the applicant ought to prove that its prospects of success in both the condonation application and that of the appeal.

*Held that:* a lot of weight is accorded to the prospects of success on appeal even in the absence of a plausible explanation in respect of the condonation sought for the applicants' non-compliance.

*Held further that:* the applicant has satisfied the requirement for irreparable harm it will suffer if the application for stay is refused and the condonation and reinstatement application together with the appeal succeeds.

*Held further that:* the applicant has demonstrated good prospects of success on appeal.

*Held:* that the Supreme Court has the ultimate discretion on whether or not to grant the application for condonation, the exercise of that discretion equally highly influenced on the prospects of success of appeal.

The court granted the application for stay of execution of the order and ordered the applicant to pay the costs of the application.

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**ORDER**

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1. Pending the Defendant's application in the Supreme Court of Namibia for condonation and the re-instatement of its appeal against the judgment of her Ladyship Ms Acting Justice Angula of 9 March 2020, an order is issued:
  - 1.1 suspending the execution of the judgment and the order issued pursuant thereto;
  - 1.2 staying any warrant issued pursuant to the said judgment or the order.
2. The Applicant is hereby ordered to pay the costs of the Respondent, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

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**RULING**

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**MASUKU J:**Introduction

[1] This is an application for suspension of the execution of a judgment and order issued by Angula, AJ on 9 March 2020 and a subsequent warrant of execution obtained as a result of such order pending the applicants' application for condonation and reinstatement of the appeal in the Supreme Court of Namibia.

### The parties

[2] The applicant is Krucor Investment Holdings (Pty) Ltd t/a Professional Farming, a company duly incorporated in terms of the company laws of Namibia, with its place of business situate at Cnr. Of Sam Nujoma & Hosea Kutako Drive, Windhoek. The respondent is Ms. Estie Kwenani (born Eberenz), an adult female resident in Windhoek.

### Background

[3] The parties have been embroiled in litigation for quite some time. This is the third ruling that I am required to deliver in this matter. This matter initially commenced as an urgent application but because of its fundamental flaws and non-compliance with the rules and practice directives of this court, that application was struck from the roll and the matter was heard in the normal course.

[4] The matter commenced as an action in which the respondent claimed eviction of the applicant from farms Rooiwal-Oos and Teenspoed, respectively. The trial served before Angula AJ, who eventually found for the applicant and she issued the following order:

- '1. It is hereby declared that the option contained in the lease agreement (annexure A to the particulars of claim) is null and void.
2. The Defendant is ejected from the premises or the aforesaid properties being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares as set out in paragraph 5.1 hereof;
3. The Defendant is ordered to vacate the premises being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares within 21 days from date of this court's order;
4. In the event that the Defendant does not vacate the aforesaid premises or the aforesaid properties being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares in compliance with this Courts order as set out

in prayer 2 hereof, the Deputy sheriff of the Magisterial District of Rehoboth is hereby ordered to immediately evict the defendant from the aforesaid premises.

5. The Defendant is ordered to pay the Plaintiff occupational rent in the amount of N\$ 20 000.00 per month or N\$ 204 000 per year computed from 1 May 2013 to a date the defendant vacates the premises.

6. The Defendant is ordered to pay interest on the aforesaid amount at the rate of 20% per annum calculated from the date of judgment to date of final payment.

7. The Defendant is ordered to pay the Plaintiff's costs, such costs to include costs of one instructing counsel and one instructed counsel.'

[5] Dissatisfied with this judgment and order, the applicant noted an appeal to the Supreme Court as of right. It, however, failed to file the record and the appeal was in terms of the Supreme Court rules, deemed to have been abandoned, and this notification was given to the applicant by the Registrar of the Supreme Court.

[6] As a result, the respondent commenced with proceedings to give effect to the judgment because the appeal had been deemed abandoned. With execution processes afoot, the applicant filed an application for condonation for the late filing of the appeal before the Supreme Court and for an order re-enrolling the appeal. Both these applications are pending before the Supreme Court.

[7] In order to keep its access to the Supreme Court open and maintaining the *status quo*, the applicant approached this court seeking an order staying execution of the judgment in question. This application was vehemently opposed by the respondent. It is the sustainability of that application that this court is called upon to determine.

#### The applicant's case

[8] The order that the applicant seeks to appeal emanates from a lease agreement in respect of rental of the respondent's farms. In this connection, the parties entered into a lease agreement commencing from 01 May 2003 to

30 April 2013. This lease was however subject to renewal at the instance of both parties subject to the negotiation of the rental amount. The parties upon negotiating the rental amount experienced some difficulties. This is because the applicant alleges that the defendant intended on unilaterally increasing the rental amount from N\$ 120 000 to N\$ 240 000 per annum.

[9] The matter proceeded to trial where the respondent sought an eviction order. This was successful. The trial was concluded during February 2016 however the judgment was delivered three years later in March 2020. The applicants moved out of the farm during November 2020. The eviction order was coupled with payment of occupational rent of N\$ 20 000 as of May 2013 to the date of vacation of the property. It is clear that the bone of contention on appeal does not relate to the eviction of the applicant from the farms in question as the applicant actually vacated the farms. The appeal is directed at the payment of occupational rent ordered by the court.

[10] The applicant contends that its failure to file the appeal record was the reason the appeal lapsed. This is so because Hibachi, the transcription company, could not obtain the recordings of the first day of trial. It further contends that as a result of the three years gap after the finalisation of the trial, it slipped its mind that the record had in actual fact been transcribed before closing arguments were heard at trial.

[11] The applicant contends that whether this explanation or reason proffered is good, bad or indifferent, it should be viewed in terms of the context of the good prospects of success it has on appeal. If this is done, further contends the applicant, it should mean in almost certain that its application for condonation will be granted and the appeal upheld.

[12] The applicant contends that the appeal has merit and the prospects of success are high. This is so because the applicant contends that the respondent claimed occupational rent of N\$ 20 000 per month based on the applicant's unlawful occupation of the farms whereas at no point during the trial did the applicant adduce expert evidence to illustrate the reasonable

value of the use of farms, this despite allegations from the applicant that the rent mentioned was not market related.

[13] The applicant further contends that the balance of convenience favours it and that it will suffer irreparable harm if forced to pay the amount set out in court order. This will be the case particularly if it is held on appeal that indeed it was entitled to occupation and use of the farms.

#### The respondent's case

[14] The respondent has raised several points in *limine*, most of which relate to the issues taken over by events, i.e. the urgent application which was subsequently struck because of these points raised. In so far as it relates to the urgent application this court will not consider those points raised.

[15] In a nutshell, the respondent contends that this court has no jurisdiction to determine default for the non-compliance. This is coupled with the fact that the applicant has failed to diligently take all reasonable steps that would have prevented the execution of the judgment.

[16] The respondent extensively took issue with the unexplained timeline in the applicant's papers in so far as filing the record is concerned. This it contends, is indicative of the lack of due diligence on the part of the applicant.

#### The Replying Affidavit

[17] There appeared to me much contestation regarding the replying affidavit before court. The respondent took issue with it. The respondent contends that the application was filed without leave from this court and the timeframe to file it as prescribed in terms of Rule 66 had lapsed. This affidavit was filed in 2021, whereas this application was filed in 2020. I do not find it necessary to deal with this particular issue.

### Determination

[18] In presenting its argument, the applicant relied on *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia*<sup>1</sup> where the court at paragraph 20 expressed itself as follows:

‘The question arises as to whether the applicant has established that the dictates of real and substantial justice require a stay in execution pending the outcome of the application for condonation and reinstatement of the appeal. The applicant would in my view bear the onus to establish that there are grounds for the exercise of the discretion vested in this court in its favour by establishing a proper case for the stay in execution. If at the end of the hearing the court would be in doubt as to the essential facts or whether it was an appropriate case for the grant of a stay, then it would seem that should be refused. Special circumstances would need to be established with the overriding principle being that an applicant would need to establish that substantial justice would require a stay so as to avoid irreparable damage to either of the parties. This would inevitably give rise to weighing the prejudice and harm to be sustained by the parties if the relief were to be granted or refused together with the prospects of success of the application for condonation and reinstatement of the appeal, the latter being a highly relevant factor in that weighing up process. The prospects of success of the application for condonation and for reinstatement entail two distinct components, namely whether a reasonable and acceptable explanation has been given for the failure to comply with the Supreme Court Rule in question and secondly the merits of the appeal itself.’

[19] In considering and applying the above quotation, it is clear that the principle to be applied is two-fold. The applicant is firstly required to show that it has prospects of success in the condonation and reinstatement of the appeal before the Supreme Court. Secondly, that it enjoys prospects of success regarding the appeal. In so doing, an applicant must illustrate the irreparable harm he or she is to stand to suffer should the application for stay be refused. Ordinarily, much weight is accorded to the prospects of success on appeal.

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<sup>1</sup> *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* 2014 (1) NR 22 (HC)



[20] The damages in question granted in the order sought to be stayed by the applicant are in the amount of N\$ 1 820 000. This is, by any standard, a large amount and the applicant contends that should the stay be refused, its assets will have to be sold in execution. The applicant claims that once these assets have been sold, the likelihood of the applicant recovering these assets is slim should the appeal be upheld. This has not been effectively gainsaid by the respondent.

[21] Accordingly, this in my view, meets the threshold of irreparable harm that an applicant is required to show. The order granted in favour of the respondent makes provision for interest to be levied at the rate of 20% per annum, from the date of judgment. This interest ordered serves to ameliorate the prejudice to be suffered by the respondent, should the appeal fail.

[22] It is not sufficient that the applicant accords its failure to lodge the appeal to the fact that there was a delay in the delivery of judgment. It cannot be said that because of this delay it slipped the applicant's mind that there had been a previous transcription of the record of proceedings. The rules of court allow for an applicant to seek an extension for the filing of the prescribed record of proceedings. This was an option open to the applicant, which it elected not to exercise.

[23] Be that as it may, sight should not be lost to the fact that this aspect of condonation is only but one factor. As seen in the *Witvlei* judgment, a lot of weight is accorded to the prospects of success of the appeal proper. The Supreme Court is vested with the ultimate discretion to condone this failure of filing the appeal record timeously.

[24] This court, after considering the arguments advanced, is at one with the applicant in so far as the prospects of success on appeal are concerned. The applicant, in this connection, relied on the matter of *Hydrop Investments*

*Ltd and Another v NCS Carriers and Forwarding CC and Another*,<sup>2</sup> where the court enunciated the applicable law at paragraph 48 as follows:

'In summary: the simple fact that the occupier has no lawful right to remain in occupation after the lease expires is an incidence of contractual law and is *per se* a wrongful act under delict. In both cases the measure of damages is identical (market related) because they flow naturally from the breach and are also reasonable foreseeable as a consequence of the wrongful act.'

[25] The applicant raised a relevant point, that is to say that the amount of occupational rent granted by the trial judge as the market value during such time of occupation does not appear to have been substantiated by relevant expert evidence at trial. In this regard, the learned trial judge said the following in her judgment:<sup>3</sup>

'I am unable to find the amount which is reasonable as compensation other than the rental amount which the plaintiff had offered to the defendant.'

[26] It goes without saying that the respondent was required during the trial to prove that indeed this amount claimed and subsequently granted by the court represented the market value of the property. I am of the view that in the absence of such expert evidence, the Supreme Court may find it appropriate to uphold the appeal. I am therefore satisfied that a case has been made out for the existence of prospects of success on appeal in this matter.

[27] I am bound by the sentiments expressed in the matter of *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others*,<sup>4</sup> where it was held 'that the parties must be heard, particularly because of the existence of reasonable prospects of the appeal succeeding and the importance of the case to all the parties.'<sup>5</sup>

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<sup>2</sup> *Hydrop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another* 2013 (4) SA 607 (GSJ)

<sup>3</sup> *Kwenani v Krucor Investment Holdings (Pty) Ltd t/a Professional Farming* (Case No: I 4273/2013) [2020] NAHCMD 110 (9 March 2020), at para 69.

<sup>4</sup> *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 (SC)

<sup>5</sup> *Ibid* p. 479C, para [25].

[28] The applicant contends, and I agree with it, that there are prospects of success on appeal, which may result in the Supreme Court granting condonation and re-instatement of the appeal even in the face of an unsatisfactory explanation for the failure to comply with the rules of the Supreme Court.

[29] I need to say a word about the amended notice of motion filed by the applicant. In it, the applicant included a prayer in terms of which it sought an order for the respondent to pay security for costs in the amount of the judgment in the event the order of this court is carried into effect pending the outcome of the appeal. It seems odd that such a prayer could have been sought as it is normally the appellant, against whom an existing order stands, that provides security for the payment of the amount of the judgment, should the appeal not succeed.

### Conclusion

[30] In view of the analysis above, together with the court's findings and conclusions, I am satisfied that the applicant has made out a case regarding the existence of reasonable prospects of success on appeal and it is for this reason that I find that this application should succeed.

### Costs

[31] Counsel for the applicant prayed for costs occasioned by the respondent's opposition. This for me is unjustified in the circumstances. I say so because had the appeal not lapsed in the Supreme Court, as a result of the applicant's inattention, the execution of the order would have automatically been stayed, pending the outcome of the appeal. We find ourselves in the predicament we face today due to the neglect of the rules of the Supreme Court by the applicant. The respondent's opposition in this matter was in no way frivolous, vexatious or unreasonable. The respondent was clearly desirous of tasting the fruits of her judgment.

[32] It must be recalled that a party seeking the stay of execution on account of its failure to comply with the rules, is essentially craving an indulgence from the court, which the court will, in exercise of its discretion, grant in appropriate cases. It accordingly follows that the applicant should bear the costs of this application, seeing that the application was necessitated by the remissness of the applicant regarding compliance with the Supreme Court rules.

### Order

[33] In view of the discussion and conclusions made above, I accordingly make the following order:

1. Pending the Defendant's application in the Supreme Court of Namibia for condonation and the re-instatement of its appeal against the judgment of her Ladyship Ms Acting Justice Angula of 9 March 2020, an order is issued:
  - 1.1 suspending the execution of the judgment and the order issued pursuant thereto;
  - 1.2 staying any warrant issued pursuant to the said judgment or the order.
2. The Applicant is hereby ordered to pay the costs of the Respondent, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku  
Judge

## APPEARANCES:

APPLICANT: H. Steyn  
Instructed by: Kruger, Van Vuuren & Co

RESPONDENT: D. Khama  
Instructed by: Sibeya & Partners