



NOT REPORTABLE

CASE NO: SA 68/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ONAMAGONGWA TRADING ENTERPRISES CC

Applicant

and

MINNESOTA TRADING ENTERPRISES GROUP

Respondent

Coram: SMUTS JA

Heard: IN CHAMBERS

Delivered: 24 September 2020

JUDGMENT IN TERMS OF S 14(7)(a) OF ACT 15 OF 1990

SMUTS JA:

[1] This is an application brought by the respondent in this appeal under s 14(7) of the Supreme Court Act 15 of 1990 (the Act), read with rule 6 of the rules of this court for the summary dismissal of the appellant's appeal on the grounds that it is frivolous and vexatious or has no prospects of success. The

respondent/applicant also seeks costs of this application. (For the sake of convenience and clarity, the parties are referred to as respondent and appellant and also as plaintiff and defendant, respectively).

[2] Section 14(7) of the Act provides:

- '(a) Where in any civil proceedings no leave to appeal to the Supreme Court is required in terms of any law, the Chief Justice or any other judge designated for that purpose by the Chief Justice –
 - (i) may, in his or her discretion, summarily dismiss the appeal on the grounds that it is frivolous or vexatious or otherwise has no prospects of success; or
 - (ii) shall, if the appeal is not so dismissed, direct that the appeal be proceeded with in accordance with the procedures prescribed by the rules of court.
- (b) Where an order has been made dismissing the appeal on any of the grounds referred to in subparagraph (i) of paragraph (a) of this subsection, such order shall be deemed to be an order of the Supreme Court setting aside the appeal.
- (c) Any decision or direction of the Chief Justice or such other judge in terms of paragraph (a) of this subsection, shall be communicated to the parties concerned by the registrar.'

[3] The procedure for bringing applications under s 14(7) is set out in rule 6 of the rules of this court.

[4] The respondent served its notice of motion and founding affidavit on 2 September 2020 upon the appellant. Despite being called upon to file an

answering affidavit under rule 6(3) within ten days of that service, no answering affidavit was filed by the appellant within that time or to date.

[5] Having been designated to determine the application under s 14(7) of the Act, I do so under rule 6(4)(a) in chambers on the notice of motion and founding affidavit and annexures seeing that the appellant has not seen fit to oppose this application and file an affidavit under rule 6(3) within the time period of ten days.

[6] Shortly stated, the background facts are these.

[7] The respondent (plaintiff) instituted an action against the appellant (defendant) in March 2020 for payment of N\$731 400 together with interest and costs in respect of services rendered by the plaintiff to the defendant. The defendant entered an appearance to defend and the matter proceeded to judicial case management. After case planning, the High Court made an order of court on 6 May 2020, requiring that the plaintiff file its summary judgment application by 27 May 2020 and that the defendant file its answering affidavit by 17 June 2020 and postponed the case to 1 July 2020 for a status hearing.

[8] The defendant however failed to file an answering affidavit to the summary judgment application. On 1 July 2020, the High Court postponed the summary judgment application for hearing to 9 July 2020. The defendant was represented by a legal practitioner on that occasion.

[9] On 9 July 2020, the High Court heard the application for summary judgment. The defendant was also represented in court when that application was

moved. The court granted summary judgment in favour of the plaintiff in the sum claimed together with interest and costs on that same day (9 July 2020).

[10] The plaintiff's representative proceeded to cause a writ of execution to be issued on 15 July 2020.

[11] The Deputy Sheriff executed the writ on 12 August 2020 and made an attachment of moveable goods.

[12] The defendant thereafter on 17 August 2020 filed a notice of appeal against the order. This was done out of time as the days for noting an appeal expired on 7 August 2020. The notice was not accompanied by an application for condonation, although para one of the notice seeks condonation for non-compliance with the rules of this court. The notice further complained that the writ was 'an infringement of appellants' constitutional right to a fair trial in terms of Art 12 of the constitution' without specifying any basis for this assertion. It is also stated in the notice of appeal that the appellant 'became aware for the first time of the court order of 15 July 2020 on 11 August 2020'. This despite the order reflecting that its legal practitioner, Mr Awaseb, was present during those proceedings and the uncontested evidence of the respondent's (plaintiff's) legal practitioner to that effect. The notice further contends without any factual basis that the plaintiff's legal practitioners did not have a mandate to issue summons. The notice of appeal also asserts that 'the court *a quo* erred to apply its mind to the matter placed before it by means of a combined summons in that it failed to exercise authority to enforce delegated legislation *inter alia* the rules of court'. It is also contended that this matter was of 'a labour nature' and should have been brought in the Labour court.

[13] The facts set out in this application are not contested. The defendant failed to take issue with the plaintiff's practitioner's mandate when it had an opportunity to do so. It failed to place any factual material before the High Court or this court in that regard, except referring to trite legal precedent in the notice of appeal. In fact, the defendant's unsupported assertion about authority in the notice of appeal is squarely gainsaid under oath in this application by the sole member of the plaintiff. That statement has not been contested by the defendant despite the opportunity to do so. This affidavit would in any event constitute ratification of the proceedings even if they were unauthorised which is not by any means established [*Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA)]. The defendant does not take issue with the formulation of the plaintiff's claim. The claim is for services rendered and the High Court plainly had jurisdiction to hear and entertain it. In short, the defendant did not properly raise any tenable defence to it when it had the opportunity to do so and while legally represented.

[14] In short, not a single tenable ground is raised in its notice of appeal or in answer to this application why summary judgment should not have been granted. Indeed, this application is unopposed and the averments in the founding affidavit are unchallenged.

[15] Whilst inference would appear to be inescapable that the defendant's notice of appeal has been filed for the purpose of delay and to frustrate the plaintiff's execution of its judgment duly given by the High Court and would thus constitute an abuse of process, an application under s 14(7) and rule 6 presupposes an appeal pending in this court. The failure to file the notice of appeal in accordance with rule 7 of the rules of this court means that there is currently no appeal

pending in this court. The fact that reference is made in the notice of appeal to condonation for this non-compliance does not avail the appellant. There remains no appeal pending. The mere reference in the notice of appeal to condonation in any event does not amount to an application for condonation. The notice of appeal filed by the appellant thus has no legal effect and would, of its own, certainly not be any bar to execution of the High Court judgment.

[16] Despite the plaintiff/respondent establishing the other elements of s 14(7) of the Act, applications under that section presuppose a pending appeal which is not the case in this matter. An order under that section can only be given in respect of pending appeals which this is not. It follows that this application cannot be granted and is to be declined. It was not opposed and no order is made as to costs.

[17] The following order is made:

1. The respondent's application in terms of rule 6 is declined.
2. No order is made as to costs.
3. The registrar is directed to comply with s 14(7)(c) of Act 15 of 1990.

APPEARANCES

APPLICANT:

H Awaseb

Of Awaseb Law Chambers,
Windhoek

RESPONDENT:

R P Behrens

Of Behrens & Pfeiffer, Windhoek