



REPORTABLE

CASE NO: SA 81/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**WS TRADING AND INVESTMENT CC
ALEXINE ALEXIA JEJA
ELIAS JEJA
ELTON JEJA**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant**

and

CAPX FINANCE NAMIBIA (PTY) LTD

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 7 July 2021

Delivered: 15 July 2021

Summary: The High Court granted default judgment against the appellants in the amount of N\$1 294 048,73 plus interest and costs in favour of the respondent on agreements not stamped in accordance with s 12 of the Stamp Duties Act 15 of 1993 (the Act). An application in terms of rule 108 of the High Court Rules to declare the encumbered property executable was opposed by the appellants on the ground that the respondent had not complied with the Act. Relying on *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others* 2017 (4) NR 1173 (SC), the court *a quo* found that although the respondent had not complied with the Act when it applied

for default judgment it corrected this failure which cured the non-compliance. The court found that the default judgment was valid and dismissed the appellants' opposition.

The issue on appeal is the validity of the default judgment.

This court finds that the approach in *Denker* and that in *Lee & another v Tobias & another* [2017] NAHCMD 204 (31 July 2017) applies. An unstamped document can be stamped retrospectively and even after judgment or on appeal.

The appeal is dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] At issue in this appeal is the validity of a default judgment granted on agreements not stamped in accordance with the Stamp Duties Act.¹

Factual background

[2] The High Court on 8 June 2018 granted judgment by default against the appellants in the amount of N\$1 294 048,73 plus interest and costs in favour of the respondent.

[3] The judgment debt arose from a loan agreement between the respondent and first appellant, secured by deeds of suretyship concluded by the second, third and fourth appellants respectively, binding themselves as sureties and co-principal debtors with the first appellant to the respondent. The loan was further secured by

¹ Act 15 of 1993 (the Act).

the registration of a mortgage bond in the deeds registry over farm Renosterkom No. 650 (the farm).

[4] After the High Court granted judgment by default, the respondent applied for an order declaring the encumbered property (the farm) executable in terms of rule 108 of the Rules of the High Court. The appellants opposed this application. The only ground of opposition persisted with on appeal is that the respondent had not complied with the Act (by not stamping the instruments relied upon for default judgment) and that the default judgment was null and void as a consequence.

[5] When the respondent was alerted to this non-compliance, it made good that failure by affixing the required stamps and penalty stamps as provided for in the Act. This was done prior to the hearing of the rule 108 application.

The approach of the High Court

[6] In dealing with the application in terms of rule 108, the High Court referred to *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others*² where a similar issue (of non-compliance with the Act) was raised and where this court held:

‘The High Court’s approach as regards the effect of non-compliance with the Stamp Duties Act accords with the modern trend in interpreting a provision which places an obligation on a legal actor to do something. That approach is to consider if the legislative intent was to visit non-compliance with a nullity. The learned judge approached the matter on correct principle. He held:

“I am of the view that the existence of sections 12 and 13 [of the Stamp Duties Act] is an indication that the legislature did not intend that if a document is not stamped such failure would lead to a nullity of the document. I am of the further view that the court when faced with a

² 2017 (4) NR 1173 (SC).

document which is not stamped may order that the document be stamped in accordance with the Stamp Duty Act, 1993.”³

[7] The High Court found that, although the respondent had not complied with the Act when applying for default judgment, it made good this failure which had the effect of curing the non-compliance and dismissed the contention that the judgment by default was invalid.

[8] The High Court proceeded to declare the farm executable with costs.

Submissions on appeal

[9] The appellants rely on s 12 of the Act for their submission that the default judgment was a nullity. This provision reads:

‘Save as is otherwise provided in any law, no instrument which is required to be stamped under this Act shall be made available for any purpose whatsoever, unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law, except –

- (a) in criminal proceedings; or
- (b) in any proceedings by or on behalf of the State for the recovery of any duty on the instrument or of any penalty alleged to have been incurred under this Act in respect of such instrument:

Provided that the court before which any such instrument is so produced, given or made available may permit or direct that, subject to the payment of any penalty incurred in respect of such instrument under section 9(1), the instrument be stamped in accordance with the provisions of this Act and upon the instrument being duly stamped may admit it to be produced or given in evidence or made available.’

³ Para 48.

[10] It was argued on behalf of appellants that the court granting default judgment failed to direct that agreements be stamped subject to the payment of penalties. Appellants' counsel contended that the court seized of the default judgment application was required to make an order requiring the agreements to be stamped. The argument proceeded to the effect that by admitting those agreements into evidence without making such an order tainted the legality of the default judgment. In support of this contention, the appellants rely upon *TransNamib Ltd v Poolman & others*.⁴ It was also argued that Masuku, J erred by failing to make any order to permit or direct the stamping of the instruments and without such an order the default judgment was a nullity.

[11] The appellants' counsel further argued that the approach taken by the High Court in *Lee & another v Tobias & another*⁵ that an unstamped document could be stamped subsequently is patently wrong and sought to distinguish the approach of this court in *Denker*, contending that there was a different factual matrix in this matter.

[12] Respondent's counsel supported the approach adopted by Masuku, J in the court below and argued that *Denker* found application. It was further argued that when the application under rule 108 served before Masuku, J it was open to the court to permit the stamping pursuant to s 12.

Disposal

⁴ 1999 NR 399 (SC) at 409F-G.

⁵ (HC-MD-CIV-ACT-CON-2016/04131) [2017] NAHCMD 204 (31 July 2017).

[13] In *Denker* a share transfer instrument had not been stamped as is prescribed by the Act. The appellant in that case contended that the unstamped instrument could not validly transfer shares and was invalid by virtue of non-payment of the required stamp duty. The High Court in that matter (per Ueitele, J) considered the scheme of the Act overall and concluded that nullity of the transaction was not what the legislature intended in the event of this form of non-compliance.⁶ This court in *Denker* found that the High Court's approach was sound and concluded in the terms quoted by Masuku, J in the court *a quo*, set out in para 6. The approach endorsed by this court in *Denker* included specific reference to s 12 of the Act.

[14] The High Court in *Lee & another v Tobias & another*⁷ reached the same conclusion prior to this court's decision in *Denker*. Miller, AJ in *Lee* held, with reference to South African authority⁸ in respect of a similarly worded provision applicable there, that an unstamped document can be stamped retrospectively and even after judgment or on appeal. The appellants contend that *Lee* was wrongly decided.

[15] The approach in *Denker* is not distinguishable, as contended on behalf of the appellants. The principle it espouses is indeed on all fours, even though counsel for the appellants accepted that unstamped instruments would not be nullities. We are bound to follow *Denker* unless persuaded that it is clearly wrong. The approach in *Denker* is not clearly wrong. On the contrary, I am firmly of the view that it is entirely correct and should be followed. The approach in *Denker* and

⁶ *Denker* para 42.

⁷ *Supra* fn 5.

⁸ D T Zeffert, A P Paizes and A St Q Skeen *The South African Law of Evidence* (2003) at 699.

Lee, which was also correctly decided, also accords with that followed in South Africa in respect of its similarly worded provision.⁹ The appellants' reliance upon *Kejarukua v Veziruapi*¹⁰ does not avail them. In that matter the court did not admit into evidence an unstamped acknowledgment of debt and granted absolution. It would not appear that the court or the practitioner representing the plaintiff in that matter were aware of the court's power to permit or direct the document to be stamped.

[16] The approach in *Denker* and *Lee* is supported by the clear terms of the proviso to s 12 and the Act construed as a whole.

[17] This approach also accords with that adopted by this court, *albeit* in a different statutory context, in *Torbitt & others v International University of Management*.¹¹

[18] The *Poolman* matter relied upon by the appellants is plainly distinguishable and does not remotely find application. It concerned a matter where a court had no jurisdiction under the applicable legislation to make the order it made. For that reason the orders in the Labour Court and High Court were set aside by this court in *Poolman*.

[19] On the contrary, s 12 in its proviso expressly contemplates permitting or directing that unstamped instruments are to be stamped retrospectively in accordance with the Act, including the payment of penalties.

⁹ *De Meyer v Bam* 1951 (4) SA 68 (N); *Buyers Guide (Pty) Ltd v Dada Motors (Mafikeng) Pty Ltd* 1990 (4) SA 55 (T); *Gleneagles Farm Diary v Schoombec* 1947 (4) SA 66 (E).

¹⁰ (I 131/2015) [2018] NAHCMD 161 (07 June 2018).

¹¹ 2017 (2) NR 323 (SC) paras 25 – 28.

[20] It follows that there is no substance whatsoever in the solitary point raised by the appellants against the execution of the default judgment granted against them. The appeal is thus to be dismissed. Costs should follow this result.

[21] One aspect remains and calls for comment. The exorbitant interest charged on the loan was raised in the papers but correctly not persisted with. The capital attracted interest at 3 per cent per month and in the event of default, a further 1,5 per cent per month became payable. Interest was thus charged at the extremely high rate of 4,5 per cent per month. This interest regime as set out in the agreement surprisingly does not fall foul of the Usury Act¹² because the loaned sum is in excess of threshold amount of N\$500 000 provided for in s 15(g) of the Usury Act read with the regulations.¹³ This means interest at an effective annual rate of 54 per cent is not impermissible under statute and is thus payable in terms of the agreement. The legislature may well consider extending the threshold or improving the protective provisions of the Usury Act to protect consumers from such an extremely high rate of interest.¹⁴ The threshold amount was last increased by regulation in 1988 and has since been left untouched despite the significant decline in the value of money since then.

¹² Act 73 of 1968.

¹³ Regulation R943 of 5 May 1988 (South Africa).

¹⁴ In a recent LLD thesis '*Towards Responsible Lending in Namibian Consumer Credit Law: A Comparative Investigation*' by Ndatega Victoria Asheela (November 2017), the author concludes with reference to the Usury Act (including s 15(g)) that current debt prevention and consumer protection measures are inadequate in protecting consumers from irresponsible credit lending and the risk of consumer over-indebtedness.

Order

[22] The following order is made:

- (a) The appeal is dismissed with costs, which include the costs of one instructing and one instructed legal practitioner.

SMUTS JA

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT:

LB Mokhatu

Of Du Pisani Legal Practitioner,
Windhoek

FIRST RESPONDENT:

J Jacobs

Instructed by Schickerling Attorneys,
Windhoek