



REPORTABLE

CASE NO: SA 9/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STANDIC BV

Appellant

and

PETROHOLLAND HOLDING (PTY) LTD

First Respondent

PETROHOLLAND OIL REFINING (PTY) LTD

Second Respondent

RENE JOHANNES CHRISTIAAN WILHELMUS KESSELS

Third Respondent

Coram: MAINGA JA, HOFF JA and LIEBENBERG AJA

Heard: 16 March 2022

Delivered: 23 September 2022

Summary: In an application which sought an order declaring a default judgment granted against the respondents in a foreign court (a Dutch court) enforceable and executable against the respondents in Namibia, the court *a quo* dismissed the application on the basis of two points raised *in limine* by the respondents.

The court *a quo* erred in upholding the first point *in limine* that the documents on which the appellant relied on for the default judgment had not been authenticated. The court *a quo* impermissibly relied on a bare and unsubstantiated allegation by the respondents to this effect, in spite of uncontested evidence by the appellant that the documents relied on had indeed been properly authenticated.

The court *a quo* erred in upholding the second point *in limine* that the default judgment pronounced in the District Court of Rotterdam had not been final and conclusive. The court *a quo* misinterpreted the uncontroverted expert evidence presented on behalf of the appellant, and on which evidence the court *a quo* itself relied on for its decision, to the effect that the default judgment granted, was final, definitive and unassailable.

In respect of disputes of fact in application proceedings, a court must establish whether or not there is a real dispute of fact. A bare or unsubstantiated denial of material averments cannot be regarded as sufficient to defeat an applicant's right to secure relief on affidavit. Enough must be stated, by a respondent, to enable the court to ascertain whether the denials are not fictitious or intended merely to delay. If the statement constituting the denial is an inference from the facts, the affidavit in question must at least disclose facts supporting the inference. A court must not permit simple and blatant stratagems of denial to circumvent its effective functioning.

It is inappropriate and unfair for a judicial officer to unilaterally or *mero motu* make findings on matters not put before him or her either in evidence, or oral or written submissions by a party, and in circumstances where the party against whom the judgment is given had not been given the opportunity to address the court upon such issue.

As a general rule the appeal court is disinclined to allow a party to raise a point for the first time on appeal but has a discretion to allow or disallow such new point; where it is covered by the pleadings; where it would be unfair to the other party; and where the

other party would have conducted its case differently had the point been raised earlier in litigation.

The appeal against the dismissal of the application in the court *a quo*, is upheld and the decision of the court *a quo* is set aside with costs.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and LIEBENBERG AJA concurring):

[1] On 15 November 2012 the appellant (applicant *a quo*) launched an application in the High Court (court *a quo*) in which the applicant sought an order declaring and ordering that the judgment granted against the respondents by the District Court of Rotterdam, in the Netherlands, on 22 February 2012 is enforceable and executable against the respondents in Namibia, jointly and severally.

[2] In this regard, the applicant (appellant) sought an order directing the respondents, jointly and severally, to pay the applicant:

- (a) The amount of €398 081,04 reflecting the capital portion of the applicant's claim;
- (b) The amount of €4529,17 reflecting the legal costs payable to applicant by the respondents, arising from proceedings in the District Court of Rotterdam;

- (c) Interest at the rate of 8% per annum on the sum of:
 - (i) €199 040,52 representing the first rental amount that fell due to applicant 15 days after the date of invoice date in terms of which the due date for the payment of the first invoice was 4 June 2011;
 - (ii) €199 040,52 representing the second rental that fell due on 4 July 2011 to date of the order made by the Honourable court.
- (d) Interest at the *mora* rate of Namibia namely 20% as the interest rate applicable from the date of the order of this court to all amounts ordered to be paid to the applicant, calculated from the date of such order until the date of final payment of all such amounts;
- (e) The costs of the proceedings incurred by the applicant in Namibia, on the scale as between party and party; and
- (f) *Mora* interest on any amount of costs awarded to applicant, calculated from the date of the *allocatur* of the Taxing Master to date of payment thereof.

[3] The court *a quo* dismissed applicant's application and ordered applicant to pay first and second respondents' costs.

[4] For reasons not relevant to the present appeal, the third respondent no longer plays any role in the proceedings. No relief is sought against him, neither is he cited as a party to the appeal and is referred to purely for purposes of lending context to the contents of appellant's appeal.

[5] The application was opposed by the respondents who raised six points *in limine*. The court *a quo* in its judgment dealt only with the following points. The first point, according to the court *a quo*, was that the appellant's documents which constituted an essential element of the appellant's cause of action, were not authenticated as required by the rules of the court *a quo*; secondly, that some of the documents which formed part of the appellant's evidence and pleadings were not translated from the Dutch language to the English language; thirdly, the documents which were translated were not translated by a sworn translator of the court *a quo*; and fourthly, that the foreign judgment relied upon was not final, but merely a preliminary order which was obtained by default in Rotterdam.

[6] In respect of the first point *in limine*, the court *a quo* found firstly, that the founding affidavit in support of the application, by one Frank Berkhout (Berkhout), for the reasons provided, did not need to be authenticated. Secondly, it was found that the signatures on the judgment on which the appellant relied on, purporting to be a judgment of the District Court of Rotterdam, were not authenticated. This point was upheld.

[7] In respect of the second point *in limine* the court *a quo* found that the relevant documents attached to the founding affidavit had indeed been translated from the Dutch language to the English language, and did not uphold this point. The third point *in limine* was also disallowed.

[8] In respect of the fourth point *in limine* the court *a quo* held that the judgment relied on by the appellant was not final and conclusive, and this point was upheld.

[9] The appeal lies not only against the upholding of aforementioned points *in limine*, but also against a finding by the court *a quo*, that it 'is inappropriate for a legal practitioner to institute proceedings on behalf of his client and also provide evidence and expert evidence in the case he has taken upon himself to be a party to'.

Proceedings in the court *a quo*

[10] In support of the application Berkhout, practising as a legal practitioner in the Netherlands, in his founding affidavit set out his qualifications and experience and explained the history of the present litigation in the Netherlands and referred to subsequent correspondence addressed to the second respondent in Namibia.

[11] It is common cause that the third respondent was at the time the contract had been concluded between the second respondent and the appellant, the chief executive officer of both first and second respondents.

[12] Berkhout stated that the appellant and second respondent concluded a written agreement in the Netherlands on 20 June 2011 in terms of which the appellant made certain storage facilities for liquid goods, in bulk, available to the second respondent for a period of 12 months at appellant's terminal at Dordrecht. The first respondent is the holding company of the second respondent.

[13] Berkhout stated that the second respondent became liable to appellant for payment in the amount of €398 081,04 in respect of the rental facilities for the months June and July 2011, charged at the sum of €199 040,52 per month. The first respondent, it was averred, expressly undertook and accepted liability of the second respondent to pay the said amounts to the appellant.

[14] According to Berkhout, the respondents provided numerous unequivocal undertakings to pay the amount of €398 081,04 to the appellant, but failed to do so. The appellant thereupon cancelled the agreement, and initiated proceedings against the respondents, jointly and severally, in the District Court of Rotterdam, for the payment of the outstanding debt. The joint and several liability of each respondent was based on, in the case of:

- (a) the first respondent, an undertaking that such company would be liable and responsible for the payment of the amounts due to the appellant;
- (b) second respondent, the provisions of the written agreement; and

- (c) the third respondent (Kessels), his misconduct in his capacity as chief executive officer of the first two respondents, for which liability the Dutch law makes provision in a similar manner to which the Namibian law provides for such liability in terms of s 430 of the Namibian Companies Act 28 of 2004.

[15] Berkhout stated that a provisional or *interim* judgment for the debt due to the appellant was granted by the District Court of Rotterdam on 22 February 2012 jointly and severally against the respondents, after a hearing on 15 February 2012 from which proceedings the respondents intentionally absented themselves. The proceedings against the respondents were not further defended by themselves thereafter, whereupon the *interim* order against them became final in nature.

[16] The appellant now seeks to enforce this judgment of the District Court of Rotterdam against the respondents, in Namibia.

[17] Berkhout further elaborated that in respect of the contents of the exhibits annexed to the summons, neither of the respondents disputed liability to the appellant for the amount owing, and at best for the respondents, the contents of such exhibits presented numerous and repetitive endeavours to achieve a respite for the payment of the debt owing without seeking to present any reason or grounds why they should be exonerated, excused or exempted from liability to pay.

[18] Berkhout stated that the respondents at no stage indicated that they may wish to defend the proceedings against them (in the District Court of Rotterdam), or that they had any defence to the claims forming the subject matter of such proceedings.

[19] In addition to the capital amount, according to Berkhout, judgment was granted against the respondents in respect of an amount of €4529,17 reflecting the legal costs payable by the respondents, and in terms of Dutch law the respondents incurred liability for the payment of 'statutory commercial interest' to the appellant at the rate of 8% per annum.

[20] Berkhout in his founding affidavit also referred to and discussed the principles relating to the enforcement of a foreign judgment.

[21] Berkhout stated that it clearly appears from a letter dated 14 February 2012 addressed to himself by a certain Hiskia Auchab,¹ that the respondents had full knowledge of the court hearing on 15 February 2012 and that they had wilfully and intentionally caused a judgment by default to be given against them by express prohibition issued to Kessels against attending the proceedings.

[22] Berkhout stated that, on the assumption that neither of the respondents knew about the proceedings on 15 February 2012, each one would have been at liberty, for a period of eight weeks after the date of judgment, or after they had become aware

¹ And signed in his capacity as Executive Director – Head of Administration Petroholland Oil Refining (Pty) Ltd (the second respondent).

thereof, to oppose the claims of the appellant by duly instituted 'verzet' proceedings, however, no such further proceedings at the behest of the respondents eventuated.

[23] Instead, according to Berkhout, by way of a letter dated 5 March 2012 the respondents reacted with further proposals of new business ventures that would have facilitated their financial ability to pay the appellant's claim.

[24] An opposing affidavit was deposed to by Sidney Wilfred Martin (Martin) on behalf of the respondents. Martin stated that he is a director of the first and second respondents and has been duly authorised to depose to the opposing affidavit.

[25] *In limine*, the point was raised that the application of the appellant was fatally defective in the following respects:

- (a) the 'composite court process' for the purpose of enforcement of a foreign judgment is not a 'notice of motion document', but a 'provisional sentence document';
- (b) the foreign judgment relied upon is not final as is evident from the affidavit of Berkhout (paragraph 48);
- (c) the foreign judgment relied upon is *ex facie* the record not a liquid document as is evident from the affidavit of Berkhout (paragraph 48);

- (d) the document (foreign judgment) does not inform the respondents (a) of the consequence of their failure to pay the amount claimed, and (b) of the respondents' right to demand security for the restitution thereof should they pay the amount;

- (e) all the documents which constitute an essential element of the cause of action in terms of a claim based on foreign documents 'must be annexed to the action', must be true copies, and must be duly authenticated – none of the appellant's documents were authenticated and were further in a foreign language to the first and second respondents. Therefore the application does not disclose or reveal a cause of action or give rise to an enforceable claim.²

[26] In the answering affidavit, the respondents contested the appellant's reliance on Dutch law and appellant's reliance on conduct by the third respondent which may have the effect of binding first and second respondents. The first and second respondents denied liability in any amount owing to the appellant.

[27] In his replying affidavit, Berkhout made the point that, despite the fact that both Martin and the third respondent are currently directors of the first and second respondents, and despite the fact that the third respondent must have been in a position to deal with the contents of the application papers of the appellant, the first and second respondents elected, most likely for tactical reasons, to cause their

² Points (a) and (d) were not persisted with in the court *a quo*.

answering papers to be deposed to by Martin, with whom the appellant had no dealings whatsoever, and whose evidence as set out in the answering affidavit clearly amounts to pure hearsay. Furthermore, it appears that the third respondent was specifically not chosen as the party to respond to the appellant's founding papers, to enable Martin to raise the objection that the documents relied upon by the appellant are in a foreign language in which he is not proficient.

[28] It was averred by Berkhout that Martin cannot have any personal knowledge of any of the events, facts or circumstances set out in the founding affidavit.

[29] It was pointed out by Berkhout, that the fact that the first and second respondents (in the answering affidavit) '*contest their liability*' for the relief claimed by the appellant is the first occasion during the period of 27 September 2011 to 22 February 2013 that any of the respondents denied their liability – that such 'contesting' is spurious in nature.

[30] The appellant in its replying affidavit fully dealt with all the allegations contained in the answering affidavit of the respondents. It is not necessary to record all those replies since there were only two points *in limine* upheld by the court *a quo* and which are relevant for the determination of this appeal, namely firstly the point upheld that the judgment relied on by the appellant, in particular the signatures on such judgment were not authenticated, and secondly, that the judgment was not final and conclusive.

[31] In respect of the point raised that the judgment was not authenticated, the appellant made the following points:

- (a) Martin in his answering affidavit stated that . . . ‘the copies of the documents annexed must be true copies and correspond with the originals in material respects . . .’, without any allegation that the applicant’s papers failed to comply with this requirement.
- (b) The allegation by Martin that: ‘None of the applicant’s documents are authenticated’, is incorrect.

The appellant referred to rule 63 of the repealed Rules of the High Court of Namibia which deals with the authentication of documents executed outside Namibia for use within Namibia, and referred to the circumstances under which any document executed at any place outside Namibia shall be deemed to be sufficiently authenticated for the purpose of use in Namibia.

- (c) In terms of Art 1 of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents,³ to which both the Netherlands and Belgium are State parties, and to which Namibia acceded on 30 January 2001, any public document ‘emanating from an authority or an official connected with the courts or tribunals of

³ Also referred to as the Apostille Convention.

the State, including those emanating from . . . a clerk of a court or a process-server (*'huissier de justice'*) and 'administrative documents' are exempted from legalisation.

[32] It was pointed out that both annexures FB 1⁴ and FB 2⁵ to the founding affidavit are documents of such nature, ie documents referred to in paragraph [31] (c) above. The judgment of the District Court of Rotterdam bears the official stamp of the 'Griffier Rechtbank, Rotterdam' as well as the signature of the 'Griffier', together with the confirmation that the judgment had been given by 'Meester A.F.L. Geerdes in the presence of Meester H.C. Fraaij, clerk of the court, and was pronounced in public on 22 February 2012', and that the document was signed by both Messrs Geerdes and Fraaij.

[33] It was further pointed out, and correctly so, that apart from the bold assertion that 'none of the documents' have been authenticated, Martin's affidavit contains no assertion of whatever nature, that either or any of the documents are not what the appellant claims them to be; or that they had been forged; or that the appellant had tampered with the documents in a manner to misrepresent the contents thereof.

[34] In respect of the second point that the judgment relied upon was not final, the appellant pointed out that his founding affidavit is replete with repetitive contentions, assertions and proof that the foreign judgment relied upon became a final judgment.

⁴ A certified copy of the summons together with exhibits annexed thereto.

⁵ A certified copy of the judgment of the District Court of Rotterdam.

[35] Thus, even the paragraph upon which Martin 'disingenuously' relied upon for purposes of claiming that Berkhout, himself, suggested that the judgment is not a final one (paragraph 48), contains assertions directly contrary to the conclusion of Martin that the judgment remained a preliminary order.

[36] The appellant sought an order directing Martin to pay the costs of the application, jointly and severally with the first and second respondents, *de bonis propriis*, on the scale as between attorney and own client, on the basis that it appears that the first and second respondents are entities of no substantial financial substance, against whom the appellant would most likely not be able to execute any costs order in its favour.

Judgment of the court *a quo*

[37] Before dealing with the points *in limine* raised by the respondents, the presiding judge found it necessary to deal with a matter which caused him 'great discomfort', and that was the fact that, according to the presiding judge, Berkhout who launched these proceedings in the court *a quo* and who deposed to the affidavit on behalf of the appellant, is the same legal practitioner who represented the appellant in the Netherlands, and the same legal representative who instructed the local representatives of the appellant.

[38] The presiding judge *a quo* was of the view that Berkhout assumed three roles, namely, he instituted the proceedings, deposed to the founding affidavit, and testified as an expert witness on behalf of the appellant. The critical question which arose in

these circumstances, troubling the presiding judge, was whether the court *a quo* could accept the expert witness testimony of Berkhout.

[39] The presiding officer *a quo* referred to authority which requires that a legal representative should, *inter alia*, conduct his practice with a high degree of independence, and that an expert witness should provide a court with an objective and unbiased opinion, based on his or her experience – a person who does not assume the role of advocate.

[40] The court *a quo* concluded that Berkhout could not have performed three different roles without overstepping the boundaries of the different roles, since (by way of an example) the duty of an expert witness to give non-partisan and objective testimony is inconsistent with an attorney-client relationship and for those reasons the presiding judge *a quo* was ‘disinclined to accept the expert testimony of Berkhout’. The presiding judge *a quo* stated that Berkhout appears to be ‘well qualified’, but despite his reluctance to accept Berkhout’s expert testimony, he would proceed to consider the points *in limine* (on the very same rejected expert evidence of Berkhout).

[41] In respect of the point *in limine* that ‘none of the Applicant’s documents are authenticated’, the court *a quo* correctly pointed out that it is not sufficient merely to question the authenticity of documents without specifying the document or directing the court and the opponent to the document that is being assailed.

[42] The court *a quo* then proceeded to consider the judgment of the District Court of Rotterdam, annexure 'FB 2', and referred to the page where the judgment concluded as follows:

'This judgment has been given by Meester A.F.L. Geerdes, in the presence of Meester H.C. Fraaij, clerk of the court, and pronounced in public on 22 February 2012
1862/676

[signed] illegible

[signed] illegible'

[43] The court *a quo* found that the signatures on the document 'purporting' to be the judgment of the District Court of Rotterdam, which Berkhout attached to his affidavit, are not legible; that all that the court is informed is that the document was signed but as to who signed the document, the court *a quo* is expected to assume that Geerdes and Fraaij signed the default judgment. Therefore, the court *a quo* found that 'there is merit in the respondents' complaint that the signatures on the summons were not authenticated'.

[44] In respect of the point *in limine* that the judgment relied on was not final, the court *a quo* firstly referred to Martin's answering affidavit in which Martin stated that the foreign judgment is not final as is evident from paragraph 48 of Berkhout's affidavit where Berkhout stated that the judgment is a preliminary order that was obtained by default.

[45] The court *a quo* then proceeded to refer to the founding affidavit where Berkhout discussed the finality of the default judgment granted by the District Court of

Rotterdam. In this affidavit the court *a quo* pointed out that Berkhout stated that a party may seek preliminary relief in terms of Art 254 of the Dutch Civil Procedure Code (the Code) in all matters which require immediate court intervention, normally referred to as 'preliminary relief proceedings'.

[46] The court *a quo* referred to where Berkhout (in his affidavit) pointed out that in terms of the Code, a default judgment may be opposed by issuing '*verzet summons*' setting out the grounds of opposition by a defendant before the same court which granted the order, and that the Code does not make provision for any condonation proceedings if the '*verzet summons*' was not timeously lodged, in which case the preliminary order then becomes final, definitive and unassailable.

[47] The court *a quo* pointed out that Berkhout stated that in the present proceedings the respondents were informed of the judgment already on 23 February 2012 but despite this knowledge, the respondents did not make any endeavours to either appeal or launch '*verzet proceedings*' and as a result, the preliminary order became a final default judgment. The court *a quo* also referred to the founding affidavit where Berkhout stated that there was proper service on all the parties, prior to the granting of the order by the court and that proof of service was attached to his affidavit.

[48] The court *a quo* then continued to discuss the legal principles relating to the enforcement of foreign judgments by stating that foreign judgments are not directly enforceable in Namibia unless certain requirements are met, *inter alia*, that the

judgment must be final and conclusive and must not have become superannuated – that a judgment is deemed to be final when it is not capable of alteration by the court which granted it.

[49] The court *a quo*, applying the legal principles to the facts, stated that the evidence (the expert testimony of Berkhout) made it quite clear that a preliminary or interlocutory order made by the District Court of Rotterdam, the existence of the debt may, despite the existence of the order, between the same parties be afterwards contested in that court, and it may be declared that there existed no obligation to pay the debt at all. The court *a quo* was of the view that such a judgment, preliminary or interlocutory order cannot be regarded as final and conclusive, since ‘it cannot be disputed that judgment, preliminary interlocutory order is capable of being altered by the same court that has issued or granted it’.

[50] The court *a quo* continued and stated the following in paragraphs 54 and 55:

[54] The fact that a defendant, as in this case the respondents, did not sue out ‘verzet summons’ to set aside the default judgment granted against them is irrelevant and does not affect the question whether or not the judgment is final and conclusive. I therefore uphold the point *in limine* by the respondents. This conclusion makes it unnecessary for me to consider whether the Rotterdam District Court had jurisdiction over the first and second respondents.

[55] For the avoidance of doubt I make the following findings. It is inappropriate for a legal practitioner to institute proceedings on behalf of his client and also provide evidence and expert evidence in the case he has taken upon himself to be a party to. Secondly I find that the purported default judgment granted by the Rotterdam District

Court is not properly authenticated as required by Rule 63 of the now repealed rules of this Court and such a failure is fatal. Thirdly the judgment on which Standic relies is not final and conclusive. For these reasons I will dismiss the applicant's application.'

Notices of appeal

[51] There are divergent contentions on which date the aforementioned application was set down for hearing. The appellant in its notice of appeal contended that the matter was set down for hearing on 6 and 7 February 2014 when arguments on behalf of the parties were presented to the court *a quo*; that judgment was reserved on 7 February 2014, and that the presiding judge indicated that he would deliver his judgment in March 2014.

[52] In the judgment of the court *a quo* (delivered on 27 May 2020), it was stated that arguments in respect of the appellant's application were heard on 7 February 2017 with the promise to deliver the judgment not later than six months from that date – ie around September 2017. It is common cause that the judge *a quo* failed to keep his promise.

[53] Against this background the appellant on 31 January 2020 filed a notice of appeal in the absence of a judgment by the court *a quo*.

[54] In its notice of appeal it was stated that the basis on which the appeal was launched, was that the court *a quo* constructively refused the relief sought by the appellant.

[55] It was stated that despite the lapse of six years from the date upon which judgment had been reserved, and despite written requests urging the presiding judge to give his urgent attention to the preparation and handing down of the judgment, this has not been done.

[56] The appellant avers that, in view of the circumstances, the failure of the judge to deliver his judgment in the six year period, amounts to constructive refusal of the relief sought, and that the appeal was being pursued upon the principles enunciated in the matter of *Pharmaceutical Society of South Africa & others v Tshabalala-Msimang & another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & another (New Clicks)*⁶ in which it was held that an unreasonable delay in pronouncing judgment upon relief sought by a litigant could under appropriate circumstances, amount to a constructive refusal of such relief.

[57] It was further pointed out that since there is no written judgment to which the appellant's grounds of appeal can be directed, the grounds of appeal will be the grounds upon which the appellant sought its relief in the court *a quo*.

[58] In a supplementary notice of appeal (filed on 3 July 2020) the appellant stated that if the contention of constructive refusal were not to be upheld, the appellant will in the supplementary grounds of appeal demonstrate that the court *a quo* in any event erred in its May 2020 judgment, justifying the setting aside of that judgment.

⁶ *Pharmaceutical Society of South Africa & others v Tshabalala-Msimang & another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & another* 2005 (3) SA 238 (SCA).

[59] The appellant referred to the judgment of the court *a quo* dated 27 May 2020 summarised (at paragraph 55) its own findings limited to three findings.⁷

[60] The appellant avers that the first finding could not have any effect on the outcome of the appellant's application in the court *a quo*, whilst the second and third findings are demonstrably incorrect.

[61] In the supplementary notice of appeal, the appellant further elaborated on the contention that the findings of the court *a quo* were erroneous, and it is not necessary to repeat them here.

Submissions on appeal

On behalf of the appellant

[62] The legal practitioner on behalf of the appellant confirmed in oral argument as well as in his heads of argument, the ground of appeal in respect of constructive refusal, based on certain authorities cited, and a passage in the judgment, acknowledged by the presiding judge that '... it is unfair and unreasonable to parties who approached court to wait for more than three years for the pronouncement by the court on their dispute'.

[63] It was submitted that the appeal should be based on the fact that the court *a quo* constructively refused the relief sought by the appellant and that this constructive refusal was eventually vindicated by the judgment of 27 May 2020 refusing the relief.

⁷ These findings are referred to in para 50 of this judgment.

[64] It was submitted that the eventual judgment substantially reduced the grounds of appeal of the appellant as articulated in the first notice of appeal, in that the judgment relied upon a limited number of issues as grounds for the refusal of the relief sought by the appellant.

[65] In respect of the first finding in paragraph 55 of the judgment to the effect that it is inappropriate for a legal practitioner to institute proceedings on behalf of his or her client, it was submitted that in this jurisdiction there is no complete prohibition upon an attorney deposing to an affidavit launching an application, and although the courts have expressed their displeasure at such conduct, there may be exceptional circumstances, as in the instant case, where a legal practitioner will be obliged to make a statement.

[66] However, still on this finding, it was submitted that it was not raised by the respondents in argument before the court *a quo*. In addition, this point was not taken by Martin in his answering affidavit – this was not an issue. Neither of the respondents, it was submitted, took the point that the institution of the application was irregular, and appellant’s counsel was at no stage prior to the delivery of the judgment in May 2020, required by the court *a quo* to address the issue.

[67] It was submitted that it was not open to the court *a quo* to unilaterally or *mero motu* make findings about the credibility and acceptability of the evidence of Berkhout

where the respondents did not deem it necessary or appropriate to impugn such evidence.

[68] It was submitted that it is constitutionally unfair to base a judgment upon an issue in respect of which the party against whom the judgment is given had not been given the opportunity to address the court upon such issue.

[69] In respect of the finding that the default judgment granted was not properly authenticated, raised by Martin in his answering affidavit, it was pointed out by counsel that evidence contained in the replying affidavit on behalf of the appellant dealt with this finding by the court *a quo*, in which Berkhout stated that the authentication of the default judgment complied with the provisions of rule 63(2), and in addition thereto Art 1 of the Convention of 5 October 1961 the default judgment in the circumstances is exempted from legalisation. It was submitted that the court *a quo* did not deal with this evidence of Berkhout but simply dismissed the application upon points the court did not deal with.

[70] It was further submitted on this issue, that there was not the slightest suggestion that the default judgment was alleged not to be what it was – no objection was ever lodged against the validity of that judgment.

[71] In respect of the finding that the default judgment was not final and conclusive, it was submitted that the court *a quo* quoted extensively from the evidence of Berkhout in which he explained the circumstances under which preliminary

proceedings became final and conclusive, without raising a single word of criticism against the accuracy and persuasiveness thereof. This evidence of Berkhout, it was submitted, did not leave any room for the court *a quo* to conclude in paragraph 53 of the judgment that the default judgment relied upon was capable of being altered by the same court which has granted it and on that basis formed the view that the preliminary order cannot be regarded as final and conclusive.

[72] It was submitted that the heads of argument on behalf of the respondents contained no submissions made in respect of all the issues raised by the court *a quo*, but instead, counsel for the respondents dealt with a brand new issue and that is the contention that the foreign judgment offends public policy in Namibia. This issue, it was submitted, was not raised at the inception of the proceedings in the court *a quo*, and no argument was presented on it in the court *a quo* – it was never an issue.

[73] It was submitted that it cannot now ten years down the line for the first time be raised in argument on appeal. It was further submitted that nevertheless, the argument that the foreign judgment offends public policy is misconceived.

On behalf of the respondent

[74] The first point raised on behalf of the respondents was that appellant failed to comply with the provisions of rules 7, 8 and 14 of the Rules of this Court, rendering appellant's appeal liable to be struck from the roll with costs.

[75] Counsel on behalf of the respondents referred to the affidavit in support of a condonation application for the non-compliance with the Rules of this Court, where the deponent to the affidavit, a legal practitioner, stated (in paragraph 14 of the affidavit) that the appellant relied on legal advice from both its instructing and instructed legal practitioner, to the effect that, given the special circumstances of this matter, rule 14(2) of the Rules of this Court found no application.

[76] It was submitted that the appellant's position at the inception of the proceedings was not to provide security for costs, that such security was not filed, resulting in the lapsing of the appeal. It was submitted that there was no appeal before this court.

[77] It was submitted that the tendering as security of an amount of N\$150 000 by the appellant, did not change the position, since the respondents did not consent to this amount and neither was this amount determined by the registrar of this court as prescribed by the rules. It was submitted, in addition on this point, that there is nothing in the condonation application justifying why this court should usurp the function of the registrar. Thus without security being provided, the appeal should be struck from the roll with costs.

[78] It was submitted that an 'appeal' noted in the absence of a judgment or an order of the court *a quo*, on the reading of the express terms of rule 7(1) and (3) of the Rules of this Court, enjoys no status. In the absence of a judgment or order appealed against, it was submitted, this court would undesirably, in essence act as a

court of first and final instance. Counsel on behalf of the respondents submitted that the ratio in the *New Clicks* case is distinguishable from the circumstances of this matter and does not find application.

[79] In respect of the heads of argument on behalf of the appellant and the submissions made therein it was submitted that some of those submissions are not supported by the record in respect of the proceedings in the court *a quo*. It was submitted that since it was viewed essential for the determination of the appeal, the appellant should have filed those parts of the record supporting its contentions, in terms of the provisions of rule 11(8). For example, it was contended in paragraph 4 of the appellant's heads of argument that the proceedings in the court *a quo* were set down on 6 and 7 February 2014, judgment was reserved, that the court *a quo* would have delivered judgment in March 2014, and that judgment was eventually delivered six years later. This contention, it was submitted, should have been apparent from the record, which it was not.

[80] Similarly, in paragraph 50 of the appellant's heads of argument, it was submitted that at no stage during oral argument during any of the proceedings in the court *a quo* had it been submitted that the application in the (District Court of Rotterdam) had been instituted irregularly. There was, it was submitted, no record filed to support this contention.

[81] Similarly, in paragraph 51 of appellant's heads of argument, appellant's counsel contended that it was not open for the court *a quo* to unilaterally make

findings about the credibility and acceptability of Berkhout's evidence in circumstances where the respondents failed to impugn such evidence. Again, it was submitted, by respondents' counsel, this is not apparent from the record of appeal, and this court only has the word of counsel appearing on behalf of the appellant. It was submitted that it is improper to attribute a matter to the court below without putting the record that is dealing with an issue, and which this court is called upon to deal with, before this court.

[82] In respect of the notices of appeal filed, it was submitted in respect of the notice dated 31 January 2020, should it be accepted as a notice of appeal in terms of rule 7(3)(a), the appellant filed it out of time. If the supplementary notice of appeal dated 3 July 2020 is to be accepted as the notice of appeal, it was also lodged out of time. It was submitted there was no condonation application in respect of these non-compliances.

[83] Lastly, it was submitted that considerations of public policy regarding the enforcement and executability of foreign judgments within the jurisdiction of this court, broadly entails an assessment whether or not the respondents were afforded procedural and substantive fairness in the proceedings giving rise to a judgment and order obtained in a foreign court.

[84] In this regard it was submitted that the appellant has failed to set out in the founding affidavit why it is appropriate for this court to recognise that foreign judgment.

Evaluation

[85] In view of the fact that the court *a quo*, subsequent to the filing of the notice of appeal, indeed pronounced its judgment, I deem it unnecessary to decide whether the principle expounded in the *New Clicks* case should also be adopted in Namibia. This appeal can be considered and be determined on the basis of the judgment of the court *a quo*.

[86] The court *a quo* in its judgment made three findings referred to hereinbefore, firstly that it is inappropriate for a legal practitioner to institute proceedings on behalf of his client and also provide evidence and expert evidence; secondly, that the judgment granted by the District Court of Rotterdam was not properly authenticated; and thirdly that the judgment on which the appellant relies is not final and conclusive.

[87] It was submitted on behalf of the appellant in oral argument that the first finding was a new issue which had not been raised in the court *a quo*, was not raised by the respondents, that no argument in this regard was presented in the court *a quo*, and that even in the answering affidavit of Martin this point was never raised by him.

[88] In the heads of argument, on behalf of the appellant, it was submitted that the court *a quo* nowhere ruled that the evidence of Berkhout should be struck from the record and nowhere pointed to any pertinent and specifically identified unaccepted or

improper consequences arising from the fact that Berkhout had instituted (with full authority to do so) appellant's proceedings in Namibia, and that neither of the respondents took the point that the institution of the application was irregular. In answer to these circumstances, the legal representative of the respondents submitted that the record does not reflect any submissions that were made in the court below, nor do the heads of argument provided, give any indication of what was said in the court below. It was submitted that in order for the appellant to rely on this specific aspect, the record should have reflected that.

[89] What is however clear from the record is that in his answering affidavit, Martin never raised this point. This is a fact which cannot be denied by respondent's counsel. This in my view supports the submission by counsel appearing on behalf of the appellant, that this point was not addressed in the court *a quo*, because if it had appeared in Martin's answering affidavit (in the same way as the points *in limine*), in my view, the court *a quo* certainly would have referred to this fact, especially in view thereof that the court *a quo* would have found support in Martin's viewpoint.

[90] In addition to this, one cannot conclude from a reading of the judgment of the court itself that the inappropriateness or otherwise of the conduct of Berkhout had been argued in the court *a quo*. The inference is that the court decided to consider *mero motu*, this point in its judgment, and the reason for this inference is clear: At no stage, before considering the points *in limine* did the court *a quo* refer to any submissions made by the parties in support of or against the court's point of view.

[91] Counsel for the respondents is unable to deny the assertion of appellant's counsel, that this point was never argued in the court *a quo*, since the former, unlike the latter, did not participate in the proceedings in the court *a quo*. It is in my view clear that it is not only the word of the appellant's counsel that the issue of the appropriateness or otherwise of Berkhout giving evidence, which was not argued in the court *a quo*, but it is supported by the record of appeal itself.

[92] It is necessary once more to refer to the oft quoted passages in *Kauesa v Minister of Home Affairs & others*:⁸

' . . . It is the litigants who must be heard and not the judicial officer.

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.'⁹

[93] In *Fischer & another v Ramahlele & others*¹⁰ at para 13 the following appears:

'[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues.'

⁸ *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC) at 183E-G.

⁹ See also *Teek v The President of the Republic of Namibia* 2015 (1) NR 58 (SC) para 30.

¹⁰ *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA).

and at para 14:

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues.'

The Court of Appeal remarked that this point is of great importance because it calls for judicial restraint.

[94] In holding as the court *a quo* did, that the conduct of Berkhout was inappropriate in the circumstances and to use this finding as one of the reasons to dismiss the appellant's application, it erred. Nothing further needs to be said on this point.

The two points *in limine* considered by the court *a quo*

The purported default judgment granted by the District Court of Rotterdam is not properly authenticated.

[95] The issue of authentication was raised in the answering affidavit of the respondents to the effect that none of the appellant's documents were authenticated. The appellant responded thereto in its replying affidavit referring to the provisions of rule 63(2) of the Rules of the High Court which provides as follows:

'(2) Any document executed in any place outside Namibia shall be deemed to be sufficiently authenticated for the purpose of use in Namibia if it be duly authenticated at such foreign place by the signature and seal of office –

- (a) of the head of a Namibian diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a Namibian diplomatic, consular or trade office abroad or a Namibian foreign service officer grade VI, or an honorary Namibian consul general, honorary consul, vice-consul, honorary vice-consul or honorary trade commissioner . . .'

[96] Berkhout stated that annexed to his founding affidavit were annexures FB 1 to FB 10 which bore the seal and office of Mr Jens Peter Prothmann (Prothmann) and who is 'a person in the administrative or professional division of the public service serving at a Namibian diplomatic, consular or trade office abroad or a Namibian foreign service officer grade VI' at the Embassy of the Republic of Namibia, in Brussels, Belgium, where the authentication of the documents took place, and where his founding affidavit was signed and attested by himself and Prothmann. A copy of the last page of his affidavit showing the signature and seal of office of Prothmann was annexed as annexure FB 16.

[97] It was further stated by Berkhout in his replying affidavit that in terms of Art 1 of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents – to which both the Netherlands and Belgium are State parties, and to which Namibia acceded on 30 January 2001, any public document 'emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from . . . a clerk of a court or a process-server (*huissier de justice*)' and 'administrative documents' are exempted from legalisation.

[98] It was pointed out that annexure FB 1, the service of the summons, was effected by the 'bailiff' and is therefore a document 'emanating from a process-server' and simultaneously amounts to an administrative document as contemplated by Art 1 of the Convention of 5 October 1961.

[99] It was pointed out by Berkhout that annexure FB 2, the default judgment of the District Court of Rotterdam, in terms of the same consideration as set out in the previous paragraph is exempted from legalisation. The default judgment also bears the official stamp of the 'Griffier Rechtbank, Rotterdam' at page 1 of the judgment, and bears the signature of the 'Griffier', together with a confirmation (on page 2) that the judgment had been given by 'Meester A.F.L. Geerdes in the presence of Meester H.C. Fraaij, clerk of the court, and was pronounced in public on 22 February 2012'. Berkhout stated that this default judgment was signed by both Geerdes and Fraaij.

[100] The court *a quo* (in paragraph 34 of its judgment) stated that the signatures of the document purporting to be the default judgment are not legible leaving the court to assume that those signatures were the signatures of Geerdes and Fraaij. The court *a quo* concluded that therefore there is 'merit in the respondents' complaint that the signatures on the summons were not authenticated'.

[101] The court *a quo* does, firstly, not deal with Berkhout's assertion in his replying affidavit that the default judgment was in fact signed by the clerk of the court and pronounced in public on 22 February 2012, and that complying with all other requirements of rule 63(2), the default judgment is deemed to be duly authenticated.

Secondly, the denial by Martin is a bare denial. Apart from the bold assertion in his answering affidavit that none of appellant's documents had been authenticated, Martin's affidavit contains no assertion that the default judgment is not what the appellant claims it to be, and contains no reason why it is alleged that the default judgment (and other documents) had not been authenticated. It certainly does not contain any averment that the default judgment had not been signed by Geerdes and Fraaij.

[102] In my view, the court *a quo* erred when it found that 'there is merit in the respondents' complaint that the signatures on the summons were not authenticated'. This is so because it is trite that a respondent cannot content himself or herself in an answering affidavit with a bare or unsubstantiated denial.

[103] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*¹¹ the following was stated:

'The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such a dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence.'

¹¹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 SA 1155 (T) at 1162-1163.

[104] In *Engar & others v Omar Salem Essa Trust*¹² the court with reference to alleged disputes of fact in application proceedings pointed out that; it must be established that there is a real dispute of fact; that a bare denial of material averments cannot be regarded as sufficient to defeat an applicant's right to secure relief on affidavit; that enough must be stated to enable the court to ascertain whether the denials are not fictitious or intended merely to delay; if the statement constituting the denial is an inference from facts, the affidavit in question must at least disclose facts supporting the inference; and the court must not permit simple and blatant stratagems of denial to circumvent its effective functioning.

[105] In the oft quoted *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹³ the Appellate Division of South Africa referred with approval to the passage in *Room Hire (supra)* and advised that in certain circumstances, the denial by a respondent of a fact alleged by the applicant may not be such as to raise a genuine or *bona fide* dispute of fact and where a court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof.

[106] The allegation by Martin that documents relied on by the appellant had not been authenticated is a bare or unsubstantiated denial which does not raise a *bona fide* dispute in these circumstances, and the court *a quo* should have approached the assertions by Berkhout that the relevant documents are deemed to have been sufficiently authenticated and exempted from legalisation, on an unopposed basis.

¹² *Engar & others v Omar Salem Essa Trust* 1970 (1) SA 77 NPD at 83D-G.

¹³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635A.

[107] The court *a quo* also did not deal with the contention of Berkhout that the default judgment was in any event exempted from legalisation, ie it was unnecessary for the default judgment to have been authenticated.

The point in limine that the default judgment is not final and conclusive

[108] Berkhout in his founding affidavit stated that a provisional or *interim* judgment was granted against the respondents by the District Court of Rotterdam on 22 February 2012, jointly and severally after a hearing on 15 February 2012 from which the respondents had intentionally absented themselves. The proceedings against the respondents were not further defended by them, whereupon the *interim* order became final in nature.

[109] It was stated that if the claim of the plaintiff is disputed in the preliminary relief proceedings on grounds that suggest the existence of a proper defence to the claim, the preliminary or interlocutory relief will not be granted. This also explains why, in most cases, a preliminary judgment constitutes a final and dispositive judgment in the matter, since the very jurisdictional fact that an order was given, postulates the absence of any reasonable or triable defence to the claim.

[110] Berkhout deals with the procedure where a default judgment is opposed, namely the institution of '*verzet*' proceedings by a defendant, as well as the appeal procedures.

[111] It is not disputed that neither of the respondents made any endeavour to either appeal against the default judgment, or to launch ‘*verzet*’ proceedings, despite the fact that the respondents had been made aware of the fact of such default judgment.

[112] Importantly, it was stated by Berkhout that if no ‘*verzet*’ proceedings are timeously lodged, such default judgment, initially made as an interlocutory preliminary order, will then become final, definitive and unassailable.

[113] Martin in his answering affidavit, with reference to Berkhout’s explanation of the process in terms of the Dutch law and how a preliminary order eventually became final and unassailable, stated the following:

‘17.1 I repeat the contents of paragraph 6, 7, 8, 9 and 10 of this affidavit.

17.2 Save for the foregoing, the contents of these paragraphs are denied.’

[114] I shall briefly consider the contents of these paragraphs in the answering affidavit in order to see if any one of them raised a *bona fide* dispute. Paragraph 6 of the answering affidavit raised the points *in limine* referred to hereinbefore. Paragraph 7 contains a submission by Martin that the application is materially defective in that the process which the appellant followed is materially defective; that appellant’s documents attached to the application are materially defective; that the documents are in a foreign language; that the judgment is clearly not final; and that the application does not disclose or reveal a cause of action or give rise to an enforceable claim. These averments are unsubstantiated and have no evidential value. Paragraph

8 stated that the appellant's reliance on Dutch law is contested. This again is a bare denial. Paragraph 9 stated that appellant's reliance on conduct by the third respondent which may have the effect to bind first and second respondents is contested and appellant is put to the proof thereof. This paragraph as explained earlier has become irrelevant. Paragraph 10 states that the first and second respondents deny liability of any amount owing to the appellant. This is again a bare denial of liability and was raised for the first time by the respondents in the answering affidavit in the court *a quo*, and was not raised as it should have been, in the District Court of Rotterdam. In my view, clearly all these paragraphs referred to by Martin do not raise a *bona fide* dispute and is devoid of any evidential value.

[115] The court *a quo*'s conclusion that the default judgment is not final and conclusive, is purportedly founded on the evidence of Berkhout to the effect that in the instance of a preliminary order made, 'the existence of the debt may, despite the existence of the order, between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be decided that there existed no obligation to pay the debt at all'.

[116] This is pure speculation, and in addition, contrary to the evidence of Berkhout, a duly qualified expert in Dutch law, that in the present circumstances the preliminary order became 'final, definitive and unassailable'.

[117] The court *a quo* did not deal with the fact that Martin had no answer to the assertion by Berkhout that the default judgment was a final judgment. The court *a*

quo, in my view, erred by misinterpreting Berkhout's clear and unambiguous evidence. Furthermore, Berkhout's evidence should have (again) been accepted on an unopposed basis.

[118] Regarding the contention, only raised on appeal, on behalf of the respondents, in respect of considerations of public policy, namely the assessment whether or not the respondents were afforded procedural and substantive fairness in the proceedings giving rise to the default judgment, respondents' counsel submitted, in oral argument, that the appellant has failed to set out in the founding papers why it is appropriate for this court to recognise the foreign judgment.

[119] The appellant in paragraphs 52 to 64 of his founding affidavit dealt with the topic of public policy in Namibia and contended that the rules of natural justice regarding the notice of and an opportunity to be present or represented at the proceedings of 15 February 2012, had been complied with. The response of the respondents thereto is contained in paragraph 18 of his answering affidavit where Martin stated that paragraphs 6, 7, 8, 9 and 10 of his answering affidavit (previously referred to and discussed) are repeated, and that the contents of paragraphs 35 to 60 of the founding affidavit are denied. This is again a bare and unsubstantiated denial and carries no evidential value. Counsel appearing on behalf of the respondents during oral argument averred that the founding affidavit did not deal with the address of the first respondent, however counsel did not know whether this point was raised in the court *a quo*. Berkhout in his founding affidavit also dealt with the issue why the District Court of Rotterdam could have exercised jurisdiction over the first respondent.

There was not a single objection lodged against the validity of the default judgment. It is significant that the court *a quo* referred to 'background information', set out in appellant's founding affidavit, which had not been denied by the respondents. One such an instance referred to by the court *a quo*, and correctly so, was that the first respondent accepted and expressly undertook to pay the amount of €398 081,04 due by the second respondent to the appellant.

[120] With reference to the point raised of public policy ie that the respondents were not afforded procedural and substantive fairness in the proceedings giving rise to the default judgment, Berkhout in paragraph 62 of his founding affidavit stated that instead of taking any steps to pursue any defence, the respondents reacted to the proposal in the penultimate paragraph of his letter of 1 March 2012¹⁴ with further proposals of new business ventures that would have facilitated their financial ability to pay the appellant's claim. Berkhout stated that the letter of credit which Auchab indicated he wished to issue before 8 March 2012 as payment to the appellant never eventuated. This statement (in paragraph 62 is an averment of an acknowledgement of debt) and was totally left unanswered by Martin in his answering affidavit and stands thus uncontroverted by the respondents. The contention, on behalf of the respondents, that they had not been afforded procedural and substantive fairness, is misconceived.

¹⁴ In this penultimate paragraph Berkhout stated that if payment of EUR 435 518,65 has been received by Standic (the appellant) not later than 8 March 2012 at 17h00, the appellant was prepared to discuss in good faith with Petroholland (second respondent) the terms of a new agreement for storage capacity for 30 000 cbm.

[121] Counsel on behalf of the respondents in his heads of argument did not deal with any of the three issues on which the court *a quo* based its verdict, instead counsel impermissibly raised a new issue, for the first time on appeal, namely that the foreign judgment (the Dutch judgment) offends public policy in Namibia.

[122] In *Di Savino v Nedbank Namibia Ltd*¹⁵ this court expressed itself as follows in respect of raising a new defence on appeal:

‘As a general matter, the appeal court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battleground, a party should ordinarily not be allowed to move to a different terrain. However, the court has a discretion whether or not to allow a litigant to raise a new point on appeal. In the exercise of its discretion, the appeal court will have regard to whether: the point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have conducted its case differently had the point been raised earlier in litigation.’

[123] The point that the foreign judgment obtained was against public policy in Namibia was never raised by the respondents in their answering affidavit and is therefore a point not covered in the pleadings. The legal representative on behalf of the respondents in oral submissions did not address the contention by appellant’s legal representative that the point was raised, impermissibly. This court was also not requested to exercise its discretion in favour of granting the respondents leave to raise this new point on appeal. This point was therefore not available to the respondents on appeal.

¹⁵ *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) at 518A-C.

[124] In conclusion, on the two points *in limine* dealt by the court *a quo*, it should be clear from the aforesaid evaluation that it erred in upholding those two points, and thus erred in dismissing the appellant's application with costs. The court *a quo* also erred by refusing to accept Berkhout's evidence since it was never an issue between the parties before the court *a quo*.

Condonation application

[125] In an affidavit in support of the application for condonation for the alleged non-compliance with the Rules of this Court, the deponent to the affidavit, a legal practitioner, pointed out that the appellant was under no obligation to enter into security for the respondents' costs as contemplated by rule 14(2). The appellant nevertheless undertook to furnish security in the sum of N\$150 000 should this court hold that the provisions of rule 14(2) are applicable.

[126] This argument was developed as follows by the deponent to the supporting affidavit:

In paragraph 1 of the appeal it was stated that the appeal was launched upon the basis that the court *a quo* constructively refused the relief sought by the appellant. In paragraph 12 of the notice of appeal it was stated that since there was no written judgment to which the appellant's grounds of appeal could be directed, the grounds of appeal would be the appellant's relief sought in the court *a quo*.

Rule 14(2) provides as follows:

'If the execution of a judgment is suspended pending appeal, the appellant must, before lodging copies of the record, enter into good and sufficient security for the respondent's costs of appeal, unless –'

[127] The lodging of the appeal could therefore not have had the effect of suspending any 'judgment', which did not exist when the appeal was lodged.

[128] It was stated that the appellant relied on legal advice from both its instructing and instructed legal practitioner to the effect that, given the special circumstances of this matter, rule 14(2) found no application.

[129] Once the appeal was lodged on the above basis such basis governed the foundation background that regulated to what extent the appellant had to comply with the various rules of this court. The degree and the extent of the appellant's obligations in terms of the rules was then cast and set, so it was contended.

[130] When the court *a quo* handed down its judgment subsequent to appellant's noting of appeal, the appellant made its position clear in the 'supplementary' notice of appeal filed on 3 July 2020, that a delay of six years in the granting of a judgment, must be construed as a constructive refusal of the relief sought by the appellant, that appellant had not abandoned the appeal based on constructive refusal to grant relief and that the supplementary notice of appeal was not intended to substitute the earlier notice of appeal but to supplement its contents.

[131] The deponent to the supporting affidavit prays, that in the event that this court finds that the provisions of rule 14(2) do apply, for condonation for its late and/or non-compliance with its provisions on the basis of the following grounds:

- (a) Having pursued its cause of action for a period of ten years, with substantial legal expenditure in both the Netherlands and in Namibia, the appellant does not wish to stumble over a technical hurdle which may cause its pursuit to fail without the merits of the pursuit ever having been properly considered.
- (b) When the heads of argument on behalf of the respondents were received, deponent of the affidavit in support of the condonation application, became aware of the fact that respondents intended making a substantive issue about the provisions of rule 14(2), the deponent liaised with both Berkhout and counsel for appellant in Cape Town for purposes of establishing whether such issue could not be resolved prior to the hearing of the appeal.
- (c) Since the deponent had to dispatch the respondents' heads of argument and the bundle of authorities to appellant's counsel in Cape Town, counsel only became aware of the full extent thereof on Friday, 4 March 2022.

- (d) Both the deponent and appellant's counsel subsequently on 4, 7 and 8 March 2022 communicated with Berkhout in an attempt to resolve the issue. It was pointed out that any decision to make available the sum of N\$150 000 as security for costs, had to be approved through a special process in the hierarchy of the appellant in the Netherlands, which delayed the final outcome of the decision until 9 March 2022, when it was resolved to furnish the amount of N\$150 000 and deponent to the supporting affidavit was informed thereof by email from Berkhout at 18h31 on 9 March 2022.
- (e) The deponent undertook to present a proper and appropriate security bond as soon as the amount transferred from the Netherlands would show on the bank account of her legal firm.

[132] It must be stated that the bond of security was filed with the registrar of this court on the same day the appeal was heard.

[133] In respect of the further points taken by the respondents in their heads of argument, the following explanations were given: firstly, in respect of the contention that appellant did not comply with rule 7(1), the time frames contemplated by this sub-rule are calculated from the date of postulated 'judgment or order'. There could be no such judgment or order where the appeal, as in this instance, is based upon a constructive refusal of relief.

[134] This court was referred to paragraph 17 of the respondents' heads of argument where the following appears:

'Should the appellant's "notice of appeal" dated 31 January 2020 be accepted as such in terms of rule 7(3)(a) of the Rules of this Court, the appellant was required to lodge its ground of appeal within 14 days from 7 May 2020, that is no later than 16 June 2020.'

[135] It was contended that this statement is misconceived for the following reasons:

- (a) The filing of the notice of appeal of 31 January 2020 was not a step as contemplated by rule 7(3)(a), the latter which provides for the situation 'where an appeal is noted against an order where reasons have not been given'.
- (b) In the present case there was no order, at all.
- (c) The notice of appeal commenced a process against a constructive refusal to grant relief in respect of which the rules of court do not provide any time frames.

[136] Secondly, in paragraph 18 of the heads of argument of the respondents, the following was stated:

'If the supplementary notice of appeal dated 03 July 2020 is to be accepted as the notice of appeal, it had to be lodged within 21 days from 27 May 2020, that is no later

than 25 June 2020. It was in fact lodged on 03 July 2020, this is out of time on both scores.’

[137] It was repeated by the deponent to the supporting affidavit that the notice filed on 3 July 2020 merely *supplemented* and not substituted the earlier notice of appeal filed on 31 January 2020.

[138] However, it was submitted, if the submission in paragraph 18 of the respondents’ heads of argument were to be accepted as correct, the lodgement of the notice on 3 July 2020 would have been six days late, that such lateness is only marginal and could not have caused any prejudice to respondents. The deponent prayed for condonation for the marginal late filing of six days.

[139] The deponent to the supporting affidavit dealt with the prospects of success on appeal and contended, based on these prospects, that the granting of condonation with the non-compliance with the Rules of this Court, favour the appellant.

[140] It is not necessary for me to repeat the contentions of the appellant in respect of the prospects of success on appeal, since this aspect has already been dealt with earlier in this judgment.

[141] It remains only now to briefly state the approach adopted by this court, in considering condonation applications.

[142] In *Balzer v Vries*¹⁶ the approach was explained as follows:

¹⁶ *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552A.

[20] It is well settled that an application for condonation is required to meet two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.'

[143] The explanation must be 'full, detailed and accurate' to enable the court to understand clearly the reasons for it.¹⁷

[144] A number of factors relevant to the determination of a condonation application, tabulated in *Arangies t/a Auto Tech v Quick Build*,¹⁸ include *inter alia* the reasonableness of the explanation offered, the *bona fides* of the application, the prospects of success on the merits of the case, and the prejudice suffered by the other litigants as a result of the non-compliance.

[145] It is further trite that good prospects of success may compensate for a poor explanation and vice versa. This does not mean that the explanation provided by the appellant is a poor one, on the contrary, as will be apparent from the reasons herein below, it was reasonable in the circumstances.

[146] The explanation by the applicant was that because of the peculiar circumstances of this case, rule 14(2), requiring the appellant to enter into good and sufficient security for the respondent's costs of appeal, does not apply. This was so

¹⁷ *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC (5 November 2010) para 13.

¹⁸ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5.

since at the time of the lodging of the notice of appeal there was no judgment or order from the court *a quo*. Since a judgment or order of court was a condition precedent, which was absent, appellant was advised by its legal practitioners that it was unnecessary to provide security for costs.

[147] I agree that the appellant was faced with exceptional circumstances, since it is very rare for a litigant to wait for six years without obtaining a judgment from a court. The legal representative of the respondents conceded during argument before us, that even a period of 39 months, calculated by the court *a quo* as the delay in pronouncing judgment, is an unreasonable period of delay. The question which comes to mind, if a litigant finds himself or herself, in the shoes of the appellant is, until when was the appellant required to wait for the delivery of a judgment?

[148] I am of the view that it was not unreasonable for the appellant in the circumstances to have decided to lodge an appeal on the basis of constructive refusal of the relief prayed for, especially in view of the fact that when the judgment was eventually given the court *a quo* provided no reason for the delay, only an apology. The Rules of this Court, for obvious reasons, do not prescribe a procedure in such an exceptional case.

[149] I am of the view that it is not necessary for this court to make a definitive determination on the question on the merits, ie whether or not the provisions of rule 14(2), are applicable in the present circumstances. What is required is whether this court is satisfied that the appellant has met the two requirements of good cause. I am

of the view that the explanation provided on behalf of the appellant, is a reasonable and acceptable explanation which enables this court to understand why the security for costs was not provided as prescribed by rule 14(2). Where the rules do not regulate the conduct of a litigant, as in this instance, logically one cannot describe the failure to lodge security for costs as non-compliance with the rule.

[150] The fact of the matter is that security for costs had been lodged with the registrar of this court, even though the prescribed procedure, which may involve a decision of the registrar of this court, had not strictly speaking been adhered to, the respondents do not suffer any prejudice. In my view, the late lodging of the security for costs should in the unique circumstances of this case be condoned.

[151] In respect of the submission that the provisions of rules 7(1) and 7(3)(a) had not been complied with, the appellant had adequately explained the reason for the non-compliance. Both these subsections refer to a judgment or order as a *sine quo non* for compliance with these subsections. These subsections do not provide any time frames which guide a litigant, in circumstances where there is no judgment or order from the trial court.

[152] The submission on behalf of the respondents that there was non-compliance with the provisions of these subrules is misconceived since it was impossible for the appellant in the absence of a judgment or order from the trial court, to comply with the provisions of these subsections.

[153] The second requirement of prospects of success in respect of the merits of the application on appeal was dealt with by the appellant. In view of the discussion hereinbefore in respect of the points *in limine*, considered by the court *a quo*, it should in my view be apparent that the prospects of success on appeal are excellent.

[154] To the extent that it is necessary for this court to condone the conduct of the appellant in the prosecution of its appeal for the 'non-compliance' with the Rules of this Court, such conduct is hereby condoned.

[155] In the result the following order is made:

- (a) The appeal is upheld.
- (b) The finding of the court *a quo* dismissing the application is set aside and substituted with the following:
 - (i) The judgment granted against the respondents by the District Court of Rotterdam, in the Netherlands, on 22 February 2012 is ordered and declared enforceable and executable against the respondents in Namibia, jointly and severally.
 - (ii) The respondents are ordered to pay the appellant, jointly and severally:

The amount of €398 081,04 reflecting the capital portion of the applicant's claim;

The amount of €4529,17 reflecting the legal costs payable to applicant by the respondents, arising from proceedings in the District Court of Rotterdam.

- (c) Interest at the rate of 8% per annum on the sum of:
 - (i) €199 040,52 representing the first rental amount that fell due to applicant 15 days after the date of invoice date in terms of which the due date for the payment of the first invoice was 4 June 2011;
 - (ii) €199 040,52 representing the second rental that fell due on 4 July 2011 to date of the order made by the Honourable court.
- (d) Interest at the *mora* rate of Namibia namely 20% as the interest rate applicable from the date of the order of this court to all amounts ordered to be paid to the applicant, calculated from the date of such order until the date of final payment of all such amounts.
- (e) The costs of the proceedings incurred by the applicant in Namibia, on the scale as between party and party; and

- (f) *Mora* interest on any amount of costs awarded to applicant, calculated from the date of the *allocatur* of the Taxing Master to date of payment thereof.
- (g) The first and second respondents are ordered to pay the costs on appeal, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed legal practitioner.

HOFF JA

MAINGA JA

LIEBENBERG AJA

APPEARANCES

APPELLANT:

T A Barnard

Instructed by ENSafrica | Namibia

(Incorporated as LorentzAngula Inc.)

FIRST and SECOND RESPONDENTS:

G Narib (with him T Muhongo)

Instructed by Etzold-Duvenhage