



NOT REPORTABLE

CASE NO: SA 38/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AGRICULTURAL BANK OF NAMIBIA LIMITED

Applicant (Respondent)

and

ESME AVRIL GOLIATH

Respondent (Appellant)

Coram: SMUTS JA

Heard: IN CHAMBERS

Delivered: 21 June 2023

Summary: Application under s 14(7) of the Supreme Court Act 15 of 1990 (the Act) read with rule 6 of the Supreme Court Rules (the rules) for summary dismissal of the respondent's/appellant's appeal on the grounds that it is frivolous and vexatious or has no prospects of success.

The respondent/appellant filed her notice of appeal (accompanied by a condonation application for failing to comply with rule 7 of the rules) on 20 April 2023, five years after the order appealed against was handed down (ie on 7 February 2018). This

was in reaction to the applicant/respondent proceeding to take steps to execute the order of 7 February 2023 by issuing a notice of sale in execution of the farm with a sale scheduled for 24 April 2023. Respondent/appellant also failed to lodge a record of appeal within the required period (in terms of rule 8) and to find security (in terms of rule 14) which also resulted in the appeal lapsing. The consequence of failing to timeously note the appeal means that there is no appeal before this Court to be dismissed, unless and until condonation is granted and the appeal is reinstated (which was not even sought by the respondent/appellant).

Held that, if a notice of appeal has not been timeously filed or the appeal lapses by reasons of the failure to comply with the rules of this Court as provided by such rule, the respondent in that appeal, as is the case in this matter, is at liberty to execute the judgment or order obtained in its favour.

Held that, the late filing of a notice of appeal even if accompanied by a condonation application cannot suspend execution. A party in those circumstances seeking to appeal would not be remediless and would be at liberty to seek an interim interdict to suspend execution pending the hearing of an application for condonation for the late filing of the notice of appeal but would be saddled with the onus of establishing prospects of success both on appeal and in respect of the condonation application.

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

SMUTS JA:

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

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

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

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

[4] The applicant served its notice of motion and founding affidavit on 23 May 2023 upon the respondent. Despite being called upon to file an answering affidavit under rule 6(3) within ten days of that service, no answering affidavit was filed by the respondent within that time or to date.

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

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

[7] The applicant as plaintiff obtained judgment against the respondent as defendant on 7 February 2018 declaring the respondent's farm executable. This order had been given in respect of proceedings under rule 108 of the rules of the High Court and had followed an order made in October 2015 where a settlement agreement had been made an order of court. The respondent/defendant was represented in both the proceedings which culminated in the settlement agreement made an order of court on 28 October 2015 and in the rule 108 proceedings on 7 February 2018.

[8] The applicant proceeded to take steps to execute the order in its favour by issuing a notice of sale in execution of the farm with a sale scheduled for 24 April 2023. On 20 April 2023, the respondent filed a notice of appeal and an application for condonation for the late filing of that notice, the appeal record and security for costs – more than five years after the impugned order had been granted and where the respondent was represented.

[9] The applicants asserts that the grounds of appeal raised in the notice are devoid of merit and that the notice itself does not comply with rule 7 of the rules of

this Court and that the appeal is frivolous, vexatious and does not have any prospects of success. It is not necessary for the purpose of this judgment to refer to what is stated in the purported notice of appeal or the condonation application.

[10] The difficulty facing this application is that the notice of appeal was filed late – in this case more than five years late. Although the notice of appeal is accompanied by a condonation application for this failure to comply with rule 7, the failure to timeously note the appeal means that there is no appeal before this Court to be dismissed, unless and until condonation is granted and the appeal is reinstated (which was not even sought by the respondent in her condonation application).

[11] The failure to lodge a record within the required period and to find security also resulted in the lapsing of the appeal. There is thus no appeal pending before this Court which can be dismissed under s 14(7) read with rule 6, as has been emphatically confirmed by this Court in *Ondjava Construction CC & others v HAW Retailers t/a Ark Trading*.¹

[12] If a notice of appeal has not been timeously filed or the appeal had lapsed by reasons of the failure to comply with the rules of this Court as provided by such rule, the respondent in that appeal, as is the case in this matter, is at liberty to execute the judgment or order obtained in its favour. The late filing of a notice of appeal even if accompanied by a condonation application cannot suspend execution. A party in those circumstances seeking to appeal would not be remediless and would be at liberty to seek an interim interdict to suspend execution pending the hearing of

¹ *Ondjava Construction CC & others v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) para 5.

an application for condonation for the late filing of the notice of appeal but would be saddled with the onus of establishing prospects of success both on appeal and in respect of the condonation application in order to succeed with such an interlocutory interdict. In the absence of an order embodying such an interdict, execution can proceed.

[13] Given the frequency with which parties file late notices of appeal on the eve of execution in a bid to delay execution, the registrar is directed to provide a copy of this judgment to the Director of the Law Society for the attention of its members who practise as instructing legal practitioners and to deputy sheriffs charged with the execution of judgments and orders.

[14] The following order is made:

- (a) The applicant's application brought under s 14(7) of the Supreme Court Act 15 of 1990 read with rule 6 is dismissed by reason of the fact that s 14(7) is not applicable because there is currently no appeal before this court by reason of the late filing of the notice of appeal. As there is currently no appeal before this Court, there is currently no suspension of any judgment or order sought to be appealed against.
- (b) No order is made as to costs of this application.

REPRESENTATION

APPLICANT/RESPONDENT:

Dr. Weder, Kauta & Hoveka Inc.

RESPONDENT/APPELLANT:

In person