



REPORTABLE

CASE NO: SA 38/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AGRICULTURAL BANK OF NAMIBIA LIMITED

Applicant (Respondent)

and

CECILIA VASTI CHANTEL GAYA

Respondent (Appellant)

Coram: SHIVUTE CJ, SMUTS JA and HOFF JA

Heard: 18 July 2023

Delivered: 28 July 2023

Summary: The applicant, Agricultural Bank of Namibia, applied 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. In opposition to the application, the respondent, Ms Gaya, filed an answering affidavit in which she raised a preliminary point that s 14(7)(a) conflicts with Art 79(3) of the Constitution and is invalid in that by seeking to authorise a single judge of this Court to determine this application, s 14(7)(a) conflicts with the provisions of Art 79(3) which sets the quorum of this

Court at three judges when hearing appeals. Given the constitutional question raised by the respondent, the Chief Justice directed this matter to be set down for hearing on 18 July 2023 for purposes of hearing argument on the respondent's preliminary point concerning the constitutionality of s 14(7).

Held that, s 14(7) provides for the summary dismissal of an appeal by the Chief Justice or any judge designated for that purpose. This power is exercised upon application to this Court by a party on appeal upon notice to the other parties to that appeal in accordance with the procedure set out in rule 6 of the rules of this Court. Where an appeal is not summarily dismissed, it then proceeds to be heard in accordance with the procedures of this Court and a quorum of three judges would hear that appeal as provided for by Art 79.

Held that, s 14(7)(a) in essence envisages an application directed to the court for the summary dismissal of an appeal on the grounds of being frivolous, vexatious and without merit. It entails an application directed for the confined purpose of preventing an abuse of its process, which this Court has the inherent power to do, and does not amount to the hearing of an appeal itself. The issue to be determined in the application is whether or not the noting of an appeal amounts to an abuse of process and not determining the appeal itself. If the appeal does not amount to an abuse then it proceeds to be heard in accordance with the rules.

It is thus held that, the provisions of Art 79(3) do not apply to applications under s 14(7)(a). As there is no conflict between s 14(7) and Art 79(3), it follows that the preliminary point is to be dismissed.

JUDGMENT: RESPONDENT'S PRELIMINARY POINT

SMUTS JA (SHIVUTE CJ and HOFF J concurring):

[1] The applicant, Agricultural Bank of Namibia (Agribank) applies 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

or vexatious or has no prospects of success. The applicant also seeks the costs of this application.

[2] This application is opposed by the respondent, Ms Gaya, who has filed an answering affidavit to it and raised a preliminary point attacking the constitutionality of s 14(7)(a) and rule 6.

Background facts

[3] Most of the relevant background facts are common cause. Agribank advanced the sums of N\$238 000 and N\$7 256 500 to Ms Gaya in 2014 and in 2016 respectively. Agribank as plaintiff obtained judgment against Ms Gaya as defendant on 25 September 2019 for N\$359 950,72 and N\$9 345 455,42 together with interest at specified rates and costs. Writs were issued and followed by *nulla bona* returns. Agribank applied under rule 108 of the Rules of the High Court to have Ms Gaya's immovable property in Rehoboth and a farm to be declared executable. That application was personally served on Ms Gaya. On 12 June 2020, the High Court declared both properties executable.

[4] The applicant proceeded to take steps to execute the order in its favour by issuing a notice of sale in execution of the farm. It took place on 7 April 2022.

[5] The farm has not yet been transferred to the purchaser. Within a few weeks of the sale, Ms Gaya on 28 April 2022 applied to the High Court for the rescission of the default judgment of 25 September 2019 and the one incorrectly referred to as on 20 January 2020 with apparent reference to the unopposed judgment granted

under rule 108 of the High Court rules on 12 June 2020. The full papers in that rescission application are attached to this application.

[6] The High court per Christiaan AJ (and not Tommasi J as incorrectly asserted in the notice of appeal) dismissed the rescission application with costs on 5 April 2023.

[7] Ms Gaya filed a notice of appeal against the dismissal of the rescission application on 27 April 2023. This notice resulted in Agribank's application under s 14(7) read with rule 6, seeking the summary dismissal of Ms Gaya's appeal. Agribank asserts that the appeal is without any prospects of success, frivolous and vexatious and falls to be dismissed.

[8] In opposition to this application, the respondent in her answering affidavit takes a preliminary point that s 14(7) conflicts with Art 79(3) of the Constitution and is invalid.

Respondent's preliminary point

[9] The respondent asserts that, by seeking to authorise a single judge of this Court to determine this application under s 14(7)(a) conflicts with the provisions of Art 79(3) which sets the quorum of this Court at three judges when hearing appeals.

[10] Given the constitutional question raised by the respondent's preliminary point, the Chief Justice directed that the matter be set down for hearing on 18 July 2023 for the purpose of hearing argument on the respondent's preliminary point

concerning the constitutionality of s 14(7). The respondent was directed to file heads of argument by 5 July 2023 and the applicant by 12 July 2023.

[11] It is not necessary for present purposes to further refer to the notice of appeal and the other aspects raised by the appeal because this judgment only concerns the constitutional point taken against s 14(7).

The parties' submissions

[12] Ms Gaya appeared in person and presented oral argument, having timeously filed her written heads of argument.

[13] Ms Gaya referred to s 14(7)(a) which authorises the Chief Justice or any other judge designated for that purpose to summarily dismiss an appeal in their discretion on the grounds that it is frivolous or vexatious or otherwise has no prospects of success. An order so dismissing an appeal is deemed to be an order of this Court.

[14] Ms Gaya argued that her appeal is as of right and that Art 79 of the Constitution requires that it must be heard by this Court and not by a single judge because Art 79 sets the quorum of this Court at three judges except where an Act of Parliament authorises a lesser quorum in circumstances where a judge dies or becomes unable to act prior to judgment.

[15] Ms Gaya pointed out that the proviso would not arise and that no less than three judges of this Court must constitute this Court as contemplated by Art 79. In so far as s 14(7)(a) seeks to authorise a single judge to determine an appeal, Ms

Gaya argued that this would conflict with Art 79 and be unconstitutional. Ms Gaya further submitted that to 'hear and adjudicate an appeal' would include a decision which is conclusive and dispositive of a matter as arises under s 14(7)(a).

[16] Ms Gaya accordingly contended that s 14(7)(a) and rule 6 violates her right to be heard by this Court in accordance with Art 79(3) and should be struck down.

[17] In written heads of argument filed in advance of the proceedings on behalf of Agribank, it was stated that Agribank declined to make submissions on the respondent's preliminary constitutional point. It was stated that Agribank 'doubt(ed) whether it has an interest in challenges relating to the validity of statutory provisions'. This despite the fact that Agribank had itself invoked the remedy afforded by s 14(7)(a) and had directed an application under that provision to this Court and despite the fact that its primary statutory object is to lend money for the purpose set out in its empowering statute¹ and is empowered to secure the payment of money that was so borrowed from it.²

[18] During the hearing of oral argument, counsel for Agribank confirmed this extraordinary stance. Counsel also stated that Agribank's application under s 14(7)(a) was not withdrawn and that Agribank would abide by the decision of this Court on the preliminary constitutional point.

[19] In his written heads of argument, points were taken by counsel for Agribank that the Attorney-General should have been joined to the proceedings and that it would be inappropriate for this Court to determine the issue as a court of first

¹ Section 4 of Agricultural Bank of Namibia Act 5 of 2003.

² Under s 6 of Act 5 of 2003.

instance. This Court had however issued a directive to the parties to advance argument on this preliminary constitutional point raised in opposition to Agribank's application. This Court in its directive did not determine that any joinder of parties would be necessary.

[20] As for the second point, it likewise amounts to maladroitness. The preliminary point was raised in an application under s 14(7)(a) directed to the Chief Justice and falls to be considered and determined by a court as constituted by the Chief Justice or a judge of this Court designated by him. By its nature, an application under s 14(7)(a) is not first made in the High Court and is decided as of first instance in this Court.

[21] The preliminary point is thus considered without the benefit of argument of the issue by the party who invoked the impugned provision, a circumstance which is less than what would be expected of a party when invoking a legal remedy to secure debts due to it.

Is section 14(7)(a) in conflict with the Constitution?

[22] 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.'

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

[24] Article 79(3) of the Constitution is to be read within the context of Art 79 read as a whole which establishes the Supreme Court and provides:

'The Supreme Court

- (1) The Supreme Court shall consist of a Chief Justice, a Deputy-Chief Justice who shall deputise the Chief Justice in the performance of his or her functions under this Constitution or any other law, and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.
- (2) The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament.
- (3) Three (3) Judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with matters referred to it by the Attorney-General under this

Constitution: provided that provision may be made by Act of Parliament for a lesser quorum in circumstances in which a Judge seized of an appeal dies or becomes unable to act at any time prior to judgment.

- (4) The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament.’

[25] Article 79(3) requires that when this Court hears appeals and matters referred to it as contemplated under Art 79(2), three judges constitute a quorum of this Court.

[26] In essence, s 14(7)(a) provides for the summary dismissal of an appeal by the Chief Justice or any judge designated for that purpose in the very confined circumstances set out in s 14(7)(a). This power is exercised upon application to this Court by a party on appeal upon notice to the other parties to that appeal in accordance with the procedure set out in rule 6.

[27] Section 14(7)(a) envisages an application directed to the court for the summary dismissal of an appeal on the grounds of being frivolous, vexatious or without merit. It thus entails an application directed for the very confined purpose of preventing an abuse of its process, which this Court has the inherent power to do.

[28] This Court in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*³ stressed that what amounts to an abuse of process is insusceptible to precise definition, stating:

‘While there can be no all-encompassing definition of the concept of “abuse of process” that is not to say that the concept of abuse is without meaning. It has been said that “an attempt made to use for ulterior purposes machinery devised for the

³ *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC).

better administration of justice” would constitute an abuse of the process. In *Beinash v Wixley* the Supreme Court of Appeal in South Africa held that “an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”. In *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* it was held that “[i]n general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end.”⁴

(Footnotes excluded.)

[29] As explained by Damaseb DCJ in *Permanent Secretary of the Judiciary v Somaeb & another*:⁵

[13] The court has an inherent jurisdiction to prevent an abuse of its process. As was recognised in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 21:

“Abuse connotes improper use, that is, use for ulterior motives. And the term “abuse of process” connotes that “the process is employed for some purpose other than the attainment of the claim in the action.”

[14] An appeal is liable to be summarily dismissed under s 14(7)(a) either if it is (a) frivolous, (b) vexatious or (c) without any prospect of success. There is no prospect of success where the litigant, objectively viewed, has no reasonable chance of success. It is conceivable that an appeal which qualifies as one of the three jurisdictional alternatives will also fall under one or both of the other two criteria. In my view, there is no fine dividing line to be drawn between the three categories. The common denominator between the three categories is that the appeal to which they relate is so unmeritorious that no court can grant a remedy for it under the law.

[15] To illustrate, if an appeal is frivolous, it would be vexatious for a party to pursue it. An appeal without any prospects of success is an exercise in futility and

⁴ Paragraph 22.

⁵ *Permanent Secretary of the Judiciary v Somaeb & another* 2018 (3) NR 657 (SC).

therefore frivolous. Its only reason would be to annoy and in that sense, is vexatious.’

[30] As to the meaning of vexatious, the Labour Court has held:

‘The question arises: what does it mean to say that a party has “acted frivolously or vexatiously”? In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) Nicholas J, as he then was, while dealing with an application to stay proceedings which were alleged to be vexatious or an abuse of the process of the court, said this (at 1339F):

“In its legal sense, “vexatious” means

“frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant”

(Shorter Oxford English Dictionary). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; “abuse” connotes a mis-use, an improper use, a use *mala fide*, a use for an ulterior motive.’⁶

[31] The purpose of applications under s 14(7)(a) is to prevent an abuse of this Court’s process. To this end, s 14(7)(a) envisages applications for summary dismissal on the very confined grounds referred to in order to avoid the abuse of this Court’s process. The confined question to be determined in such applications is whether an appeal is frivolous or vexatious or without merit. It does not entail or amount to the hearing of an appeal. If the appeal does not amount to an abuse then the appeal proceeds to be heard in accordance with the rules by a quorum of three judges.

⁶ *National Housing Enterprise v Beukes & others* 2009 (1) NR 82 (LC) para 20. Also see *National Housing Enterprise v Beukes* 2015 (2) NR 577 (SC) para 14.

[32] The provisions of Art 79(3) thus do not apply to applications under s 14(7)(a). There is thus no conflict between s 14(7) and Art 79(3). It follows that the preliminary point is to be dismissed.

Costs

[33] As Agribank did not oppose the preliminary point and elected to abide by the decision of this Court, there can be no question of being awarded any costs in respect of the determination of the preliminary point.

[34] It follows that the following order is to be made:

1. The preliminary point directed at challenging the constitutionality of s 14(7)(a) of the Supreme Court Act 15 of 1990 and rule 6 of the rules of this Court is dismissed.
2. No order as to costs is made in respect of the dismissal of this preliminary point.
3. The application under s 14(7)(a) is referred to the judge of this Court designated for that purpose.

SHIVUTE CJ

HOFF JA

REPRESENTATION

APPLICANT/RESPONDENT:

E Nekwaya

Instructed by ENSAfrica | Namibia

RESPONDENT/APPELLANT:

In person