



REPORTABLE

CASE NO.: SA 42/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AGRICULTURAL BANK OF NAMIBIA

Applicant

and

CECILIA VASTI CHANTEL GAYA

Respondent

Coram: MAINGA JA

Heard: IN CHAMBERS

Delivered: 9 October 2023

Summary: The respondent instituted an appeal against an order of the High Court refusing her application for rescission. The applicant opposed the appeal and filed a rule 6 application. Subsequent thereto, the respondent failed to file the record within three months from the date of the order appealed against.

Held that, the appeal is in terms of rule 9(4) deemed withdrawn and there is therefore no need to determine a rule 6 application in respect of a withdrawn appeal.

**JUDGMENT IN TERMS OF SECTION 14(7)(a) OF THE SUPREME COURT ACT 15
OF 1990**

MAINGA JA:

[1] This is an application in terms of rule 6 of the Rules of the Supreme Court of Namibia. The parties are referred to as they appear in this application.

[2] This judgment should be read with the judgment of this Court delivered on 28 July 2023 between the same parties which articulates the background facts of the case. In that judgment, this Court made an order dismissing 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 and a further order that the application under s 14(7)(a) is referred to the judge of this Court designated for that purpose.

[3] The preliminary point was dismissed and the application was eventually referred to me in chambers.

[4] It suffices for the purposes of this judgment to only state that 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 grounds that it is frivolous and vexatious or has no prospects of success. The respondent raised a preliminary point challenging the constitutionality of s 14(7) which as already stated was dismissed on 28 July 2023.

[5] The appeal referred to above was filed on 27 April 2023.

[6] On 16 August 2023, respondent filed the appeal record together with a condonation application seeking condonation for the late filing of the appeal record and reinstatement of the appeal. This is more than three months from the date of the order/judgment appealed against, ie the rescission judgment of 5 April 2023.

[7] Rule 8(1) and 8(2)(b) of the Supreme Court Rules provide as follows:

‘(1) After an appeal has been noted in a civil case the appellant must, subject to any direction issued by the Chief Justice, file four copies of the record of the proceedings with the registrar and deliver such number of copies of the record to the respondent as may be considered necessary.

(2) The record referred to in subrule (1) must be filed –

(a) . . .

(b) in all other cases, within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required, within three months after an order granting the leave to appeal; or

(c)’

[8] Rule 9(1)(b) provides that-

‘Withdrawal of appeal

(1) If an appellant-

- (a) . . .;
- (b) fails to file the record of the proceedings of the court appealed from; or
- (c) in terms of subrule (4), is deemed to have withdrawn the appeal.'

[9] Rule 9(4) further reads-

'If an appellant or a respondent who has noted a cross-appeal and, is therefore, considered to be an appellant in terms of subrule (2) –

- (a) fails to lodge the record within the period prescribed in rule 8(2);
- (b) has not within the time prescribed in rule 8 applied to the respondent or his or her legal practitioner for consent to an extension of time; and
- (c) has not given notice to the registrar that he or she has so applied for such extension, he or she is deemed to have withdrawn his or her appeal, and in that event, the suspension of any judgment or order of the court appealed from is considered lifted.'

[10] The respondent filed a document titled 'condonation application'. This document is however not deposed to by the respondent. In fact, the first sentence of the supporting affidavit reads-

'I, the undersigned, Hewat Jacobus Samuel Beukes do hereby solemnly affirm and state as follows:'

[11] It is not known to me on what authority Mr Beukes is deposing to the affidavit in support of the respondent's condonation application as he is not even a party to the proceedings. He does not have an interest in this matter and no such interest is even remotely suggested in the said supporting affidavit. For that reason, there is no condonation and reinstatement application deposed to by the respondent for the late

filing of the appeal record. As such, the appeal remains withdrawn and there is therefore no appeal before this Court and needless to say, the court cannot consider whether an appeal that is not before it is frivolous or vexatious. A condonation and reinstatement application is a condition precedent to a withdrawn appeal and the appellant has not crossed that hurdle.

[12] Even if I were to consider the condonation application, the appeal is meritless as there are no prospects of success and the explanation for the late filing of the record (if Mr Beukes who attested to the condonation affidavit had power of attorney to do so) is unreasonable. The explanation hinges on financial constraints and lack of knowledge of the finer nuances of civil litigation. They both fall short of a reasonable explanation. It is settled law that those who practice or litigate in this Court should acquaint themselves with the rules of this Court. The rule on furnishing security was also violated. The appeal would still have been struck.

[13] The judgment and order of the court *a quo*, dismissing respondent's application for rescission of the default judgments granted against her on 25 September 2019 and 20 January 2020 are unassailable. Respondent failed to give a reasonable explanation for her default, the application for rescission was not *bona fide* and she had no *bona fide* defence to applicant's claim. Therefore, the rescission application was correctly rejected.

[14] In the result, the respondent's appeal is deemed withdrawn and the suspension of the judgments or orders sought to be appealed against are therefore lifted. No order as to costs.

MAINGA JA

APPEARANCES:

Applicant:

G Pause

ENSafrica | Namibia (Incorporated as
LorentzAngula Inc.)

Respondent:

In Person