

**REPORTABLE**

CASE NO: SA 02/2014

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**CALISTA ANNA BALZER**

**Appellant**

And

**JACOMINA VRIES**

**First Respondent**

**REGISTRAR OF THE HIGH COURT OF NAMIBIA**

**Second Respondent**

**DEPUTY-SHERIFF OF WINDHOEK**

**Third Respondent**

**Coram:** MAINGA JA, SMUTS JA and O'REGAN AJA

**Heard:** 6 March 2015

**Delivered:** 17 March 2015

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**APPEAL JUDGMENT**

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SMUTS JA (MAINGA JA and O'REGAN AJA concurring):

Background

[1] The appellant, who appeared in person, filed a notice of appeal dated 24 January 2014 in respect of two judgments granted against her in the High Court. The notice of appeal firstly seeks to appeal against a judgment of the High Court delivered on 26 April 2013. This was in essence a default judgment granted against her for payment of the sum of N\$42 000 and a further amount of N\$3000

per month as from May 2011 until the appellant vacated certain property in Pappawer Street, Khomasdal, together with interest, and an eviction order of the appellant from those premises. Costs of suit were also granted.

[2] The notice of appeal also sought to appeal against the dismissal of an application on 24 January 2014. The High Court provided written reasons for the dismissal on 4 February 2014. Those proceedings are referred to in more detail below.

[3] Shortly after the notice of appeal was filed, the appellant on 31 January 2014 served an application for condonation for the late filing of the notice of appeal in respect of the default judgment granted on 26 April 2013. On 29 April 2014, the Registrar informed the appellant that she had not complied with rules 8(3) and 5(5) of the rules of this court and that the appeal had lapsed as a consequence. This necessitated a further application for condonation on the appellant's part on 12 May 2014.

[4] In July 2014 the first respondent purported to make application to the Chief Justice to dismiss the condonation applications summarily under s 14(7)(a) of the Supreme Court Act 15 of 1990 on the grounds that the appeal is frivolous or vexatious or otherwise has no prospects of success. This was done by way of an affidavit by her legal practitioner attached to a covering letter – and not by way of a notice of motion. The appellant responded to this application by letter, resisting its application. The appellant complained that the application was not served on her.

Certainly she should be entitled to service of an application of this nature. The Chief Justice however declined to exercise the discretion vested in him under s 14(7)(a) as is evidenced by the fact that this matter has been set down for hearing. In view of that fact, it is not necessary to say anything further on this application.

[5] Before dealing with the applications for condonation, it would be conducive to clarity first to set out the background to judgments appealed against. The case relates to the property in Khomasdal where the appellant lives (the property). The case has a long history, not all of which can be set out here.

#### Judgment of 26 April 2013

[6] It would appear that default judgment was initially obtained against the appellant in 2009 in relation to monies she owed to First National Bank Ltd. Execution proceeded in respect of the property. The first respondent purchased the property at the sale in execution that took place in early 2010. Thereafter the appellant refused to vacate the property, despite the judgment against her, the subsequent sale in execution and the transfer of the property to the first respondent. In 2011, the first respondent instituted an action for appellant's eviction and also claimed rental in respect of appellant's continued occupation of the property. Although appellant filed a notice to defend the action, no plea was filed. A notice of bar was served and default judgment was subsequently sought and granted by the Registrar against the appellant on 19 April 2012. In the meantime during February 2011, first respondent sold the property to Mr and Mrs Karuombe and transfer was registered on 29 March 2011.

[7] The appellant subsequently applied for rescission of that judgment *inter alia* on grounds that it should not have been granted by the Registrar. Papers were exchanged in that opposed application which became protracted.

[8] The first respondent decided to abandon the default judgment granted by the Registrar and gave notice to the appellant's erstwhile legal representatives, 'appointed by the Legal Aid Directorate', that she would do so. She also gave notice that she would seek judgment by default from a judge against the appellant in view of the fact that the appellant had not filed a plea. In that notice, it was stated that default judgment would be sought on the next available motion court date. That turned out to be 26 April 2013.

[9] The first respondent's legal representative accordingly applied for default judgment on that date and it was granted by the High Court. The appellant's erstwhile legal representative was present in court when judgment was granted. It would appear that immediately after it was granted, the appellant's legal representative pointed out to the court that a notice to oppose default judgment application had been filed on that morning. This was not however on the court file. The High Court pointed out that the order had already been granted and that the appellant would need to pursue an appropriate remedy. This would usually be in the form of a rescission application.

Events following the order of 26 April 2013

[10] No application for rescission was forthcoming from the appellant, despite the fact that she was represented at the time. The first respondent then proceeded with a warrant of execution for the appellant's eviction in May and June 2013. The point was apparently taken on behalf of the appellant by her legal representatives that the property was wrongly described in the default judgment and in the writ. The first respondent thereafter applied to court to vary the court order to correctly reflect the description of the property. This order was then granted on 27 September 2013.

[11] The appellant subsequently launched an interlocutory application on 15 October 2013, set down for 25 October 2013, seeking to stay the writ of execution issued pursuant to the default judgment pending the outcome of a separate application directed at setting aside the High Court rule authorising the Registrar to grant court orders as unconstitutional. The appellant deposed to the founding affidavit in support of this interlocutory application which is styled 'Interlocutory *status quo* application'. In her affidavit she specifically states that the application is directed against respondents at whose instance a disputed sale in execution was effected and as a consequence her eviction threatened. The appellant specifically states that the purpose of that application, as confirmed in the notice of motion, is directed at temporarily staying the ejectment order or writ of execution issued by the High Court in respect of the default judgment, pending the outcome of the other application referred to. This despite the fact that the first respondent was not party to that other application.

[12] The October 2013 interlocutory application is attached to the proceedings and forms part of the record. In it, the appellant specifically states under oath that the first respondent had caused service of a writ of ejection and execution on 8 August 2013 upon her. The writ, dated June 2013, is specifically referred to and is attached to her affidavit.

[13] The first respondent in the meantime renewed her attempts to have that Deputy-Sheriff act upon the writ. This resulted in the Deputy-Sheriff giving the applicant notice on 21 January 2014 that he would execute the eviction order.

Application which was dismissed on 24 January 2014

[14] The appellant responded by bringing an urgent application dated 23 January 2014 and set down on 24 January 2014. She did so in person. She does not in her affidavit explain the reason for her erstwhile legal practitioners no longer acting for her. This application was dismissed by the High Court on the same day. As is pointed out, this is the second order appealed against by her.

[15] In this (January 2014) application, the appellant sought an order against the first respondent together with the Registrar and Deputy-Sheriff (cited as second and third respondents) to desist from disturbing her in 'her undisturbed possession and occupation' of the property and to cease with the 'unlawful ejection' of her. Punitive costs were also sought by her against them.

[16] In this application, the appellant also accused the Deputy-Sheriff and Registrar of acting 'criminally against my family and me' and of abusing their respective positions. Allegations of this nature are made elsewhere in the papers by the appellant. These very serious allegations are however unsupported. They are referred to below when dealing with the question of costs. The appellant made it clear that the relief sought in that application was of an interlocutory nature, pending the finalisation of other proceedings and related to the eviction order obtained against her.

[17] I turn now to the applications for condonation.

#### Condonation applications

[18] In the first application for condonation dated 27 January 2014, the appellant applies for condonation for the late filing of her notice of appeal against the order of 26 April 2013. The appellant states under oath in a supporting affidavit that she and her husband only became aware of the court order of 26 April 2013 on 24 January 2014. This she repeated in oral argument. The appellant further stated that her attorney of record at the time 'never informed me about the court order of Justice Unengu dated 26 April 2013'. The appellant further states that this only came to her attention in the opposing affidavit of the first respondent to her application set down on 24 January 2014. In her affidavit, the appellant also quotes from a leading South African textbook on civil procedure and cases in support of her contentions that she was not aware of the need to bring a rescission application and that she should not be penalised for her attorney not complying

with the rules of court. The appellant further submits that the respondents would not and cannot be prejudiced by the late filing of the notice of appeal as this notice of appeal will also be in the best interest of the first respondent.

[19] In addition the appellant states that her default was not wilful and further submits that she has a 'solid defence on the merits and that there is a strong likelihood of success'.

[20] It is well settled that an application for condonation is required to meet the 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.

[21] This court recently usefully summarised the jurisprudence of this court on the subject of condonation applications in the following way<sup>1</sup>:

[5] The application for condonation must thus be lodged without delay, and must provide a "full, detailed and accurate" explanation for it.<sup>2</sup> This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include -

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<sup>1</sup> *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at p 189-190, para (5).

<sup>2</sup> *Beukes and Another v South West Africa Building Society (SWABOU) and Others* (SA 10/2006) [2010] NASC 14 (5 November 2010) para 13.

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona fides* of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”<sup>3</sup>

These factors are not individually determinative, but must be weighed, one against the other.<sup>4</sup> Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been “glaring”, “flagrant” and “inexplicable”.<sup>5</sup>

[22] The default judgment was granted on 26 April 2013. The notice of appeal was lodged on 24 January 2014, some 8 months out of time.

[23] The crucial components of the appellant's explanation for this lengthy delay are her professed ignorance of the default judgment having been granted against her on 26 April 2013 until she heard of it in the answering affidavit to the application on 24 January 2014 and the blame placed by her at the door of her erstwhile legal practitioner for failing to inform her of that judgment and for failing to take further steps on her behalf as a result of it.

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<sup>3</sup> See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2013\_(3) NR 664 (SC) para 68.

<sup>4</sup> *Id.*

<sup>5</sup> See *Beukes*, cited above n 2, para 20; see also *Petrus v Roman Catholic Archdiocese* 2011\_(2) NR 637 (SC) para 9.

[24] In her condonation application, the appellant does not deal with or even refer to the interlocutory application made on her behalf in October 2013 when she herself under oath refers to a warrant of execution for her eviction served on her on 8 August 2013. It is expressly stated in the warrant attached to her affidavit that it is a warrant for her eviction in respect of the court order granted on 26 April 2013. Accordingly, despite her express statement to the contrary, the applicant appears to have been aware of the warrant for her eviction and the judgment of 26 April 2013 upon which it was based. Also of significance is correspondence written on her behalf by her erstwhile legal practitioners after the court order of 26 April 2013. The first of these letters is dated 12 August 2013. It is also attached to her '*status quo* application'. In this letter, her legal practitioners expressly referred to the warrant for eviction received from the Deputy-Sheriff's office (presumably the one served on the appellant on 8 August 2013). In that letter it is further stated by her erstwhile legal practitioners:

'It is our instructions that the court order dated 26 April 2013 is in respect of the 2911, Pappawer Street, Khomasdal, Extension 3, Windhoek and not erf 2977, Pappawer Street, Khomasdal, Extension 3, Windhoek.' (*sic*)

It is further stated in the letter on her behalf:

'In light of the above, we propose that you give us an undertaking in writing not to proceed with the eviction and to allow us to seek a rescission of judgment unopposed.'

[25] The record also includes a letter of 12 December 2013 addressed by the appellant's erstwhile legal practitioners to the Deputy-Sheriff, informing the latter that the (*status quo*) application was removed from the roll and not struck and that the Deputy-Sheriff should not proceed with the eviction order. The eviction order is that granted on 26 April 2013.

[26] Ultimately, most telling is the warrant for the appellant's eviction attached to her founding affidavit in support of the interlocutory application dated 15 October 2013 (the '*status quo* application'), already referred to. This warrant expressly refers to the very terms of the court order granted on 26 April 2013. The warrant itself is dated 11 June 2013 and has a further date stamp of the Deputy-Sheriff of 19 June 2013. It would have been this warrant which was the subject of correspondence because of the description of the property raised by her lawyers on 12 August 2013 (which resulted in the court order being varied on 27 September 2013) as this warrant had been served upon the appellant on 8 August 2013.

[27] It would follow from the record considered as a whole that the appellant's professed ignorance of the court order evicting her from the property is lacking in credibility. It is contradicted by her own prior statement under oath in one of her interlocutory applications. The attempt at blaming her erstwhile lawyer for not informing her also lacks credibility. He not only sent letters on her behalf concerning that court order, but in one instance raised the description of the immovable property in the order in his letter of 12 August 2013. This was shortly

after the writ had, according to the appellant, been served on her on 8 August 2013. That letter is also expressly addressed as being upon her instructions. It is not surprising that there is no statement made by her erstwhile lawyer in support of her improbable allegation that he had not informed the appellant of the order of 26 April 2013. The totality of the evidence including her own statement under oath provided elsewhere in this record is emphatically to the contrary.

[28] The delay in filing the notice of appeal was more than 8 months. A weighty and cogent explanation is called for in the circumstances. But that is singularly lacking.

[29] The appellant's explanation for the lengthy delay is instead entirely unsatisfactory and not credible. The appellant bears the *onus* to establish a reasonable and acceptable explanation for her delay. This she has comprehensively failed to do. On this basis alone this application for condonation is to be dismissed with costs. But it is also clear from the record that the appellant also does not establish the second requisite for good cause for condonation. The grounds advanced in the condonation application in support of the prospects of success on appeal are similarly unconvincing. The first respondent was not even in fairness to the first respondent cited as a party in the other proceedings challenging default judgments granted by the Registrar and those proceedings cannot provide a basis for staying these proceedings. Furthermore, the issue in those proceedings relates to the constitutionality of the Registrar granting default

judgments. However, in this case that order was abandoned by first respondent and a judgment was sought and granted by the High Court.

[30] It follows that the application to condone the late filing of the notice of appeal in respect of the default judgment of 26 April 2013 is to be dismissed. It further follows that the appeal against the judgment of 26 April 2013 is to be struck from the roll.

#### The second application for condonation

[31] The further application for condonation for failing to comply with rules 8(3) and 5(5) would remain in respect of the notice of appeal only insofar as it relates to the order of 24 January 2014. That application sought to indict the respondents cited in it, from taking action including acting upon the writ, pending other litigation. It was by its very nature an interlocutory application.

[32] Interlocutory applications require leave of the High Court before they may be appealed<sup>6</sup>. No application for leave to appeal was brought. Nor was leave granted. An appeal in respect of that judgment and order is thus not properly before this court and is to be struck for this reason alone. It serves no purpose to further canvas the second application for condonation.

#### Conclusion

[33] A default judgment was granted against the appellant as long ago as 2009. The property was sold in execution pursuant to that judgment in early 2010.

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<sup>6</sup> In terms of s 18(3) of the High Court Act 16 of 1990.

Despite the sale and transfer to the first respondent (and the subsequent purchasers), the appellant has remained in occupation of the property without any lawful basis to do so and in the face of a court order evicting her from the property. Conduct of this nature cannot be condoned by this court. Effect must be given to orders of court until or unless they are set aside. The appellant has acted with defiance with regard to an order of the High Court and has frustrated the due process of law and thus undermined the rule of law upon which the Constitution is premised.

[34] The following order is made:

1. The appellant's application for condonation for the late filing of the notice of appeal in respect of the judgment of 26 April 2013 is dismissed with costs.
2. The appeal against that judgment and against the order of 24 January 2013 is struck from the roll with costs.

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**SMUTS JA**

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**MAINGA JA**

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**O'REGAN AJA**

APPEARANCES

APPELLANT:

In person

FIRST RESPONDENT:

Z Grobler

Instructed by Grobler & Co