

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: <i>Temptation Fashion CC</i>	Case No: HC-MD-CIV-MOT-GEN-2021/00329
<i>Olivia Ndahafa Kanyemba Usiku</i> <i>2nd Applicant</i>	Division of Court: Main Division
<i>and</i>	Heard on: 17 August 2021
<i>Sannamib Investments (Pty) Ltd</i> <i>Deputy Sheriff</i> <i>2nd Respondent</i>	
Heard before: Honourable Mr. Justice Masuku, J	Delivered on: 16 September 2021
Neutral citation: <i>Temptations v Sannamib Investments (Pty) Ltd</i> (HC-MD-CIV-MOT-GEN-2021/00329 [2021] NAHCMD 417 (16 September 2021))	
The order: Having heard the Applicants' In Person , and Mr. Muhongo on behalf of the 1 st Respondent and having read the pleadings and other documents filed of record: (i) The Application for the matter to be heard as one of urgency is refused for want of compliance with the provisions of Rule 73 (4) and (b) of this court's rules. (ii) The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner. (iii) The matter is removed from the roll and is regarded as finalised.	

Reasons for order:

MASUKU, J:

[1] On 17 August 2021, having listened to argument and having considered the papers filed of record, I granted an order refusing the applicants application for stay of execution that was heard on urgency with costs.

Background

[2] The parties in the matter have been embroiled in litigation in as far back as 2018. The 1st respondents obtained a default judgement against the applicants and sought to execute its judgment debt. The deputy sheriff has attached the properties belonging to the 1st respondent and the sale in execution is slated for 18 August 2021.

[3] The applicants' main contention is that there is an appeal pending before Geier, J which relates to the default judgement granted against the applicants. The Applicants stated however that the appeal was struck from the roll in terms of rule 132(10) and was regarded as finalised. This they contend was in error as the Judge should not have made this order.

[4] The applicants contend that their urgency is rendered by the auction being imminent and will not be afforded substantial relief in due course.

[5] The applicants further pray for relief wherein which they seek an automatic right for leave to appeal should the court find against them. The applicants contend that this automatic right to appeal will be the only remedy available to them should they be unsuccessful. In turn this allows for execution to be stayed in terms of Rule 121 of this courts Rules.

[6] I should waste no time in stating categorically that the prayer for the granting of an automatic right of leave to appeal is still-born. There is no provision in our rules for a court to grant a party in anticipation of an adverse ruling, leave to appeal. The question of leave is to be raised by the dissatisfied party after the judgment or order, as the case may be, has been issued. Only then may the dissatisfied party seek leave to appeal on stated grounds which the court is bound to take into account in deciding whether or not to grant the leave sought.

Urgency

[7] In terms of the rules, an applicant for urgency must explicitly set out the circumstances which render the matter urgent and further explicitly provide reasons why he or she claims they could not be afforded substantial redress at a hearing in due course.¹

[8] In the present matter, it is clear that the applicants were notified of the impending sale in execution but they did not, within a reasonable time, take appropriate steps to approach the court in good time. The applicants rested on their laurels and only approached the court on the eve of the sale in execution. No explanation is given as to why they did not approach the court well before the date of the sale.

[9] In the premises, the conclusion appears inexorable, that the urgency was self-created. It does not bode well for the interests of justice for a party to sit on its hands and apply for urgent relief on the eve of the event, expecting the court to be driven by maudlin sympathy alone.

[10] Parker, J in the application concerning the same parties referred to the matter of *Bergmann v Commercial Bank of Namibia Limited and another*² where it was stated that where urgency is an application self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.

[11] The appellants' appeal was struck from the roll on 19 November 2020 for non-activity in terms of R 132(10). It is unclear from the papers why the applicant has waited for this long after the appeal has been struck to bring the application for stay. In the absence of an application for reinstatement having been filed, it is insufficient or rather baseless for the applicants in the instant application to allege that Geier, J erred in striking the appeal due to the miscalculation of days when regard is had to the inactivity of the matter. It is common cause that such dates are not calculated by the Judge or his support staff but rather by the e-justice system itself. I find that argument thus holds no water.

[12] The applicants were idle and waited for the respondents to re-advertise the auction. The applicants only acted after having sight of the advertisement in the newspaper knowing that the auction was now imminent. This does not take away from the fact that the applicant ought to have known that the auction was to proceed in the absence of any court rescinding the default judgment.

[13] It was for the following reasons that the matter was struck from the roll for want of compliance with the provisions of rule 73(4) (a).

¹ High Court Rules, Rule 73(4) (a) and (b).

² *Bergmann v Commercial Bank of Namibia Limited and another* 2001 NR 48

[14] There is another issue that presents itself as important in this matter. It is a matter of note that there is no appeal pending before this court. It would appear that the appeal launched by the applicant was struck from the court roll on 19 November 2020 by Geier, J. That order still stands. In the absence of an application for reinstatement of that appeal, this court is bound by that very order.

[15] The order sought by the applicant simply put, is to stay the respondents auction pending the outcome of the appeal before Geier, J. The court in *Herf v Germani*,³ dealt with the effects for an order striking an appeal from the roll as follows:

‘I am of the view that it is the pending appeal or appeal that suspends the operation of such judgement and that the noting of an appeal which is pending which suspends the operation of such judgment and that the noting of an appeal is merely the first step in such appeal. When the appeal is struck from the roll it ceases to be a pending appeal and the staying effect thereof is suspended.

[16] I am of the view that the courts findings in the *Herf* finds application in the instant case. If further authority is required for the above proposition, it is to be found in *De Sousa v Alexia Properties CC*⁴, a recent judgment of the Supreme Court. Although the case dealt with the effect of the lapsing of an appeal, the reasoning still resonates in this case.

[17] Damaseb DCJ, writing for the majority of the court reasoned as follows at paragraph 24 of the judgment:

‘Where there has been non-compliance with the rules governing appeals, the appeal lapses...once an appeal has lapsed, it can only be reinstated when a litigant has sought and has been granted condonation. Until such time that condonation and reinstatement has actually been granted, there is no appeal pending before this court. What is pending is only the application for condonation and reinstatement although in practice the court considers the condonation alongside the merits because prospects of success are ordinarily important in such an inquiry.’

[18] It is my considered view that with the appeal having been struck from the roll, there exists no pending appeal which has the effect of staying the judgement or execution proceedings. What will be before the presiding Judge to consider is the reinstatement application and only once that application has been granted and reinstated can the applicant make reference to a pending appeal.

Costs

³*Herf v Germani* 1978 (1) SA 440 (T) at 449G

⁴*De Sousa v Alexia Properties CC* Case No: SA 84/2019 (Delivered 27 July 2021).

[19] The principle normally applicable, is that costs follow the event. In the premises, there is no reason suggested or apparent, that would require a departure from this principle. There exists no reason why the ordinary approach for costs should not follow in this matter. In this instance costs will follow the cause.

Order

[20] In the result, I make the following order:

- (i) The Application for the matter to be heard as one of urgency is refused for want of compliance with the provisions of Rule 73 (4) and (b) of this court's rules.
- (ii) The Applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.
- (iii) The matter is removed from the roll and is regarded as finalised.

	Note to the parties:
T. S. Masuku Judge	Not applicable
Counsel:	
Applicant	Defendant:
In Person	T. Muhongo Instructed by Etzhold Duvenhage