REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2018/03324

In the matter between:

RUDOLF WOLDEMAR WINCKLER **APPLICANT**

and

STANDARD BANK NAMIBIA LIMITED **RESPONDENT**

In re:

STANDARD BANK NAMIBIA LIMITED **PLAINTIFF**

and

RUDOLF WOLDEMAR WINCKLER **NINTH DEFENDANT**

Neutral citation: *Winckler v Standard Bank Namibia Limited* (HC-MD-CIV-ACT-CON-2018/03324) [2022] NAHCMD 408 (12 August 2022)

Coram: PRINSLOO J
Heard: **25 July 2022**
Delivered: **12 August 2022**

Flynote: Practice – Applications – Stay of proceedings – An applications for stay of proceedings pending the outcome of the review proceedings – Circumstances ordinarily gives rise to a defence of *lis alibi pendens* or estoppel – Overriding objective of the rules of court – Review application not within spirit of the rules of court – Stay application self-created – Application for stay of proceedings refused.

Summary: On 18 November 2013 the applicant and his co-trustee bound themselves as surety and co-principal debtor in *solidum* jointly and severally for the due payments to the plaintiff for the due payment of all monies which the Faanbergh Winckler Development Trust ('the Trust') may from time to time owe the plaintiff. On 8 November 2019 the Trust was placed in final sequestration. On 13 December 2019, the Master of the High Court gave notice to the third, seventh and twelfth defendants (in the main action) of the first creditors meeting to be held on 22 January 2020. During the said meeting the plaintiff submitted a claim of N$36 502 901.62, against the estate of the Trust, which was admitted by the Master of the High Court. The plaintiff proceeded to amend its particulars of claim accordingly to reflect the claim amount as N$36 502 901.62. On 9 December 2021, this court granted the relief so sought by the ninth defendant by ordering the plaintiff to discover a full copy of the plaintiff's claim admitted in the insolvent estate of the Trust.

On 4 March 2022, the ninth defendant launched a review application under case number HC-MD-CIV-MOT-REV-2022/00087 seeking the review and setting aside of the Master's and/or presiding officer's decision to admit the plaintiff's claim in the insolvent estate of the Trust. This review application under case number HC-MD-CIV-MOT-REV-

2022/00087 brought about the application to stay the current proceedings pending the outcome of the review proceedings.

Held that: in terms of the overriding objective of the Rules of Court the parties are obliged to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively. A delay of more than two years to launch the review application is not within the spirit of the Rules of Court. To stay the current application pending the outcome of the review proceedings will delay the main action with months. There is not even a possible time line to consider and the implications for the finalization of the matter cannot be disregarded.

Held that: the difficult position that the applicant professes to be in causing him to launch the current application is in my view self-created. Nothing precludes the applicant to pursue the review application to its conclusion but this court cannot be allowed to do so at the cost of the respondent.

Held further that: In my view the applicant neither made out a case for extraordinary circumstances to justify an application to stay the current proceedings, nor did the applicant make out for alleged prejudice he will suffer.

The application for the stay of proceedings under case HC-MD-CIV-ACT-CON-2018/03324 is refused.

ORDER

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1. The application for the stay of proceedings under case HC-MD-CIV-ACT-CON-2018/03324 is refused.

2. Cost is awarded to the respondent (plaintiff) against the applicant (ninth defendant) to include the costs of two legal practitioners where so engaged.

3. The matter is postponed to 8 September 2022 at 15h00 for Pre-trial Conference.

JUDGMENT

PRINSLOO J:

The parties

[1] The applicant is Rudolf Woldemar Winckler, the ninth defendant in the main action. During the course of the judgment I refer to Mr Winckler as the applicant or ninth defendant interchangeably.

[2] The respondent is Standard Bank Namibia Limited, the plaintiff in the main action. As in the case of the applicant I will refer to Standard Bank as the respondent and the plaintiff interchangeably.

The application

[3] The applicant approached this court on notice of motion praying for the following relief:

1. Staying the action instituted by the first respondent against the applicant under case number HC-MD-CIV-ACT-CON-2018/03324, pending the outcome of the application to review and set aside the decision of the third respondent (in his capacity as presiding officer) at the meeting of creditors on 22 January 2022 of the Faanbergh Winckler Development Trust (Master's reference: W 26/2019) ("the trust") to admit the first respondent's claim in the insolvent estate of the trust.
2. Directing any of the respondents opposing this application to pay the costs of the application jointly and severally.
3. Granting further and/or alternative relief.'

Background

[4] On 18 November 2013, the applicant and his co-trustee bound themselves as surety and co-principal debtor in solidum jointly and severally for the due payments to the plaintiff, for the due payment of all monies which the Faanbergh Winckler Development Trust ('the Trust') may from time to time owe the plaintiff.

[5] The main action arose out of a commercial property loan agreement concluded between the Trust and Standard Bank on 15 March 2016. The ninth defendant was a trustee of the Trust at the time of the agreement between the plaintiff and the Trust. It was a term of the loan agreement that the loan will, inter alia, be secured by the unlimited suretyship signed by the trustees on 18 November 2013.

[6] On 21 August 2018 Standard Bank instituted action against the Trust, the ninth defendant and nine other defendants. The ninth defendant was sued in his capacity as a surety of the Trust. The plaintiff claimed against the third, fourth, fifth, sixth, ninth and tenth defendants, jointly and severally, one paying the other to be absolved for, amongst other, the following relief:

a) Payment of the sum of N$67 742 683.20.
b) Payment of interest at the rate of 11.50% per annum on the amount N$ 67 742 683.20 calculated from 16 July 2018 to the date of payment.

[7] On 8 November 2019, the Trust was placed in final sequestration[1]. On 13 December 2019, the Master of the High Court gave notice to the third, seventh and twelfth defendants (in the main action) of the first creditors meeting to be held on 22 January 2020. During the said meeting the plaintiff submitted a claim of N$36 502 901.62 against the estate of the Trust, which was admitted by the Master of the High Court.

[1] By order of court under case number HC-MD-CIV-MOT-GEN-2019/00345.

[8] The plaintiff proceeded to amend its particulars of claim accordingly to reflect the claim amount as N$36 502 901.62 to which the ninth defendant pleaded on 21 January 2021 disputing, amongst other things, the fulfilment of the suspensive condition contained in clause 8 of the agreement relied upon by the plaintiff.

[9] In its replication the plaintiff pertinently pleaded the details of the proceedings at the Offices of the Master of the High Court on 22 January 2020, during which the plaintiff's claim of N$36 502 901.62 was admitted in the insolvent estate of the Trust. The plaintiff pleaded that it is an expressed term of the suretyship agreement, that any admission of proof of claim by the plaintiff in the insolvent estate of the Trust, as between the ninth defendant and the plaintiff is deemed to be acknowledgment of indebtedness in the amount for which such claim is admitted to proof and therefore the ninth defendant is deemed to have acknowledged his indebtedness to the plaintiff in the amount of N$36 502 901.62[2].

[10] Pursuant to the filing of the replication of the plaintiff the ninth defendant launched an interlocutory application in terms of rule 28(14) seeking an order that the plaintiff be ordered to discover the full copy of the plaintiff's claim that was admitted by the Master. On 9 December 2021, this court granted the relief so sought by the ninth defendant by ordering the plaintiff to discover a full copy of the plaintiff's claim admitted in the insolvent estate of the Trust[3].

[11] On 4 March 2022, the ninth defendant launched a review application under case number HC-MD-CIV-MOT-REV-2022/00087 seeking the review and setting aside of the Master's and/or presiding officer's decision to admit the plaintiff's claim in the insolvent estate of the Trust.

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[2] With reference to clause 9 of the deed of suretyship which provides as follows:'9. Admissions by Debtor 9.1 All admissions or acknowledgement of indebtedness by the Debtor shall be binding upon the Surety. 9.2 The admission to proof of a claim by the Bank in the insolvent estate or liquidation or judicial management of the Debtor shall be deemed, as between Surety and the Bank, to be acknowledgment of indebtedness in the amount for which such claim is admitted to proof.'

[3] *Winckler v Standard Bank Namibia* Ltd (HC-MD-CIV-ACT-CON-2018/03324) [2021] NAHCMD 584 (9 December 2021)

Application to stay the current proceedings pending the outcome of the review proceedings

[12] It is the case of the applicant that the determination of the validity of the claim admitted by the Master, to be considered in the review proceedings, will have significant effect on the action proceedings as the trial court cannot be called upon to decide if whether the claim of the plaintiff was properly proven.

[13] The applicant maintains that the trial court can merely, from a factual point of view, find if the plaintiff had proven its claim and if so then the applicant would be deemed to be liable as the deeming provision in terms of clause 9.2 of the suretyship agreement would take effect.

[14] The applicant therefore contends that the review court may set aside the proof of the plaintiff's claim because of the non-fulfilment of suspensive condition and if that was to happened after a judgment is pronounced by the trial court on the acknowledgement of debt the applicant would be prejudiced as a judgment would be granted on an acknowledgment of debt found not be to have existed. Therefore, the applicant maintains that the aforementioned untenable position can be avoided by first disposing of the review application before the trial action.

Opposition

[15] The respondent opposed the application and raised a point in limine, on the basis the applicant fails to disclose a cause of action as the applicant failed to allege and prove the elements of *lis alibi pendens*.

[16] With reference to the requirements of *lis alibi pendens* the respondent makes two pertinent points:

a) The respondent submitted that there is no pending claim between the parties to the application as the parties are not the same as those in the review application and the application is fatally defective as a result.

b) The matters before court are not based on the same cause of action as the first set of proceedings is action proceedings instituted by the respondent in August 2018 and the second set of proceedings pertains to a review application launched by the applicant against the decision of the Master to admit the respondent's claim. The respondent submits that the cause of the action proceedings arose *ex contractu* and that the claim of the respondent did not arise from the claim proven against the Trust. The contractual claim is thus independent from the claim the applicant seeks to impugn in the review proceedings.

[17] The respondent denies that the applicant's review application enjoys prospects of success. In support of the respondent's statement in this regard the respondent points out that the applicant has delayed in instituting the review application more than two years and despite the delay failed to tender an explanation for the late filing of the application or seeking condonation.

[18] The respondent further submits that the applicant presupposes that the review application will succeed but that the applicant does not take the court into his confidence as to what position would prevail if the respondent during the course of the trial proofs that the suspensive conditions were complied with and what effect it would have on the review application.

[19] The respondent denies that the only issue for determination during the trial proceedings is whether the respondent has proven its claim with the Master. The respondent contends that the proven claim is not the underlying cause of the suretyship agreement, instead it is a commercial loan agreement. The trial court must therefore decide whether a valid agreement existed before it can decide on the consequences that flows from the agreement.

[20] The respondent submits that it would suffer prejudice, should the court grant the stay application by the applicant as the matter is ready to proceed to trial and further submits that the applicant's defence would not be affected if the trial proceeds as the applicant's defence is that the suspensive conditions were not fulfilled and that this defence is independent of the acknowledgment of indebtedness as per the surety agreement.

Arguments advanced on behalf of the applicant

On behalf of the applicant

[21] Mr Quickfall strongly argued that facts of the current matter is extra-ordinary and that the applicant has a substantive right to review as it is enshrined in s 151 of the Insolvency Act[4]. Mr Quickfall further argued that the right to fairness dictates that the review must be heard before the main action

[22] Mr Quickfall also argued that the applicant finds himself in a difficult situation as the main action is still ongoing and therefore the current matter, given its peculiar circumstances, can be regarded as extraordinary. Mr Quickfall urged the court to not penalize the applicant for incorrect advice received which resulted in a delay of two years in bringing the review application.

[23] Mr Quickfall argues that, should the court find in favor of the respondent in the current proceedings, there is a risk of conflicting judgments in the same jurisdiction. Further to that, if the trial court finds in favor of the respondent there would be a binding

[4] **Review** 151. Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the Court and to that end may apply to the Court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the Court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve.

judgment against the applicant, which the applicant will have to appeal causing cost and interest to continue running. Mr Quickfall contends that if the current proceedings is not stayed it can have far-reaching consequences of the applicant, whereas the prejudice in respect of the respondent would be minimal. Therefore, the balance of convenience favors the applicant.

On behalf of the respondent

[24] Ms Kuzeeko argued that the issues raised by the applicant that the acceptance of the respondent's claim in the insolvent estate of the Trust is an acknowledgment of debt by him and that it creates an unassailable acknowledgment of debt by him, makes no sense. Ms Kuzeeko argues that on the applicant's understanding it appears that he would be held liable to pay the N$36 502 901.62 by virtue of the deeming provision even if the respondent does not proof the suspensive conditions. I do agree with Ms Kuzeeko that this approach of the applicant, in terms of which he wishes to support his current application does not pass muster.

[25] Ms Kuzeeko invited the court to look at the pleadings and also to consider the question if there is in the true sense of the word a review pending before this court. Ms Kuzeeko further argues that there is nothing exceptional about the application of the applicant and that the applicant did not discharge the onus in convincing the court that sufficient exceptional circumstance exists to justify a stay of proceedings.

[26] Ms Kuzeeko further pointed out the following:

a) The respondent, in its contractual claim, must proof that there is a valid contract of suretyship, that the causa indebiti is one for which the applicant undertook liability and the indebtedness of the principal debtor, ie the Trust. The submissions made in replication to the applicant's plea only relates to the amount due.
b) The Master cannot make any determination regarding suspensive conditions even if the matter is referred back to the Master.

c) The applicant does not deny he is a surety and as a result liable to the respondent.
d) The review cannot settle the matter between the parties and the court should consider which of the two proceedings will bring the matter to an end.
e) The real issues between the parties can be crystalized during the pre-trial conference proceedings.
f) The referral to trial will be in line with the overriding objectives of the High Court. The trial court will determine whether there is a valid contract between the respondent and the Trust.
g) The applicant failed to set out the prejudice, if any, that he would suffer if the matter is referred to trial.

[27] Ms Kuzeeko contends that, the applicant is abusing the court process and this abuse started during the previous interlocutory application to compel discovery, which was a ruse to initiate the review proceedings and that the applicant had no intention to assist in the finalization of the joint proposed pre-trial order.

The applicable legal principles

[28] The High Court possesses the inherent jurisdiction to prevent the abuse of process by staying proceedings, but also has the power to grant such an application in certain circumstances[5].

[29] In *Mouton v Gaoseb and Another*[6], where Masuku J had occasion to consider the application for leave to stay eviction proceedings on the ground that there were pending proceedings before the Supreme Court. Masuku J outlined the factors a court has to take in consideration when considering an application for stay of civil proceedings as follows:

[5] *Government of the Republic of Namibia (Minister of Land Reform) v Kamunguma* (HC-MD-CIV-ACT-OTH-2017-00069) [2018] NAHCMD 237 (8 August 2018).

[6] *Mouton v Gaoseb and Another* [2015] NAMHCMD 257 (I 4215/2011; 28 October 2015).

'[13] It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure. I would think this is because once legal proceedings are initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs.'

[30] I agree with the submissions on behalf of the applicant that in the instance where the court would grant a stay of proceedings is not limited and that each case should be considered on its merits.

[31] The special circumstances in which the aid of the court may be invoked to stay proceedings temporarily, as in the instant matter, is in many instances where there are pending proceedings before two or more courts and similar issues are to be determined in said proceedings. These circumstances ordinarily gives rise to a defence of *lis alibi pendens* or estoppel

[32] The requisites for successful plea of lis pendens was set out by Angula DJP in In *Schuette v Schuette*[7]*,* wherein the learned Judge made the following observations regarding the concept of *lis pendens* and the court's approach thereto:

'[14] The requirements for the plea of *lis pendens* in terms of the law are these: there must be pending litigations; between the same parties or their privies; based on the same cause of action; and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical.[11] The plea of *lis pendens* is not absolute. This means that even if it is found that the requirements have been met, the court has a discretion to

[7] *Schuette v Schuette* (HC-MD-CIV-MOT-GEN-2019/00376) [2020] NAHCMD 426 (18 September 2020).

allow an action to continue should that be considered just and equitable in the circumstances, despite the earlier institution of the same action.'

[33] When these requirements as set out in the *Schuette* matter are applied to the facts before me, the following is clear:

a) There is a pending litigation between the parties, specifically the applicant and the respondent.
b) The parties are not exactly the same. The second to fourth respondents in the review proceeding are not the same as in the action proceedings. The applicant however argues that the 'main protagonists' are the same. That is however where the similarity stops.
c) The review action currently pending is not based on the same cause of action. The cause of action in the main action is ex contractu being founded in a suretyship agreement, whereas the review proceedings is aimed at setting aside the administrative decision of an administrative officer and does not relate to the underlying cause of action.
d) The review proceedings also do not relate to the same subject-matter. The issue of fact and law to be considered in the respect matters are quite distinct from each other.

[34] In my view the applicant did not satisfy the requirements of *lis alibi pendens*.

[35] I take no issue with the applicant's right of review or with the argument advanced on fairness however fairness is a double edged sword. It does no only work in favor of the applicant at the cost the respondent.

[36] If I consider the chronological order in the current matter it is clear that the action was instituted as far back as 2018 and the first creditors meeting was held during first creditors meeting to be held on 22 January 2020 and the plaintiff replicated on 10 February 2021, setting out the details of what happened during the proceedings at the Master. The applicant has been aware of the first creditors meeting but only in March 2022 launches a review application, more than two years after the fact.

[37] When the applicant launched the review application it was not done with a concomitant application for condonation. The respondent submits that the application cannot succeed for his failure to make out a case why the court should condone his unreasonable delay to bring the review application. I am however of the view that the applicant is not required to satisfy this court as to his prospects of success in the review application. I must, however, point out that the reality is that without a proper application for condonation being made, the applicant's review application is doomed to fail on this basis alone.

[38] However, I do agree with Ms Kuzeeko, even if the review application is decided in favor of the applicant it does not terminate the issues between the parties. In the event that the default remedy is set aside and the matter is remitted to the Master for reconsideration of his/her decision and in the event that the respondent's claim is rejected, nothing prevents respondent from proving it claim again at a subsequent meeting. The only way that this matter can be properly ventilated and finalised is to proceed to trial.

[39] In terms of the overriding objective of the Rules of Court, the parties are obliged to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively. A delay of more than two years to launch the review application is not within the spirit of the Rules of Court. To stay the current application, pending the outcome of the review proceedings, will delay the main action with months. There is not even a possible time line to consider and the implications for the finalization of the matter cannot be disregarded.

[40] The difficult position that the applicant professes to be in causing him to launch the current application is in my view self-created. Nothing precludes the applicant to pursue the review application to its conclusion, but this court cannot be allowed to do so at the cost of the respondent.

[41] In my view, the applicant neither made out a case for extraordinary circumstances to justify an application to stay the current proceedings, nor did the applicant make out for alleged prejudice he will suffer.

Conclusion

[42] I agree with my Brother Masuku J as indicated in *Mouton v Goaseb* applications for stay of proceedings must be granted sparingly and the current matter is not justified for this court to apply its discretion in favor of the application. Therefore, for the reasons set out above the application to stay the current proceedings pending the outcome of the review proceedings is dismissed.

Order

[43] My order is as follows:

1. The application for the stay of proceedings under case HC-MD-CIV-ACT-CON-2018/03324 is refused.

2. Cost is awarded to the respondent (plaintiff) against the applicant (ninth defendant) to include the costs of two legal practitioners where so engaged.

3. The matter is postponed to 8 September 2022 at 15h00 for Pre-trial Conference.

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JS Prinsloo

Judge

APPEARANCES

FOR PLAINTIFF:	M Kuzeeko Dr Weder, Kauta & Hoveka Windhoek
FOR DEFENDANTS	D Quickfall Instructed by Danielle Lubbe Attorneys Windhoek