

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> Frans Mbuyu Kwala Kwala and Company Incorporated  and  Bank Windhoek Limited Manfred Hennes Dr. Weder, Kauta And Hoveka Incorporated	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2021/00412  <b>Division of Court:</b> Main Division  <b>Heard on:</b> 15 September 2022
First Applicant Second Applicant	
First Respondent Second Respondent Third Respondent	
<b>Heard before:</b> Honourable Mr Justice Usiku J	<b>Delivered on:</b> 06 October 2022
<b>Neutral citation:</b> <i>Kwala v Bank Windhoek Limited</i> (HC-MD-CIV-MOT-GEN-2021/00412) [2022] NAHCMD 534 (06 October 2022)	
<b>Order:</b> 1. The applicants' application for leave to re-open the pleadings, is dismissed. 2. The applicants are ordered to pay the costs of the first respondent, jointly and severally the one paying the other to be absolved. Such costs include costs of one instructing and one instructed counsel. 3. The matter is postponed to 2 November 2022 at 15:15 for status hearing.	

4. The parties shall file a joint status report on or before 26 October 2022.

**Reasons for order:**

USIKU J:

Introduction:

[1] In the present matter, the applicants seek an order in the following terms:

- (a) ordering that the pleadings be re-opened;
- (b) ordering that the applicant be allowed to file a supplementary affidavit to ventilate the aspect of disputed documents;
- (c) costs of suit only if opposed, and
- (d) further and / or alternative relief.

Background

[2] On or before 18 July 2018, the first respondent (Bank Windhoek Namibia) instituted action against first applicant under case number HC-MD-CIV-ACT-CON-2018/02788. In that action the first respondent claimed against the first applicant payment in the amount of N\$2 251 546.15, plus interest thereon, an order declaring immovable property described as Erf No. 3729 (a portion of the Erf 1367) Windhoek, specially executable, and costs of suit.

[3] The first applicant did not enter appearance to defend. However, the parties concluded a settlement agreement in terms of which the first applicant undertook to pay N\$300 000 on or before 31 October 2018. The parties also agreed that the settlement agreement be made an order of court and that the abovementioned immovable property, which is bonded in favour of the first respondent, is to be declared specially executable by that court order.

[4] The parties also agreed, in the settlement agreement, that the plaintiff shall be entitled to execute against the bonded property should the first applicant default on any of the provisions of the agreement.

[5] The settlement agreement was made an order of court on 4 September 2018. According to

the first respondent, the first applicant defaulted by failing to make payment as agreed between the parties. On or about 24 January 2019, the first respondent caused a writ of execution to be issued against the property.

[6] On 28 July 2021, the property was sold in execution by the second respondent (the deputy sheriff) to Bank Windhoek Limited (the first respondent) for N\$3 000 000.

[7] In October 2021, the applicants (Frans Mbuyu Kwala and Kwala and Company Incorporated) brought an application against the respondents seeking relief in the following terms:

- (a) ordering that the deed of sale signed between the first and second respondent is null and void;
- (b) ordering the first respondent to carry the costs of transfer, in the event the property was unlawfully transferred;
- (c) ordering the first respondent to reimburse the first applicant all the overpayments made by the first applicant with interest;
- (d) ordering the first respondent to remove first applicant's name from ITC listing with immediate effect;
- (e) costs of suit and,
- (f) Further and / or alternative relief.

[8] After the parties have exchanged pleadings in the abovestated application, the applicants brought the present interlocutory application on 15 June 2022, requesting that the pleadings be re-opened and that the applicants be allowed to file a supplementary affidavit to ventilate an aspect of disputed documents.

[9] In the present application the applicants aver that they dispute the authenticity of certain documents provided by the first respondent, namely:

- (a) a 'facility letter', with the heading 'Application for residential mortgage loan', dated 11 April 2012, and,
- (b) the acknowledgment of debt, dated 2 and 3 September 2020.

[10] The facility letter among other things, informs the first applicant that his loan application has been approved subject to certain conditions, and proceeds to set out those conditions. It is purportedly signed by two officials of the first respondent and by the first applicant. By signing the letter, the first applicant purportedly accepted the conditions applicable thereto. The date of the

signature by first applicant is reflected as 24 April 2012.

[11] The acknowledgment of debt is purportedly signed by the first and second applicants and the first respondent. In the acknowledgment of debt, the applicants acknowledge being indebted to the first respondent as co-principal debtors in the amount of N\$3 704 811.59 and undertook, among other things, to pay N\$45 000 monthly, on or before 7 October 2020.

[12] The facility letter was attached to the first respondent's answering affidavit to the main application, which answering affidavit was filed on 17 November 2021. The acknowledgment of debt was made available to the applicants by the first respondent on 16 March 2022, upon applicants' request.

[13] The applicants aver that the aforesaid documents are not authentic and seek an order directing that the pleadings be re-opened to enable applicants to file a supplementary affidavit addressing the subject of authenticity of these documents.

[14] The application to re-open pleadings is opposed by the first respondent.

#### The application to re-open pleadings

[15] In their interlocutory application, the applicants state that they wish the first respondent to explain the genesis of the disputed documents and to further explain why the acknowledgement of debt was not attached to the first respondent's answering affidavit.

[16] The applicants therefore pray that the pleadings be re-opened to allow them to ventilate issues arising from the disputed documents.

[17] In opposition, the first respondent contends that the applicants had an opportunity to raise any alleged dispute about the authenticity of the facility letter in their replying affidavit, but elected or failed to do so.

[18] The first respondent further contends that it did not, in its answering affidavit, rely on the acknowledgment of debt, because same is not required for its opposition to the main application.

[19] It is further the contention of the first respondent that the material sought to be raised in the

supplementary affidavit is irrelevant to the issues for determination and irrelevant to the relief sought in the main application.

[20] The first respondent therefore submits that the interlocutory application be dismissed with costs.

### Analysis

[21] It is trite that in application proceedings evidence is led by way of affidavits. The ordinary rule is that affidavits are limited to three sets. The affidavits take the place of the pleadings and the evidence that would be led at the trial. Rule 66(2) of the High Court Rules, provides that further affidavits may be allowed in the discretion of the court.

[22] A court will only exercise its discretion to allow further affidavits if there is a good reason for doing so. In other words, there must be a proper and satisfactory explanation why the facts or information sought to be tendered by way of further affidavits, was not put before the court at an earlier stage.<sup>1</sup>

[23] In the present matter, the applicants seek to be allowed to file additional affidavit(s) in order to address the issue of authenticity of the facility letter and the acknowledgement of debt. There is no explanation put forth why the issue of authenticity of the facility letter was not addressed in the applicants' replying affidavit.

[24] Furthermore, there is no explanation on how the issue of authenticity of the facility letter and the acknowledgment of debt are relevant to the determination of whether or not:

- (a) the deed of sale signed between the first and second respondents be declared null and void, or,
- (b) the sale in execution of Erf 3729, be declared unlawful and invalid.

[25] It appears apparent from the applicants' founding and replying affidavits that the applicants do not rely on lack of authenticity of the facility letter or the acknowledgment of debt, for the relief they seek in the main application. In addition, the first respondent does not rely on the facility letter or acknowledgement of debt for its defence against the applicants' application. I am therefore, of the opinion that the issues that the applicants seek to address by way of further affidavits are

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<sup>1</sup> *The chairperson of the Council for the Namibia Qualifications authority v Shdonai Beauty School* (HC-MD-CIV-MOT-REV-2020/00337)[2021] NAHCMD 530 (12 November 2021) para 20.

irrelevant to the issues for determination and to the relief sought by the applicants in the main application. I am, therefore, of the view that the application to reopen pleadings stands to be dismissed for the foregoing reasons.

[26] As regards the issue of costs, I am of the opinion that the general rule that costs follow the event must find application in this matter.

27] In the result, I make the following order:

1. The applicants' application for leave to re-open the pleadings, is dismissed.
2. The applicants are ordered to pay the costs of the first respondent, jointly and severally the one paying the other to be absolved. Such costs include costs of one instructing and one instructed counsel.
3. The matter is postponed to 2 November 2022 at 15:15 for status hearing.
4. The parties shall file joint status report on or before 26 October 2022.

<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>First &amp; Third Respondent:</b>
F Kwala Kwala & Co. Inc., Windhoek	CJ Van Zyl Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek