

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

<b>Case Title:</b> WS TRADING AND INVESTMENT CC & 3 OTHERS // CAPX FINANCE NAMIBIA (PTY) LTD	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2023/00002
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER, ACTING	<b>Heard on:</b> 12 SEPTEMBER 2023
	<b>Delivered on:</b> 2 OCTOBER 2023
<b>Neutral citation:</b> <i>WS Trading and Investment CC v Capx Finance Namibia (Pty) Ltd</i> (HC-MD-CIV-MOT-GEN-2023/00002) [2023] NAHCMD 609 (2 October 2023)	
<b>Order:</b>	
<p>1. The order granted on 16 August 2023 is varied and replaced with the following:</p> <p>1.1 The main application under Case No. HC-MD-CIV-MOT-GEN-2023/00002, any rescission application, any condonation application and any other interlocutory application related thereto are dismissed.</p> <p>1.2 There is no order as to costs.</p> <p>2. The matter is considered finalised and removed from the roll.</p>	
<b>Reasons:</b>	
PARKER AJ:	

Introduction:

[1] Why are the parties in court – in this court – under Case No. HC-MD-CIV-MOT-GEN-2023/00002, ie Case No. 2023/00002 for short? The parties are the following: WS Trading and Investment CC (first applicant), Alexine Alexia Jeja (second applicant), Elias Jeja (third applicant) and Elton Jeja (fourth applicant) against Capx Finance Namibia (Pty) Ltd (respondent).

[2] In their notice of motion under the case No. 2023/00002, filed on 12 April 2023, the applicants sought the following relief:

- ‘1. Rescinding the condonation granted by this Court on 22 March 2023;
2. Ordering that the founding affidavit in support of condonation application is not property attested and is rejected.
3. Directing the respondent to pay the costs in this application.
4. Further and/or alternative relief.’

The court order of 22 March 2023

[3] In chambers and in the absence of the parties, the court granted the following order on 22 March 2023:

- ‘1. The respondent’s late filing of its Answering Affidavit is hereby condoned.
2. The applicants should deliver a replying affidavit if they so wish, on or before 17 April 2023.
3. The case is postponed to **21 April 2023 at 10h00** for Residual Court Roll hearing (Reason: Documents Exchange).’

[4] The foregoing is the order sought to be rescinded referred to in para 2 above. The respondent mentioned in the 22 March 2023 order is the respondent referred to as such in para 2 above, and the applicants are the applicants referred to as such in para 2 above.

[5] On 16 August 2023, the court granted the following order:

1. The rescission application is not opposed and is accordingly granted with costs limited to disbursements.
2. The first respondent shall file its replying affidavit in respect of the condonation on or before 25 August 2023.
3. The first respondent shall file its heads of argument on or before 1 September 2023.
4. The applicants shall file their heads of arguments on or before 8 September 2023.
5. The case is postponed to 12 September 2023 at 10h00 for Interlocutory hearing (Reason: Hearing).'

[6] In the proceedings of 16 August 2023, Mr Christian, who is not a legal practitioner in terms of the Legal Practitioners Act 15 of 1995 ('LPA') informed the court at the threshold that he was representing the applicants. His representation was not objected to by Mr Jacobs, a legal practitioner, who practises without a fidelity fund certificate in terms of the LPA and who was instructed by the law firm of Schickerling Attorneys. Mr Jacobs represented the respondent. Without any such objection, I allowed Mr Christian to represent the applicants because it seemed to me that the second, third and fourth applicants have an inter-family affiliation and each of them is the alter ego of the first applicant, a close corporation, and Mr Christian was a member of the first applicant.

[7] I shall return to the 16 August 2023 order in due course. That order forms part of the brouhaha that has characterized the illegalities that have in turn bedevilled the series of interlocutory applications brought in relation to the main application, referred to in para 11 below.

[8] The focus of this ruling is not only to sanitize the applications but also to dissipate the illegalities. To do that and in virtue of the view I take of the instant matter, it would be of some assistance to set out hereunder the chronology of the proceedings before the court and the Supreme Court.

[9] In case number HC-MD-CIV-ACT-CON-2018/01452, default judgment was granted in favour of the respondent against the applicants on 8 June 2018. Thereafter, on 12 November 2019, an opposed rule 108 application was granted declaring Farm Renosterkom ('the farm') specially executable.

SA 81/2019

[10] Dissatisfied with the outcome of the Case No. HC-MD-CIV-ACT-CON-2018/01452, the applicants appealed the high court decision to the Supreme Court under case number SA 81/2019. On 15 July 2021, the Supreme Court dismissed the appeal with the costs.

The instant Case No. HC-MD-CIV-MOT-GEN-2023/00002

[11] After the Supreme Court judgment, the applicants on 9 January 2023 launched the instant application under Case No. HC-MD-CIV-MOT-GEN-2023/00002 whereby they sought the following relief:

- '1. Declaring that the order in case No: HC-MD-CIV-ACT-CON-2018/01452 dated 7 November 2019 declaring the immovable property specially executable is unprocedural and void;
2. Declaring that the order is contrary to the express, peremptory conditions of rule 108 of the Rules of Court;
3. Declaring that the order, declaring the immovable property, emerged principles which cumulatively be considered, the categorical imperatives of the doctrine Ex Debito Justitiae;
4. Declaring all other proceedings consequent to the declaration of applicants primary home specially executable void;
5. Granting the Applicants and/or alternative relief as the Court, may deem fit to restore the status quo ante as at before 7 November 2019.'

[12] The order the applicants now ask the court to declare void is the self-same order they appealed from to the Supreme Court, which appeal the Supreme Court dismissed, as discussed in para 10 above. The applicants' conduct should not be countenance under any circumstances. Such conduct is inimical to the rule of law upon which Namibia's

constitutional life is built on.<sup>1</sup> I shall return to these important remarks in due course.

### Conclusion

[13] I have set out the chronology of proceedings in paras 3-12 above to make the following Constitution correct points. In virtue of the judgment of the Supreme Court referred to in para 10 above, the court has no power whatsoever – not even a whimper of it – to consider any application for final relief or interlocutory relief relating to the matter that was disposed of by the Supreme Court in its judgment of 15 July 2021 that is aimed at setting at nought that judgment. Such judgment is binding on all courts and persons in Namibia until set aside by the Supreme Court itself or by an Act of Parliament.<sup>2</sup>

[14] It is important to stress this important point. In their abortive appeal to the Supreme Court, the applicants challenged the lawfulness and validity of the aforementioned order made by the court on 8 June 2018. In the present main application, the applicants challenge the lawfulness of the self-same order of the court made on 8 June 2018 and the subsequent order of 12 November 2019; this time by seeking the remedy of declaration when the Supreme Court has already spoken, as it were. It should be remembered, in our law, it ought not to make any difference to a competent court what door a litigant uses to approach the seat of judgment of the competent court where the lawfulness and invalidity of a judgment or order is impugned.

[15] On the facts of the case, the appeal remedy and the declaratory remedy cannot be said to be mutually exclusive. It follows irrefragably that in virtue of the Supreme Court judgment, the instant main application and interlocutory applications related thereto offend article 81 of the Constitution and disregard *Schroeder and Another v Solomon and 48 Others*, referred to above, and so they cannot be entertained, as aforesaid.

[16] The order of the court, referred to in para 9 above, declaring the farm specially executable, was made as long ago as 12 November 2019. Despite the failure of the aforesaid appeal from that order in July 2021, that is, more than eight years ago, the appellants have gone on an excursion via the main application and interlocutory applications. Such conduct cannot be countenanced by the court. 'Effect must be given to orders of court until or unless they are set aside.'<sup>3</sup> The 12 November 2019 order has not been set aside.

<sup>1</sup> *Van Straten NO v Namibia Financial Institutions* 2016 (3) NR 747 (SC) para 108.

<sup>2</sup> *Schroeder and Another v Solomon and 48 Others* 2011 (1) NR 20 (SC).

[17] Consequently, as a matter of law, the court cannot hear the main application under Case No. HC-MD-CIV-MOT-GEN-2023/00002, any rescission application, any condonation application and other interlocutory application related to the main application without offending article 81 of the Constitution and without disregarding unconstitutionally and unlawfully *Schroeder and Another v Solomon and 48 Others*. Indeed, it would be perpetuating the illegal and unconstitutional conduct of the applicants if this court only struck the matter from the roll. Such order would only invite the applicants to 'frustrate the due process of law and thus undermine the rule of law upon which the Constitution is premised'.<sup>4</sup> The main application, any rescission application, any condonation application and other interlocutory application related to the main application clearly offend article 81 of the Constitution and disregards *Schroeder and Another*, as aforesaid.

[18] For the foregoing reasons, the proper and effective order to make is to dismiss the main application, any rescission application, any condonation application and any other interlocutory application related to the main application. It would be postponing the funeral of the main application unjustifiably and to no avail if only the rescission application and the other interlocutory applications alone were dismissed. In all this, I cannot say the respondent bears no blame, having allowed itself to accept the aforementioned conduct of the applicants.

[19] Based on all these reasons, I am entitled to amend the order made on 16 August 2023 because the respondent's constitutional right to fair trial under article 12 of the Constitution, as well as article 81, would be violated if that order was not varied appropriately.<sup>5</sup>

[20] For this circus, the ringmaster's circus has come to an end. The lights have been turned off!

[21] In the result, I order as follows:

1. The order granted on 16 August 2023 is varied and replaced with the following:

1.1 The main application under Case No. HC-MD-CIV-MOT-GEN-2023/00002, any rescission application, any condonation application and any other interlocutory

<sup>3</sup> *Balzer v Vries* 2015 (2) NR 547 (SC) para 33.

<sup>4</sup> *Loc cit.*

<sup>5</sup> *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and Others* 2011 (1) NR 272 (HC).

application related thereto are dismissed.

1.2 There is no order as to costs.

2. The matter is considered finalised and removed from the roll.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondent</b>
H Christian (In person and representing the applicants)	J Jacobs Instructed by Schickerling Attorneys, Windhoek