

## REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

## RULING

<b>Case Title:</b>	<b>Case No:</b> HC-MD-CIV-MOT-GEN-2021/00351
Praelex Property & Investment Consultants      Applicant CC t/a Bridge Pro Financial Solutions	<b>Division of Court:</b> Main Division
and	<b>Heard on:</b> 29 November 2022
Urban Farming CC    Respondent	
<b>Heard before:</b> Honourable Lady Justice Rakow	<b>Delivered on:</b> 3 March 2023
<b>Neutral citation:</b> <i>Praelex Property &amp; Investment Consultants CC t/a Bridge Pro Financial Solutions v Urban Farming CC</i> (HC-MD-CIV-MOT-GEN-2021/00351) [2023] NAHCMD 89 (3 March 2023)	
<b>Order:</b>	
1.       The rule nisi is re-instated and extended to 28 March 2023.	
2.       Each party to carry their own costs of the application.	
3.       The applicant to file their replying affidavit on or before 7 March 2023.	
4.       The parties to file a case management plan on or before 23 March 2023.	
<b>Reasons for order:</b>	
RAKOW J	
<u>Introduction</u>	
[1]       During 2016 the applicant and the respondent entered into an agreement, a so-called	

bridging loan agreement whereby the applicant loaned to the respondent the amount of N\$6 000 000. As security for the loan, mortgage bonds were registered over two farms, Ehuiro and Ohere. As per the agreement, the respondent agreed to repay the applicant the whole capital amount plus interest no later than 15 January 2017. The respondent further agreed to, if it fails to pay the outstanding amount on 15 January 2017, to pay a further penalty fee of N\$4 512,33 per day until the date of repayment.

[2] The respondent failed to make any payments on the debt. The applicant was further informed that a default judgement in favour of the Namibian Procurement Fund was granted and that they intend to sell the bonded property on auction as they were holding a second covering mortgage bond. This however, did not happen and as a result, the applicant decided to apply for the respondent to be wound-up and for a provisional liquidator to be appointed and to take control of any of the assets of the respondent for safekeeping.

[3] The respondent filed an answering affidavit in which it indicates that it intends to oppose the said application and filed its intention to oppose on 21 September 2021. The matter was then removed from the first motion roll because it became defended and on 5 November 2021 Justice Angula gave certain instructions to the parties regarding the filing of papers. The first matter that was dealt with, was the condonation application for the late filing of the answering papers. Justice Masuku dealt with the application and ordered that the application for condonation of the filing of the answering affidavit is refused and removed the matter from the roll.

[4] The matter was placed back on the roll and on 11 February 2022, the provisional order was granted with the return date of the rule nisi given as 22 April 2022. The respondent again filed an answering affidavit and on 20 April 2022, the matter was removed from the roll by Justice Schimming-Chase for failure to comply with the Practice Directives. As a result hereof, the applicant filed an application on 12 May 2023 seeking the revival of the rule nisi in terms of rule 86, and this is the application currently before the court.

#### The founding affidavit

[5] The founding affidavit accompanying the revival application was commissioned by Mr. Titus an associate at Francois Erasmus and Partners. He explained that because the matter was on the First Motion roll, they had to comply with the Practice Directives and file a draft court

order as well as an annexure 9 document. A certain Ms. Fourie at their office is responsible for the management of all deadlines for documents that need filing and records these on a calendar. She, however, did not record the deadline for this specific file, resulting in the necessary documents not being filed on time. A confirmatory affidavit of Ms. Fourie is also filed.

[6] He further stated that the failure to file the necessary documents was not a willful disregard on their side but an oversight. He also indicated that no prejudice will be suffered by the respondents as the matter would in any case have been removed on 22 April 2022 because an answering affidavit was filed and it now became opposed. On the other hand, the applicants stand to be severely prejudiced if the rule nisi is not revived as they are currently not having their matter heard.

### Arguments

[7] For the applicants, it was argued that the rule nisi was not discharged because of a default of appearance of the applicant but that it was on other grounds. These grounds were, however, not based on the merits of the matter, and therefore the court could permit the application to proceed on the same papers at a later stage. It was further argued that the provisions in the Practice Directions were only issued on 2 March 2009 (when annexure 9 was called a motion court return) when the same worded rule existed under rule 27(4) which was introduced to the Uniform Rules of Court in 1987 and formed part of the Namibian High Court rules in 1990. It was therefore submitted that when the 1990 rules and the 2014 rules, which introduced this rule as rule 86, were promulgated, the need for the revival of a rule nisi was not necessarily foreseen in circumstances other than the default of an applicant's appearance, especially circumstances where a matter is struck from the roll for non-compliance with certain practice directions.

[8] In the alternative, it was argued that rules 54(1), 55(1), and/or 56(3) confer powers on the Court which may be exercised upon application and good cause shown, which was done in the current matter and would allow for the revival of the rule nisi. The applicant showed good cause as well as prospects of success in its application.

[9] On behalf of the respondents, it was argued that there is no good cause requirement in a revival application under rule 86. The application brought by the applicant seems to be more in line with a rule 88(7) application which deals with the reinstatement of a rule nisi by the court in

divorce proceedings. Rule 86 is clear, it is only available for non-appearance.

### Legal considerations

[10] Under the heading Revival of rule nisi rule 86 provides as follows:

'After a rule nisi has been discharged because of default of appearance of the applicant the court or the managing judge may, on application by a party with an interest in the matter and on notice to all interested parties, revive the rule and may direct that the rule so revived need not be served again.

[11] When interpreting legislation, the principles of interpretation of statutes are trite. In the matter of *Commissioner, South African Revenue Services v United Manganese of Kalahari (Pty) Ltd*<sup>1</sup> it was summarized as follows:

'It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.'

'It has been held that a rule nisi which has lapsed because the applicant had failed to take a prescribed step within the time limit laid down in the rule cannot be revived in terms of rule 27(4) as it had not been discharged by default of appearance by the applicant.'

[13] When interpreting the wording of the rule and looking at the South African authorities on the subject, it must be clear that this rule can only come into play at a failure of appearance. It was written for a specific purpose, being discharged due to default of appearance, and it must be understood to mean just that. The application under rule 86 must therefore be dismissed.

[14] However, to insist that the applicant must file a whole new application does not serve the spirit and ethos of the new court rules. To have the process start over, seemingly for the third time may just result in wasting time and money and a delay in dealing with the real issues. The respondents are further ready to oppose the application and as such have filed their opposing papers. To find that the application must be filed afresh will therefore be a delay in the process

<sup>1</sup> Commissioner, South African Revenue Services v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA) (82 SATC 444; [2020] ZASCA 16) para 8.

and this matter has been coming for some time without being dealt with.

[15] As the notice of motion referred to alternative relief, and I have found that rule 86 is not applicable, I will turn now to the relief provided by rule 56, which in my opinion is suitable relief in a matter like the one before the court. Rule 56 reads as follows:

'(1) On application for relief from a sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction, or court order, the court will consider all the circumstances, including -

- (a) whether the application for relief has been made promptly;
- (b) whether the failure to comply is intentional;
- (c) whether there is a sufficient explanation for the failure;
- (d) the extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) whether the trial date or the likely trial date can still be met if relief is granted;
- (g) the effect that the failure to comply has or is likely to have on each party; and
- (h) the effect which the granting of relief would have on each party and the interests of the administration of justice.

(2) An application for relief must be supported by evidence '

### Conclusion

[16] It is common cause that an adverse consequence – the matter being removed from the roll – followed after not complying with practice directives occurred in this matter. The applicant filed an application and in my view, it was done promptly as it was filed within days of being removed from the roll. I further find that the failure to comply was not intentional and the explanation provided for the failure was sufficient. The previous non-compliance in this matter is attributed to the respondents and from my reading of the court file, the applicant met timelines. The granting of the relief will also allow the respondents to proceed with the hearing of their defence to the allegations and serve the interest of justice.

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

<ol style="list-style-type: none"> <li>1. The rule nisi is re-instated and extended to 28 March 2023.</li> <li>2. Each party to carry their own costs of the application.</li> <li>3. The applicant to file their replying affidavit on or before 7 March 2023.</li> <li>4. The parties to file a case management plan on or before 23 March 2023</li> </ol>	
<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>Defendant:</b>
B de Jager  Francois Erasmus & Partners, Windhoek	J Diedricks  Conradie & Damaseb Legal Practitioners, Windhoek