

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case number: HC-MD-CIV-MOT-GEN-2020/00007

In the matter between:

MARIA RACHEL RUDATH	1ST APPLICANT
GORDON CECIL RUDARTH	2ND APPLICANT
JOHN WILLIAM DAWSON	3RD APPLICANT
SUSANNAH JOHANNA DAWSON	4TH APPLICANT
KATRINA IZAAKS	5TH APPLICANT

and

ZACHARY CHRISTY IAN DU PLESSIS	1st RESPONDENT
ELSABE ANNETTE DU PLESSIS	2nd RESPONDENT
KATRINA FREDRIKA IZAAKS	3rd RESPONDENT
ELIZABETH BEUKES	4th RESPONDENT
ANNA-MARIE IZAAKS	5th RESPONDENT
GERHARD JOHN BEUKES	6th RESPONDENT
CORNELIA ROSA BEUKES	7th RESPONDENT
THE REGISTRAR OF DEEDS REHOBOTH	8th RESPONDENT
THE MINISTER OF AGRICULTURE, WATER AND RURAL DEVELOPMENT	9th RESPONDENT
THE CEO BANK WINDHOEK LIMITED	10th RESPONDENT
THE PERMANENT SECRETARY, OFFICE OF THE JUDICIARY (MAGISTRATE REHOBOTH)	11th RESPONDENT

FREDERICK ARRIE IZAAKS

12th RESPONDENT

SABINA IZAAKS

13th RESPONDENT

CHRISTINA MAGRIETA IZAAKS

14th RESPONDENT

GERT ISAAKS

15th RESPONDENT

Neutral citation: *Rudath v Du Plessis* (HC-MD-CIV-MOT-GEN-2020/00007) [2024]
NAHCMD 82 (06 March 2024)

Coram: Ndauendapo J

Heard: 07 February 2023

Delivered: 06 March 2024

Flynote: Civil Procedure- Rule 132(7) – Inactive case – Reason to the satisfaction of managing judge to be provided – Reason provided – Not in the interest of justice to strike the application – Application enrolled.

Summary: The applicants launched an application seeking, *inter alia*, orders setting aside the lease agreement dated 9 March 2017, whereby, the fourth respondent leased 552,3623 hectares in farm Zaugab to the first and second respondents as *null* and *void ab initio* and setting aside a deed of sale dated 8 March 2016 in terms whereof the seventh respondent sold 552,3623 hectares of farm Zaugab to first and second respondents *null* and *void ab initio*. The applicants alleged that they inherited the farm from their parents and that some of the heirs have unlawfully sold certain portions of the farm to some of the respondents. The application is opposed and affidavits have been filed. At one point the application was inactive for six months. On 27 July 2022, there was no appearance on behalf of the applicants and the court removed the application from the roll. On 18 September 2023 a notice in terms of r 132(6) was issued. The applicants filed an affidavit explaining why the application was inactive for more than six months. Some of respondents opposed the affidavit of applicants explaining why the application should not be struck and want the matter to be struck from the roll. The respondents allege that the applicant have failed to expeditiously prosecute the application.

Held that: it is in the interest of justice that the application is not struck and be re-activated.

Held further that: in terms of the new dispensation of judicial case management, all the parties (including respondents) must assist the court in moving the application forward.

ORDER

1. The application will not be struck from the roll and is hereby re-activated.
2. There is no order as to costs.
3. The application is postponed to 17 April 2024 at 15h30 for case management conference.
4. The parties must file a joint case management report by 12 April 2024 at 15h00.

RULING

Ndauendapo J

Introduction

[1] On 27 July 2022, this court removed the application from the roll because of non-appearance of the legal practitioner of the applicant or any of the respondents. A hearing notice was uploaded on 18 September 2023.

[2] The hearing notice states:

'Notice to all parties and legal practitioner of record

Take notice that you are hereby called upon to attend a hearing before the managing judge, Honourable Ndauendapo, on 04th day of October 2023 at the High Court of Namibia (Main Division) at 15:30 PM to show cause to the satisfaction of the managing judge why there has been no activity in this case for six months and why the case must not be struck from the roll. Not to be enrolled again (Own underlining)

TAKE FURTHER NOTICE that failing to attend this hearing may result in the case being struck from the roll and not being enrolled again and to be regarded as finalised.'

[3] Rule 132 (4) provides that:

'The registrar must, after consulting the Judge-President, docket-allocated any inactive case that has not yet been docket-allocated to a managing judge.'

[4] This matter is on the roll for this reason.

[5] The matter was removed from the roll on 27 July 2022, as a result of the absence of the legal practitioner of record for the applicants.

[6] Rule 132(7) states the following:

'Where a party or his her legal practitioner appears on that date the managing judge must inquire as to why there is no activity on the case and if the managing judge is satisfied with the reason he or she must make such order that he or she may consider suitable or appropriate and give appropriate directions for the speedier conduct of the proceedings.'

[7] Ms Petherbridge, the applicants' legal practitioner, filed an affidavit in response to the notice. The fourth applicant has passed away in the interim, she has withdrawn as legal practitioner of record for the third applicant. The third applicant has not appointed a new legal practitioner.

[8] She avers that she filed a status report on 27 July 2022, which she states that the court "seemingly did not have regard to this report". She cannot recall exactly

why she did not attend the status hearing when the matter was removed, but tendered her apology for the inconvenience caused. It was not intentional and not intended to waste the court resources.

[9] Her instructions were always to proceed with this application. She avers further that upon the instructions of the applicants, she on 2 November 2022, addressed a letter to Ms Williams, who is on record for the first and second respondents. The same letter was re-sent on 16 November 2022 to the legal practitioner for the first and second respondents. She contends that on 20 September 2023, she requested Ms Williams to reply to her letter dated 2 November 2022. To date, she has not received any response from Ms Williams. She also had a brief discussion about the letter with Ms Williams that she needed to reply to during the course of July 2023 when they met up in B court in unrelated matters.

[10] She avers that, the reason why she makes reference to this letter is that Ms Williams' clients, the first and second respondents, are the cause of this application. Their actions or non-actions have sparked the institution of this application. The remainder of the respondents have an interest in the outcome of this application. She contends that if she had a reply from her, they may have been able to resolve some of the issues in this matter. On 9 February 2023, she filed a status report indicating that the applicants intend to proceed with the application. The matter was kept alive at two levels, which is by the written communications to the legal practitioners for the first and second respondent and the filing of status reports.

[11] She contends that the case is still active. The rights of the applicants have been infringed. The respondents have contravened numerous pieces of legislation. This fact alone should weigh heavy in favour of keeping the matter alive and for the court to give directions for the further conduct of the matter. No prejudice has been suffered by any party and it is in the interest of justice that the matter should not be struck from the roll. The applicants on the other hand will be severely prejudiced if this application does not proceed. The prejudice lies therein that the rights in and to the farm which is the subject matter of this application, are restricted by the first and second respondents and their actions on this farm.

[12] On the issue of costs, she avers that she is unable to tender costs as this is a legal aid instruction.

[13] The notice to show cause to the satisfaction of the managing judge, as to why there has been no activity and why it must not be struck is opposed by the first, second, tenth, twelfth and thirteenth respondents. The remainder of the respondents have not opposed. Some of the respondents filed answering affidavits and others have not. The gist of the opposition is that the applicants have been delaying the speedy finalisation of the application. They allege that the applicant's legal practitioner is not serious in executing her mandate. She failed to attend to court on 27 July 2022, when the matter was set done for status hearing for no good reason. They allege that she only had been in correspondence with the legal practitioner of the first and second respondents and not with the other legal practitioners representing the other respondents. She failed to seriously engage the Master of the High Court and to bring the application to substitute the third respondent who passed away.

[14] The respondents are being prejudiced by the failure of the applicants to expeditiously deal with the application. The respondents are urging the court to dismiss and/or struck the matter from the roll.

Discussion

[15] This application came before court for status hearing on 27 July 2022 and when the matter was called, there was no appearance on behalf of the parties. The application was then removed from the roll. Ms Petherbridge, for the applicants submitted that she filed a status report on the very same date (27 July) the matter was removed and she failed to attend to court. She says "the court seemingly did not have regard to this report", but how could the court have regard to the status report which was filed on the very same day when the court had judicial case management? The status report must be filed three days before the judicial case management hearing date. She does not explain as to why, she could not attend

court after she filed the status report in the morning. After the application was removed from the roll, the application remained inactive for more than six months.

[16] In November 2022, she addressed various letters to the first and second respondents' legal practitioners to try and seek an amicable resolution to some of the disputes raised in the application, but she never received any response from Ms Williams. The conduct of the applicants' legal practitioner left much to be desired. Not only did she file the status report late, she further did not turn up at court, which is a flagrant disrespect of the rules of court. In the status report filed on 22 July 2022, she promised that she will engage the office of the Master and bring an application to substitute the third respondent who passed away, but failed to provide any proof of her engagement with the Master of the High Court. For more than six months, the application remained inactive and the only reason that applicants' legal practitioner relies on, was to address letters to the Ms Williams, the legal practitioner for the first and second respondents.

[17] Not only should the blame for the inactivity of the application be levelled at the applicants' legal practitioner, but blame should also be apportioned amongst the respondents. Whilst the application remained inactive, they (the respondents and their legal practitioners) remained "spectators" and sat idle waiting on the applicants to make a move. In *Aussenkehr Farm (Pty) Ltd v Namibia Development Corporation Ltd*¹, the court held that:

[82] There are sound reasons why court should not sanction the proposition that because the plaintiff is the dominus litis, the defendant, may legitimately sit idly by while delays accumulate. In the first place, it is inimical to the public interest in the administration of justice that disputes be brought to trial and be resolved expeditiously, effectively and efficiently. Inordinate delay in the administration of justice undermines public confidence in the administration of justice...

I agree with Mr. Vaatz's submission. In term of the current Rules of court, the applicant was not singly to be blamed for the delay. The respondents also had the right to have taken steps to prosecute the matter. With the introduction of the Judicial Case Management, all

¹ *Standard Bank Namibia Limited v Bezuidenhout* (HC-MD-CIV-ACT-CON 2017/03248) [2021] NAHCMD 177 (20 April 2021).

the parties and their legal representative have the obligation to assist the court to prosecute the proceedings.’

[18] On the strength of the aforesaid authority, it was also incumbent upon the respondents to have taken steps to expedite the finalisation of the application. In terms of the new dispensation of judicial case management, the respondents and their legal practitioners also have a duty to assist the court in moving the application expeditiously. When the application was removed from the roll on 27 July 2022, there was also no appearance on behalf of the respondents.

[19] The applicants, most of them, are pensioners who may not live longer. The disputes concern a farm which they claim they inherited from their parents and which was allegedly sold unlawfully to some of the respondents. They also alleged that some lease agreements to some portions of the farm were allegedly entered into unlawfully.

[20] To strike the application and to order the application to start *de novo*, will not be in the interest of justice and as pensioners they may not live to see it to its finality. In fact some of the applicant and respondents have passed on while the application is pending. For all those reasons, it will not be in the interest of justice to strike the application.

Order

1. The application will not be struck from the roll and is hereby re-activated.
2. There is no order as to costs.
3. The application is postponed to 17 April 2024 at 15h30 for case management conference.
4. The parties must file a joint case management report by 12 April 2024 at 15h00.

Ndauendapo, J

APPEARANCES:

APPLICANTS:

MS PETHERBRIDGE

OF PETHERBRIDGE LAW CHAMBERS

1st and 2nd RESPONDENTS:

MS WILLIAMS

OF WILLIAMS LEGAL PRACTITIONERS

10th RESPONDENTS:

MR MARTIN

OF DR. WERDER, KAUTA AND HOVEKA
INC.12th and 13th RESPONDENTS:

MR CAROLUS

OF NEVES LEGAL PRACTITIONERS