



REPORTABLE

CASE NO: SA 113/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOSEPHINE LOUISE SISANDE

Respondent/Appellant

And

STANDARD BANK NAMIBIA

Applicant/Respondent

Coram: DAMASEB DCJ

Heard: IN CHAMBERS

Delivered: 12 December 2023

Summary: The court *a quo* granted a default judgment order against the appellant for failing to honour a debt with the respondent. After failing to obtain sufficient movables to satisfy the judgment, the respondent successfully brought an application in terms of Rule 108 of the Rules of the High Court. The appellant filed a notice of appeal to have the default judgment and Rule 108 orders set aside.

The respondent filed an application in terms of Rule 6 to declare the appeal brought by the appellant as frivolous and vexatious.

Held that, a default judgment is not a final judgment in terms of s 18 of the High Court Act 16 of 1990, to the extent that in terms of Rule 16, the High Court still has the competence to rescind its order that granted default judgment. If a rescission application is out of time, the judgment debtor should seek condonation from the High Court. An appeal to this court will only lie against the High Court's refusal of a rescission application.

The appeal is dismissed, with costs.

JUDGMENT PURSUANT TO A RULE 6 APPLICATION

DAMASEB DCJ:

Introduction

[1] On account of the respondent's (who was the defendant *a quo*) default to defend a combined summons against her, the applicant in this Rule 6 application obtained a default judgment against her. The applicant then proceeded in terms of Rule 108 of the High Court Rules, to declare the respondent's immovable property specially executable in satisfaction of an underlying debt totalling N\$ 619 299.53.

[2] The default judgment was granted on 10 September 2019 and the Rule 108 order was granted on 27 September 2021, some two years after default judgment was obtained.

Background

[3] The applicant instituted action proceedings against the respondent for the payment of N\$ 619 299.53 and interest. On 10 September 2019, the High Court (in chambers) granted judgment by default to the applicant. On 16 September 2019, the applicant caused a writ of execution to be issued against the respondent's movable

properties. The deputy sheriff returned a *nulla bona* return on 27 January 2020 after personally serving the writ of execution on the respondent. In other words, at the very latest, as of January 2020, the respondent knew that a judgment had been obtained against her.

[4] On 27 September 2021, at the instance of the applicant, the court *a quo* declared the respondent's immovable property (No.12 Oluzizi Villa, Khomasdal, Ext. 16) specially executable.

Appeal

[5] On 15 December 2023, the respondent appealed the orders granted against her, alleging that the judgment and orders infringe her right to a fair trial in terms of Art. 12 of the Namibian Constitution and that the particulars of claim were 'misplaced and misleading'. The respondent claimed that she addressed numerous communications to the applicant in an attempt to settle the debt but that her attempts were either refused, neglected or ignored.

[6] Since the purported appeal was filed out of time, the respondent filed a purported condonation application seeking indulgence from this Court for not complying with Rule 7(1) the failure to lodge the notice of appeal timely, for the failure to lodge the record of appeal timely in terms of Rule 8(1) and for the failure to provide the respondent's security for costs in terms of Rule 14(1).

[7] The respondent offers no explanation for the delay nor does she address her prospects of success. Rather, she simply repeats her grounds of appeal in the

condonation application. Since the respondent did not offer any explanation on affidavit for the untimely prosecution of the appeal, there is in effect no condonation application before this Court.

[8] On 8 November 2023, a document was delivered by the respondent with an offer to settle and a cession of a life insurance policy in favour of the applicant. In the first place, that puts beyond any doubt that she had no defence to the applicant's claim. Secondly, it appears that her intention is to cede her life policy to the appellant as some kind of security for the settlement of the debt and to save her property from execution. Understandably, there has not been a response from the applicant to this offer.

Rule 6: Frivolous or vexatious appeal

[9] On 13 October 2023, the applicant filed a notice of opposition to the purported appeal and condonation application, together with an application in terms of s 14(7) (a) of the Supreme Court Act 15 of 1990 read with Rule 6 of the Rules of this Court.

[10] Rule 6 reads:

'(1) A party to an appeal who is of the opinion that the appeal is frivolous or vexatious, may within 21 days of service of the notice of appeal apply on notice of motion supported by an affidavit setting out the reasons why the party contends that the appeal should be dismissed on the basis that it is frivolous or vexatious or that it has no prospects of success. . . .'

[11] A Mr Colmer deposed to an affidavit on behalf of the applicant. According to him, the applicant is the registered bond holder of the respondent's property. He

asserts that the respondent was served personally with the court process and did not enter an appearance to defend, nor did she oppose the Rule 108 application. Mr Colmer further alleged that the sale of the property was done in terms of Rule 110(9) of the High Court Rules, which directs that the property must not be sold for less than 75 per cent of the municipal value or sworn valuation in the event of the property being the primary home.

[12] The respondent's allegation that she failed to comply with the loan agreement because the applicant failed to engage her is denied and the deponent states that the respondent had not made any meaningful effort to settle the outstanding amount and that no payment had been received from the respondent since 2017.

[13] Mr Colmer contends that the respondent's grounds of appeal are without merit and not in compliance with Rule 7(3)(c) of this Court's Rules. He contends that the respondent failed to identify the findings of fact and conclusions of law to which she seeks the orders to be appealed and that she further failed to set out the prayer she wants this Court to grant.

[14] According to Mr Colmer, the respondent does not enjoy prospects of success because the applicant has complied with the provisions of Rule 108 as the immovable property is bonded in favour of the applicant, and that it has a substantial real right over the property. He further contends that no fault can be attributed to the court *a quo* as the respondent did not offer a less drastic alternative to sale in execution and that the sale of the immovable property was an option of last resort for the applicant to recover its money.

[15] Mr Colmer therefore prays that the appeal be dismissed in terms of s 14(7)(a) of the Supreme Court Act, read with Rule 6.

Disposal

[16] In her way-out-of time notice of appeal to this Court delivered on 15 September 2023, the respondent states that she appeals against both the default judgment and the Rule 108 order. The latter was, of course, only possible because of the former. If the default judgment falls away the Rule 108 order will suffer the same fate. I will accordingly deal with the question whether the purported appeal against the default judgment is competent.

[17] The notice of appeal was filed out of time by four years with regards the default judgment and two years out of time with regards the Rule 108. The appeal should have been filed by no later than 26 October 2021 with regards the Rule 108 order and by 9 October 2019 with regards the default judgment. The respondent ought to have furnished but failed to provide security for the applicant's cost in the appeal and also failed to file the record of proceedings in the court *a quo*.

[18] In the absence of a valid condonation application for those transgressions the appeal is in any event incompetent.

[19] On the merits, there are in any event no prospects of success because an appeal to this court against a default judgment is not the proper route to follow. Rule 16 of the High Court Rules provided that:

'A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment . . .'

[20] Rule 16 of the High Court Rules is the appropriate remedy for a party against whom a default judgment has been granted¹. That is so because it is not a final judgment as contemplated in s 18 of the High Court Act 16 of 1990². To the extent that in terms of Rule 16, the High Court still has the competence to rescind its order that granted default judgment the question of *res judicata* does not arise.³

[21] If a rescission application is out of time, an applicant must seek condonation from the High Court. An appeal will only lie to this Court if the High Court refuses to grant a rescission application.

[22] The purported appeal is thus frivolous and vexatious.

Costs

[23] Costs must follow the result.

Order

[24] In the result,

The appeal is dismissed, with costs.

¹ *Gibeon Village Council v Development Bank of Namibia & others* 2022 (4) NR 1011 (SC).

² *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC) para 51.

³ *Herbstein & Van Winsen*. *The Civil Practice of the High Courts of South Africa*, 5th ed, Vol 1, p544 also see *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 454.

DAMASEB DCJ

REPRESENTATION

APPLICANT/RESPONDENT: Shikongo Law Chambers

RESPONDENT/APPELLANT: Josephine Louise Sisande