



REPORTABLE

CASE NO: SA 91/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**POSHD INVESTMENTS CC
TERTU SHUUYA**

**First Appellant/Applicant
Second Appellant/Applicant**

and

**SMALL AND MEDIUM ENTERPRISES BANK
LIMITED**

Respondent

Coram: MAINGA JA, ANGULA JA and FRANK AJA

Heard: 2 April 2025

Delivered: 17 April 2025

Summary: During November and December 2016 the Small and Medium Enterprises Bank Limited (the Bank) lent and advanced money to the first applicant (POSHD). As security for the loan, the second applicant (Ms Shuuya) agreed that a mortgage bond be registered against her dwelling home situated at erf 610, Oshakati in favour of the bank and she also bound herself as surety and co-principal debtor in *solidum* with POSHD in respect of the repayment of the loans extended to POSHD by the bank.

POSHD defaulted in its repayment from the outset and the bank instituted an action for the repayment of the loan. In the summons, an amount of N\$484 052.76 is claimed in respect of the loan and an amount of N\$234 421.21 in respect of the overdraft with compound interest at the rate 10 per cent per annum. An order was also sought to declare the bonded immovable property specially executable. The action was not defended and judgment was granted by default. The relief in respect of the declaration of the immovable property executable was not granted and stood over for determination at a later stage.

The bank as a result, subsequently instituted a rule 108 application to have the bonded immovable property declared specially executable. Both first and second applicants opposed the application. On 3 October 2022, the High Court declared the immovable property specially executable. On 24 October 2022, POSHD and Ms Shuuya filed a notice of appeal in this Court.

The appellants did not file the record within the timelines set out in the rules of this Court and the Registrar of this court informed them that the appeal is deemed withdrawn. Security was also filed late. When the respondent brought an application for the appeal to be summarily dismissed, applicants sought condonation for the late filing of the record. The answering affidavit in the condonation application was also filed late and condonation was also sought in that regard. The application for condonation and reinstatement was set down for 2 April 2025. The applicants' legal practitioner indicated that she will not be available on 2 April 2025 and requested an alternative hearing date. When this request was not granted, the legal representative withdrew from the case. On the same day 27 February 2025, the second applicant's current legal representative came on record. Heads of argument were filed in respect of the condonation and reinstatement application, a day before the hearing date. According to Ms Shuuya's current legal representative, he only got the full record on 3 March 2025 and his client instructed him to seek a postponement to afford him time to study the record.

The bank for its part does not accept the position of Ms Shuuya's legal representative and posited that the delay in obtaining the complete record is not justified in light of the fact that the missing ten pages could have been accessed and obtained from the e-justice system or from the Registrar of this Court. That the trial that was set down in

which Ms Shuuya's legal representative would have been involved, did not take place and that those days were available to him.

Held that, many documents forming part of the record are not contentious and simply constitute the background to the rule 108 application.

Held that, taking into account the nature of the relief sought in terms of rule 108, the extent of the record and that the judgment *a quo* identifies the applicable and relevant authorities of this Court, the heads of argument should have been filed within days and at a maximum not more than five days from the receipt of the record, even if this would have meant that the bank would not have had the normal time to study the heads of argument and to file their heads of argument out of time. This would not necessarily have led to a postponement.

Held that, after a notice of appeal is filed, appeals in general must join the chronological queue awaiting a hearing date. In this matter, the hearing date was two and a half years after the notice of appeal was filed. During this time, the bank did not execute the order, thereby affording the applicants another two and a half years to come up with a viable alternative to the sale of the house of Ms Shuuya.

Held that, because of the rigid nature of process in this Court and the deleterious effect postponements have on other parties involved, the inconvenience caused to the Court and the negative effect on the administration of justice, postponements of appeals are a rare occurrence in this Court.

Held that, in this Court, postponements must be properly motivated and must be in the interest of justice. It must be borne in mind that by the time the postponement application is brought three judges have probably already read the record and the issues involved which will be time wasted that could have been better utilised in a case that was ready to proceed.

Consequently, the application for postponement was refused and the matter was struck from the roll and POSHD was ordered to pay the respondent's costs.

**JUDGMENT IN RESPECT OF AN APPLICATION TO POSTPONE AN
APPLICATION TO REINSTATE THE APPEAL**

FRANK AJA (MAINGA JA and ANGULA JA concurring):

Introduction

[1] During November and December 2016 the Small and Medium Enterprises Bank Limited (the Bank) lent and advanced money to the first applicant (POSHD). The biggest portion of the advance was in respect of a loan which had to be repaid in 57 monthly instalments of N\$8433,88. The balance was in respect of the granting of an overdraft to POSHD.

[2] As security for the loan second applicant (Ms Shuuya) agreed that a mortgage bond be registered against her dwelling situated at erf 610, Oshakati in favour of the Bank and she also bound herself as surety and co-principal debtor in *solidum* with POSHD in respect of the repayment of the loans extended to POSHD by the Bank.

[3] Whereas the funding was advanced to POSHD, the latter defaulted in its repayment obligations from the outset to such extent that when the Bank issued summons for the repayment of their loans more than four years later at the end of April 2021 not a single repayment had been made.

[4] In the summons an amount of N\$484 052,76 is claimed in respect of the loan and an amount of N\$234 421,21 in respect of the overdraft with compound interest at the rate of 10 per cent per annum. An order was also sought to declare the bonded property executable. The action was not defended and judgment was granted as per

the summons on 21 October 2021, save for the order to declare the property executable which stood over for later determination should the need therefor arise.

[5] Thereafter the Bank brought an application in terms of rule 108 of the rules of the High Court for the property, being the primary home of Ms Shuuya, to be declared executable. This application was opposed by POSHD and Ms Shuuya. Nearly a year after the default money judgment, the High Court on 3 October 2022 declared the property specially executable. On 24 October 2022, POSHD and Ms Shuuya filed a notice of appeal to this Court.

Lapsing of the appeal

[6] At the time of filing of the notice of appeal the legal practitioners for the applicants were Shikale and Associates. When no record was filed by 31 January 2023, the Registrar of this Court informed the said legal practitioners that the appeal was deemed to have been withdrawn for non-compliance with rule 8(2)(b) read with rule 9(1)(b) of this Court's rules.

[7] Rule 8(2)(b) provides that the record had to be filed within three months of the judgment *a quo*. This means the record had to be filed by 2 January 2023.¹ Shikale and Associates maintained that they had until 27 February 2023 to file the record. This they calculated by converting the three months mentioned in the rules to days and then, because the rules define 'court day' as 'any day which is not a Saturday or Sunday or public holiday' and, in this manner, extended the date to file to 27 February 2023, ie to a period of nearly five months instead of the three months stipulated in the rules.

¹ The civil method of computation (*computatio civilis*). See LAWSA vol 25 para 291.

[8] It should be noted that even on their own version as calculated, the record was filed a day late. That a legal practitioner practicing in Namibia is not aware of the fact that the civil method of computing time periods was applicable as the general rule and it is only where a different method of calculation is stipulated that the latter time period applies, defies comprehension. The security was not filed timeously but was eventually filed and nothing more needs to be said in respect of this latter issue as nothing was made of it by the Bank.

[9] When the Bank brought an application in terms of s 14(7) of the Supreme Court Act 15 of 1990 for the appeal to be summarily dismissed as being frivolous or vexatious or without any prospects of success the applicant sought condonation for the late filing of the record. I could not find anything on the file suggesting such condonation was granted and this issue still needs to be determined. It should however be noted that the answering affidavit to the s 14(7) application was filed late and condonation was also sought for the belated opposition.

[10] Per a Notice of set down from the Registrar of this Court, the applicants were notified on 26 November 2024 that their 'Application for condonation and reinstatement' was set down for hearing on 2 April 2025. The condonation at the time related to the late filing of the record and the failure to provide security. The parties in the matter were also informed by the Registrar that at this hearing they 'should be prepared to argue the merits of the appeal if the application for condonation' is granted and their attention was drawn to rule 17 of this Court relating to the filing of heads of argument.

[11] On 26 November 2024, Mugaviri Attorneys came on record for the applicants and simultaneously filed two powers of attorneys from the applicants appointing them to act on their behalf in the noted appeal (Shikale and Associates finally withdrew as legal practitioners of record for the appellants on 27 December 2024).

[12] In a letter dated 13 December 2024 but only delivered to the Registrar on 13 January 2025, Mugaviri Attorneys indicated that Ms Mugaviri had been appointed as Commissioner to the Law Reform and Development Commission and it was required of her in this capacity to attend a conference in Malta from 30 March 2025 to 12 April 2025. Ms Mugaviri would thus not be able to attend to the appeal and 'humbly' requested an alternative hearing date. This letter was not copied to the legal practitioners of the Bank.

[13] When the appeal record and relevant documentation were distributed among those members of the Bench designated for the hearing of the appeal, the Registrar was directed to address the request of Ms Mugaviri, which he did as follows in a letter dated 17 February 2025:

'We have been directed to inform you that the appeal will proceed on 2 April 2025 and any application to postpone the appeal, if at all, will have to be moved in court. Further, in such application, you are to provide an explanation why another legal practitioner cannot appear and argue the matter on 2 April 2025.'

[14] The backdrop to the directive forwarded to Mugaviri Attorneys in the letter from the Registrar is threefold. Firstly, the request was made without informing the legal practitioners for the bank which, *prima facie*, amounted to professional misconduct and an application to this Court for a postponement would clear this defect. Secondly, the courts and especially this Court do not arrange their diaries, as a general rule, to suit

the diaries of the legal practitioners involved.² Thirdly, where a practitioner is not available on a specific date or becomes unavailable for that date, such practitioner must advise client to seek alternative representation, and if need be, even assist client to find such alternative representation in such manner that the matter can proceed on the date allocated for the matter if at all possible.³

[15] On 27 February 2025, Mugaviri Attorneys withdrew as legal practitioners for the applicants. On the same day the applicants' current legal practitioner T Nanhapo Inc came on record. However, from the founding affidavit to the reinstatement application it is clear that T Nanhapo Inc was appointed by the Directorate of Legal Aid to act for Ms Shuuya in the intended appeal on 17 February 2024 already. This is of importance as the heads of argument on behalf of the applicants were due on 28 February 2025 according to the Bank, and on 3 March 2025 according to Mr Nanhapo.

[16] Heads of arguments were filed in respect of this application for condonation and reinstatement at 14h59 the day prior to the hearing of this matter. This is unacceptable. It seems to be another stratagem to force the Bank to concede a postponement so that they could consider these heads of argument and file supplementary heads of arguments so as to deal with the aspects raised in the heads of arguments filed on behalf of Ms Shuuya. I refer to the aspect further below when dealing with the application to postpone the reinstatement application and the potential consequential appeal.

Postponement

² *State v Kuzatjike* 1992 NR 70 (HC) and *Aztec Granite (Pty) Ltd v Green & others* 2006 (2) NR 399 (SC).

³ *Kisilipile & another v First National Bank of Namibia Ltd* 2021 (4) NR 921 (SC) para 44.

[17] Ms Shuuya states that the changes in legal practitioners came about as the Director of Legal Aid did not want to pay for the travel and accommodation costs of Ms Mugaviri who is based in Oshakati to come to Windhoek attend to the appeal and thus decided to appoint Mr Nanhapo of T Nanhapo Inc, who is based in Windhoek. Ms Shuuya says nothing of the trip to Malta by Ms Mugaviri and one wonders if she was fully informed of the reasons leading to the withdrawal of Ms Mugaviri.

[18] Mr Nanhapo states that on receipt of what he thought was the record that was couriered to him on 25 February 2025, he realised that what he received was defective. He thus attempted to attain a copy of the record from the Bank's legal practitioners who sent it to their instructing legal practitioners. Mr Nanhapo proceeded to the instructed legal practitioner's office but there was no one present, as the secretary had gone to attend the memorial service of the late Founding Father (President Nujoma). According to Mr Nanhapo, he had a full record by 3 March 2025 and Ms Shuuya agreed that he should seek a postponement to have 'sufficient time to study the record for purposes of filing his heads of argument'. According to Mr Nanhapo he had to be in court on 5 and 6 March 2025 and 10 – 14 March 2025 and that would leave Mr Nanhapo 'only eight days to file heads of argument'. It is submitted that Mr Nanhapo's schedule was such that it was insufficient to 'carefully study the appeal record and prepare heads of argument as required by the rules of this Honourable Court'.

[19] It is submitted that the appeal has good prospects of success with reference to a succinct summary of the grounds of appeal without further elaboration. In his heads of argument belatedly filed, more submissions are advanced in this regard.

[20] On behalf of the Bank, the stance of Mr Nanhapo set out above is not accepted. It is pointed out that he received instructions and accepted them about ten days prior to the day his heads of argument were due; that what he sought from the Bank's counsel in respect of the record was not the whole record but only ten missing pages from what was forwarded to him. They further pointed out that the documents were available on the e-justice system of the High Court and could also be sourced from the Registrar of this Court and it is inexplicable that these sources were not utilised. They point out that the trial that was to proceed during 5 - 6 March 2025 did not proceed and those days were available for the preparation of heads of argument.

[21] Apart from the e-justice system mentioned and an approach to the Registrar of this Court he could also have approached the transcribers to obtain a copy of the record. By the time Mr Nanhapo was authorised to act on behalf of Ms Shuuya, four copies of the record had already been filed with the Registrar of this Court from whom he could have gotten leave to copy the ten missing pages and the transcribers who copied the record would have been able to reproduce a further copy within a relatively short period of time or provided copies of the ten missing pages.

[22] The record consists of one volume containing 139 pages. It contains the original summons and particulars of claim with its annexures which formed the basis of the judgment by default. This documentation is not contentious and is simply the background to the rule 108 application. This disposes of 49 of the 139 pages. The rule 108 application which is part of the material to the intended appeal takes up 70 pages of the record and the rest of the record consists of the judgment *a quo* and the notice of the appeal.

[23] The judgment *a quo* deals with the issues raised in the rule 108 application fully with reference to the leading cases in this regard from this Court and following the guidelines spelt out in such cases. The judgment *a quo* concludes that no viable alternative to declaring the property executable had been established and hence granted such order. The question is simply whether the judge *a quo*, on the facts presented to her, was correct in her finding that Ms Shuuya did not present a viable alternative to the sale of her house. No complicated legal or factual issues arises from the judgment *a quo*.

[24] From the nature of the relief sought in the rule 108 application and the extent of the record, and taking into account that the judgment *a quo* identifies the applicable and relevant authorities of this Court, the heads of argument should have been filed within days and at maximum not more than five days from the receipt of the record. Even if this meant that the Bank would not have the normal time to study the heads of argument and would have had to file their heads of argument out of time. This would not necessarily have led to a postponement. The objective of the legal practitioners should have been to utilise the date the matter was set down for, for the purpose of such set down. In this matter this was really possible. In fact, the eight available days to file the heads of argument were more than enough time in the circumstances of this matter as pointed out above. To simply sit back and delay for as long as was done seems to me more of an attempt to force a postponement rather than to finalise the matter. This is borne out of the fact that the heads of argument were only filed during the afternoon of the day prior to the hearing. From the relief sought in the condonation and reinstatement application, it is clear that what is sought is a postponement of both the reinstatement application and on the back thereof the appeal, should it be reinstated.

[25] In general, matters appearing on the roll of this Court are cases that have been heard and determined in the High Court. It is in the High Court that the witnesses are heard and the pleadings are finalised. That whole process is a flexible one dealt with in the process of case management. The managing judge can set down and hear interlocutory or ancillary issues on short notice when other cases which he or she manages settle or are withdrawn. The judge can use that time that becomes available to hear interlocutory or ancillary applications. He or she must deal as expeditiously as possible with the cases so as to manage them for this purpose. This flexibility is not present in the process of this Court. After a notice of appeal has been filed, appeals in general (save when application to expedite had been granted) must join the chronological queue awaiting a hearing date. In this matter, for example, the notice of appeal was filed on 24 October 2022 and the notice of set down for the hearing is dated 22 November 2024 with a set down date for 2 April 2025. In other words, the hearing date was nearly two and a half years after the notice of appeal. It should also be stated that during this period the Bank did not execute the order of the court *a quo*, effectively granting the applicants another two and a half years to come up with a viable alternative to the sale of the house of Ms Shuuya.

[26] Because of the rigid nature of the process in this Court and the deleterious effect postponements have on the other parties involved, the inconvenience caused to the court and the negative effect on the administration of justice, postponements of appeals are a rare occurrence in this Court. The considerations at play when considering postponements in the High Court (with its flexible approach) are not necessarily the same considerations at play in this Court. In this Court, postponements must be properly motivated. (The other party's consent is not determinative of such

application although it is a factor for consideration). It must be borne in mind that by the time the postponement application is brought, at least three judges had probably already read and considered (at least partially) the record and the issues involved which will be time wasted that could have been better utilised in a case or cases that were ready to proceed. The rights of the other parties to finality is more important seeing the time lapse involved. The inevitable prejudice to other litigants who must now wait even longer because the postponed matter will be heard when their case could have been heard. This effect cascades right through the waiting queue.

[27] In short, to succeed with a postponement application, good and strong reasons for such postponement must be shown and this Court must be satisfied that it would be in the interest of justice to do so. Apart from the factors mentioned that need to be addressed in such an application, a full and satisfactory explanation of the circumstances that give rise to the application need to be stated. When postponement is sought shortly before the hearing date, then the reasons why such application was not sought sooner must be set out in full. An application not brought timeously may lead to the inference of intentional delay and/or lackadaisical approach to compliance with the rules of this Court.⁴

Good and strong reasons for postponement

[28] As already mentioned, the Bank has a procedural right to the matter proceeding to finality and has been waiting for this matter to be finalised for nearly two and a half years from the noting of the appeal to the date of this hearing on 2 April 2025. Should the matter be postponed, it will probably be heard in the first term of 2026 seeing that the court roll for June/July 2025 has already been settled and the court roll for

⁴ *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 494; *North West Provincial Government & another v Tswaing Consultanting CC & others* 2007 (4) SA 452 (SCA) at 457 and *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 8B.

October/November 2025 has been provisionally settled. This, will mean that the Bank will have to wait for another nine months or so. This in circumstances where it is in possession of a judgment debt which is not under attack at all and which is secured by a first mortgage bond in its favour. It is only a question of the manner in which payment is to be enforced.

[29] The applicants have not made a single payment in settling the indebtedness to the Bank from being advanced the money up to date of judgment in November 2022. Since then, and facing the real prospect of the security being utilised to settle the judgment debt two payments of N\$10 000 each were made. Despite promises of further monthly payments of N\$30 000 per month from her son in Europe none has been forthcoming. In fact, the admitted indebtedness has now been outstanding so long that the *in duplum* rule is about to be triggered if it has not already been triggered.

[30] Furthermore, the manner in which an attempt was made to latch onto the fact that the instructions to represent Ms Shuuya came at a late stage of the process does not dispel the impression that the matter was not dealt with in line with what was expected from a legal practitioner who must have known that the approach of this Court to postponements meant he had to do the best he could to have the matter finally determined on the date that it was set down for hearing. Firstly, the complaint about not receiving the record timeously was exaggerated and it turned out that he received the bulk of the record by courier on 25 February 2025 and that he took steps to obtain the ten missing pages. Why he did not source copies of the record or the missing pages from either the Registrar or the transcribers is not mentioned. He clearly thought on 17 February 2025 when he accepted the instructions from the Directorate of Legal Aid that this would give him sufficient time to prepare the heads of

argument by 28 February 2025 and correctly so if regard is had to the record and the nature of the issues involved. Why he did not attempt to file heads of argument, albeit late, at such time that the Bank could still respond thereto so that the matter could proceed is nowhere explained. His attempt to complicate the nature and complexity of the issues to assert that he would need at least eight days to prepare heads of argument can be rejected out of hand for the reasons I have already mentioned above.

[31] I am afraid that the manner in which all the lawyers acting for the applicants approached this appeal can be described as follows (to borrow from the judgment in *Arangies T/A Auto Tech v Quick Build*):⁵

‘The absence of any sense of diligence or attention to compliance with the Court’s rules renders the explanation for the delay in filing (the heads of argument) weak and unpersuasive.’

[32] In conclusion, I should mention that the applicants’ relief sought was to condone the non-compliance with the rules of this Court, to reinstate the appeal and ‘vacate’ the date and a postponement of the hearing date set down for 2 April 2025. Once a new date is sought for the hearing of the application, a postponement application is required and this is what is in effect sought. Once a date has been allocated to ‘vacate’ it is tantamount to a withdrawal of what was set down for hearing. Whatever the position may be in the court *a quo*, in this Court, once a matter is set down, it can be withdrawn with the usual effects as to costs, postponed for good and satisfactory reasons, or dealt with in line with the purpose it was set down for and nothing else. As indicated, as it was clear from the relief sought that what was intended was a postponement, I thus dealt with it as such.

⁵ *Supra* fn 3.

[33] In the result, the application to postpone the reinstatement application fails and the matter is to be struck from the roll.

Costs

[34] As Ms Shuuya obtained legal representation via the Directorate of Legal Aid, counsel for the Bank did not seek a costs order against her but still sought a costs order against POSHD.

[35] Why POSHD was made an applicant/appellant in this matter is inexplicable. It had no interest in the rule 108 application as the security was not its primary home or even its property. It had no business to oppose or appeal the rule 108 order. At best it could have been cited as a respondent because it was a party to the default judgment for the interest it might have had in this rule 108 application and in the intended appeal. Be that as it may, it was an applicant/appellant and it must suffer the consequences of the striking off order.

[36] Had Ms Shuuya not been assisted by the Directorate of Legal Aid she would have been jointly liable for the adverse costs order with POSHD as a result of this application being dismissed or even jointly and severally with POSHD because of this joint opposition on exactly the same grounds and facts. In such instance, as between Ms Shuuya and POSHD they would only be liable for one half of the costs. In my view, and in the circumstances of this case, where Ms Shuuya was the one more directly interested in the relief sought and all the evidence and submissions revolved around the prejudice to her should the property involved be sold in execution and where Ms Shuuya was also the deponent in the applications filed with this Court, it would be inequitable to mulct POSHD with all the costs without any recourse to Ms Shuuya. I

am thus of the view that a cost order to the effect that POSHD must pay one half of the costs would be fair and equitable in this matter.

[37] In the result the following order is made:

1. The postponement application is refused and the application to condone the non-compliance with rules 8 and 17 of this Court and reinstate the appeal is struck from the roll.
2. First appellant must pay half the costs in respect of the postponement application and half the costs in respect of the condonation application struck from the roll. Such costs shall include the costs of one instructing legal practitioner and one instructed legal practitioner.
3. No order as to costs is made in respect of second applicant.

FRANK AJA

MAINGA JA

ANGULA JA

APPEARANCES

APPELLANTS/APPLICANTS:

T Nanhapo

Instructed by Directorate of Legal Aid

RESPONDENTS:

J Diedericks

Instructed by Morland Incorporated