Case No. I.1387/94

DIMITRI METZLER -vs- BENJAMIN JACOBUS AFRIKA. 1995/11/02

0:Linn, J.

CIVIL LAW.

Practice. Application for settiny aside default judgment.

Held 1. If it appears that the default; was willful, or due to gross negligence, or appears to be due to applicant's disdain for the rules of court, then the explanation is not reasonable and the application must fail.

Held 2. If a litigant suffers prejudice at the hands of his or her chosen attorneys, such litigant must look to such attorneys for redress. The innocent litigant should not suffer prejudice because of the action or omission of the attorneys of his adversary.

**IN THE HIGH COURT OF NAMIBIA**

In the matter between

**DIMITRI METZLER** **APPLICANT**

versus

**BENJAMIN JACOBUS AFRIKA** **RESPONDENT**

**CORAM: O'LINN, J.**

Heard on: 1995.09.11

Delivered on: 1995.11.02

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**JUDGMENT**

**0' LINN, J.** : The applicant is D Metzler, the editor and publisher of the Akasia newsletter, published in the Rehoboth area of Namibia. The respondent is Dr **B** J Afrika, a medical practitioner of Rehoboth.

The applicant was the defendant in an action for defamation instituted against him by the respondent.

Default judgment was granted against the defendant by Teek, J. in the High Court of Namibia on 23 October 1994 for the payment of N$30 000, as damages for defamation, plus costs.

The defendant has applied for the setting aside of the aforesaid default judgment and for leave to defend the action.

Mr Smuts appeared before me for applicant and Ms Vivier-Turck for respondent.

Both counsel filed extensive written heads of argument and adhered to this argument in their viva voce submissions.

There is no discernable difference between counsel in regard to the applicable rules of law when considering an application for the setting aside of a default judgment. These are:

1. The applicant must give a reasonable explanation of his or her default.

2. The application must be made bona fide and not with the intention of merely delaying plaintiff's claim.

3 . Applicant must show that he or she has a bona fide defence to plaintiff's claim. It is sufficient if applicant makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle applicant to the relief claimed. Applicant need not deal fully with the merits of the case and need not produce evidence that the probabilities are in applicant's favour.

Law Society of Tvl., 1985(2) SA 756 (A) at 764 J - 765 C.

Counsel are also agreed that requirement No. 3 supra has been met, in that averments are set out which, if established at the trial, would entitle applicant to the relief claimed.

This is not a case however, where this Court can infer that the applicant has a strong case. The principle that a strong case may compensate for a weak explanation, cannot assist the applicant in this case. Applicant will therefore have to stand or fall on the issue of whether or not a reasonable explanation has been given for his default.

The applicant has given an explanation. I must now decide whether that explanation is reasonable.

If it appears that the default is wilful, or due to gross negligence, or appears to be due to his disdain for the rules of this Court, then his explanation is not reasonable and his application must fail.

Some of the facts on which the application is based are common cause, others not. The facts which are common cause or not in dispute are the following:

1. The summons claiming N$30 000 in damages for alleged defamation was served on applicant in July 1994 .

2. Appearance to defend was entered on behalf of applicant by his erstwhile attorneys, Karuaihe and Conradie, on 2 August 1994.

3. A certain Ms Dammert, an attorney employed by that firm, acted on the applicant's behalf during that time. She informed the applicant by letter dated 18/08/1994 as follows:

> "We confirm that we have served our notice of intention to defend. We enclose under cover hereof our Statement of Account for work done. We would require, in addition to the outstanding amount reflected on the account an amount of N$500 as cover for our fees and disbursements herein before we would be able to proceed herein."

The "amount outstanding" was N$338.55 and the further amount required N$500.

4 . A notice of bar was served on the aforesaid attorneys on 22 September 1994 when no plea had been filed by that date.

5. Ms Dammert informed the applicant of the notice of bar and obtained a postponement of the application for default judgment to enable a plea to be filed. She also told the applicant that he was required to bring the deposit as required and that she had resigned from the firm and that someone else in the firm would continue to act on behalf of defendant.

6. The applicant never paid his attorneys the outstanding balance or deposit required up to and including the default judgment although he knew that such payment was required before his attorneys would proceed with his defence. Approximately two months elapsed between the letter by Ms Dammert requesting the funds and the hearing of the application for the default judgment and one month elapsed between the notice of bar and the said hearing.

7. The applicant resided at Rehoboth, a town about 80 kilometres from Windhoek but did not visit the offices of his attorneys in Windhoek during the period 18/08/1994 to date of default judgment on 11th November 1994.

8. Applicant's said attorneys never gave applicant notice of the date of the hearing of the application for default judgment and also not of the judgment itself. Although the respondent filed an answering affidavit by Mr Akwenye, who apparently acted for applicant on behalf of the firm Karuaihe and Conradie after Ms Dammert had left, no affidavit by Ms Dammert was filed by either party.

According to Akwenye the position was as follows:

> "It is correct that Ms Dammert, who was previously employed by the same firm,

handled the Applicant's case and when she resigned from the aforesaid firm to take up employment with Transnamib Limited, she handed the file over to me with a request to further deal with the matter.

At the time when Ms Dammert handed the file over to me, she explained to me that Attorneys P F Koep and Co already served a Notice of Bar on our firm but she arranged for a postponement of two weeks due to the fact that there were no funds at all in trust to cover the costs of Counsel's fees for drafting the Applicant's Plea.

She furthermore informed me that she has already requested Applicant for additional funds and Applicant confirmed that request to me subsequently.

After receiving the file from Ms Dammert I personally contacted the Applicant and informed him that unless he furnishes us with the required deposit to cover our disbursements in respect of Counsel's fees, the firm would not be in a position to file a Plea on his behalf and Judgment by Default could be granted against him.

As I have heard nothing further from the Applicant thereafter, I assumed that he was either not interested in continuing with the matter or that he did not have funds to enable him to continue with this matter and there was nothing further that I could do to assist the Applicant.

In so far as the Applicant alleges that our firm never contacted him to request him for additional funds or that we failed to explain to him the consequences of his failure to furnish us with additional funds or the consequences of our failure to file a Plea on his behalf due to the lack of funds, the Applicant is simply not telling the truth."

The applicant in reply filed an affidavit by one F A Coetzee, the attorney employed by Attorney A Vaatz, who was instructed in November 1994 to act for applicant.

According to Coetzee, he requested the applicant's file from Mr Akwenye, Mr Murorua and Mrs Schmidt, the secretary of Mr Akwenye and was told that the file could not be found. Akwenye told him that he had not dealt with the matter but that a Mr Murorua had dealt with the matter. When Mr Murorua was asked, he in turn said that he had not dealt with the matter and referred Coetzee to Akwenye. Another staff member then said the file was missing for some time. There was also no response from Messrs Karuaihe and Conradie to a letter dated 30th November 1994 requesting the file and the balance of account, if any, for settlement.

The file was never received and Mr Akwenye in his statement on behalf of respondent, did not refer to any file of applicant or any notes made on any file.

The statement by Coetzee reflects badly on the services, organisation and filing systems of the firm Karuaihe and Conradie. However, in view of the fact that Mr Akwenye and others did not have the opportunity to reply to these allegations in the answering affidavits on behalf of the applicant, I regard it as inappropriate to comment herein further on the state of affairs at Karuaihe and Conradie.

Although Coetzee's statement also reflects on the credibility of Akwenye's version in his answering affidavit on behalf of respondent, it is not possible on these papers to reject the version of Akwenye relating to his dealings with applicant. Akwenye's affidavit therefore remains a hurdle in accepting applicant's version of events.

The applicant puts the blame for his default on his attorneys. However, if they had lost his file and had lost interest after Ms Dammert had left, the main cause of not filing a plea timeously remains the failure of applicant to put his attorneys in funds and his failure to take any reasonable steps to ensure that his pleadings would be prepared and filed. On his own version he made two telephone calls to his attorneys in September 1994 during the two weeks following the notification of the notice of bar and when he got no response, nothing else was done until he read of the default judgment sometime in November 1994.

The applicant is an editor and publisher of a local publication. He cannot shield behind a plea that he did not know the implications of a notice of bar. If Ms Dammert did not tell him, as he alleges, then he should have asked. It is however improbable that she would not have explained to him the implications. He admits however that she again, at the time of informing him of the notice of bar, requested the funds needed to proceed with the matter.

This notwithstanding applicant does not explain in any of his affidavits, why he did not put his attorneys in funds.

In the instant case the dictum of Melamet, J. in De Wet & Others v Western Bank Ltd, 1977(4) SA 770 (T) at 780 E - G is apposite:

> " (The applicants) cannot divest themselves of their responsibilities in relation to the action and then complain vis-a-vis the other party to the action that their agents, in whom they have

> apparently vested sole responsibility have failed them ... They are the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct. "

See also the judgment on appeal, confirming the Full Bench judgment. De Wet & Others v Western Bank Ltd, 1979(2) SA 1031 AD at 1044 C - D.

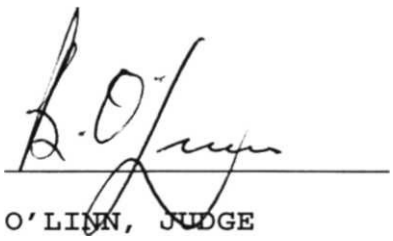
If a litigant suffers prejudice at the hand of his or her chosen attorneys, such litigant must look to such attorneys for redress. The innocent other litigant should not suffer prejudice because of the action or omission of the attorneys of his adversary.

By emphasising this principle, I am not suggesting that the applicant's attorneys are to blame for the applicant's failure to take reasonable steps to defend the action.

In all the circumstances it appears that the applicant was at least grossly negligent, if not wilful.

In the result:

The application for rescission of the default judgment is dismissed with costs.



O'LINN, JUDGE