IN THE HIGH COURT OF NAMI3IA

In the matter between

HAFENI'S LIQUOR DEN **APPLICANT**

versus

NAMIBIA SORGHUM BEER DISTRIBUTORS

(PTY) LTD **RESPONDENT**

Heard on: 1996.05.13

Delivered on: 1996.05.24

JUDGMENT

FRANK, J. : This is an application, the ultimate aim whereof is, to rescind a judgment granted by default on 3rd March, 1995 against the applicant. As a preliminary to the ultimate relief sought applicant is also seeking condonation for the late filing of his application which was launched on 26th January, 1996.

In order to be granted condonation the applicant must show good cause for his failure to comply with Rule 31(2) (b) which provides that an application for rescission of a default judgment must be launched within 2 0 days of obtaining knowledge of such judgment. The applicant is a business belonging to a sole proprietor, one Mr Haikoti. Where I refer to the applicant in this judgment as if it is a natural person I refer to Mr Haikoti.

According to the applicant the deputy sheriff visited his premises during June, 1995 and informed him that the respondent was demanding payment for beer sold and delivered. He informed the deputy sheriff that he did not owe the respondent any money and took the deputy sheriff to a plot where he stored the beer awaiting its removal from the premises by the respondent. According to the applicant the deputy sheriff then left without giving him any document. On 19th July, 1995 the deputy once again visited him and on this occasion told him that he (the deputy) had come to attach property and also gave him a copy of a Writ of Execution from which he gleaned that judgment had been granted against him on 3rd March, 1995. He then informed the deputy that he had no knowledge of the judgment whereupon the deputy told him to "consult an attorney urgently." In answering the applicant's allegations in this respect the respondent annexes to returns of service by the deputy dated 26th May, 1995 and 19th July, 1995. Ex facie these writs both were served on the applicant. In his reply the applicant concedes that the first visit might have been on 26th May but maintains his version and that no document was served on him. I do not accept the applicant's version as to what happened on 26th May, 1995. Why would the deputy who, according to the returns, operate from Usakos travel all the way to Omaruru to basically pay the applicant a social visit? According to the return this was a round trip of 184 kilometres. And why would he accompany applicant from Omaruru to a plot where the beer was stored if he really had no business with applicant? In my view the applicant's version in this regard is clearly untenable and in any event the probabilities are, in this respect, overwhelmingly in favour of the

respondent. (See also Van Vuuren v Jansen, 1977 (3) SA 1062 (T)) . In my view it can be accepted that- the judgment by default came to the knowledge of the applicant on 17th May, 1995 when the deputy served that Writ of Execution on him. It is clear from that writ that only the beer which formed the subject matter of the judgment was attached. When the deputy returned in July additional movables were inventoried. Applicant probably only became concerned then as he realised that his other assets were also at risk.

On applicant's own version he was told on 19th July, 1995 by the deputy to consult urgently with an attorney. According to his replying affidavit he thought he had two to three weeks as the deputy informed him that it would take this long for the writ to reach the respondent's attorneys. He waited 5 days until 24th July when he telephonically contacted a firm of attorneys, Lorentz & Bone, where his attorney, Mr Angula is a partner. He was informed by someone there that Mr Angula would not be available for the next two weeks. During the second week of August he travelled to Windhoek and to Lorentz & Bone where he was informed that Mr Angula was not available. He eventually saw Mr Angula on 17th August who advised him to return on 21st August. According to applicant he became frustrated with his inability to see Mr Angula and decided to make an appointment with another attorney at a different firm of attorneys for the 23rd August.

One wonders why applicant, if he knew he had to consult with an attorney urgently and thought he had at most 2 - 3 weeks to do this, waited for more than a month before going to an alternative attorney? And this after he had consulted with the

initial attorney of his choice on 17th August and were due for further consultations on 21st August. He then decided to rather make an appointment with an alternative attorney for 23rd August. Applicant was thus aware of the fact that he could make use of alternative attorneys but did not do so despite the fact that he was advised to seek advice urgently and knew he had only 2 - 3 weeks to do this. He then waited more than 2 - 3 weeks for an appointment with one specific attorney. After seeing this attorney on 17th August and being told to return on 21st August he switches attorneys because of his unhappiness in not being able to see that attorney and only sees an attorney on 23rd August. I find it strange that once the reason for his unhappiness is removed by seeing Mr Angula and having another appointment arranged with him applicant switches attorneys for the very reason that no longer existed. What exactly applicant informed Mr Angula is not divulged.

When applicant saw his new attorney on 2 3 rd August he briefed him and also asked him whether he had received a summons and when told he had not the new attorney (Mr Conradie) phoned the respondent's attorneys to make inquiries and was then informed that the summons was served on one of applicant's employees, a Mr Shimooli. According to applicant he was then advised by Mr Conradie to trace Mr Shimooli for a consultation with Conradie. Applicant left and could not trace Shimooli immediately as he was no longer in the employ of the applicant. On 6th or 7th September the deputy sheriff served a Notice of Sale in Execution on applicant who«managed to obtain an appointment with Conradie on 13th September by which time he had also obtained a statement from Shimooli. On this date he briefed Conradie fully who then required a deposit of N$l 500 to

proceed with the matter which deposit he paid on 14th September. On 15th September he spoke to a Mr Akwenya at the firm as Mr Conradie was not available. Mr Akwenya, according to him, then arranged with the respondent's attorneys for the sale in execution not to proceed on 20th September. Despite these arrangements the sale did proceed. When he attempted to confront Mr Conradie about this on 22nd September Mr Conradie refused to see him and told the secretary to refund him his deposit and return his documentation. According to a letter from Conradie applicant had to pay a deposit and consult on 7th September. Conradie further states that he did not take a statement from applicant and that, presumably as a result thereof, nothing was done, and that applicant's money was refunded as the sale in execution had already taken place.

Due to the fact that the sale actually took place the denial by the respondent that an agreement was reached not to proceed with it, can be accepted. Here it must be borne in mind that according to applicant this was arranged with the secretary of the respondent's attorney which is highly unlikely. Further, no written confirmation of this agreement was produced which, in my view, also indicates that nothing was in fact arranged.

The letter by Mr Conradie explaining the events to applicant's present attorneys of record not only contradicts the applicant- in various respects, it is also very thin on details and unsatisfactory. It is clear that Conradie was informed during August about applicant's dilemma. Conradie states this much in the first paragraph of his letter where he deals with both the sale in execution and the service of the original summons. In view of this it is surprising that he later states he had no statement from the applicant. It is also not clear whether the

applicant had an appointment for 7th September to pay the deposit and consult or whether he turned up unannounced. Conradie says as he was not present no statement could be taken on that date and when applicant eventually turned up when he was present the sale had already taken place. Surely Conradie must have realised the urgency of the matter as he should have known that in order to rescind a judgment time was important. Secondly, if he knew a sale was going to take place he knew that something had to be done prior thereto. In these circumstances it would have been totally unwarranted to leave the next visit by applicant unarranged. How applicant could have told him that a sale was to be held during August when applicant was only informed about this during September is incomprehensible. In my view the conduct of both Mr Conradie and Mr Akwenya needs further investigation in the proper forum and I intend referring it to the Law Society.

After leaving Mr Conradie with his deposit and documents applicant approached a Mr Theron at the firm of attorneys Muller & Brand who advised him on 2 9th September that there was nothing that Theron could do for him but that he should contact Theron in the event of the deputy sheriff attaching further assets. This indeed happened on 28th November whereafter applicant approached Theron and consulted with him on 6th December and on 8th December Theron informed him that he could do nothing for him and that he should consult his present attorney. Despite a request by applicant's present attorney to explain what happened between him (Theron) and applicant Theron did not even have the courtesy to reply to the request. Applicant consulted with his present attorney on 13th December and this application was brought during January the next year.

Applicant's present attorney attended to the matter properly, did what was in his ability to do and I have no criticism of his handling of the matter and thus do not deal with his role any further. Theron's conduct, however, I also find unacceptable. Why did he not have the courtesy to report to applicant's present attorneys requesting to furnish them with some information and why did he not appreciate the urgency of the matter when originally approached by applicant and then advised applicant that there was nothing he could do? I likewise intend referring his conduct in this matter to the Law Society.

I interpose here to state that the attorneys whose conduct I am referring to the Law Society did not file affidavits in this matter and the referral is based on the applicant's papers. It may thus turn out after hearing their versions that they indeed acted properly and that applicant's version is not correct and the fact that their conduct will be referred does not mean that they acted improperly. It only means that the allegations of the applicant under oath indicates improper conduct which should be investigated.

From the respondent's perspective it received a query with regard to the summons on 23rd August from applicant's attorneys to which they responded whereafter nothing happened. A sale in execution was held on 20th September, the net proceeds to which they were entitled to and must have received. On 28th November further assets of the applicant were attached and only in January, 1996 is the application served on it. Whereas one might have expected respondent to have been cautious after being contacted by applicant's attorney during August nothing

happened and it was perfectly reasonable for it to have assumed that the judgment obtained during March was final.

According to the applicant none of the attorneys consulted by him prior to his present attorney advised him that an application for rescission had to be brought within 20 days of knowledge thereof. I can hardly believe that none of them were aware that steps had to be taken with some urgency and that he was not informed accordingly. If, on the other hand, they did not then they were clearly negligent in the exercise of their duties.

Although applicant's version, if proved, will constitute a defence to the claim on which the default judgment is based applicant will have a hard row to hoe in this regard. Applicant's version is that he never ordered the beer to be

delivered. However in a letter written on his behalf by an attorney to respondent the order is conceded but it is stated that the order was later altered.

In my view the applicant's delay in launching this application is not acceptable. The fault for the delay which was very long lies with him and his attorneys. From 17th May, 1995 when he was served with the first Writ of Execution he did nothing until he saw his first attorney during August, 1995 and this despite the fact that he was told the matter was urgent by the deputy sheriff on 19th July, 1995. Applicant does not disclose what transpired between him and Mr Angula and gives an unsatisfactory reason for leaving Mr Angula and moving to Mr Conradie. Hereafter, if applicant is to be believed, his

attorney's conduct is a nightmare. What is certain is that respondent was entitled to assume, as pointed out already, that it had obtained a final judgment and to now, where no blame at all can be laid at the door of respondent, rescind the judgment will further also be to its prejudice as some of the judgment debt already recouped in an undisputed sale in execution will become the subject matter of a dispute where on the applicant's own version he accepted his attorney's advice that nothing could be done about this sale. Apart from respondent's interest in the finality of the matter it is also in the public interest that court orders be certain and final. If it could not be accepted in this matter that the judgment was final one wonders when a party will be able to accept it.

In the result:

(1) the application for condonation of applicant's failure to comply with rule 31(2) (b) is dismissed with costs;

(2) A copy of this judgment as well as of the application is to be forwarded to the Law Society to investigate the conduct of the following legal representatives;

(i) Mr D Conradie of Karuaihe & Conradie;

(ii) Mr Akwenya who was at the relevant time also attached to Karuaihe & Conradie;

(iii) Mr Theron who was at the relevant time attached to

FRANK, JUDGE

Muller & Brand.

ON BEHALF OF THE APPLICANT:

Instructed by:

ON BEHALF OF THE RESPONDENT

Instructed by: