CASE NO.: (P) A 157/97

EBSON MUTJAVIKUA versus MUTUAL & FEDERAL INSURANCE COMPANY LIMITED

HANNAH, A.J.P.

1998/05/06

CIVIL PROCEDURE

Default judgment - Application to rescind. Applicant must give reasonable explanation of his default. His application must be bona fide. And he must show a bona fide defence to plaintiffs claim.

CASE NO. (P) A157/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

EBSON MUTJAVIKUA **APPLICANT**

and

MUTUAL & FEDERAL INSURANCE

COMPANY LIMITED **RESPONDENT**

CORAM: HANNAH, A.J.**P.**

Heard on: **1997/06/06 & 1998/04/20**

Delivered on: **1998/05/06**

JUDGMENT:

HANNAH, A.J.P.: I have before me an application to rescind a default judgment granted against the applicant on 7th March, 1997. The brief facts of the matter are as follows.

By summons dated 25th July, 1995 the applicant sued the respondent for N$26 412,98 allegedly due to him in terms of an insurance policy. On 16th February, 1996 the respondent filed a plea and counterclaim. The counterclaim alleged that the applicant had fraudulently claimed and been paid the sum of N$38 787,74 in terms of the policy and the respondent claimed repayment of that sum.

The applicant's attorneys in February, 1996 were van der Westhuizen and Partners and

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the applicant's case was being handled by one van Vuuren of that firm. However, subsequently van Vuuren set up practice on his own and on 3rd June, 1996 his firm became the applicant's attorney of record. On 31st May, 1996 and again on 7th June, 1996 the respondent's attorneys wrote to the applicant's attorneys calling on them to file a plea to the counterclaim but there was no response. Then on 19th November, 1996 a notice of bar was served on the applicant's attorneys. This required the plea to the respondent's counterclaim to be delivered within five days but no plea was forthcoming. All that happened was that on 26th November, 1996 van Vuuren and Partners withdrew as the applicant's attorneys. Apparently fees were outstanding and this was the reason for the withdrawal. The applicant maintains that he did not receive a copy of the notice of withdrawal although the record shows that it was sent by registered post to his correct postal address.

The next to happen was the issue on 3rd February, 1997 of an application by the respondent for default judgment on its counterclaim. According to the return of service of the assistant deputy-sheriff this was served on a co-employee of the applicant at his place of employment on 6th February but according to the applicant he did not receive it until about 11th February. Be that as it may, the application was set down for 28th February so the applicant had ample time to deal with the matter.

The applicant visited van Vuuren on 11th February and was informed that van Vuuren had withdrawn as his attorney. He was also informed that he owed the attorney N$ 2 800,00 and that van Vuuren would only proceed with the matter when he was paid. According to the applicant he visited van Vuuren once again on 25th February when he offered to pay N$l 000,00 but this offer was rejected.

The applicant then approached another firm of attorneys, van Wyk, Maritz and Partners, and at their request the application for default judgment was postponed for a week to 7th March, 1997. However, the applicant did not take advantage of this indulgence granted by the respondent. On 7th March the application for default judgment was granted. The explanation

advanced by the applicant is:

> "Due to the urgency of the matter as well as the unavailability of counsel at the time, my instructing legal practitioner, Mr Maritz, was unable to secure the services of counsel to assist me to oppose the application for default judgment."

I will comment more fully **OH** that explanation in due course but point out at this stage that there could have been no question of opposing the application. All that was required was the preparation of a plea and an application to lift the bar.

The applicant also refers in his affidavit to difficulties stemming from the fact that van Vuuren was reluctant to hand over his file until paid but these are clearly illusory as copies of all relevant documents could have been obtained from the court file.

That is the history of this matter leading to the default judgment being granted and one would have thought that in the circumstances just described timeous steps would then have been taken to launch an application to have the judgment set aside. But that was not to be. Although the applicant must have known that judgment had been taken against him on 7th March, 1997 it was not until 11th April, 1997 that such an application was filed and served on the respondent's attorneys. In terms of Rule 31(2)(b) a defendant against whom default judgment has been granted has 20 days after knowledge of the judgment in which to apply to court to set aside such judgment and not only did the applicant not trouble to ensure that that was done but no explanation is tendered for such failure nor is there any application for condonation. Such an application should, of course, have been brought pursuant to Rule 27 and the applicant cannot even claim that failure to bring such an application was due to oversight. He was or should have been alerted to the point as it was raised in the respondent's answering affidavit but took no steps to bring such an application.

The applicant's lackadaisical attitude did not end with the launch of the present application. The application was set down for hearing on 6th June, 1997 but it had to be postponed because there was no replying affidavit and no heads of argument had been filed by the

applicant's legal practitioners. And when the matter was called for hearing on 20th April, 1998 there was still no replying affidavit and no heads of argument. Indeed, the applicant was not even legally represented his attorneys having withdrawn on 1st April due to lack of funds. An application by the applicant for a further postponement was refused and the matter was argued though it has to be said that the applicant was not really in a position to contribute anything useful.

In *Grant* v *Plumbers (Pty) Ltd* 1949 (2) SA 470 (o) at 476 it was held that an applicant in the position of the present applicant should comply with the following requirements:

a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

b) His application must be *bona fide* and not made with the intention of merely delaying plaintiffs claim.

c) He must show that he has a *bona fide* defence to plaintiffs claim. It is sufficient if he makes out a *prima facie* defence in the sense of averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

These requirements have been approved in numerous cases in South Africa and were also approved in *Metzler v Afrika*, an unreported decision of the High Court given on 2nd November, 1995. I respectfully agree that they represent what is required of the applicant in the instant case. But in addition, if the applicant has failed to comply in some other way with the rules of court then condonation should be sought or, at very least, some acceptable explanation tendered.

The first point argued by Mr Tdtemeyer, on behalf of the respondent, was the late filing of the rescission application and the total lack of any explanation therefor either in an application for

condonation or in a replying affidavit. Mr Tdtemeyer submitted that the application should be dismissed on this ground alone. In my opinion there is merit in this submission. Relief granted in terms of Rule 31(2)(b) is by way of an indulgence and when an applicant shows a contemptuous disregard for the rules of court the Court will, in my view, be perfectly justified in exercising its discretion not to grant the indulgence which is sought. On this ground alone I would dismiss the application.

The next point argued by Mr Tdtemeyer concerns the explanation tendered by the applicant for his default. The basic default was, of course, the failure to file a plea and this, on the applicant's account, stemmed from his failure to place his attorneys, van Vuuren and Partners, in funds. But the applicant does not deign to provide any real explanation for his failure to supply the necessary funds. All he says is that he received a monthly salary of N$2000,00 of which a substantial amount was utilised to meet his monthly liabilities. He does not state whether he had savings or not or saleable assets and it must be borne in mind that he was the one who instigated the proceedings. When deciding to bring the proceedings he must have satisfied himself, and probably also his attorneys, that he was in a position to pay the necessary legal fees. What change of circumstance, if any, brought about a situation in which he could not pay fees? His founding affidavit is silent on matters such as these. His explanation for his default is unsatisfactory and in the absence of a full and proper explanation I can only conclude that his default was wilful, that he chose to give other matters priority over payment of fees to his attorneys.

Moving on now to the application for default judgment it is clear that the applicant knew that this was due to be heard on 7th March, 1997 and yet nothing was done to have .the bar lifted and to prepare a plea. The explanation which is given is that his attorney was unable to secure the services of counsel to deal with the matter but this bald statement is not good enough. The attorney was consulted 8 days before the hearing date and I find it difficult to believe that no counsel was available throughout that time. But even if that had been the case there was nothing to prevent the applicant's attorney from settling the plea and drafting an application. And on the scant information available it would appear that there was nothing to prevent the

attorney from attending court on 7th March. Certainly there could have been no reason why the applicant could not have attended court but he did not. In *Bowes* v *Pinnick* 1905 TS 156 an application to set aside a default judgment was refused on the basis that a defendant who was impecunious could have taken the necessary steps in person and, in my view, the circumstances of the instant case give even stronger reason for refusing the relief which is sought. See also *Neuman (Pvt)Ltd* v *Marks* 1960(2) SA 170 (S.R.) at 172 G.

Turning briefly to the defence advanced by the applicant in his affidavit he alleges that the vehicle which he had insured with the respondent was stolen from his place of employment in October, 1994 and he thereafter claimed under the policy and was paid out. He denies that his claim was fraudulent as alleged by the respondent in its counterclaim. In its answering affidavit the respondent makes certain very damaging averments the principal one being that the applicant sold the vehicle to one D.J. Noble in Cape Town, South Africa some 5 days before he reported it as stolen. What I find disturbing is that the applicant has failed to make a replying affidavit refuting these factual averments and has chosen simply to rely on the general denial of fraud contained in his founding affidavit. While it is true that the applicant in an application such as the present one need not deal fully with the merits of the case and produce evidence that the probabilities are in his favour it would, nonetheless, be reasonable to expect him to deal with the kind of factual allegations advanced by the respondent in order to show his *bona fides.*

In all the circumstances I am not persuaded that the relief sought should be granted. Accordingly, the application is dismissed with costs.

ON BEHALF OF THE APPLICANT	IN PERSON
ON BEHALF OF THE RESPONDENT	**ADV. R. TOTEMEYER**
Instructed bv:	**A Vaatz & Partners**