**I. 3307/96**

T,evv. AJ

2000-11-21

Application to set aside default judgement. Late filing of index and heads of argument. Condonation granted • default judgment set aside.

Case No.: A. 349/2000

IN THE HIGH COURT OF NAMIBIA

In the application of:

TERERAI A J MHUNGU APPLICANT

and

COMMERCIAL BANK OF NAMIBIA LTD RESPONDENT

CORAM: LEVY, AJ

Heard on: 2000-11-09

Delivered on: 2000-11-21

JUDGMENT-

LEVY, AJ: This is an application for condonation for non-compliance with the Rules of Practice relating to the late fding of an index and heads of argument. Both the index and heads of argument were required in respect of an application brought by Fourth Defendant to set aside a default judgment granted on 17th October 1999 against him.

Applicant herein is represented by Ms Dammert and respondent by Mr Heathcote.Rules of practice are essential adjuncts to the rules of court and assist in the proper administration of justice. One must, however, be cautious not to insist upon compliance with such rules of practice to the detriment of the very purpose for which they are formulated, namely to do justice.

The paginating of the record, the index and the heads of argument are of great assistance to the Court but compliance therewith does not determine the merits of the case between litigating parties. In a complicated case and a lengthy record these two rules of practice may well be indispensable and failure to furnish heads of argument timeously may well hamper and hinder the administration of justice. A Court may well under such circumstances postpone or strike the matter from the roll.

In the present case the record is short and the point in issue not complicated.

To decide whether or not condonation should be granted in matters of this kind, the Court will look ***inter alia*** at the litigation as a whole to ascertain what is in issue, the Court will consider the nature of the breach, the chances of success of the offending party in the principal case, and the prejudice which either of the parties will sustain if condonation is granted.

In ***Melane v Santam Insurance Co Ltd*** 1962(4) SA 531(A) at 532, Holmes, J.A. said:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective ***conspectus*** of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decision of this Court, and therefore 1 need not add to the evergrowing burden of annotations by citing the cases."

The "main action" at this stage of the proceedings constitutes the setting aside of a default judgment which respondent obtained on 7lh October 1999, against applicant and certain others for the payment of N$l,050,606-58, interest thereon at 20% per annum from 2‘„J May 1999 to dale of payment and costs of suit on an attorney and client scale.

On 1 llh August 1999 plaintiff issued a combined summons against four defendants the fourth being the applicant herein.

The second defendant duly entered an appearance to defend and thereafter made an affidavit to prevent summary judgment being taken against him. In his affidavit second defendant complained that the copy of the suretyship annexed to the Particulars of Claim, was illegible in parts. The suretyship concerned dated 23rd September 1993 was annexure "B" to the Particulars of Claim served on applicant herein is similarly illegible.

Annexure "D" to the said Particulars of Claim is a letter from plaintiff addressed to "The Directors, Namibia Industries (Pty) Ltd", the Directors of the said company are not mentioned by name in the

letter. The letter has a heading in capitals "Banking facilities" which is underlined. Thereafter the letter provides:

"We refer to our discussions and are pleased to confirm that we have accorded your company banking facilities as detailed below:"

Two numbered paragraphs 1 and 2 then follow and the letter then relates in paragraph 1 that there arc overdraft facilities/Letter of Credit up to NS500 000-00 until 30lh June 1994 and then follows matter relating to the rate of interest.

Inasmuch as plaintiff alleges in paragraph 8 of the Particulars of Claim that "Plaintiff s claim only relates to the overdraft facility referred to in paragraph 1", it is unnecessary to refer to the balance of the letter save and except to point out that only one person purported to accept the terms and conditions therein related, and that person did not do so in his capacity as a director.

Plaintiff alleges that in terms of the said paragraph 1 of the aforesaid letter money was advanced on overdraft and that as at 1st May 1999 the sum of N$l 050 606-58 was due and owing to plaintiff.

Thereafter it is alleged by plaintiff that on 23rd September 1993 the second, third and fourth defendants signed a deed of suretyship in favour of plaintiff binding themselves as sureties and co-principal debtors with first defendant for the latter's liability to plaintiff and a copy of the deed of suretyship is Annexure "B" to which reference has already been made.

On 7"' October 1999 plaintiff asked for Default Judgment against first, third and fourth defendants on the grounds that appearance to defend had not been entered. Such judgment was granted. Fourth defendant has applied for rescission of the judgment in terms of "Rule 44 and/or 3 l(2)(b) of the Rules of the High Court". The application for rescission is opposed.

The applicant has filed an affidavit which purports to set out a number of defences, which he says he has to the action and his reasons for not entering an appearance timeously.

There appears to be some confusion in the papers between "default judgment" and "summary judgment". The latter can only be granted where there is an entry of appearance to defend an action and is not granted where there already is a default judgment for failure to enter an appearance. The Court was only addressed in respect of the default judgment granted on 7th October 1999, by reason of fourth defendant's failure to enter an appearance.

According to the affidavit filed by fourth defendant, he was absent from Namibia from 29lh July 1999 to 6"' October 1999. On 7th October 1999, his attorney "served notices of representation and intention to defend" on plaintiffs attorney. However, the record discloses that default judgement for failure to enter an appearance was granted on that date. Miss Dammert argued that due to the administrative procedure in the Registrar's Office, the default judgment could have been mistakenly granted. This may well have also been the view of plaintiff s legal adviser because on October 18th, 1999, the attorney for the plaintiff served notice of intention to apply for Summary Judgment on 5th November 1999. In truth and in fact the application for Summary Judgment was unnecessary as default judgment had already been granted. Accordingly the breach of the rules by fourth defendant was in fact minimal and possibly even the plaintiff thought that he had entered an appearance to oppose the action and therefore applied for Summary Judgment.

Fourth defendant's delay and his breach of the rules are accordingly explained. However, the Court will not grant condonation as now applied for if the applicant does not make out a case in terms of Rule 31 (2)(b) which provides:

> "A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such

> judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of N$200 set aside the default judgment on such terms as to it seems meet."

The fourth defendant has provided the security. He has explained that he was absent from Namibia and his breach of the rules in respect of not filing his entry of appearance timeously is as already stated, minimal.

Judges have been reluctant to define "good cause" in these circumstances. However, should a defendant's affidavit disclose that he his not *bona **fide*** in his application to rescind a default judgment, the Court will not come to his assistance. Where he is *bona **fide,*** however, the Court will assist him if he can show that he has a reasonable prospect of success. He need not convince the Court that he will succeed.

In his affidavit, he refers to several defences some of which he has abandoned. His main defence is that plaintiff released him from his suretyship.

Fourth defendant says that "during or about April 1994" (that is some 5 years prior to the issue of summons) he ceased to be a director of first defendant. About that time he met with Mr Kuschke who was the Manager of plaintiff at the time and explained to him that he was no longer connected with first defendant and that he wanted his name removed as co-surety from the Deed of Suretyship signed on 23rd September 1993, (that is Annexure "B" aforesaid). He says Mr Kuschke was willing and prepared the necessary documents which he signed. He said these documents are in the possession of plaintiff.

The plaintiff replied to this particular allegation by filing an affidavit made by Salomon Petrus Van der Wath who said he was the Senior Manager, Credit Administration and Recoveries of plaintiff. He

says:

> "On Applicants own version he is not entitled to have the Judgment rescinded, and more particularly because the suretyship agreement specifically provides that:

'This suretyship shall continue to bind the undersigned notwithstanding any amalgamation or reconstruction that may be effected by you with any other company or person or any transfer of your business or any part thereof or any change in your constitution and shall endure additionally for the benefit of any new company or corporation so formed to carry on your business of any part thereof a successor to you, or as your assignee, whether such new company or corporation shall or shall not differ in its name, objects, character and constitution from you, it being the intent that this suretyship shall remain valid and effectual in all respect and for all purposes in favour of and with reference to any such new company or corporation or other your successors or assignees as well as you, an may be proceeded on and enforced in the same manner to all intents and purposes as if such new company or corporation or other your successors or assigns had been expressly named and referred to herein in addition to you

> The provisions hereof comprise the entire terms of this suretyship given by me/us to you, and it is agreed that no cancellation, amendment, addition or alteration to the provisions hereof shall be of force and effect unless such cancellation, amendment, addition or alteration is reduced to writing and signed by you and me/us. as the case may be.

Mr Heathcote echoed this argument. The

argument, however, is fallacious.

1 have already pointed out that the suretyship agreement which plaintiff annexes to his Particulars of Claim, marked "B" and which is the basis of his action is illegible in parts. Those parts quoted by Mr van der Wath can indeed be discerned but at the bottom of the first column appears a provision which cannot be read in its entirety but which appears to make provision for a surety to be released from the suretyship agreement.

In his affidavit fourth defendant did not say the suretyship agreement was "cancelled" as Mr van der Wath deposes. He said he was "released" and this is what that paragraph appears to deal with.

In the trial hereof the onus is on fourth defendant to satisfy the Court that he was released, but, at this stage he must merely show "good cause" which would include showing a reasonable prospect of success. He has made a positive allegation thereanent, and while Annexure "B" (drafted by plaintiff) appears to make provision for such a situation, there is no affidavit by Mr Kuschke refuting it.

I was told that an affidavit by Mr Kuschke had gone astray. There is no direct evidence on record supporting this statement nor is there secondary evidence as to the content of the affidavit which lias gone astray. The fact that Mr van der Wath who was looking for a written cancellation of suretyship agreement, did not find one, is of no assistance to plaintiff.

Fourth respondent has therefore complied with the requirements of Rule of Court 31(2)(b).

It was agreed by Ms Dammert and Mr Heathcote that should this Court grant condonation, it could regard the hearing as the application for rescission of default judgment.

The order of this Court is:

1. Condonation for the late filing of the index and heads of argument is granted.
2. The default judgment granted against fourth defendant in favour of plaintiff on 7lh October 1999 is hereby rescinded.
3. Fourth defendant is given leave, as far as may be necessary, to enter appearance to defend the action instituted by plaintiff against defendants on 11th August 1999.
4. Costs shall be costs in the cause.

| | |
|---|---|
| **For the applicant:** | **Ms M Dammert** |
| **Instructed by:** | **Messrs Dammert & Hinda** |
| **For the respondent: Instructed by:** | **Mr R Heathcote Messrs P F Koep & Co** |