CASE NO. (P) A 172/2005

SUMMARY:

CHARLES GASTON ALBERT ANGELE VAN HERZEELE
SHARLAE HOLLEY

versus

EPACHA GAME LODGE (PTY) LTD

HOFF, J

2005/10/10

CIVIL PROCESS:

Rescission of default judgment – requirement of willful default considered.

Summonses served on applicants.

Applicants ignored summonses for 10 weeks.

Default judgment obtained against applicants in interim period.

Applicants required to give sufficiently full explanation of their default to enable Court to understand how it really came about and to assess their conduct and motives.

Applicants failed to provide any explanation why summonses had been ignored by them.

Such conduct found to be deliberate or at least grossly negligent.

Court will in absence of reasonable explanation not come to assistance of applicant who deliberately chose to disregard process of Court.

In absence of reasonable explanation it must be found that applicants are in willful default.

Having shown no good cause application for rescission refused.

CASE NO: (P) A 172/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHARLES GASTON ALBERT ANGELE
VAN HERZEELE **1ST APPLICANT**
SHARLAE HOLLEY **2ND APPLICANT**

and

EPACHA GAME LODGE (PTY) LTD **RESPONDENT**

CORAM: HOFF, J

Heard on: 2005.09.26

Delivered on: 2005.10.10

JUDGMENT:

HOFF, J: This is an application for the rescission of two default judgments. Respondent opposed the application. The applicants are *peregrini* of this Court and respondent is an *incola.*

On 14 February 2005 this Court ordered an *attachment ad fundandum jurisdictionem,* in respect of certain assets of both applicants, pending an action to be instituted by respondent against applicants for payment of the amount of N$355 501.93 and the delivery of bank statements in possession of applicants as well as an order to debate an account and documents.

First Applicant *in casu* in an affidavit states that upon receipt of the order obtained on 14 February 2005 and after discussions with his legal practitioner Chetwynd-Palmer, it was decided to wait for service of those summonses and to defend the action alluded to therein.

First applicant relates that on 7 March 2005 he arrived home in Durban and found that a large pile of documents had been left with his housekeeper. He says that upon *"receipt of the documents I looked at it but it did not dawn upon me that the summonses included in the documents were in respect of the action alluded to in the order of Court obtained by respondent on 14 February 2005."*

First applicant proceeds as follows:

> *"I communicated with Chetwynd-Palmer who informed me that he had received Court documents from our Windhoek correspondent and that he*

> *had arranged a consultation with counsel for the following day. I was not able to attend on that consultation.*
>
> *I was under the mistaken impression that the documents received by Chetwynd-Palmer included the summonses and that he, as applicant's attorney would deal with it".*

On 7 April 2005 a default judgment was obtained against the applicants in respect of an amount of N$355 501.93 and on 11 April 2005 default judgment was given against the applicants ordering them to deliver all bank statements in their possession in respect of a specified number of entities and to debate the account and documents.

First applicant states that it was only on 23 May 2005 after receipt of a letter from respondent's attorneys that he and his legal practitioner became aware that default judgment had been granted against applicants and on 24 May 2005 counsel was instructed to prepare this application for the rescission of the default judgments.

The Supreme Court of Namibia in the unreported judgment of *Transnamib Holdings Ltd v. Bernhardt Garoëb Case SA 26/2003 at p.9* in dealing with applications for rescissions of judgments expressed itself as follows:

"In a long line of judgments the Courts have by precedent distilled the essential criteria by which to determine whether "good cause" has been

shown for default judgments to be rescinded or varied. In *Leweis v. Sampoio 2000 NR 186 (SC) at 191 G – H* this Court approved the following content given to the requirements implied by that phrase in *Grant v. Plumbers (Pty) Ltd, 1949 (2) SA 470 (O) at 476 – 477:*

"(a) He must give a reasonable explanation of his default. If it appears that his default was willful 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 delaying plaintiff's claim.*

(c) *He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out 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.*

(See also *SOS Kinderdorf International v. Effie Lentin Achitects 1990 NR 300 (HC) at 302 D – F; Kraner & Another v. Metzger (2) 1990 NR 135 at*

139 G – J and *Mutjabikua v. Mutual Federal Insurance Company Limited 1998 NR 57 (HC) at 59 D – F".*

It was submitted by Mr. Troskie who appeared on behalf of applicants that applicants were not in willful default, that they are *bona fide* in bringing this application and that applicants have *bona fide* defences in respect of both claims.

In respect of the element of willful default Mr. Troskie referred to the decision of *Neuman (Pty) Ltd v. Marks 1960 (2) 170 S.R where the following appears at 173 A - B:*

> *"The true test, to my mind, is whether the default is a deliberate one – i.e. when a defendant with full knowledge of the set down and the risks attendant on his default, freely takes a decision to refrain from appearing".*

It was further submitted on behalf of applicants that correspondence and other Court documents prove that applicants were prior to 23 May 2005 under the impression that respondent has not yet issued summons in respect of the action alluded to in the order of 14 February 2005.

That may be correct but is there a reason or an explanation why applicants claim that they had been unaware prior to 23 May 2005, that summons had already been issued ?

The explanation offered by applicants is that a pile documents had been received on 7 March 2005 amongst which were summonses. First applicant states that it did not dawn on him that the summons seen by him was in respect of the action alluded to in the Court order obtained by respondent on 14 February 2005.

It is clear from the affidavit deposed to by first applicant that he looked at the summons. He does not explain why it did not dawn on him that this summons was in respect of an action respondent promised to institute against him.

First applicant must have looked at the first page of the summons since he states that he saw a summons. If he had seen that it was a summons what was his attitude towards such summons ? It must be remembered that he had received notice that an action would be instituted and that he was in fact expecting a summons. First applicant does not explain what he did with that summons. If he had read it (he does not say so) he would have realized that it was the summons he was expecting. If he did not read the summons then surely this is an indication of his attitude in respect of Court documents. First applicant in my view chose to ignore the summons received on 7 March 2005 because he looked at it again only on 23 May 2005 after he had been informed that default judgment

had been obtained against him. First respondent cannot be heard to say that he was unaware that a summons had been issued in circumstances where he himself deliberately chose to ignore the summons he received. This Court,

likewise, cannot condone such conduct. First applicant in my view acted recklessly or at least his failure to deal with the summons at all amounts to gross negligence.

In *Mvaami (Pvt) Ltd v. Standard Finance Ltd 1977 (1) SA 861 (R) at 862 F Davies J* considering the requirement of willful default by reference to the *Neuman's* case expressed himself as follows:

> "Willful default amounting to acquiescence would, however, bar success, and in this connection it is to be noted that *"willful"* merely means *"deliberate".*
>
> See also *Schmidlin v. Multisound (Pty) Ltd 1991 (2) SA 151 (C)*

In Van den Heever J (as her Ladyship then was) in an application for rescission in terms of Rule 42 said the following at 15 B:

> *"Acquiescence in the execution of a judgment must surely in logic normally bar success in an application in an application to rescind on the same basis as acquiescence in the very granting of the judgment would"*

and in

Manjean t/a Audio Video Agencies v. Standard Bank of SA Ltd 1994 (3) SA 801 at 805 E – F King J held as follows:

> *"It is, however, clear that the absence of willful default is a fundamental requirement in applications of this nature. ….Mr. Lory referred to a number of authorities which emphasise that rescission applications require the exercise of judicial discretion. This is surely so. However, where, the applicant for rescission is in willful default, there is no room for the exercise of such discretion in his favour".*

I have indicated that I regard the conduct of first applicant deliberate or least grossly negligent. Acquiescence, in terms of the authorities referred to, can also be a bar to a successful rescission application.

In my view on the facts presented by first applicant himself there can be only one inference and that is that he chose to ignore a summons issued by this Court and first applicant only looked at it again 10 weeks later. He does not say that he was under the impression that the summons served was in respect of a different action neither does he say why he never looked again at the summons during the intervening 10 weeks. First applicant knew that a summons had been served.

He did nothing for 10 weeks. At the very best he surely must have acquiesced in whatever consequences would follow as a result of inaction of which one is that default judgment would follow.

First applicant, in addition, after having been served with the summons, never informed his attorney of the service of such summons. He chose to keep quiet about it. He does not explain why he did not inform his attorney as one would have expected him to do.

Gardiner JP in Chedburn v. Barkett 1931 CPD 421 in considering an appeal from the magistrate's Court for refusing to rescind a default judgment held as follows on 423:

> *"I adhere to what was said in Hendricks v. Allen (1928 CPD at 521), that "if it is once proved that the summons has been brought to the notice of the defendant and he has not appeared, then, in the absence of an explanation on his part which would be accepted, it seems to me that a presumption arises of willful default, and unless the presumption is rebutted by the defendant, the Court must take it that willful default is proved".*

See also *Newman v. Ayten 1931 CPD 454 at 455*

In *Vincolette v. Calvert 1974 (4) SA 275 ECD* applicant had ignored a summons served on him, despite advise to consult an attorney, since he was of the opinion

that the Court would not grant judgment against him without proof that the amount claimed was indeed owing by him.

Kotze J referred to the Rules which require a defendant who receives a summons to deliver a notice of intention to defend within the *dies induciae* set out in the summons.

The learned Judge continues at 276 H – 277 A – B as follows:

> *"It has been laid down over many years that one of the requirements to be satisfied in an application of this nature is a reasonable explanation of applicants default. ….*
>
> *I do not think that the applicant overcomes this first hurdle. His attitude, in effect, is that he was free to treat the summons which was served upon him lightheartedly. ….*
>
> *This attitude is one of disregard of the process of the Court upon which the Court cannot place its stamp of approval".*

Although the facts in the *Vincolette* case *supra* are distinguishable from the one under consideration the same principle applies namely that where an applicant in

a rescission application chose to disregard the process of Court, a Court would in the absence of a reasonable explanation not come to the assistance of such applicant.

In the *Manjean* case at 804 B it was held that a defendant who knows that default judgment is to be taken against him does not demur but allows the plaintiff to take his course, is presumed to be in willful default and is not entitled to a rescission of judgment.

Second applicant in her affidavit confirmed the correctness of the affidavit of first applicant in so far as it refers to her, confirms that until the evening of 23 May 2005 she was unaware that the action had been instituted and that at all times it was her intention to defend the action respondent intended to institute. She is the wife of the first applicant and I accept that the explanation by first applicant in respect of his failure to oppose the action instituted by the respondent should also be accepted as second applicant's explanation since in her affidavit she does not provide a separate explanation. In fact she provides no explanation at all.

It is clear that second applicant must have had knowledge of the summons served on 7 March 2005 since first applicant in his affidavit states that it was during the evening of 23 May 2005 when his attorney Chetwynd-Palmer went

through the documents which he had received on 7 March 2005 *“that the summonses that were served on second applicant and myself”* were *“identified”.*

First applicant in his affidavit stated, without mentioning any dates, that his attorney informed him that he (i.e. the attorney) had received Court documents from their Windhoek correspondent and that he was under the “mistaken *impression”* that the documents received by his attorney included the summonses (presumably those summonses served on applicants on 7 March 2005) and that the attorney would further deal with the matter.

First applicant in his affidavit states that the next that happened Van der Vijver (the person who acquired first applicant’s interest in respondent) brought an application which first applicant opposed and filed an affidavit dated 23 March 2005. In this latter affidavit first applicant refers to the Court order dated 14 February 2005 and states that no summons has yet been served on him in respect of the action alluded to by respondent in that Court order.

In my view, if it is correct that first applicant had been under the *“mistaken impression”* that his attorney received the summons he had been expecting and that his attorney would deal with it why would first applicant then in a latter affidavit state that the summons had not yet been served on him ?

Moreover first respondent does not explain why he could have been under such *"mistaken impression".*

In *Metje & Ziegler Bpk. V. Gresse 1959 (3) SA 698 (SWA) at 700 A Hofmeyer J,* as he then was, held that in a rescission application an applicant must provide the Court with a reasonable explanation (gegronde rede) and the respondent bears the onus of proving willful default.

A Court must thus first consider the reason for applicant's previous non-appearance. If it is proved that the non-appearance was due to willful default the application must be dismissed.

In *Federated Timbers Ltd. v. Bosman and Others 1990 (3) SA 149 WLD at 157 E – F.*

Zulman AJ with reference to what was said in *Silber v. Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)* held *"that in order to show 'good cause' a defendant must at least furnish an explanation of his default* ***sufficiently full*** *to enable the Court to understand how it really come about and to assess his conduct and motives".*

(Emphasis mine).

Applicants have failed to provide a reasonable explanation why summonses had been ignored by them. There is simply no explanation at all for such grossly negligent conduct.

In the absence of any reasonable explanation it must be found that applicants were in willful default.

It was submitted by Mr. Heathcote who appeared on behalf of the respondent that an additional reason why this rescission application should fail is the lack of *bona fide* defences. In the light of my finding that applicants are in willful default it is not necessary for me to consider the requirement of a *bona fide* defence.

No good cause has been shown by applicants why this Court should exercise its discretion in favour of rescinding the default judgments against them.
This application for rescission of default judgments thus stands to be dismissed.

Regarding the question of costs the respondent is the successful party and therefore entitled to costs.

In the result the following order is made:

The application for rescission of two default judgments obtained against the applicants on 7 April 2005 and 11 April 2005 respectively is hereby dismissed with costs.

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HOFF, J

COUNSEL ON BEHALF OF THE APPLICANTS: MR. TROSKIE

Instructed by: FISHER, QUARMBY & PFEIFER

COUNSEL ON BEHALF OF THE RESPONDENT: ADV. HEATHCOTE

Instructed by: VAN DER MERWE-GREEFF INC.