CASE NO.: I 2920/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GEOMAR CONSULT (PTY) LTD **APPLICANT**

and

ONLY PROTECTING PROPERTIES CC **RESPONDENT**

CORAM: **NDAUENDAPO, J**

Heard on: 28 July 2008

Delivered on: 17 June 2011

JUDGMENT

NDAUENDAPO, J

[1] This is an application for rescission of judgment in terms of rule 44(1) of the Rules of the High Court.

[2] The applicant, Geomar Consult (Pty) Ltd, was sued by the respondent, Only Protecting Properties, for an amount of N$36 634.97 together with interest on that

amount at a rate of 20% per annum a tempore morae in respect of services rendered and material supplied by the respondent to the applicant during 2003.

[3] The summons was served on the applicant (defendant) on 28 November 2005. On the 1st of December 2005 the respondent filed a notice of intention to defend together with a request for further particulars.

[4] On the 9th of December 2005 the respondent filed an application for summary judgment to be heard on 23 January 2006. On the 23rd of January 2006 the application for summary judgment was removed from the roll. On 14 March 2006 the respondent filed a declaration. On 8 May 2006 the applicant filed an application in terms of Rule 30 to be heard on 5 June 2006. The Rule 30 application sought the following relief:

1) *Declaring the filing of a declaration by plaintiff as an irregular step and setting aside the said declaration.*

The respondent opposed the rule 30 application and filed an opposing affidavit. On 5 June 2006 the Rule 30 application was postponed by Mr Kamanja (who represented the respondent) to a date to be arranged with the registrar. Such a date was never arranged with the registrar. The respondent's legal representative addressed three letters dated 13 July 2006, 1 August 2006 and 13 September respectively inquiring from the lawyer of the applicant as to what he intended doing with the Rule 30 application which was postponed to a date to be arranged with the registrar. The lawyer of the applicant, Mr Mbaeva, never replied to those letters. Frustrated by the silence from Mr Mbaeva regarding the Rule 30 application, Mr Namandje filed a notice of bar on the lawyer of the

respondent. Although the notice of bar is dated 11th day of January 2006, it was filed and served on Mr Mbaeva and the registrar of the High Court on 16 January 2007 (that is evident from the stamp on the notice of bar) notwithstanding the notice of bar, Mr Mbaeva did not file a plea.

[5] On 3 September 2007 Mr Namandje launched an application for default judgment. On 14 September 2007 the application for default judgment was granted. It is that judgment that is sought to be rescinded in terms of Rule 44(1). The application is being opposed by the respondent. Mr George Martin, the managing director of the applicant, deposed to an affidavit in support of the rescission application. In summary he says that "the reasons why he applies for rescission of judgment is that the summary judgment was postponed to a date to be arranged with the registrar and the meris and demerits of the summary judgment were not dealt with by a justice of this court in terms of Rule 32(3). The summary judgment was not withdrawn and he did not take any steps after the declaration was filed and he did not take any steps in relation to the said declaration as such would institute an indulgence on his part."

[6] Mr Mahevo Amkongo who deposed to the opposing affidavit on behalf of respondent contends that the application for summary judgment was removed from the roll to enable the applicant for purposes (sic) of granting leave to applicant to defend the matter. It was the application in terms of Rule 30 which was postponed to a date to be arranged with the registrar, contends the respondent. He further stated that;

"If applicant indeed decided not to take any steps in relation to the declaration even after the bar was served then that was done at its own peril."

[7] Rule 30 provides as follows:

"30(10) A party to a case in which an irregular step or proceeding has been taken by any other party may, within 15 days after becoming aware of the irregularity, apply to court to set aside the step or proceeding provided that no party who has taken any further step in the case with knowledge of the irregularity shall be entitled to make such an application."

The learned authors: Herbstein & Van Winsen (the Civil Practice of the High Courts of South Africa 5th edition at 742 say the following:

"Taking of a further step precludes application:

An aggrieved party forfeits the right to have the offending step set aside if he has taken any further step in the cause with knowledge of the offending step. The question of what constitute a 'step' in the proceedings has often been considered." In Killarney of Durban (Pty) v Lomax 1961 (4) SA 93 (D) at 96 FanninJ stated that a 'step' in the proceedings is some act which advances the proceedings one stage nearer completion and held that the taking of an exception is such an act. In Jowell v Bramwell—Jones 1998(1) SA 836 (W) Heher J stated that:

“Further step in the proceedings is one which advances the proceeding one stage nearer completion and which objectively viewed, manifests an intention to pursue the cause despite the irregularity....”

[8] In casu, the Rule 30 application was only postponed to a date to be arranged with the registrar, nor was it abandoned by silence as submitted by Mr Namandje. The fact that the Rule 30 application was not withdrawn and still pending prevented the applicant from taking any further step to bring the proceeding nearer completion. Had the applicant filed a plea as per the notice of bar that would have amounted to it taking a further step and it could not have pursued the Rule 30 application. I must confess that I do not know why the filing of the declaration by the respondent was challenged or is challenged as an irregular step. That is for the presiding officer who will hear the Rule 30 application to decide.

[9] The fact that the applicant was requested by the respondent to indicate what it intended to do with the Rule 30 application which was postponed to a date to be arranged with the registrar and the applicant ignored that does not in my respect full view amount to the abandonment of the Rule 30 application by silence. Once an application has been postponed to a date to be arranged with the registrar that implies that the application is pending before court. It was open to the legal practitioner of the respondent to invite the legal practitioner of the applicant to obtain a date from the registrar and not to file a notice of bar.

Rule 44 (1) provides that:

"The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –

a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

It is common cause that the default judgment was obtained without notice to the applicant.

In the result, the filing of the notice of bar was an irregular step while the Rule 30 application was postponed to a date to be arranged with the registrar. Consequently, the default judgment was granted erroneously.

In the result, I make the following order:

The application for rescission of judgment in terms of Rule 44(1) is granted with costs.

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NDAUENDAPO, J

ON BEHALF OF THE APPLICANT: **MR NAMANDJE**

Instructed by: **SISA NAMANDJE & CO. INC.**

ON BEHALF OF THE RESPONDENT: **MR MBAEVA**

Instructed by: **MBAEVA & ASSOCIATES**