CASE NO.: I 1206/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

TV WORX CC
RESPONDENT/PLAINTIFF

and

NATHAN JOSEPH T/A CJ COFFEE SHOP **1ST DEFENDANT**

CHRISTA JOSEPH **APPLICANT/2ND DEFENDANT**

CORAM: SWANEPOEL, J

Heard on: 19 - 20 SEPTEMBER 2011

Delivered on: 07 OCTOBER 2011

JUDGMENT:

SWANEPOEL, J: By way of a notice of application for rescission of judgment filed on 20 December 2010, application is made on behalf of the Applicant (2nd Defendant) for an order: (unedited)

"1. *That the judgment granted against the Applicant on 08 September 2010, be rescinded and leave granted to the Applicant to defend the main action.*

2. *The sale – in – execution of the Nissan 1400 Motor Vehicle with registration number N 13682 S and Blue Toyota Corolla Motor Vehicle with registration number N 1761 S, be stayed, pending adjudication of the rescission application.*

3. *That the cost of this application be ordered to be costs in the main action."*

2.1 Respondent/Plaintiff originally issued a combined summons against Nathan Joseph t/a CJ Coffee Shop in respect of goods sold and delivered. Subsequent to an appearance to defend having been entered, an application for summary judgment was launched and met with an opposing affidavit wherein the said Nathan Joseph maintained that he was only the manager of CJ Coffee shop although admittedly married to Christa Joseph by ante nuptial contract. There after the respondent/plaintiff launched an unopposed Notice of Motion to join the said Christa Joseph as second defendant which joinder was granted by this Court on 30 July 2010. It is to be noted that attached to the application for joinder, the combined summons against Nathan

Joseph t/a CJ Coffee shop was annexed as an annexure to the founding affidavit. An amended particulars of claim wherein the aforesaid Christa Joseph was cited as second defendant was thereafter served first on Nathan Joseph (1st defendant) "*and also on him for the second respondent, Christa Joseph, as she was not present at the time of service…..*"

2.2 On 06 September 2010 the respondent/plaintiff filed an application for default judgment with the Registrar in terms of Rule 31(5)(a) against the applicant/2nd defendant. In its application the following is inter alia alleged:

*"**TAKE NOTICE FURTHER THAT**:*

1. *The Second Defendant has duly been served with the summons;*
2. *The time for entering an appearance to defend has expired; and*
3. *The Second Defendant has not entered an appearance to defend;*
4. *It is submitted that the papers are in order."*

The Registrar granted default judgment on 08 September 2010 against the applicant.

2.3 A plea on behalf of the applicant and first defendant was only filed with the Court on 16 September 2010 when default

judgment against the applicant had already been granted. The purported plea on behalf of the applicant also lacked validity in view of the fact that she had only on the 7th of October 2010 authorised her legal practitioners by way of a special Power of Attorney to defend the action instituted by the respondent.

2.4 In the minutes of the parties' conference held on 28 July 2011 the following was stated:

> "*3. Applicant's/Defendant's (sic) still want to file and deliver a replying affidavit. Applicant's/Defendant's (sic) will have to bring an application for condonation in this regard.*"

2.5 It was only on 09 August 2011 that the replying affidavit on behalf of the applicant and deposed to by her legal practitioner was filed with this Court without any application for condonation for the late filing thereof and despite of what had been stated in paragraph 2.4 *supra*.

2.6 On 31 August 2011 it was ordered by this Court during a case management conference that both counsel should address the following in their respective heads of argument:

> "*Could the default judgment against the 2nd Defendant have been granted on the 8th September 2010 on the papers placed before the Registrar? If not, should this court not* ***mero motu*** *rescind the judgment and set the warrant of execution as well*

> *as the proposed sale in execution aside in terms of Rule 44(1)(a)?*"

[3]It is clear from the applicant's founding affidavit in support of her application for the rescission that she relies on the fact that after she had received the notice to be joined as second defendant, she had instructed her legal practitioners to defend the action on her behalf as well as on the fact that she had a defence against the claim of the plaintiff/respondent "*as clearly reflected in the plea filed on my behalf on the 16th of September 2010 and attached hereto as annexure "CJ1""*.

[4]Nowhere in the founding affidavit was any reliance placed on the provisions of Rule 44 of the Rules of the High Court and/or alleged that the application for default judgment was erroneously sought and/or erroneously granted.

[5] In the answering affidavit filed on behalf of the respondent opposing the application for rescission of judgment the following important submission is set out with which this court agrees:

> *"There is no* (acceptable) *explanation why the applicant's instructions to defend the matter after receipt of the application to join (20 July 2010) were not complied with."* (The insertion is mine)

[6] On the morning of the hearing of this application a notice of application to strike in the following terms was filed with the court:

> *"1. That the Replying Affidavit of the Applicant be struck in its entirety on the grounds that it constitute (sic) new matter which ought to have been included in the Founding Affidavit. The Respondents (sic) did not have an opportunity to have answered to the new matter so contained in the Replying Affidavit and it is therefore prejudiced by such inability to have answered to the new matter so raised for the first time in the Replying Affidavit.*
>
> *2. Costs of this application."*

This application was not opposed-probably on account of the fact that applicant has not filed an application for condonation as referred to in paragraph 2.4 *supra* ór in the hope that the court *mero moto* rescinds the judgment on the question raised in paragraph 2.6 *supra*.

[7]The court in the circumstances had struck the replying affidavit from the papers with costs. The striking out however did not affect the Court's concern set out in paragraph 2.6 supra.

[8]It is to be noted that it is only in the replying affidavit which is no longer before the court, that reliance was placed on the substance of Rule 44 namely that the judgment was erroneously sought and I may add, erroneously granted.

[9]Both parties have referred this court to *Mutebwa v Mutebwa and Another* 2001(2) SA 103 (TkH) but for different reasons. I respectfully agree with the following dictum of the court at the bottom of page 199 and the top of page 200 where the following was stated:

> "*The Rule (Read our Rule 44) should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby, a rescission of the judgment should be granted.*"

> In *Tshabalala and Another v Peer* 1979(4) SA 27(T), Eloff J adopted this interpretation and said at 30D:

> "*The Rule accordingly means – so it was contended – that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that is so, and I think that strength is lent to this view if one considers the Afrikaans text......*"

[10] I find in the circumstances of this case that the basis for the respondent's application for default judgment addressed to the Registrar was erroneously sought and subsequently erroneously granted in view of the following:

1. No summons in which the applicant was cited as a defendant was ever served on her albeit that a summons in which **first respondent** was cited, was attached to the application for joinder.

2. Nowhere in any of the papers before court in the application for joinder and the amended particulars of claim was applicant called upon to either enter an appearance to defend and/or to file a plea within stated time.

[11] The applicant should in its notice to the Registrar and referred to in paragraph 2.2 *supra* have stated that the 2nd defendant having been joined as second defendant in the action (which was not done). Such a notice would then have placed the respondent in a dilemma for it not being in a position to state that *"The time for entering an appearance to defend has expired"* because none was afforded to the applicant.

[12]In the circumstances I am satisfied that the judgment granted against the applicant on 08 September 2010 should be rescinded together with the ancillary relief prayed for.

[13]With regard to the question of costs of this application, I have decided to exercise my discretion against the applicant notwithstanding the fact that the default judgment is being rescinded. The application did not succeed on the basis set out in the applicant's founding affidavit, but on the question raised by this court in paragraph 2.6 supra. Both counsel for the applicant and for the respondent made submissions to the court which make it unnecessary to go into any detail. Applicant's counsel submitted that "*A tragedy*

of errors" occurred in the handling of the application by the applicant's legal practitioner while counsel for the respondent in his heads of argument submitted: "*The applicant has no respect for the rules and for rulings..., because it has flagrantly disregarded the rules and orders of this Honourable Court*".

[14]I find in the circumstances that the respondent was entitled to have opposed the application as proffered by the applicant. I furthermore agree with the following dictum stated in *Saloojee and Another v Minister of Community Development* 1965(2) SA 135 (A) at 141C and approved in the matter of *Moraliswani v Mamili* 1989(4) SA 1(A) which case originated from the predecessor of this court:

> "*There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court.*"

[15] In the result the following orders are made:

1. The judgment granted by the registrar dated 08 September 2010 against the applicant is hereby rescinded.

2. The writ of execution whereby a Nissan Ford 1400 motor vehicle with registration number N13682S and a blue Toyota Corolla motor vehicle with registration number N1761S had been attached, is hereby cancelled.

3. The applicant is ordered to pay the respondent's costs in opposing the application, including the costs of one instructed and one instructing counsel.

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SWANEPOEL, J:

ON BEHALF OF THE APPLICANTS Adv. Irene Visser

Instructed by: Kirsten & Company Inc.

ON BEHALF OF THE RESPONDENT Adv. CJ Mouton

Instructed by: Chris Brandt Attorneys