REPUBLIC OF NAMIBIA

CASE NO: A 11/2001

IN THE HIGH COURT OF NAMIBIA
In the matter between:

ABEL P A GUIMARAES **APPLICANT**

And

VICTOR VOLKOV **RESPONDENT**

CORAM: **SHIVUTE, JP**

Heard on: 31 August 2001

Delivered on: 13 December 2011

JUDGMENT

SHIVUTE, JP:

[1] The respondent instituted action against the defendant on the 03 of June 1997 by way of simple summons for the amount of US$60 000.00, alternatively, the equivalent thereof in Namibian dollars. The amount owed was as a result of a business venture between the respondent and the applicant whereby the latter sold goods belonging to the former in Angola and made a profit of 12 billion Kwanza, being approximately US$

60 000.00. The action is based on a liquid document in the form of an Acknowledgment of Debt over the signature of the applicant, dated 28 April 1997.

[2] The applicant filed his notice of intention to defend on 5 May 1997, where after the respondent filed his declaration in terms of rule 20 of the Rules of Court. The declaration states that the amount of US$60 000.00 was due and payable and that the applicant undertook to raise the required amount to settle his indebtedness to the respondent not later than June 1997, alternatively within a reasonable time. The applicant deposed to the founding affidavit dated 9th March 1999 wherein he states that he had a *bona fide* defence to the respondent's claim and that the appearance to defend is not for purposes of delay.[1]

[3] Although the applicant acknowledged his indebtedness to the respondent in his plea filed of record, it is maintained that such indebtedness was subject to the fulfillment of the terms as contained in the Acknowledgment of Debt. The terms read as follows:

> 'However, due to financial constraints, payments of this debt could not be affected in a timely manner. Therefore, as the owner of a flat in Lisbon, Portugal, I herein undertake and bind myself forever that I shall forthwith raise the required amount to settle this debt either by selling the flat or to secure a loan through a second mortgage. I declare that this flat is free of any encumbrance. I plan to travel to Lisbon at the end of May and hope to finalise this transaction not later than end of June 1997.'

[4] On applicant's version, repayment of the debt was to be sourced from the sale of the flat owned by the applicant or from a loan to be obtained against the registration of a second mortgage bond over the said flat, with the effect that applicant's payment

[1] Rule 32(2)(b) of the rules of the High Court.

obligation would be suspended and the amount of US$60 000.00 would become due and payable only after the occurrence of either of those events. The applicant submitted that numerous steps had been taken to ensure the speedy recovery of the money through the sale of the flat but such could not be effected due to circumstances beyond his control and additionally that a second mortgage bond could not be secured since banking institutions in Portugal required one to be a Portuguese citizen, which the applicant was not. In any event, so the applicant maintained, the respondent was not entitled to payment at the stage of the issue of the summons.

[5] Evidence before Court indicates that an amount of US$25 000.00 had been paid to the respondent by way of bank transfer from Lisbon to the respondent's bank account held with a bank in Independence Avenue, Windhoek on 31 July 1997 and it is the applicant's position that the debt had been substantially reduced. The applicant further denied that the balance or any other amount was due and payable since the alleged suspensive conditions of the Acknowledgement of Debt had not been fulfilled and the summons were issued prematurely. It was his further contention that the Acknowledgement of Debt relied on by the respondent for his cause of action did not meet the requirements necessary to sustain an action.

[6] The respondent chose not to proceed with the notice of application for summary judgment and afforded the applicant the opportunity to prove and defend his case on 3 December 2000. Default judgment was granted against the applicant on 3 February 2000 in the absence of the applicant and a writ of execution was issued and served on the applicant on 23 May 2000 for the amount of US$60 000.00. The applicant now applies for the rescission of the default judgment.

Issues to be decided

Application to strike out

[7] The respondent has filed Notice to strike out certain matter that is contended to be either hearsay evidence or new matter contained in the applicant's founding affidavit. The allegations that are sought to be struck on the basis of alleged hearsay are to be found in paragraphs 27, 37 and 38 of the affidavit wherein the following was respectively stated:

> '27. When I left for Angola, I anticipated to return to the Republic of Namibia towards the end of the year 1999. When I left for the Republic of Angola on 11 March 1999 I did not foresee that this matter would be set down on a date within a year from 11 March 1999 because I was advised which advice I verily believed to be true and correct that the court roll is so overloaded and when application is made for a court date, a date is not easily obtained within one year from when application is made therefor.
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> 37. I was advised that Mr. Victor Bok, as a result of my absence from Namibia and my presence in Angola where communication is in fact non-existent let alone bad, could not reach me by telephone or otherwise and consequently, could not inform me as to the state of affairs pertaining to this case. Mr. Bok then considered it wise to withdraw as attorney of record where after the matter was enrolled for hearing on 3 February 2000…
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> 38. In the premises I respectfully submit that I was not in willful default for not having attended the hearing on 8 February 2000 because I was not aware of such date nor, on the advice of my legal practitioner of record, did I anticipate that this matter would have

been heard at any time within a year after pleadings had closed and *lites contestatio* had set in.'

[8] It was argued on behalf of the respondent that the highlighted portions of paragraph 27 and 38 (the impugned statements) as well as the entire paragraph 37 constituted inadmissible hearsay evidence in that there was no confirmatory affidavit from the applicant's legal practitioner, Mr. Bock, who is apparently the source of the advice relied on by the applicant, and no explanation had been offered why Mr. Bock's affidavit could not be filed together with founding papers. Mr. Bock filed what purports to be a confirmatory affidavit only in reply and after notice had been given that application would be made to strike out the impugned sentences. Consequently, the respondent could not have an opportunity to respond to that affidavit.

[9] Rule 6(15) of the Rules of Court provides that on application the Court can order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant but that such matter shall not be struck out unless the Court is satisfied that the applicant will be prejudiced in his case if such matter were allowed to remain. The Rule concerned does not refer to hearsay statements in affidavits. Such statements can be struck out irrespective of whether there is prejudice or not.[2] There was clearly no affidavit by Mr. Bock filed together with the founding papers to confirm the content of the founding affidavit by the applicant that the court roll was overloaded and that trial dates were not easily obtainable within one year from the application thereof. No explanation was offered why a confirmatory affidavit was not filed at the time the application was

[2] Cultura 2000 v Government of the Republic of Namibia 1993 (2) SA 12 (Nm HC) at 27H; Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours 1958 (3) SA 285 (A) at 296E; Southern Pride Foods (Pty) Ltd v Mohidien 1982 (3) SA 1068 (C) at 1071D; Wiese v Joubert en Andere 1983 (4) SA 182 (O).

brought. It does not seem to me therefore to be permissible on the facts of this case to purport to confirm the contents of the applicant's founding affidavit in replying affidavit. This not being an urgent application for interim relief, the applicant cannot cure the defect relating to hearsay in reply. It follows that the 'confirmatory affidavit' by Mr. Bok is inadmissible. It follows too that the impugned statements (in paragraphs 27 and 38) as well as the entire paragraph 37 of the applicant's founding affidavit stand to be struck as being hearsay.

[10] The next paragraphs sought to be struck out are 18.1 and 19.4 of the applicant's replying affidavit. In paragraph 18.1, the applicant sought to counter the allegation in the respondent's answering affidavit that reference to the advice given by Mr Bok detailed in paragraph 37 of the applicant's founding affidavit (as quoted above) was hearsay, by simply stating: 'I refer to the confirmatory affidavit of Mr. Bock attached hereto.' I have already found that the affidavit deposed to by Mr Bok is inadmissible and as such cannot assist the applicant to overcome the challenge. This paragraph also falls to be struck as being hearsay.

[11] Paragraph 19.4 of the applicant's replying affidavit is sought to be struck for allegedly constituting new matter. The paragraph reads as follows:

> '19.4 I state that the amount of U$35 000.00 although due, is not yet payable because the suspensive conditions referred to in the 'Acknowledgement of Debt' have not yet been fulfilled and as a consequence the amount of U$35 000.00 is not yet payable. For this reason I have not tendered such an amount and I am still of the opinion that I am entitled to pay such an amount in future when the conditions precedent had materialized.'

The above statement appears to be a reaction to what was stated in paragraph 19.5 of the respondent's opposing affidavit as follows:

> '19.5 Applicant while admitting to be indebted to me in the amount of US$35 000.00 fails to tender payment of this amount without disclosing any defence thereto other than that the summons was issued prematurely in 1997. Applicant does not say that the amount is still not due and payable but relies on allegations that default judgment could not have been entered based on the Acknowledgement of Debt.'

[12] The real question is whether what was stated in paragraph 19.4 constitutes new evidence. New evidence can be said to be present if the respondent will be required to plead and to bring new evidence in response thereto. The allegation that the US$35 000.00 was not due and payable then as the conditions were not fulfilled was made in the applicant's founding affidavit. In paragraph 9 the applicant stated *inter alia* that he was required to pay the amount of US$60 000 'once I have sold my flat in Portugal alternatively once I have secured a second mortgage bond over and/or in respect of such property in Portugal.' In paragraph 11 thereof, the applicant points out that he had 'hoped' to have the flat sold or to have secured a second mortgage bond over such property not later than June 1997 and only thereafter that he would have been in a position to pay the claimed amount to the respondent. In paragraph 14, he alleges among other things, that the respondent had instituted summons prematurely. It is trite that the purpose of a replying affidavit is to put up evidence which serves to refute the case advanced by the respondent in the answering affidavit. As already mentioned, the impugned statement in paragraph 19.4 of the applicant's replying affidavit is a direct refutation of the allegation made in paragraph 19.5 of the respondent's answering

affidavit. For all these reasons, I am not persuaded that paragraph 19.4 of the applicant's affidavit constitutes new matter and the application to strike out this paragraph must fail.

[13] When the matter was heard in court, it was submitted, based on the allegations made in the applicant's founding affidavit that the applicant was not in the country by the time default judgment was granted. In amplification of the reasons for his absence, the applicant stated that that he had gone to Angola to attend to his son who had a medical condition. His son later died as a result of an unsuccessful heart operation in Italy. The applicant subsequently had to travel to Italy to attend to the burial of his late son. All these, so the applicant alleges, kept him away from Namibia for a considerable period of time, hence the default judgment against him.

[14] As previously mentioned, the applicant further denied his indebtedness to the respondent in the amount of US$60 000.00 and stated that the respondent had been well aware at the time the default judgment was granted that he was only entitled to US$35 000.00 and furthermore that the balance would be paid subject to the conditions in the Acknowledgement of Debt which, at that time, had not been fulfilled. It was thus submitted that the default judgment was erroneously granted in the applicant's absence.

[15] It was argued on behalf of the respondent that the applicant did not have a *bona fide* defence and that his absence was due to his own negligence. The respondent further contended that the Acknowledgment of Debt only referred to 'steps that were intended' to liquidate the debt but no extension of time was granted. The respondent

denied that he had misled the court regarding certain allegations contained in the declaration or that the summons were prematurely issued. The respondent maintained that the Acknowledgment of Debt stated that the debt was 'now due and payable' and was therefore not subject to any condition. In addition, the respondent stated in his heads of argument that the application was not made *bona fide* but made with the intention to further delay respondent's claim which was already due and that failure from the applicant to state the current position with regard to the sale of or mortgage over the flat was an indication of such purposeful delay.

[16] The respondent acknowledged the payment of the U$25 000.00 but stated that that amount was incurred as a result of a transaction in respect of which the applicant had signed a 'guarantee of payment' of US$28 000.00 for consignment of stock which the applicant had allegedly delivered to a certain Joseda da Silva of Lubago, Angola, and had nothing to do with the US$60 000.00 owed. The US$25 000.00 was accepted in full and final settlement of the guarantee. The respondent further states that no exception was lodged against the declaration as regards its enforceability and that the liquid document was sufficient enough to sustain a cause of action, hence the default judgment based on this Acknowledgement of Debt. The respondent therefore submitted that the applicant did not have a *bona fide* defence and no prospect of success existed for the rescission of judgment.

Was rescission application brought in terms of the rule or common law?

[17] It was submitted on behalf of the respondent that the judgment granted against applicant was not a default judgment as contemplated in rule 31(2)(b) and the remedy

provided by that rule is not available, unless under common law. This contention appears to be premised on the fact that the applicant nowhere in his affidavit indicated that the application was brought in terms of the rule or under common law. It was, however, argued by counsel for the applicant that the application was brought in terms of rule 44(1)(a) of the Rules of Court on the grounds that it was erroneously sought and granted in his absence.

[18] In so far as it is relevant to the facts in issue, Rule 44(1)(a) provides as follows:

> '(1) 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;
> (b) …
> (c) …'

The difference between the application brought under the common law and the one brought pursuant to rule 44(1)(a) (the Rule) is that under common law, an applicant is required to establish 'good cause' or 'sufficient cause' for the rescission of the judgment granted in his or her absence in the sense of an explanation for his default and *bona fide* defence while in the latter case 'good cause' need not be shown.[3]

[3]See, for example, *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411(CPD) at 417I; Herbstein and Van Winsen's *The Civil Practice of the High Courts of South Africa* 4th Edition by Cilliers, Loots and Nel on page 691.

[19] On examination of the papers filed on behalf of the applicant to determine whether the application is brought in terms of the rule or under common law, paragraph 27 of the applicant's heads of argument reads:

> 'It has been submitted that, having regard to what has been set out hereinbefore, the judgment by default granted against the applicant was consequently erroneously sought and erroneously granted.'

The submission is made under the heading '*ad defence of a judgment erroneously sought and erroneously granted*', which appears to be an indication that the applicant relied on rule 41(1)(a) for the rescission of judgment. Thus, in this case, the applicant is not required to show 'good cause' for the rescission.

[20] It seems to me that the applicant had relied both on rule 44(1)(a) and on common law. Although clear language has not been used, the allegations and content of the heads of argument make this clear. Not only did counsel for the applicant argue on the basis of rule 44(1)(a) but also went on the merits in an effort to explain the default of the applicant and his defence or prospect of success. He cited the rule both in the written heads as well as in oral argument. As was pointed out by Jafta J in *Mutebwa v Mutebwa*[4] at paragraph [12], the fact that an application for rescission is brought in terms of one rule does not mean that it cannot be entertained pursuant to another rule or under common law provided, of course, that the requirements of each of the procedures are met. The court is therefore persuaded that the applicant had relied on both the rule and common law for the rescission of judgment and what remains to be determined is whether the requirements have been met or not.

[4] 2001 (2) SA 193 (Tk HC).

Has the applicant shown that the judgment was erroneously sought or granted in his absence?

[21] The next issue to be determined is whether the default judgment was erroneously sought or granted. Submissions on behalf of the respondent indicate that an order is erroneously granted only if there is an irregularity in the proceedings or if it not legally competent for a court to have made such an order. It is further the respondent's contention that the summons were valid enough to sustain a cause of action, hence the default judgment. The principle of fair trial as guaranteed by the Namibian constitution entails that an applicant whose rights will be affected by a judgment or order must be given an opportunity to defend his or her rights provided of course that in the case of a default judgment, he or she has satisfied the requirements for rescission of judgment. An order or judgment that was erroneously sought or granted in the absence of any party affected by it should be rescinded or varied without further enquiries. See the South African cases of *De Sousa v Kerr*[5]; *Topol and Others v L S Group Management Services (Pty) Ltd*[6]*.* It was stated in *Nyingwa v Moolman N.O*[7] that a judgment can be said to have been erroneously granted if there existed, at the time of its issue, a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he or she had been aware of it, not to grant the judgment. In *Bakeoven Ltd v G J Howes (Pty) Ltd*[8], Erasmus J held at 471F, that in deciding whether a judgment was 'erroneously granted', a Court is, like a Court of appeal, confined to the record of proceedings. The learned Judge went on to observe at 472H that unless an applicant for rescission could prove an error or

[5] 1978 (3) SA 635 (W) at 638A-B
[6]1988 (1) SA 639 (W) at 650D-J.
[7] 1993 (2) SA 508 at 510.
[8] 1992 (2) SA 466 (E)

irregularity appearing on the record of proceedings, the requirements of the Rule cannot be said to have been satisfied and rescission cannot therefore be granted. On the contrary, in the case of *Stander and Another v ABSA Bank*[9], it was held at 882E-G as follows in reference to the phrase 'in the absence of any party affected thereby' in the rule:

> 'It seems to me that the very reference to 'the absence of any party affected' is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the Court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the Court in order to have such order or judgment rescinded or varied on the basis of facts, of which the Court would initially have been unaware, which would justify this being done. Furthermore the Rule is not restricted to cases of an order or judgment erroneously granted, but also to an order or judgment erroneously sought. It is difficult to conceive of circumstances where a Court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this is so, were placed before the Court.' (Emphasis added)

[22] The approach in the *stander* case has been applied in recent cases, for example, Jafta, J in *Mutebwa v Mutebwa* (*supra*), while agreeing with Erasmus J's *dictum* in *Bakeoven* (*supra*) that the error should appear on the record, observed that such a requirement applied only in cases where the Court acts *mero motu* or on the basis of an oral application made from the Bar for rescission or variation of the order. For in those circumstances, so the learned Judge reasoned, the Court would have had before it the record of the proceedings only. The learned Judge continued to remark as follows in paragraph [20]:

[9] 1997 (4) SA 873 (E)

> ‘The same interpretation cannot, in my respectful view, apply to cases where the Court is called upon to act on the basis of a written application by a party whose rights are affected by an order granted in its absence. In the latter instance the Court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored and it is not irregular to adopt such a procedure in seeking rescission. In fact, it might be necessary to do so in cases such as the present, where no error could be picked up ex facie the record itself… It is not a requirement of the Rule that the error appear on the record before rescission can be granted.’

[23] I find the approaches in *Stander and Another v ABSA Bank* and *Mutebwa v Mutebwa* to be sound and persuasive. I will accordingly follow them. In the consideration of the application for rescission, a court would therefore be entitled to have regard not only to the record of the proceedings of the court that had granted the impugned judgment or order, but also to those facts set out in the affidavit relating to the application for rescission.

[24] Applying these principles to the facts of present case, it is not disputed that the default judgment was granted in the absence of the applicant. It was submitted on behalf of the respondent that the applicant had been negligent at his own peril in not keeping in touch with his legal practitioners with full knowledge of the pending action. It is trite law that a litigant is under an obligation to keep in touch with his or her legal practitioner and cannot simply leave matters in the hands of the lawyer without enquiring on progress. It is also a well-known principle of our law that there is a limit beyond which a litigant cannot escape the consequences of his or her legal practitioner’s remissness. However, this principle appears to be directed to clients who purposely kept quiet and did not give directions to the legal practitioners entrusted with

their cases. In the present matter, there is no proof that the trial date was brought to the attention of the applicant. In the circumstances, the applicant has established that the judgment was erroneously granted in his absence in that had the Court that granted the default judgment been aware that the applicant had not been informed of the trial date by his legal practitioners, it may not have granted the default judgment. The application for rescission must therefore succeed.

Costs

[25] As regards the issue of costs, each of the parties has submitted that costs of the applications should in effect follow the event. This is the route I would take. The following order is accordingly made:

1. The impugned statements (in Paragraphs 27 and 38), paragraph 38 of the applicant's founding affidavit as well as paragraph 18.1 of the applicant's replying affidavit are struck out;
2. The applicant is ordered to pay the costs occasioned by the application to strike out;
3. The application for rescission of judgment is granted;
4. The respondent is ordered to pay the costs of the application for rescission of judgment;
5. The default judgment granted under Case Number (P) I 990/97 on 3 February 2000 is rescinded and set aside;

6. Any process of court issued by the respondent on the strength of the said default judgment is set aside;
7. The applicant is authorized and allowed to uplift the monies paid as security into court pursuant to the provisions of rule 31(2)(b) of the Rules of Court,

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SHIVUTE, JP

COUNSEL ON BEHALF OF THE APPLICANT:	Mr C Mouton
Instructed by:	E V Bok and Associates
COUNSEL ON BEHALF OF THE RESPONDENT:	Ms S Vivier
Instructed by:	Lorentz & Bone