



CASE NO.: I 1102/2010

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RIAN DE KLERK

PLAINTIFF/RESPONDENT

And

GUSTAV KATJIROKERE

DEFENDANT/APPLICANT

CORAM: MILLER, AJ

Heard on: 25 July 2012

Delivered on: 15 August 2012

JUDGMENT

MILLER, AJ.: [1] These proceedings commenced in this Court on 12 April 2010, when the present respondent as plaintiff issued summons against the present applicant as defendant. I shall continue to refer to them as the plaintiff and the defendant respectively.

[2] The plaintiff's case as set out in its Particulars of Claim is that he concluded an Agreement of Sale with the defendant during May 2009. In terms of that agreement he bought an Isuzu motor vehicle from the defendant at a price of N\$234,000.00. The plaintiff claims that he paid the full purchase price to the defendant in the following manner as set out in paragraph 5 of the Particulars of Claim:

“The plaintiff has complied with all his obligations in terms of such oral agreement and especially since he has paid the full purchase price of N\$234 000.00 (Two Hundred Thirty Four Thousand Namibian Dollars) to the defendant in the following manner.

N\$50 000.00 on or about 27 May 2009.

N\$24 000.00 on or about 01 July 2009.

N\$160 000.00 on or about 06 July 2009.”

[3] The plaintiff alleges further that the defendant failed to deliver the vehicle to him. Instead, so it is alleged the defendant sold and delivered the vehicle to Spes Bona Motors who in turn sold it to someone else.

[4] The plaintiff claims payment of the purchase price, interest on that amount and costs.

[5] In a plea filed on behalf of the defendant by his legal practitioners at the time the defendant denies that he had sold the vehicle to the plaintiff. With reference to the

alleged payments made by the plaintiff in Paragraph 5 of the Particulars of Claim the defendant's case is pleaded as follows:

“AD PARAGRAPH 5 THEREOF:

4.1 The contents of this paragraph are denied as if each and every allegation contained therein has been traversed and then denied and the plaintiff is put to the proof thereof.

4.2 The defendant specifically denied that the two amounts of N\$50 000.00 and N\$24 000.00 were paid to him by as alleged.

4.3 The defendant alleges that the plaintiff cashed a cheque of N\$160 000.00 with him on/or about 6 July 2009. The case was handed to the plaintiff.”

[6] The defendant further admits that he had sold the vehicle to Spes Bona Motors.

[7] Once the pleadings were closed, the matter was assigned to me as the managing judge in terms of the Amended Rules of Court. Managing this matter in terms of the Rules became a difficult task. This was occasioned mainly by the fact that at different stages both the plaintiff and the defendant were at times without legal representation which necessitated that case management conferences and notices of such conferences had to be served by the deputy-sheriff.

[8] As far as the defendant is concerned and on 27 October 2011, and in the absence of the defendant I issued an order postponing the case management conference to 24 November 2011 and I directed that the order be served on the defendant.

[9] That order was served on the defendant's sister-in-law in the absence of the defendant on 03 November 2011.

[10] On 24 November 2011 the defendant failed to appear. I consequently postponed the conference to 26 January 2012 and once more directed that the order be served on the defendant.

[11] The defendant once more failed to appear on that date, whereupon the matter was postponed to 15 March 2012. That order was served on the defendant personally on 02 February 2012.

[12] On 15 March 2012 the defendant once more failed to appear.

[13] I thereupon made an order striking the defendant's case in terms of Rule 37 (16)(e) (ii) of the Rules of Court.

[14] The defendant now applies for the following relief:

“

1. Rescinding and setting aside the order made in this matter by the Honourable Court on 15 March 2012.
2. Re-instating the defence/notice to defend and granting leave to the applicant/defendant to proceed with his defence to respondent/plaintiff's claim.

3. Setting aside all processes issued pursuant to the judgment granted herein on 15 March 2012.
4. Condoning the failure of the defendant to file Heads of Argument and Index this application before 11 July 2012.
5. Costs (only if opposed).
6. Further and/or alternative relief.”

[15] The application for rescission is brought in terms of the common law. In order to succeed in such an application, the applicant carries the onus to establish;

- (i) That there is a reasonable explanation for his default;
- (ii) The application must be made *bona fide* and not intended to delay the matter, and;
- (iii) That the applicant has a *bona fide* defence.

Namcor CC v Tula's Plumbing CC 2005 NR 39 (HC).”

[16] As far as the first requirement is concerned the defendant admits that the order of 26 January 2012 was served on him. He then continues to state the following:

“

6.

I have been advised, which advice I readily believe to be true that this application can only succeed if I can show good cause why I did not attend court on 15 March 2012.

7.

I did receive a court order from the deputy sheriff for the district of Keetmanshoop. It was handed to me during February 2012 in Keetmanshoop. I did not read the order and handed it to my secretary to attend to. As a result I did not realize at the time that I was handed an order of court in terms whereof I had to attend court on 15 March 2012. I then left on a business trip.

8.

At this juncture I have to point to this Honourable Court that I am a contractor at Namibia Diamond Corporation (Pty) Ltd in Oranjemund as well as the Ministry of Works and Transport and the Ministry of Health and Social Services as a senior electrical engineer. As such I often have to travel between Oranjemund and Windhoek. I am also involved with the life insurance of the members of the police force as well as the members of the defence force. I am also involved in two fishing companies to wit Supa Fishing (Pty) Ltd and Demosselle Fishing (Pty) Ltd.

9.

As a result of my continuous travels between my job and attending to my interest in the fishing industry as well as the insurance business, I lost track of time and did not attend court as per the order. I am however extremely sorry about this and apologize to this Honourable Court for this oversight.”

[17] The defendant only has himself to blame for this state of affairs. One would expect a prominent businessman as the defendant says he is, to at least read documents served by the deputy sheriff. If he chose not to read them, he must accept the consequences of that failure. I am not persuaded that the defendant is *bona fide*

when he states in paragraph 6 that he did not realize that he was handed a court order requiring him to attend court. It is clear from the return of service filed by the deputy sheriff that he explained the nature of the order to the defendant. In addition in paragraph 9 the respondent seems to suggest that he knew he had to appear but “...lost track of time and did not attend court as per the order”. See ***De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 AD.***

[18] I am also not persuaded that the defendant has established a *bona fide* defence.

[19] I am mindful of the fact that it is not required of the defendant to deal fully with the merits of the case.

Namcor CC v Tula's Plumbing C (supra).

[20] However, sufficient facts must be placed before me to at least establish the defence.

Nyingwa v Moolman 1993 (2) SA 508 TKCGD at p. 513.

[21] The defence set out by the defendant in his affidavit is as follows:

“

2.

During the first term of the year 2009, the plaintiff together with another person Mr. Burger approached me to enter into a very lucrative transaction with them. Each of us had to contribute N\$150 000.00 towards the successful execution of this transaction.

At this juncture I have to point out to this Honourable Court that the plaintiff is known to me for many years.

3.

Plaintiff was appointed as the person who had to take control of the funds as soon as all three of us had made our contribution, to enter into the transaction. I paid plaintiff my contribution of N\$150 000.00 in cash. Plaintiff and Burger had difficulty in raising their respective contributions. One day Burger and I accompanied plaintiff to his bank manager where he raised sufficient funds for his contribution.

4.

Plaintiff and Burger engaged in this transaction. I subsequently proofed to be not lucrative at all and we lost all of our money. Plaintiff had however under took to repay the funds to his bank within a few days. He was not in a position to do so as a result of the transaction that went wrong. He then came up with this claim against me to raise funds to repay his bank. I am considered a wealthy man in the community where I live. This explains his actions against me.

5.

I did sell an Isuzu bakkie to Spes Bona Motors, but this was not a vehicle which belongs to me or was registered in my name. It belonged to a third party.”

[22] These are indeed vague and sweeping allegations lacking the details one would expect to support a *prima facie* defence.

[22] The purported defence now raised also seems to me to be at odds with what was alleged be in defendant’s plea.

[23] In the result I will dismiss the application with costs.

MILLER AJ

ON BEHALF OF THE PLAINTIFF/RESPONDENT:

Ms. Delport

INSTRUCTED BY:

Delport Attorneys

ON BEHALF OF THE DEFENDANT/APPLICANT:

Ms. Petherbridge

INSTRUCTED BY:

Petherbridge Law Chambers