REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3572/2011

In the matter between:

CHRISTOFFEL JOHANNES LABUSCHAGNE	**APPLICANT**
and	
SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD	**FIRST RESPONDENT**
FOUREK INVESTMENTS SIXTEEN CC	**SECOND RESPONDENT**
HARRIET ELIZABETH LABUSCHAGNE	**THIRD RESPONDENT**
JAN HENDRIK BASSON LABUSCHAGNE	**FOURTH RESPONDENT**

Neutral citation: *Labuschagne v Scania Finance Southern Africa (Pty) Ltd* (I 3572/2011) [2013] NAHCMD 143 (30 May 2013)

Coram: PARKER AJ
Heard: **2 April 2013**
Delivered: **30 May 2013**

Flynote: Practice – Summary judgment by default – Application for rescission of in terms of rule 44(1)*(a)* of rules of court – When granted – There is the rule of practice that though an applicant brings an application under rule 44(1)*(a)* the application may be determined under the common law – Court held that the court may consider such application under the common law only if the circumstances permit it.

Summary: Practice – Summary judgment by default – Application for rescission brought in terms of rule 44(1)*(a)* of the rules of court – When granted – There is the rule of practice that an application though brought under rule 44(1)*(a)* may be determined under the common law – Court holding that rule of practice is a general rule through and through and so it does not apply mechanically in every circumstance imaginable – *In casu* the circumstances are such that that rule of practice is not applicable or appropriate – Relying on authority of *Naftalie Nathanael Gaoseb and Another v Standard Bank of Namibia Limited and 5 Others* Case No. A 150/2010 the court held that the applicant has not established that the summary judgment was granted erroneously – Consequently, the application is dismissed.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] The applicant, represented by Mr Small, has brought an application on notice of motion in which he seeks relief in the following terms, that is to say; an order –

(a) rescinding, in terms of rule 44(1)*(a)* of the rules of court, the summary judgment granted by the court on 20 January 2012 against the applicant and in favour of the first respondent;

(b) for costs of suit (only in the event of opposition to the applicant; and

(c) further and alternative relief or alternative relief.

[2] It is clear on the papers that in the absence of the defendants in the action instituted by a combined summons the court granted the summary judgment by default. The plaintiff in the action is Scania Finance Southern Africa (Pty) Ltd and the defendants are Fourek Investments Sixteen CC (first defendant), Christoffel Johannes Labuschagne (second defendant), Harriet Elizabeth Labuschagne (third defendant) and Jan Hendrik Basson Labuschagne (fourth defendant). The applicant in the present application proceeding is the second defendant; and the respondents are the plaintiff (first respondent), the first defendant (second respondent), the third defendant (third respondent) and the fourth defendant (fourth respondent). The first respondent, represented by Mr Barnard, has moved to reject the application.

[3] On the pleadings, there is not one iota of doubt in my mind that the applicant has elected to bring the present application under rule 44(1)*(a)* of the rules of court, and so he relies on that rule for the relief sought. In pursuit of that expressed election, the applicant formulated the founding affidavit in terms as support the application; and what is more, the rule is referred to explicitly in the founding affidavit, and there a specific allegation is made that the judgment sought to be rescinded was granted in error. The significance of these findings will become opponent in due course.

[4] Accordingly, I proceed to determine the application upon the interpretation and application of rule 44(1)*(a)* of the rules. It is the applicant's contention that the summary judgment granted by default 'was granted in error'. And what is the basis of his contention? Only this; that 'the first respondent, in terms of the Particulars of Claim, failed to inform this court of the fact that I was a minor at the time when I signed the suretyship agreement with the first respondent. Further – that I was, at the time of signing the suretyship, not duly assisted by a person competent to do so'. That argument does not appeal to me in the least. It cannot stand in law. Being a rule of the court, rule 44(1)*(a)* 'is procedural in its scope and application; and in that case, it gives the court a discretion in its application'. Thus, an order or judgment is granted in error if there was an irregularity in the proceedings or if it was not competent for

the court to grant the order or the judgment. (*Naftalie Nathanael Goabeb and Another v Standard Bank Namibia Ltd and 5 Others* Case No. A 150/2010 (judgment delivered on 12 August 2011 (Unreported) para 3)

[5] In the instant proceeding the applicant has not shown that an irregularity was committed in the proceeding in question. The applicant has also not shown that the court that granted the judgment was not competent to do so. A judgment or order to which a party is procedurally entitled cannot be said to have been granted in error by reason of facts of which the judge who granted the order or judgment, as he was entitled to so grant, was unaware. (*Naftalie Nathanael Goabeb and Another*, para 4; *Jack's Trading CC v The Minister of Finance and Others* Case No. A 172/2012 (judgment delivered on 29 October 2012) (Unreported) para 32) *In casu* the applicant alleges facts (see para 4 above) of which the judge who granted the summary judgment by default was unaware.

[6] For these reasons the application as is brought in terms of rule 44(1)*(a)* is singularly lacking in merits; and so it fails.

[7] But the matter does not rest there. It would seem after reviewing the authorities, Mr Small appears to have realized that the application in terms of rule 44(1)*(a)* had no legal leg to stand on. Counsel did not see it fit to remove the application from the roll, tender costs and bring a new application in which the applicant would rely on rule 44(1)*(a)* or, in the alternative, on the common law for relief. But, then, it is Mr Barnard's submission that the fact that an application for rescission has been brought in terms of the rule of court does not mean that the application cannot be 'entertained' under the common law, provided that the requirements of the common law are met.

[8] It is worth noting that curiously, the submission is that of Mr Barnard and not of Mr Small, counsel for the applicant. This confirms irrefragably the fact – mentioned in para 3 – that it has never been the position of the applicant that the application is brought or should be determined on the basis of the common law.

[9] Be that as it may, I do not think a court is entitled in an application proceeding – where no basis has been laid at all in the notice of motion – to *ex proprio motu* set up an alternative legal basis on which the applicant could have relied for relief, but did not, and then determine the application on that legal basis which is not mentioned at all in the notice of motion on which the application was brought. (See *Swadif (Pty) Ltd v Dyké NO* 1978 (1) SA 928 (A) at 938 D-E.) In this regard, it must be remembered, 'In a long line of cases the courts have stated as a general rule that an applicant in motion proceedings must set out his cause of action and supporting evidence in his founding affidavit'. (*Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) at 634 G-I) *In casu*, the applicant's cause of action is that the summary judgment was erroneously granted by default in his absence within the meaning of rule 44(1)*(a)* of the rules of court.

[10] Thus, the applicant's case which he has called upon the respondents to meet, as I have said *ad nauseam*, is as set out in the notice of motion, which is that the summary judgment granted by default was erroneously granted in the absence of the applicant within the meaning of rule 44(1)*(a)*, and the applicant puts forth the facts, in support of the application, on which he relies for the relief sought (see para 4 above). That that is all the case the applicant has called upon the respondents to meet is further confirmed in no small measure by the parties' joint case management report submitted in terms of rule 6(5A)*(c)* of the rules of court. And Mr Barnard referred the court to para 2 of the report, in particular where it is recorded that '[T]he applicant brings the application in terms of the provision of rule 44(1)*(a)* and *the application is to be dealt with in terms of the law on that rule*'. (Italicized for emphasis) Paragraph 2 of the joint report is significantly entitled 'Limitation and narrowing of issues'. What this means is that the parties agreed to limit and narrow the issues to be adjudicated in this proceeding to a determination of the application in terms of 'the law on that rule (ie rule 44(1)*(a)* of the rules)'. I should say this constitutes a compromise (*transactio*) and the court has a duty to give effect to it. (See *Cosmos Sinfwa Sinfwa v Thomas Shipahu* Case No. I 1326/2011 (judgment delivered on 16 May 2013) (Unreported).) To do otherwise and determine the present application on the basis of the common law in the alternative is tantamount to this court stultifying and disregarding the rules of court; and that would not conduce to due administration of

justice. ‘If the courts do not apply the rules and the laws, the rule of law will be abrogated and justice will be unattainable’, so said O’Linn AJA in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC) at 561G.

[11] In my opinion, the rule of practice proposed by Mr Barnard (see para 7 above) is a general rule through and through. It is not an inflexible and immutable rule that applies mechanically in every circumstance imaginable. On the basis of the reasoning and conclusions put forth in paras 9 and 10 of this judgment, in the circumstances of the present application, including the formulation and content of the notice of motion and the parties’ joint case management report, I conclude that that general rule of practice is not applicable or appropriate in the present proceeding. To determine the present application on the basis of the common law in the alternative will not only be wrong, it will also be unjust and unreasonable, and it will severely prejudice the respondents.

[12] For the aforegoing reasons, it is with firm confidence that I hold that in this proceeding the application cannot be ‘entertained’ (to respectfully borrow Mr Barnard’s word) under the common law. In any case, Mr Small did not give any reason why it should be. And he did not present any argument ‘on the law of rule 44(1)*(a)*’, albeit the application was brought specifically under that rule. I have already held that the application as brought under rule 44(1)*(a)* cannot succeed.

[13] In the result, the application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

7
7
7
7
7

APPEARANCES

APPLICANT:	A J B Small Instructed by Delport Attorneys, Windhoek.
FIRST RESPONDENT:	P C I Barnard Instructed by Van der Merwe-Greeff Inc., Windhoek
SECOND, THIRD AND FOURTH RESPONDENTS:	No appearance