REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3292/2010

In the matter between:

1.1.1.1. **SELMA TUEMUMUNU KARUAIHE**
APPLICANT

and

UNIVERSITY OF NAMIBIA **RESPONDENT**

Neutral citation: *Karuaihe v University of Namibia (I 3292/2010) [2013] NAHCMD 197 (17 July 2013)*

Coram: SMUTS, J
Heard: 11 July 2013
Delivered: 17 July 2013

Flynote: Rescission application. Stated to be in terms of Rule 31, although applicant's written argument relying on Rule 44. But in oral argument relying on the common law. Explanation given for default not found to be reasonable and acceptable. Application dismissed.

ORDER

That the applicant's application for rescission of the judgment granted against her on 4 February 2013 is dismissed with costs.

JUDGMENT

SMUTS, J

(b) This is an application to rescind a judgment of this court granted on 4 February 2013 in favour of the respondent (as plaintiff) against the applicant the defendant in that action. The court order on 4 February 2013 struck the defendant's plea with costs and dismissed her counterclaim with costs and granted a judgment in the sum of N$551 679,70 in favour of the plaintiff together with interest at the prescribed rate from 9 October 2010 to date of payment and costs.

(c)

(d) The judgment was granted by this court in the absence of the applicant after her legal practitioner had withdrawn on the same date which was the first day of the scheduled trial between the parties.

(e) The applicant brought her application for rescission of judgment on 25 February 2013. In the founding affidavit, she states that the application is brought in term of rule 31(2) of the rules.

(f) The respondent elected not to file an answering affidavit, but instead filed a notice in terms of rule 6(5) (d) setting out legal points to be taken at the hearing of the matter. Certain technical points are taken, contending that the wrong form had been utilised and relating to the service of the application.

These points have rightly not been persisted with. But the point is squarely taken that the explanation for the applicant's default to appear in court on 4 February 2013 is 'contradictory and/or vague' and thus inadequate.

(g) The claim of the plaintiff against the applicant is in respect of study leave payments made to the applicant in respect of further studies pursued by her abroad. In terms of the agreements attached to the particulars of claim, the applicant was required to return to work at the respondent for a total period of five years and six months, being the period equal to the study leave granted to the applicant. The agreement further stated that in the event of the applicant breaching the agreements, the sums paid to her as a study leave would then become repayable. It was alleged in the particulars of claim that the applicant breached the terms of the agreements by resigning in advance of completing the period in question in the plaintiff's employ. The respondent then claimed the sum in which judgment had been granted.

(h) The claim was defended by the applicant She had taken up employ in Pretoria, South Africa and engaged the legal firm of Weder, Kauta & Hoveka to act on her behalf in defending the claim. She filed a plea and counter claim. After the pleadings had closed, the matter was referred to case management. At the first case management meeting, the parties' representatives proposed that the matter proceed as a stated case. At a subsequent case management meeting both representatives concluded that this was not possible and a report was then provided. The parties both subsequently discovered. The defendant's discovery affidavit was served on 3 August 2012 and the defendant subsequently filed a bundle of discovered documents on 20 November 2012.

(i)

(j) At the case management meeting of 17 October 2012, the matter was postponed to 21 November 2012 at 09h00 for a pre-trial conference. The court order of that day (17 October 2012) also stated that the trial was provisionally set down for hearing for the week 4-8 February 2013 on the floating roll.

(k)

(l) On 21 November 2012, the parties applied for the postponement of the pre-trial conference as they had not been able to conduct the necessary

meeting which was a pre-requisite. The pre-trial conference was postponed to 3 December and again to 12 December 2012. In advance of the pre-trial conference of 12 December 2012, the parties filed a proposed pre-trial order in accordance with rule 37 as amended. It set out in some detail which issues a fact were to be resolved during the trial and which facts were not in dispute. It further referred to the witnesses which the respective parties would call. It also expressly confirmed the trial date.

(m)

(n) On 12 December 2012 this court then directed that the matter would be set down for trial on 4-8 February 2013 at 10h00 and that the issues to be determined were those set out in proposed pre-trial minutes. That is briefly the procedural background which preceded the trial.

(o)

(p) In the applicant's application for rescission, the applicant states that because she has been resident in Pretoria, South Africa, she has not had the 'luxury of having been able to personally consult with my erstwhile legal practitioners on a regular basis.' She further states that she was forced to rely upon telecommunications and emails to provide her instructions. As a result, she states that her instructions were not accurately recorded in her plea which would require considerable amendment in order to set out the defence which she sets out in this application. But because of the conclusion I reach in this matter, it is not necessary to further deal with the defences raised in this application.

(q) In setting out reasons for her default of appearance on 4 February 2013, the applicant states that she had left the action in the hands of her erstwhile legal practitioners because she is resident in Pretoria and trusted that they would do everything to defend the matter, having provided them with a power of attorney. The applicant then proceeds to the events of February 2013 without referring to any preceding step taken in the conduct of the litigation on her behalf and especially the pre-trial procedures from 17 October 2012 onwards. Given the relevance of the portion of the affidavit dealing with her failure to appear on 4 February 2013, it is quoted in full:

'On 2 February 2013 in the late afternoon I was contacted by my erstwhile

attorneys who, for the first time informed me that I needed to be in Windhoek for the trial set to commence on Monday 4 February 2013. This telephone conversation of 2 February was the first time I had ever been given an actual instruction to be at the trial form y erstwhile attorneys, despite earlier communication that the trial was set for that day. I immediately told them that they had left it very late to inform me, and that I would not just be able to pack up and leave for a week by Monday, as it was already late and I would need to obtain the necessary leave from my employer, and make travel arrangements.

16

I was told that the matter was on the floating roll, together with two other matters, a copy of the relevant page of the roll is attached as annexure "STK3". In light of this and the fact that I was the defendant in the main action thereby obliging the plaintiff to begin, it was decided that my attorney's would be able to ascertain with more accuracy on the Monday, when I would be needed to present my evidence. With this done I could be contacted by 11h00 on that Monday, so that I could arrange to leave for Namibia as needed.

17

On Monday, 4 February 2013, instead of receiving a telephone call from my attorney informing me when I needed to be in court, I received an email attached to which was a notice of withdrawal as attorneys of record undersigned by Mr Kauta from Dr Weder, Kauta & Hoveka Inc. I attach a copy of this notice of withdrawal as Annexure "STK4".

18

As I am a lay person I do not know very much about the law and legal procedure, I do however know enough to realise that I was unrepresented in court and thereof in all probability I would be faced with some or other adverse order.

19

On the strength of this I was able to get hold of Mr. Kaumbi from Kaumbi-Shikale Incorporated, to whom I conveyed my side of the story and asked him to assist me. He was able to ascertain that the order attached as "STK1" had indeed been made and that the plaintiff could now start execution proceedings against my property.'

(r) The applicant further referred to practice directive 38 of the consolidated

practice directives of this court dealing with the withdrawal of legal practitioners and then stated:

> 'It is apparent that Mr Kauta nevertheless withdrew on the day of the trial, and what is worse is that he gave me absolutely no warning that he was intending to do this. I can only think that my matter was not given the attention it deserved after all.'

That is the extent of the applicant's explanation for her being fault of appearance on 4 February 2013.

(s) When the matter was argued, Mr J.P.R. Jones who appeared for the applicant correctly contended that rule 31 would not apply, given the history of the matter. He referred to *De Villiers v Axiz Namibia*[1] where the Supreme Court, with respect, rightly held that 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 the common law, provided, of course, that the requirements of each of the procedures are met'.[2]

(t)

(u) In Mr Jones' heads of argument, he sought to rely upon rule 44 (1) in contending that the order or judgment was erroneously sought or granted in the absence of the applicant and should thus be rescinded. The basis for his written submissions was that the withdrawal of the applicant's erstwhile legal practitioners was contrary to the practice directives and that the judgment was accordingly erroneously sought or granted. He correctly pointed out with reference to *De Villiers v Axiz Namibia (Pty) Ltd*[3] that under rule 44(1) (a) an applicant is not required to establish good cause or sufficient cause for the rescission of a judgment granted in her absence in the sense of meeting the two pronged requirement of an adequate explanation for her default and a bona fide defence to the action. He referred to both rule 16(4) (a) of the rules dealing with the withdrawal of counsel from an action as well as the practice directive 38 and submitted on the strength of the applicant's founding affidavit that a withdrawal contrary to the rules and practice directives would result in the judgment being

---

[1]2012 (1) Nr 48 (SC) at 54 {par 19)

[2]Supra at 54 I-J, par 19

[3]Supra at 52 C-E, par 10

granted erroneously in the absence of the applicant.

(v) The applicant had attached the notice of withdrawal of her erstwhile legal practitioner to the application. Significantly, the email attached to the notice of withdrawal provided on the court file was not attached to the applicant's founding affidavit. Nor did she state in her terse explanation for her default at what time she received the notice of withdrawal. The email attached to the notice of withdrawal indicates it had been forwarded to the applicant at 08h03 on Monday 4 February 2013.

(w)

(x) But even more significantly, the applicant's current legal practitioner had not taken the time to enquire as to what transpired when the matter was called at 10h00 on 4 February 2013, and caused the proceedings on 4 February 2013 to be transcribed or at least listened to the recording. Given the importance of what transpired in court a significant portion is quoted below. As is apparent from the transcribed record, Mr Kauta, applicant's erstwhile legal practitioner appeared in court to apply to withdraw.

'MR DE BEER: May it please the Court My Lord I appeared on behalf of the Plaintiff in this matter.

MR KAUTA: May it please you My Lord I appear for the Defendant in this matter.

COURT: You appeared?

MR KAUTA: Yes My Lord.

COURT: Is that past tense?

MR KAUTA: Yes in past tense.

COURT: Are you withdrawing or you are applying to withdraw?

MR KAUTA: I am applying to withdraw My Lord. This morning I served a Notice of Withdrawal.

COURT: I do not have a Notice of Withdrawal in the Court's file.

MR KAUTA: My Lord I actually have a copy here.

COURT: Mr Kauta what is the reason for that, you know what the Practice Directive says?

MR KAUTA: Yes My Lord I will address Your Lordship on that (intervention)

COURT: You had better.

MR KAUTA: I do better My Lord, yes. My Lord the withdrawal has nothing to do with

lack of funds or conflict of interest, but on Saturday I had a consultation with my client and it appeared very pertinently to me that there is a lack of trust and respect of the discussion we had and I categorically then informed her that I did not see myself proceeding on that basis and that she should appear in Court today with a new lawyer whom she has trust in. I also informed her that yes it is short notice, but I will not file just a Notice of Withdrawal and not pitch up in court and I will be in court today. Earlier on before Your Lordship was called I tried to see whether she was around and I did not see whether she is here, I still cannot see my client here.

COURT: And she is aware that the trial is set down today?

MR KAUTA: Yes she is very much aware that the trial is set down for this week and that is really the long and short of why I have to withdraw.

COURT: So you are applying to withdraw because in your consultation which was no doubt scheduled for the purpose of preparation for trial you felt that you no longer enjoyed the confidence of your client?

MR KAUTA: Yes My Lord.

COURT: And for that reason you cannot continue to represent her?

MR KAUTA: Yes My Lord.

COURT: Thank you Mr Kauta. Let me just her from Mr De Beer. Mr De Beer what is your attitude about (incomplete). . .

Mr De Beer. . .

COURT: No, Mr Kauta has indicated that his client is aware of the proceedings continuing today, but you do not oppose his application, is that right?

MR DE BEER: No, no.

COURT: Thank you Mr De Beer. Mr Kauta I just like to have your confirmation that your client, you said you consulted your client on Saturday?

MR KAUTA: On Saturday yes My Lord.

COURT: And you confirm that your client is aware that the matter would proceed today at 10:00 in this court?

MR KAUTA: Yes My Lord also told her and (incomplete)

COURT: And she would be aware that if she did not appear today that I can give judgement against her so then she would need to apply for either a postponement to represent herself?

MR KAUTA: Yes My Lord, I told her specifically that, I do not know why she is not here, maybe she is looking for a lawyer, but I cannot really speak for her. I did inform her of the consequences of that for today.

COURT: And just for the record I see in the notice of withdrawal it is indicated that her address is in Johannesburg, is there not a physical address there?

MR KAUTA: I will forward the physical address of where she stays in Pretoria.

COURT: Is it in Pretoria?

MR KAUTA: That is where she works.

COURT: She works in Johannesburg?

MR KAUTA: She works in Johannesburg.

COURT: Thank you Mr Kauta. I have heard what you have to say, Mr De Beer does not oppose your application and I
understand that in view of what you have said to this Court,. the primary problem the Court has at the late stage of withdrawal is if it is for funds, and that is why a lawyer is required to appear, but if it is not for funds or conflict but because you no longer enjoy the confidence of your client and you apply to withdraw and you have provided a Notice of withdrawal, in those circumstances, I will accept the explanation you provided and your application to withdraw. You may then be excused from further attendance and thank you for attending and providing your explanation.

MR KAUTA: As it pleases the Court.

COURT: Madam orderly will you please call the defendant's name, her name is Selma Karuaihe?

ORDERLY: There is no response My Lord.' (sic)

(y) As is apparent, after Mr Kauta was excused, the name of the applicant was called and she did not appear. The respondent applied to strike the applicant's defence and dismiss her counterclaim and also applied for judgment in the amount which was then granted together with interest and costs. I then proceeded to grant the order which was attached to the application for rescission but gave brief reasons at the time in doing so. Those reasons are also not referred at all in the application for rescission of judgment.

'COURT: The defendant is not present. Her instructing legal practitioner Mr Kauta has withdrawn. He informed the court that he had conveyed to his client that he was withdrawing today. He had consulted her on Saturday, the 2nd of February 2013 and informed her that he could no longer proceed to act on her behalf due of the fact that he no longer enjoyed her trust and confidence to represent her in these proceedings. He then filed the notice of withdrawal which was served this morning and he handed it up and applied for leave to withdraw. This was not opposed by Mr De

Beer who appears for the plaintiff and I accordingly granted him leave to withdraw, given the explanation that he had provided to me. He also confirmed that the defendant was aware that the matter was to proceed in court today and that his advice to her was to secure the services of another attorney to come to court today and apply for the postponement of the matter or to appear herself. She was not represented by any legal practitioners in court and I had her name called in the foyer of the court. She did not answer when her name was called and has not appeared in court. I accordingly directed that the matter can proceed, given her failure to attend or being represented by a counsel. Mr De Beer then moved to strike the defendant's plea and that her counter claim also be dismissed with costs. I accordingly granted an order striking the plea with costs and dismissing the counter claim with costs. He then moved for judgement by default, that interest should run from the date of the service of the summons, the summons were served on the 8th of October 2010 and I accordingly am prepared to grant interest from the 9th of October 2010. I accordingly grant judgement in favour of the plaintiff in a sum of five hundred and fifty one thousand six hundred and sixty nine dollars and seventy cents (N$551 669,70), interest on this amount at the prescribed rate of 20% per annum from the 9th of October 2010 to date of payment and further costs of suit. I further confirm my earlier order in striking the plea and the defendant's defence with costs and dismissing the defendant' counter claim with costs.'

(z) Mr Jones in the circumstances informed me that the applicant would no longer proceed with the application on the basis of rule 44, thus accepting that the order had not been erroneously sought or granted.

(aa) Mr Jones however proceeded to apply for rescission on the basis of common law, correctly accepting, that rule 31 also did not apply.

(bb) Under the common law, the applicant is required to establish sufficient cause for rescission which is synonymous with the good cause requirement of rule 31.[4] The applicant would need to establish a reasonable and acceptable explanation for her default and that on the merits she has a bona fide defence which, prima facie, carries some prospects of success.[5]

---

[4]Cilliers, Loots Nel: Herbstein and Van Winsen – The Civil Practice of the High Courts of South Africa (5d 2009) Vol 1, p 938-939.

[5]Op cit at 938.

(cc) Mr De Beer who appeared for the respondent argued that the point was taken in the notice in terms of rule 6(5) (d) that the applicant had not provided an adequate and acceptable explanation for her default in the founding affidavit, particularly when viewed in light of the statements made by Mr Kauta in court in applying to withdraw as her erstwhile legal practitioner of record. Mr De Beer correctly points out that paragraph 15 of the applicant's founding affidavit contains what appears to be an internal contradiction. On the one hand, the applicant states that she was informed on 2 February 2013 for the first time that she needed to be in Windhoek for the trial set to commence of 4 February 2013. This is however contradicted to an extent in the following sentence by stating 'despite earlier communication that the trial was set for that date'. The applicant does not explain why she would not need to be in court on the trial date except with reference in the subsequent paragraph to conjecture as to when the matter would proceed and when her evidence would be required.

(dd)

(ee) As against the extremely vague and terse explanation for her default, there is a statement, albeit not under oath, provided by her erstwhile legal practitioner, an officer of this court to this court. In his statement, he made it plain that he had informed the applicant of his withdrawal already on Saturday when the disagreement had arisen and had also explained to her that she would need to secure the services of other legal practitioners or appear in person in court on Monday, 4 February 2013 at 10h00. Quite how the applicant could state that she would have received the call from Mr Kauta on Monday morning as to when she would be needed in court following the discussion on Saturday when he had informed her that he would withdraw and of the consequences of doing so, is not explained. The applicant's statement that she is 'a lay person' and does not 'know very much about the law and the legal procedure' cannot avail her in the circumstances of this matter. The recent procedural history of the matter in going through case management and discovery and particularly with reference to the preparation of the proposed pre-trial order would have necessitated instructions from the applicant. Significantly, the applicant does not even refer to the preceding steps. I also take into account that the applicant study leave granted to her and referred to in the agreements annexed to the particulars claim was for the purpose of completing a PHD in Natural Resource Economics and that she

is currently a Senior Research Manager (economist) Economic Performance and Development at the Human Science Research Council in South Africa.

(ff) In considering the very brief explanation for her default set out in vague and sketchy terms, I have considered that I am entitled to take into account what was stated in open court by her erstwhile legal practitioner in applying for his withdrawal, even though that application was not made under oath. This court is entitled is place reliance upon statements made to it by officers of this court. As against the terse and vague explanation provided by the applicant is Mr Kauta's statement that he had informed her on Saturday 2 February 2013 in the course of consultation that he would not see his way clear to represent her and that she would need to appear in court on 4 February 2013 with a lawyer whom she had trust in. As I have indicated, her current legal practitioners should have enquired as to what transpired in court when the matter was called on Monday 4 February 2013. This could have been easily done. An enquiry could also have been directed to Mr Kauta or the respondent's legal practitioners. But more importantly, the recordings of what transpired in court are readily available to practitioners. It would have been reasonable for her practitioners to assume that Mr Kauta would have needed to appear in court on 4 February 2013 in order to apply for his withdrawal given the very late stage at which it had occurred. That is after all what is required by the practice directives, relied upon by the applicant. Yet this aspect was not investigated. Nor was there a proper explanation provided for the failure to do so. The fact that the applicant has thus not in her affidavit dealt with the explanation provided by Mr Kauta is in my view a problem of her own making or of her lawyers and is to be attributed to the applicant.

(gg) In considering the applicant's explanation and taking into account that provided by Mr Kauta in court when the matter was initially called, it would seem to me that the applicant has fallen very short of providing an acceptable or reasonable explanation for her default. The applicant furthermore does not state if she took any steps at all between 08h00 and 10h00 in seeking to secure the services of any other legal representatives. This aspect was not dealt with in her affidavit because the applicant did not attach the email notification to her of the

withdrawal which had occurred very early in that morning or disclose when she had received the notice of withdrawal.

(hh) It is well settled that an application for rescission of judgment under the common law must establish both requisites of sufficient cause set out above namely an acceptable and reasonable explanation as well as a bona fide, defence which, prima facie, enjoys reasonable prospects of success. Where an explanation is so lacking in reasonableness and its adequacy as the applicant's in this case certainly is, it would not be necessary to consider the question as to whether reasonable prospects of success of her defence being raised in the application, even though the applicant would now rely upon a defence somewhat different to that pleaded and maintained for some time. It is thus not necessary for me to deal with that aspect and I decline to do so. Suffice to say that in the exercise of my discretion, I find that the explanation for her default provided by the applicant is not reasonable and acceptable.

(ii) It follows that the applicant's application for rescission under the common law must fail for the reasons set out above. I accordingly make the following order:

The applicant's application for rescission of the judgment granted against her on 4 February 2013 is dismissed with costs.

____

D SMUTS

Judge

APPEARANCES

APPLICANT: J.P.R Jones

Instructed by JR Kaumbi Inc.

RESPONDENT:	De Beers Instructed by De Beers and Kleuder