REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1673/2012

In the matter between:

CHINA HENAN INTERNATIONAL COOPERATION (PTY) LTD **APPLICANT**

and

WILLEM CORNELIUS DE KLERK **1ST RESPONDENT**
THE DEPUTY SHERIFF FOR THE
DISTRICT OF KARIBIB **2ND RESPONDENT**

Neutral citation: *China Henan International Cooperation (Pty) Ltd v De Klerk* (I 1673/2012) [2013] NAHCMD 356 (26 November 2013)

Coram: GEIER J
Heard: **30 October 2013**
Delivered: **26 November 2013**

Flynote: Practice — Judgments and orders — default judgment – on a legally deficient claim formulation – in the sense that no cause of action has been made out – and which does not found the conclusions in law that the applicant seeks to draw - cannot found a valid default judgment –

Practice — Judgments and orders — Default judgment granted on a legally deficient claim formulation – in the sense that no cause of action has been made out – also constituting a judgment granted 'erroneously' against the absent party - which can - in the normal course - competently found an application for rescission in terms of Rule 44(1) of the rules of court –

Practice — Judgments and orders — Rescission of judgment in terms of rule 44(1) of High Court Rules — Court should rescind judgment erroneously granted on excipiable claim particulars — Court needs to analyse underlying cause of action in order to determine whether a valid cause of action has been made out -

Practice - Pleadings - particulars claim to disclose a cause of action – definition of 'cause of action' as formulated in *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 adopted – principles re-stated –

Practice - Pleadings – definition of 'cause of action' meaning of - a Plaintiff is required to set out *'… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'* - this relates only to 'material facts' –

Practice - Pleadings – when formulating cause of action - due regard is to be had to the distinction between the *facta probanda* and the *facta probantia*. Care must be taken to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*).

Practice - Pleadings – In order to ensure that a pleading is not excipiable on the ground that they does not disclose a cause of action, a party should set out the material facts ie. the *facta probanda* - as opposed to the *facta probantia* - with sufficient particularity and completeness to ensure that - if such facts would be

accepted – they would also found the conclusions of law which a party will request the court to make at the time of applying for judgment

Practice - Pleadings – what the facta probanda are in each particular case, is essentially a matter of substantive law, and not of procedure - the failure to plead certain *facta probantia* – for instance in breach of Rule 18(6) - does not necessarily and always result in a situation that no legal conclusion can be drawn from the pleaded facts – particularly if the remainder of the pleaded facts cover the all the essential requirements imposed by the substantive law for a valid cause of action.

Practice - Pleadings - Requirements of – Failure to plead where contract was entered into and who acted on behalf of the parties at the time in breach of requirements set by Rule 18(6) of Rules of High Court - such failure while obviously amounting to a breach of the rules – should however not *per se* be equated – and does not *per se* bring about a situation – which results in a legally deficient claim formulation - it are the requirements of the substantive law which determine whether or not a valid cause of action has been made out and not the particular compliance or non-compliance with the rules of court.

Court finding in casu that all the essential allegations required to make out a valid cause of action in contract had been pleaded – alternatively had been pleaded with sufficient particularity to make out a valid cause of action and that the underlying claim particulars also founded the conclusions of law which the plaintiff requested the court to make at the time of applying for default judgment and which consequentially resulted in a valid judgment being given against applicant, the defendant at the time. As the underlying particulars of claim – also bolstered by an damages affidavit in this case - were not excipiable they could thus- and indeed did competently- found a valid default judgment

It was accordingly held that – in view of this finding - the application for rescission in terms of Rule 44(1)(a) - brought on the basis that the default judgment was ‘erroneous’ , because it was based on excipiable claim particulars – had to fail.

Application for rescission accordingly refused with costs.

Summary: See Flynote above

ORDER

The application for rescission of judgment is dismissed with costs.

JUDGMENT

GEIER J:

[1] The applicant seeks to rescind a default judgment which had been granted against it on 14 September 2012 for:

> 'Payment in the amounts of N$102, 960.15, N$30, 000.00, N$47,569.00 (totalling N$ 180 529.15) together with interest at the rate of 20% per annum, ejectment of the applicant from the premises, payment of damages and costs.'

[2] In this application an order is also sought to have the writ, which had been issued in pursuance of the said judgment, set aside and that leave be granted to defend the main action instituted by the 1st respondent against it.

[3] Although the applicant initially mounted its quest to seek this rescission also on the provisions of Rule 31(2)(b) and on the common law, it ultimately emerged that rescission was essentially sought in terms of Rule 44(1)(a) of the Rules of High Court.

[4] In his written heads of argument Mr Khama, counsel for the applicant formulated his client's case thus:

'The applicant contends that the word erroneous in rule 44 covers a situation where a litigant obtains a relief in Court when there is no cause of action warranting that relief or where the judgement has no legal foundation in law. The applicant contends that the first respondent did not allege the necessary averments.

In his particulars of claim, the first respondent expressly pleads that the applicant is a private Company that is duly incorporated under the laws of Namibia.

At paragraph 3 of his particulars of claim, the first respondent avers that his claim is based on an oral agreement that was purportedly concluded between himself and the applicant.

It is submitted that a statement to the effect that the plaintiff and the defendant entered into an oral agreement of lease is a conclusion and the first respondent was required to aver in his summons the essential averments that establishes the basis for that conclusion.

It will be submitted that, in the absence of those essential averments that establishes the conclusion of an agreement the first respondent's summons do not establish a cause of action against the applicant and under those circumstances it was irregular to grant the relief of default judgement.

In the alternative to the above, it will be submitted that the first respondent was required by law at the time he lodged the application for default judgment to present evidence that demonstrates the conclusion of an agreement. It will be submitted that to simply plead that an agreement was concluded is not enough and it does not establish facts that proves the conclusion of the agreement.

In the Marais matter[1] cited above, the Court stated as follows with regard to essential averments that are lacking in pleadings:

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[1] *Marais v Standard Credit Corp Ltd* 2002 (4) SA 892 (W)

In terms of Rule 42(1)(a) I can rescind the judgment on application by the party affected. In my view the word 'erroneously' covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, ie nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of Rule 42(1)(a).

In the light of the above authority, it will be submitted that the lack of averments or evidence by the first respondent establishing the conclusion of an agreement is an essential averment that was necessary and this deficiency in both the summons and in the application for default judgment makes his claim against the applicant to have no legal foundation in law.

THERE WAS NO EVIDENCE PLACED BEFORE COURT ESTABLISHING THE FIRST RESPONDENT'S ALLEGED AGREEMENT.

With regard to the evidence required to establish an agreement, the Appellate Division of South Africa stated as follows:

"An applicant for an order declaring the existence of an agreement (not in writing) therefore has to meet the following requirements in order to establish his case: (1) He has to state whether he relies on an express oral agreement, or on a tacit agreement (that is an actual agreement, no an implied agreement), or on an express agreement and, as an alternative, a tacit agreement. (2) If it is his case that an express oral agreement had been concluded, then (a) he has to allege an express oral agreement; (b) set out the terms of the agreement; and (c) in his affidavit furnish evidence of the nature of the agreement and its terms, prove actions – including words – which gave rise to the agreement, and the date on which, the place at which and the parties to the agreement. (3) If it is his case that a tacit agreement had been concluded, then (a) he has to allege it; and (b) he has to allege and prove conduct which is not only consistent with the making of the alleged agreement, but which establishes, on a balance of probabilities, that an agreement in the terms alleged had been reached. (At 344F/G-I/J.)"

It is evident from the particulars of claim of the first respondent that there are no primary facts that the first respondent alleges from which the Court could have established that an agreement was indeed concluded. It will be submitted that the primary facts that

were required to prove the existence of an agreement were not alleged and proved and consequently, the first respondent obtained the default judgment erroneously.

A similar position was stated in another decision of the South African then Appellate Court where the Court stated as follows:

"The plaintiff's cause of action being a mandatory contract, he had to prove its existence and its material terms: To succeed he had to call evidence as to the contents of the contract at the time of its execution; he could not by-pass his duty to place evidence before the court by relying on a presumption of fact unknown to our law."

PRIMA FACIE CASE UNDER RULE 44(1)(a)

It is submitted that the applicant had made out a case for the relief set out in rule 44(1)(a) of the rules of the High Court.

The applicant contends that rule 44(1)(a) does not require an applicant to establish a bona fide defence, good cause and even prospects of success at trial.

It is common cause that the first respondent's claim is based on a contract. It is submitted that in those circumstances, the first respondent was obliged to comply with the provisions of rule 18(6) of the rules of the High Court and in casu, the first respondent failed to comply with the terms of that rule.

Rule 18(6) of the rules of the High Court provides as follows:

"A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

CONCLUSION

In the light of the above submissions and authorities, it will be submitted that the applicant had made out a case for the relief set out in the notice of motion.'

[5] During oral argument Mr Khama confined his client's case to the Rule 44 rescission[2] and to the argument that no cause of action had been set out in the underlying particulars of claim on the strength of which the default judgment against the applicant could legitimately have been based – He submitted further that, as the claim particulars were legally deficient in this sense, no valid default judgment could have been founded thereon. The resultant default judgment was thus an erroneous judgment as contemplated in Rule 44(1)(a) .

[6] He contended more particularly that the underlying particulars of claim where excipiable as the requirements of Rule 18(6) of the Rules Court had not been complied[3] with in that it had not been pleaded where the contract had been concluded and who had acted on behalf of the parties at the time of the conclusion of the agreement – In this regard it had to be taken into account, so the argument went further, that the applicant was a juristic person which could only act through natural persons. It was this non-compliance which rendered the judgment irregular. He rounded off his argument by boldly stating that his client's case should stand or fall on this issue alone.

[7] Mr Schickerling who appeared on behalf of the first respondent countered by firstly analysing all the decisions relied upon by applicant and by submitting that they were distinguishable – that this also held true particularly for the *Marais v Standard Credit Corp Ltd* decision as that case had dealt with a situation where a statute had imposed a suspensive condition on the relied upon agreement and where the failure to plead a necessary averment in that regard[4] had led the court to conclude that the word 'erroneously' in Rule 42(1)(a)[5] also covered the situation where, for want of an essential averment, there was no cause of action and thus nothing to sustain a judgment. The order granting default judgment in that case had thus been made

[2] Correctly so, in my view as the requirements for a Rule 31- and a common law rescission had not been met

[3] 'A party who in his or her pleading relies on a contract shall state whether the contract is written or oral and when and by whom it was concluded, and if the contract is written a true copy thereof or the part relied on in the pleading shall be annexed to the pleading.'

[4] ie. that the particular condition precedent had been complied with

[5] The South African equivalent to the Namibian Rule 44(1)(a)

without legal foundation and, as such, had been 'erroneously' granted for the purposes of the South African Rule 42(1)(a).

[8] Secondly, and with reference to Mr Khama's 'Rule 18(6) argument', he acknowledged that the underlying particulars of claim indeed failed to allege where the relied upon contract was concluded and who had acted on behalf of the parties at the time.

[9] He argued further that although there was non-compliance with the requirements set by Rule 18(6) in these respects that those non-compliances did not constitute an irregularity in the proceedings. He referred the court in this regard to *Bank of Lisbon v Botes* 1978(4) SA 724 (W)[6] – he also submitted that it was wrong to allege that no cause of action had been made out and that the ultimate test was whether or not the particulars of claim disclosed a cause of action, which according to him they did.

[10] In reply Mr Khama reiterated that he continued to rely in the main on *Marais v Standard Credit Corp* Ltd[7] – He re-emphasised Rule 18(6) prescribes essential averments that have to be made in particulars of claim and if such averments are absent then that would be the end of the matter.

[11] Central to the determination of this dispute are obviously the Particulars of Claim in respect of which it was common cause that they did not comply with the requirements set by Rule 18(6) in two said respects – they were formulated as follows:

'PARTICULARS OF CLAIM

1. The Plaintiff is Willem Cornelius de Klerk, an adult male of No 4, Kalk Street, Karibib, Republic of Namibia.

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[6] At 724H to 725D

[7] 2002 (4) SA 892 (W)

2. The Defendant is China Henan International Cooperation Group (Pty) Ltd, a private company duly incorporated under the company laws applicable in the Republic Namibia having its principal place of business at Kapapu street, Usab Main Road, Karibib, Republic of Namibia.

3. During or about November 2010 the Plaintiff and Defendant entered into an oral agreement of lease ("the agreement") in terms whereof the Defendant leased No 4, Kalk Street, Karibib ("the premise") from the Plaintiff as accommodation for its employees.

4. The material terms of the agreement were, inter alia, the following:

4.1 the lease would be for the period commencing on 1 November 2010 and terminating on 30 November 2011;

4.2 the rental payable was an amount of N$ 8 000.00 per month;

4.3 the Defendant shall be liable for payment of the full water and electricity accounts charged by the relevant authorities;

4.4 the Defendant shall at his own costs keep and return the premise in good order and condition.

4.5 that the Defendant had inspected the premise and accepted the premises in the condition in which same was at present and shall have no claim against the Plaintiff for any defect therein;

5. It was a further material term of the agreement that:

5.1 the Defendant would effect repairs and improvements to the premise in the total amount of N$ 82 155.86 to bring the premise in a fit condition for the purpose for which it was being leased;

5.2 a portion of the agreed rental in the amount of N$6 000.00 would be set-off from the monthly rental over the period of the lease, as compensation and/or reimbursement to the

Defendant for the repairs so effected and Defendant would thus pay over to the Plaintiff an amount of N$2 000.00 per month.

6. The Plaintiff complied with his obligations in terms of the agreement and the Defendant took occupation of the premise during November 2010.

6. In breach of the aforesaid agreement the Defendant has failed to:

6.1 effect the repairs and Improvements in the amount of N$ 82 155.86 and is thus indebted to the3 plaintiff for payment of the balance of the rental in the amount of N$ 6 000.00 over the period of the lease amounting to N$ 72 000.00 in total;

6.2 pay the water account and is in arrears in the total amount of N$ 18 798.74;

6.3 pay the electricity account and is in arrears in the total amount of N$ 12 161.41;

6.4 vacate the premise at the termination of the agreement by effluxion of time on 30 November 2011 and is currently in unlawful occupation of the proper as a result of which the Plaintiff has suffered damages in the total amount of N$ 30 000.00 for the period from 1 December 2011 to 30 April 2012.

7. The Defendant in further breach of the agreement failed to keep and return the premise in good order and condition in that:

7.1 holes were made in the walls of the premise;
7.2 light fittings and fixtures were damaged and/or removed;
7.3 windows and door fittings and fixtures were damaged and/or removed;
7.4 the burglar bars were damaged and/or broken;
7.5 two toilets were broken;
7.6 electrical installations were removed;
7.7 various plumbing fixtures and fittings were broken.

8. As a result of Defendant’s failure as aforesaid, Plaintiff suffered damages in the amount of N$ 47 569.00 being the reasonable costs to repair the aforesaid damages.

9. In the premise Defendant is indebted to Plaintiff in the total amount of N$ 180 529.15 which amount despite demand, alternatively herewith demanded, has failed and/or refused to pay.

WEREFORE PLAINTIFF CLAIMS:

1. Payment in the amount of N$ 180 529.15;

2. Confirmation of the interdict appearing in the Summons;

3. Ejectment from the said premise being No 4 Kalk Street, Karibib;

4. Damages in the amount of N$ 8 000.00 per month calculated from 1 May 2012 to date of eviction;

5. Interest on the outstanding amount at the rate of 20% per annum as from date of Summons to date of full and final payment;

6. Costs of suit;

7. Further and/or alternative relief.'

[12] It should possibly also be mentioned at this stage - and before the underlying issues to this rescission are determined - that the first respondent's total of claim of N$ 180 529.15 also included a claim for N$47, 569.00 - relating to the reasonable costs of repairs of the leased premises – which thus constituted a claim for unliquidated damages - in respect of which however a damages affidavit was filed in support- and prior to applying for default judgment on the strength an amended request for default judgment – Nothing accordingly turned on this.

[13] Mr Khama however argues that the above quoted particulars of claim are rendered excipiable by reason of the failure to allege the said two averments

required in terms of Rule 18(6) and that this omission was fatal and that therefore – by virtue of the first respondent's non –compliance with the rule - no valid cause of action had been pleaded on which any valid judgment could be based and that for this reason there was nothing to sustain the complained of default judgment which had thus been made without legal foundation, and therefore constituted a judgment which had also been 'erroneously' granted, as contemplated by Rule 44(1)(a), and which therefore became liable for rescission in terms of that rule.

[14] The key to the determination of the merits of this argument will in my view be provided by the analysis of what a valid cause of action is and by testing these submissions against the applicable authorities which define what is meant by a pleading that 'lacks the necessary averments to sustain a cause of action'.

[15] A useful exposition of the applicable principles – also placing the arguments by counsel in better context - is found in *Erasmus Superior Court Practice* at B1-156 (Service 40, 2012):

> "While rule 18(4) requires every pleading to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim', rule 20(2) requires a declaration to 'set forth the nature of the claim' and 'the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein', and this subrule warrants an exception if a pleading 'lacks averments which are necessary to sustain an action.'
>
> Although these rules do not explicitly require the plaintiff's particulars claim or declaration to disclose a cause of action, it is generally accepted that this is in fact what they require.' [8]

In *McKenzie v Farmers' Co-operative Meat Industries Ltd* [9] the following definition of 'cause of action' was adopted by the Appellate Division:

> *'… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to his right to judgment of the court. It does not comprise every*

[8] *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244C
[9] 1922 AD 16 at 23 - see also the other authorities cited in footnote 2

piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

It is important to bear in mind that the definition relates only to 'material facts', and at the same time to have due regard to the distinction between the *facta probanda* and the *facta probantia*. Care must be taken in any given case to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*).[10] It follows, therefore, that in order to ensure that his or her summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff

"moet toesien dat die wesenlike feite (dit wil sê die. facta probanda en nie die facta probantia of getuienis ter bewys van die facta probanda nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag t a v die regshulp of uitspraak wat hy aanvra." [11]

What the facta probanda are in each particular case, is essentially a matter of substantive law, and not of procedure." [12]

[16] If one then considers Mr Khama's argument against this background, and as superficially persuasive it might have been, it emerges that it fails to take into account that the South African authorities – which have been applied in Namibia for many years and which I do not hesitate to adopt – only require the pleader, in order to plead a valid cause of action, to set out the material facts – with due regard to the distinction that should be maintained between the *facta probanda* and the *facta probantia.* It is clear that this exercise does not entail the pleading of every piece of evidence which is necessary to establish the right to judgment of the court - or – the pleading of every piece of evidence which is necessary to prove each fact.

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[10] *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 138-9, *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658A, *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) at 649A, *Myerson v Hack* 1969 (4) SA 521 (SWA) at 523C, *Patterton v Minister van Bantoe-administrasie & -ontwikkeling* 1974 (3) SA 684 (C) at 686H – 687F, *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244F-G

[11] *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D

[12] *Alphedie Inv (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T) at 161H

[17] Surely the averments relating to - where the contract was concluded – and - who acted on behalf of the parties at the time – must be ancillary to- and do not constitute material facts which a pleader, pleading a cause of action in contract, must necessarily set out in order to generate claim particulars which sustain a valid action based in contract. The material fact, which most certainly has to be pleaded, must, at the very least, be the allegation that a contract was concluded between the parties.

[18] It cannot be controverted that Rule 18(6) expressly requires such details – certain *facta probantia* - to be inserted into a pleading based in contract. The failure to do so obviously amounts to a breach of the rules. Such a breach - which can also found a valid request for further particulars for instance – should however not *per se* be equated – and does not *per se* bring about a situation – which results in a claim formulation which is legally deficient just because it does not set out all the ancillary facts – the *facta probantia* – required by the rule. It surely are the requirements of the substantive law which determine whether or not a valid cause of action has been made out and not the particular compliance or non-compliance with the rules of court.

[19] Put differently: the failure to plead certain *facta probantia* – for instance in breach of Rule 18(6) - does not necessarily and always result in a situation that no legal conclusion can be drawn from the pleaded facts – particularly if the remainder of the pleaded facts cover the all the essential (material) allegations imposed by the substantive law for a valid cause of action.

[20] To illustrate further: the failure to allege where a contract was concluded does not detract from the veracity of the remainder of the material allegations, were, as in in this instance, it was materially alleged that an agreement was concluded - between the parties cited – together with the relied upon pleaded terms – etc.

[21] In the same vein: the failure to allege who acted on behalf of the parties, at the relevant time, does not detract from the veracity of the material allegations

underscoring the relied upon cause of action, namely that a contract, with the pleaded terms, now relied upon, was concluded between the parties cited in the summons - etc.

[22] It emerges that the omitted particulars constitute *facta probantia* i.e facts which are required to prove the material *facta probanda* i.e. that an agreement of lease was concluded between the cited parties together with the relied upon terms etc.

[23] If one then further analyses the actual claim formulation which founded the default judgment herein one can extract therefrom the following essential averments:

(a) that a contract of lease was concluded between plaintiff and defendant;

(b) that such contract contained certain material terms, now relied upon;

(c) that the plaintiff complied with his obligations in terms of relied upon contract;

(d) that the defendant is in breach of the relied upon material terms of the agreement.

(e) that as a result of such breaches the plaintiff has suffered damages – liquidated and unliquidated;

(f) that the defendant has in such premises become indebted to plaintiff in the claimed amounts;

(g) which amounts the defendant despite demand has failed or refused to pay.

[24] The so extracted elements, in my view, comprehensively cover the material allegations required to make out a valid cause of action in contract. At the very least it can be said that all essential allegations, pertaining to the relied upon lease

agreement were pleaded with sufficient particularity to make out a valid cause of action. This analysis then also demonstrates how immaterial - in this context – the respondent's non-compliance with Rule 18(6) – is/was.

[25] It is of final significance that the underlying claim particulars also founded the conclusions of law[13] which the plaintiff requested the court to make at the time of applying for default judgment and which consequentially resulted in the judgment given against applicant, the defendant at the time.

[26] It is for these reasons that I find that the particulars of claim - bolstered by the damages affidavit - filed in support of the default judgment granted against the applicant on 14 September 2012 - where not excipiable. The underlying claim formulation could thus- and indeed did- found a valid default judgment.

[27] I should add that - although I agree, in principle - and this was also common cause - that a legally deficient claim formulation – in the sense that no cause of action has been made out - cannot found a valid default judgment – and that a judgment by default - granted on the basis of an excipiable claim formulation, would also constitute a judgment granted 'erroneously' against the absent party, - which could thus, in the normal course, competently found an application for rescission in terms of Rule 44(1) of the rules of court – I cannot by reason of my conclusions drawn above – which indicate that the contrary is true –- accede to this application on the grounds advanced in this instance.

[28] It is for these reasons that the application for rescission must fail.

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[13]Payment in the amount of N$ 180 529.15 – which included the abovementioned unliquidated claim for damages in the amount of N$ 47 569.00 - Confirmation of the interdict appearing in the Summons -Ejectment from the said premise being No 4 Kalk Street, Karibib - Damages in the amount of N$ 8 000.00 per month calculated from 1 May 2012 to date of eviction - Interest on the outstanding amount at the rate of 20% per annum as from date of Summons to date of full and final payment - Costs of suit;

[29] The application is accordingly dismissed with costs.

H GEIER

Judge

APPEARANCES

APPLICANT:	D Khama Instructed by Sibeya & Partners Legal Practitioners, Windhoek.
1st RESPONDENT:	J Schickerling Instructed by Engling, Stritter & Partners, Windhoek