REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3570/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MARTIN NAMBALA **APPLICANT**

and

JOHN SHIVUTE ANGHUWO **RESPONDENT**

Neutral citation: *Nambala v Anghuwo* (I 3570/2010) [2013] NAHCMD 97 (9 April 2013)

CORAM: UEITELE, J

Heard: 14 February 2013

Delivered: 09 April 2013

Flynote: Practice - Judgments and orders - Rescission of judgment - Late filing of application - Applicant must seek condonation - Must give reasonable explanation for late filing of rescission application. Requirements for - Applicant should not be in wilful

default; he should not use such application as a delaying tactic; he must make out a *bona fide* defence.

Summary: The applicant approached this Court by way of notice of motion with an application for condonation of the late filing of an application for rescission of the judgment by default granted against him on 14 April 2011.

This application has its origin in an action instituted as far back as 18 October 2010 by the respondent, in which action he claimed payment of the amount of N$84 569.59, interest on the amount of N$84 569.59 at a rate of 20% per annum as from 30 July 2010 to date of payment and costs of suit.

The applicant did not defend the action, the respondent set down the matter, applied for and on 14 April 2011 obtained default judgment. On an application for rescission of judgment.

Held, that in view of the applicant's inaction and 'don't care' attitude it is difficult to envisage circumstances in which the judgment was erroneously granted. That the default judgment was not granted erroneously and the application cannot be brought under Rule 44(1) (a).

Held, further that the relief granted in terms of Rule 31(2) (b) is by way of an indulgence and that it is therefore imperative that the applicant must provide an acceptable explanation how the default came about to enable the Court whether or not to grant the indulgence.

Held, further, the explanation for failure to bring the application for rescission within the time period stipulated in Rule 31(2) (b), must be made in an application for condonation. Such an application should, of course, have been brought pursuant to Rule 27.

Held, further, that service of the summons on the applicant as contemplated in Rule 4(1) (a) (ii) was not defective service.

Held, further, that it is difficult, if not impossible, to find that good cause has been shown for granting the indulgence sought.

ORDER

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1 The application for rescission of judgment is refused.

2 The applicant is ordered to pay the respondent's costs.

JUDGMENT

UEITELE J

[1] The applicant, Martin Nambala (who is the defendant in the main action and to whom I will, in this judgment, refer to as the applicant) approached this Court by way of notice of motion with an application for, inter alia, for the condonation of the late filing of an application for rescission of the judgment by default granted against him on 14 April 2011 for:

a) Payment of the amount of N$84 569.59.

b) Interest on the amount of N$84 569.59 at a rate of 20% per annum as from 30 July 2010 to date of payment.

c) Costs of suit.

d) Further and/or alternative relief.

[2] I find it appropriate to briefly give the background (as I discerned it from the documents filed of record) which gave rise to this application.

BACKGROUND

[3] This application has its origin in an action instituted as far back as 18 October 2010 by the respondent, John Shivute Anghuwo, as plaintiff (I will, in this judgment, refer to him as the respondent) in which action he claimed payment of the amount of N$84 569.59, interest on the amount of N$84 569.59 at a rate of 20% per annum as from 30 July 2010 to date of payment and costs of suit.

[4] The applicant did not defend the action, the respondent set down the matter applied for and on 14 April 2011 obtained default judgment. The applicant alleges that the first time he realized that default judgment had been taken against him was when the messenger of the court turned up at his residence on 05 July 2011 with a warrant of execution, which then triggered the launching of this application.

[5] The applicant's explanation as to why the default judgment was granted against him is that the summons was not served on him. His version is that during November 2010 and December 2010 until a day or two prior to Christmas he was on business in Walvis Bay. During his absence from Windhoek his girlfriend, a certain Ms. Ester Nagolo, was at his house at Erf 3374/4, Istanbul Street, Otjomuise, Windhoek.

[6] During December 2010 the said Ms. Nangolo called him (applicant) and informed him that there was a document at his house. He only returned to his house during January 2011 and upon his returned to Windhoek Ms. Nangolo gave him the document which she mentioned to him in December 2010 whilst he was in Walvis Bay.

[7] As indicated above the applicant's version is that he only became aware of the default judgment against him when the Deputy Sheriff arrived at his residence with a warrant of execution and informed him that he (Deputy Sherriff) wanted to sell some of the applicant's properties in order to satisfy a default judgment granted against him in favour of the respondent. He said that he informed the Deputy Sherriff that he did not owe the respondent any money and that he was not aware of the default judgment as it was granted in his absence.

[8] He said that on 06th July 2011 he consulted with his legal practitioner of record seeking legal advice on the matter. On 03 August 2011 he consulted with Advocate Akweenda who took instructions and commenced preparing the application. The application was ultimately launched on 08 August 2011. The applicant thus alleges that the judgment granted on 14 April 2011 was 'erroneously sought and erroneously granted in his absence.'

THE LEGAL PRINCIPLES GOVERNING RECISSION OF JUDGMENT

[9] The application for the rescission of the default judgment is sought on the basis of Rule 44(1) (a), alternatively the provisions of Rule 31(2)(b) or common law principles. Rule 44(1) (a), provides as follows:

> '44. (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) …'

[10] It has been held that Rule 44(1) (a) only finds application where a judgment was erroneously sought or erroneously granted in the absence a party.[1]

[11] Rule 31(2) (b) of the High Court Rules provides as follows:

> 'A defendant may within 20 days after he or she has knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may upon good cause show, and upon the defendant furnishing to the plaintiff security for the payment of the cost of the default judgment and of such application to a maximum of R200 set aside the default judgment on such terms as to it seems meet.'

[12] Rule 31(2) (b) of the High Court Rules is one of the rules which has been extensively interpreted. What has emerged from the interpretation of the rule is the legal principle that for an applicant for rescission of a default judgment to succeed, the applicant must show 'good cause'. Although the term 'good cause' defies precise or comprehensive definition, it has been judicially defined[2]. From the cases it appears that 'good cause' means that:

(a) the applicant must give a reasonable explanation for its default;

(b) the application must be *bona fide* and not made with the sole intention of delaying the plaintiff's claim; and

(c) the applicant must show that he has a *bona fide* defence which, *prima facie*, carries some prospect of success.[3]

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[1] *Kamwi v Law Society of Namibia* 2007 (2) NR 400 (HC); and also *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 T at 780-781 A.

[2] See *City Council of Windhoek v Pieterse* 2000 NR 196 (LC); *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) and *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

[13] Strydom CJ[4] set out the approach which a court must adopt in applications for rescission of judgment as follows:

> 'An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not *bona fide.*'

[14] The third basis on an application for rescission will succeed is in terms of the common law. In *De Wet and Others v Western Bank Ltd* [5] Trengrove, AJA as he then was, set out the provisions of our common law relating to the rescission of judgments as follows:

> 'Thus, under common law the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds

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[3]See *Mutjavikua v Mutual & Federal Insurance Company Ltd* 1998 NR 57 (HC) *Xoagub v Shipena* 1993 NR 215 (HC) *Minister of Home Affairs, Minister Ekandjo v Van Der Berg* 2008 (2) NR 548 (SC) and *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 708G - J.

[4] In *Leweis v Sampoio* 2000 NR 186 (SC).

[5] 1979 (2) SA 1031 (A) at 1041B.

provided for in Rules 31 and 42(1), and those specifically mentioned in the *Childerley* case. Those grounds do not, for example, cover the case of a litigant, or his legal representative, whose default is due to unforeseen circumstances beyond his control, such as sudden illness, or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief.'

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

[15] The basis on which the applicant is seeking rescission of judgment is, first that the summons was not served on him and he was thus unaware of the set down of the matter and that default judgment was granted against him in his absence. He thus submitted that default judgment was therefore 'erroneously sought' and 'erroneously granted' in his absence.

[16] The question of when a judgment has been granted 'erroneously' has been considered in numerous cases. In *Topol and Others v LS Group Management Services (Pty) Ltd*[6] after referring to various cases which dealt with Rule 42(1) (a), the Court rescinded a judgment which had been granted on the premise that the defaulting parties had been given notice and were in willful default, whereas they had in fact not been given notice.

[17] The term 'erroneously granted' was also applied in a case, where the capital claimed has already been paid by the defendant[7] -. In the matter of *Nyingwa V Moolman NO*[8] White, J held that:

'It therefore seems that a judgment has 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

[6] 1988 (1) SA 639 (W).

[7] See *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C).

[8] 1993 (2) SA 508 (TK) at 510 F-G.

granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'

[18] In the present matter the applicant's own version is that the summons was served on his girlfriend at his house during November 2010, the girlfriend then handed him the summons in January 2011. I am therefore of the view that the applicant was aware of the summons issued against him. In the affidavit in support of his application for rescission the applicant does not explain what he did after he got the summons and this leaves me with one conclusion only, namely that he did not care of the consequences and that he was a willful defaulter. In view of the applicant's inaction and 'don't care' attitude it is difficult to envisage circumstances in which the judgment was erroneously granted. In my opinion, therefore, the default judgment was not granted erroneously and the application cannot be brought under Rule 44(1) (a).

[19] The applicant in the alternative relies on rule 31(2) (b) for the rescission of the judgment. Although the applicant must have known that judgment had been taken against him on 05 July 2011 it was not until 08 August 2011 that such an application was filed and served on the respondent. In terms of Rule 31(2) (b) a party against whom default judgment has been granted has 20 days after knowledge of the judgment in which to apply to court to set aside such judgment. In the present matter the applicant has filed his application four days out of time.

[20] The applicant in his affidavit (in support of the application for rescission simply indicated that he has 'applied for condonation for non-compliance with the period of 20 days stipulated in Rule 31(2) (b).'[9] In the replying affidavit the applicant states the following:

"4.1 I am well aware of the fact that my application for rescission of judgment was filed late.

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[9] See paragraph 24 of the supporting affidavit (page 14 of the record).

4.2 I humbly submit that I have set out good reasons why my application is filed late and I humbly request this honourable court to grant me condonation for such late filing.

4.3 I humbly submit that the late filing of my rescission application is not wilful or blatantly in disregard of the rules of this court.

4.4 I respectfully disagree with the respondent herein and submit that I am entitled to a rescission of the default judgment granted against me on 14 April 2011.'[10]

[21] Relief granted in terms of Rule 31(2) (b) is by way of an indulgence. It is therefore imperative that where an applicant fails to launch the application within the time stipulated in that rule he or she must provide an acceptable explanation how the default came about to enable the Court whether or not to grant the indulgence. The explanation for failure must be made in an application for condonation. Such an application should, of course, have been brought pursuant to Rule 27.[11]

[22] There is no application for condonation of the late filing of the application for rescission of judgment Rule 27 is clear, when there is non-compliance with the rules of

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[10] See paragraph 4 of the replying affidavit (page 62 of the record).

[11] Rule 27 (1), & (3) of the High Court Rules provides as follows:

'27. (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) …

(3) The court may, on good cause shown, condone any non-compliance with these rules.'

court the party in default must in the absence of agreement between the him/her and the other party apply to court for condonation. Rule 6 (1) provides that *'every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief*". I am accordingly of the opinion that Rule 27(1) read with Rule 6(1) spells out the need to make a substantive application. The words of those rules could not mean anything else.

[23] The next point I consider concerns the explanation tendered by the applicant for his default. The basic default was, of course, the failure to file a notice to defend the action and to file a plea. But the applicant does not provide any real explanation for his failure. His only excuse is that there was a defective service of summons on him. I do not agree that the service on the applicant was defective. I say so for the following reasons:

> Rule 4(1) (a) (ii) provides as follows:
>
> '4. (1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (b) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners, namely –
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> (i) …;
>
> (ii) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age, and for the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, 'residence' or 'place of business' means that portion

of the building occupied by the person upon whom service is to be effected.'

[24] In the present matter, what rule 4(1) (a)(ii) contemplates is precisely what happened. On the applicant's own version Ms. Nagolo was in charge of his residence while he was in Walvis Bay and she is apparently older than 16 years and the summons was served on her. After the summons was served on her, she called the applicant in Walvis Bay during December 2010 and informed him that there was a document delivered at his residence and when he arrived at his residence in January 2011 she handed over the documents (which happened to be the summons) to him. The summons was handed over to the plaintiff during January 2011, default judgment was granted on 11 April 2011 and the attachment made on 05 July 2011. This means that for a period of six months the applicant took no interest whatsoever in the case. He did go to the trouble of contacting his legal practitioners. On the applicant's own version it is quite clear that he was grossly negligent in his approach to the case, and that he has no reasonable and acceptable explanation for his default.

[25] I now turn to the defence advanced by the applicant in his supporting affidavit. In that affidavit the applicant denies that he owes the respondent the amount of N$84 569.59 or any portion of that amount, but he does not set out the grounds on which the denial is based. He further denies having caused any damage to the applicant's property and states that he intends instituting a counterclaim against the respondent. What I could discern from the applicant's affidavit is that the intended counter claim is for moneys allegedly lent and advanced by the applicant to the respondent.

[26] While it is true that the applicant in an application such as the present one need not deal fully with the merits of the case and produce evidence that the probabilities are in his favour it would, nonetheless, be reasonable to expect him to deal with the kind of

factual allegations advanced by the respondent in order to show his *bona fides*. The applicant has not done so.

[27] I am of the opinion that the incompleteness and inadequacy of the applicant's explanation of why he did not timeously defend the action, the failure to apply for condonation of the late filling of the application for rescission and the failure to outline his defence raise an inference that there was no acceptable explanation for such neglect and that such delays were caused with the intention of extending as far as possible payment of respondent's claim. It is thus difficult, if not impossible, to find that good cause has been shown for granting the indulgence sought.

[28] In the result I make the following order:

1 The application for rescission of judgment is refused.

2 The applicant is ordered to pay the respondent's costs.

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SFI Ueitele

Judge

APPEARANCES

APPLICANT:	A Small
	Instructed by Weder, Kauta & Hoveka Inc
DEFENDANT:	ZJG Grobler
	Instructed by Grobler & Co