REPUBLIC OF NAMIBIA NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

JUDGMENT

Case no: A 403/2013

In the matter between:

1.1.1.1. **EDISON BUILDING ENTERPRISES CC**

APPLICANT

and

R. FURNIS t/a ELECTRIFIX **RESPONDENT**

Neutral citation: Edison Building Enterprises CC v R. Furnis t/a Electrifix (A403/2013) [2014] NAHCMD 150 (29 April 2014)

Coram: SMUTS, J
Heard: 15 April 2014
Delivered: 29 April 2014

Flynote: Application for rescission of judgment under the then applicable Rule 44. Default judgment had been granted against the applicant in terms of the former Rule 31(5)(a) by the Registrar. The applicant contended that this offended against the Constitution. The applicant failed to join the rule-giver (the Judge-President),

the Registrar who granted the judgment or the Attorney-General, even though alive to the obligation to do so. This non-joinder, aggravated by other unsatisfactory features of the application, led to its dismissal.

ORDER

The application is dismissed with costs. The costs include the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

(b) This is an unusual application for rescission of a default judgment.

(c) The applicant on 13 November 2013 served its application on the respondent's legal practitioners to rescind a judgment by default (in the sum of N$156 931, 33) which the respondent had obtained against the applicant on 29 January 2013.

(d) The applicant's sole member says in his brief founding affidavit that he became aware of the judgment when he sought to access funds held on behalf of the applicant as retention money but established that these funds had been attached pursuant to a warrant of execution issued pursuant to the default judgment. No date is supplied as to when the applicant's member became so aware. The applicant's sole member says that he (and not the applicant) had not been served with the summons and that he was unaware that a default judgment had been granted against the applicant. He further states that his enquiries revealed that default judgment was granted by the registrar in terms of

Rule 31(5)(a) of the then applicable Rules of this Court and not in open court. He states that he was advised that Rule 31(5)(a) is *ultra vires* Articles 12(1)(a), 78, 80(2), 93 and 25(1) of the Constitution. The only further statement in support of this contention is that a default judgment should have been granted by a judicial officer in terms of Article 80(2) of the Constitution in open court and not by the Registrar who is an official or employee in terms of Article 93 of the Constitution. The applicant accordingly submits, upon advice, that the judgment was granted "in error and/or mistake" and that this court would have the power to set it aside in terms of the then applicable Rule 44(1)(a) of the Rules of this Court.

(e) The respondent filed an answering affidavit. It was conceded that the applicant's sole member had not been served with the summons but that it was served on a certain Vipuira Kapuuo, bearing the same surname as the deponent, at the principal place of business of the applicant which was also the residential address given by the applicant's sole member in his founding affidavit. It was thus pointed out that there was due service upon the applicant in accordance with the rules and that this had thus taken place at the residence of the sole member.

(f) The respondent further denies that the applicant's deponent (and sole member) was unaware of the default judgment. It is stated that the deponent had on various occasions contacted the respondent's legal practitioner of record, Mr Pfeifer, in an attempt to arrange for payment of the applicant's indebtedness and that Mr Pfeifer had informed him of the default judgment and the issuing of a warrant of execution. Attached to the answering affidavit was an email in which the applicant's sole member had admitted liability of the applicant's indebtedness to the respondent to Mr Pfeifer who provided a confirmatory affidavit.

(g) The respondent took the point that the application had not been brought within a reasonable time as would be required by Rule 44 or the common law.

(h) The respondent also took issue that Rule 31(5)(a) offended against the

Constitution. The respondent pointed out that the Registrar is an officer of the court, duly appointed in the administration of justice and that the granting of a default judgment by that official would not violate the applicant's constitutional rights. The respondent also submitted that the application was an attempt to delay payment of the applicant's admitted indebtedness to it.

(i) The applicant did not file a replying affidavit within the required period and the matter was then referred to case management on 5 February 2014. The parties were unable to agree upon a joint report and the respective legal practitioners each filed their own report. In the report prepared by the respondent's legal practitioner it was specifically stated that the respondent did not foresee any interlocutory motions but noted that the applicant intended to join the Ministry of Justice and other parties to the proceedings given the challenge to the constitutionality of Rule 31(5) but pointed out that no relief to that effect had been sought in the application.

(j) In the applicant's draft case management report, it was in fact stated that there would be a need to join the Government of the Republic of Namibia and the Ministry of Justice. Despite this, no application to join the Government or the Ministry was brought. Nor was any application to join the Judge President (the rule-giver) or the Registrar of the High Court who had granted the default judgment.

(k) Despite the failure by the parties to agree upon the terms of the joint case management report and because it is an opposed application, I provided the parties with a date of hearing being 19 March 2014. On that date, and when the matter was called, the court file had not been indexed or paginated. It was also entirely incomplete. There was not even an answering affidavit on the court file. The applicant's heads of argument were also filed late. Given the disarray of the court file, I directed that the application be postponed for hearing to 15 April 2014 and that the wasted costs occasioned by the postponement were to be borne by the applicant.

(l) Shortly before the postponed hearing, and on 10 April 2014, the applicant sought to file a brief replying affidavit. It was not accompanied by any application

for condonation. It was simply included in the court bundle and duly indexed and paginated.

(m) Ms Campbell, who appeared for the respondent, took the point that, in the absence of a condonation application, the replying affidavit should be struck and disregarded. Mr Mbaeva, who appeared for the applicant, could provide no explanation as to why the replying affidavit, filed at such a very late stage had not been accompanied by a condonation application. It follows that, in the absence of a condonation application, the replying affidavit is to be struck and disregarded. I however pause to point out that the applicant's admission of indebtedness to Mr Pfeifer both telephonically and in the email attached to the answering affidavit is not properly dealt with in that replying affidavit. Nor did the replying affidavit provide any date upon which the applicant became aware of the default judgment, despite the challenge having been made in the answering affidavit that the application had not been brought within a reasonable time.

(n) In his oral argument (as well as in the written heads of argument which preceded it), Mr Mbaeva on behalf of the applicant contended that the parties had at the case management meeting stated that there was no need to join other parties to the proceedings. As I have already pointed out, this contention is not borne out by the facts. The respondent had expressly stated that governmental respondents may need to be joined in view of the fact that the constitutionality of Rule 31(5)(a) was placed in issue. The draft case management report prepared on behalf of the applicant by Mr Mbaeva himself also refers to the need for joinder of governmental respondents. This did not however occur.

(o) When I pointed out to Mr Mbaeva that, even if the parties did not identify the need for joinder, it was a matter which the court could (and in this instance should) *mero motu* raise, particularly in view of the fact that the constitutionality of a rule of court was raised, Mr Mbaeva could not provide a response.

(p) In his written heads of argument, Mr Mbaeva did not refer to any authority in support of the constitutional challenge made in respect of Rule 31(5)

(a). I enquired from him whether he had any authority to support his argument in that regard. He then handed up a recent decision of the South African Constitutional Court in *Gundwana v Steko Development CC and Others.*[1] He submitted that the failure on the part of the Registrar to acknowledge the constitutional violation in granting a default judgment would constitute an error for the purpose of Rule 44. In support of the constitutional challenge, he referred to Articles 12(1)(a), 78, 80 and 25 of the Constitution.

(q)

(r) Ms Campbell argued that the application should be dismissed by reason of the non-joinder of the Attorney General and other interested parties such as the Judge President and the Registrar. She submitted that the applicant's legal practitioner was alive to the fact that joinder would be required, given the fact that the constitutionality of Rule 31(5)(a) was challenged, even though no express order was sought striking down the rule in question. She submitted that a finding that the judgment should be set aside by reason of a conflict between the rule and the constitutional provisions relied upon would have the same effect and that those parties would need to be joined. Given the fact that the applicant's legal practitioner was aware of this issue, this would be an instance where a court would dismiss the application rather than postpone it to afford the applicant the opportunity to join them, so she submitted.

(s) Ms Campbell also submitted that the application had not been brought within a reasonable time and that this should also disqualify the applicant to secure any relief. Ms Campbell also submitted that the applicant had not established that the provisions of Rule 31(5)(a) offended against the Constitution in the respects contended for or at all.

Ms Campbell also submitted that the applicant had not properly pleaded the alleged conflict with the Constitution in accordance with the approach of this court as set out in *Lameck and another v President of the Republic of Namibia and others.*[2]

(t) Ms Campbell also submitted that Rule 44 would not apply to an

[1] 2011(3) SA 608 (CC).

[2] 2012(1) NR 255 (HC).

application of this nature – not only because it had not been brought within a reasonable time, but also because there had been no error on the part of the Registrar.

(u) There is much force to certain of her submissions.

[22] The basis upon which the applicant seeks to rescind the judgment by default is that Rule 31(5)(a) offends against the various provisions in the Constitution referred to in the founding affidavit. In those circumstances, the rule-giver, the Judge President, is clearly a necessary party. As is the Registrar of this court who had granted the default judgment which is challenged on that very basis. Furthermore, this court has also held that in challenges to the constitutionality of statutory provisions, including subordinate legislation such as the Rules of the Court, the Attorney General of the Republic of Namibia should also be joined. As was correctly contended by Ms Campbell, the applicant's legal practitioner, Mr Mbaeva, was fully aware of the need to join governmental respondents even though the Judge President and Registrar were not referred to. But this did not occur. The application is thus defective for this reason. Given certain other unsatisfactory features of this application, this would not be an instance where, in the exercise of my discretion, the application should be postponed to afford the applicant the opportunity to do so. The applicant's legal practitioner has, as I have said, been aware of the need to do so. Yet he failed to do so. It would follow for this reason and given the other unsatisfactory features of the application that the application should in the exercise of my discretion be dismissed by reason of the non-joinder of interested parties.

[23] The unsatisfactory features to which I have alluded include the failure on the part of the applicant to state when it had become aware of the default judgment obtained against it. This important fact was not stated in the founding papers. The applicant should have done so. Even after the issue was raised in the answering affidavit, it was not even referred to in the abortive replying affidavit. An applicant for rescission not brought under Rule 31 would need to explain why the application had not been brought earlier, given the delay in bringing the application after the applicant had been in communication about the

default judgment.

(x) Another unsatisfactory feature of the application was the failure on the part of the application to specify in what respect the rule in question offended against the constitutional provisions relied upon. This court has made it clear that a constitutional challenge is to be properly pleaded. Although the impugned provision was identified as well as the constitutional provisions relied upon, it was not fully stated in what respects the rule offended against those specific provisions in the Constitution save for stating that the Registrar was an official and not a judicial officer.

(y) As was stated in *Lameck*:

> '[57] Although the notice of motion seeks to set aside ss 22 and 33 of POCA dealing with affected gifts and anti-disposal orders by court respectively as well as the other sections and definitions already referred to, the applicants do not identify any other provisions which relate to asset forfeiture. The founding affidavit furthermore does not address quite how and in what manner these provisions offend against the Constitution.
>
> [58] The rules of pleading clearly apply to applications in which statutory provisions come under constitutional attack. It is thus imperative that the impugned provisions are precisely identified and the attack upon them substantiated with reference to them so that a respondent is fully apprised of the case to be met and evidence which might be relevant to it. The relevant principle in this context, neatly summarised in National Director of Public Prosecutions v Phillips and Others referred to by Mr Trengove, in my view finds application in Namibia. This court has also confirmed this principle in the context of a Constitutional challenge.'
> (footnotes excluded).

[26] I also enquired from Mr Mbaeva as to how the applicant could contend that its constitutional rights have been violated by the granting of a default judgment when it had in fact admitted its indebtedness and liability to the respondent. Mr Mbaeva was understandably not able to address this question.

As was pointed out in *Gundwana* a debtor would need to set out a defence to the claim - in an instance where a court found that a rule relating to execution levied against immovable property based on a default judgment given by Registrar was unconstitutional, based upon the South African Constitutional provisions which include certain rights to housing, not included in the Constitution of Namibia. The applicant had thus brought its application within the basis of the authority relied upon which in any event would appear to be distinguishable.

[27] I also referred him to the provisions of Rule 31(5) and specifically Rule 31(5)(d) which entitles a party in the position of the applicant who is dissatisfied with a judgment granted by the Registrar to set the matter down for reconsideration by the court within 20 days after acquiring knowledge of that judgment. I enquired as to why the applicant had not invoked this provision if the applicant had any reason to be dissatisfied with the order. I also enquired as to whether this provision would not retain with the court the power of determining the rights and obligations of parties when they are disputed and thus not vest that power in the Registrar. A party's constitutional right in Article 12(1)(a) to a fair hearing is in respect with the determination of his or her civil rights and obligations by a competent court or tribunal. That would after arise when the right or obligation is determined. If a party admits liability or does not dispute it, as is the case in this matter, then there would seem to me be no determination of the rights and obligations in the circumstances. It is thus not clear to me, despite *Gundwana*, that Rule 31(5)(a) would necessarily attract Article 12(1)(a) of the Constitution on the facts of this matter, given the acknowledgement of an indebtedness on the part of the defendant in this instance (or for that matter, in other instances where a defendant does not contest his or her indebtedness). It is not however necessary to determine this question in this judgment and whether *Gundwana*, would be applied in this court, particularly as execution against immovable property does not arise or is alleged in this matter. It is thus left open because of the fact that I have resolved to dismiss the application by reason of the failure to join interested parties in the exercise of my discretion in the context of the other unsatisfactory features of this application and given the fact that the applicant was aware of the need for joinder of governmental

respondents.

(bb) The order I accordingly make in this application is that it is dismissed with costs. The costs include those of one instructing and one instructed counsel.

_____

D SMUTS

Judge

APPEARANCES

APPLICANT:	Mr T Mbaeva Instructed by Mbaeva & Associates
RESPONDENT:	Ms Y Campbell Instructed by Behrens & Pfeifer