



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 719/2013

In the matter between:

**JUTTA SANDVOSS**

**PLAINTIFF**

and

**WILFRED SUDWISCHER**

**DEFENDANT**

**Neutral citation:** *Sandvoss v Sudwischer* (I 719/2013) [2014] NAHCMD 17 (24 January 2014)

**Coram:** CHEDA J

**Heard:** 19 November 2013

**Delivered:** 24 January 2014

**Flynote:** Rule 30 application – Applicant must elect a proper procedure when attacking an irregularity – The court cannot review its own decision – Provisions of Rule 31 (2) (b) must be complied with in an application for a rescission of judgment – Application dismissed.

**Summary:** An application under Rule 30 was lodged attacking the application for a rescission of judgment. Applicant argued that the summary judgment was granted without regard to the provisions of Rule 31 (2) (b).

It was not clear whether application was relying on an irregularity of the procedure employed by the court or the decision itself in which case a proper procedure should have been elected from the start.

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### ORDER

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- 1) The Rule 30 application succeeds.
- 2) Applicant/Defendant shall pay the costs and such costs shall include one instructing and one instructed counsel.

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### JUDGMENT

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**CHEDA J** [1] This is a Rule 30 application which attacks respondent's application for a rescission of summary judgment granted by this court on the 10<sup>th</sup> May 2013.

[2] The brief background of this matter is that respondent (plaintiff) applied for a summary judgment out of this court on the 13 May 2013 which application was defended by applicant (defendant). Respondent was of the view that applicant had no genuine defence and hence his application for a summary judgment which was granted by this court on the 31<sup>st</sup> May 2013.

[3] The said judgment was granted in the absence of an opposing affidavit. However, Mr Kasper, applicant's legal practitioner was present and in fact participated in the proceedings as he made certain submissions and explanations with regards to his client's failure to comply with the rules of this court applicable to such an application. One of his points which was orally submitted from the bar was that his client (applicant) was unable to attend to the requisite opposing affidavit or some such other response for respondent's claim as his motor vehicle had broken down on his way to his legal practitioner's office. During the hearing, the court at page 4 of paragraph 10 of the record of proceedings remarked:

*“Court: I was going to grant you an indulgence but you are dirtying the water, the indulgence is that you receive this, the person is not here, he lives in Outjo, I need time, we need time to (incomplete), that is a very good point, but do not bring points which are not, which dirties the water.”*

[4] I will come to this remark later. The learned judge after considering all the submissions granted the application for summary judgment which has led to an application for rescission. On the 6<sup>th</sup> of June 2012 counsel served a second application for rescission having withdrawn the first one on the 31 May 2013.

[5] Respondent made an application in terms of Rule 30 (read with the applicable rules of court). It is his contention through Advocate Van Vuuren that the application for rescission of judgment dated the 6 June 2013 including the notice of motion dated 6 June 2013 together with the accompanying affidavits constitute an irregularity in terms of the Rules of this court and should be struck out or alternatively be set aside. In addition thereto that applicant should pay the costs of this applicaiton and such costs should be of one instructing and one instructed counsel.

[6] Advocate Van Vuuren based his argument on three grounds:

**(1) Rule 31(2)(b)**

It is his contention that an applicant seeking rescission of a judgment granted in terms of Rule 31 (2) (a) must have been in default of filing a notice to defend or a plea. The summary judgment in question was granted in respect of summary judgment proceedings which is not catered for by Rule 31 (2)(b). It is for that reason that he argues, that it is irregular and improper for applicant to have sought an application for a rescission of a summary judgment under those circumstances.

**(2) Security for payment of costs**

He further argued that in terms of Rule 31(2)(b) an applicant seeking relief should upon good cause shown and secure costs for respondent up to N\$200.00. This was not stated in applicant's affidavit, for that reason the applicant in the rescission of judgment is irregular.

### **(3) Rule 31(2)(b) and Rule 44**

He also argued that a rescission of judgment in terms of the above rules can only be set aside where it was granted in the absence of the party seeking such relief. It is therefore his further submission that respondent is prejudiced as the application for rescission of judgment is improper and irregular.

[7] Advocate Phatela for applicant/Defendant opposed his application, his argument in a nutshell is that this application for a rescission of a summary judgment is not in terms of the Rules as the said summary judgment was granted in default despite the presence of his legal practitioner in court on that particular day. He contended that despite the legal practitioner's physical presence, he was in default of filing crucial documents, that is his mandatory answering affidavit which is a prerequisite to enable the court to have a full picture of the grounds for opposing the summary judgment. He further argued that, the summary judgment was granted without applicant/respondent having been accorded his right to a fair trial as provided for in Article 12 of the constitution, therefore, he was deprived of a fair trial.

[8] He also submitted that the absence of an answering affidavit is on the same footing with the absence of a plea, thereby qualifying for a default in terms of Rule 31(2)(b) of the Rules of court. The other ground which he relied on is that there is no justification for the court to have refused a postponement of the matter in the circumstances. Advocate Phatela vigorously argued in his Heads of Argument that the court misdirected itself and erred in its handling of this matter, in that it dealt with the application for summary judgment as an ordinary application for a default judgment and that it was dealt with without applicant dealing with the merits of the summary judgment. Lastly, that the court was at some point willing to grant a

postponement on condition that applicant's legal practitioner did not dirty the water by raising any other point. This is a point, I stated, I would re-visit later.

[9] Advocate Phatela clearly raises a point of irregularity of the proceedings and the issue of the court having reached a decision without taking into account certain facts and its reference to a desire to grant applicant/Defendant an indulgence of a postponement.

[10] Advocate Phatela's argument is grounded on the irregularity of the proceedings, but, said very little if anything at all about the plaintiff/respondent's complaint about the procedure employed in seeking the setting aside of the said judgment.

[11] In my mind applicant should have applied a proper procedure in seeking a redress in this matter. It is pertinent to point out clearly that:

- 1) this court does not have powers either at common law or statutory law to review the proceeding of a court with the same jurisdiction; and
- 2) a party who is not happy with proceedings or an outcome in the circumstances should elect his forum for a redress. He can either seek a review of the proceedings if he believes they were irregular or an appeal if he is of the view that there was a misdirection on the court's part. It is an election which must be made right from the start.

[12] In my view an applicant/defendant's complaint about irregularity and the outcome based on the said procedure should not find home before this court of a similar jurisdiction.

[13] For that reason my conclusion is that applicant/defendant should direct its complaint to a proper forum. Its arsenal is pointed to a wrong direction as it were.

Accordingly, this is my order:

- 1) the Rule 30 application succeeds; and
- 2) applicant/defendant shall pay the costs and such costs shall include one instructing and one instructed counsel.

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M Cheda  
Judge

**APPEARANCES**

**PLAINTIFF :** Advocate A Van Vuuren  
Instructed by Engling Stritter and Partners  
Windhoek

**DEFENDANT:** Advocate T Phatela  
Instructed by Murorua & Associates  
Windhoek