



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 118 /2012

In the matter between:

DAVEY'S MICRO CONSTRUCTION CC**PLAINTIFF/RESPONDENT**

And

JUNIAS NGEDE**DEFENDANT/APPLICANT**

Neutral citation: *Davey's Micro Construction CC v Ngende* (I 118/2012) [2014] NAHCMD 238 (8 August 2014)

Coram: UEITELE, J
Heard: 11 June 2014
Delivered: 11 June 2014
Reasons released on: 08 August 2014

Flynote:

Practice - Judgments and orders - Rescission of judgment - Can only be granted in terms of rule 44(1)(a) of Rules of High Court or under common law where judgment erroneously granted in absence of party – Application, in terms of Rule 44(1) (a) & (c), for rescission of a judgment granted in presence of applicant not competent.

Practice - Judgments and orders - Rescission - Rescission in terms of Rule 44(1)(a) - meaning of 'erroneously granted' restated.

Summary:

On 08 February 2012 the plaintiff issued summons against the defendant in which he claimed N\$72 958.50 being the amount outstanding for work done in respect of building and renovation contract. The defendant filed its plea and counterclaim for N\$103 924.11 being the costs to rectify and complete the defective work of the plaintiff and further claimed that the building and renovation work was defective and not completed.

The hearing started on 05 November 2013 and continued until 06 November 2013 on which date the plaintiff closed his case.

At the close of the plaintiff's case, counsel for the defendant applied for absolution of the instance. This court granted absolution of the instance. Thereafter the defendant indicated to the court that he would not pursue his counterclaim and he withdrew the counterclaim. The Court granted the defendant leave to withdraw its counterclaim with no order as to costs and a cost order was awarded in respect of the counterclaim that was withdrawn.

On 17 January 2014 counsel for the defendant filed a notice of motion seeking the following relief: '(1) that the cost orders made by the Honourable Justice Ueitele in respect of his judgment on absolution of the instance and withdrawal of the counterclaim of the applicant be rescinded and set aside in terms of Rule 44; (2) that the respondent/ plaintiff pay the costs of the applicant/defendant in respect of the judgment on absolution of the instance; (3) costs of this application and (4) further and/or alternative relief.'

Held that the order made on 06 November 2013 was not made in the absence of any party or as a result of a mistake common to the parties. It thus follows that the application cannot be made in terms of Rule 44(1) (a) &(c).

Held further that there is no ambiguity in the two cost orders as both orders are very clear in that no cost order is granted in respect of the absolution from the instance and a cost order is awarded in respect of the counterclaim that was withdrawn.

Held further that there is no patent error or omission to justify a rescission of the order in terms of Rule 44(1) (b).

ORDER

- 1 The application for rescission of judgment is refused.
- 2 The applicant is ordered to pay the respondent's costs.

JUDGMENT

UEITELE, J

BACKGROUND

[1] On 08 February 2012 the plaintiff issued summons against the defendant in which he claimed N\$72 958.50 being the amount outstanding for work done in respect of building and renovation contract (the original quotation was N\$ 150 200.00).

[2] The defendant entered a notice of intention to defend the plaintiff's claim. He (the defendant) claiming that the building and renovation work was defective and not completed filed a counterclaim of N\$103 924.11 for the costs to rectify and complete the defective work of the plaintiff.

[3] The hearing started on 05 November 2013 and continued until 06 November 2013 on which date the plaintiff closed his case.

[4] At the close of the plaintiff's case, Mr Grobler who appeared for the defendant applied for absolution of the instance. After both counsels argued the matter, this court granted absolution of the instance. Thereafter the defendant indicated to the court that in view of the fact that the absolution from the instance was granted in respect of the plaintiffs claim the defendant would not pursue his counterclaim and he withdrew the counterclaim. The Court granted the defendant leave to withdraw its counterclaim.

[5] When the court granted the absolution from the instance it said "as regards to costs, because of the state of the pleadings, this is a case in which I will make no order as to costs".

Application for rescission of judgment

[6] On 17 January 2014 Mr Grobler on behalf of the defendant filed a notice of motion seeking the following relief:

- '1. That the cost orders made by the Honourable Justice Ueitele in respect of his judgment on absolution of the instance and withdrawal of the counterclaim of the applicant be rescinded and set aside in terms of Rule 44.
2. That the respondent/ plaintiff pay the costs of the applicant/defendant in respect of the judgment on absolution of the instance.
3. Costs of this application.
4. Further and/or alternative relief.'

[7] Mr Tjituri opposed this application and filed his answering affidavit. The application was set down for hearing on 11 June 2014 and on that day I made an order dismissing the application. On 19 June 2014 Mr Grobler filed a notice of appeal

against the order dismissing the application for rescission and requested reasons for that order. What follows are the reasons for the order dismissing the application for rescission of judgment.

[8] Mr Tjituri in the opposing affidavit he states that the defendant's application is ill-advised and without any basis in law. I agree with Mr Tjituri's assertions for the following reasons: The applicant/defendant seeks rescission of the judgment order made on 06 November 2013 in terms of Rule 44. Rule 44 in material terms provides as follows:

'Variation and Rescission of Orders

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 granted in the absence of any party affected thereby;
- b) An order or judgment in which there is an ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission;
- c) An order or judgment granted as a result of a mistake common to the parties.'

[9] It has been held that Rule 44(1)(a) only finds application where a judgment was erroneously sought or erroneously granted in the absence of a party¹. 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*² 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.

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 1988 (1) SA 639 (W).

[10] The term 'erroneously granted' was also applied in a case, where the capital claimed has already been paid by the defendant³. In the matter of *Nyingwa V Moolman NO*⁴ White, J states 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 granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'

[11] In the present case it is common cause that the order made on 06 November 2013 was not made in the absence of any party or as a result of a mistake common to the parties. It thus follows that the application cannot be made in terms of Rule 44(1) (a) &(c).

[12] The application for rescission could therefore only have been brought in terms of Rule 44(1) (b). The applicant, however, has to satisfy the court that the order is ambiguous. There is no ambiguity in the two cost orders as both orders are very clear in that no cost order is granted in respect of the absolution from the instance and a cost order is awarded in respect of the counterclaim that was withdrawn.

[13] What remains then is for the court to consider if there was a patent error or omission in granting these orders. When the Court made the costs orders which it made, the Court said the following⁵:

'[27] the basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.⁶ It is trite that the discretion must be exercised judiciously with due regard to all relevant

³See *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).

⁴ 1993 (2) SA 508 (TK) at 510 F-G.

⁵ See paragraph 28 of the reasons released on 13 December 2013.

considerations. The court's discretion is a wide, unfettered and equitable one⁷. There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present.⁸

[28] In the present matter the only issue which the plaintiff failed to prove is the amount of N\$ 72 958-50 which he claimed. There is evidence that he left some material which he bought on the site, the evidence further indicates that Simataa Building & Renovation used some of the materials to complete the project. I am therefore of the view that it just fair and equitable not to mulct the plaintiff with a cost order.

[29] After I granted the absolution from the instance Mr Grobler indicated that the defendant withdraws its counterclaim. I indicated that the court will grant leave to the defendant to withdraw its counterclaim but the defendant has to pay the plaintiff's cost in respect of the counterclaim which it withdrew. My reason for that order is based on the provisions of Rule 42 (1) of this court's rules which reads as follows:

"42. (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an

⁶See *Hailulu v Anti-Corruption Commission and Others and China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

⁷ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

⁸See *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

order for costs.”

[14] The trial court has a discretion in the granting of costs orders and that in exercising such discretion the trial court will have due regard to all the circumstances of the case. From the above quoted paragraphs it is clear that the Court did consider the circumstance and gave reasons why it made the awards it made. I am thus satisfied that there is no patent error or omission to justify a rescission of the order in terms of Rule 44(1)(b).

[15] In the result the following order is made.

- 1 The application for rescission of judgment is refused.
- 2 The applicant is ordered to pay the respondent's costs.

SFI Ueitele
Judge

APPEARANCES:

PLAINTIFF/RESPONDENT:

Mr. M Tjituri
Of Tjituri Law Chamber

DEFENDANT/APPLICANT:

Mr. Z H Grobler
Of Grobler & Co