REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 211/2013

In the matter between:

JACOBUS JANSEN FREDERICK **APPLICANT/PLAINTIFF**

And

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **RESPONDENT/DEFENDANT**

Neutral citation: *Jacobus Jansen Frederick vs Government of the Republic of Namibia* (A 211/2013) NAHCMD 240 (12 August 2014)

Coram: UNENGU, AJ
Heard: 28 May 2014
Delivered: 12 August 2014

Flynote: Civil Practice - Application – Rescission of judgment in terms of Rule 44(1) alternatively common law – application dismissed – Court upholding the point *in limine* by the respondent that the Court is *functus officio* – in the alternative, the applicant has failed to establish good cause for default and *a bona fide* defence.

Summary: Civil Practice – Application for Rescission of judgment in terms of Rule 44(1) alternatively the common law. The Court has upheld the point *in limine* raised by the respondent and found further that the applicant has failed to establish a good

cause or a *bona fide* defence. The application for the rescission of judgment dismissed with costs.

ORDER

The application is dismissed with costs.

JUDGMENT

UNENGU, AJ

[1] This is an application for the rescission of judgment in terms of Rule 44(1) of the old Rules of the Court, alternatively in terms of the common law.

[2] The judgment sought to be rescinded was granted by Parker, AJ on the 20 June 2013 in favour of the respondent. The application for the rescission is being opposed by the respondent.

[3] In opposing the application, the respondent has raised appoint *in limine* on the basis that the rescission application both in terms of Rule 44 (1)(a) and the common law is incompetent as the merits of the dispute were already considered by this Court thus rendering this Court *functus officio*:

[4] The respondent is also opposing the application on the merits contending that Rule 44(1)(a) is not applicable because the order of the Court was not granted erroneously. With regard the common law ground, the respondent contents that the applicant cannot also succeed because he has not established good cause for the default and that he has no *bona fide* defence. It is further contended by the respondent that even if the applicant could establish good cause for the default this

Court has already found that the applicant does not have a *bona fide* defence to the respondent's claim therefore, *functus* and cannot retry the issue.

[5] In support of the submissions, Mr Marcus, counsel for the respondent, referred the Court to various case law as authorities. In respect of the issue of the court being f*unctus officio*, he referred to the matter of *Jack's Trading CC v Minister of Finance and Another* (Ohorongo Cement Intervening)[1] wherein Smuts, J when referring to Rule 44(l)(a) stated: "not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate a restatement of the common law. It does not amend or extend the common law. For this reason the common law is the proper context for the interpretation of the Rule"

[6] It is further stated that the fundamental purpose of Rule 44 is to expeditiously correct an obviously wrong judgment or order.[2]

[7] However, it would appear though that counsel for the applicant is in agreement with the submission of his counter-part that the guiding principle of common law is certainty of judgment. Once judgment is given in the matter, it is final. It may be not thereafter be altered by judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment. That is the function of the Court of appeal. However, there are exceptions to this guiding principle or the common law. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of judgment obtained by fraud or, exceptionally, *justus error*, and where party in default can show sufficient cause. (*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills*[3]).

[8] In this matter, the defendant (applicant) pleaded a special plea that the land the plaintiff wants him to be evicted from fall under a foreign jurisdiction, which is South

[1] 2013 (2) NR 491 para 6
[2] Jack's Trading CC matter at 501 E
[3] 2003 (6) SA (1) (SCA) [2003]2 All SA 113

Africa and that this Court does not have jurisdiction to grant such an eviction order sought by the plaintiff.

[9] On 12 February 2013 the special plea that the area depicted as Portion C,D and E on the diagram annexed to Plaintiff's Amended Particulars of Claim as annexure "C", fall within the 100 (HUNDRED) year High Water Mark, of the northern bank of the Orange River. The area which is depicted as Portions C,D and E of Annexure "C" of Plaintiff's Amended Particulars of Claim, falls under the jurisdiction of a foreign sovereign country, to wit the Republic of South Africa, was dismissed on the basis of the Namibia Constitution which binds the Court. On the same day the Court also ordered the parties or their legal representatives (if represented) to attend a case management conference in open court at 09h00 on 28 March 2013 and all parties present were cautioned of the provisions of Rule 37(4) and (5) of the rules of the Court. This order was served by registered post on the defendant.

[10] On the last JCM conference, the trial was set down for hearing at 10h00 for 29 and 30 May 2013. The defendant was absent at the trial and so did his counsel. No explanation was placed before Court, establishing why there was no such appearance at the trial. Counsel for the plaintiff made serious and *bona fide* attempts telephonically to get hold of the defendant to remind him of the trial date – but to no avail. As a result, the Court exercised its discretion and proceeded to trial and afforded the plaintiff the opportunity to prove its claim.

[11] The plaintiff then called three witnesses to testify. They are Mr Karl Mutani Aribeb, employed by the Ministry of Environment and Tourism: Directorate Parks and Wildlife as a park warden at the Ais-Ais Hotspring Game Park. He stated that no written permission was granted to the defendant by the Nature Conversation in terms of s 18(a) Ordinance 4 of 1975 (the Ordinance) to occupy the land and the area opposite these agricultural fields where the defendant has erected the dwelling structures. Aribeb's testimony was corroborated by the evidence of Mendes Paolo Vinte, who works at the same place with him.

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[12] The third witness called to testified by the plaintiff is Mr Richard Tondeni Nyatoti, a professional surveyor who was employed by the Ministry of Lands and Resettlement, Directorate Survey and Mapping in the Surveyor-General's office. He testified that the land in dispute fall outside the property covered by the lease and that the defendant's dwelling house and padlock situated opposite Portion C are also outside the lease property.

[13] On the evidence placed before him, Parker, AJ was satisfied that the plaintiff has proved its case that it was entitled to judgment and granted judgment for the plaintiff, ordering the defendant and any livestock belonging to him be evicted from the land. This happened on 20 June 2013.

[14] According to minutes in terms of Rule 6(5A) dated 25 October 2013, the parties agreed that the point *in limine* raised by the respondent be heard simultaneously with the merits of the application and the applicant undertook not to oppose the respondent's application for the late filing of its opposing papers. Indeed, the respondent duly filed the said opposing papers together with an application for condonation of the late filing of the opposing affidavit. Condonation was granted by the Court. Not the respondent alone was in default, the applicant also failed to file his Heads of argument in time as ordered by the Court on 31 March 2014. Condonation in that respect was also granted and the matter was then argued.

[15] Mr Wylie argued the matter on behalf of the applicant and as already indicated, Mr Marcus acted for the respondent.

[16] In view of the decision of *Colyn v Tiger Food Industries* above, both Mr Wylie and Mr Marcus are together on the issues that after evidence is led and the merits of the dispute have been determined, the Court becomes *functus official* and may not ordinarily vary or rescind its own judgment. Variation or rescission of such a judgment becomes a function of Court of appeal. However, this Court is permitted

by law to rescind such judgment where it has been obtained by fraud or *justus* error, and where the party in default can show sufficient cause. In the instant matter, there is no indication that the default judgment was obtained by fraud or as a result of *justus error.*

[17] What remains is for the applicant to show sufficient cause alternatively to satisfy the requirements of Rule 44(i). In this regard Mr Wylie places reliance on the decision of *De Villiers v Alexis Namibia (Pty) Ltd*[4], where the Supreme Court in appeal, reversed this Court's decision in a similar application on the ground that the judgment or order was erroneously sought or granted.

[18] Another authority relied on by Mr Wylie, is the matter of *Stander and Another v Absa Bank*[5] where Nepgen, J stated the following:

> "It seems to me that the very reference to 'the absence of any party affected' is an indication that what was intended was that such party, who was not present when the order of judgment was granted, and who was therefore not in a position to place facts before the Court which would have or could have persuaded it not to grant such order or judgment, it is afforded the opportunity to approach the court in order to have such order or judgment rescinded or varied on the basis of facts, of which the Court would initially have been unaware, which would justify this being done. Furthermore the Rule is not restricted to cases of an order of judgment erroneously granted, but also to an order or judgment erroneously sought. It is difficult to conceive of circumstances where a Court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this is so, were placed before the Court."

[19] Counsel argued that the set down of the matter for trial was done in the absence of the applicant, that no proof that the order was sent by registered mail was submitted at the trial and complained about the fact that the applicant's former legal

[4]2012 (I) NR 48.
[5] 1997(4) SA 873 at 882 E-G

practitioner of record continued to act on his behalf despite filing a notice of withdrawal. Be that as it may. I agree with Mr Marcus that this Court has become *functus officio* in view of the fact that the merits of the dispute were considered when it has found that the applicant occupied the respondent's land that adjourns the leased property which falls outside the leased property, and that the applicant's occupation of the property he being evicted from is without respondent's written permission, therefore illegal as the occupation contravenes section 18(1)(a) of the Nature Conservation Ordinance 4 of 1975.

[20] The applicant does not dispute these issues. He is aware that the property in question is part of the Ais Ais Hotsprings Game Park which covers approximately 4,420 kilometres^2. Therefore, the applicant must have a written permission from the respondent to stay, and to conduct farming activities there. Such written permission the applicant does not have. His defence is that the respondent allowed him to stay there. That might be the case, but the law requires him to have written permission in order for him to stay lawfully in the Park.

[21] Accordingly, for the aforegoing reasons, it is my view that this Court is precluded from retrying the same issues already decided upon by it. In the result, I uphold the point *in limine* raised by the respondent on the basis that this Court has become *functus officio* to hear the matter, and dismiss the application with costs.

[22] Even if I am wrong in upholding the point *in limine* by the respondent, the applicant did not establish that the default judgment was granted erroneously and had failed also to establish good cause for his default. The applicant, knowing that the property does not have cell phone signal nor landline connection, opted to check his post every 3 to 4 months. Further he makes contact with others outside the Game Park through his wife who drives to Rosh Pinah every second week. These arrangements might be in order under normal circumstances. However, the circumstances have changed and different from the normal one as the applicant was expected to constantly be in contact with his legal practitioner of record to give him

or her further instructions on the way forward with regard his case. This, the applicant did not do. Have he had done so, he would have been informed about the progress of his case. The applicant's conduct, in my view, is grossly unreasonable, and amounts to a high degree of negligence on his part, irresponsible and cannot be condoned. The Court in the application for default judgment could not halt the wheel of justice in order to accommodate a litigant who showed no interests in the progress of his pending case. Therefore, he failed to establish good cause for his default and does not have a *bona fide* defence, and on that basis also, the applicant cannot succeed both in terms Rule 44(1) or common law.

[23] For the above reasons and conclusions, I make the following order:

The application is dismissed with costs.

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E P Unengu

Acting Judge

Appearances:

For plaintiff:	THEUNISSEN, LOUW & PARTNERS
For defendant:	GOVERNMENT ATTORNEYS