REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 351/2013

In the matter between:

MLN EXTREME SATEFY WEAR CC **APPLICANT**

and

ROCKSTAR FOOTWEAR (PTY) LTD **1ST RESPONDENT**

REGISTRAR, HIGH COURT - WINDHOEK **2ND RESPONDENT**

DEPUTY SHERIFF - WINDHOEK **THIRD RESPONDENT**

Neutral citation: *MLN Extreme Safety Wear CC v Rockstar Footwear (Pty) Ltd* (I351/2013) [2014] NAHCMD 49 (14 February 2014)

Coram: CHEDA J
Heard: 11 February 2014
Delivered: 14 February 2014

Flynote: Service of summons or court process on a *domicilium citandi* chosen by a defendant or respondent is proper service even if he/she is no longer at that address as long as plaintiff and/or applicant has not been notified of the change of *domicilium citandi* - Acknowledgement of debt in the absence of an undue influence is an admission of liability and cannot be used to assist applicant in the rescission of a judgment - Costs on ordinary scale granted.

Summary: Applicant was issued with summons which was served at his chosen *domicilium citandi*. At the time of the service he had left his *domicilium citandi,* but, had not notified first respondent. A default judgment was granted against him and he applied for a rescission of judgment. This was not allowed as there had been proper service on him and had no good prospects of success in light of the acknowledgment of debt. Costs at ordinary scale were granted as applicant did nothing to justify an order for punitive costs.

ORDER

---

1) The application for rescission of judgment be and is hereby dismissed with costs.
2) The said costs shall include one instructing and one instructed counsel.

JUDGMENT

CHEDA J [1] This is an application for rescission of default judgment and condonation of late filing of the said application.

[2] This matter is based on a contract of purchase and sale for footwear which has however raised certain disputes. First respondent applied for a default judgment which was granted by this court on the 27 March 2013 and was served on applicant on the 10th July 2013. Applicant filed a notice of opposition on the 15 July 2013. However, this application was removed from the roll on the 19th July 2013. The parties then exchanged replying and answering documents.

[3] On the 29th August 2013 applicant filed an application for condonation of late filing of its application for rescission which application was also removed from the roll on 13 September 2013. Both applications were then set down for hearing on 11 February 2014.

[4] Applicant did not enter an appearance to defend after summons. The service of summons was effected by affixing it on the principal door at the *domicilium citandi* that was chosen by applicant himself. Applicant however, contended that summons were served at a place which he had left three months prior to the service of summons. He, therefore, did not have knowledge of it. It is for that reason that he delayed in attending to this matter and hence this application for condonation.

CONDONATION

The courts' approach to the issue of condonation is well laid down in the case of *Swanepoel v Marais and others*[1] *where the leaned Judge stated:-*

> *"The Rules of court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance."*

[1]Swanepoel v Marais and others 1992 NR 1 at 2J – 3A

[8] This appears to be a well-grounded principle of our law and was indeed applied with equal force in *Telecom Namibia Limited v Mitchel Nangolo & 34 others*[2] *[*delivered on 28 May 2012 by Damaseb, JP]. In that matter the learned Judge President came up with five principles, namely that:

a) condonation will not be had merely for asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of condonation;
b) there must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate;
c) it must be sought as soon as non-compliance has come to the fore;
d) the degree of delay is a relevant consideration; and
e) the application must show good prospects of success on the merits, for want of prospects of success is pointless for the court to grant the application, see *Beukes and another v Swabou & others*[3]*; Ondjava Construction CC v Haw Retailers*[4]*; Unitrans Fuel & Chemical (Pty) Ltd v Gove – Co-carriers CC*[5]*; Maia v Total Namibia (Pty) Ltd; and Channel Life Namibia (Pty) Ltd v Otto*[6]

[9] Applicant argued through his legal practitioner, Mr Isaacks that the summons were served at a place which he had left three months prior. Indeed under normal circumstances was a physical impossibility. However, the matter is not as easy as it is, as the court does not confine itself to the practical situation alone, which he seeks to cling to. The determining factor is found in the legal principles which govern proper or good service. Rules of this court are quite clear as to how service should be effected, in particular Rule 4 which provides thus:

SERVICE

[2]Telecom Namibia Limited v Mitchel Nangolo & 34 others (unreported) [LC 33/2009] delivered on 28/05/2012
[3]Beukes and another v Swabou & others [2010] AASC 14 (5 November 2010).
[4] Ondjava Construction CC v Haw Retailers 2010 (1) NR 286 (SC) at 288.
[5] Unitrans Fuel & Chemical (Pty) Ltd v Gove – Co-carriers CC 2010 (5) SA 340
[6]Maia v Total Namibia (Pty) Ltd 1998 NR 303 (HC) at 304 and Channel Life Namibia (Pty) Ltd v Otto 2008 (2) at 432 (SC) at 445.

"*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 of other of the following manners, namely:-*

(i) *……*
(ii) *……*
(iii) *……*
(iv) *The person so served has chosen a domiciliun citandi by delivering or leaving a copy thereof at domicilium so chosen;*
(v) *……*
(vi) *……*
(vii) *……*
(viii) *……*
(ix) *……*"

[10] The correct legal position is that it is proper service if it is effected at the previous *domicilium citandi* even where change in *domicilium* was not brought to the plaintiff's attention, see *Sfetsios v Theophilo Poulos and Bonaero Park (edms) BPL*[7]*.*

[11] Applicant's failure to notify first respondent of his change of *domicilium citandi* is of his own making and cannot in my view be used as an excuse to defeat a legitimate application for a default judgment. This therefore, makes condonation extremely difficult. As condonation limits the examination of the prospects of success of the applicant's application, therefore, the granting of the application for rescission attracts scrutiny from the court. Applicant became aware of the judgment on the 20th May 2013, but, he waited until the 8th of July 2013 (seven weeks) to bring the application for rescission. The court has not been favoured with an acceptable explanation for the long delay since 20 May 2013. The explanation was necessary and applicant's failure to appraise the court of his failure militates against him. It is noteworthy that during this period, the parties engaged each other about this debt which resulted in applicant's acknowledging his indebtedness at least in theory and offered to settle it by installments of N$30000 per month. He, however, did not sign it. This is common cause. There was no suggestion that the acknowledgment of debt

[7]Sfetsios v Theophilo Poulos 1967 (4) SA 645 (W) and Bonaero Park (edms) BPL 1998 (1) SA 697 (T) [in Afrikaans] (extracted from the Head note).

was reached as a result of undue influence or duress. In the absence of that, it is safe to say it was genuine and the court accepts its authenticity.

[12] To my mind, there is no other clearer admission of liability than this. For applicant to turn around and deny that which he admitted in his replying affidavit is not proper.

[13] This then brings me to the question of his *bona fides* with regards to his defence. Applicant, not in many words acknowledges his indebtedness. He was properly served with summons. A default judgment was granted against him, he waited for seven weeks and only reacted against the writ of execution. These factors taken in totality, in my view speak volumes of his lack of genuineness in this matter.

[14] Rule 44 (1) (a) (*supra*) is designed to cater for cases where an order or judgment was erroneously brought or erroneously granted in the absence of any party affected thereby. The error must be common to both parties. I am not persuaded to hold that the court erroneously granted the order in this matter as there was indeed proper service and applicant's failure to enter an appearance to defend was in the circumstances willful, hence a default judgment was granted against him.

COSTS

First respondent through his counsel Advocate C.J. Van Zyl urged the court to order costs against applicant at a higher scale. The court has a discretion to do so, but, such discretion should be used judiciously. Applicant has a right to enforce his legal rights and in *casu* it was not out of the ordinary or was applicant abusive of either the court or court process to justify the invocation of the courts wrath which could be expressed in the form of punitive costs.

In the exercise of my judicial discretion, I am not inclined to punish him in that manner. In the result this is the order of the court:

ORDER

1) The application for rescission of judgment be and is hereby dismissed with costs.
2) The said costs shall include one instructing and one instructed counsel.

M Cheda

Judge

APPEARANCES

APPLICANT:	Mr B. Isaacks Of Isaacks & Benz Incorporated Windhoek
1ST DEFENDANT:	Adv C.J Van Zyl Instructed by Dr Weder, Kauta & Hoveka Inc. Windhoek