**REPUBLIC OF NAMIBIA** REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 1218/2012

In the matter between:

**JOHANNES HENDRIK VAN DER MERWE** **APPLICANT**

and

**PLASTIC PACKAGING (PTY) LTD** **1ST RESPONDENT**

**EVA SALT REFINERIES (PTY) LTD** **2ND RESPONDENT**

**REGISTRAR OF THE HIGH COURT** **THIRD RESPONDENT**

**DEPUTY SHERIFF – WINDHOEK** **FOURTH RESPONDENT**

**Neutral citation:** *Van der Merwe v Plastic Packaging (Pty) Ltd* (I 1218/2012) [2014] NAHCMD 52 (18 February 2014)

**Coram:** CHEDA J
**Heard**: 4 February 2014
**Delivered**: 18 February 2014

**Flynote:** Service of a summons affixed to a gate of a yard where there are various offices and residential properties is not a proper or good service as it is not a principal door as contemplated by the rules of court – Failure to apply for rescission of judgment due to non-service and followed by negotiations by the parties is a reasonable explanation for non-compliance with the rules – A rescission of judgment sought on the basis of a defective service but no disclosure to the court results in an erroneous judgment – Negotiations that followed after the default judgment raising the issue of an agreement with a possibility of excusing defendant/applicant enhances his chances of a successful defence. – Application for condonation and application for rescission of the judgment succeeded.

**Summary:** Applicant was in a 50% share ownership with second respondent before it converted into a company. Applicant sold his shares to a Mr Herman Mans. Second respondent later applied for a credit from first respondent to which applicant signed as surety, but, thereafter signed a memorandum of understanding excluding applicant. Summons were served on applicant and were affixed at the gate where there are many offices and residential properties. Applicant later entered into negotiations which failed. Applicant sought condonation of late application and rescission in terms of Rule 44 (1) (a) on the basis of an error of a judgment granted by the court.

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**ORDER**

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1) The application for rescission of judgment succeeds.
2) First respondent to pay costs and such costs shall include the costs of one instructing and one instructed counsel.

**JUDGMENT**

**CHEDA J** [1] Applicant approached this court in terms of Rule 44 (1) (a) of the Rules of the Court in the following briefly stated relief, that:

a) the court grants him condonation for his late filing of this application;
b) the default judgment granted by this court on 6 December 2012 under case number I 1218/2012 (hereinafter referred to as “the judgment” be rescinded and set aside;
c) any and all processes in execution issued on the basis of the judgment be set aside; and
d) costs of this application against such respondents electing to oppose this application, jointly and severally, the one paying the other to be absolved.

[2] Applicant and second respondent were in a 50% share holding each, before second respondent went into liquidation and Mr Ian Robert Mclaren, of Investment Company (Pty) Ltd is the liquidator. During the existence of the said business operations, second respondent obtained credit jointly with applicant from first respondent to the limit of N$50 000 and applicant signed as surety of the said credit facility.

[3] Applicant sold his shares to Mr Mans and the Herman Mans Family Trust [hereinafter referred to as “the trust”] who then took applicant’s liability in terms of the surety, at the same time indemnified him against any claims. This was to take effect from 31 August 2011. He further stated that from the end of February 2011, he was no longer involved in the business. During early 2012, second respondent was placed under provisional liquidation.

[4] On the 20th of May 2013 he was contacted by a tracing agent in Windhoek. After discussions with the tracing agent, he contacted Mrs Fourie of Francois Erasmus & Partners legal practitioners. He thereafter secured services of a Legal Practitioner who discovered that a default judgment [hereinafter referred to as "the judgment"] had been granted against him on 6 July 2012. The default judgment was on the basis of the Deputy Sheriff's return of service which states:

> *"No other return of service was possible as nobody could be found on the premises, who could accept service of the document…."*

This service was affected by placing the document on the door on Erf No 134, Jan Jonker road [hereinafter referred to as "the property"].

[5] It is applicant's argument through his counsel that he was not properly served in terms of the law as the Erf referred to consists of several commercial units on the property as well as other residential flats. He further argued that this Erf has no principal door and therefore it was not possible for the Deputy Sheriff to have attached court process on the principal door as is required by the rules of court. In addition thereto, it is his assertion that he is well known to various personnel inclusive of the security guards who are on duty 24hours and the cleaners who would have handed the said documents to him, had summons been left with them.

[6] A further attack was launched in respect of:

1.1 the irregularity of the particulars of claim in terms of Rule 44 of the Rules of Court;
1.2 the non-disclosure as to who represented first respondent in the agreement as first respondent is a juristic person in terms of rule 18 (6) of the rules of court; and.

1.3 the issue of non-availability and/or sequential production of invoices and receipts or any other relevant documents thereat.

[7] It is for that reason that he is of the view that, the said judgment was granted in his absence as contemplated by the provisions of rule 44 of the Rules of Court and this entitles him to a rescission of the said judgment.

[8] First respondent has argued that the Deputy Sheriff served court process in accordance with the Rules of Court and the address of service was indeed the *domicile citandi* chosen by applicant.

[9] With regards to applicant's concern about first respondent's failure to indicate in the particulars of claim as to who represented them during the agreement, they argued that this was complied with sufficiently.

To buttress their argument, they referred the court to the case of *China Henan International Co-operation (Pty) Ltd v Willem Cornelius De Klerk and another*[1] in particular the failure to particularise a certain fact which is material to the cause of action where the court stated:

Page 14 paragraphs 18-19 states

> *"[18] It cannot be controverted that Rule 18 (6) expressly requires such details – certain facta probantia – to be inserted into a pleading based in contract. The failure to do so obviously amounts to a breach of the rules. Such a breach – which can also found a valid request for further particulars for instance – should however not per se be equated – and does not per se bring about a situation – which results in a claim*

[1]China Henan International Co-operation (Pty) Ltd v Willem Cornelius De Klerk and another case no I 1673/2012 delivered on 26/11/2013 (unreported)

*formulation which is legally deficient just because it does not set out all the ancillary facts – the facta probantia – required by the rule. It surely are the requirements of the substantive law which determine whether or not a valid cause of action has been made out and not the particular compliance or non-compliance with the rules of court.*

*[19] Put differently: the failure to plead certain facta probantia – for instance in breach of Rule 18(6) – does not necessarily and always result in a situation that no legal conclusion can be drawn from the pleaded facts – particularly if the remainder of the pleaded facts cover all the essential (material) allegations imposed by the substantive law for a valid cause of action*"

In coming to this conclusion, it appears that the court was guided by the principle found in Erasmus's Superior Court Practice at B1 – 156 (service 4D. 2012) which provides:

'***Or lacks averments which are necessary to sustain an action'***

"*while rule 18 (4) requires every pleading to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim', rule 20(2) requires a declaration to 'set forth the nature of the claim' and 'the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein'.*
*And this sub-rule warrants an exception if a pleading 'lacks averments which are necessary to sustain an action*."

In the matter of *Makgae v Sentraboer (Kooperatief*) BPK 1981(4)[2], it was held that although the rules do not explicitly require plaintiff's particulars of claim as

[2]Makgae v Sentraboer (Kooperatief) BPK 1981(4) SA 239 (T) at 244C

declaration to disclose a cause of action, it is generally accepted that this is in fact what they require. (my emphasis). To my mind the omission of a material fact in proceedings will render the particulars excepiable as it would not disclose a cause of action.

[10] In as much as the leaned judge in the China Henan International Co-operation (Pty) Ltd v Willem Cornelius De Klerk and another matter is correct in that approach, I would like to add that the question of omission of *facta probantia* in my view entirely depends on the circumstances of each case. In a case where the identity of a representative is a material fact, the omission is fatal as a specific pleading regarding its existence, legal capacity, knowledge of the formation of the agreement is above all essential.

While there are strong arguments by both counsel in this matter, it came to my attention that there had been negotiations after applicant had, had knowledge of the judgment. On the 12th June 2013, respondent's legal practitioner wrote a letter to applicant's legal practitioner in the following terms:

*"Francois Erasmus and Partners*
*P O Box 6202*
*5 Conradie Street*
*Windhoek*
*Tel: +264 61 388 850*
*Fax: + 264 61 388 888*

*Our Reference:* *Mr V Du toit*
*Your Reference:* *FGE/PLA1/0038/sj*
*E-Mail:* *henno@ferasmuslaw.com.na*

*12 June 2013*

*Du Toit Associates*
*WINDHOEK*

*Dear Sir*

***PLASTIC PACKAGING (PTY) LTD / MR H J VAN DER MERWE***

*Your letter dated 10 June 2013 refers.*

*We confirm that we have received the memorandum of understanding entered into between the Herman Mans Family trust and your client. We have instructed counsel to advise client on the way forward.*

*We agree that the days as from today until we revert to you be regarded as dies non for purposes of your intended rescission application.*

*If the aforesaid proposal is not acceptable to you, you are at liberty to proceed with your application soonest.*

*We trust that you will find the above in order.*

*Yours faithfully*

*(Signed)*
*F G ERASMUS*
*FRANCOIS ERASMUS AND PARTNERS"*

[11] It is clear in that letter that there were discussions about a possible settlement and first respondent acknowledged receipt of a memorandum of understanding entered into between the Herman Mans Family Trust and applicant. Further they indulged applicant to file its application for rescission and in particular they stated:

> *"We agree that the days as from today until we revert to you be regarded as dies non for purposes of your intended rescission application. If the aforesaid proposal is not acceptable to you, you are at liberty to proceed with your application soonest."*

[12] This letter was without prejudice. It appears that at that stage the parties were on a settlement discussion which unfortunately appears to have failed as evidenced by the respondent's letter to applicant's letter of the 27 June 2013 now marked "without prejudice". In that letter they rejected the settlement offer and the *dies non* which was referred to in their letter of the 12th June 2013 was no longer applicable.

[13] The question then is, had the court that determined and granted the default judgment been made aware of the full circumstances of this case granted the default judgment thereby removing it from the ambit of Rule 44 (1) (a)? Was the court aware of the existence of the memorandum of settlement and the offer to settle? It does not seem so.

[14] The first issue then is the application for condonation. The court needs to determine whether or not the application discloses sufficient cause to entitle him to a condonation by the court. The principles regarding an application for condonation were laid down in the case of *Telecom Namibia Limited v Michael Nangolo and 34 others*[3] where Damaseb, JP at page 4 to 6, paragraphs 5 – 7 stated the following principles with regards to condonation of applications:

> *"a) Condonation will not be had merely for the asking. The party seeking condonation bears the onus to satisfy the Court that there is sufficient cause to the grant of condonation.*

[3]Telecom Namibia Limited v Michael Nangolo and 34 others (LC 33/2009 (unreported) delivered on 28 May 2012

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*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 the non-compliance has come to the fore. An application for condonation must be made without delay.*

*d) The degree of delay is a relevant consideration.*

*e) The condondation application must show good prospects of success on the merits, for success renders it pointless for the Court to grant the application."*

[15] In *casu* applicant explained that the summons was served at an address where there are numerous offices and residential flats as this address is on the main gate. Immediately he became aware of the default judgment through Mrs Fourie he instructed his legal practitioners to intervene. This intervention led to some negotiations. It is those negotiations coupled with the delay in him acquiring knowledge of the summons, that led to this delay.

[16 Applicant's explanation in the delay is that he was not aware of the summons and that there were negotiations for a possible settlement offer as he had been contacted by Ms Fourie. This delay was with the knowledge of first respondent as indicated by its letter where it initially indulged him to file for rescission of the default judgment but, thereafter, changed its mind. In light of this it is clear that applicant has shown good cause in his non-compliance, see Vaatz: In *Schweiger b Gamikaub (Pty) Ltd*[4]

[4]Schweiger b Gamikaub (Pty) Ltd 2006 (1) NR 161 (HC) at 163.

[17] While it can be argued that the address upon which summons were served is indeed his *domicilium citandi*, but, that to me does not mean that it is a principle which is cast in concrete and stone to an extent of ignoring other relevant and compelling factors. One factor which cannot escape my mind is that in as much as service was effected at the appointed address, the truth is that it was not affixed on a principal door, but, at the gate. The position would have been different had the summons been affixed on the principal door as per the rules of court. Applicant's failure to act timeously is in the circumstances fully explained and accurate. It was not challenged by respondents.

[18] It is also a requirement that applicant must show good prospects of success on merits. After applicant had gained knowledge of the default judgment, the parties entered into some negotiations, the particulars of which the court is not privy to as proved by a letter to applicant's legal practitioner of the 27 June 2013 marked "without prejudice".

[19] The essence of the letter was to convey a message of rejection of applicant's offer. This was a follow-up to first respondent's letter to applicant's legal practitioner of the 12 June 2013 which made reference to a memorandum of understanding entered into between the Trust and applicant.

[20] A letter written "without prejudice" is not admissible in evidence as it remains a privileged communication between the parties, see *Tshabalala v President Versekeringsmaatskappy BPK and Potgieter v Santam BPK*[5]. Such evidence would only have been admissible as an admission of liability if such "without prejudice" negotiations had resulted in a settlement, see *Gcabashe v Nene*[6]. Applicant's

[5]Tshabalala v President Versekeringsmaatskappy BPK 1987 (4) SA 72 and Potgieter v Santam BPK 1995 (1) SA 465.
[6]Gcbashe v Nene 1975 (3) SA 912.

argument is that he is not liable for the first respondent's claim as he had entered into a memorandum of agreement with the Trust and this fact is common knowledge to both parties. The existence of such an agreement, even in the absence of the details thereof is enough evidence to show that applicant has an arguable case.

[21] Applicant has therefore made out a case in its condonation application and it succeeds accordingly. The courts should give credence to a litigant's reasonable explanation of its non-compliance whenever there is an iota of evidence which is proof on a balance of probabilities that the default was not wilful.

[22] With regards to a rescission of judgment which is brought in terms of rule 44 (1) (a) of the Rules of this court, the pertinent question is whether judgment was granted erroneously as contemplated by the rules. It is trite that a judgment will be considered as having been granted erroneously, if at the time of granting it, there existed certain facts or a fact which the judge was unaware of which would have prohibited the granting of such judgment, see *Nyimgwa v Moolman and Colyn v Tiger Food Industries Ltd t/a Meadour Feed*[7].

[23] Advocate Van Vuuren argued that the summons is not clear as to who represented the parties in the said agreement. He placed his reliance on R18 (6) which provides thus:

> *"A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on the pleading shall be assessed to the pleading"*

[24] This is in fact the law. First respondent in both its claims did not do so. No doubt such omission renders the summons and particulars defective and are therefore vague and embarrassing as they lack the required particularity. Such pleadings do not disclose a cause of action as they do not state the nature, extent and grounds of the cause of action.

[7]Nyimgwa v Moolman 1993 (2) SA 508 (TK) and Colyn v Tiger Food Industries Ltd t/a Meadour Feed.

[25] In *Chassis Engines CC v Nghikofa* [8], Parker J held that a statement is said to be vague and embarrassing when it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied upon, and therefore it is insufficient in law to support in whole or in part the action or defence. He further stated that an exception in that regard can only be taken when the vagueness and embarrassment strike at the root of the cause of action or the defence.

[26] This in fact is correct legal position and is applied by our courts.

[27] I am in agreement with applicant's counsel's submission that the particulars do not disclose a cause of action and that in light of the circumstances surrounding the transaction between the parties, applicant should be accorded an opportunity to defend the said action. The court which granted the default judgment was not privy to the circumstances surrounding this matter and accordingly the judgment was erroneously sought and erroneously granted.

[28] In light of that it justifies the application of Rule 44 (1) (a). In the result the following is the order of the court:

**ORDER**

1) the application for rescission of judgment succeeds; and

[8]Chassis Engines CC v Nghikofa case No I 887/2010 delivered on 29 July 2011 (unreported)

2) first respondent to pay costs and such costs shall include the costs of one instructing and one instructed counsel.

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M Cheda

Judge

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**APPEARANCES**

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|---|---|
| **APPLICANT**: | Advocate A Van Vuuren<br>Instructed by Du Toit & Associates<br>Windhoek |
| **1ST RESPONDENT**: | Advocate C Van Zyl<br>Instructed by Francois Erasmus & Partners<br>Windhoek |