

UNREPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 4050/2014

In the matter between:

FABIANUS KAMBANDA

PLAINTIFF

And

FIRST NATIONAL BANK OF NAMIBIA

DEFENDANT

Neutral citation: *Kambanda v First National Bank of Namibia* (I 4050-2014)
[2016] NAHCMD 192 (6 July 2016)

Coram: OOSTHUIZEN J

Heard: 19 APRIL 2016

Order and Skeletal reasons delivered: 27 May 2016

Reasoned Judgment released: 6 July 2016

Flynote: Rescission of Default Judgment.

Summary: Rescission of Judgment by Default. Three modes of rescission. Rule 16, Common Law and Rule 103 of the Rules of the High Court of Namibia. Common denominator in respect of Rule 16 rescission and common law rescission. Good cause and sufficient cause. Both include a prima facie defence. Rule 103(1)(a) requires, in the circumstances of the subject case, an application by the applicant, within a reasonable time to rescind the default judgment erroneously sought or granted in the absence of the applicant.

ORDER

THE FOLLOWING ORDER WAS MADE:

The application for rescission of the default judgment granted on 19 February 2015 is refused with costs on an attorney own client scale, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

OOSTHUIZEN J:

[1] On 19 January 2015 personal service of the summons and particulars of claim was effected on the defendant.¹

[2] Defendant did not enter an appearance to defend.

¹ Record, Index for Notices, p 27.

[3] On 19 February 2015 Parker AJ granted default judgment in favour of First National Bank (plaintiff) against Mr Kambanda (defendant) in the following terms²:

“1. Payment in the amount of N\$ 723 761.90.

2. Compound interest on the aforesaid amount at the Plaintiff’s home loan base rate currently 10.75% per annum, calculated daily and capitalized monthly as from 26 September 2014 to date of final payment.

3. An order in terms whereof the following property is declared executable:

Certain: Erf No 230, Tamariskia (Extension No 1)

Situated: In the Municipality of Swakopmund
Registration Division “G”

Measured: 942 (Nine Four Two) square metres

Held: under Deed of Transfer No T 1654/2013

4. Costs of suit on an attorney and client scale, as agreed.”

[4] On 7 May 2015 the writ of execution in respect of movable property was personally served on defendant.³

[5] The property described in paragraph 3 above was eventually sold in execution to one Samuel Autrich Franz for N\$ 700 000.00 on 11 September 2015.⁴

[6] On 15 October 2015 the plaintiff’s attorneys of record received the defendant’s application for rescission dated 6 October 2015.⁵

² Record, Index for Court Orders ... pp 1,2.

³ Record, Index for Notices ... p 6.

⁴ Record, Index for Notices ... p 16.

⁵ Record, Index for Notices ... pp 18, 19.

[7] Plaintiff opposed on 19 October 2015.⁶

[8] Notice of opposition was served on defendant on 3 November 2015.⁷

[9] The answering affidavit of the plaintiff was served on defendant on 20 November 2015.⁸

[10] The notice of status hearing for 29 February 2016 by the managing judge was served on defendant on 22 February 2016.^{9, 10}

[11] On 29 February 2016 the matter was postponed to 7 March 2016.

[12] On 7 March 2016 the defendant (applicant) was personally in court when the court ordered that:¹¹

1. The applicant shall file his replying affidavit on or before 10 March 2016;
2. The applicant to file his heads of argument on or before 23 March 2016;
3. The respondent to file its heads of argument on or before 4 April 2016.
4. The rescission application is set down for hearing on 19 April 2016 at 09h00.

⁶ Record, Index for Notices ... p 27.

⁷ Record, Index for Notices ... p 28.

⁸ Record, Index for Notices ... p 69.

⁹ Record, Index for Notices ... p 73.

¹⁰ Record, Index for Court Orders ... pp 3,4.

¹¹Record, Index for Court Orders ... p 22.

[13] Defendant (applicant) did not file a replying affidavit and no heads of argument.

[14] On 19 April 2016 the defendant availed the court with a written submission.

[15] Due to personal services of the initial processes the defendant can hardly be heard to say that default judgment was erroneously given in his absence. He never filed a notice of opposition and did not appear of 19 February 2015 before Parker, AJ. Defendant appeared to be literate and well versed. This is also evidenced in the correspondence he had with plaintiff and its legal practitioners, his application for rescission and his written submissions.

[16] It is trite law that an application for rescission must be brought within a reasonable time after the applicant became aware of it. Rule 16(1) define the time periods to be within 20 days after he has knowledge of the default judgment. Rule 103(1) requires “within a reasonable time“. The common law likewise would require an application within a reasonable time after the judgment came to the knowledge of the defaulter, based on the principle that certainty and finality should be reached concerning judgments of the courts.

[17] The present rules of this court concerning rescission of judgments are akin to the previous rules 31(2) and 44(1).

[18] In Grüttemeyer NO v General Diagnostic Imaging 1991 NR 441 at 448 C – J, the law concerning the rescission of judgments is appropriately set out and I shall not repeat same herein.

[19] Rule 16 provides as follows:

“(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N\$5 000, set aside the default judgment on such terms as to it seems reasonable and fair, except that –

(a) the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security; or

(b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.

(3) A person who applies for rescission of a default judgment as contemplated in subrule

(1) must -

(a) make application for such rescission by notice of motion, supported by affidavit as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security;

(b) give notice to all parties whose interests may be affected by the rescission sought;
and

(c) make the application within 20 days after becoming aware of the default judgment.

(4) Rule 65 applies with necessary modification required by the context to an application brought under this rule.”

[20] The relevant portions of Rule 103 reads as follows:

“(1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

(a) erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) ---;

(c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or

(d) --.

(3) The court may not make an order rescinding or varying an order or judgment unless

it is satisfied that all parties whose interests may be affected have notice of the proposed order.”

[21] The applicable common law is¹²-

“Broadly speaking, the exercise of the Court’s discretionary power [under the common law] appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default.”

[22] In so far as it may be necessary and in terms of Rule 103(1)(c) I, on my own initiative vary the default judgment granted on 19 February 2015, by replacing the name “Justice Kambanda” in the header of the said court order with “Parker, AJ”.

¹² Trengove AJA in *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042H.

[23] It is clear that defendant's explanations why nothing meaningful was done to rescind the aforesaid judgment before 6 October 2015, is incomplete and do not meet the requirements of a reasonable explanation. In this respect the defendant's founding affidavit was compared with the answering affidavit of Ms Morland.¹³

[24] Defendant did not adduce any evidence of a defence on the merits of plaintiff's claim at all and failed dismally on the requirement to show a bona fide or prima facie defence at all. From the papers it is clear that he has no triable defence.

[25] The lack of reasonable explanations and an absent defence, negatively impacted on any consideration of the bona fides of the application.

[26] Defendant's unexplained factual inaction during February to August 2015, contributed nothing to the consideration of an application in good faith.

[27] Having been personally served with the Summons on 19 February 2015, failing to do anything subsequent to 7 May 2015 when he was personally served with a writ of execution on movable property and only writing to plaintiff's legal practitioners on 27 August 2015 (which he alleged was much earlier), falsely claiming payment made in the sum of N\$ 105 000.00 to prevent the auction and generally not complying with any of the requirements of a rescission application pertaining to any of the three available rescission remedies, resulted in the refusal of defendant's application with costs on the scale of attorney and own client as agreed when the loan agreement was concluded.

[28] In respect of costs I find that a rescission application is a substantive application and not interlocutory and therefore is not capped by Rule 32(11) of the Rules of the High Court.

¹³ Record, Index for Notices ... pp 22-26 and pp 29-63.

GH OOSTHUIZEN

Judge

APPEARANCES

APPLICANT: Mr F. Kambanda

Applicant (Defendant) in Person, Walvis Bay, Namibia

RESPONDENT: Adv. B De Jager (Instructed counsel)

By Weder, Kauta & Hoveka Inc., Windhoek