

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NUMBER: CA 12/2017

In the matter between:

GROVE MALL (PTY) LTD

APPELLANT

And

WAGO INVESTMENTS CC T/A BATA SHOES

1ST RESPONDENT

JACKSON TUHAFENI WANDJIVA

2ND RESPONDENT

MICHAEL MUKICHI GOTORE

3RD RESPONDENT

Neutral citation: *Grove Mall (Pty) Ltd v Wago Investments CC T/A Bata Shoes (CA 12/2017) [2017] NAHCMD 252 (28 August 2017)*

Coram: **UEITELE J**

Heard: **12 MAY 2017**

Delivered: **28 AUGUST 2017**

Flynote: Judgments and orders - Default judgment - Setting aside of under Rule of Court 49 - On good cause - What amounts to.

Practice - Judgments and orders - Setting aside of a default judgment under s 36 (b) of Magistrates Court Act, 1944 - When granted.

Summary: The appellant, Grove Mall (Pty) Ltd instituted proceedings against the respondents claiming an amount of N\$ 146 948-72 as arrear rent in respect of a leased property. After receiving the summons the respondents paid an amount of N\$ 145 00 to the appellant.

Despite the fact that the respondents paid a substantial amount the appellant still proceeded and obtained default judgment against the respondents for the sum of N\$87 178-36. When the appellant moved to execute the default judgement the respondents paid the N\$87 178-36 and thereafter applied to the Magistrates Court for the District of Windhoek for a rescission of the default judgment granted against them. In addition to the rescission the respondents sought an order directing the appellant to refund them the amount of N\$87 178-36, and to pay the costs of the rescission application on an attorney and client scale.

The Magistrate varied the default judgement from N\$ 87 178-36 to N\$ 1 948 -72 and also ordered the appellant to refund the respondents the amount of N\$87 178-36 and to pay the costs on an attorney and client scale. On appeal against the order of the Magistrate.

Held that to show good cause in terms of rule 49 (1) and (2) of the Magistrates Court Rules an applicant must comply with the following requirements: (a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance. (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim. (c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for.

Held, further, that in so far as the application was brought in terms of s 36 (b) it is necessary for an applicant to in detail set out the particularities of the allegations of fraud. Baseless charges of fraud are not encouraged by Courts of Law. Involving as

they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be lightly made, and when made should not only be made expressly but should be formulated with a precision and fullness which is demanded in a criminal case.

Held that the defendants did not make out a case for the rescission application to have been granted. The requirements to have the default judgment rescinded have not been met on the founding papers. The court was of the view that the learned magistrate could not rescind the default judgment granted in the absence of the defendants on the basis of s 36(b), he erred in that respect.

ORDER

1. The appeal is upheld.
2. The order of the Magistrates Court for the District of Windhoek is set aside and replaced with the following:
 - (a) The default judgment granted on 16 January 2016 is rescinded.
 - (b) The defendants are granted leave to defend the action instituted against them by the plaintiff under case number 5605/2015.
 - (c) There is no order as to costs.'
3. The defendants must play the plaintiff's costs in respect of this appeal.

JUDGMENT

UEITELE, J

The parties

[1] The appellant, who was the plaintiff in the court below, is the Grove Mall of Namibia (Pty) Ltd, a private company with limited liability, duly incorporated and registered in accordance with the Company Laws of Namibia. The appellant owns or administers a shopping complex which is situated, in the Windhoek suburb of Kleine Kuppe.

[2] The first respondent, who was the first defendant in the court below is Wago Investment CC t/a Bata Shoes, a close corporation incorporated and registered in terms of the Close Corporation Act, 1988. The second respondent, who was the second defendant in the court below, is a natural person Jackson Tuhafeni Wandjiva.

[3] Third respondent, who was the third defendant in the court below, is a natural person, Michael Mukichi Gotore. The second and third respondents are the two members of the first respondent. I will for ease of reference refer to the parties as they appeared in the court below.

The background facts

[4] As I have indicated above the plaintiff is the owner or administrator of a shopping complex known as the Grove Mall. On 6 August 2014 the plaintiff and the first defendant (the first defendant was represented by the second and third defendants) concluded a written lease agreement in respect of a certain business premises namely: Shop No. 286, The Grove Mall of Namibia, measuring approximately 134 square meters, including one parking bay.

[5] The terms of the lease agreement, amongst other things, were that: the lease agreement was for a period of 5 years commencing 1 October 2014 and terminating on 30 September 2019, that the rental payable in respect of the shop was the amount of N\$ 405 per square meter and N\$ 500 per month in respect of the parking bay. The first defendant was also responsible for the payment of the municipal services.¹ The second and third defendants bound themselves as sureties for and co-principal debtors with the first defendant for the due and proper fulfilment of the obligations of the first defendant.

¹ That is the rates, taxes and fixed water charges.

[6] By August 2015 the first defendant was in arrears with the payment of its rent and municipal services. The rent and municipal services accounts that were outstanding were for the months of July 2015 and August 2015. The amount that was outstanding as at the end of August 2015 was the amount of N\$ 146 948-72.

[7] On 27 August 2015 the plaintiff caused summons to be issued out of the Magistrates Court for the District of Windhoek. In the summons the plaintiff claimed the amount of N\$ 146 948-72 plus interest at the rate of 20% per annum *a tempora morae* until the date of payment. The plaintiff furthermore claimed the costs of suit on an attorney and client scale.

[8] After the first defendant received the summons, it (first defendant), did not enter an appearance to defend the action, but proceeded to, on 1 September 2015, pay an amount N\$ 75,000 to the plaintiff. On 14 September 2015 the first defendant paid another amount of N\$70, 000 to the plaintiff. The plaintiff thus paid a total amount of N\$ 145 000.

[9] The pleadings placed before me do not disclose what transpired between 15 September 2015 and 14 December 2015. It is not clear whether the first defendant again fell in arrears with the rent and municipal services payment or not. But what is clear is that, despite the fact that the first defendant paid the amount of N\$ 145 000, the plaintiff on 14 December 2015 applied for and obtained, on 19 January 2016, a default judgment in the amount of N\$74 899-38 against all the three defendants.

[10] On the strength of the default judgment granted against the defendants the plaintiff during February 2016 sought a warrant of execution against the defendants' property out of the Magistrates Court for the District of Windhoek. On 8 March 2016 the clerk of the Magistrates Court for the District of Windhoek issued a warrant of execution against the properties of the defendants. The warrant of execution was for the amount of N\$ 73 051-76 (this amount included legal costs of N\$ 1002 -42). The plaintiff caused that warrant of execution to be served on the defendants on 21 April 2016.

[11] On 16 May 2016 the plaintiff placed an advertisement in the 'The Namibian' and 'Die Republikein' newspapers notifying the public that the properties of the defendants

will be sold on a public auction in order to satisfy a judgment granted against the defendants on 19 January 2016. On 17 May 2016 the plaintiff through its legal practitioners addressed a letter to the defendants indicating that as at 17 May 2016 the defendants were indebted to the plaintiff in the amount of N\$ 89 127-08. On that same day (i.e. 17 May 2016) the defendants paid to the plaintiff the amount of N\$ 89 127-08.

[12] On 20 June 2016 the first defendant launched an application for the rescission or variation of the default judgment granted against it on 19 January 2016. In the same application the first defendant sought an order directing the plaintiff to refund it the amount of N\$ 87 178-36. It furthermore sought an order directing the plaintiff to pay the costs of the rescission application on an attorney and client scale.

[13] From the pleadings filed of record it appears that the application to rescind or vary the default judgment granted on 19 January 2016 was based on the allegations that the default judgment was obtained by fraud or mistake. In prayer 1 of the application for the rescission of the default judgment granted on 16 January 2016, the first defendant stated that the relief was sought in terms of rule 49 (1) as it was obtained by error or fraud. In paragraph 3 of the founding affidavit to the rescission application it was stated that the default judgment was obtained by error and/or fraud. The plaintiff, on 28 June 2016 gave notice that it will oppose the rescission application.

[14] The application, for the rescission of the default judgment granted against the defendants on 19 January 2016, was set down for hearing on 19 July 2016 but from the pleadings it appears that the application was only heard on 31 August 2016. After hearing the application for the rescission of the default judgment granted against the defendants on 19 January 2016 the Magistrate made the following order (I quote verbatim):

‘1. The default judgment granted by this court on 19th January 2016 is varied to the amount of N\$ 1 948 -72 plus interest on which amount was outstanding at the time the application for default judgment was filed with the court.

2. The respondent [i.e. the plaintiff] is ordered to refund the applicant [i.e. the defendants] the amount of N\$ 87 178-36 by which the respondent was erroneously unjustly enriched.

3. The respondent [i.e. the plaintiff] is ordered further to pay costs of this application on the scale attorney and client.'

[15] The plaintiff is aggrieved by the order of the Magistrate and now appeals against the whole judgment of the Magistrate. I will proceed to first set out the grounds and basis on which the plaintiff appeals against the judgement of the Magistrate.

The grounds on which the appeal is based

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[16] The plaintiff basis its appeal on four grounds of appeal namely that, the learned Magistrate erred;

- (a) In finding that the appellant was not entitled to judgment in the amount of N\$74,899.38;
- (b) In ordering the plaintiff to refund to the defendants the amount of N\$87 178-36;
- (c) In finding that the plaintiff was erroneously unjustly enriched at the expense of the defendants; and
- (d) In finding the plaintiff was liable to pay the defendants costs of the application for rescission of judgment on the scale as between attorney and client.

The applicable legal principles

[17] I find it convenient to, before I consider whether the learned magistrate was correct in his findings, set out the legal principles governing rescission of judgements in the Magistrates Court. Applications for rescission of judgment in the Magistrates Court are governed by section 36(1) of the Magistrates' Courts Act 32 of 1944, which provides that:

'36 What judgments may be rescinded

The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*-

- (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
- (b) rescind or vary any judgment granted by it which was *void ab origine* or was obtained by fraud or by mistake common to the parties;
- (c) correct patent errors in any judgment in respect of which no appeal is pending;
- (d) rescind or vary any judgment in respect of which no appeal lies.'

[18] The procedural aspects of an application for the rescission of a default judgment is regulated by Magistrates' Courts Rules, Rule 49. That rule prescribes the procedure that must be followed and the contents of the affidavit which must be filed in support of the application for rescission or variation of a judgment granted in the absence of a party seeking its rescission. Subrules (1) to (9) deal with the rescission or variation of a default judgment by a party to the action while subrules (10) and (11) deal with the rescission or variation of judgements contemplated in paragraphs (b) to (d) of s 36 of the Magistrates Court Act, 1944. Subrules (1) to (9) provides that:

'(1) Any party to an action or proceedings in which a default judgment is given may apply to the court to rescind or vary such judgment provided that the application shall be set down for hearing on a date within 6 weeks after such judgment has come to his knowledge.

(2) Every such application shall be on affidavit which shall set forth shortly the reasons for the applicant's absence or default of delivery of a notice of intention to defend or of a plea and, if he be the defendant or respondent, the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment.

(3) Save where leave has been given to defend as a *pro Deo* litigant in terms of rule 53, no such application shall be set down for hearing until the applicant has paid into court, or has secured to the satisfaction of the plaintiff, to abide the directions of the court, the amount 20% of the principal debt to a maximum amount of N\$3000.00 as security for the costs of the application, but the judgment Creditor may, by consent in writing lodged with the clerk of the court, waive compliance with this requirement.

(4) Where the amount of the costs awarded against the applicant under such judgment has not at the date of the hearing of the application been taxed the clerk of the court shall assess the approximate amount of such costs and the amount so assessed shall be paid into court.

(5) The provisions of rule 18 (10) shall *mutatis mutandis* apply to moneys paid into court under this rule.

(6) Unless the applicant proves the contrary, it shall be presumed that he had knowledge of such judgment within 2 days after the date thereof.

(7) The court may on the hearing of any such application, unless it is proved that the applicant was in willful default and if good cause be shown, rescind or vary the judgment in question and may give such directions and extensions of time as may be necessary in regard to the further conduct of the action or application.

(8) The court may also make such order as may be just in regard to moneys paid into court by the applicant.

(9) If such application is dismissed, the judgment shall become a final judgment.'

[19] The courts have set out the requirements for the rescission of a judgment given by default in the absence of a party to be the following:

- (a) A party seeking to rescind a judgment granted by default in his or her absence must give a reasonable explanation of his or her default. If it appears that his or her default was wilful or that it was due to gross negligence the Court should not come to his or her assistance.²
- (b) The application to rescind the judgment grant by default in the absence of the party seeking to rescind it, must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.³

² *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O), *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) SA 861 (R).

³ *Du Plessis v Tager* 1953 (2) SA 275 (O).

- (c) A party seeking to rescind a judgment granted by default in his or her absence must show that he or she has a bona fide defence to plaintiff's claim. It is sufficient if he or she makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him or her to the relief asked for. The party need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his or her favour.⁴

[20] In so far as the rescission of a default judgment is grounded in s 36(b) of the Magistrates Court Act, 1944 particularly if the rescission is grounded on allegations of fraud the courts have held that, it is necessary for the applicant to in detail set out the particularities of the allegations of fraud. The then South African Appellate Division, in the matter of *Schierhout v Union Government*⁵ said:

‘...baseless charges of fraud are not encouraged by Courts of Law. Involving as they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be lightly made, and when made should not only be made expressly but should be formulated with a precision and fullness which is demanded in a criminal case.’

[21] Our courts have thus held that in order to succeed on a claim that a particular judgment be set aside on the ground of fraud, it is necessary for the claimant to allege and to prove that: (a) the successful litigant was a party to the fraud.⁶ (b) the evidence was in fact incorrect; (c) it was made fraudulently and with intent to mislead; and (d) it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than what it was induced by the incorrect evidence to give.

[22] Erasmus⁷ argues that section 36 (b) allows for a judgment to be rescinded where there is a ‘Mistake common to the parties’, i.e. where the parties are both mistaken as to the correctness of certain facts. He further argues that a typical case would be where

⁴ *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F-301C, also read *Brown v Chapman* 1938 TPD 320 at p. 325.

⁵ 1927 AD 94 per De Villiers JA at p 98.

⁶ See *Makings v Makings*, 1958 (1) SA 338 (AD) at pp. 344 – 345.

⁷ In *Jones and Buckle: The Civil Practice of the Magistrates’ Courts in South Africa*: Volume 1 Eighth edition at page 139.

the parties had agreed upon a statement of fact which was afterwards found to be incorrect. Thus an order as to costs, made on a mistaken and uncontradicted statement as to the date of the tender, can be rescinded on this ground⁸. An example of a case where a judgment was rescinded on the ground of mistake is the case of *Ex parte Kruger*.⁹

[23] The facts of that case (*Ex parte Kruger*) are briefly that after applicant's husband had disappeared without trace, applicant had sued for and obtained an order for divorce on the grounds of malicious desertion. Subsequently her husband's body was discovered and an inquest was held in which the date of his death was determined. A death certificate was issued and his estate was reported to the Master. The applicant, not wishing to carry the stigma of being a divorced woman, applied for an order declaring that her husband had died on a specified date, setting aside the order for divorce and declaring her to be the widow of her late husband. The court per Mullins AJ said:

'The order of Court in ... case 1763/77 [that is the divorce proceedings] was granted in error, for which error neither the applicant nor anyone else was to blame. Quite apart from any common law powers which the Court may have to rescind an order, Rule of Court 42(1) (c) entitles the Court to rescind 'an order or judgment granted as a result of a mistake common to the parties.' There can hardly be a more fundamental mistake than where a spouse seeks and obtains a divorce in *bona fide* ignorance of the fact that the other spouse is already dead.'

Did the first defendant meet the requirements of s 36 of the Magistrates Court Act, 1944 and Rule 49 of the Magistrates Court Rules?

[24] Having set out the basis on which the first defendant could apply to court for the judgment granted in its absence, on 16 January 2016, to be rescinded I now proceed to look at the reasons advanced by the first defendant in his application to rescind that judgment and the reasons advanced by the Magistrate for rescinding or varying the judgment in order to establish whether the magistrate erred when he rescinded or varied the judgment granted on 16 January 2016.

⁸ *Jones and Buckles supra*.

⁹ 1982 (4) SA 411.

[25] Rule 49 (1) and (2) of the Magistrates Court Rules tells us that an application for the rescission of a judgment granted in the absence of a party, must be brought within 6 weeks after the judgment has come to the knowledge of the applicant and that the application must be supported by an affidavit which must set forth shortly the reasons for the applicant's absence or default of delivery of a notice of intention to defend or of a plea and, if he be the defendant or respondent, the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment. [underlined for my emphasis]

[26] What is clear from the facts of this matter is that the defendants must have come to know about the default judgment by the latest on 21 April 2016, the application for the rescission of the default judgment was, however only, launched on 20 June 2016. The six weeks expired on 3 June 2016. The affidavit filed in support of the application for the rescission of the default judgment was deposed to by Mr Gotore, the third defendant. The affidavit of the third defendant consist of eleven paragraphs. The first two paragraphs of that affidavit consists of the introduction as to who the parties are. The third defendant tells us in paragraph 3 what the purpose of the application was. Paragraph 3 of the affidavit reads as follows:

'3. The present application is brought in terms of section 36 of the Magistrates' Court Act, No. 32 of 1944 read together with Rule 49 of the Magistrates Court Rules. More specifically, the purpose of this application is to rescind and /or vary the default judgment obtained against the Applicants¹⁰ on 14 December 2015 in the amount of N\$ 74 899 -38. It is the Applicants' case that the impugned default judgment was obtained by an error /and /or fraud.'

[27] In paragraph 4 of his affidavit, the third defendant tells us that the plaintiff and the defendant entered into a lease agreement and what the terms of the lease agreement were. In paragraph 5 of that affidavit the third defendant tells us that the plaintiff in August 2015 issued summons against the three defendants in which summons the plaintiff sought payment for arrears rental. In paragraph 6 of the affidavit the third defendant tells us that upon receipt of the summons the defendants proceeded to settle the claim.

¹⁰ That is the defendants.

[28] In paragraph 7 of the affidavit the third defendant tells us that during December 2015 the plaintiff applied for and was granted default judgment and says that the defendants find the granting of the default judgment 'strange and erroneous if not fraudulent.' He further tells us that the plaintiff issued a warrant of execution against the defendants' property. In paragraph 8 of the affidavit the third defendant tells us that for 'fear of closing' of their business 'as well as avoiding embarrassment associated with attachment of their properties at their business premises' the defendants paid the amount of N\$ 89 127 -08 to the plaintiffs. In paragraph 9 of the affidavit the third defendant says:

'In the light of the foregoing, the Respondent¹¹ was unduly and unjustly enriched to the tune of N\$ 87 178-36; whilst they were only entitled to an amount of N\$ 1 948 -72 plus interest thereon and legal costs if any at the time of the default judgment.'

[29] In paragraph 10 of his affidavit the third defendant addresses the issue of costs and states that regard being had to the manner in which the default judgment was obtained the plaintiff must be ordered to pay the defendants' costs of the application for the rescission of the default judgment and that the costs must be on the scale of attorney and client. In paragraph 11 of the affidavit the third defendant simply submits that for the reasons set out in his affidavit the defendants are entitled to the relief set out in the notice of motion.¹²

[30] The plaintiff opposed the application for default judgment. In the concluding part of the opposing affidavit Mr Johan van der Westhuizen who deposed to the opposing affidavit on behalf of the plaintiff said:

¹¹ That is the plaintiff.

¹² The third defendant is mistaken he when refers to the relief set out in the 'notice of motion' because the application for the rescission of judgment was not on notice of motion but was on an application and the relief sought was the following:

- '(1) to rescind and/or vary the default judgment in terms of Rule 49 (1) granted by this honourable court on 14 December 2015 as it was obtained by error or fraud;
- (2) to order the Respondent to refund the amount of N\$ 87, 178.36 to the Applicant;
- (3) to order the Respondent to pay the costs of this application on the attorney-and-client scale;
- and
- (4) Further and/or Alternative relief.'

'I am advised that the application is fatally defective, as the Applicant has failed to indicate why he remained in default of appearance in this matter.'

[31] After hearing legal arguments the magistrate granted the application and made the order I quoted above in paragraph [14]. Part of the reasoning of the Magistrate why he varied and rescinded the default judgment appears from paragraph [8] of his written reasons where he said (I quote verbatim):

'On closer perusal of their original request, it was suggested that there was never a single payment made towards settlement of arrear rentals by the Applicant. However this was contrary to annexures "3" and "4" filed of record by the Applicant. This was inadvertently admitted by the Respondent in their opposing affidavit in which they sought to justify their stance by arguing that by the time the request for default judgment was filed with this court, the Applicant's rental account with the Respondent was in arrears in the amount not less than N\$ 206 089.96. There was however no indication by the Respondent that this amount formed part of the original claim filed in terms of the main action. It is thus incomprehensible to this court as to why the Respondent had to apply for default judgment in the amount not due in terms the original claim filed. As submitted by the Applicant in this regard, it would appear to this court that there was no legal basis for the respondent to apply for default judgment in the amount of N\$79 765.35 and thus that granting the same by this court could only have been made in error. It follows further therefore that the Respondent were neither entitled to the extra amount erroneously paid to them by the applicant nor were they entitled to allocate the said amount to the so-called older debts which never formed part of the main action.'

[Underlined for emphasis]

[32] I have above quoted Rule 49 (1) and (2), those sub-rules require an applicant for the rescission of a default judgment to launch his or her application for rescission of the default judgment within 6 weeks of him or her having become aware of the default judgment and also that he or she must in his or her affidavit set out shortly the reasons for the applicant's absence or default of delivery of a notice of intention to defend or of a plea and, the grounds of defence to the action. I have also set out the allegations which an applicant must make and prove in order to succeed in application for rescission of judgement where he or she relies on fraud or mistake. In my view the third defendant's affidavit falls far short of those requirements, nowhere in his affidavit does Mr Gotore tell us why the defendants did not launch their application before the six weeks expired

(that is on or before 3 June 2016). He furthermore does not tell us why the defendants did not file a notice to defend the action nor does he tell us why the defendants did not turn up at court and he also does not tell us what the defendants' defence to the action was.

[33] The third defendant tells us in his affidavit that 'it is the applicants' (the defendants') case that the impugned default judgment was obtained by an error or fraud or both by error and fraud. Herbstein & Van Winsen¹³ point out that 'a pleading that states conclusions and opinions instead of material facts, or that draws a conclusion without alleging the material facts which, if proved, would warrant that conclusion, is defective'. In his founding affidavit the third defendant simply avers that the default judgment was obtained by an error or fraud. These are conclusions drawn by the third defendant without him having stated the material facts on which the conclusions are based. A bold allegation that a judgment was obtained by fraud is entirely insufficient.

[34] Mr Gotore's affidavit does also not tell us what the common mistake between the defendants and the plaintiff was. The third defendant's affidavit is to the extent that it fails so set out the material allegations on which the conclusions or opinions are based, defective. I agree with Ms De Jagger, counsel for the plaintiff, who submitted that the defendants did not make out a case for the rescission application to have been granted. In other words, the requirements to have the default judgment rescinded have not been met on the founding papers. I am therefore of the view that the learned magistrate could not rescind the default judgment granted in the absence of the defendants on the basis of s 36(b), he erred in that respect.

[35] Section 36 of the Magistrates Court Act, 1944 only provides for the rescission of judgments. Erasmus¹⁴ argues that:

'All that the court set aside is the judgment and not the whole proceedings. For example, where A is served with a summons issued out of a court having no jurisdiction over him, his remedy is to plead to the court's jurisdiction. If however on his failure to do so the court grants a

¹³ Celliers, Loots & Nel *Herbstein & Van Winsen, The Civil Practice of the High Courts and the Supreme Court of South Africa* 6th ed (Juta 2009) at 566.

¹⁴ In *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa*: Volume 1 Eighth edition at page 136.

default judgment against him and he thereafter succeeds in having it rescinded as a judgment which, because of lack of jurisdiction was *void ab initio* the effect of the rescission is to set aside not the summons but only the default judgment. The plaintiff summons stands, and if he chooses to proceed, A must plead to the jurisdiction.'

[36] It follows that in the present matter the Magistrate could only set aside the judgment, he could not make any other order. The plaintiff's summons stands, and if the plaintiff chooses to proceed, the defendants must plead to the summons and if they so wish file a claim in reconvention. I am thus satisfied that the Magistrate exceeded his powers under section 36 and Rule 49 when he ordered the plaintiff to refund to the defendants the amount of N\$ 87 178-36 and he thus erred in that respect.

[37] Despite the fact that I have come to the conclusion that the defendants failed to satisfy the requirements of s 36 and Rule 49, there is one difficulty that I have with the plaintiff's application for default judgment. The difficulty that I have with the application for default judgement is the fact that the plaintiff acknowledges that the summons were issued for the amount of N\$ 146 948-72. The plaintiffs further acknowledge that after the defendants were served with the summons the defendants paid the sum of N\$ 145 000. I therefore fail to understand how the plaintiff could still in those circumstances apply for a default judgment in the amount of N\$ 73 051-76. The explanation can only be obtained at a trial properly constituted where all the aspects have been pleaded and the evidence properly ventilated. For that reason only I would rescind the default judgment granted on 19 January 2016.

[38] In view of my finding that the defendants failed in their affidavit to set out and to meet the requirements necessary to rescind a default judgment, the magistrate erred when he made the punitive order of costs against the plaintiff. For the reasons that I have set out in this judgment the appeal must partly succeed. This leaves the question of costs.

[39] The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the court.¹⁵ It is trite that the

¹⁵ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one.¹⁶

[40] There is also, of course, the general rule, namely that costs follow the event, that is, the successful party must be awarded his or her costs. This general rule applies unless there are special circumstances present.¹⁷ In this matter the plaintiff was substantially successful in its appeal to set aside the judgment of the magistrate. The applicants have not referred me to any special circumstances why the general rule that costs follow the event must not apply. For that reason the plaintiff is entitled to its costs of the appeal.

[41] I therefore make the following order.

1. The appeal is upheld:
2. The order of the Magistrates Court for the District of Windhoek is set aside and replaced with the following:
 - '(a) The default judgment granted on 16 January 2016 is rescinded.
 - (b) The defendants are granted leave to defend the action instituted against them by the plaintiff under case number 5605/2015.
 - (c) There is no order as to costs.'
3. The defendants must play the plaintiff's costs in respect of this appeal.

Ueitele S F I
Judge

¹⁶ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

¹⁷ *China State Construction. Supra.*

APPEARANCES:

ON BEHALF OF THE APPELLANT:

B de Jagger instructed by
Fisher Quarmby & Pfeifer,
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ON BEHALF OF THE RESPONDENTS:

F X Bangamwabo
Of Clement Daniels Attorneys,
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