



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: I 1684/2014

ROAD CONTRACTOR COMPANY CC

APPLICANT/DEFENDANT

and

EBEN SMITH CONCRETE COMPANY LTD

RESPONDENT/PLAINTIFF

Neutral citation: *Road Contractor Company CC v Eben Smith Concrete Company Ltd* (I 1684/2014) [2017] NAHCMD 50 (01 March 2017)

Coram: MILLER AJ

Heard: 19 November 2015

Delivered: 01 March 2017

Flynotes: Civil Practice – Judgments and orders – Rescission of judgment – Condonation for the late filing of the application outside the required 20 days – Default judgment granted 23 October 2014 – Applicant became aware of the judgment on 15th January 2015 when the Deputy Sherriff

acted on the writ by attaching one CAT doser belonging to the applicant – Applicant denies that the combined summons were ever served on her as indicated on the return of service of 12 August 2014.

ORDER

1. Condonation of non-compliance with Rule 16 (1) be and is hereby granted.
2. The application for rescission of default judgment is granted.
3. The writ of execution issued by the Registrar in pursuant of the judgment is hereby set aside and the Deputy Sheriff is stopped from acting thereon.
4. Applicant is granted leave to defend the action in terms of the Rules; and
5. The respondent is ordered to pay the costs of the application.

JUDGMENT

Miller, AJ:

[1] This is an application to rescind the default judgment granted in favour of the respondent, plaintiff in the main action, on 23 October 2014 in the amount of N\$ 42 346.86. The applicant further seeks to set aside the writ of execution issued by the Registrar in pursuant of the judgment and to stop the Deputy Sheriff from acting thereon. This application was filed on 19 March 2015 and a bond of security in the amount of N\$ 5 000 has also been furnished by the applicant as required by rule 16 of the Rules of Court.

[2] Rule 16(3) reads:

'(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.'

[3] As part of the application, the applicant thus seeks condonation for the late filing of the application outside the required 20 days after becoming aware of the default judgment.

The Application

[4] The founding affidavit is deposed to by the Company Secretary of the applicant who, firstly denies that the combined summons were ever served on her as indicated on the return of service of 12 August 2014 and that if that was the case, the deponent would have acted on the summons and would have instructed counsel to handle the matter. As a consequence, applicant was not aware of the suit against it by the respondent.

[5] Accordingly, it was only on the 15th January 2015 that the applicant became aware of the judgment against it when the Deputy Sherriff acted on the writ by attaching one CAT doser belonging to the applicant. After an investigation by the applicant, it became apparent from the applicant's accounting system that only an amount of N\$ 13 685.00 was owing to the respondent which was duly paid on 12 February 2015. The deponent claims that no other amount is due and owing to the respondent and that any further payment would result in unjustified enrichment of the respondent and puts the respondent to the proof thereof. In the same affidavit, the deponent states that the applicant received the summons from the legal practitioners of record before the investigation was started, which depicts a picture that the applicant knows of the claim after the 15th January 2015.

[6] Counsel in the matter could not attend to it earlier due to 'heavy work overload'. Final instructions seeking rescission of the Default judgment was only received by counsel on 10 March 2015 who then proceeded to launch the application on 19 March 2015. This much is confirmed by Mr. Horn by confirmatory affidavit which was however filed late and only after the respondents have already filed its answering affidavit. The applicant is of the opinion that there is a bona fide defence and that it is up to the respondent to prove, at trial, its entitlement to the remainder of the debt. It is further alleged that sufficient grounds has been set out for the court to grant condonation for the late filling of the application. The applicant further maintain that rule 32 has been complied with in that a letter has been forwarded to the respondent in an attempt to resolve the matter but that no response was ever received.

The opposition

[7] The legal practitioner on behalf of the respondent deposed to the replying affidavit. From the opposing affidavit of the respondent, the respondent admits that

security in the amount of N\$ 5000 has been furnished and that the amount of N\$ 13 685.00 has been paid.

[8] The respondent denies that the applicant was not served with the summons, claiming that a presumption arises that service was properly done on the face of the return of service provided by the deputy sheriff. The respondent deny that the amount paid was the only debt owing, stating that the system may not have been properly updated so as to reflect the true indebtedness to the respondent and that since no confirmatory affidavit was provided to confirm the correct capturing on the system, the debt, as determined by the court on 23 October 2014 remains.

[9] In addition, respondent denies that there is a bona fide defence on the part of the applicant, which accordingly is not a requirement to sustain rescission and that no reasonable explanation has been tendered. This, the respondent alleges, is further undermined by the fact that there is no explanatory affidavit by counsel who took over 44 days after the 16 January 2015 to launch the application and why the investigation had to take almost a month just to determine liability. Accordingly, there is no good cause shown for the delay and for acting contrary to rule 16(3). No condonation should accordingly therefore be granted.

[10] As regards the issue on Rule 32, the respondent states that the letter that was sent was no invitation to amicably settle the matter but rather a notification of its intention to bring the application for rescission. The respondent merely 'awaited the application and opposed it'.

[11] The replying affidavit was filed three days late and the explanation for the delay is purely work overload on the part of the legal practitioner who was unable to file the

replying affidavit on time. Condonation thereof is also sought. In reply, the applicant takes issue with the fact that the legal practitioner deposed to the answering affidavit and confirmed by the respondent's Mr Eben Smith. The applicant alleges that since the respondent does not have knowledge on the circumstances of the service, the version of the applicant must be accepted. As regards the letter, the applicant denies the allegations by the respondent and stated that the letter proposed a settlement of the matter through mediation and that no counterproposal was ever received from the respondent.

[12] As regards the allegation against the accounting system, the applicant replied that there is no need to prove on affidavit that the system was in proper working conditions as a prima facie position has already been established by the findings of the investigations and ultimately the payment of the amount of N\$13 685.00. Such allegations may only be dealt with during trial. The applicant maintains that at this stage, all that needs to be proved is that a bona fide defence exists which prima facie carries some prospects of success. The remaining debt is accordingly in dispute and the onus is on the respondent to prove the applicants liability during trial.

Submissions

[13] Counsel on behalf of the applicant submits that the court has a discretion whether or not to grant rescission. It is applicant's stance that condonation for the late filing of the application is sought; that security has been furnished; good cause for the default is shown and that there is a bona fide defence to the respondent's claim. Counsel is of the opinion that the applicant has offered a reasonable explanation in that immediate steps were taken, in the form of an investigation, as soon as the applicant became aware of the default judgment and that due to work overload with the legal practitioner of record, the application could only be done as soon as practically possible.

In addition, the payments made by the applicant are a sign that it admits that services were rendered by the respondent and denies the rest of the debt claimed. The only way that the respondent can rebut the allegation is by leading oral evidence.

[14] Counsel on behalf of the respondent submit that the application must fail. Firstly, on the ground that no steps were taken to amicably resolve the matter. Secondly, counsel states that an investigation and a delay on account of work overload is no reason to warrant an indulgence from the court. The explanation offered by the applicant is accordingly not reasonable and does not raise a bona fide defence against the remainder of the amount due.

[15] It appears that both counsel agree on the test that is used by the courts in rescission applications. The position is that this court has the power to rescind a judgment obtained in default provided that the applicant provides sufficient cause, or what is commonly referred to as good cause.¹ Good cause has two essential elements in it; namely that the party seeking relief must present a reasonable and acceptable explanation for its default, and that on the merits the party has a bona fide defence, which prima facie carries some prospect or probability of success.² What constitutes good cause has been defined in the case of *Cairns' Executors v Gaarn*³, and adopted through most of the court's judgments to mean that the applicant must show "something which entitles him to ask for the indulgence of the Court. What that something is must be decided upon the circumstances of each particular application".⁴ The question is therefore, the question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not *bona fide*.⁵

¹ Hange and Others v Orman 2014 (4) NR 971 (HC) At 976A-G.

² Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J – 765E.

³ 1912 Ad 181 At P 186.

⁴ Ita v Angula No (A 245-2014) [2015] NAHCMD 215 (4 September 2015), Para 13.

⁵ Leweis v Sampoio 2000 NR 186 (SC).

[16] The question to be decided upon in this case is whether the applicant has satisfactorily explained the delay, whether the application is made *bona fide* and not put up merely for the purpose of delaying satisfaction of the respondent's claim and whether the applicant has, in the affidavit, set out a *prima facie* defence to the respondent's claim.

Court's analysis

[17] Having considered the submissions made and the authorities quoted, I in the exercise of my discretion conclude that the application must succeed.

[18] In the result the following orders are made:

6. Condonation of non-compliance with Rule 16 (1) be and is hereby granted.
7. The application for rescission of default judgment is granted.
8. The writ of execution issued by the Registrar in pursuant of the judgment is hereby set aside and the Deputy Sheriff is stopped from acting thereon.
9. Applicant is granted leave to defend the action in terms of the Rules; and
10. The respondent is ordered to pay the costs of the application.

PJ Miller
Acting

APPEARANCES

APPLICANT:

S Horn

Of:

MB De Klerk & Associates, Windhoek

RESPONDENT:

M Petherbridge

Of :

Petherbridge Law Chambers, Windhoek