

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REASONS FOR RULING OF RESCISSION OF JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2017/00734

In the matter between:

ANDRICO INVESTMENTS NUMBER SIXTY FIVE CC RESPONDENT/PLAINTIFF

and

WELWITSCHIA FAMILY CLINIC CC

APPLICANT/DEFENDANT

Neutral Citation: *Andrico Investments Number Sixty Five CC v Welwitschia Family Clinic CC* (HC-MD-CIV-ACT-CON-2017/00734) [2018] NAHCMD 112 (23 April 2018)

CORAM: PRINSLOO J

Heard: 14 March 2018

Delivered: 23 April 2018

Reasons: 26 April 2018

Flynote: Civil Practice – Default Judgment – Application for rescission of judgment – Requirements for rescission of judgment – Reasonable explanation for default, that application bona fide and bona fide defence – Applicant for rescission required to make out prima facie defence – Need not fully set out merits.

Summary: The respondent issued a combined summons which was served at the *domicilium* address of the applicant as per the agreement of lease entered into with the plaintiff. On 6 April 2017 the respondent obtained default judgment against the applicant.

The applicant submitted that it only became aware of the default judgment against it when the Deputy Sherriff arrived at units 84, 328, 329, 330 and 331 of the Auas Hill Medical Centre on 08 May 2017 with a warrant of execution that was issued on 12 April 2017. A warrant of ejection issued on 19 April 2017 was also served on the applicant. Upon gaining knowledge of the judgment, the applicant filed a rescission application to which the respondent opposed.

The respondent was of the view that the the combined summons with reference to the default judgment application was served at the correct *domicillium* address as elected by the applicant in the lease agreement and as a result, has no proper explanation for having defaulted in entering an appearance to defend the default judgment proceedings. The respondent further submits that even if the applicant no longer resided at the nominated *domicillium*, the applicant also failed to provide a notice to the respondent of a change of *domicillium* if at ever there was in this case.

The applicant was of the view that the respondent cancelled the lease agreement prematurely by not willing to accept the amount offered by the applicant in payment of the rent due. The amount offered was according to the applicant in line with the oral amendment of the lease agreement allegedly agreed to between the applicant and the respondent and naturally as a result of declining to accept the offer made by the applicant, the respondent never received the rent due on the leased premises.

The applicant further submits that it was not willful in its failure to defend the action and neither is the rescission application brought merely to delay the enforcement of the judgment of the respondent and that it has a bona fide defence against the plaintiff's judgment.

Held – as a principle, two essential elements of 'sufficient cause' for rescission of judgment by default are namely that the party seeking relief must present a reasonable and acceptable explanation for his default and that on the merits such party has a bone fide defence which, prima facie, carries some prospect of success.

Held – The applicant therefore bears the onus of establishing good cause and the other requirements in the application to rescind the judgment in terms of Rule 16.

Held – Once the court found that there has been a breach of a material term of the agreement, the cancellation of the agreement follows by virtue of operation of law which will entitle the respondent to recover the movable property and money advance by way of default application.

ORDER

- a) In respect of claim 2 and 3 the judgment granted by default on 06 April 2017 is hereby rescinded.
- b) Application for rescission of judgment in respect of claims 1, 4, 5 and 6 is refused with cost.
- c) Cost to include one instructing and one instructed counsel and such cost to be limited to Rule 32(11).
- d) The case is postponed to 17 May 2018 at 15:00 for status hearing. (Reason: Request by plaintiff to consider further conduct of the matter in respect of claim 2 and 3.
- e) A status report must be filed on or before 14 May 2018.

REASONS

PRINSLOO J:

[1] This is an application for rescission of a default judgment granted by this court on 06 April 2017. An application for rescission of judgment was filed by the defendant in the main action which the plaintiff opposed. For purposes of this judgment I will refer to the defendant in the main action, as the applicant.

Background

[2] The application has its origin in an action instituted on 02 March 2017. The plaintiff issued a combined summons which was served at the *domicilium* address of the defendant as per paragraph 7.2 of the agreement of lease entered into with the plaintiff. On 6 April 2017 the plaintiff obtained default judgment against the defendant.

[3] According to the defendant, it became aware of the default judgment against it when the Deputy Sherriff arrived at units 84, 328, 329, 330 and 331 of the Auas Hill Medical Centre on 08 May 2017 with a warrant of execution issued on 12 April 2017. A warrant of ejectment issued on 19 April 2017 was also served on the defendant. Upon gaining knowledge of the judgment, the defendant filed a rescission application with a notice of motion and the ancillary thereto, which the plaintiff opposed and answering papers were filed in response and to which the defendant filed replying papers as per the normal procedure.

[4] It is primarily based on the above that the parties are now before this court. I will firstly commence in dealing with the submissions of fact by the parties and thereafter deal with the law applicable to rescission of judgments.

Submission by respondent/plaintiff

[6] The respondent submits that the applicant gained knowledge of the default judgment at the very latest 8 May 2017, to which the applicant concedes that the rescission application was not brought within the 20 day period as provided in terms of Rule 16 (1). The plaintiff submits that it was therefore required of the applicant to file a condonation application, which the applicant submits was not done. The question of condonation was however previously argued and condonation was granted and I need not concern myself any further with this aspect of the case.

[7] On the merits of the applicant's case the respondent highlights the concession made by the applicant that service of the combined summons with reference to the default judgment application was served at the correct *domicillium* address as elected by the defendant. On this note, the respondent submits that the applicant has no proper explanation for having defaulted in entering an appearance to defend. As a result, the applicant was grossly negligent in failing to defend the respondent's action. The respondent further submits that even if the applicant no longer resided at the nominated *domicillium*, the applicant also failed to provide a notice to the respondent of a change of *domicillium*.

[9] With respect to the *bona fide* issue in the applicant's application, the respondent submits that the parties concluded a binding agreement and no variation with respect to the rental agreement occurred. The respondent submits that the applicant simply failed to pay the rental as agreed.

[10] The respondent further submits that the payments made by the applicant were taken into account, although such payments made were irregular and not paid when due. In this regard, the respondent submits that it is willing to accept that the court has the discretion to rescind the judgment in respect of claims 2 and 3 in that it is divisible from the remainder of the judgment granted.

[11] The respondent concluded in submitting that the applicant failed to make out a *prima facie* defence or show good cause. The respondent argued the only aspect in which the court can exercise its discretion to rescind is in terms of claims 2 and 3, but to rescind the entire judgment would amount to absurdity, since the defence raised by the applicant is limited to claims 2 and 3. The respondent in conclusion submits that claim 4 dealing with ejectment of applicant from the premises is now purely academic as the applicant already vacated the premises and has no wish to return to the premises or to continue with the rental agreement.

Submission by applicant/defendant

[12] The applicant submits that the parties concluded the rental agreement during June 2015 and the payment of the lease only commenced during August 2015. The rental amount agreed upon was set initially at N\$180 000 which was later (orally) amended, which still remains in dispute.

[13] The applicant further submits that the lease agreement was terminated prematurely. The applicant had a letter effected to the respondent in which a tender of N\$200 000 was made, which was rejected by the respondent. The applicant submits that the tender made it abundantly clear that it was for rent of October 2016 and November 2016 as the rent was (orally) fixed to N\$ 100 000 per month. The applicant further submits that because the respondent rejected the tender made by the applicant, naturally as a result, the respondent never received its rent.

[14] The applicant further submits that the respondent also did not take the court into its confidence to admit that the applicant made payments, together with the N\$ 200 000 tender made by the applicant. As a result, the applicant is of the belief that it has good prospects of success in the event that it is granted leave to defend the action. The applicant further submits that it was not willful in its failure to defend the action and neither is the rescission application brought merely to delay the enforcement of the

judgment of the respondent and that it has a *bona fide* defence against the plaintiff's judgment.

Applicable law

[15] In terms of the rules of court, rescission applications are provided in Rule 16 that 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.”

[16] The common law also makes provision for rescission applications as stated by Trengove AJA in *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042H where the court held that:

“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.”

[17] Chomba AJA in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC) at para 19 made observations with respect to rescission applications and what the court generally expect an applicant in a rescission application to show, as discussed in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) as follows:

‘The following are the benchmarks which that case sets out, viz:

- “(1) He must give a reasonable explanation for 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.
- (2) His application for rescission must be bona fide and not made with the intention of merely delaying the plaintiff’s claim.
- (3) He must show that he has a *bona fide* defence to plaintiff’s claim. It is sufficient if he make out a prima facie defence in the sense of setting out averments which, if

established at the trial, would entitle out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.” ’

[18] The applicant therefore bears the onus of establishing good cause and the other requirements in the application to rescind the judgment in terms of Rule 16.

[19] It is in principle and in long standing practice in our courts two essential elements of ‘sufficient cause’ for rescission of judgment by default are:

- a) ‘the party seeking relief must present a reasonable and acceptable explanation for his default;
- b) and that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success.’

It is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default.¹

Explanation for Applicant’s default

[20] In respect of the service, the respondent submitted that it was proper and in terms of the rules and that the applicant is in wilful default or was grossly negligent.

[21] As far as the first requirement is concerned the applicant has only itself to blame. The onus was on the applicant to change the *domicilium* address following the move to a different address and to inform the respondent accordingly of the changed domicilium address. This was not done but in my view this would not constitute gross negligence on the part of the applicant.

¹ *Xoagub v Shipena* 1993 NR 215 (HC).

Bona fide defence

Claim 1

[22] In respect of claim 1 the applicant raises a defence that it is not indebted to the defendant because there was an oral variation of the rental amount which was tacitly accepted and payment was made in accordance with the varied rental amount due.

[23] During June 2015 the parties entered into a written lease agreement in terms of which the applicant would lease five (5) units in the Auas Hills Retirement Village to operate as a frail care unit. The parties agreed that the monthly rental of N\$ 180 000 (inclusive of VAT) would commence on 1 July 2015 alternatively the date of approval of the applicants facility as frail care by the Ministry of Health and Social Services and the lease period would be for a period of five years.

[24] The applicant was granted a grace period for the first twelve (12) months of the lease period and the monthly rental would become due as from the thirteenth month, which was the 1st day of August 2016.

[25] The lease agreement also contained special conditions pertaining to rental and deposit. Herein it was recorded that the lessor (respondent) would assist the lessee (applicant) in establishing the business by providing capital for furnishings and fittings of premises in the amount of one million Namibian Dollars (N\$ 1 000 000) and provide it with working capital of one million Namibian Dollars (N\$ 1 000 000).

[26] Also in respect of these contributions to the applicant the agreement was that the re-payment thereafter would only commence on the thirteenth month from commencement date of the agreement.

[27] The cash flow facility of one million Namibian Dollars had to be repaid within 24 months of the commencement date and the repayment of the equipment and furnishings had to be repaid no later than five (5) years of the commencement date.

[28] During June 2016 the member of the applicant, Ms. Hough, approached the member of the respondent and indicated that monthly rental of N\$ 180 000 was not attainable by the frail care facility and it would not be able to pay such a rental amount. The member of the respondent, one Mr Derks, then indicated that Ms. Hough must send him an email and advise what amount the applicant was able to pay. She hereafter send him an email proposing that the applicant can pay N\$ 100 000 for six (6) months, thereafter N\$ 130 000 of three (3) months and then indicating that the applicant can pay rent in the amount of N\$ 162 500 per month, presumable excluding VAT. Mr Derks never replied to the e-mail and applicant avers that it was under the impression that the proposal was accepted. Applicant proceeded to make payment on 01 July 2017 in the amount of N\$ 100 000.

[29] It is indeed so that the lease agreement does not contain a non-variation clause and the agreement can be changed either by oral or written agreement however for this variation to be effective there must be:

- (a) a valid agreement between the parties. A mere notification by one party to the other is not effective; and
- (b) there must be some form of consideration supporting this agreement.

[30] The applicant wish to imply that there was tacit acceptance of the reduced rental amount, however it is quite clear that the lower rental amount that was paid over to the respondent was not acceptable. Correspondence by the legal practitioners of the respondent dated 09 November 2016 directed to the applicant, demanded remedy of the breach of the agreement and subsequent to that on 17 January 2018 the agreement was cancelled. It would however appear from the documents annexed to the answering

affidavit that the issue of the new rental amount was already addressed during October 2016 when the legal practitioner acting on behalf of the respondent denied the allegation by the applicant that the parties agreed to a new rental amount.²

[31] There is no evidence before this court that the respondent accepted or agreed to the variation of the rental amount therefor the rental amount of N\$ 180 000 (inclusive of VAT) remained payable to the respondent.

[32] According to calculations in the opposing affidavit, it appears that the applicant was due to pay a rental amount of N\$ 720 000 (seven hundred and twenty thousand Namibian Dollar) for the period of 01 August 2016 to 01 November 2016, whereas payment in the amount of N\$ 380 000 (three hundred and eighty thousand Namibian Dollars) was made, which was N\$ 340 000 (three hundred and forty thousand Namibian Dollars) short.

[33] Applicant complains that it is not clear how the N\$ 340 000 was arrived at and that the respondent does not set out in its particulars of claim what amount was paid. It should be born in mind that the plaintiff/respondent refers in its particulars of claim the amount not paid, which is relevant for these proceedings. The plaintiff does not claim what was paid.

[34] By signing the lease agreement the applicant bound itself to abide by the terms thereof. The purported variation of the lease agreement is not valid. I therefore agree with the submission of learned counsel for the respondent that the applicant has no *bona fide* defence to this claim.

Claim 2

[35] In respect of claims 2 respondent claims that the applicant is liable for water consumption for the period of August 2016 to November 2016.

² Annexure A.I 9.1 dated 14 October 2016.

[36] From the documentation submitted to court it would appear that the amount was paid in full prior to the issuing of the summons and the applicant indeed has a bona fide defence to this claim.

Claim 3

[37] In respect of claims 3 respondent claims that the applicant is liable for electricity consumption in the amount of N\$ 70 827.94 due and payable to the City of Windhoek for the period of August 2016 to November 2016.

[38] From the documentation submitted to court it would appear that the amount was paid in full prior to the issuing of the summons and the applicant indeed has a bona fide defence to this claim.

Claim 4

[39] The plaintiff claimed by virtue of defendant's breach of material terms of the lease agreement and the subsequent cancellation of the agreement that the defendant is liable to vacate units 84, 328, 329, 330 and 331, Auas Hills Medical Centre.

[40] This claim is currently purely academic as the applicant already vacated the property and has no intention of returning to the premises.

[41] The applicant denies that there was any breach of the material terms of the agreement that entitled the respondent to cancel the agreement. This issue was discussed under claim 1. What is interesting though is that the applicant also alleges that the respondent is not the owner of the property.

[42] Attached to the answering affidavit however the respondent annexed a deed of transfer number ST 792A/2015 confirming transfer of the units 84, 328, 329, 330 and

331 from Auas Hills Retirement Village Investment CC to Andrico Investments Number Sixty Five CC.

[43] It is not clear on which documentation the applicant based its submissions that the respondent was not the owner of the property as nothing was attached in this regard to the founding affidavit.

Claim 5

[44] Claim 5 and 6 relates to the special conditions pertaining to the rental and deposit set out in paragraph 5 of the lease agreement.

[45] In respect of claim 5 and 6 the applicant's defence is that the amount is not due and payable. In respect of the capital amount the applicant stated that it had a period of five (5) years from date of commencement to repay the amount of one million Namibian Dollars (N\$ 1 000 000).³

[46] The amount in respect of the movable property (furniture and fittings) was due for payment from the thirteenth month of the lease agreement same had to be settled within 24 months from date of commencement and applicant made two payments towards the amount, which the respondent did not disclose to the court.

[47] The capital amount is indicated as one million dollars in the lease agreement however according to the particulars of claim the amount is N\$ 853 083.03.⁴ The amount due for various movable property⁵ that the respondent purchased is indicated as one million Namibian Dollar (N\$ 1 000 000) however in claim 6 the particulars of claim reflect an amount of N\$ 1,146,912.97.⁶

³ Paragraph 5.5.2 of Lease Agreement.

⁴ Paragraph 25 -26 of Particulars of Claim.

⁵ Paragraph 5.5.1 of Lease Agreement.

⁶ Paragraph 28-32 of Particulars of Claim.

[48] According to the opposing affidavit the parties varied the agreement during November and more specifically paragraph 5 in that the respondent would advance the applicant business capital in the amount of N\$ 853 083.03 and purchase various movable property (furniture, fittings and fixtures) in the amount of N\$ 1,146 912.97 (claim 6).

[49] The fact that the terms of paragraph 5.5.1 and 5.5.2 have been varied by agreement does not appear to be in dispute.

[50] If one have regard to the schedule of payment it would appear that an amount of N\$ 80 000 was paid in April 2016 which was initially allocated by the respondent toward payment of equipment. However on the insistence of the applicant it was converted into a payment towards the lease. It would therefore appear that no payments were made towards movable property or towards the capital advanced.

[51] Once the court found that there has been a breach of a material term of the agreement the cancellation of the agreement follows by virtue of operation of law which will entitle the respondent to recover the movable property and money advance. Claims 5 and 6 are premised on such cancellation.

[52] I am satisfied that there was breach of a material term of the agreement which entitled the respondent to cancel the agreement.

[53] The applicant has no *bona fide* defence to this claim of the respondent.

Other issues raised on behalf of the applicant

Commissioning of the answering affidavit

[54] Applicant raised an issue that answering affidavit was not commissioned properly as it refers to the deponent as 'he' whereas the deponent is female.

[55] I am of the opinion that it is clearly typographical error and nothing turns of this.

Compliance with Rent Ordinance, Ordinance 13 of 1977

[56] In correspondence dated 12 October 2016 the legal practitioner acting on behalf of the applicant referred to the Rent Ordinance and hereafter again during her oral submissions. It was not raised in the founding affidavit or in head of argument.

[57] In the matter of *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 634H - J the following was stated:

'A defence, whether it is contained in a plea or an affidavit, must be sufficiently clearly stated to enable the other litigant as well as the Court to be apprised of the defence. In *Seedat v Arai and Another* 1984 (2) SA 198 (T) the respondent in a summary judgment application did not suggest that the Rent Control Act (at 201C) was applicable. The Court held that the respondent could not raise that Act as a defence.

Where a litigant relies upon the provisions of a statute he should, in his pleading or affidavit, as the case may be, refer to the Act and section whereon he relies. More important, however, he should plead such facts which entitle him to invoke the legislation concerned. *Price v Price* 1946 CPD 59. Where he sets out the facts and omits the reference to the Act or section, he would, nevertheless, be entitled to rely on such legislation (subject of course, to the rules relating to pleadings) if it is clear what his case or defence is.'

[58] Applicant can therefore not rely on the Rent Ordinance at this late stage of the proceedings and the argument in this regard will be disregarded.

Cost

[59] The last issue that I need to deal with is the issue of cost.

[60] In light of the fact that a substantial part of the judgment which was obtained by default remains in force the respondent will be entitled to its costs.

[61] My order is therefore as follows:

- a) In respect of claim 2 and 3 the judgment granted by default on 06 April 2017 is hereby rescinded.
- b) Application for rescission of judgment in respect of claims 1, 4, 5 and 6 is refused with cost.
- c) Cost to include one instructing and one instructed counsel and such cost to be limited to Rule 32(11).
- d) The case is postponed to 17 May 2018 at 15:00 for status hearing. (Reason: Request by plaintiff to consider further conduct of the matter in respect of claim 2 and 3.
- e) A status report must be filed on or before 14 May 2018.

J S Prinsloo
Judge

APPEARANCES:

APPLICANT:

M Petherbridge
of Petherbridge Law Chambers, Windhoek

RESPONDENT:

A Van Vuuren
instructed by Fisher, Quarmby & Pfeiffer, Windhoek