REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 34/2017

In the matter between:

UUSHONA TIMOTHEUS **APPELLANT**

and

SAMUEL ABED **RESPONDENT**

Neutral citation: *Timotheus v Abed* (CA 34/2017) [2018] NAHCMD 130 (17 May 2018)

Coram: ANGULA DJP
Heard: **5 April 2018**
Delivered: **17 May 2018**

Flynote: Civil Law and Practice – Civil Appeal against Magistrate Court's decision – Rescission of a default judgment *void ab origine*, section 36 of the Magistrates Court Act (Act No. 32 of 1944) ('the Act') and Rule 49(1) and 49(11) of the Magistrate's Court.

Summary: This is an appeal, against an order by a Magistrate refusing to rescind a judgment granted by default against the appellant – The application was brought on the ground, *inter alia*, that the default judgment was *void ab origine* and the Magistrate misdirected herself on the facts and law.

Court held: The Magistrate misdirected herself both on the facts and on the law by holding that the application was brought in terms of rule 49(1), whereas it was clearly stated that the application was brought to rescind a default judgment as contemplated by rule 49(11).

Court held further: The Magistrate Court as well as the Clerk of the Court are both creatures of the Act: they have no power other than those powers vested upon them by the Act. The Clerk of the Magistrate Court has no power in terms of the Act to grant a judgment by default in the circumstances where an action becomes defended. The Clerk of the Court's power to grant default judgement is limited to applications for default judgments made in undefended matters. It is for this reason that the purported default judgment was *void ab origine.* The Clerk of the Court was, in terms of the rules, under an obligation to have notified the respondent that the matter has become defended and therefore judgment by default could not be granted.

ORDER

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1. The appeal succeeds.

2. The order of the Magistrate for the district of Windhoek made on 15 November 2016 dismissing the appellant's application for rescission of default judgment on the ground that it was *void ab origine*, is hereby set aside and is replaced with the following order:

    2.1. The judgment by default granted against the appellant/defendant on 13 April 2016 is hereby rescinded and set aside.

    2.2. The appellant/defendant is hereby granted leave to defend the action instituted against him by the respondent/plaintiff under case number I 326/2016.

2.3. Leave is granted to the appellant/defendant, to be refunded the amount of security for costs paid into court in terms of rule 49(3).

2.4. The respondent/plaintiff is ordered to pay the appellant/defendant's costs occasioned by the opposition of this application.

3. The respondent is ordered to pay the appellant's costs occasioned by this appeal.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an appeal against a ruling by the Magistrate, refusing to grant an application for rescission of a default judgment, on the ground that such judgment was *void ab origine*.

[2] The appeal was opposed by the respondent but at the hearing of the appeal, counsel for the respondent conceded that the default judgment was indeed *void ab origine*.

Application for condonation for the late filing of the appeal

[3] The appeal was filed out of time, which necessitated the appellant to file an application for condonation which application was not opposed.

[4] It is not necessary to set out the facts constituting the explanation which led to the late filing of the appeal. It should suffice to state that the court was satisfied that the explanation tendered by the appellant was reasonable and acceptable. Furthermore, the court was satisfied that prospects of success favoured the appellant. Accordingly the court granted condonation.

Factual background

[5] It is common cause that summons was served on the appellant on 17 March 2016; that the notice to defend was served and filed on 11 April 2016; that an application for default judgment was filed on 4 April 2016; and that the default judgment was only granted on 13 April 2016, about a day later after the notice to defend had been filed.

[6] On those common facts, it was not competent for the Clerk of the Court to have granted judgment by default.

Approach by the appellant to have the default judgment rescinded.

[7] On 19 July 2017 the appellant filed an application for the rescission of the default judgment in terms of Rule 49(1) of the Magistrate Court rules. The application was subsequently struck from the roll on 9 August 2017 due to non-appearance by the appellant's legal practitioner.

[8] Subsequent thereto, on 3 November 2016, the appellant filed another application for the rescission of the default judgment. This time the application was made in terms of Rule 49(11).

[9] The Magistrate dismissed the application, holding that the application was brought on 3 November 2016, set down for hearing on 15 November 2016 which was more than the six week period prescribed by Rule 49(1).

Grounds of appeal

[10] The appellant set out his grounds of appeal in the notice of appeal as follows:

'1.1 The learned Magistrates failed to have proper regard to the fact that the Application for Rescission of judgement was filed in terms of Rule 49(11) and not Rule 49(1).

1.2 The learned Magistrate misdirected herself on the facts and/or law in that she made an adverse finding that the Appellant file (the application) 27 weeks out of time.

1.3 The learned Magistrate erred on the facts and/or law in that she refused to grant the rescission of the judgment thereby depriving the appellant a fair trial as envisaged in Article 12 of the Constitution of the Republic of Namibia.'

Applicable law

[11] Applications for the rescission of judgments granted by default are governed by section 36 of the Magistrates Court Act, No. 32 of 1944 ('the Act') and Rule 49 of the Magistrates Court's Rules.

[12] Section 36 of the Act provides as follows:

'The court may upon application by any person affected thereby

(a) rescind or vary any judgment granted by it which was *void ab origine* or was obtained by fraud or mistake common to the parties.'

[13] Rule 49(1) provides as follows:

'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 such application shall be brought within six weeks after such judgment has come to the knowledge of the applicant.'

[14] Furthermore, Rule 49(11) provides thus:

'(11) Where rescission or variation of a judgment is sought on the ground that it is *void ab origine* or was obtained by fraud or mistake, application may be made not later than one year after the applicant first had knowledge of such voidness, fraud or mistake.'

Application of the law to the facts

[15] It was submitted on behalf of the respondent that whereas the appellant alleged that the application was made in terms of rule 49(11) read with section 36, the appellant did not in his founding affidavit or anywhere else attempt to place facts before court in support of the allegation that the default judgment was void ab *origine*.

[16] This argument is not borne out by the facts. On a careful reading of the papers which constituted the application for rescission of judgment, it is clear that the appellant had set out the facts.

[17] In paragraph 24 of the appellant's founding affidavit filed in support of the application for the rescission of judgment, the following was stated by the appellant:

'By virtue of that error my legal practitioners of record have advice, which advice I readily believe to be true, that the respondent's particulars of claim lacks a cause of action as such, the judgment granted by default against the erf is *void ab origine* as contemplated in rule 49(11).

[18] As regard to the Magistrate's finding that the application was made in terms of rule 49(1), it is difficult to comprehend how she arrived at that finding. I have already referred to paragraph 24 of the supporting affidavit where it was clearly stated that the default judgment was void *ab origine* as contemplated in rule 49(11).

[19] Furthermore, the notice of motion for the application for the rescission of judgment filed by the appellant, in prayer 1, he had asked for the court to grant an order 'that the judgment granted by default against the applicant on 13 April 2016 be declared *void ab origine*'. It is only rule 49(11) which deals with the rescission of a default judgment which was *void ab origine*. Apart from specifically stating in paragraph 24 of the founding affidavit that the application was brought as 'contemplated in rule 49(11)', in my view, the further mentioning of the words '*void ab origine'* should have alerted the Magistrate that the application was not brought in terms of rule 49(1) as she found but was in respect of rescission of a default judgment as contemplated by rule 49(11).

[20] I am satisfied that the Magistrate misdirected herself both on the facts and on the law by holding that the application was brought in terms of rule 49(1), whereas it was clearly stated both in prayer 1 of the notice of motion and in paragraph 24 of the supporting affidavit that the application was brought to rescind a default judgment as contemplated by rule 49(11).

[21] It was not in dispute that the application was brought within the time period of one year after the default judgment came to the knowledge of the appellant as stipulated by rule 49(11).

[22] Given the undisputed fact that the judgment was granted after the notice of intention to defend had already been filed, the judgment was *void ab origine*. It is trite that the Magistrate Court as well as the Clerk of the Court are both creatures of the statute: they have no power other than those powers vested upon them by the Magistrate Court's Act. The clerk of the Magistrate court has no power in terms of the Act to grant a judgment by default in the circumstances where an action has become defended. The Clerk of the Court's power to grant default judgement is limited to applications for default judgment made in undefended matters. It is for this reason that the purported default judgment was *void ab origine.* The clerk of the court was, in terms of the rules, under an obligation to notify the respondent that the matter had become defended and therefore judgment by default could not be granted.

[23] In the result, I make the following order:

1. The appeal succeeds.

2. The order of the Magistrate for the district of Windhoek made on 15 November 2016 dismissing the appellant's application for rescission of default judgment on the ground that it was *void ab origine*, is hereby set aside and is replaced with the following order:

    2.1 The judgment by default granted against the appellant/defendant on 13 April 2016 is hereby rescinded and set aside.

    2.2 The appellant/defendant is hereby granted leave to defend the action instituted against him by the respondent/plaintiff under case number I 326/2016.

    2.3 Leave is granted to the appellant/defendant, to be refunded the amount of security for costs paid into court in terms of rule 49(3).

2.4 The respondent/plaintiff is ordered to pay the appellant/defendant's costs occasioned by the opposition of this application.

3. The respondent is ordered to pay the appellant's costs occasioned by this appeal.

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H Angula

Deputy-Judge President

APPEARANCES

APPELLANT:	E NEKWAYA instructed by Nambahu & Associates, Windhoek
RESPONDENT:	S ENKALI of Kadhila Amoomo Legal Practitioners, Windhoek