

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING**

Case no: HC-MD-CIV-ACT-CON-2017/04585

In the matter between:

**JAN JOHAN VISSER**

**APPLICANT**

and

**AUTO TECH TRUCK AND COACH CC**

**RESPONDENT**

**Neutral citation:** *Visser v Auto Tech Truck and Coach CC* (HC-MD-CIV-ACT-CON-2017/04585) [2018] NAHCMD 359 (8 October 2018)

**Coram:** USIKU, J

**Heard on:** 08 October 2018

**Delivered:** 08 October 2018

**Flynote:** Application for rescission of default judgment – Failure to file a plea – No acceptable or reasonable explanation furnished for failure to file a plea – Prospects of success in the applicant’s defence not considered – Application dismissed.

**Summary:** The Applicant applied for rescission of default judgment granted by this court upon his failure to file a plea. The Applicant attributes this failure to fault on the part of his erstwhile legal representative. No confirmatory affidavit by the said legal representative filed confirming her contribution in the failure to file a plea. In the circumstances, no reasonable explanation was given for the failure. Appeal dismissed.

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### ORDER

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1. The Applicant’s application for rescission of judgment granted against him on 13 June 2018, is dismissed;
  2. The Applicant is directed to pay the costs of the Respondent; and
  3. The matter is removed from the roll and regarded finalized.
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### RULING

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Usiku, J:

#### Introduction

[1] This is an application to rescind a judgment granted by this court on 13 June 2018 in favour of the Respondent against the Applicant upon default to file a plea. The court order of 13 June 2018, granted judgment in the amount of N\$ 36 992.59 and N\$ 520 901.70, in favour of the Respondent, together with interest at the prescribed rate as from 01 November 2017 to date of final payment and costs.

[2] The brief background to the above judgment is as follows: On 18 April 2018, the court issued a case plan order, in terms whereof the Applicant (as the Defendant) was among other things, directed to file his plea to the Respondent's (as the Plaintiff) claim, by no later than 09 May 2018.

[3] The Applicant did not file plea by 09 May 2018 and has not filed a plea thereafter.

[4] On 31 May 2018, the legal practitioner for the Respondent filed a unilateral status report indicating that the Respondent would move for default judgment on 13 June 2018. There was no response thereto by the legal practitioners of the Applicant.

[5] On 13 June 2018, the Respondent moved for default judgment. On the same date, the legal practitioner for the Applicant indicated that he had filed a notice of withdrawal as legal practitioner of record for the Applicant. On the same date, the court granted judgment for the Respondent as aforesaid.

[6] On 27 June 2018, the Applicant signed an acknowledgment of debt, acknowledging his indebtedness to the Respondent in the amounts as set out in the court order dated 13 June 2018.

[7] On 4 July 2018, the Applicant through his attorneys, addressed correspondence to the attorneys of the Respondent, indicating that he withdraws the acknowledgment of debt aforesaid.

[8] On 11 July 2018, the Applicant launched the present application seeking an order rescinding the judgment granted on 13 June 2018, upliftment of the automatic bar on the Applicant to file a plea and an order granting the Applicant leave to file a plea and an order that the Applicant pays the costs of this application, in the event that the Respondent does not oppose the relief sought.

[9] The Respondent opposes the application for rescission of the judgment in question.

#### Applicant's case

[10] In his application, the Applicant contends that he had instructed his erstwhile legal practitioners properly, including instructions to file a plea, and the default to file a plea was due to a 'mistake or non-compliance' on the part of the Applicant's erstwhile legal practitioners. The Applicant submits that he should not be sanctioned for the default committed by his erstwhile legal practitioners.

[11] The Applicant further submits that the judgment granted on 13 June 2018 was sought and granted erroneously in his absence. He further contends that he is entitled to the relief he seeks by virtue of the provisions of Rule 16, alternatively by virtue of having shown sufficient cause under common law.

[12] In his founding affidavit in support of the application for rescission of judgment, the Applicant confirmed having received an email on 11 June 2018 (about two days before judgment was granted) from his erstwhile legal practitioner (Ms. Du Plessis) to the effect that Ms. Du Plessis 'had bought as much time for ( the Applicant) as (she) could' and the only further option for the Applicant to 'buy some additional time' was for Ms. Du Plessis to withdraw as legal practitioner of the Applicant. From the above provision, it appears that when the erstwhile legal practitioners of the Applicant withdrew as legal practitioners of record, they did that as "the only further option to buy additional time" for the Applicant.

[13] The Applicant went on further to state the basis for his defence to the Respondent's claim.

### Respondent's response

[14] The Respondent on the other hand submits that the only reason provided by the Applicant for his default in filing the plea is that his erstwhile legal practitioner did not inform him that his plea was due. The Respondent argues that the Applicant had a duty to stay in contact with his legal practitioner as to the deadlines he had to meet. The Respondent further contends that the Applicant has not discharged the onus to show good cause in this application.

[15] On the issue of the email referred to by the Applicant in his founding affidavit about 'buying time', the Respondent argues that the Applicant did not in his founding affidavit deny the allegations of his erstwhile legal practitioner seeking to buy time, on the instructions of the Applicant. The Respondent submits that the only interpretation to be drawn from the paragraph is that the Applicant instructed his erstwhile legal practitioner not to defend the matter, but to buy as much time for him as possible.

### Analysis

[16] The first issue to determine is whether, the Applicant has given a reasonable explanation in the circumstances, for his default in filing a plea. In summary, the explanation of the Applicant, in so far as I understand it, is that the Applicant had instructed his erstwhile legal practitioner to file a plea, but the legal practitioner did not file the plea as instructed. Furthermore, the legal practitioner did not inform the Applicant until 18 June 2018, that the plea was not filed.

[17] In other words, the explanation given by the Applicant for his default is that Ms. Du Plessis, contrary to the Applicant's instructions, failed to file the plea.

[18] The Applicant has not filed a confirmatory affidavit by Ms. Du Plessis. Furthermore, in his founding affidavit, the Applicant does not indicate that any attempt

or effort had been done by him to obtain a confirmatory affidavit from Ms. Du Plessis in respect of the aspects attributed to her in this application.

[19] On the facts of this matter, I am of the opinion that the Applicant (and his current legal practitioner(s)) should have enquired from Ms. Du Plessis what transpired that the plea of the Applicant was not filed at all. Such an enquiry is essential in my opinion, in determining whether or not the Applicant has a reasonable explanation for the default to file his plea. An enquiry in that regard, would have shed some light on why Ms. Du Plessis, felt it necessary that 'additional time' needed to be bought for the Applicant in respect of this matter. In my opinion, such an enquiry could have been easily done and there is no explanation given, why it was not done.

[20] The fact that the Applicant has not, in his founding affidavit, dealt with why Ms. Du Plessis defaulted in filing the plea, and the fact that the Applicant seems to have avoided asking Ms. Du Plessis, why the plea has not been filed, in the circumstances, is in my view a problem to the reasonableness of the explanation for the default given by the Applicant. It is a problem, especially in light of the evidence that Ms. Du Plessis had indicated to the Applicant that her withdrawal as Applicant's legal practitioner of record was aimed at buying the Applicant 'additional time'.

[21] In considering the Applicant's explanation, it would seem to me that the Applicant had fallen short of furnishing an acceptable or reasonable explanation for the default.

[22] It is common ground that an application for rescission of default judgment, must establish a reasonable or acceptable explanation as well as a bona fide defence, which prima facie enjoys reasonable prospects of success. Where the explanation is lacking in its reasonableness and adequacy, as the Applicant's in the present case is, it would not be necessary to consider the question whether there are reasonable prospects of success in the Applicant's defence raised.

[23] Suffice it to say that I find the explanation for the default provided by the Applicant, not reasonable and not acceptable in the circumstances.

[24] It therefore follows that the application for rescission of default judgment granted against the Applicant on 13 June 2018, falls to be dismissed.

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

- a) The Applicant's application for rescission of judgment granted against him on 13 June 2018, is dismissed;
- b) The Applicant is directed to pay the costs of the Respondent; and
- c) The matter is removed from the roll and regarded finalized.

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B Usiku  
Judge

## APPEARANCES

APPLICANT:

S Horn  
of DHC Inc., Windhoek

RESPONDENT:

H Garbers-Kirsten  
instructed by Behrens & Pfeiffer, Windhoek