REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2017/04534

In the matter between:

RIXI INVESTMENT CC **PLAINTIFF/RESPONDENT**

and

KHOMAS CIVIL CONSTRUCTION CC **APPLICANT/DEFENDANT**

Neutral Citation: *Rixi Investment CC v Khomas Civil Construction CC* (HC-MD-CIV-MOT-REV-2017/04534) [2018] NAHCMD 395 (3 December 2018)

CORAM: MASUKU J
Heard: **26 September 2018**
Delivered: **3 December 2018**

Flynote: Practice - Judgments and orders - Rescission of judgment - Requirements for a rescission application - Reasonable explanation for default, that application is *bona fide* and the applicant has a *bona fide* defence on the merits - Applicant for rescission required to make out *prima facie* defence and need not fully set out merits – It is sufficient for applicant to show that probabilities lie in his or its favour.

Summary: Respondent issued summons against applicant, the latter claiming that it had no knowledge of the court process as service was effected on another party. As a consequence, applicant did not enter a notice to defend and default judgment was granted against it.

Subsequent to this, respondent issued a writ of execution for the attachment of applicant's movable properties. The applicant became aware of the combined summons as well as the writ of execution after receipt of a message from Standard Bank Namibia that an amount of N$ 546, 475.000, standing to the applicant's credit was on hold and not accessible to it. Owing to the aforementioned, applicant then instructed its legal practitioners to bring an application for a rescission of the default judgment, and an order to have the writ of execution set aside and to defend the main action.

Held: that the requirements for the granting of an application for rescission were: (1) the defaulting party must give a reasonable explanation for his default: if it appeared that his default was willful or due to gross negligence, the court should not come to his assistance; (2) his application for rescission must be *bona fide* and not merely made with an intention of delaying the plaintiff's claim; (3) he must show that he has a *bona fide* defence to the plaintiff's claim: it was held that it is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle him to the relief sought. Furthermore, an applicant need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

The court was then of the view that in the circumstances, the application for rescission must be granted.

ORDER

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1. The default judgment granted in favour of the respondent/plaintiff against the applicant/ defendant by this court on 22 February 2018 under the above case number is hereby rescinded.

2. The writ of execution, issued by the registrar of this court on 27 February 2018 under the above case number is hereby set aside.

3. The applicant/defendant is hereby granted leave to defend the action by the respondent instituted under the above case number.

4. The applicant is to file its notice of intention to defend on or before 12 December 2018.

5. The matter is referred to the Registrar for allocation to a managing judge for the further conduct of the matter.

6. Costs of the application are reserved for determination by the trial court.

JUDGMENT

MASUKU J:

Introduction

[1] Applicant/Defendant is Khomas Civil Construction CC, bearing registration number CC/2007/0833. It is a close corporation registered in terms of the laws of Namibia, with its registered address situate at number 105 John Meinert Street, Windhoek West, Namibia.

[2] Respondent/Plaintiff is Rixi Investment CC, bearing registration number CC/2011/5264. It is a close corporation registered in terms of the laws of Namibia, with its principal place of business situate at Unit 54, Hyper Motor City, Windhoek, Namibia.

[3] The parties, namely, the applicant and the respondent, entered into a contract regarding the manufacture of steel moulds for casting concrete manholes. The applicant was represented by Mr. Matheus Morkel, whereas the respondent was represented by Mr. Jurgen Wellmann.

[4] I shall for purposes of this judgment, refer to the parties as the applicant and respondent, respectively.

Background

[5] On 29 November 2017, a combined summons was issued out of this court by the respondent and same was served on 15 December 2017. The said summons was served on a certain Candy Carew. The return of service in respect of the combined summons, reads as follows:

> "I the undersigned, Carlos Freygang, do hereby certify that I have on 15th day of December 2017 at 12:13, served a combined summons together with particulars of claim, on Candy Carew on behalf of defendant, apparently over the age of 16 years and a responsible employee with the defendant, in charge at given address, being the Registered address, the same time handing to her a copy thereof, after exhibiting the original documents and explaining the nature and exigency of the process".

[6] On account of the applicant's failure to enter a notice to defend, on 22 February 2018, default judgment in the amount of N$ 536,475.00 was granted against the applicant by this court as follows:

'1. The court grants default judgment in favour of the plaintiff as claimed against the defendant, on the following terms:

2. Payment of the amount of N$ 536 475.00.

3. Interest tempore morae at the rate of 20% per annum from 15 December 2017 to date of payment.

4. Costs of suit.'

[7] Subsequent to this, a writ of execution for the attachment of movable properties was issued on behalf of respondent on 27 February 2018. The applicant became aware of the combined summons as well as the writ of execution after receipt of a message from Standard Bank Namibia that an amount of N$ 546, 475. 00 standing to the applicant's credit was on hold and not accessible to it. Owing to the aforementioned, the applicant then instructed its legal practitioner to bring an application for a rescission of the default judgment and an order to have the writ of execution set aside, together with leave to defend the action, which applications this court is now seized with.

The applicable law and its application to the facts

[8] The rescission of judgments in this is governed by Rule 103 for judgments generally and Rule 16, specifically for default judgments. For purposes of this judgment, it is necessary to quote the relevant portions of the Rule in their entirety.

[9] Rule 16[1] provides as follows:

'16. (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

[1] High Court Rules.

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.'

[10] Rule 103, on the other hand, provides thus:

'103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment - (a) erroneously sought or erroneously granted in the absence of any party affected thereby; (b) in respect of interest or costs granted without being argued; (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or (d) an order granted as a result of a mistake common to the parties. (2) A party who intends to apply for relief under this rule may make application therefor on notice to all parties whose interests may be affected by the rescission or variation sought and rule 65 does, with necessary modifications required by the context, apply to an application brought under this rule. (3) The court may not make an order rescinding or varying an order or judgment unless it is satisfied that all parties whose interests may be affected have notice of the proposed order.'

[11] When regard is had to the provisions of the rules quoted above, it becomes quite apparent that in order to satisfy the court that a rescission of judgment may be granted, the requirements of the rules must be met. This then begs the question, has defendant met the requirements for rescission?

[12] It should be stated here that, for purposes of this judgment, rule 16 is the applicable rule for the reason that the applicant seeks to have a default judgment set aside.

<u>The Requirements for Rescission</u>

[13] It was held in *Minister of Home Affairs, Minister Ekandjo v Van Der Berg,*[2] in which case the dicta in *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476, was applied, that the requirements for rescission were: (1) the defaulting party must give a reasonable explanation for his default: if it appeared that his default was willful or due to gross negligence, the court should not come to his assistance; (2) his application for rescission must be *bona fide* and not merely made with an intention of delaying the plaintiff's claim; (3) he must show that he has a *bona fide* defence to the plaintiff's claim. It was held to be sufficient if he set out a *prima facie* defence in the sense of making averments, which, if established at trial, would entitle him to the relief sought. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[14] Now that the requirements have been set out, it is imperative to look at whether applicant in this instance has met the said requirements. It is the applicant's contention that the combined summons was never served on it, and that the applicant only became aware of the process on 28 February of 2018. Our courts have held that it is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them[3]. The process in this case was served at the address of applicant's accounting officer. It is worth stating that said address is also the registered address of applicant. Mr. Morkel, who is the sole managing member and duly authorised representative of the applicant, was not served and was thus at all material times, unaware of the process.

[15] I*n Knouwds NO v Josea and Another* 2007 (2) NR 792 (HC) at para 33, it was held thus:

'Where there is a complete failure of service, it matters not that, regardless, the affected party somehow became aware of the legal progress against it, entered an appearance and is represented in the proceedings. A proceeding that has taken place without service is a nullity and it is not competent for a court to condone it.

[2] 2008 (2) NR 548 (SC).
[3] Standard Bank of Namibia and Others v Maletzky and others 2015 (3) (SC) at 17.

[16] In *Standard Bank v Maletzky*[4], it was also stated that 'the purpose of service is to notify the person to be served of the nature and contents of the process of court and to be provide proof to the court that there has been such notice. The substantive principle upon which the rules of service are based is that a person is entitled to know the case being brought against him or her and the rules governing service of process have been carefully formulated to achieve this process and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind.'

[17] It was Mr. Morkel's contention, on behalf of the applicant, that had he, being sole member and the only managing agent of the applicant, gathered knowledge of the process, he would have caused the action to be defended. I will, in this regard, hold in favour of the applicant, without deciding the issue, that it did not become aware of the service of the combined summons.

[18] What then is the applicant's defence to the claim? It was held in the Supreme Court in *Minister of Home Affairs*[5] that the explanation, be it good, bad, or indifferent in the light of the disclosed defence: disclosure of a *prima facie bona fide* defence was an important consideration, and further that: 'that in any case a *bona fide* defence disclosed at the time of applying for rescission of a default judgment was not intended to be a cast-iron defence: the question of how good or bad that defence was, was an issue which should be determined at the trial of the main action. It was sufficient if (the defendant) made out a *prima facie* defence, in the sense of setting out averments which, if established at the trial, would entitle him to the relief sought; he need not fully deal with the merits of the case and produce evidence that the probabilities were actually in his favour.'

[19] Has the applicant met the standards set out above? According to the papers filed, the applicant and the respondent, duly represented by Mr. Morkel and Mr. Wellman respectively, entered into an oral sub-contractor agreement the express, alternatively implied, alternatively tacit terms of which were as follows:

[4] *Supra.*
[5] *supra*

1. Respondent was to manufacture 10 steel moulds for purposes of casting concrete manholes as per applicant's specifications. Applicant provided the material and there were no payment terms agreed upon;

2. Respondent was, subsequent to manufacturing the moulds, use them to cast 206 concrete man holes for the applicant against payment per manhole;

3. Applicant shall pay the respondent the amount of N$ 1000.00 per manhole in respect of its labour;

4. Respondent shall only be responsible to render its labour with regard to the casting of the manholes;

5. Applicant shall prepare the site for the casting of each of the 2016 manholes and shall provide all materials so required.

6. The covers for the manholes would be casted, once the lids had been supplied by the applicant; applicant would make progress payments to the respondent upon rendering of an invoice, as and when applicant gets paid his client.

The respondent manufactured the 10 moulds and commenced with the casting of the manholes as per the oral agreement during September 2017. The applicant alleged that respondent rendered unsatisfactory work which was in breach of the agreement and that it subsequently had to repair the gabs in 90% of the manholes as well as remanufacture 3 manholes. It was the applicant's case that despite demand, respondent persisted with the poor workmanship and was thus in breach of the agreement which in turn led to a cancellation of the agreement by the applicant.

[20] On 27 September 2017, respondent presented applicant with an invoice in the amount of N$ 338 675.00 and another invoice in respect of the manufacturing of the moulds in the amount of N$ 184 000.00 from which a deposit in the amount of N$ 26

000.00 was deducted and at which point the applicant informed the respondent that the invoices were not in accordance with the agreement. Notwithstanding the aforementioned, the applicant informed respondent that it was willing to pay for 190 manholes at the agreed rate of N$ 1000.00 per manhole so as to bring the dispute to an end.

[21] Sometime during October 2017, the respondent's legal representatives addressed a letter of demand to applicant in which correspondence, an amount of N$ 523 882.50 was demanded from the applicant. Subsequent to this, applicant made a 'without prejudice' offer in the amount of N$ 162 725.00 to the respondent in the hope of finalising and settling the claim, there was however, no response from the respondent.

[22] The respondent filed very brief opposing papers in which it states that applicant admitted liability for payment in respect of the 190 manholes cast and 10 moulds which the former manufactured and also that, applicant failed to quantify the costs it reasonably had to incur due to respondent's poor workmanship. These allegations are denied by the applicant.

[23] According to the respondent, the applicant is not entitled to a rescission of the whole judgment. It is the version of the respondent that the application for rescission is only opposed in respect of the amount of N$ 162 725.00 and not in respect of the balance of the judgment amount.

[24] The applicant on the other hand, as alluded earlier, only made an offer in the amount of N$ 162 725.00 with the hope of settling the dispute between the parties and that that was in no way a calculation of its liability to the respondent. According to applicant 'it was a thumb suck amount offered to the applicant for purposes to settle this matter'.

[25] I am of the view that it would not be possible nor desirable in the present proceedings as to attempt to resolve this particular dispute between the parties. This is a dispute which would be fit to be resolved in action proceedings, where the conduct of

the *dramatis personae* can be fully and properly interrogated by unleashing the machinery of cross examination. I am of the view that the applicant has set out a *prima facie* defence, namely, that the respondent failed to perform the work in a workmanlike fashion and is thus not entitled to the amount it claims. The allegations made, if proved at trial, would, in my view, constitute a defence to the claim.

Conclusion

[26] From a reading of the papers, it is evident that the requirements which would warrant the granting of a rescission have been satisfied by the applicant. There can therefore be no dispute from the preceding paragraphs that applicant has made out a case for the granting of a rescission of the default judgment and in the result, I make the following order:

[27] Order:

1. The default judgment granted in favour of the respondent/plaintiff against the applicant/ defendant by this court on 22 February 2018 under the above case number is hereby rescinded.

2. The writ of execution, issued by the registrar of this court on 27 February 2018 under the above case number is hereby set aside.

3. The applicant is hereby granted leave to defend the action by the respondent instituted under the above case.

4. The applicant is to file its notice of intention to defend on or before 20 January 2019.

5. The matter is referred to the Registrar for allocation to a managing judge for the further conduct of the matter.

6. Costs of the application are reserved for determination by the trial court.

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TS Masuku
Judge

APPEARANCES:

APPLICANT/DEFENDANT:	H Garbers-Kirsten instructed by Van Wyk Legal Practitioners, Windhoek.
RESPONDENT/PLAINTIFF:	L Du Pisani of Du Pisani Legal Practitioners, Windhoek.