

## Practice Directive 61

## IN THE HIGH COURT OF NAMIBIA

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| <b>Case Title:</b><br>MARK ADCOCK V HOLLARD INSURANCE COMPANY OF NAMIBIA (PTY) LTD  | <b>Case No:</b><br>HC-MD-CIV-ACT-CON-2017/03587<br>(INT-HC-RECDJDGM-2019/00080)               |
| <b>Heard before:</b><br>HONOURABLE LADY JUSTICE PRINSLOO, JUDGE   | <b>Division of Court:</b><br>HIGH COURT(MAIN DIVISION)  |
| <b>Neutral citation:</b> <i>Adcock v Hollard Insurance Company of Namibia (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2017/03587) [2019] NAHCMD 284 (02 August 2019)   | <b>Date of hearing:</b><br>15 JULY 2019   |
| <b>Results on merits:</b><br>Merits not considered.   | <b>Date of order:</b><br>02 AUGUST 2019<br><br><b>Reasons delivered on:</b><br>09 AUGUST 2019 |
| <b>The order:</b><br>Having heard <b>FRANCOIS PRETORIUS</b> , for the Plaintiff and <b>CELEST COETZEE</b> for the Defendant and having read the documentation filed of record:<br><br><b>IT IS HEREBY ORDERED THAT:</b> <ol style="list-style-type: none"> <li>1. The default judgment granted in favour of the respondent/plaintiff against the applicant/ defendant by this court on 21 February 2019 under the above case number is hereby rescinded.</li> <li>2. The sanctions order dated 07 February 2019 striking the applicant's defence/plea is rescinded</li> <li>3. Applicant's plea/defence is re-instated on the main action.</li> <li>4. Costs of the application are reserved for determination by the trial court.</li> <li>5. Matter is postponed to <b>22 August 2019</b> at <b>15:00</b> for Status hearing</li> <li>6. Parties must file a joint status report on or before <u>19 August 2019</u> setting out the further conduct of</li> </ol> |   |

the matter.

**Reasons for orders:**

Introduction

[1] The parties will be referred to as they are in the main action.

[2] The defendant who is a business man, working and residing at Ngepi Lodge in the Northern part of Namibia, is seeking the rescission or setting aside of an order entered against him in favour of Hollard Insurance Company of Namibia (Pty) Ltd, on 21 February 2019.

[3] In the plaintiff's particulars of claim it is alleged that the defendant defrauded the plaintiff in that he allegedly made false representations by stating that he (defendant) suffered a loss by virtue of irreparable damage to the solar electricity system at Ngepi Lodge, including 144 batteries and that 138 of the said batteries needed to be replaced but that the defendant only replaced 6 batteries.

[4] The defendant commenced motion proceedings against the plaintiff wherein the defendant claims the following relief:

- (a) Rescinding and/or setting aside the sanctions order which struck the applicant's defence/plea with costs on 7 February 2019;
- (b) Rescinding and/or setting aside the default judgment granted in favor of the plaintiff against the defendant on 21 February 2019;
- (c) Granting leave to the defendant to re-instate his defence/plea in the main action.

The legal principles regulating rescission applications

[5] Rule 16 of the High Court Rules 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 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.'

[6] The legal principles in Namibia relating to applications for rescission of judgment have been dealt with extensively by the Supreme Court of Namibia<sup>1</sup> and the parties have no quarrel with one another on the set principles.

[7] In order for a party to succeed with an application for rescission of judgment he or she must show good cause for the judgment to be rescinded. The requirements for good cause are the following<sup>2</sup>:

(a) The applicant must give a reasonable explanation of his default. If it appears that his default was due to gross negligence, the court should not come to his assistance.

(b) The application must be bona fide and not made with the intention of delaying the plaintiff's claim.

(c) The applicant must show that he has a bona fide defence to the 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 him to the relief asked for. He/she need not deal with the merits of the

<sup>1</sup> *Lewis v Sampoio* 2000 NR 186 (SC) and *Minister of Home Affairs, Minister Ekandjo v Van Der Berg* 2008 NR 543 (SC)

<sup>2</sup> *Van Der Bergh* supra at 557 J-578 B; *SOS-Kinderdorp International v Effie Lentin Architects* 1991 NR 300 (HC) at 302; *Gruttemeyer NO v General Diagnostic Imaging* 1991 NR 441 at 448; *Xoagub v Shipena* 1993 NR215 (HC) at 217; *Namcon CC v Tula's Plumbing CC* 2005 NR 39 (HC) at 41.

case and produce evidence that the probabilities are actually in his favor.

[8] It is trite that in an application for rescission of judgment the applicant bears the onus and that the court has the discretion to grant such an application.

#### The defendant's default

[9] In considering the defendant's default and whether he has a reasonable explanation for his default it is necessary to give consideration to the judicial case management history of the matter.

[10] I will not burden this ruling with a prolix narration of the case management history. The part that is relevant for purposes of this ruling dates back to June 2018 when the plaintiff's legal practitioner filed a status report that the defendant is not actively partaking in the drafting of the proposed pre-trial order. On 12 July 2018 the matter was postponed until 02 August 2018 and this court ordered the defendant to show cause why sanctions should not be imposed in terms of the Rules of Court. On 30 July 2018 a status report was filed by the plaintiff's legal practitioner indicating that the defendant's legal practitioner failed to sign the pre-trial order. On 2 August 2018 the matter was again postponed for sanctions hearing to be held on 30 August 2018. On 24 August 2018 the legal practitioners approached the managing judge in chambers to explain the difficulties facing the defendant's erstwhile legal practitioner which related to serious health problems. The parties agreed that the defendant's legal practitioner would file the relevant affidavit and the plaintiff's legal practitioner indicated that given the circumstance there would be no opposition to the application for condonation. On 31 August 2018 after having considered the application for condonation and the accompanying affidavit this court granted the condonation sought and relieved the defendant from sanctions. The matter was then postponed to 11 October 2018 for pre-trial conference. The proposed pre-trial order was still not signed and the plaintiff's legal practitioner requested that the defendant be placed on terms. The matter was postponed until 1 November 2018 for another pre-trial conference. On 1 November 2018 during the case management proceedings it became apparent that due to an oversight the case management conference report was never adopted, therefor during case management conference hearing the case management report was adopted and the pre-trial conference was kept in abeyance pending the filing of the parties' witness statements. The parties were ordered to file their witness statements by 3 December 2018 and 7 December 2018 respectively. The matter was postponed until 25 January 2019 for pre-trial

conference. The plaintiff complied and filed its witness statements as ordered but the defendant failed to file any witness statements.

[11] On 24 January 2019 a status report was filed on behalf of the defendant by a professional assistant that upon receipt of the plaintiff's witness statements same were forwarded to the defendant via electronic mail in anticipation of preparing the defendant's witness statement however did not receive instructions in that regard and sought the court's indulgence in postponing the matter for two weeks to file the said statements. After hearing the legal practitioners on 24 January 2019 the court postponed the matter to 07 February 2019 for a sanctions hearing. The defendant was ordered to file a sanctions affidavit for not filing its witness statement on or before 30 January 2019, which was not done and this led to the plaintiff's legal practitioner strongly arguing that sanctions should be imposed. After hearing the legal practitioners of record the court proceeded to impose sanctions in terms of Rule 53(2) (b) of the Rules of Court and the defence of the defendant was struck. Default judgment was hereafter granted on 21 February 2019.

#### The defendant's explanation

[12] The defendant's e-mail communication to his erstwhile legal practitioner indicate that he engaged his legal practitioner on various occasions since 3 November 2018 to determine what the progress in the matter was. From the affidavit filed by the erstwhile legal practitioner it is clear that prior to this date the postponements were due to the ill-health of the defendant's legal practitioner which can surely not be attributed to the defendant. In fact the 3 November 2018 communication was two days after the 1 November 2018 hearing when the matter was postponed until 24 January 2019 and directions were given regarding the filing of the witness statements. This e-mail communication was followed up on 7 November 2018 by the defendant and again 29 January 2019 and 01 February 2019. These last two e-mails were shortly before the sanctions were imposed on 7 February 2019 and stands in stark contrast to status report filed on 24 January 2019 indicating that the no instructions could be obtained. The defendant states that in spite of the multiple e-mails to his erstwhile legal practitioner he never received any reply on any of the e-mail enquiries. He further states that he was unaware of the fact that a pre-trial report or witness statements were due for filing as he was not informed. The defendant stated that he first became aware of the fact that his defence was struck when he received a writ of execution and inventory list was emailed to him on 5 April 2019, whilst he was in Europe. Defendant states that in spite of the fact that he was not in Namibia at the time he immediately

contacted his current legal practitioners to address the issues without delay.

### Discussion

[13] For reasons not clear to this court no extension was sought by the defendant's erstwhile legal practitioner for the filing of the witness statement or the sanctions affidavit in February 2019. This failure cannot be attributed to the defendant.

[14] I agree with the sentiments expressed by the court in *Katjiamo v Katjiamo*<sup>3</sup> that there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or insufficiency of explanation tendered, however I am of the opinion this is not one of those case. The postponements and non-compliances must be attributed to the erstwhile legal practitioner for a variety of reasons and that a certain degree of remissness must be attributed to the defendant's erstwhile legal practitioner. Therefore having considered the founding affidavit and the argument advanced on behalf of the defendant I am satisfied that the defendant has a reasonable and acceptable explanation for his default.

### Bona fide defence

[15] In *Rixi Investment CC v Khomas Civil Construction CC*<sup>4</sup> Masuku J stated as follows:

[18] It was held in the Supreme Court in *Minister of Home Affairs*<sup>5</sup> 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.'

[16] The defendant denied the averments by the plaintiff that he made false representations and pleaded

<sup>3</sup> 2015 (2) NR 340 (SC).

<sup>4</sup> (HC-MD-CIV-MOT-REV-2017/04534) [2018] NAHCMD 395 (3 December 2018)

<sup>5</sup> *Minister of Home Affairs, Minister Ekanjio v Van Der Berg* 2008 (2) NR 548 (SC).

that he acted at all material times upon expert advice enlisted when he obtained quotes and when he submitted his claim to the plaintiff. The defendant further maintained, regarding the plaintiff's allegations, that he obtained quotations from two professional institutions namely, Alensy Alternative Energy Systems CC and EWC Environmental Consulting Services CC. In addition thereto the loss adjuster acting on behalf of the plaintiff, one Mr Johan Liebenberg advised the defendant that the system of batteries consists of battery banks which consists of battery cells in series and should one shell within these strings be damaged then the internal resistance of the single unit shall differ compared to other cells.

[17] The defendant further goes on to say that Johan Liebenberg further explained that the end effect of the aforesaid is that, should a single cell or various individual cells be damaged with a battery bank as described then the individual cell shall cause harm to the rest of the battery bank which shall not operate correctly. The damaged cell shall charge and discharge at different rates to the rest of the battery bank and by doing so, effectively becoming the weak link of the system, alternatively, this shall result in the complete demise of the battery bank's ability to hold charge and supply power.

[18] The defendant explains further that it is for the aforesaid reasons that the individual cells are not replaced but rather the complete battery bank. This is especially true for individual damaged cells that would be replaced by new cells as 6 batteries that were changed. By virtue of the aforesaid a total of 48 batteries needed to be replaced, ie 2 banks of cells and not only 6 batteries. The defendant averred that Mr Liebenberg, acting on behalf of the plaintiff recommended and insisted that all the batteries or 'bank' be replaced and not only 6 batteries. This resulted in one of the professional institutions at first only giving a quotation for 6 batteries and then an additional quotation in terms whereof the balance of 138 (144-6) was quoted for.

[19] The defendant maintains that the fact that 48 batteries, ie two banks of cells needed to be replaced was conveyed to the plaintiff at the time and prior to when the claim was submitted by the defendant and that the plaintiff was at all relevant times appraised of the situation and also assessed the damage caused by the lightning strike when Mr Liebenberg was sent out to the lodge to determine the damage caused.

[20] The defendant thus maintained that he neither provided false information to the plaintiff nor defrauded the plaintiff as alleged.

[21] It was argued that the defendant's defence was anything but bona fide and a number of inconsistencies were pointed out in the founding affidavit of the defendant. However, in spite of the fact that the defence of the defendant might be flawed in certain respects and is open to criticism it need not be a cast iron defence and as pointed out in the *Home Affairs* matter the question of how good or bad that defence was, was an issue which should be determined at the trial of the main action.

[22] I am satisfied that the defendant made out a prima facie defence and, if established at the trial, would entitle him to the relief asked for. I am further satisfied that the application before court is not aimed at frustrating the plaintiff or with the intention of delaying the plaintiff's claim.

[23] My order is therefore as set out above.

| Judge's signature  | Note to the parties:   |
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|  | Not applicable.  |
| Counsel:   |  |
| Applicant  | Respondent   |
| Adv C Mouton<br>On instructions of De Klerk Horn & Coetzee Inc | Adv C Van der Westhuizen<br>On instructions of Francois Erasmus & Partners |