

IN THE HIGH COURT OF NAMIBIA

Case Title: Khomas Regional Council // Sam Namene	Case No: I 1847/2012
	Division of Court: High Court
Heard before: Honourable Justice Herman Oosthuizen	Date of hearing: 12 December 2019
	Delivered on: 3 February 2020
Neutral citation: <i>Khomas Regional Council v Namene</i> (I 1847/2012) [2020] NAHCMD 34 (3 February 2020).	
Result on merits: Rescission and condonation application dismissed.	
The order: Having heard Mr Ndlovu , counsel for the plaintiff, and Ms Ndilula , counsel for the defendant: IT IS ORDERED THAT: 1 Defendant's rescission application is dismissed. 2 Defendant's condonation applications for the non-compliance with the court orders of 12 November 2018 and 27 May 2019 are dismissed and refused. 3 The automatic bar against defendant, as well as the court order of 8 July 2019 remain valid and operative. 4 Defendant shall pay the costs of the plaintiff, which shall include the costs of one instructing counsel.	
Reasons for orders:	

1. During July 2012 the plaintiff sued defendant for eviction from its premises.
2. Defendant entered defence and plea and counterclaim.
3. Plaintiff raised an exception during September 2012.
4. Almost a year later the parties applied for a trial date.
5. On 25 March 2014 the matter went to Court.
6. On 27 March 2014 judgment was given in favour of plaintiff on an exception it raised.
7. Defendant appealed and the Supreme Court upheld his appeal during June 2016 and referred the matter back to the High Court.
8. The case had to be referred to a case management judge, which was eventually done during August 2018 and after the plaintiff has amended its particulars of claim by adding a monetary value to its claim for ejection by inserting rental amounts as from 2015.
9. During October 2018, Oosthuizen J, the newly assigned case managing judge, scheduled a status hearing for 12 November 2018 and ordered the parties to file a joint case management report by 8 November 2018.
10. On 12 November 2018 after reading the said report which was filed, the court ordered the defendant to plea to the amended particulars of claim on or before 14 December 2018, file discovery on or before 25 January 2019 and witness statements on or before 1 March 2019.
11. Defendant, duly represented by the same legal practitioners which represented him from 2012 and during the appeal to the Supreme Court, failed to do any of the above.

Instead it initiated settlement negotiations with plaintiff, but failed to follow through.

12. On 27 May 2019 the court after hearing plaintiff's attorney and the defendant in person issued an order, ordering defendant to apply for condonation in terms of Rules 55 and 56 of the Court Rules and apprising defendant of the possible consequences in terms of Rule 53(2) for failure to do so. The court availed the courts research assistant to defendant to assist him if there was something he wanted to have explained again. The matter was then postponed for a status hearing to 8 July 2019 at 14h15 and defendant was warned to be personally present.

13. Defendant, despite what happened in court on 27 May 2019, then filed an unsworn request for condonation on 29 May 2019.

14. The whole of June 2019 passed and on 8 July 2019 neither the defendant nor his newly obtained legal practitioner appeared. Needless to say, no condonation application was filed.

15. The excuse tendered by defendant is that he arranged with his new legal representative, Mr Amoomo, to be in court and that Mr Amoomo stepped out to attend to mediation dates. Defendant himself came late. The matter was disposed of.

16. Defendant say he only found out on 10 July 2019 that his defence was struck and the matter finalised.

17. On 8 July 2019 the court struck his defence and granted final judgment for plaintiff and ordered defendant to be evicted.

18. The whole court order of 8 July 2019 is reproduced for ease of reference.

“Having heard **Mr Ndlovu**, counsel for the plaintiff and having read the documents filed of record: Having noted that the defendant has not complied with order numbers 1, 2 and 5 of this court's order dated 27 May 2019, despite being personally at court; and in the absence of defendant although he was ordered to be present.

IT IS ORDERED THAT:

1. Defendant's defence is struck with costs in terms of Rule 53 (2) of the High Court Rules.
2. Plaintiff is granted final judgment in terms of Rule 53 (2) and the defendant is ejected/evicted from plaintiff's property being erven 10356, 10357 and 10358 Single Quarters, Katutura, Windhoek within 30 court days calculated from 9 July 2019.
3. Defendant is ordered to remove all structures illegally constructed on the aforesaid erven within 30 court days calculated from 9 July 2019.
4. The eviction order in order 2 hereof include all other unlawful occupants of the said erven who occupy through the defendant.
5. No damages for and relating to rental or holdover rental are granted.
6. The matter is finalised and removed from the court roll.”
19. The matter being finalised and the court files was returned to the Main Registry of the High Court.
20. On 8 August 2019 the defendant has filed the present rescission application.
21. The case file was re-allocated to me (Oosthuizen J) during the same month.
22. On 30 August 2019 the plaintiff opposed the rescission application.
23. On 16 September 2019 only counsel for plaintiff appeared in court, neither defendant nor his legal practitioner appeared contrary to Rule 19 (a) and (e).
24. The court order of 16 September 2019 reads:

“Having heard **Mr Ndlovu**, counsel for the plaintiff and having read the documents filed of record:

IT IS ORDERED THAT:

1. Plaintiff/Respondent shall file its Opposing Affidavits on or before 30 September 2019.
2. Defendant/Applicant shall file his Replying Affidavit on or before 16 October 2019.
3. Applicant shall file its Heads of Argument on or before 25 October 2019.
4. Respondent shall file his Heads of Argument on or before 7 November 2019.
5. The matter is postponed to Thursday, **12 December 2019** at **09H00** for Hearing.”
25. Plaintiff filed its opposing affidavit on 30 September 2019.
26. Defendant failed to file his replying affidavit as ordered, and failed to file his Heads of Argument on or before 25 October 2019 as ordered.
27. The matter was set down for argument on 12 December 2019.
28. No condonation application was filed as ordered on 27 May 2019.
29. Defendants rescission application was filed late and no security was paid or arranged (vide Rule 16(1), (2) and (3)). No condonation was sought.
30. Defendant furthermore did not file a replying affidavit and did so to its peril because the factual averments made by plaintiff in its opposing affidavit remains uncontested.
31. Defendant filed his heads of argument late and only on 4 November 2019, again without an explanation or condonation. He and his legal practitioner apparently believe that court rules and orders are not applicable to them.
32. Mr Benjamin, the deponent for plaintiff appositely made the following remarks:

“Even with the court's assistance, applicant has continued to flout the rules of court. His actions have no difference when he is unrepresented or when he is represented. At all times he does not comply then he seek indulgences. The rules of court are designed for expediency and

justice. The delay by the applicant benefits him but are an injustice for the plaintiff. The interests of justice require finality of matters and the rescission of judgment should not be granted.”

33. In paragraphs 28 and 29 of plaintiff's opposing affidavit, Mr Benjamin declared:

“The non-compliance was clearly due to a wanton disregard of the rules of court as well as the courts orders. Mr Namene was warned to appear in court by the court and he chose not to. His representative, while not on record at the time chose to obtain mediation dates; if those allegations were to be believed rather than be in court at the appointed time. This is a clear wilful disregard of the court.

There is no reason or basis to condone the multiple non-compliances that hinder and strangle the objectives of case management. I am advised that there is an adage that “the law favours the vigilant and not the sluggard.” In this case the defendant has been a sluggard for more than 4 times, each of which has been prejudicial to the plaintiff. Such actions should no longer be tolerated and the application must fail.

In conclusion, I feel constrained to highlight to the court the prejudice that the plaintiff continues to suffer as a result of Mr Namene's unlawful occupation of the plaintiff's property.

29.1 the property occupied by the defendant has been earmarked for the building of a constituency office for a number of years now. In December 2013, while we still hoped for a quick resolution of this matter, a tender was awarded to *spes bona* construction and renovation cc for the amount of N\$7 668 481. I attach hereto our award letter and the acceptance thereof marked KRC9 and KRC10 respectively.

29.2 due to the continual delays and ongoing litigation we eventually were left with no option but to cancel the tender. I attach hereto marked KRC11 a letter from the contractor relating to this.

29.3 this in fact is the least of our worries. As the years have gone by, it has become increasingly difficult to justify the continued extension of time to utilise the funds to the Ministry of Finance in light of the austerity measures now engaged by the nation.

29.4 I must also point out that with time, the costs of the project continue to escalate while one person enjoys the use of space meant for the community without justification.

29.5 I dare say, this situation cannot be allowed to continue any longer. Defendant has

no legal basis to occupy the property and no defence to the claims against him. Having been given multiple notices to vacate plaintiff's property he ought to have long moved out and his presence continues to prejudice plaintiff who cannot utilise their property and also receive no benefit from it, not even a dime.”

34. By refusing to rescind the judgment of 8 July 2019 the court has applied (1) *Rixie Investments CC v Khomas Civil Construction CC* (HC-MD-CIV-MOT-REV-2017/04534 (2018) NAHCMD 39 (3 December 2018) and (2) *Nikodemus Mumbandja v Nehale* (I 126 (2014) (2016) NAHCMD 84 (1 October 2016) and (3) *Grove Mall (Pty) Ltd v Wago Investments CC T/A Beta Shoes* (CA 12/2017) [2017] NAHCMD 252 (28 August 2017).

35. The court is satisfied that applicant/defendant had the onus to convince the court of the merits of his rescission and condonation application. In applying *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 in the premises, the conclusion is inescapable. Applicant/defendant is not entitled to the relief it seeks.

36. In the premises the court orders that:

36.1 Defendant's rescission application is dismissed.

36.2 Defendant's condonation applications for the non-compliance with the court orders of 12 November 2018 and 27 May 2019 are dismissed and refused.

36.3 The automatic bar against defendant, as well as the court order of 8 July 2019 remain valid and operative.

36.4 Defendant shall pay the costs of the plaintiff, which shall include the costs of one instructing counsel.

Judge's signature:	Note to the parties:
Counsel:	

Plaintiff	Defendant
<p data-bbox="320 257 632 349">Mr Ndlovu Government Attorney</p>	<p data-bbox="874 257 1382 349">Mr Amoomo Kadhila Amoomo Legal Practitioner</p>