

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> <i>Christiaan Johannes Von Solms v Mavin Mootseng</i>	<b>Case No.:</b> HC-MD-CIV-ACT-OTH-2017/04151
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/tried before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 03 September 2020
	<b>Delivered on:</b> 03 September 2020
<b>Neutral citation:</b> <i>Von Solms v Mootseng</i> (HC-MD-CIV-ACT-OTH-2017/04151) [2020] NAHCMD 391 (3 September 2020)	
<b>The Order:</b> Having heard <b>Mr Pretorius</b> , on behalf of the plaintiff and <b>Mr Mootseg</b> , the defendant in person and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The application by the defendant for re-instatement of an application for rescission of a judgment granted by this court on 24 June 2019, is dismissed.	

2. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to defendant's application for re-instatement as well as to the application for rescission.

3. The matter is removed from the roll and is regarded finalized.

**Reasons: Practice Direction 61(9)**

Introduction

[1] In this matter the defendant seeks re-instatement of his application for rescission of a judgment granted by this court in favour of the plaintiff on 24 June 2019.

Background

[2] The plaintiff had instituted an action against the defendant for damages arising from a collision between a motor vehicle owned by the plaintiff and a motor vehicle then being driven by the defendant. The defendant defended the action. The defendant acted in person throughout the proceedings. The matter went through the relevant case management stages. On the 18 September 2018, in the presence of the defendant, the court ordered, among other things, that the defendant files his witness statements by the 02 November 2018 and the matter was postponed to 04 December 2018 for pre-trial conference. The defendant has not filed any witness statement to date. The parties, however, filed a joint pre-trial report. On the 4 December 2018, there was no appearance on the part of the defendant. On that day the court made a pre-trial order based on the parties' joint pre-trial report and set the matter down for trial for the 24-28 June 2019.

[3] On the 24 June 2019, the matter was called for trial. The plaintiff appeared, however, there was no appearance on the part of the defendant. After hearing counsel for the plaintiff, the court made an order in the following terms:

**'IT IS RECORDED THAT:**

*There is no appearance on the part of the defendant. The plaintiff prays for judgment in terms of rule 98(1). Having read the pleadings and having considered the damages affidavit filed on behalf of the plaintiff, I am satisfied that the plaintiff has made out a case entitling the plaintiff to the relief he seeks. For that reason the following order is hereby made:*

**IT IS HEREBY ORDERED THAT:**

Judgment is hereby granted in favour of the plaintiff against the defendant, in the following terms:

*1 Payment in the amount of N\$69,165-69;*

*2 Interest on the aforesaid amount at the rate of 20% per annum from 24/06/2019 until the date of final payment;*

*3 Costs of suit;*

*4 The matter is removed from the roll: Case Finalized.'*

[4] On 04 November 2019 the defendant filed an application for rescission of the abovestated judgment. The matter was set down on a residual roll. On the 15 November 2019 the parties made appearance in a residual court and were directed to exchange further papers by certain dates and the matter was postponed to the 06 December 2019 for hearing on a residual roll.

[5] On the 05 December 2019 the matter was struck from the roll in terms of *practice direction 58(6)* read with *practice direction 58(4)(b)*.

[6] It is the above striking of the matter from the roll that led the defendant to launch the present application for re-instatement. The application for re-instatement is opposed by the plaintiff.

The application for re-instatement

[7] In his application, the defendant contends that the court erred in striking the application for rescission from the roll because *practice directions 58(4) (b)* is only applicable to a party who is represented by a legal practitioner. The defendant is not represented by a legal practitioner, therefore, the provisions of *practice direction 58(4)(b)* are not applicable to

him.

[8] Insofar as prospects of success on the merits are concerned, the defendant contends that when the matter was set down for trial, the defendant was not present in court. The defendant asserts further that counsel for the plaintiff (Ms Delpont) who attended court proceedings on the 04 December 2018 when set-down dates were granted, did not inform the defendant that the matter was set down for trial for the 24 to 28 June 2019. The defendant was thus unaware of the trial dates. The defendant also argues that the evidence filed on behalf of the plaintiff is not sufficient to warrant awarding the plaintiff the relief he seeks. The defendant therefore contends that the judgment granted on 24 June 2019 was granted in error in that the defendant was not present when the trial dates were allocated.

[9] The plaintiff contends that the defendant has not given a plausible explanation for this failure to prosecute his rescission application. The explanation that the defendant believes that he is not required to comply with *practice direction* 58(4)(b) is inconceivable because the defendant had complied with *practice direction* 58(4)(b) previously. On 04 November 2019 the defendant enrolled the matter on first motion court and filed an *Annexure "9"* form on e-justice, through the service of bureau. The plaintiff, therefore, argues that the defendant's explanation based on his subjective interpretation of *practice direction* 58(4)(b) is improbable.

[10] The plaintiff further contends that the defendant has not disclosed his defence to the main action in his application for rescission. In addition, the plaintiff contends that the defendant has not furnished security to the plaintiff. The plaintiff, therefore, submits that the application for reinstatement be dismissed with costs.

### Analysis

[11] It is trite law that an applicant for re-instatement is required to:

- (a) satisfy the court that he has a reasonable and acceptable explanation for his default, and,
- (b) show that he has reasonable prospects of success on the merits of the case.

[12] There is some reciprocal relationship between the foregoing requirements. A reasonable prospect of success may lead to the granting of reinstatement application even if the explanation is not entirely satisfactory. While the two requirements are generally considered together, that is not always the case. For example, where there is no reasonable explanation for a glaring non-compliance with the rules, an application may be dismissed without consideration of the prospects of success. Conversely an entirely satisfactory explanation will not save an application where there are no prospects of success on the merits.<sup>1</sup>

[13] Practice direction 58(4) provides as follows;

‘(4) Where a case is initiated through the electronic case management and filing system of the court, the legal practitioner is required to perform all actions mentioned in paragraph (3):

(a) by completing the required fields on the system in order for the system to generate Annexure “9” and enrolling the matter on the on the First Motion Court roll or Second Motion Court roll by not later than 16h00 of the eighth court day prior to the applicable motion roll, or

(b) if the matter is on the roll due to a previous postponement by the court, by completing and filing Annexure “9” as a pdf document on the electronic case and checking the electronic file by not later than 16h00 of the eighth court day prior to the applicable motion court.’

[14] *Practice direction* 58(6) reads as follows:

‘(6) If annexure “9” has not been filed, the presiding judge may not hear the matter and the matter must be struck from the roll with possible order as to costs.’

[15] From the provisions of *practice direction* 58(4) it is apparent that paragraph (4) applies to each case on a First Motion Court roll or Second Motion Court roll, initiated

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<sup>1</sup> Sun Square Hotel (Pty) Ltd v Southern Sun Africa and Another: Case No. SA 26/2018 para.13.

through the electronic case management and filing system of the court. The paragraph therefore directs a party or if represented, his/her legal practitioner, to perform all actions set out in paragraph (3), by taking steps as more fully set out in paragraph (4).

[16] Though the explanation by the defendant (to the effect that he interprets paragraph (4) as applicable only to a legal practitioner) appears appealing, such explanation is not reasonable in the circumstances. Paragraph (4) is the only provision that deals with what should be done where a party has initiated his case through *e-justice*. It is therefore not reasonable for the defendant, having initiated his case through the *e-justice system*, to contend that a provision that applies to all cases initiated through the *e-justice system*, is not applicable to him, because he is not a legal practitioner. If the explanation given by the defendant were to be accepted in this case, then the court will have to accept every other explanation for failing to comply with that *practice direction*, where a party or parties have initiated their case through the *e-justice system*. The explanation given by the defendant in this respect is neither reasonable nor acceptable in the circumstances.

[17] In addition to the foregoing, I am also not persuaded that the defendant has shown reasonable prospects of success on the merits of the matter. The defendant was present in court on 18 September 2018 when the matter was postponed to 04 December 2018 for pre-trial conference. On the 18 September 2018 the defendant was among other things, directed to file his witness statements by 02 November 2018. He has not done so. Having not attended court on 04 December 2018, the defendant has not explained the steps he has taken to inform himself of what transpired in court on the 04 December 2018. Further, there is no evidence that his absence in court on the 04 December 2018, or his failure to take steps to apprise himself of the proceedings that took place on that day, was due to circumstances beyond his control. In addition to the foregoing, the defendant has not yet filed witness statements and has not disclosed a defence upon which a court may be persuaded that he has reasonable prospects should he be given another opportunity to appear at trial. There being no prospects of success on the merits, the defendant's application for reinstatement of the rescission application, stands to be dismissed.

[18] As regards costs, I am of the opinion that the general rule that costs follow the event, must find application in this matter.

[19] In the result I make the following order:

1. The application by the defendant for re-instatement of an application for rescission of a judgment granted by this court on 24 June 2019, is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by plaintiff's opposition to defendant's application for re-instatement as well as to the application for rescission.
3. The matter is removed from the roll and is regarded finalised.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
F. Pretorius Of Francois Erasmus & Partners Windhoek	In person