

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> <i>Megameno Boas Naanda vs Gerhardus Christian Fredrik and Hilma Fredrik</i>	<b>Case No.:</b> HC-MD-CIV-ACT-CON-2018/04242
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard/trie before:</b> Honourable Mr Justice B Usiku J	<b>Date of hearing:</b> 15 September 2020
	<b>Delivered on:</b> <b>15 September 2020</b>
<b>Neutral citation:</b> <i>Naanda v Fredrik</i> (HC-MD-CIV-ACT-CON-2018/04242) [2020] NAHCMD 415 (15 September 2020)	
<b>The Order:</b> Having heard <b>Mr Andima</b> on behalf of the Plaintiff and <b>Adv. Shifotoka</b> with <b>Ms Gaes</b> , on behalf of the Second Defendant and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  1. The second defendant's application for rescission of the court order dated 12 November 2019, is granted.  2. The warrant of ejectment issued by the registrar on 15 January 2020 is set aside.  3. I make no order as to costs.	

4. The matter is postponed to 7 October 2020 at 15:15 for status hearing.
5. The parties must file a joint status report on or before 30 September 2020.

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

Introduction

[1] This is an application by the second defendant, in terms of rule 103(1)(a), for the rescission of court order dated 12 November 2019.

[2] On the 12 November 2019, in chambers and in absence of the parties, the court issued an order in the following terms:

**'IT IS RECORDED THAT:**

The plaintiff has filed application for summary judgment. The defendants have not filed any opposing affidavit. The following order is hereby made.

**IT IS HEREBY ORDERED THAT:**

1. The first and second defendants, and all persons holding under them, are evicted from:
  - 1.1 Certain: Erf No. 3944 Katutura (Extension No. 2);
  - 1.2 Situate: In the Municipality of Windhoek, Registration Division "K", Khomas Region.
  - 1.3 Measuring: 314 square metres;
  - 1.4 Held by the plaintiff under Deed of Transfer No. T 6463/2017; 2 The defendants must pay the plaintiff's costs of suit.
- 3 The defendants must vacate the above property on or before 13 December 2019, failing which the Deputy Sheriff for the district of Windhoek is hereby authorised to evict the defendants and all persons holding under them.
- 4] Matter is removed from the roll and regarded as finalised.'

[3] The foregoing order was a sequel to an order dated 24 September 2019, in the following terms:

**'IT IS RECORDED THAT:**

The plaintiff intends to apply for summary judgment.

**IT IS HEREBY ORDERED THAT:**

- 1 The plaintiff must comply with rule 32 (9) and (10) on or before 11/10/2019.
- 2 The plaintiff must file the summary judgment application on or before 18/10/2019.
- 3 The defendant must file opposing affidavit(s), if any, on or before 01/11/2019.
- 4 The case is postponed to 13/11/2019 at 15:15 for Status hearing.
- 5 The parties must file joint status report on or before 06/11/2019.'

[4] The plaintiff did comply with the aforesaid order and filed an application for summary judgment. The defendants did not file any opposing affidavit, and subsequent thereto, the court issued the order dated 12 November 2019, granting summary judgment.

[5] On 23 January 2020, the second defendant filed the present application seeking the rescission of the summary judgment granted on 12 November 2019.

The application for rescission

[6] At the outset of the hearing of the application for rescission, the second defendant raises a point in limine to the effect that the plaintiff has failed to file notice of intention to oppose the rescission application, within 5 days from the date of service of the notice of motion on the plaintiff. The second defendant argues that the notice of motion was served on the plaintiff on 24 January 2020. The plaintiff ought to have delivered a notice of intention to oppose by 4 February 2020 and file his answering affidavit by 24 February 2020 (ie 14 days from the 4 February 2020). Instead, the plaintiff filed his notice of intention to oppose on 18 February 2020 and filed his answering affidavit on 10 March 2020. The second defendant therefore argues that there is no answering affidavit before the court and the court should only have regard to the second defendant's founding affidavit.

[7] The plaintiff responds to the effect that when there is no notice of intention to oppose filed by the 4 February 2020, the second defendant simply ought to have complied with rule 66(3) and give notice to the registrar to place the matter before a judge on a

residual court for decision.

[8] In my opinion, there is no substance in the point in limine raised by the second defendant. If a notice of intention to oppose is not delivered timeously, the issue is to be dealt with in a similar fashion, as contemplated under rule 14(6): namely that the opposing party is only entitled to costs if the notice of intention to oppose is delivered after the opposing party has lodged an application for judgment by default. The second defendant's point in limine therefore stands to be dismissed.

[9] As regards the application for rescission, the second defendant argues to the effect that the order dated 12 November 2019 was sought and granted erroneously because she was not legally represented and has no access to e-justice and was unaware of the papers filed of record and the court orders made in the matter. The second defendant also contends that Messrs Swartbooi and Muharukua, who held out to be her legal representatives, were not her legal representatives as they had not formally filed a notice of representation.

[10] The gist of the second defendant's application appears to be that the order dated 12 November 2019 must be set aside because neither she nor her alleged legal representatives were aware (or can be deemed to have been aware) of the application for summary judgment and the court order directing the defendant to file an opposing affidavit, if so advised, by a certain date.

[11] In response, the plaintiff argues that the defendant was at all material times represented by Messers Swartbooi and Muharukua Inc and that there is no basis for rescinding the summary judgment granted in favour of the plaintiff. The plaintiff therefore submits that the rescission application be dismissed with costs.

## Analysis

[12] Rule 103 deals with variation and rescission of orders and judgment, and provides as follows:

'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.'

[13] An applicant for rescission in terms of rule 103 bears the onus to show that the impugned court order had been erroneously granted. As a general rule an order or judgment is erroneously granted if there existed, at the time of its issue, a fact which the court was unaware of, which would have precluded the granting of the order and which would have induced the court, if aware of it, not to grant the order.<sup>1</sup> It therefore, appears to me that, in order for an application for rescission to succeed, the applicant is required to put before the court facts which the court had ignored or failed to take into consideration, and which demonstrate that the impugned order was ill-advised in the circumstances.<sup>2</sup>

[14] It is common cause that the second defendant was at all material times aware of the eviction proceedings initiated against her by the plaintiff. She was aware that the matter has been initiated through the electronic case management and filing system. She was under the impression that Messers Swartbooi and Muharukua Attorneys were her legal representatives. The second defendant has filed of record a copy of a letter from the Directorate: Legal Aid to the effect that Messers Swartbooi and Muharukua Attorneys has been instructed to represent her. The aforesaid attorneys have exchanged correspondence with the plaintiff's attorneys in which the former had referred to the second defendant as their

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<sup>1</sup> *Naidoo v Matlala* 2012 (1) SA 143 GNP at 153C.

<sup>2</sup> *Bekker v Kotze and Another* 1994 NR 345 at 348 E-G.

'client.' Messers Swartbooi and Muharukua did not formally come on e-justice record as defendant's legal representatives. On 18 October 2019, the plaintiff caused the application for summary judgment to be served on the second defendant. According to the return of service the application for summary judgment was served on Gerhardus Fredrik (a son of the second defendant), at the residential address of the second defendant.

[15] From the papers filed of record, it is arguable whether or not Messers Swartbooi and Muharukua held instructions to represent the second defendant. I say so because they seem to have made no effort to come on record on e-justice system, as second defendant's attorneys of record. That makes it hard to determine when they started representing the second defendant and at what stage they ceased the representation. It is, therefore, difficult to discount the version put forth by the second defendant that Messers Swartbooi and Muharukua never represented the second defendant.

[16] The crucial question in this matter is whether the second defendant was aware (or should be deemed to have been aware) of the court order dated 24 September 2019 directing her to file an opposing affidavit by the 1 November 2019.

[17] From the papers filed of record, I see nothing pointing in that direction. It appears that, after the order dated 24 September 2019 was issued, the plaintiff made no further effort to engage the defendants (or Messers Swartbooi and Muharukua Attorneys) in terms of rule 32(9). All the documentary evidence attached to the plaintiff's notice in terms of rule 32(10) refers to events that took place prior to the 24 September 2019. This makes it difficult to even assume that Messers Swartbooi and Muharukua can be deemed to have had knowledge of the court order dated 24 September 2019, in view of the fact that they do not appear on e-justice as the defendant's legal representatives of record.

[18] It is apparent that the plaintiff saw a need to have the application for summary judgment served on the second defendant. However, the plaintiff did not at the same time serve on the second defendant a copy of the court order dated 24 September 2019. It is this court order that placed an obligation upon the second defendant to, if so advised, file an

opposing affidavit.

[19] The effect of rule 135(6) and (7) require that the court order dated 24 September 2019 and the application for summary judgment, should have been brought to the attention of the second defendant in the present circumstances. That was not done. It therefore appears to me that the granting of the court order dated 12 November 2019, in the face of the non-service of such documents on the second defendant, in the present case, constitute an error contemplated under the provisions of rule 103(1)(a) warranting the granting of the rescission application.

[20] Insofar as the issue of costs is concerned, it appears from the papers filed of record that the second defendant is represented on the instructions of the Directorate of Legal Aid. In these circumstances, I do not deem it appropriate to make an order for costs.

[21] Accordingly, I make the following order:

1. The second defendant's application for rescission of the court order dated 12 November 2019, is granted.
2. The warrant of ejectment issued by the registrar on 15 January 2020 is set aside.
3. I make no order as to costs.
4. The matter is postponed to 7 October 2020 at 15:15 for status hearing.
5. The parties must file a joint status report on or before 30 September 2020.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	

<b>Plaintiff</b>	<b>Second Defendant</b>
T. Andima Of Van der Merwe-Greef Andima Inc Windhoek	F. Gaes Of Uanivi Gaes Inc Windhoek