

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
RULING



NAMIBIA, MAIN DIVISION,

CASE NO: HC-MD-CIV-

ACT-CON-2019/03638

In the matter between:

**SIMEON NEKONGO IN HIS CAPACITY AS
EXECUTOR IN THE ESTATE OF
THE LATE AILI KAWELA**

FIRST APPLICANT

SIMEON NEKONGO

SECOND APPLICANT

and

FIRST NATIONAL BANK OF NAMIBIA LIMITED

RESPONDENT

Neutral Citation: *Nekongo NO v First National Bank of Namibia* (HC-MD-CIV-ACT-CON-2019/03638 [2020] NAHCMD 495 (29 October 2020))

CORAM: MASUKU J

Heard: 22 September 2020

Delivered: 29 October 2020

Flynote: Rules of Court – rules 65(4) and 8(6) – service – rescission application is incidental to the matter in which the default judgment was granted – service of the rescission application on the legal practitioners of the plaintiff / applicant in the default judgment application via e-justice by the applicant to the rescission application, is proper service.

Rules of Court – rules 8(6) and 9(1)(b) – proof of service - filing of notice to oppose the rescission application demonstrates that service of the application was effected, as it is confirmed by the Respondent's participation in the proceedings. It is not necessary to file proof of service in terms of rule 9(1)(b).

Rules of Court - rule 65(7) – service on Master mandatory - a failure to comply with this provision is fatal to the application – fatal does not mean 'dismiss', it means the Court cannot properly consider the application until such time that the provision has been complied with.

Summary: This matter concerns an opposed application for rescission of default judgment in terms of rule 16, and an opposed application for condonation for the late filing of the rescission application.

The Applicant is Simeon Nekongo. He is both the First and Second Defendant in the action. He is cited as First Defendant thereto in his *nominé officio* capacity as the executor in the estate of his late wife, Aili Nekongo (previously Kawela). The Respondent is First National Bank of Namibia Ltd, the Plaintiff in the action.

The late Aili Nekongo and the Respondent entered into a written instalment sale agreement in terms of which the late Aili Kawela purchased a vehicle.

The Applicant's spouse, alternatively the estate of the late Aili Nekongo, defaulted in respect of payment to the Respondent. The Respondent issued summons for payment of the amount of outstanding amount. No notice of intention to defend was delivered and consequently default judgment was granted.

The Applicant then launched this rescission application. The rescission application was served, together with an application for condonation, via e-justice on the attorneys of record for the Respondent, as they were registered in the preceding the default judgment application.

Both the rescission and condonation applications are opposed.

The Respondent raises two points of law *in limine*. The first, that the application is not in compliance with rule 65(4) as it was not reserved on the Respondent. The second, being that the Applicant is required by rule 65(7) to serve a copy of the application on the Master.

Held that the rescission application is “*incidental to*” the default judgment.

Held further that service of the rescission application as provided for in terms of rule 8(6), on the legal practitioners of the plaintiff / applicant in the default judgment application via e-justice by the applicant in rescission application, constitutes proper service.

Held further that the Applicant is required by rule 65(7) to serve a copy of the application on the Master prior to filing the application, and failure to do so is fatal.

ORDER

1. The application for rescission filed by the Applicants, is removed from the roll for non-compliance with the provisions of rule 65(7) of the Rules of this Court;
2. The Applicants are ordered to pay the costs of the Respondent, jointly and severally, the one to pay the other to be absolved.

JUDGMENT

MASUKU J:

Introduction

[1] Presently serving before this Court for determination are two applications. The first is an opposed application for rescission of a default judgment dated 1 October 2019. The second, is an opposed application for condonation for the late filing of the rescission application.

Parties

[2] The Applicant is Mr. Simeon Nekongo, a major male. He is both the first and second defendant in the main action, whose order is sought to be rescinded. He is cited as first defendant thereto in his *nominé officio* capacity as the executor in the estate of his late wife, Ms. Aili Nekongo (previously Kawela). He is further cited in his personal capacity as second defendant.

[3] The respondent is First National Bank of Namibia Ltd, the Plaintiff in the main action.

Background

[4] For purposes of completeness, I briefly depict the history to this matter, in as much it is relevant to the application with which the Court is currently seized.

[5] It is common cause that the applicant and his late wife married at Onyaanya, on 23 August 2014. What is in dispute is which marital proprietary regime was applicable to the marriage.

[6] On 9 December 2017 the late Aili Nekongo and the respondent entered into a written instalment sale agreement (the “agreement”), in terms of which the late Aili Kawela purchased a 2017 Mahindra pickup motor vehicle.

[7] On the same date, the applicant signed a written declaration with the respondent to confirm that the proprietary regime applicable to their marriage is a marriage in community of property and further giving consent to his

spouse to enter into the agreement with the respondent. The applicant now disputes that this is the applicable marital proprietary regime and submits that they were married out of community of property, by virtue of the Native Administration Proclamation, 15 of 1928, at Onyaanya, on 23 August 2014.

[8] The purchase price of the vehicle, together with finance charges, is the total amount outstanding in respect of the Agreement, which was N\$238,823.10. In terms of the agreement the outstanding amount is payable in 54 monthly instalments.

[9] During or about January 2019 the applicant's spouse, alternatively the estate of the late Aili Nekongo, defaulted in respect of payment to the respondent.

[10] It is not clear from the pleadings when the late Aili Nekongo passed away.

[11] On 12 August 2019 the respondent issued summons against the applicant (both in his capacity as executor and his personal capacity, as set out above), for payment of the amount of N\$169,211.14, together with interest thereon at a rate of 12.5% per annum as from 1 June 2019 to date of final payment. The respondent further claimed costs on attorney client scale, being allegedly due and owing to the respondent in respect of the agreement.

[12] No intention to defend was entered and consequently, on 1 October 2019, a default judgment was granted against the applicant (jointly and severally in both capacities), for payment of the amount of N\$169,211.14, together with interest thereon at a rate of 12.5% per annum as from 1 June 2019 to date of final payment, together with costs on attorney and client scale.

[13] On 30 January 2020, the applicant launched this application for rescission of the default judgment, as provided for in terms of rule 16. The application further incorporated a condonation application for the late filing of the rescission application. The rescission application was served, together

with the application for condonation, via e-justice on the respondent's legal practitioners of record as they were registered in the preceding default judgment application. Both applications are opposed by the respondent.

[14] The respondent raises two points of law *in limine*, which must be dealt with first before proceeding with the condonation application. If both points of law are dismissed, can the merits of the rescission application be properly considered. The points of law *in limine* are dealt with below.

Non-compliance with rule 65(4)

[15] The first point of law *in limine* raised by the respondent in its answering affidavit is that the application for rescission is not in compliance with rule 65(4) as it was not served on the Respondent.

[16] Rule 65(4), under the heading 'requirements in respect of an application', provide as follows:

'(4) Every application, other than one brought *ex parte* in terms of rule 72, must be brought on notice of motion on Form 17 and true copies of the notice and all annexures thereto must be served, either before or after the application is issued by the registrar, on every party to whom notice of the application is to be given.'

[17] Rule 8, on the other hand, provides for the manner in which the service of process initiating proceedings must be effected. Sub-rule 8(6) specifically provides that:

'(6) Where the person to be served with any process or document initiating application proceedings is already represented by a legal practitioner of record in the matter to which the application is interlocutory or incidental, the process may be served by the party initiating the proceedings on the legal practitioner and if that legal practitioner is a registered user of e-justice, service must be effected by e-justice.' (Emphasis added).

[18] An electronic printout of from e-justice will suffice as proof of service in the event of service via e-Justice, as provided for in terms of rule 9(1)(b).

[19] The first question to address is whether service of the rescission application was properly effected on respondent. Rule 8(6) finds application to application proceedings. The instant proceeding, it cannot be doubted, is an application to which rule 8(6) applies. Secondly, this subrule applies in application proceedings that are interlocutory or incidental to proceedings which have already been launched and as a result of which a legal practitioner would have gone on record for the party to be served. The rule renders service on the litigant, in that event, unnecessary. Rather, service must be effected on the legal practitioner and if the legal practitioner is a registered user on e-Justice, this must be done via e-Justice.

[20] This is the apposite moment to consider what the phrase "...interlocutory or incidental to proceedings which have already been launched..." occurring the relevant rule means. This is in order to determine whether a rescission application can be considered firstly, interlocutory to the proceedings in which the judgment was obtained, and in the alternative, whether it is ancillary to the proceedings in which the judgment was obtained. This entails the process of interposing the relevant rules for construction and interpretation of the provision.

[21] In anticipation of any critique that may be levelled at the court for considering this peculiar aspect of the matter without it being addressed in the papers, let me say this: interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses.¹ It would have been helpful to have heard counsel's submissions on the point, however, unfortunately, it was not addressed by either counsel, neither in the heads nor during oral argument, and the issue only crystalized in my mind at the time that I embarked on writing the judgment.

¹ B Braun Medical (Pty) Ltd v Ambasaam CC 2015 (3) SCA 22 at par 14; Harms JA in KPMG Chartered Accountants SA v Securefin Ltd & Another 2009 (4) SA 399 (SCA) cited with approval by O'Reagan AJA in Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC (SC) SA 9/2014 at par [23].

[22] In that connection, the court may decide on legal issues not directly or pertinently raised in the affidavits where it is satisfied that all the relevant facts have been canvassed in the affidavits so that none of the parties are prejudiced.² In this instance, I am satisfied that the facts relevant to this legal point have been canvassed in the affidavits, and that neither party is prejudiced.

[23] Interpretation is the process of attributing meaning to the words used in a document, legislation, or some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole under circumstances attendant upon its coming into existence.³ The inevitable point of departure in interpreting legislation, is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.⁴ Namibian courts should approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.⁵

[24] Attempting to construe whether a rescission application in general, but more specifically as it relates to the matter currently before me in terms of rule 16, can be deemed interlocutory, will take one down a rabbit hole. With due regard to the exhaustive analysis by the Supreme Court in *Di Savino*⁶ of what constitutes an interlocutory application, matters that fall neatly within the category of interlocutory proceedings were listed in *Soltec CC*⁷. A rescission application is not included in that list, because it does not fall neatly within this category.

[25] Practice direction 19 deals with applications in terms of rule 103 and provides that:

² Essential Judicial Reasoning (in Practice and Procedure and the Assessment of Evidence), BR Southwood, 2015, at par 4.8.

³ Natal Joint Municipal Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), at par 18.

⁴ Natal Joint Municipal Fund, *ibid*, at par 18.

⁵ Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC (SC) SA 9/2014, at par [19].

⁶ Antonio Di Savino v Nedbank Namibia Limited (SC) SA 82/2014.

⁷ Soltec CC v Swakopmund Super Spar (I 160/2015) [2018] NAHCMD 265 (31 August 2018), at par [18].

'29. An application brought under rule 103 is interlocutory and must reflect the same case number issued in the main proceedings.'

Rule 103, on the other hand, provides for the variation and rescission of orders or judgments generally. An application in terms of rule 103 to vary an order or judgment is self-evidently interlocutory, in addition to being identified as such by the practice directions. In terms of the practice directions an application in terms of rule 103 to rescind a judgment will be regarded, in all practical aspects, as an interlocutory application. However, currently serving before me is an application for rescission of judgment in terms of rule 16. Rule 16 provides for rescission of default judgments. PD29 must not be used to interpret rule 8(6). I am of the view that it is in any event not necessary to attempt a contrived classification, as I will demonstrate below that a rescission application in terms of rule 16 comfortably fits into the classification of proceedings "incidental" to the main matter.

[26] Let me start where the authority compels me to (and logic dictates): an examination of the language used in the provision. The word "incidental" is defined to be an adjective, in the sense of "secondary", or in the sense of "accompanying", or "ancillary".⁸ "Incidental to" can be defined as "happening as a result of".⁹ Applying the ordinary meaning of the text, a rescission application in terms of rule 16 is incidental to the default judgment, as it is secondary or ancillary to the default judgment. It is launched as a result of the default judgment, and accordingly "happening as a result of".

[27] When considering the context of any of the provisions contained in the Rules, the Court must have regard of the overriding objective as set out in rule 1(3), as it is enjoined to do in terms of rule 17(1). The overriding objective is formulated as follows:

⁸ https://www.collinsdictionary.com/dictionary/english-thesaurus/incidental#incidental__1;

⁹ <https://www.lexico.com/definition/incidental>;

'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable...'

This sets the tone for the interpretation which is to follow. The court must view the literal meaning of the words in the provision under consideration through the lens or prism of the overriding objective as stated above.

[28] With regards to the background in respect of preparation of the Rules, it is not a far-fetched proposition to say that the rule-maker had in mind an expedited, less cumbersome and improved procedure for service of documents through e-Justice when he crafted rule 8(6). The e-Justice system was implemented during or about February 2014. It provides functionalities that streamline the litigation process, thereby helping to improve the efficiency of procedural aspects and enhances access to justice.

[29] The apparent purpose of the provision contained in rule 8(6) is to facilitate the easy, effective, and secure service of documents by making use of the state-of-the-art technology built-in to the e-justice system. I see no reason why a party should not be allowed to serve an application for rescission in terms of rule 16 in this fashion, subject to compliance with the rules.

[30] A rescission application in terms of rule 16 is launched by an applicant as a result of a default judgment, which has been entered against him/her. It can be brought under the same case number as that of the default judgment; it concerns the same parties; the same subject matter; and if successful, the parties will proceed to lead evidence and argue the matter. In that regard it is "...incidental to proceedings which have already been launched...".

[31] Considering the ordinary meaning of the words of the provision, read in the context as set out above, I find that the rescission application as provided for in rule 16 is incidental to the default judgment, which is ultimately the underlying action, as provided for in terms of the provisions of rule 8(6).

[32] I am accordingly of the view that it is unnecessary for the applicant to provide an electronic print-out from e-Justice as proof of service, since I can, and do, take judicial notice of the fact that Mr. Jacobus Cornelius Van Wyk (JC van Wyk Attorneys) was registered as the legal practitioner for the respondent on e-Justice at the time that the rescission application was launched, and further that the application was served on his office via e-Justice on 13 January 2020 at 09h00.

[33] In any event, in the instant case it is clear that the process, albeit no proof of service was provided in reply after the service became disputed, was actually served on the respondent's legal practitioner and he became aware of the case his client had to meet, since the application was opposed and an answering affidavit was filed. As such, any defect in respect service is cured and it can be safely stated that service was effected, as it is confirmed by the Respondent's participation in the proceedings. The inference is inescapable - the Respondent was aware of the case it was called upon to meet and it did not suffer any prejudice.¹⁰

[34] Smuts J eloquently describes the fundamental purpose of service in his judgment in *Witvlei Meat*¹¹ as follows:

'There was service on the Government Attorney in respect of a committee whose secretary is an employee of the Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the Committee. The fundamental purpose of service after all is to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where that the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate the import.) [own emphasis]

¹⁰ *Kapuire v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017-01508) [2017] NAHCMD 297 (18 October 2017), at par 24.

¹¹ *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others A 212/2011* (HC), at par 17.

[35] As such, I find that the application for rescission is in compliance with rule 65(4) in that service of the application was properly effected on the respondent, as provided for in terms of rule 8(6). I accordingly, dismiss the first point of law *in limine*.

Non-compliance with rule 65(7)

[36] The second point of law *in limine* was raised for the first time by the Respondent in its heads of argument, being that the applicant is required by rule 65(7) to serve a copy of the application on the Master prior to filing the application, which it has not done.

[37] The principle that a point of law *in limine* may be raised at any time may have been entrenched in our jurisprudence. One renowned authority in this regard is *Municipality of Walvis Bay v the Illegal Occupiers*¹² where a point relating to *locus standi* was raised for the first time in the heads of argument of the certain of the Respondents. The Applicant in the aforementioned matter protested that the point should have been raised in the answering affidavits so as to afford the Applicant the opportunity to deal with it in its replying affidavit. The court countenanced that approach.

[38] However, in *Van Zyl v Welwitchia Private School*¹³ this court strongly discouraged the practice previously followed of raising points of law even at the hearing. In dealing with this issue, where reliance had been placed on *Usakos Town Council v Jantze and Others*¹⁴ the court reasoned that judicial case management has introduced a system in which all issues, including legal points for determination, including those sought to be raised *in limine*, should be included in the case management report for certainty and eliminating the element of surprise.

¹² Municipality of Walvis Bay v Respondents Set Out in Annexure A Hereto Being the Occupiers of the Caravan Sites at the Long Beach Caravan Park Walvis Bay Republic of Namibia (A119/04) [2005] NAHC 16 (16 June 2005).

¹³ (HC-MD-CIV-MOT-REV-GEN-2018/00196) [2019] NAHCMD 486 (15 November 2019).

¹⁴ 2016 (1) NR 240 (HC).

[39] In dealing with this issue, the court in *Van Zyl* stated, in reference to rule 71(2) as follows:

[30] I am of the considered view that it is at this very point that any issues of law, including those that may be considered appropriate to raise *in limine*, should be properly identified and included in the case management report. This, as stated earlier, conduces to eliminating the element of surprise, which is ingrained in the previous dispensation where one would, just before argument, be made wise to the fact that a point of law *in limine* will be raised, affording that party little or no time to be of assistance to the court in dealing with that particular question of law.

[31] I am not impractical in my views. There may, of course be instances where the instructing legal practitioner may not be aware of the existing legal question, fit to be raised *in limine*, until instructed counsel is engaged. In that scenario, I am of the considered view that the parties should, in that event, apply for the amendment of the case management order as well, so that the new legal question to be raised *in limine*, is properly recorded and forms part of the record and preparation, both for the court and other side.' See also *Mwoombola v Simaata*¹⁵

[40] I expected that the respondent's counsel would have acquainted himself with the latest approach in the jurisprudence of the court, especially after the introduction of judicial case management. Because the respondent did have some notice in the heads of argument, I will allow the issue to be determined, whilst stressing that the objectives of judicial case management should not be thwarted by holding on to pre-judicial case management principles, which no longer apply. A time may come for the court to take a stern approach to this issue.

[41] Rule 65(7) provides as follows:

'(7) A person who makes an application to the Court in connection with the estate of a person deceased or alleged to be a prodigal or under any legal disability, mental or otherwise must, before the application is filed with the registrar –

(a) submit the application to the Master for his or her consideration and report; and

¹⁵ (HC-MD-LAB-MOT-REV-2017-00020) [2020] NALCMD 2 (23 January 2020).

(b) likewise submit any suggestion to the Master for a report, if any person is to be proposed to the Court for appointment as curator to property, but this subrule does not apply to an application under rule 72, except where that rule otherwise provides.’

[42] I have considered the mandatory language in which this provision is enveloped in *Michael*.¹⁶ In paragraph 9 of that judgment it is stated that the effect of the subrule is to require an applicant, who seeks to lodge an application in respect of an estate of a deceased person, to first submit the application to the Master before the application is filed with this Court. A failure to comply with this provision is fatal to the application. Although in *Michael* the application was brought against the executrix of the late estate, I am of the view that rule 65(7) is equally applicable to applications brought on behalf of the late estate.

[43] It seems to me that the intent of rule-maker in couching this subrule in this fashion, is to enable the Master to give a report on the deceased’s estate and, where appropriate, make recommendations to the Court on the further progress of the matter. This, the Master is able to do, because of the unique position of that office as the primary repository of records relating to deceased estates.

[44] The applicants have evidently not complied with rule 65(7). As indicated above, the mandatory language of the provision has the result that the failure to comply with the subrule is fatal to the application. I will follow the same approach in this matter as in *Michael*, viz that the non-compliance, does not have the effect of rendering the application liable to be dismissed. Rather, it has the effect that the court cannot properly consider the application until such time that the provision in question has been complied with. The application is, in these circumstances, not properly before court for adjudication. I am loath to dismiss an application on a procedural requirement like the present one when the merits of the matter have not been traversed.¹⁷

¹⁶ *Michael v Tshiwalo* (HC-NLD-CIV-MOT-GEN-2020/00002) [2020] NAHCNLD 60 (3 June 2020), at paras [9] to [15].

¹⁷ *Michael*, *ibid*, at par [15].

[45] The second point of law *in limine* is upheld. As a result I cannot, and do not, consider either the condonation application or the rescission application. That may be food for thought on another day and once the applicant has complied with the mandatory requirements of rule 65(7).

Costs

[46] There is no reason to deviate from the trite principle relating to costs: costs follow the event. The Applicants are *dominis litis*. By choosing to go by way of application they should familiarize themselves beforehand with the procedures and requirements associated with the manner in which they choose to approach this Court.

Order

[47] In the premises, I make the following order:

1. The application filed by the Applicants, is removed from the roll for non-compliance with the provisions of rule 65(7) of the Rules of this Court.
2. The Applicants are ordered to pay the costs of the Respondent, jointly and severally, the one to pay the other to be absolved.

T.S. Masuku
Judge

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