

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> Frankie Ngurimuje Khoe-Aub v Aljo Investments CC	<b>Case No:</b> (HC-MD-CIV-ACT-DEL-2018/04550)
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 9 November 2020
	<b>Date of order:</b> <b>26 November 2020</b>
	<b>Reasons delivered on:</b> <b>26 November 2020</b>
<b>Neutral citation:</b> <i>Khoe-Aub v Aljo Investments CC</i> (HC-MD-CIV-ACT-DEL-2018/04550) [2020] NAHCMD 546 (26 November 2020)	
<b>Results on merits:</b> Merits not considered.	
<b>The order:</b> Having heard <b>ADV GARBERS-KIRSTEN</b> Plaintiff/Respondent and <b>MR ASHLEY BRENDELL</b> for the First Defendant/Applicant, and having read the documents filed of record:  <b>IT IS HEREBY ORDERED THAT:</b>	

1. The application for rescission of judgment is struck from the roll for failure to comply with Rule 32(9) and (10) in respect of the late filing of the application.
2. The first defendant is ordered to pay the costs of this application limited in terms of the provisions of Rule 32(11). Such cost to include the costs of one instructing and one instructed counsel, where engaged.
3. The parties must comply with the following procedural steps:
  - 3.1 The first defendant must comply with Rule 32(9) on or before 4 December 2020;
  - 3.2 The first defendant must file the report in terms of Rule 32(10) on or before 11 December 2020;
  - 3.3 The first defendant must file a fresh application for condonation on or before 18 January 2021 in respect of the late filing of the application for rescission and its failure to attach the relevant annexures to founding affidavit;
  - 3.4 The plaintiff must file amplified answering papers, if so advised, on or before 28 January 2021.
4. The case is postponed to **4 February 2021 at 15:00** for Status hearing (Reason: Interlocutory (To Bring)).

#### **Reasons for orders:**

[1] The parties relevant to the application before me is Frankie Ngurimuje Khoe-Aub with full legal capacity to sue and be sued, and is residing in Swakopmund. The first defendant is Aljo Investments CC, a close corporation duly registered and incorporated in terms of the Close Corporation Act 1988 with its principal place of business situated in Otjiwarongo. The second defendant is Kabat Kvetoslav, an adult business man residing in Otjiwarongo. I will refer to the parties as they are in the main action.

#### Brief background

[2] The plaintiff issued summons against the defendants on 8 November 2018. The

summons were duly served on the first defendant but the defendants failed to defend the matter. On 8 March 2019 the matter was enrolled on the residual roll where the Honourable Justice Tommasi granted default judgment in favour of the plaintiff against the first defendant for payment in the amount of N\$139,529.82. On 25 April 2019 the first defendant's current legal practitioners of record filed a notice of intention to defend the action. For completeness of the record it is necessary to note that on 2 September 2019 Usiku J granted default judgment against the second defendant. The second defendant did not bring an application for rescission of judgment and is not part of the current proceedings.

[3] The first defendant proceeded to launch an application for rescission for some reason on three different dates, i.e. 4 October 2019, 22 October 2019 and 23 October 2019. The application for rescission of judgment was opposed by the plaintiff where after the matter was docket allocated. The application for rescission should however have been dealt with as an opposed motion in terms of Part 8 of the Rules of Court instead of being subjected to judicial case management. However, due to the undue delay already experienced in bringing the matter to finality I decided to proceed to deal with the matter instead of referring it back to the correct court roll.

#### The application

[4] The application for rescission of judgment was duly set down for hearing however the plaintiff raised a number of different points *in limine* which had to be attended to before I could consider the merits of the application.

[5] The points *in limine* raised are as follows:

- a) Failure by the first defendant to engage the plaintiff in terms of R 32(9) in respect of the late filing of the first defendant's application for rescission of judgment;
- b) Impermissible hearsay contained in the founding affidavit;
- c) The deponent to the founding affidavit failed to attach any or the annexures

referred to in the said founding affidavit.

[6] This ruling herein is on the points *in limine* only.

First point *in limine*: compliance with rule 32(9) and (10)

[7] Mrs Garbers-Kirsten argued that first defendant has engaged the plaintiff in terms of rule 32(9) regarding the application for rescission of default judgment prior to launching same. However, the first defendant has failed to engage the plaintiff regarding its application for condonation for the late filing of its application for rescission of default judgment.

[8] There are many cases wherein this court ruled that the application for condonation is an interlocutory application and the parties thus have to comply with the mandatory provisions of Rule 32 (9) and 32 (10).<sup>1</sup> This remains the position until such time that the rules of court in this regard is reviewed or amended and on this point alone the matter stand to be struck from the roll. The first point *in lime* is therefore upheld.

Second point *in limine*: impermissible hearsay contained in the founding affidavit

[9] On behalf of the plaintiff Mrs Garbers-Kirsten pointed out three paragraphs which she argued contains hearsay. These paragraphs are paragraph 4, 8 and 9 of the founding affidavit.

[10] Mr Brendell, acting on behalf of the first defendant, did not share the views of Mrs Garbers-Kirsten and argued that the deponent may relay whatever information was imparted to him and the portions complained of by the plaintiff does not constitute hearsay.

[11] For purposes of the completeness I will refer to the para 8 and 9, which reads as

---

<sup>1</sup> *South African Airways Soc Limited v Camm and Others* (HC-MD-CIV-ACT-DEL-2016/02479) [2019] NAHCMD 14 (31 January 2019).

follows:

' 8. ...Upon receipt of the summons, I consulted my colleagues who read the papers for me and explained that the cause of action and the claim to me because I could not comprehend the contents of the document. I was informed then and there that the claim pertains to a motor vehicle accident involving a vehicle I sold to the Second Respondent a few years ago. He failed to transfer the vehicle in his own name and on that basis alone I was linked to the claim.

9. As a lay person, I was not informed of the procedure to defend the action and did not then realize the danger of not noting a defence. I also contacted the Second Respondent about the action against me and the latter assured me that, he would handle the matter and I need not worry as I have nothing to do with the matter. Since then I truly and genuinely believed that there was no further obligation on me to take any legal action and hence forgot about the matter.'

[12] No confirmatory affidavits were filed on behalf of either the second defendant or the first defendant's colleagues, who advised the first defendant. There can be no doubt that what is contained in the aforementioned paragraphs amounts to hearsay. It is a requirement to file affidavits of persons other than the applicant who can depose to the facts in these circumstances.

[13] In *Paulus v Ashipala*<sup>2</sup> Cheda J (as he then was) remarked as follows:

'[10] What, therefore, is clear is that the evidence contained in the founding affidavit is hearsay, see *Mahamat v First National Bank of Namibia Ltd 1995 NR 199 (HC) and Namibia Estate Agents Board v Like and Another No. 2015 (1) NR 112 (LC)*. This is the general rule. The only exception to this rule is where the application is urgent or is interlocutory in nature. The courts will not allow hearsay evidence where the decision will affect the rights of the parties, the effect of which is final. This was clearly laid down in *Mahamat* (supra) and *Harsis' Executors v Weinberg 1938 CPD 134*. This point was illuminately stated in *Galp v Tansley NO and Another 1966 (4) SA 555 (c)* at 559 H where he remarked:

"But one important point emerging from the cases which I have enumerated in the preceding paragraph is this, viz., that our courts have consistently refused to countenance

<sup>2</sup> (I 226/2013) [2016] NAHCNLD 22 (07 March 2016).

the admission as evidence for any purpose whatever of any statement embodying hearsay material, save where such statement has properly been made the subject of an affidavit (or solemn affirmation) of information and belief, i.e., save where the deponent (or affirmer) has not only revealed the source of the information concerned but in addition has sworn (or solemnly affirmed) that he believes such information to be true and furnished the grounds for his belief.”

[11] Hearsay evidence is only permissible in certain specified and exceptional circumstance. In that regard where the matter is one of urgency or interlocutory and the person relying on it must state:

- a) why he could not obtain first-hand information;
- b) who the source of such knowledge is; and
- c) why he/she believes that knowledge to be true; see *Oshakati Tower (Pty) Ltd v Executive Properties CC & Others* (2) 2009 (1) NR 232 (HC)'

[14] The current matter is neither before court on an urgent basis nor can it be said that there are specified or exceptional circumstances present that will encourage this court to allow the hearsay evidence to stand. No reasons were advanced as to why the first defendant could not obtain confirmatory affidavits were necessary.

[15] The second point *in limine* is therefore upheld and the hearsay portion in paras 4, 8, 9 will be duly disregarded.

Third point *in limine*: failure to attach any or the annexures referred to in the said founding affidavit.

[16] When the founding affidavit deposed to Mr Paulus was filed in support of the application for rescission no annexures as referred to in the affidavit were attached to the said affidavit. Only after the first defendant's legal representative was made aware of the omission did the first defendant's legal practitioner file the annexures by attaching same to the replying affidavit. He did so without leave of court and without seeking any condonation for the omission.

[17] The first defendant maintains that the failure to attach the annexures referred to in the founding affidavit was merely a human error and an oversight.

[18] It is a trite principle that affidavits, constituting both evidence and pleadings as they are, are expected to be clear and to accurately identify issues so that both the court and the litigants can be properly appraised of relevant facts.

[19] In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*<sup>3</sup> as follows:

‘It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.’

[20] I must reiterate the principle set out in *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality*<sup>4</sup> that the annexures to an affidavit are not an integral part of it, and an applicant cannot justify its case by relying on facts which emerge from annexures to the founding affidavit but which have not been alleged in the affidavit and to which the attention of the respondent has not been specifically directed.

[21] The contrary is also true however. If the annexures are not attached to the founding affidavit but reference is made in the founding affidavit to portions extracted from the annexures and the opposing party does not have the opportunity to consider the contents of the annexures and the context in which the extracts are referred to it will be to the prejudice of the opposing party. By failing to file the relevant annexures referred to in the founding affidavit it cannot be said the applicant made out his or her case on the papers.

[22] The first defendant failed to bring a proper application for condonation for its

<sup>3</sup> 1999 (2) SA 279 (T) at 323 F.

<sup>4</sup> 1991 (3) SA 98 (C) at 111 B-I.

oversight to have attached annexures “JP1” to “JP16” to its founding affidavit and just randomly attached it to its replying affidavit, which is impermissible. Such application should have been accompanied by proper engagement in terms of rule 32 of the Rules of Court. This was not complied with. As a result the annexures on which the first defendant wishes to rely is not properly before court and stands to be disregarded unless the first defendant brings the relevant application in this regard.

[23] The third point *in limine* is therefore upheld.

### Conclusion

[24] Without dealing with the merits of the application it must be struck for lack of compliance with rule 32 (9) and (10). As a result of the hearing of the rescission application will be deferred pending the outcome of fresh condonation application and the parties are directed to comply with the directions as set out in my order above.

	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
Adv. H. Garbers-Kirsten Instructed by Kloppers Legal Practitioners Windhoek	Mr A. Brendell of Kishi Shakumu & Co. Inc Windhoek