

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2019/00126

In the matter between:

WILKO PASCHEKA

1ST APPLICANT

GUI GAM INVESTMENT 18 CC

2ND APPLICANT

and

ROBERT GRANT REID

RESPONDENT

Neutral citation: *Pascheka v Reid* (HC-MD-CIV-MOT-GEN-2019/00126)[2020]
HAHCMD 60 (18 February 2020)

Coram: KANGUEEHI AJ

Heard: 04 September 2019

Delivered: 18 February 2020

Flynote: Application – Rescission of default judgment granted on the basis of failure to comply with court order – Sanctions imposed in terms of rule 53 – Application made in terms of rule 56 for relief from sanction imposed in terms of rule 56 – Relief sought to rescind the default judgment and reinstatement of defence to claim – Court held that nature and form of application is an application for rescission and reiterated that principle that final orders, like one dismissing the action, would not be of the kind to be amenable to an application under rule 56 even if given under rule 53 because it disposes of the parties’ rights and requires a fresh action to be instituted – Court not satisfied that good cause has been shown to have the default judgment rescinded – Application for rescission dismissed, with costs.

ORDER

The application for rescission of judgment is denied with costs.

JUDGMENT

KANGUEEHI AJ:

A. BACKGROUND

[1] The applicant applied for a rescission of judgement in this matter. The Applicant was sued by the respondent for a sum of N\$ 2, 196,702.80 plus interest at the rate of 20% per annum on the amounts aforesaid *a tempore morae*.

[2] On 16 May 2018, the applicants (defendants) filed their plea disputing some allegations as set out in respondent’s (plaintiff’s) particulars of claims. The applicants further instituted a counterclaim in the amount of N\$ 113 755.46.

[3] On 4th April 2018, the parties were ordered by the Court, as part of case management, to file their respective discovery affidavits on or before the 11 May 2018. The matter was then postponed to 16 May 2018 for Case Management Conference hearing.

[4] On 8th May 2018, the applicants (defendants) filed the defendant's discovery affidavit in which they acknowledged possession of documents relating to the matters in question in this case but objecting to the production of some on the grounds of being privileged.

[5] On 14 May 2018, the parties' proposed case management report suggested that any party filing a notice in terms of Rule 28 shall do so on or before 8 June 2018. The party served with such a notice shall provide the requested discovery on or before 29 June 2018.

[6] Based on the Case Management Conference held on 16th May 2018, the Case Management Report filed was made an order of Court and the matter was postponed to 18th July 2018 for a Pre-trial Conference hearing.

[7] Pursuant to the proposed case management report, which was made an order of Court, and the applicants' (defendants') failure to discover documents claiming privilege, the Respondent (plaintiff) filed a notice in terms of Rule 28 (8) (a) for additional documents to be disclosed.

[8] On 28th June 2018, the Applicants' (Defendants') attorney of record wrote to Respondent's (plaintiff) legal practitioner stating that the Applicants' bookkeeper still needs extension of the deadline from 29 June to 30 July 2018 to finalize the financials, income tax returns and other available documentation.

[9] On 18th July 2018, a Pre-trial Conference was held, and the court noted that the respondent (plaintiff) has filed a notice in terms of rule 28 (8) and the Defendants are still to respond thereto. The case was then postponed to 3rd October 2018 for Pre-trial Conference while the parties are expected to file a joint pre-trial report on or before 26th September 2018.

[10] On the 2nd October 2018 a Pre-trial Conference took place and the Court noted that the Respondent (plaintiff) has filed a notice in terms of Rule 28 (8) and the Applicant (defendant) has not responded thereto. The Pre-trial Report was not submitted and that the Defendants Legal Practitioner of record passed away.

[11] The case was thereafter postponed to 13th February 2019 for status hearing and the parties were directed to file a joint status report on or before 8th February 2019.

[12] On the 14th February 2019, the court heard submission from the Respondent (Plaintiff) Legal Practitioner of record while the Applicant's (Defendant) was not in attendance.

[13] The Applicants (Defendants) were obliged in terms of the court order dated 16th May 2018 to answer to the Respondent (Plaintiff) notice in terms of Rule 28 (8) by 29 June 2018 to which the Applicants (Defendants) have not done so up to the date of the granting of the default judgment.

[14] The matter was therefore postponed to the 3rd April 2019 for a sanctions hearing. The Applicants (Defendants) were directed to file a sanctions affidavit on or before 28th March 2019 explaining their non-compliance with the court order dated 16 May 2018. The Applicants (Defendants) were further directed to give reasons for their non-appearance in court and showing cause why sanctions, as contemplated in Rule 53(2), should not be imposed.

[15] On the 4th April 2019, the court found that the Applicants (Defendants) have not filed a sanctions affidavit by 28th March 2019 despite the court order dated 14th February 2019. The first Applicant (Second Defendant) explained from the bar that he has not complied with the aforesaid order because he has been seeking alternative legal representation since the passing away of his erstwhile legal representative. The court observed that the Applicant (Second Defendant) could not explain what prevented him to file his explanation on affidavit on or before the 14th February 2019 as was ordered.

[16] In the premise, the court found the first Applicant's (Second Defendant) explanation as unsatisfactory and imposed the following sanctions in terms of Rule 53 (2):

- (a) The pleadings filed by the Applicants (Defendants) are struck out in terms of Rule 53 (2) (d);
- (b) The counterclaim filed by the Applicants (Defendants) is dismissed in terms of Rule 53 (2) (c);
- (c) Judgment is hereby granted in favor of the Respondent (Plaintiff) against the first Applicant and second Applicant (Defendants) jointly and severally, the one paying the other to be absolved.

[17] In summary, the default judgment came about as a result of Defendants' failure to comply with a court order which attracted sanctions in terms of Rule 53 in particular Rule 53 (1) (e) and (f) and (2) (c).

B. APPLICATION FOR RELIEF FROM THE SANCTIONS IMPOSED IN TERMS OF RULE 53 (2)

[18] On 17th April 2019, the Applicants filed an application seeking relief from the sanctions imposed on the 3rd April 2019 in the matter bearing case number HC-MD-CIV-CON-2018/00117.

[19] The application seeks an order rescinding and setting aside the judgment granted in the above action, reinstating the applicant's defense in the action, reinstating the applicant's counterclaim in the action and directing that the action proceeds in the normal course.

C. THE LEGAL ISSUES

[20] The Joint Case Management Report dated 18 June 2019 is informative of the issues to be decided. It states the following:

1. The nature of the application – The applicants maintain that the application is not a rescission of judgment in the traditional sense. This being an application for the relief

from sanctions imposed at a sanctions hearing, the requirements an applicant has to meet in order to succeed, are as set out in Rule 56 of the High Court rules.

2. The respondent takes the position that the traditional requirements for an application for rescission of judgment must be met.
3. The applicants take the position that non-compliance with the rules of court and the orders in question was the result of their previous legal practitioner's negligence and not a result of any willfulness on the part of the first applicant and therefore should not be held against the applicants.
4. The respondent takes the position that the applicants cannot hide behind the negligence of their legal practitioner (based on the facts of this matter) and that the Honourable Court should not come to their assistance. The applicants were at all times responsible for ensuring that the relevant court orders were complied with, but, so contends the respondent, the applicants did not act responsibly in this regard.'

[21] In determining whether the application should succeed, an intrinsically linked two-pronged approach will be adopted to determine the outcome:

- (a) Whether the sought remedy will succeed if the application is brought as rescission for judgment with a need for meeting common law requirements or whether the party seeking relief may succeed by relying on Rule 56. This question is critical as it determines whether the application in the first instance is rightly so before court or whether even there is an application before court.
- (b) If the applicants pass the first hurdle as postulated above, the next inquiry will be whether the applicant application has to succeed. The emphasis here should be on whether the applicants have diligently prosecuted their matter or whether their conduct is reprehensible.

D. THE NATURE OF THE APPLICATION

[22] The Applicants maintain that the application is not a rescission of judgment application in the traditional sense but rather an application for the relief from sanctions imposed at a sanctions hearing in terms of which the requirements the applicant has to meet, as set out in Rule 56 of the High Court Rules.

[23] In terms of Rule 53 (1), a court is empowered to impose sanctions for failure to comply with rules, practice direction or court order or direction. The Rule states that if a party or his or her legal practitioner, if represented, without reasonable explanation fails to-

- (a) Attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference;
- (b) Participate in the creation of a case plan, a joint case management report or parties proposed pre-trial order;
- (c) Comply with a case plan order, case management order, a status hearing order or the managing judge's pre-trial order;
- (d) Participate in good faith in a case planning, case management or pre-trial process;
- (e) Comply with a case plan order or any direction issued by the managing judge; or
- (f) Comply with deadlines set by any order of court;

The Court may in terms of Rule 53 (2) issue the following orders:

- (a) Refusing to allow the non-compliant party to support or oppose any claims or defenses,
- (b) Striking out pleadings or part thereof, including any defense, exception or special plea¹,
- (c) Dismissing a claim or entering a final judgment²; or
- (d) Directing the non-compliant party or his or her legal practitioner to pay the opposing party's cost caused by the non-compliance.

¹ This is what the court did on 04 April 2019.

² This is what the court did on 04 April 2019.

[24] Having set out the conduct which may attract sanctions as well as the type of sanctions, Rule 56 set out requirements for the party seeking relief from the operation of Rule 53 (2). The Rule states that on application for relief from sanction imposed or an adverse consequence arising from a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances, including –

- (a) Whether the application for relief has been made promptly;
- (b) Whether the failure to comply is intentional;
- (c) Whether there is sufficient explanation for the failure;
- (d) The extent to which the party in default has complied with other rules, practice directions or court orders;
- (e) Whether the failure to comply is caused by the party or by his or her legal practitioner;
- (f) Whether the trial date or the likely trial date can still be met if relief is granted;
- (g) The effect which the failure to comply has or is likely to have on each party; and
- (h) The effect which the granting of relief would have on each party and the interest of the administration of justice.

[25] It is clear that the Applicants opt to rely on the remedies provided for in terms of Rule 56. But the Respondent is of the view that:

‘the order dated 3 April 2019 is final in effect. It brought an end to the action, disposing of the rights between the parties insofar as the action is concerned. The order granted all of the relief which he claimed, and it dismissed the counter-claim by the Applicants’.

[26] The Respondents further argued that:

‘the exercise of the power to provide relief from sanctions imposed by this Court in terms of Rule 56 depends on the nature of the sanction imposed, it cannot apply to the dismissal of a claim or the entering of a final judgment even if such an order were imposed under Rule 53.’

[27] This position was confirmed in the Supreme Court decision of *Levon Namibia (Pty) Ltd v Nedbank Namibia Limited*.³ It is clear that the Court order was a final judgment. The Supreme there held that:

'this rule (rule 56) empowers a managing judge to condone non-compliance with a rule, practice direction or court order on good cause shown and provide relief from the sanction imposed. It cannot apply to the dismissal of a claim or the entering of a final judgment even if such an order were imposed under rule 53' (my emphasis)⁴.

[28] The court order of 04 April 2019 reads that **"the matter is removed from the roll: case finalized"**.

[29] The intention of the court was clear – to finally dispose of the action instituted by the plaintiff. That claim was thus finally disposed of between the parties.

[30] That order, like one dismissing the action, would not be of the kind to be amenable to an application under rule 56 even if given under rule 53. Nor was it interlocutory as it was final in the sense of disposing of the parties' rights and required a fresh action to be instituted.⁵

[31] In the matter of *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty Two*⁶ it was held that:

'(it was "not open to the defendant (and not the intention of the rules of court) to apply for relief from the sanctions. The considerations of finality of court orders and judgments and the undesirability of allowing litigants to have multiple bites at the cherry", do not permit the defendants to assail the propriety of the court order (imposing sanctions), under the guise of an application for relief from sanctions'.

The court concluded that

³ *Levon Namibia (Pty) Ltd v Nedbank Namibia Limited* (SA 31/2017) [2019] NASC 589 (02 August 2019)

⁴ Paragraph 13 thereof.

⁵ See *Levon* at paragraph 16.

⁶ *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty-Two* (I 724/2016) [2019]NAHCMD 201 (21 June 2019).

⁷ This is exactly what the applicants want.

‘the defendants should have applied for rescission or setting aside of the court order in question, as it is that court order that closes the court’s doors to the defendant⁸. Alternatively the defendants should have brought two applications (separate or combined) namely: application for rescission/variation of the court order of August 2018, and the application for relief from sanctions’).

[32] The same principle was also applied in the *Mumbandja v Nehale*⁹ matter where the court found that the Applicant has failed to establish good cause for the rescission of judgment. A reference to “good cause” means that the court expected the applicant to meet the requirements for rescission of judgment in terms of common law and not by reliance on Rule 56 as set out above.

[33] The case is similar to the present one in that:

- a. The sanctions were imposed under rule 53;
- b. The court *in hoc casu* dismissed the defendant’s/applicant’s defense;
- c. The court in *hoc casu* entered default judgment against the defendant/applicant.

[34] Even if I am wrong in the above submission, I am guided by the Notice of Motion as filed by the Applicant. Paragraph 1 thereof says:

‘TAKE NOTICE that WILKO PACSHEKA and GUI GAM INVESTMENTS CC (hereinafter called the applicants) intends (sic) to make application to this court for an order granting the applicant relief from the sanctions imposed by the honourable court on 3 April 2019 in the matter bearing case number HC-MD-CIV-ACT-CON-2018/00117, more specifically:

1.1 rescinding and setting aside the judgment granted in the above action in favour of the plaintiff, the respondent in this matter;

1.2 reinstating the applicant's defence in the action;

1.3 reinstating the applicant's counterclaim in the action;

⁸ As in the present case.

⁹ *Nikodemus Mumbandja v Nehale* (I 126/2014) [2016] NAHCNLD 84 (07 October 2016)

1.4 directing that the action proceed in the normal course.'

E. LAW TO FACTS

[35] On 14th May 2018, the parties entered into a proposed case management report where both parties indicated their wish to request further discovery and that any notice in terms of Rule 28 would be filed by 8 June 2018 and that the response to that notice would be provided on or before 29 June 2018. This case management report was made an order of Court.

[36] On 28th June 2018, a day before the Applicants (Defendants) were due to comply with the discovery notice, a letter was sent to the Respondent (Plaintiffs) seeking extension to the 30th July 2018. It is interesting to note that the Applicant's affidavit is silent on what happened between 14th May 2018 and 29th June 2018 but rather only sketches the historical facts from the 5th July 2018.

[37] On 5th July 2018 the parties filed what was their last joint status report, in which reference was made to the Respondent (Plaintiff) Rule 28 (8) request dated 6th June 2018 as well as the Applicant's (Defendants) request for extension to 30th July 2018.

[38] On 18th July 2018, a Pre-trial Conference was held and the court noted that the respondent (plaintiff) has filed a notice in terms of Rule 28 (8) and the Defendants are still to respond thereto. The case was then postponed to 3rd October 2018 for Pre-trial Conference while the parties are expected to file a joint pre-trial report on or before 26th September 2018.

[39] On 14th September 2018, the Applicants (Defendants) received a letter from the Law Society of Namibia informing the client that his Legal Practitioner has passed away and that the Law Society would act as *curator bonis*. The Applicants immediately sought the assistance of Mr. Thambapilai and the Law Society was accordingly advised in the letter dated 28th September 2018.

[40] On the 2nd October 2018 a Pre-trial Conference took place and the Court noted that the Respondent (plaintiff) has filed a notice in terms of Rule 28 (8) and the Applicant's (defendant) has not responded thereto.

[41] The case was therefore postponed to 13th February 2019 for a status hearing and the parties were directed to file a joint status report on or before 8th February 2019. On the 9th October 2018, a Law Society agent forwarded a communication to Mr. Thambapilai as well as an e-mail to Pascheka Group management advising them that the matter has been postponed to 13th February 2019 for status hearing. The same information was communicated to the Applicants in the letter dated 11 December 2018 by the Respondent's (Plaintiff) Legal Practitioner. The Applicants' averments that he never saw this communication is disingenuous. It baffles the mind that a company CEO (Pascheka Group) or the Personal Assistant to the Applicant would not inform him of a significant matter as such.

[42] The First Applicant avers that by the 13th February 2019, he did not realize that Mr. Thambapilai never actually informed the Court that he was handling the case on his behalf. This averment from the Applicant is despite the fact that he was alerted by the Respondent (Plaintiff) Legal Practitioner that he remained unrepresented in the letter dated 11 December 2018. The Applicant should have disputed this fact if all along he was laboring under the impression that they had representation.

[43] The Applicants or their Legal Practitioner failed to appear on the 13th February at the status hearing. When called upon to explain their absence from the 13th February status hearing on the 3rd April 2019, the Applicant's excuse was that he has not been able to appoint a lawyer owing to financial constraints. This is not only contrary to the earlier assertion that the Applicant was not aware that Mr. Thambapilai has not informed the Court that he is acting on his behalf. Even if it was the issue of finance and inability to instruct a new lawyer, the Applicant's failed to attend the status hearing and to explain their predicament. Furthermore, in *Mumbandja v Nehale* matter, the court observed that:

'the rules of court should not be suspended on the basis of lack of funds. To me, this is a plea for charity and can never be a legal argument. He who engages himself in a commercial enterprise should appreciate that does so with the full knowledge of the financial implications of the said enterprise'.

[44] As said in *Levon Namibia (Pty) Ltd v Nedbank Namibia Limited*¹⁰ the consideration of the facts of this case, is judicial in nature and involved a value judgment on whether the applicant had given a proper and satisfactory explanation for non-compliance. The claims of persistent lack of knowledge by the Applicant regarding the Court processes and dates has not dispel any doubt. As observed in *Mumbandja v Nehale*:

'a litigant who displays a cavalier attitude towards impending danger has himself to blame in the event that the legal process turns out against him. The legal system protects those who are wise enough to take reasonable steps to seek justice. A laissez-faire approach towards compliance of the rules of court cannot be countenanced by these courts'.

F. RELIANCE ON RULE 56

[45] The finding by the Court that based on various principles as set out in *Levon Namibia (Pty) Limited v Nedbank Namibia Limited* as well as in *Mumbandja v Nehale* that *the exercise of the power to provide relief from sanctions imposed by this Court in terms of Rule 56 depends on the nature of the sanction imposed, it cannot apply to the dismissal of a claim or the entering of a final judgment even if such an order were imposed under Rule 53*, there is no further need for this court to consider the Applicant's submission or grounds for relief in terms of Rule 56.

[46] The conclusion I come to is that Rule 56 was not available to the Applicant *in casu*. The applicant should have applied for rescission of the default judgment.

G. THE DEFAULT JUDGMENT REGIME

[47] The next question is whether the applicant complied with the requisites of 'good cause'.

[48] In order to succeed, an applicant for rescission of a judgment taken against him by default must show good/sufficient cause. This generally entails three elements. The applicant must:

- (1) give a reasonable (and obviously acceptable) explanation for his default;
- (2) show that this application is made *bona fide*; and

¹⁰ Ibid.

- (3) show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success.¹¹

[49] The courts, however, retain a discretion which must be exercised after a proper consideration of all the three relevant circumstances.¹² There is no reasonable explanation for the default, and the application is therefore not *bona fide*. The appellant further failed to show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success.

[50] As a result, I make the following order:

The application is dismissed with costs.

KANGUEEHI AJ

APPEARANCES

APPLICANT: KATJIPUKA U

OF NIXON MARKUS PUBLIC LAW OFFICE, WINDHOEK

¹¹ HJ Erasmus et al Superior Court Practice 2012 at B1-307.

¹² HJ Erasmus et al Superior Court Practice 2012 at B1-307.

RESPONDENT

S VLIEGE

OF

KOEP & PARTNERS, WINDHOEK