

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2016/02394

In the matter between:

DE WET ESTERHUIZEN

APPLICANT

and

KARSLRUH NUMBER ONE FARMING CLOSE CORPORATION

RESPONDENT

Neutral Citation: *Esterhuizen v Karslruh Number One Farming Close Corporation* (HC-MD-CIV-ACT-DEL-2016/02394) [2020] NAHCMD 64 (21 February 2020)

CORAM: **PRINSLOO J**

Heard: 7 February 2020

Delivered: 21 February 2020

Reasons: 25 February 2020

Flynote: Rescission application – Rule 103 – Requirements thereof – Irregular service – Rule 8 (4) (b) – Distinction between ‘a complete failure of service’ and

'irregular service' – Each case to be decided on its facts and circumstances – Authentication of documents – Rule 128 – whether documents not authenticated but attached to affidavits that need not be authenticated are admissible in evidence – A document not authenticated cannot be used in any proceedings before this court

Summary: Due to a number of non-compliances and non-appearance by the applicant, although cautioned by court to comply and appear in court, his defence and plea was struck in terms of Rule 53 (2) (b) of the High Court Rules. Subsequently an application for default judgment was brought by the respondents and same was granted, which led to the current application for rescission of the said default judgment.

Held that a distinction between 'a complete failure of service' and 'irregular service' should be drawn and that such distinction is determined on the facts and circumstances of each case. In the matter *in casu* the applicant was served, albeit the wrong sub-rule was used, at his residential address. The only address that both applicant's erstwhile legal practitioner and respondents legal practitioner knew to be the residential address of the applicant.

Held that rule 128 of the High Court Rules requires that a document executed outside Namibia be authenticated. If the document is not so authenticated it cannot be used in any proceedings before this court.

ORDER

1. Applicant's non-compliance with this court's orders of 27 June 2019, 1 August 2019 and 22 August is hereby condoned.
2. The applicant's plea, defence and claim struck on 22 August 2019 is hereby reinstated.

3. Orders made by this court in respect of claim 1 and 2 on 27 September 2019 is hereby rescinded in terms of Rule 103 (1) (a) and all processes and steps that may have taken place in pursuance of such orders are set aside.
4. Applicant is granted 10 days from date of this order, to file all outstanding pleadings.
5. Each party to bear its own costs for the rescission application and the re-instatement of applicant's defence.
6. The matter is postponed to **12 March 2020** at **15h00** for Status hearing.
7. Joint status report on the further conduct of the matter to be filed on or before 9 March 2019.

JUDGMENT

PRINSLOO J

Introduction

[1] The parties will be referred to as they are in this rescission application.

[2] The application before me is one wherein the applicant seeks, as appearing in his notice of motion, the following:

1. 'An order condoning the First Defendant's non-compliance with this Court's Orders of 27 June 2019 and 1 August 2019.
2. An order reinstating the First Defendant's plea, defence and claim struck by this Court on 22 August 2019.
3. An order rescinding the Orders made by this Court in respect of Claim 1 and 2 on 27 September 2019 and setting aside all processes and steps that may have taken place in pursuance of such Orders.
4. Giving the First Defendant a period of ten (10) days to file all outstanding pleadings.
5. An order of cost against any party opposing this application. . .'

Background

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[3] On 28 March 2019 the parties appeared in court and the matter was postponed to 16 May 2019 for Case Management Conference hearing (Reason: Parties to file case management conference report). Parties were ordered to file their expert witness statements on or before 7 May 2019. The parties subsequently filed a case management report as ordered however the applicant failed to file his expert witness statements and on 16 May 2019 condonation was granted for the late filing of his expert witness statements and he was given the opportunity to file his expert witness statement on or before 27 June 2019. On 27 June 2019 the erstwhile legal practitioner of the applicant filed a status report indicating that they intend to withdraw as counsel for the applicant on the basis that they could not contact neither locate the applicant to get further instructions. At this stage the applicant's witness statement was not yet filed. The erstwhile legal practitioner then caused a notice of withdrawal as legal practitioner and the court order of 27 June 2019 to be served via the deputy sheriff on the applicant. In the order of 27 June 2019 the applicant was ordered to make an appearance at court personally on 1 August 2019, and failure to do so will attract sanctions in terms of Part 6 of the Rules of Court. I would like to point out at this juncture that the return of service indicates that the notice was served on the apparent 'employment address' of the applicant although the address appearing on the return of service is that of his residential address being 13 Schiller Heights, Schiller Street, Eros, Windhoek and not his employment address as alleged and which does not seem to appear anywhere on the return of service.

[4] When the matter appeared on 1 August 2019 the applicant was still not in attendance and the court postponed the case to 22 August and again cautioned the applicant to appear in court on the said date and ordered that the court order of 1 August 2019 be served at the cost of the respondents. Subsequently, the order of 1 August 2019 was served on the applicant by the respondents at his residential address. The return of service reads as follows:

'I, the undersigned, WILBUR WILLEMSE, do hereby certify that I have on 14th day of August 2019 at 11:23, in terms of rule 8 (4) (b) of the High Court of Namibia, duly affixed a copy of the COURT ORDER DATED 1ST AUGUST 2019, at FLAT NO 13, SCHILLER HEIGHTS, SCHILLER STREET, being the RESIDENTIAL ADDRESS, of DE WET ESTERHUIZEN, by LEFT the abovementioned documentation to the MAIN ENTRANCE of the property, as no person at the address could be located or is willing to accept service of the process.

PHONE ATTORNEY – ATTORNEYS INSTRUCTED ME TO AFFIXED DOCUMENT
ON 13.08.19 AT 10H49 GATE CLOSED
DATED at WINDHOEK on this 15TH DAY of AUGUST 2019'

[5] On 22 August 2019 when the matter appeared in court, the applicant was again absent from court and the court ordered that his defence and plea be struck in terms of Rule 53 (2) (b) of Rules of Court and postponed the matter to 19 September 2019 for the respondents to move for their application for default judgment. The matter appeared on 20 September 2019 and by this time applicant managed to secure the services of his current legal practitioner who appeared in court and requested that the matter be postponed to enable the applicant to file an application for the postponement of the default judgment. The matter was then postponed to 27 September for hearing of the postponement and default judgment application. However when the matter appeared on 27 of September 2019, counsel for the applicant indicated that the applicant will no longer proceed with the application for postponement and withdrew the said application, which led to judgment being granted in favour of the respondents against the applicant in the following terms:

' . . . And whereas Mr Rukambi indicated that the application for postponement filed by the First Defendant is withdrawn, the application for default judgment is regarded as unopposed: Therefor:

Judgment is granted in favour of the Applicants against the First Respondent in the following terms:

Claim 1 (Case No: 2016/02394):

a) Payment in the amount of N\$ 673,400.00;

b) Interest a tempore morae on the amount of N\$ 673,400.00 from 31 December 2013 to date of final payment; c) Cost of suit.

Claim 2 (Case No: 2018/02568)

a) Payment in the amount of N\$ 12 586 470.00;
 b) Interest on the aforesaid amount at a rate of 20% per annum, from the date of judgment until the date of final payment; c) Costs of suit;
 Matter is removed from the roll: Case Finalized'

[6] As a result of the above order, applicant brought a rescission application in terms of rule 103 (1) (a), alternatively an application in terms of rule 16 (1), (2) and (3).

The applicant's case

[7] There were quite a number of issues and/or alleged irregularities raised by the applicant in his founding papers but I shall deal with the once that the applicant's legal practitioner placed emphasise on during argument.

Non-compliance and non-appearance

[8] In his founding affidavit the applicant explains that he has been experiencing constant and serious health problems. He stated that he has been receiving medical treatment in South Africa and was hardly residing in Namibia since around April/May 2019. He also explained that in June whilst on his way to South Africa he was involved in a motor vehicle collision which aggravated his medical situation. He explained that although the collision was not fatal, it deteriorated his condition to an extent that he remained in South Africa for medical treatment on the advice of his medical practitioner. He further explained that complicated medical procedures were conducted on his lungs and back leading to a situation where he was physically inactive. It was because of his medical condition that he could not comply with the extended time to file his expert witness statements by 27 June 2019.

[9] Applicant also explained that due to his grave medical condition which he had to give attention to, he was unable to provide information and instructions to his erstwhile legal practitioner. The applicant further explained that he did not receive the court orders of 27 June 2019, 1 August 2019 and 22 August 2019 as they were served on his residential address although he was not resident at the time of service at his residential address. He was therefore not aware of the status hearing of 22 August 2019 wherein his defence and plea was struck. In fact at the time the matter was heard on 22 August 2019 he was again admitted to hospital. The applicant travelled from South Africa after having been informed by a friend¹ that his erstwhile legal practitioner withdrew and that the matter is set down for hearing on 19 September 2019 for default judgment.

[10] He stated that he decided to travel to Namibia against the advice of his medical practitioner to acquire new legal representation and file an application for postponement. He subsequently left Namibia after the filing of the postponement application and after the respondents filed their answering affidavit the applicant's current legal practitioner found himself in difficult circumstances where he could not file a replying affidavit for the hearing set for 19 September 2019, forcing the withdrawal of the postponement application, consequently leading the court to grant the default judgment as set out in para 5 above.

Rule 103 (1) (a)

[11] It is the applicant's position that the order dated 1 August 2019 was served contrary to rule 8 (4) (b). Service that was purportedly done in terms of rule 8 (4) (b) is irregular in that service in terms of the said rule could only be effected in circumstances where 'no person is willing to accept service'. This was however not the case as the applicant states that he was not present at the address. There was therefore no person refusing to accept service as there was no one at the address. The deputy sheriff was only able to effect such service if there was 'a person not willing to accept service'. The

¹ From the papers before court it appears that Mr Bruni, the applicant's friend, became aware of the application for default judgement as per letter dated 12 September 2019 attached to the respondent's answering affidavit and which was forwarded to him via email.

applicant therefore stated that the service was not proper as it was not effected in accordance with rule 8 (4) b).² Mr Namandje, counsel for the applicant, referred the court to the case of *Elgin Brown & Hamer Namibia (Pty) Ltd v Hydrodive Offshore International Ltd*³ where Nduaendapo J referred to the case of *Knouwds N.O v Nicolaas Cornelius Josea and Another*⁴ and submitted that an order obtained by a party in his or her absence without service is a nullity just like an order obtained by (or against) a party not cited.

[12] Another irregularity raised by the applicant is that the respondents used an inadmissible affidavit and failed to draw the Court's attention to the fact that a damages affidavit used in respect of a claim of over N\$ 12 million was deposed to in a foreign country without authentication in terms of rule 128 and that the affidavit was commissioned by a notary using the French language without translation. Further, Mr Namandje argued that the affidavit indicates that it was deposed to in Windhoek although one can clearly see that it was deposed to outside the country. Counsel contends that this is a serious and material misrepresentation and on this ground alone the orders should be rescinded. Counsel submitted that for purposes of default judgment such an affidavit can never amount to evidence on the basis of which the court would have granted a judgement. There was thus no evidence in respect of the said claim. The Court was referred to the case of *La Rochelle (Pty) Ltd and Others v Nathaniel-Koch and Others*⁵. Mr Namandje also argued that the respondents in any event also conceded to the fact that the affidavit was indeed executed outside Namibia.

Rule 16

[13] It is the applicant's contention that he has set out the difficulties that prevented him from effectively and properly attending to his case and to give instructions to his erstwhile legal practitioners. The explanation is as set out in para 8 and 9 above. He

² Reference is made to the return of service as quoted in para 4 above.

³ (A 72/2016) [2017] NAHCMD 175 (26 June 2017).

⁴ Case No.: (P) A 227/ 2005.

⁵ 2010 (1) NR 260 (HC) at 567 para 22.

contends that the explanation furnished is exceedingly reasonable and plausible and the court should accept his version and grant condonation. Applicant further stated that he has an undeniable claim of liability which was accepted by the respondents via an acknowledgment of debt in the amount of N\$ 3 million. The applicant therefore states that he has a perfected counterclaim against the plaintiff. The applicant further raises an issue of *lis pendens* in respect of the action. He further alleges that his occupation of the farm was in terms of an agreement reached between the parties and the occupation was therefore not unlawful.

Opposition by the respondents

[14] It is the respondents position that the applicant fails to indicate to court why he failed to timeously file his expert witness statements which were initially due already on 7 May 2019 and long before his accident and the withdrawal of his legal representatives occurred nor is an explanation provided in respect of the continued non-compliance after the filing of the said statements was extended to June 2019. Other than a reference to ill health, he does not explain why he could not communicate such ill health to his legal representative. He knew he had a matter before court but completely ignored his case and his legal representative. The respondents therefore submit that the applicant was negligent in that regard.

[15] Further, applicant fails to indicate the exact nature of his illness and the nature of his injuries when he was involved in an accident and fails to specify whether or not he could communicate or whether he was fully conscious. The applicant also fails to attach an affidavit from a medical practitioner indicating his exact condition in order to assist the court in assessing his medical condition. The applicant also did not disclose to the court where he was residing before his accident in June 2019 and fails to explain his failure to instruct his legal representative prior to the accident. Respondents also submitted that applicant failed to explain how he was unable to give instructions to his erstwhile legal representative due to his ill health but he was able to drive a motor vehicle from Namibia to South Africa which led to the accident. Respondents submitted

that it appears from the reading of the applicant's affidavit that prior to his departure to South Africa he was in a position to give instructions to his erstwhile legal representative but negligently opted not to do so. Respondent submitted that the limited explanation is vague and evasive and fatal to the applicant's application whereupon a court can exercise a discretion to condone the non-compliances.

[16] Furthermore, applicant's alleged lack of knowledge with regard to the orders served on his residential address is solely occasioned by his neglect and unconcern attitude towards these proceedings. Ms Jason, counsel for the respondents, argued that the affixing of the court order on the door as alleged in the return of service does not amount to irregular service. Not only is the address applicant's last known valid address but applicant confirmed that it is his residential address, although he failed to reveal to court when precisely he left for South Africa and/or when he was not at his residential address. Applicant was negligent not to enquire at his address whether anything was served while he was fully aware of the current proceedings and knowing that processes will be served at his last known address. Accordingly the order was properly served.

[17] With respect to the authentication of the affidavit used in support of the application for default judgment, Ms Jason submits that the affidavit is what it purports to be and this is clear from the reading of the affidavit itself and it has been commissioned by a notary as provided by the Rules of Court. Although the content of the affidavit in some respect is in a foreign language, it is clearly in the official language as required by court. It was further submitted that although there was an oversight in respect of the notary public whose designation as a notary is in French instead of English, it does not render the affidavit inadmissible as the affidavit and its content is in substantial compliance with the relevant requirements. She further submits that there was no misrepresentation as alleged as the affidavit was indeed prepared in Windhoek and thereafter dispatched to the jurisdiction of the deponent for commissioning. It was a mere typing error in relation to the reference of 'Windhoek' and that such an error

cannot be regarded as a misrepresentation. She therefore submitted that sufficient evidence in a substantive format was before court.

[18] Respondents deny that they are indebted to the applicant in the amount of N\$ 3 million and state that the claim has in any event prescribed. Respondents further content that the Magistrate's Court ruling on unlawful occupation lead to the applicant being evicted from the premises. Therefore the issue of unlawfulness remains uncontested.

Legal principles regulating rescission applications

[19] Rule 103 (1) deals with variation and rescission of orders and judgments 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;. . .'

[20] On the other hand in order for a party to succeed with an application for rescission of judgment in terms of rule 16, he or she must show good cause for the judgment to be rescinded.⁶ The applicant bears the onus and the court has the discretion to grant such an application.

⁶ The requirements for good cause are the following:

- (a) The applicant must give a reasonable explanation of his default. If it appears that his default was due to gross negligence, the court should not come to his assistance.
- (b) The application must be bona fide and not made with the intention of delaying the plaintiff's claim.
- (c) The applicant must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if the applicant makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. Applicant need not deal with the merits of the case and produce evidence that the probabilities are actually in his/her favour (*Minister of Home Affairs vs Van Den Berg Van Der Bergh* 2008 (2) NR 548 (SC) at 557 J-578 B; *SOS-Kinderdorp International v Effie Lentin Architects* 1991 NR 300 (HC) at 302; *Gruttemeyer NO v General Diagnostic Imaging* 1991 NR 441 at 448; *Xoagub v Shipena* 1993 NR215 (HC) at 217; *Namcon CC v Tula's Plumbing CC* 2005 NR 39 (HC) at 41).

Application of legal principles to the facts

[21] In terms of the Rules of Court there are two ways in which an applicant may approach the court for rescission of judgment, an applicant may approach the court in terms of rule 103 or rule 16. In terms of which rule the application is brought solely depends on the grounds forming the basis for the application. The applicant opted to apply in terms of rule 103 (1) (a) and in the event the court is not inclined to rescind the orders in terms of rule 103, the applicant relies on the alternative basis of rule 16. For the sake of brevity, I will confine myself to the rule which I find applicable to dispose of the matter. In my view rule 103 finds application and I will limit my discussion to this rule.

[22] In the case of *Standard Bank Namibia Limited v Neumbo*⁷, Usiku J stated the following:

[21] 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.⁸ It is not necessary to show good cause under rule 103 (1) (a).⁹ In other words, the existence or non-existence of a defence on the merits, is an irrelevant consideration under rule 103 (1) (a). Where an order was erroneously sought or erroneously granted, the court is obliged to grant the order for rescission.¹⁰

[23] I will therefore proceed to deal with the issues in dispute raised by the applicant on the ground that the court erroneously granted the default judgment. I will only deal

⁷ (HC-MD-CIV-ACT-CON-2016/03103) [2019] NAHCMD 297 (1 August 2019).

⁸ *Naidoo v Matlala* 2012 (1) SA 143 (GNP) at 153C.

⁹ *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA (ECP) 587 at 597 I - 598 B.

¹⁰ *Bakoven Ltd v GJ (Pty) Ltd* 1992 (2) SA 466E at 471G.

with the issues that I find are relevant and will dispose of the case as to avoid overburdening the judgment.

Irregular service

[24] As it has been pointed out above, the applicant contends that the court order of 1 August 2019 was not served according to rule 8 (4) (b) in that service in terms of the said rule can only be effected in circumstances where 'no person is willing to accept service'. In other words, a person was found on the premises but refuses to accept such service. In that instance the deputy sheriff will then affix the document on the main door of the premises or any other place which the public has access. This was however not the case as the applicant was not home and there was no one else at home to accept service and the deputy sheriff was then instructed by the respondents' legal practitioner to serve the documents in such a manner. Applicant therefore argues that that was an irregular and improper service.

[25] The applicant referred the court to *Elgin Brown & Hamer Namibia (Pty) Ltd v Hydrodive Offshore International Limited*¹¹ wherein the case of *Knouwds NO v Josea and Another*¹² was referred to and in which case the following was held with regard to failure of service:

'Where there is complete failure of service, it matters not, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is presented in the proceedings. The proceedings which take place without service is a nullity and is not competent for a court to condone.'

[26] I however disagree with the applicant that the said position applies to the matter at hand. In the *Knouwds* matter an *ex parte* application was brought before court and the applicant failed to serve the entire application on the respondents on the strength of

¹¹ (A 72/2016) [2017] NAHCMD 175 (26 June 2017).

¹² 2007 (2) 792 at 23 and 26.

which a *rule nisi* was obtained. There was therefore a complete failure of service of the process on the respondent(s). It was on that basis that Damaseb, JP held that ‘the right to a fair trial includes the right to know the case one is required to meet. Serving only the *rule nisi* and not the entire application is inherently unfair and unjust.’ In the matter *in casu* the applicant was served, albeit the wrong sub-rule was used, at his residential address. The only address that both applicant’s erstwhile legal practitioner and respondents legal practitioner knew to be the residential address of the applicant. The applicant was duty bound to inform his erstwhile legal practitioner of his new address in South Africa or should have informed the legal practitioner of his illness and that he will be temporarily residing in South Africa. Surely the erstwhile legal practitioner would have conveyed such information to the respondent’s legal practitioner who would have served the applicant at his current address at the time. In the circumstances, this court is satisfied that the respondent cannot be faulted for effecting service at 13 Schiller Heights, Schiller Street, Eros, Windhoek and accepting this to be the respondent’s residential address. The respondents argue that the address is the applicant’s last known valid address and the applicant failed to reveal to the court when precisely he was not at his residential address and left for South Africa. Accordingly, all preceding orders were served on his address and thus properly served at his last known address.

[27] The *Knouwds* case was decided on different facts and circumstances. It relates to non-service and not service in terms of rule 8 (4) (b). Each case must be decided on its own facts and a rubber stamp approach should be avoided. In *Arendsnes Sweefspoor CC v Dalia Marcelle Botha*¹³ it was reasoned that ‘effectiveness of the service of a court process or substantial compliance should trump the form.’¹⁴ The courts have a discretion, which must be exercised judiciously on a consideration of the facts of each case, in essence, it is a matter of fairness to both parties.¹⁵ ‘

¹³ (471/12) [2013] ZASCA 86 (31 May 2013).

¹⁴ para 14.

¹⁵ paras 18-19.

[28] The Supreme Court in *Standard Bank Namibia Ltd and Others v Maletzky*¹⁶ and Others held that:

‘[22] The court in *Knouws* clearly considered there to have been ‘a complete failure of service’ in that case that could not be condoned, which suggests a distinction between a nullity and a less serious form of non-compliance in relation to service, which may be condoned. This is a distinction that has been drawn by the South African courts, which have held that irregular service may be condoned, where the service is not so irregular as to constitute a nullity.²³ The line between ‘a complete failure of service’ and ‘irregular service’ is not always easy to draw but will be a ‘question of degree.’²⁴

[23] Acknowledging the possibility that irregular service may be condoned where there has not been a ‘complete failure of service’ will avoid an over-formalistic approach to the rules, for an approach that precludes condonation whenever there has been non-compliance with the rules regulating service may prejudice the expeditious, cost-effective and fair administration of justice.
 .²⁵

[29] The insertion of ‘no person is willing to accept service’ in the return of service is not severe and fatal to render the service a nullity and severely defective. The contention of the applicant in his founding affidavit that he was virtually not residing at his residential address since around April/May is information that neither his erstwhile legal practitioner nor respondent’s legal practitioner was privy to. Even if the deputy sheriff had indicated that the order was served in any other way, ie in terms of rule 8 (2) (d), the order was still served on the applicant’s last known address and the applicant would still not have known about the order as he was not resident, on his own version, at the said address since April/May 2019. Although the wrong sub rule was used I hold that the order was effectively served.

Authentication of documents

¹⁶ (SA 15/2013) [2015] NASC 12 (24 June 2015).

[30] As alleged by the applicant, the affidavit that was used to obtain default judgment for the damages claim of over N\$ 12 million was inadmissible in the sense that it was deposed to in a foreign country without authentication under rule 128 and by a commissioner using the French language without translation. Further, the affidavit indicates that it was deposed to in Windhoek while in actual fact it was deposed to outside the country. Rule 128 stipulate that:

‘(2) A document executed in any country outside Namibia is, subject to subrule (3), considered to be sufficiently authenticated for the purpose of use in Namibia if it is duly authenticated in that foreign country by -

(a) a government authority of that country charged with the authentication of documents under the law of that country; or

(b) a person authorised to authenticate documents in that foreign country, and a certificate of authorisation issued by a competent authority in that foreign country to that effect accompanies the document.’

[31] In the case of *Alexander Forbes Namibia Group (Pty) Ltd v Andrew Nangombe*¹⁷ the court approved the following dictum in *Namquest Fishing (Pty) Ltd v Vilho Melkisendeke*¹⁸:

‘[20] In the present matter the document purporting to be the supporting affidavit creates the impression that the statement contained in that document was sworn to before a certain Gloria Blanco Iglesias, with an address somewhere in “Espana” (Spain). If indeed that is correct there is no evidence before me that Gloria Blanco was appointed or designated as a Commissioner of Oaths in terms of section 8(1)(a) of the Justices of the Peace and Commissioners of Oaths Act, 1963. It thus follows that the affidavit was not sworn to before a person who is competent to administer an oath and the document attached to the notice of motion is thus not an affidavit as is required by the rules of this court.

[21] During argument Ms. Petherbridge who appeared for the applicant submitted that the affidavit must be containing typographic errors because Mr De Castro was not in Walvis Bay

¹⁷ (I 2452-2014) [2015] NAHCMD 167 (24 July 2015).

¹⁸ (LC 2/2010) [2013] NALCMD 16 (20 MAY 2013).

when he signed the affidavit, she said he was in Spain. But that still does not save the document, as rule 63 of the High Court Rules requires that a document executed outside Namibia be authenticated as contemplated in rule 63(2). If the document is not so authenticated it cannot be used in any proceedings before this court. The document annexed to the applicants' notice of motion launched on 15 February 2010 can therefore not be used in support of the relief sought. Since there is no affidavit attached to the application, there was no application filed within the 30 days contemplated in section 89(4) of the Labour Act, 2007.' ³

[32] It is so that a party that finds it necessary to file an affidavit or other—document executed outside Namibia, that the said affidavit or document must be authenticated. In the instant case, the court is unable to identify as to the place of commissioning. Although it was argued by Ms Jason that the place of commissioning is France this is not clear from reading the affidavit. It is neither clear who the commissioner is as the stamp as well as the hand written script on the last page of the affidavit appear to be in a foreign language. No evidence is placed before me as stipulated in rule 128 (2) to verify the signature appearing on the affidavit Furthermore, there is no indication that the hand written scripts, supposedly of the capacity of the commissioner and/or notary, written in the so-called 'French' language was ever translated into English to enable the court to understand it. There is simply no evidence presented to prove that the affidavit is genuine. The respondents in their answering affidavit admit that the affidavit is partially in a foreign language. Respondents' argument that the oversight in respect of the notary public whose designation as a notary is reflected in French instead of English does not render the affidavit inadmissible stands to be dismissed. On the face of it, the document would appear that it was signed, however no substantial evidence is presented to prove that the person who signed and commissioned it is a notary in 'France'. I see no reason why this court should not accept Mr Namandje's argument that there is no properly authenticated affidavit before this court on which a court would have granted default judgment. And not only is the affidavit not authenticated but it is neither translated and not in compliance with rule 126.

[33] During the hearing, Ms Jason, trying to bypass (so skirt around) the issue of authentication, argued that France, as per rule 128 (3), is exempted from complying

with rule 128 (2). However it is trite, and I need not reiterate the principles here that a litigant stands or falls squarely by his or her papers. What a litigant relies on must be clearly pleaded in the papers before court. Mr Namandje also raised the issue that nowhere in the respondents answering affidavit or heads of argument does the respondent rely on rule 128 (3). I am therefore not inclined to entertain Ms Jason's argument in this respect.

[34] I therefore hold that the irregularity of authentication must stand and rescind the orders erroneously granted based on that issue alone.

Costs

[35] The general rule is that cost follows the event and that the successful party should be awarded his or her costs but this is not a hard and fast rule and cost is ultimately in the discretion of the court. I do however remind myself that the rule of cost to follow the event is normally only departed from when there are good grounds for doing so.

[36] Having had the benefit of hearing the arguments advanced by the parties and having considered the long history of this matter I must profess my dissatisfaction in the manner in which the applicant is conducting this matter. Surely having a case before court should be of outmost importance to an individual. To come to court and argue that due to ill health he was unable to give instructions to his lawyer is unacceptable. If the applicant was able to travel between Namibia and South Africa, he was surely able to pick up the phone and inform his erstwhile legal practitioner of his medical condition. The applicant is absolutely the author of his own misfortune in this matter and if the applicant did what is expected of a diligent litigant this matter would not have resulted in the imposition of sanctions causing the applicant's defence to be struck.

[37] I am of the considered view that in spite of the fact that the applicant was successful in his rescission application he would not be entitled to the cost.

[38] My order is therefore as follows:

1. Applicant's non-compliance with this court's orders of 27 June 2019, 1 August 2019 and 22 August 2019 is hereby condoned.
2. The applicant's plea, defence and claim struck on 22 August 2019 is hereby reinstated.
3. Orders made by this court in respect of claim 1 and 2 on 27 September 2019 is hereby rescinded in terms of Rule 103 (1) (a) and all processes and steps that may have taken place in pursuance of such orders are set aside.
4. Applicant is granted 10 days from date of this order, to file all outstanding pleadings.
5. Each party to bear its own costs for the rescission application and the re-instatement of applicant's defence.
6. The matter is postponed to **12 March 2020** at **15h00** for Status hearing.
7. Joint status report on the further conduct of the matter to be filed on or before 9 March 2019.

JS PRINSLOO
Judge

APPEARANCES:**APPLICANT:**

Mr S Namandje
Of Sisa Namandje & Co. Inc.

RESPONDENT:

Ms A N Jason
Of Shikongo Law chambers