REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-CIV-ACT-DEL-2020/02479

In the matter between:

GOTTFRIED NDAKOLONGHOSH SHIKANGALA **APPLICANT**

and

NAMDEB DIAMOND CORPORATION (PTY) LTD **RESPONDENT**

Neutral Citation: *Shikangala v Namdeb Diamond Corporation (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2020/02479 [2021] NAHCMD 174 (20 April 2021)

Coram: RAKOW, J

Heard: 26 March 2021
Delivered: 20 April 2021

Flynote: Civil Procedure - Rescission of Judgment by Default – Rule 103 – orders erroneously sought or erroneously granted – Joinder - Direct and Substantial interest - Joinder required as a matter of necessity not convenience.

Summary: The applicant who was an employee of the respondent was dismissed in 2015. Prior to his dismissal and in line with his employment conditions, he was provided with a dwelling for accomodation which belongs to the respondent. The appicant continued to reside at this property for years after his dismissal. He referred a dispute of unfair dismissal, unfair discrimination and unfair labour practice to the Office of the Labour commissioner after his dismissal, which was subsequantly dismissed and he noted an appeal against such dismissal during 2018. The labour appeal was enrolled to be heard on 22 January 2021 where it was struck from the roll on.

The respondent brought an action for eviction and unpaid water bills, service was effected at the said property as it was the applicant's *domicilium citandi et executandi* as per the employment contract. The applicant did not defend the matter and default judgment was granted in favour of the respondent. The applicant brought an application for rescission of judgment in terms of rule 103.

The respondent raised a point in limine with regards to the non-joinder of the Deputy Sheriff and argued that the Deputy Sheriff has a direct and substantial interest in the relief sought.

Held that, the mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.

Held further that, the non-joinder of the Deputy Sheriff did not render these proceedings defective as he was to suffer no prejudice as a result of any decision made herein.

Held that, the default judgment was not erroneously sought or erroneously granted in the absence of any party affected.

Held further that, there was no justification for the costs that were granted, and the applicant succeeded with the rescission of the order as to costs.

ORDER

1. The application for the recession of judgement is dismissed, save as for the recession of the cost order which is successful.
2. Cost is awarded on an appropriation of 80% to 20% to the respondent, including the costs of one instructed and one instructing council
3. The matter is postponed to 12 May 2021 at 09h00 to hear arguments on an appropriate cost order.

JUDGEMENT

RAKOW, J:

Background

[1] The applicant in this rescision application is Godtfried Ndakolonghoshi Shikangala, (Mr. Shikangala) who was previously employed by Namdeb Diamand Corporation (Pty) Ltd (Namdeb). Mr. Shikangala's employment was terminated following a hearing on 26 March 2015 by Namdeb, the respondent.[1] He referred a dispute of unfair dismissal, unfair discrimination and unfair labour practice to the Office of the Labour commissioner about 23 November 2015.[2] His complaint was subsequantly dismissed and he noted an appeal against such dismissal during 2018. The labour appeal was enrolled from time to time and was set to be heard on 22 January 2021 when it was struck from the roll on account of an incomplete record. The appeal has currently not been re-enrolled.

[2] Part of the employment conditions of the applicant was that he was to be provided with accommodation. The respondent indeed provided Mr Shikangala with a housing unit situated at erf 1122, nr 18 on 8th avenue in Oranjemund. The applicant remained in

[1] See answering affidavit of Tashrikah Nel para 13.2

[2] See founding affidavit of Mr. Shikangala at para 8

occupation of the said property after his dismissal in 2015. On 30 June 2020 the respondents issued summons against the applicant for an eviction order, arrear rental for the property and amounts for water delivery made to the property. The summons was served on the above address on 30 July 2020 by affixing a copy thereof on the front door of the residence in terms of rule 8(2)(b). No intention to defend the matter was noted and the respondents then set the matter down for default judgement proceedings on 4 September 2020. During these proceedings the following judgement was granted:

CLAIM 1

1.1 Eviction of the defendant (and all other persons occupying the property together with the defendant) from plaintiff's property being Erf 1122; number 18; 8th Avenue; Oranjemund, Namibia;

AD CLAIM 2

2.1 Payment in the amount of N$30,287.32

AD ALL CLAIMS

3.1 Costs of the action, including the costs of one instructed and one instructing counsel.

4 Matter is removed from the roll: Leave granted to approach court at a later stage for the remainder of the prayers - will need to proof the amount that is claimed for rental.

[3] Subsequent to that the Deputy Sheriff of the court, Mr. van Heerden on 13 November 2020 served the court order for eviction and a writ for the execution of movable properties. The Deputy Sheriff arranged to serve this on Mrs. Sofie Itula who according to the information he received, is the girlfriend of the applicant and in charge and control of the premises at the time of service.[3] The eviction order was then executed and the property placed in storage. On the same day a notice of intention to defend was filed by the legal practitioners of the applicant on the e-justice file. On 11 December 2020 an urgent application was filed on behalf of the applicant, which application did not proceed but which form the basis of the matter before court.

[4] The order the applicant sought, is set out as follows:

[3] See Return of Service annexure “TN1” to the affidavit of Tashrikah Nel.

1. Pending the finalisation of the Labour Appeal launched on 15 March 2018 in case number HC-MD-LAB-APP-AAA-2018/00015, set down and to be heard by Justice Masuku on the 22nd of January 2020, that the Respondent cause the immediate release of the Applicant's household goods and furniture together with the keys to the property at Erf 112 Number 18, 8th Avenue Oranjemund, Republic of Namibia.

2. That the Respondent is interdicted and restrained from executing upon any warrant of execution it may have obtained and cause the immediate release of the Applicant's household goods and furniture it removed on the strength of the default judgment entered in favour of the Plaintiff against the Applicant by this court under case number HC-MD-CIV-ACT-DEL-2020/02479 on 7 September 2020 be rescinded and set aside.

3. Rescinding the order dated 7 September 2020 by Justice Rakow in terms of Rule 103 of the High Court Rules read with Rule 22 of the Labour Court rules;

4. The Applicant is granted a period of 10 (ten) days from the date of service of this order to deliver a notice of intention to defend the plaintiff's claim.

5. That the Respondent is interdicted and restrained from in any manner attending to execute on the cost order obtained by judgment dated 7 September 2020 in favour of the Respondent.

6. That such further and/or alternative relief be granted to the Applicant as this court deems just and equitable; alternatively

7. That the Respondent be ordered to be pay costs of this application in the event of the Respondent opposing this application.

8. That a copy of this application be served on the Deputy Sheriff of the Oranjemund District.

[5] The application was initially set down for 28 January 2021 and a case planning order was made, setting out the timelines which the parties had to follow in bringing this matter before court. It was eventually heard on 26 March 2021.

<u>The late filing of the heads of argument by the applicant</u>

[6] The timelines provided by the court for the filing of further pleadings and documents directed that the applicant file his heads of argument on or before 2 March 2021. This was not complied with and the heads of argument of the applicant were only filed late in the afternoon of 23 March 2021 and therefore only served on the other parties and the court on the morning of 24 March 2021. The applicant brought a condonation application explaining his delay as well as seeking that the court condones the late filing. It appears that the delay in filing was occasion by unpaid legal fees. The legal practitioners for the applicant are not paid by the applicant for their services but the Mineworkers Union of Namibia foots the bill for legal services.

[7] In the supporting affidavit a certain Mr. Paulus Shitumba stated that an amount of legal fees remained unpaid and that they were informed by the legal practitioner of record that these need to be paid before any further matters will be attended to. On 19 March 2021 they agreed on a proposed payment plan which would allow AngulaCo to remain on record. After this agreement, the heads of argument for the applicant was drafted and filed.

[8] On behalf of the respondent it was pointed out that this can surely not be a reason for the late filing of heads of argument as Practice Directive 50 (2) reads that

> '(a) legal practitioner who has not withdrawn within the period specified in subparagraph (1)(a) is deemed to have agreed to appear on behalf of the client during the period for which the matter is set down for trial or hearing, irrespective of whether there has been payment of his or her fees and costs;'

[9] It was argued that the legal representative for the applicant should have withdrawn timeously when she was not placed in funds, and if she remained on record, it must be deemed that she agreed to appear on behalf of her client and then should have complied with the court order.

[10] The filing of heads of argument is for the benefit of the court and the power to condone therefore also rests with the court. In this instance the reason for the late filing of the heads of argument for the applicant and the conduct of the legal practitioner is

frowned upon, however, no real prejudice was suffered on the side of the respondent, except that it did not have insight of the heads of argument for the applicant at the time that it drafted its heads of argument. There was however no request for the filing of additional heads of argument and therefore the late filing of the heads of argument of the plaintiff is hereby condoned.

The point in limine

[11] The respondent raised a point in limine, that there is non-joinder of the Deputy Sheriff as it argues that he should have been a party to this application as there is an obligation to join all interested parties in legal proceedings and the Deputy Sheriff has a direct and substantial interest in the relief sought. The applicant argued that the Deputy Sheriff does not have a real interest in the matter, save as to follow the directions from the respondent on the strength of a warrant of execution and his non-joinder can never render the application fatally defective as joinder is only required as a matter of necessity and not of convenience. The question therefore is whether the party has a direct and substantial interest which may be affected prejudicially by the judgement of the court in the proceedings before it.

[12] In the matter of *Judicial Service Commission and another v Cape Bar Council and another*[4] the South African Appeals court said the following regarding non-joinder:

'It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA)* para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and*

[4] 2013 (1) SA 170 at para 12.

Hendrik Christoffel Nel Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5 ed vol 1 at 239 and the cases there cited).

[13] In *Bowring NO v Vrederdorp Properties CC and Another* (supra) Brand JA formulated the test as follows:

> 'The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned.'

[14] In applying the abovementioned test the court comes to the conclusion that no prejudice was shown that would affect the Deputy Sheriff of the court, should he not be a party to the proceedings and therefore find that the non-joiner of the Deputy Sheriff does not render these proceedings defective.

Arguments by the parties on the application for rescission

[15] The application before court was brought in terms of rule 103 in that it was erroneously sought or erroneously granted in the absence of the party affected thereby and further that the judgement is in respect of interest or costs granted without it being argued.

[16] It is the applicant's argument that at the time that the summons was served on the property, it was no longer occupied by him, he was not staying there and the respondents knew that as well as to where to get hold of him as they have been corresponding with his legal practitioners during that period. It is however not disputed that his family still occupied the said residence. He therefore was not aware that a summons was issued against him and only became aware of the said litigation when the order for eviction was to be served on the property, being the nightly hours of 12 November 2021. He immediately reacted and instructed his legal representative to oppose the matter and to file an application for rescission of judgement, which was then done. In essence the argument is that the judgement was erroneously sought and granted as there was no proper service of the summons.

[17] The applicant then proceeded to set out his defence in that there is current labour appeal proceedings pending before this court which might find that he was not fairly dismissed and can result in his return. He further submitted that the amount granted by the court for the alleged water consumption was never agreed to as he did not stay in the house unlawfully as the occupation of the house was in terms of the contract of employment between himself and the respondent. The prospects of success on appeal are therefore, according to the applicant good. At all times the legal practitioners of the respondent were aware that the legal practitioners for the applicant appeared for him and they should therefore have informed them of the pending litigation.

[18] It is further argued that this court does not have jurisdiction to entertain the default judgement application in the first instance as it pertains to a contract of employment between the applicant and the respondent and should therefore have been heard in the Labour Court of Appeal.

[19] The respondent on the other hand argued that in terms of the documentation completed in relation to the allocation of the dwelling, the parties agreed that the said dwelling will be the place of domicile of the occupant.[5] The dwelling was still occupied by the applicant and therefore, they were entitled to serve the summons in the manner in which it was served. It therefore did not seek the default judgement erroneously and was entitled to ask for, and be granted the order that it was granted.

[20] It was further argued that the applicant seems to rely on section 28(5) of the Labour Act, 11 of 2007 which reads as follows:

> 'If an employee has referred a dispute to the Labour Commissioner alleging an unfair dismissal within 30 days following the termination of the employment the employer may not, despite sub-section (4), require the employee to vacate the place or premises until the dispute is resolved in terms of Part G of this Chapter or otherwise disposed of.'

[5] See annexure TN4 to the answering affidavit.

[21] The respondent submitted that the disciplinary hearing and dismissal was on 26 March 2015 and his internal appeal was dismissed on 16 July 2015. The matter was only referred to the Office of the Labour Commissioner on 2 December 2015, more than 30 days following the termination of his employment. The applicant can therefore show no right or entitlement five years after his dismissal to still occupy the premises of the respondent.

Discussion

[23] A default judgement can be rescinded in terms of rule 16, rule 103 or the common law and in this instance the application by the applicant was brought in terms of rule 103 read with rule 22 of the Labour Court rules. This rule simply provides that the rules of the High Court will be applicable to labour matters where the Labour Court rules do not make provision for the procedure to be followed and in this instance, finds no application in the current proceedings.

[24] From the reading of the notice of motion, it is clear that the applicant brings this application only in terms of rule 103 of the Unified Court rules, which read as follows:

'Variation and rescission of order or judgment generally

103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment

(a) erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) in respect of interest or costs granted without being argued;

(c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or

(d) an order granted as a result of a mistake common to the parties.'

[25] In *Herbstein & van Winsen's the Civil Practice if the High Courts of South Africa*[6] the following was stated:[7]

[6] 5th Edition by Cilliers, Loots and Nel, Juta 2009 at page 931.

[7] See *Nyingwa v Moolman* No 1993 (2) SA 508 (TK GD) at 510.

'It seems that a judgement has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have induced the judge, if aware of it, not to grant the judgement.'

[26] It further continues on page 932 to state that one of these grounds could be:

'that the court lack legal competence to have made the order, where the return of service had been fraudulently completed and where there had not been service of the summons on the applicant.'[8]

[27] It is clear that the application in the current instance refers to rules 130(1)(a) and 130(1)(b). With regard to the service of the process on the applicant it is clear that the respondent in fact served the summons within the ambit of the rules and as it was entitled to do. The family and girlfriend of the applicant still occupied the house and in terms of their initial agreement, the said residence remained the *domicilium citandi et executandi* of the applicant and this is also the address listed by the applicant as his physical address on his founding affidavit. Service of the summons was therefore correctly done on the said address and this can therefore not be regarded as a fraudulent service nor as no service. With regards to this fact, there was therefore error regarding service at the time that the default judgement was requested.

[28] The court further had jurisdiction to hear the application for default judgement and to grant the said as the claim by the applicant that he was entitled to remain in the said residence *in leu* of his employment contract came to an end within 30 days after his termination if he did not raise the complaint of unfair dismissal with the Office of the Labour Commissioner, as per section 28(5) of the Labour Act, 11 of 2007 and the issue of the occupation of the residence was therefore no longer within the ambit of the Labour Act and correctly brought to court within the ambit of the Civil Procedure. There is further no indication as to why the claim for water consumption should not have been dealt with together with the claim for eviction.

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[8] See *Athmaram v Singh* 1989 (3) SA 953; *Mutebwa v Mutebwa* 2001 (SA) 193 (Tk HC) at 200; *Fraind v Northmann* 1991 (3) SA 837 (W) at 830.

[29] Where the court however finds that the applicant has a ground for his application for a setting aside of an order, is with regards to the cost order granted together with the default judgement. There was no indication as to why the cost order that was granted included the cost of one instructing and one instructed counsel. It is also not clear from the replies before court what the reason for the specific cost order was and that part of the application of the applicant is therefore successful.

[31] The court therefore makes the following order:

1. The application for the recession of judgement is dismissed, save as for the recession of the cost order which is successful.
2. Cost is awarded on an appropriation of 80% to 20% to the respondent, including the costs of one instructed and one instructing council.
3. The matter is postponed to 12 May 2021 at 09h00 to hear arguments on an appropriate cost order.

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E RAKOW

Judge

APPEARANCES:

Applicant:	Adv. R. Heathcote SC (with him Adv. J. Schickerling)
	Instructed by AngulaCo Inc, Windhoek.
First and Second Respondents:	Adv. J Diedericks
	Instructed by Danielle Lubbe Attorneys, Windhoek.