

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

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| Case Title: <i>ABB Namibia (Pty) Ltd v</i> <i>Radial Truss Industries (Pty) Ltd</i> | Case No.: HC-MD-CIV-ACT-CON-2019/04359 |
| | Division of Court: High Court (Main Division) |
| Heard before: Honourable Lady Justice Rakow | Date of hearing: 14 April 2021 |
| | Delivered on: 30 April 2021 |
| | Reasons delivered: 6 May 2021 |
| Neutral citation: <i>ABB Namibia (Pty) Ltd v Radial Truss Industries (Pty) Ltd</i> HC-MD-CIV-ACT-CON-2019/04359 [2021] NACHMD 206 (30 April 2021) | |
| IT IS ORDERED THAT: The application for re-enrolment of the rescission of judgment application is dismissed with costs, which costs are limited in terms of rule 32(11). | |
| Reasons for orders: | |
| <u>Introduction</u> [1] The applicant in the rescission of judgment application, Radial Truss Industries (Pty) Ltd, is the defendant in the original matter. On 7 November 2019 this court granted a default judgement against the defendant in favour of the plaintiff on the following terms: | |

'1. Payment in the amount of N\$ 1 237 180.08.

2. Interest *a tempore morae* at the legal rate of 20% per annum from 31 March 2018 until the date of final payment.

3. Costs of suit.'

[2] According to the Particulars of Claim, the plaintiff and the defendant entered into an oral agreement in October 2017 in terms of which the plaintiff was to sell and deliver goods on an open account to the defendant and the defendant would pay for the said goods upon receiving an invoice from the plaintiff. From October 2017 to February 2018 various goods were sold and delivered to the defendant for which payment has become due in the amount of N\$ 1 237 180.08.

[3] The matter became defended on 29 November 2019 and an application for rescission of judgement was filed on 6 March 2020. The application was eventually removed from the roll on 20 April 2020 and after no activity took place on the case, the parties received a notice in terms of rule 132 that the matter was assigned to a managing judge to deal with the matter in light of the inactivity of the matter on 27 October 2020 setting the date for hearing the matter in terms of rule 132 as 10 November 2020. This prompted the legal practitioner to file a request to re-enroll the rescission application and to condone the non-prosecution of the said matter. The matter is therefore before the court to hear the application for re-enrollment as well as the application for rescission of judgement.

The chronological sequence of events as set out by the applicant

[4] On 29 November 2019 the applicant became aware of the summons issued against it and filed a Notice of Intention to Defend. On 2 December 2019 the applicant engaged its legal representative and on 5 December 2019 the applicant engaged the legal representative of the respondent in terms of rule 32(9) of the High Court rules. Nothing subsequently happens until 5 February 2020 when the applicant consulted its legal practitioners to request them to explore an alternative to launching a rescission application. The legal representative of the applicant then traveled to Ongwediva and back to Windhoek and then to a farm in

Kavango from where she returned on 2 March 2020. On 6 March 2020 the application for rescission was launched, which was subsequently enrolled on the wrong court roll on 20 April 2020 and removed from the roll. This resulted in a position that no application was further pending.

[5] From the supporting affidavit of the applicant, it then seems that Mr. Kweenda on behalf of the applicant explains that the period March 2020 to September 2020 was extremely harsh, especially with the Covid pandemic which negatively impacted several businesses. He further explained that the director responsible for legal matters father was diagnosed with cancer, several in-fights within the business took place causing a lot of tension and he followed up on some of the legal matters but he traveled a lot and was under constant threat because of the lack of cash flow in the business.

[6] He further explains that the legal practitioners of the plaintiff/respondent approached the legal practitioners of the applicant for a round table discussion which the applicant at that time believed not to be bone fide as they served the summons on the wrong address for the applicant whilst they knew that it was no longer their address. He, therefore, failed to provide the legal representative with instructions timeously. The plaintiff/respondent's legal practitioners sent a follow-up request for a round table discussion which also did not take place. On 22 October 2020 his legal practitioners asked for the matter to be docket allocated as it was defended. It was then allocated and a notice to show cause as to why it should not be struck for inactivity was issued. The firm of his legal representative was closed from 26 October 2020 to 13 November 2020 due to two staff members having tested positive for covid.

Rescission of judgement

[7] In our law, we recognize three types of rescission of judgement procedures. These are an application under Rule 16 of the High Court rules, Rule 103 of the High Court rules, and under the common law. Rule 16 reads as follows:

'(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N\$5 000, set aside the default judgment on such terms as to it seems reasonable

and fair, except that -

(a) the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement of security; or

(b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.

(3) A person who applies for rescission of a default judgment as contemplated in subrule (1) must -

(a) make application for such rescission by notice of motion, supported by affidavit as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security;

(b) give notice to all parties whose interests may be affected by the rescission sought; and

(c) make the application within 20 days after becoming aware of the default judgment.'

[8] Rule 16 dictates that the application for rescission of judgement must be brought within 20 days from learning of the judgement. In this instance, the date that the applicant learned of the judgement was 29 November 2019. The application was only brought on 6 March 2020, which takes the application beyond the 20 days provided for in the rules. That necessitated the bringing of a condonation application, which was then included in the application launched on 6 March 2020. The applicant had to show good cause as well as furnish N\$5000 security, unless it shows why such security should not be paid, for the application in terms of rule 16 to proceed.

[9] Rule 103 reads 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.’

[10] In *Herbstein & van Winsen’s the Civil Practice of the High Courts of South Africa*¹ the following was stated:

‘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.’

[11] For an application under rule 106, the request is for the court to set aside the judgement granted as it was erroneously sought or erroneously granted. In essence, this rule allows for judgements erroneously granted to be set aside. It has a very narrow interpretation and should not be interpreted too broadly. In the current matter, there was service of the process and it was in terms of the rules. There is not a time limit within which one should apply in terms of the rule but it is generally accepted that delay or acquiescence in the execution of the judgement would bar success in an application to rescind.² In this instance, it took the applicant more than three months to institute the application and another year to re-enroll the application.

[12] It is clear from the explanation provided on behalf of the applicant that the said premises indeed used to be the business premises of the applicant but that they informed an employee of the respondent that their address changed. It is the court's opinion that this rule is not the correct rule to base this application on, and that rescission should have been applied for under rule 16 or the common law.

[13] In terms of the common law, courts will be willing to set aside judgements granted on various grounds such as fraud, the discovery of new documents, error, or procedural irregularity. The applicant needs to show good cause as to why the judgement should be rescinded.

¹ 5th Edition by Cilliers, Loots and Nel, Juta 2009 at page 931.

² See *Herbstein and Van Winsent*, supra at page 930.

[14] In an application for rescission of judgement the applicant must show good cause and prove that at no time did he renounced his defence and that he has a serious intention to proceed with the matter. When dealing with good cause, the applicant must give a reasonable explanation for the default, it must be a bona fide application and he must show that he has a bona fide defence to the plaintiff's claim.³ In casu, the applicant explained in its defence that it intends to rely on an arbitration clause that formed part of a contract between it and the plaintiff. This contract is however not signed by the plaintiff and therefore not a binding agreement between the parties. There is no other defence preferred by the applicant.

Dealing with the initial condonation application

[15] When dealing with the initial condonation application wherein the applicant attempts to explain the non-compliance with the 20 day period within which the application needs to be brought or the common law requirement that it needs to be brought within a reasonable time as soon after the knowledge of the default judgement became known, the applicant has to satisfy the court that the period of delay was explained in full and that there are reasonable prospects of success. The court is not satisfied with the explanation for the delay in bringing the rescission application, as it seems that there was no real urgency on the side of the applicant to ensure that the said application was brought. Even if the court was to accept the explanation for the delay in bringing the application, the court is not satisfied that the applicant showed real prospects of success. Condonation for the late filing of the application will therefore not be granted.

The re-enrollment of the application

[16] The matter before the court is an application for leave to re-enroll the rescission application and the hearing of the rescission application. For reasons as set out above, the court is not satisfied that there are any prospects for success for the condonation application and therefore does not grant leave to re-enroll the said application.

³ See Herbstein and Van Winsent supra page 716.

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| <p>[17] The following order is therefore made: The application for re-enrolment of the rescission of judgment application is dismissed with costs, which costs are limited in terms of rule 32(11).</p> | |
| Judge's signature | Note to the parties: |
| | Not applicable |
| Counsel: | |
| Applicant | Respondent |
| Adv L Ihalwa Instructed by Tjombe–Elago Inc. Windhoek | Adv T Muhongo Instructed by Etzold-Duvenhage Windhoek |