

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Paris Kaboy Vatilifa and Valongeni Trading Close Corporation Velemina Kaluwa	 Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-CON-2018/03574 Division of Court: Main Division Heard on: 03 June 2021
Heard before: Honourable Mr. Justice Usiku, J	Delivered on: 03 June 2021	
Neutral citation: <i>Vatilifa v Valongeni Trading Close Corporation and Another</i> (HC-MD-CIV-ACT-CON-2018/03574) [2021] NAHCMD 272 (03 June 2021)		
Order: <ol style="list-style-type: none">1. The defendants' application for rescission of the judgment and order dated 22 June 2020, is dismissed.2. The defendants are ordered to pay the costs of the plaintiff, jointly and severally, the one paying the other to be absolved.3. The matter is removed from the roll and regarded finalized.		
Reasons for order:		

USIKU, J

Introduction

[1] This is an application for rescission of a judgment and order granted by this court against the defendants on 22 June 2020, on the ground that such order was granted erroneously and in the absence of the defendants. The application is opposed by the plaintiff.

Background

[2] On 06 September 2018 the plaintiff instituted action against the defendants for payment of N\$179 750, being an outstanding amount allegedly due and owing to the plaintiff by the defendants arising from an abortive sale agreement of three Toyota Corolla motor vehicles. According to the particulars of claim, the plaintiff purchased the three motor vehicles from the defendants. He had the purchase price for the three motor vehicles paid to the defendants and the defendants failed to deliver the motor vehicles. The plaintiff therefore claim re-payment of the purchase price.

[3] The defendants entered appearance to defend. The matter proceeded through case management processes and was, on 11 February 2020, set down for trial for 22 to 26 June 2020.

[4] On the day of the trial, on 22 June 2020, there was no appearance on the part of the defendants, and the court made an order in the following terms:

‘Having heard MARGARET MALAMBO, on behalf of the Plaintiff and having read the pleadings for

HC-MD-CIV-ACT-CON-2018/03574 and other documents filed of record:

IT IS HEREBY ORDERED THAT:

1 Due to the absence of the Defendants and their legal practitioner, Mr. Mbaeva, the court, in terms of Rule 98 (1) of the High Court rules, grants judgment in favor of the Plaintiff against the Defendants jointly and severally liable, the one paying the other to be absolved, as follows:

1.1 Payment in the amount of N\$179,750.00;

1.2 Interest thereon at the rate of 20% per annum from December 2014 to the date of final payment;

1.3 Costs of suit.

2 Matter is removed from the roll: Case Finalized.'

[5] Aggrieved by the foregoing judgment and order, on 07 August 2020 the defendants filed the application for rescission of that judgment.

[6] On 16 March 2021, the court scheduled a status hearing in the matter for 07 April 2021. On 07 April 2021 the legal practitioner for the plaintiff attended the status hearing. The legal practitioner for the defendants did not attend the status hearing. On 07 April 2021 the court issued an order postponing the matter to 03 June 2021 for hearing the rescission application. The court also directed the defendants to file heads of argument on or before 12 May 2021. The plaintiff was directed to file heads of argument on or before 19 May 2021.

[7] The defendants did not file heads of argument. The plaintiff filed his heads of argument timeously.

[8] On the day of the hearing the defendants and their legal practitioner did not appear in court. The plaintiff's legal practitioner appeared.

The rescission application

[9] The affidavit filed in support of the defendants' rescission application is deposed to by the legal practitioner of the defendants, Mr Mbaeva. In support of the rescission application, the deponent to the affidavit states that, the daily arrangement at his office is that, his secretary checks e-justice system every morning and informs him of the matters requiring his attention. His secretary did not inform him of the Roll Call on 19 June 2020 and the trial of 22 June 2020. Consequently, he did not attend Roll Call and the trial in regard to this matter.

[10] Furthermore, the deponent to the defendants' affidavit states that the court erred in granting judgment in favour of the plaintiff in terms of rule 98(1). According to him, the court ought to have stood the matter down in order to secure the attendance of the defendants, seeing that the matter was set down for the whole week.

[11] It is further submitted in the affidavit that, there was no evidence that the defendants will fully failed to attend trial on 22 June 2020 and therefore the judgment granted in favour of the plaintiff should be rescinded.

[12] The defendants' state further that the money which is the subject of the dispute, is for the benefit of recognised war veterans and that the plaintiff is not entitled to the money but only to properties purchased with such money.

[13] The plaintiff opposes the rescission application. In his opposing affidavit, the plaintiff raises a point in *limine* to the effect that the deponent to the defendants' affidavit is not competent and is not duly authorized to institute the rescission application on behalf of the defendants. The plaintiff submits that the deponent to the defendants' affidavit is not a party to the proceedings and may not seek the relief prayed for in the notice of motion.

[14] Insofar as the merits of the application are concerned, the plaintiff submits that the court was correct in granting judgment in favour of the plaintiff in terms of rule 98(1) and that the rescission application be dismissed with costs.

Legal principles

[15] In terms of rule 103(1)(a) a court may, on the application by any party affected, rescind any order or judgment erroneously sought or erroneously granted in the absence of the party affected thereby.

[16] In terms of the common law, rescission of an order may be granted if:

- (a) there is a reasonable explanation for default,
- (b) the applicant shows that the application is *bona fide*, and
- (c) the applicant shows that he has a *bona fide* defence which *prima facie* has some prospects of success.

[17] 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.¹

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

Analysis

[18] As regards the point in *limine* raised by the plaintiff, the general principle is that, it is not advisable for a legal practitioner who represents a client to depose to an affidavit on behalf of his client, dealing with factual issues. However, where the legal practitioner is the person able to tender an explanation and verify to the correctness and truth of certain facts, it is proper for him/her to depose to the affidavit, but in such circumstances, it is not advisable for him/her to argue the application himself/herself.² In the point in *limine*, the plaintiff states that the defendants' legal practitioner is not competent and is not authorized to institute the rescission application on behalf of the defendants. I do not believe that the rescission application has been instituted by the defendants' legal practitioner. The defendants' legal practitioner merely deposed to the supporting affidavit, which in the circumstances, was the proper thing to do as he may be the only person able to tender an explanation. The plaintiff's point in *limine* has no substance and stands to be dismissed.

[19] The next issue for determination is whether the judgment granted by this court on 22 June 2020 was erroneously granted.

[20] The explanation given by the defendants for their non-appearance in court on 22 June 2020 is that the secretary to their legal practitioner failed to inform him of the trial on 22 June 2020. There is no explanation given by the defendants as to why the secretary failed to do so. Furthermore, there is no affidavit filed by the secretary confirming such allegations and explaining what happened. In my view, the defendants have not presented a reasonable and acceptable explanation for the failure to appear at trial on 22 June 2020 and the court was correct in granting the judgment in favour of the plaintiff in terms of rule 98(1).

[21] To rescind an order or judgment under the common law, the defendants are required to show 'sufficient cause'. 'Sufficient cause' has two essential elements, namely:

- (a) a reasonable and acceptable explanation for the default, and,
- (b) a *bona fide* defence on the merits which carries some prospects of success.

[22] I have already found that the explanation put forth by the defendants for their default is neither reasonable nor acceptable.

² See *IA Bell Equipment Co Namibia (Pty) Ltd v ES Smith Concrete Industries CC* (I 1860/2014) [2015] NAHCMD 68 (23 March 2015) para 35.

[23] As regards the defence put forth by the defendants, the defendants argued to the effect that the plaintiff is not entitled to the money in question but is only entitled to a property purchased with that money. I am not persuaded that such defence is a *bona fide* defence nor that it carries prospects of success. The defendants do not state the basis on which they are entitled to the money in question. In any event, the defendants do not allege, nor show, that they have a better title to the money than the plaintiff. I am therefore of the opinion that the defendants have failed to show that they have a bona fide defence on the merits which carries some prospects of success.

[24] For the foregoing reasons the defendants' rescission application falls to be dismissed with costs.

[25] In the result, I make the following order:

1. The defendants' application for rescission of the judgment and order dated 22 June 2020, is dismissed.
2. The defendants are ordered to pay the costs of the plaintiff, jointly and severally, the one paying the other to be absolved.
3. The matter is removed from the roll and regarded finalized.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	1st & 2nd Defendants:
W Chinsebu Of Sibeya & Partners Legal Practitioners Windhoek	No appearance