REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00215

In the matter between:

FURAHA TOURS AND SAFARIES CC	**1ST APPLICANT**
ILUNGA DELPHIN MWEPU	**2ND APPLICANT**

and

CARLOS MOREN HUEVELUS	**RESPONDENT**

Neutral citation: *Furaha Tours and Safaries CC v Heuvelus (*HC-MD-CIV-MOT-GEN-2020/00215) [2021] NAHCMD 359 (29 July 2021)

CORAM: MASUKU, J
Heard on: **06 May 2021**
Delivered: **29 July 2021**

Flynote: Rules of Court – Rule 16 – Rescission of judgement application – service of the rescission application on the legal practitioners of the respondent and propriety thereof – entering of notice of intention to oppose cures defect in service – Rule 16

application not an interlocutory application and thus not strictly subject to mandatory requirements of rule 32(9) and (10) – Requirements to be satisfied for the granting of a rescission application.

Summary: Default judgement having been granted against the applicants in an action instituted by the respondent against them, the applicants approached the court on motion to have the judgement rescinded. The applicants served the rescission application on the respondents' legal practitioner as opposed to serving the respondents in terms of the rules of court.

Contesting the granting of the relief sought, the respondent raised points *in limine* challenging the method used by the applicants to bring the application, the late filing of the application, and the service thereof. On the merits, the respondent contended that the applicants had not made out a case for the granting of the relief sought and moved for a dismissal of the application.

Held: that applications for rescission in terms of rule 16 although incidental to proceedings are not interlocutory in nature and are only taken up after the finalisation of proceedings. As such, they are not strictly speaking, subject to rule 32(9) and (10).

Held that: the filing of a notice of intention to oppose demonstrates that service of the application has been effected and a party is therefore aware of the proceedings against him or her.

Held further that: the law relating to rescission applications is trite and was laid down in the matter of *Grant V Plumbers* 1949 (2) SA 470 (A), namely, firstly, that there should be a reasonable explanation for the applicants' default; secondly the application should not merely be done to delay the plaintiff's claim and lastly, an applicant should have a *bona fide* defence to the claim.

The court found that the applicants had no *bona fide* defence to the claim and were merely delaying the respondent's enjoyment of the fruits of the judgment. The application for rescission was thus dismissed with costs.

ORDER

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1. The application for rescission of the judgement granted against the Applicants in favour of the Respondent in case number HC-MD-CIV-ACT-CON-2020/00912 on 20 April 2020, is hereby dismissed.

2. The applicants are ordered to pay the costs of the respondent, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner.

3. The matter is removed from the roll and regarded finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] This is an opposed application for rescission of a default judgement, wherein the applicants seek the following order:

'(A) that the judgement granted against the applicants in favour of the respondent in case no. HC-MD-CIV-ACT-CON-2020/00912 on 20 April 2020, be rescinded and set aside.

(b) The amount of N$ 5000.00 paid in as security in this application be repaid to the Applicants should the application be granted.

(c) That the taxation scheduled for 14 July 2020 be stayed until the outcome of this application.

(d) Ordering the respondent herein to pay these costs of this application in the event that the application is opposed.'

The parties

[2] The first applicant is Furaha Tours and Safaries Close Corporation, a close corporation incorporated in terms of the Close Corporation laws, with its place of business situated at Erf 102, John Meinert Street, Windhoek-West, Windhoek, Republic of Namibia.

[3] The second applicant is Mr. Mwepu Ilunga Delphin, a major adult male, with his address being the same as that of the first applicant.

[4] The respondent is Mr. Carlos Moreno Heuvelus an adult male, who resides at Guadiana 115, Apto. 116 28670- Villaviciosa de Odon-Madrid, Spain.

The applicants' case

[5] It is the applicants' case that during 2016 the respondent offered to sell his Toyota Land Cruiser vehicle at the price of N$ 326 000.00 to the applicants. On 05 June 2017, payment was made to the Respondent in the amount of N$ 20 000.00. During 2019 the parties engaged in settlement talks pertaining to the remaining capital amount. It was agreed that payment shall be made in equal instalments of N$ 20 000.00. In carrying out his obligations in terms of the agreement the second applicant paid an amount of N$ 40 000 on 20 June 2019.

[6] On 19 August 2019 the first applicant signed an acknowledgement of debt. The terms thereof recorded that the first applicant was indebted to the respondent in the amount of N$ 326 000 and a minimum monthly payment towards that debt was to be N$ 20 000.00 commencing on 31 August 2019 and further exempting the applicant from making payments during the months of January, February and March, 2020.

[7] The action giving rise to this application for rescission of default judgement was instituted against the applicants on or about 03 March 2020. The summons was served on the applicant on 12 March 2020 a position refuted by the applicant. Default judgement was granted on 20 April 2020. It is the 2nd applicants' position that he came to know about the default judgement against him only on 12 June 2020 after his legal practitioner explained to him what a taxation was as per the email sent to the applicant on 08 June 2020 by the respondents' legal practitioner requesting his presence at a taxation.

[8] The second applicant contends that he was never personally served with the summons as depicted on the return of service. He was attending a Bush Cuisine Workshop from 10 March until 12 March 2020 and only returned to the business premises at 13h00 for lunch and was back at the workshop by 14:30 which ended at about 16:00 hours. It is further his case that because of the above he was unable to defend the action timeously and the as a result, the respondent obtained default judgement against him.[1]

[9] It is the applicant's case that there is no proof that he signed receipt of the summons and that there was no unreasonable delay on his part in bringing the application as it was brought well within the 20 days provided for in terms of Rule 16 (1) of the Rules of this Court.

[10] When setting out his bone fide defence it appears that the applicant is disputing the amount claimed by the respondent. The applicant contends that he has paid a total

[1] Founding Affidavit para 4.7

amount of N$ 60 000 on 05 June 2017 and 20 June 2019 respectively of which amount was not deducted from the capital amount claimed.

[11] The applicants further depose that amounts totalling to N$ 40 000.00 were paid by the applicant on 03 September 2019 and 12 October 2019 which reduced the outstanding amount. This position is not refuted.

[12] The total amount paid in terms of the applicant is N$ 100 000.00 thus bringing the amount owed and claimable to N$ 226 000. In the result the applicant contends that should the judgement stand, the respondent stands to be unjustly enriched by N$ 60 000.00

The respondents' case

[13] In the answering affidavit, the respondent addressed four issues. Firstly, he has raised a point *in limine* in respect of the matter being enrolled under an incorrect case number. Secondly, that the applicant failed to effect personal service of the pleadings on the respondent. Thirdly the late filing of the rescission application and lastly that the applicants were barred from launching this application. I now turn to set out the position of the first *point in limine*.

Incorrect case number

[14] It is the respondent's argument that the matter ought to have been brought under the default judgement case number (case HC-MD-CIV-ACT-CON-2020/00912) as opposed to initiating a new case by way of motion proceedings. The respondent contends that this application is by its very nature an interlocutory application which is ancillary in nature. This argument in turn compliments the respondent's reasoning for the failure of the Respondents to comply with Rule 32 (9) and (10) of the rules of this Court.

[15] In support of his argument the respondent relies to the matter of *Nekongo NO v First National Bank of Namibia*[2] where it had been confirmed that an application for rescission of judgement is an interlocutory application - incidental to the default judgement.

Service

[16] It is the respondent's contention that the substantive application initiated by the respondent was not personally served on him as it should be in terms of the rules of this Court. It was rather served on his legal practitioners of record.

[17] On the flip side, the applicants are of the view that the application is not based on a new dispute or a new cause of action but rather incidental to action proceedings lodged by the respondent as such personal service on the respondent is not mandatory. The applicants therefor hold the opposite view that service was properly effected on the legal practitioner of the respondent and who accepted such service and proceeded to defend and litigate the matter which is sufficient.

Replying affidavit

[18] In reply, the applicants' hold firm that a rescission application is not interlocutory in nature and only becomes interlocutory when it falls under the ambits of Rule 103 of the High Court Rules. As a result of this position the provisions of rule 32(9) and (10) are not peremptory.

[19] The applicants' arguments are cemented in the matter of the *Municipal Council of Windhoek v Velile Construction CC*[3] where the court held that the application for rescission in terms of Rule 16 is not an interlocutory application to which Rule 32(9) and (10) apply. According to practice direction 29, an application under rule 103, which

[2] *Nekongo NO v First National Bank* (HC-MD-CIV-ACT-CON-2019/03638) [2020] NAHCMD 495 (29 October 2020)
[3] *Municipal Council of Windhoek v Velile Construction CC* (HC-MD-CIV-MOT-GEN-2019/00320) [2020] NAHCMD 190 (22 May 2020)

includes rescission, is interlocutory. The legal correctness of this provision may have to be examined in future.

[20] In addition the applicants argue that this application is not based on a new dispute or a new cause of action therefore the respondents have been properly served when service of documents was effected on the respondents' legal practitioner.

Determination

[21] I do not consider it necessary to deal with all the issues that have canvassed on the respondent's behalf. I will deal with what I consider to be substantive issues that will contribute to the determination of the matters in dispute. In this regard, I will not deal with the issue of the matter being registered under a wrong case number.

[22] I proceed to deal with the pertinent issues that arise, commencing with the question of service.

Rule 32(9) and (10)

[23] The main contention in this connection is that this application should be struck from the roll for non-compliance with rule 32(9) and (10). This contention cannot be allowed to stand for the reason that the trajectory of our jurisprudence points in the direction that applications for rescission, particularly one in terms of rule 16, is not interlocutory. It is a procedure embarked upon after the end of proceedings, which have an element of finality.

[24] Although the application for rescission may be incidental to the proceedings whose order is sought to be rescinded, it is however, not interlocutory in nature of effect.[4] For this reason, this point of law may not be upheld and it is dismissed.

[4] *Municipal Council of Windhoek v Velile Construction CC* (HC-MD-CIV-MOT-GEN-2019/00320 [2020] NAHCMD 190 (22 May 2020).

Service

[25] I am of the considered view that the applicants, by instituting application proceedings initiated new process as these proceedings are now under a new motion case number. This is also in recognition that rescission in terms of rule 16, is not interlocutory. In that light, service ought to have been effected on the respondent in the various manners allowed by the rules of court. Service on the respondent's legal practitioner was accordingly legally incorrect.

[26] That finding notwithstanding, it is a matter of record and beyond disputation that a notice of intention to oppose this application was filed on the respondent's behalf. This demonstrates that service of the application was effected and the respondent became aware of the proceedings instituted against him.

[27] Smuts J, in the matter of *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others*[5] reasoned that:

> 'Any defect as far as that was concerned would in my view be cured by the entering of opposition by the Committee. The fundamental purpose of service after all is to bring the matter to the attention of the party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that the fundamental purpose has been met, particularly where that legal representative in question had been served with the process.

[28] The respondent in this matter entered opposition, even though the application was served on his legal practitioners. This is testimony that he became aware of the proceedings against him and he filed his opposition. There can be no prejudice to him in the premises. This point cannot be upheld in the circumstances.

Rule 16

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[5] *Witvlei Meat (Pty) Ltd & Others v Disciplinary Committee for Legal Practitioners & Others* 2013 (1) NR 245 (HC), at par 17

[29] The law as set out in the well-known case of *Grant v Plumbers*[6] was accepted and approved by our courts in *Minister of Home Affairs, Minister Ekandjo v Van der Berg*.[7] The law, relating rescission, was adumbrated as follows and this applies to the provisions of rule 16:

'(1) He must give a reasonable explanation for his default. It if appears that his default was willful, or that it was due to gross negligence, the Court should not come to his assistance.

(2) His application for rescission must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim.

(3) He must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.'

[30] How do the applicants fare in this regard? I am of the view that the applicants do not come through unscathed. I am of the considered view that no reasonable explanation has been proffered by them for the default. The allegation that there was no personal service rings hollow. There is nothing to suggest why the deputy sheriff would falsify the return of service and claim that he served the second applicant personally, when he did not. None has been hazarded by the applicants either.

[31] The inference to be drawn in this connection is that the applicants were served and became aware of the proceedings instituted against them but they, through gross negligence, did not do the needful to defend the proceedings. In this connection, the respondents have no one to blame.

[32] On a full conspectus of what the applicants say in their papers, it becomes difficult to find in their favour that their application is *bona fide*. I say so for the reason

[6] *Grant v Plumbers* 1949 (2) SA 470 (A).
[7] *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC), para 19.

that they do not advance any *bona fide* defence. In point of fact, the applicants admit their indebtedness to the respondent, in pursuance of which they signed an acknowledgment of debt. In such a scenario, the conclusion appears inescapable that the applicants do not have a *bona fide* defence to the claim nor have they convinced the court by relevant allegations in their papers, which if proved at the trial, would entitle them to a rescission of the default judgment.

[33] The inference is thus inescapable that the applicants' main intention, is to delay the respondent's enjoyment of the fruits of his judgment. The applicants have not met the threshold in *Grant v Plumbers* and the court cannot, in the circumstances, come to their aid. The court's hands remain tied by the poor case presented by them.

[34] In the heads of argument, Mr. Jones appeared to concede that from the allegations made by the applicants in reply, and which the respondent had no opportunity to answer, the respondent may have recouped an amount of N$ 140 000, meaning that the respondent would have a right to execute against the remainder. I cannot say much on this issue as the allegations were made in reply, when they, due to their centrality to the applicants' case, should have appeared in the founding affidavit.

Conclusion

[35] In the premises, I am of the considered opinion that this application should fail. The applicants have not demonstrated that they are legally entitled to the relief they seek.

Costs

[36] It is common cause that costs follow the event. I do not see why this court should deviate from this general rule. As held by the court that this is not an interlocutory application, and for that reason, the provisions of rule 32(11) will not apply.

Order

[37] In the result, and for the reasons mentioned above, I make the following order-

1. The application for the rescission of the judgment granted against the Applicants in favour of the Respondent in case number HC-MD-CIV-ACT-CON-2020/00912 on 20 April 2020, is hereby dismissed.

2. The Applicants are ordered to pay the costs of the Respondent jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed attorney.

3. The matter is removed from the roll and regarded finalised.

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T. S. Masuku

Judge

APPEARANCES

FOR THE APPLICANTS	S. Nyashanu Of Shikongo Law Chambers
FOR THE RESPONDENT	J.P. Jones Instructed by Evert Gous Legal Practitioners