REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/03638

In the matter between:

SIMEON NEKONGO IN HIS CAPACITY AS EXECUTOR IN
IN THE ESTATE OF THE LATE AILI KAWELA **1ST APPLICANT**

SIMEON NEKONGO **2ND APPLICANT**

and

FIRST NATIONAL BANK OF NAMIBIA LIMITED **RESPONDENT**

Neutral citation: *Nekongo v First National Bank Limited (*HC-MD-CIV-ACT-CON-2019/03638) [2021] NAHCMD 397 (3 September 2021)

CORAM: MASUKU, J
Heard on: **Decided on the papers**
Delivered: **03 September 2021**

Flynote: Rule 16 – Rescission of default judgment - Requirements to be satisfied for the granting of a rescission application

Summary: The applicants failed to timeously defend an action instituted against them, which resulted in a default judgment being granted against them. The applicants' then brought an application to rescind the default judgment which was accompanied by a condonation application. The applicants narrated their default to this court and the court found as follows:

Held: that the law as stated in *Telecom Namibia Ltd v Michael Nangolo & others* 2015 (2) NR 510 (SC)*;* is trite and laid out part of the requirements to be met for the application to succeed, one of which the application should be launched as soon as the delay has come to notice. If not, a reasonable, accurate and acceptable explanation for the delay must be provided.

Held that: An applicant must also show that the main matter has prospects of success in fact and in terms of the applicable law.

Held further that: The applicant has shown prospects of success in the matter and is not merely frustrating the respondent from executing its judgment.

ORDER

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1. The applicants late filing of the rescission application within 20 days from the date of knowledge as required in terms of the rules is hereby condoned.
2. The application for the rescission of the judgment granted against the 1st and 2nd Applicants in favour of the Respondent in case number HC-MD-CIV-ACT-CON-2019/03638 on 20 April 2020, is hereby granted.
3. The applicant is hereby granted leave to defend the main action instituted by the paintiff/respondent and should in that regard file its notice of intention to defend within ten (10) days of the date of this order.

4. The applicant is ordered to pay the respondents' costs.
5. The matter is removed from the roll and regarded finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] This is an opposed application for the rescission of a default judgement accompanied by an application for condonation for the appliants failure to bring the application timeously within the purview of Rule 16(1).

[2] It is noteworthy that this application was previously removed from the court roll due to the applicant's non compliance with Rule 65(7). The Applicant has complied with that provision and filed the Master's Resport on 06 May 2021. Having cured the defect which prevented the court from dealing with the merits of the application, the court will now consider the application below.

The parties

[3] The Applicant is Mr. Simeon Nekongo, a major male. He is both the first and second defendant in the main action, whose order is sought to be rescinded. He is cited as first defendant thereto in his *nominé officio* capacity as the executor in the estate of his late wife, Ms. Aili Nekongo (previously Kawela). He is further cited in his personal capacity as second defendant.

[4] The respondent is First National Bank of Namibia Ltd, the plaintiff in the main action.

Background

[5] It is common cause that the applicant and his wife were married to each other at Onyaanya, on 23 August 2014. However what stands disputed is the marital regime that governs their marriage.

[6] The facts of this matter were properly laid out in the judgement which resulted in the matter being removed from the roll and for that reason will not be regurgitated for purposes of this judgement.

[7] The issues that the court is called upon to consider in this application is the marital regime of the applicant and his late wife, and the timely filing of the application. In order to deal with the marital regime, I am of the view that the condonation aspect is to be considered first. This is so because if this court refuses to condone the late filing of this application, that brings an end to the matter.

Application for Condonation

[8] The application for condonation concerns the applicant's non-compliance with rule 16(1) of the Rules of the High Court. In respect of the late filing of this application. Mr. Nekongo justifies his failure to comply with the rule in question. He submitted that on 05 September 2019 he received summons. He then approached his legal insurance company, Legal Wise to assess the prospects of his matter and to appoint a legal practitioner, as this is the procedure to be followed.

[9] He further submitted that his lawyers became aware of the default judgment obtained against him on 01 November 2019, at this point no formal instructions were received by his lawyers from legal wise. This can be gleaned from the emails attached to the affidavit which records the correspondence with an employee of his legal insurance and his lawyers pertaining to the status of the instruction. This correspondence was over a period of two months despite the urgency thereof.

[10] On 12 December 2019 a formal instruction was sent to the applicants' legal practitioners and on even date a notice of intention to defend was entered into. Subsequently the application for the rescission of the default judgment followed after the legal practitioners came from their festive break.

[11] The law relating to condonation applications is trite. In the matter of *Telecom Namibia Ltd v Michael Nangolo & others*[1], the court restated the settled legal principles and factors that a court will take into account when exercising its discretion First, an application for condonation must be submitted as soon as the delay has come to notice. If not, a reasonable, accurate and acceptable explanation for the delay must be provided.

[12] In my view the applicant has proffered a reasonable and acceptable explanation in the circumstances. I say this because once the applicant was served with the summons he acted upon it, although not by defending the matter, he obtained an opinion from his legal practitioner to assess the prospects he had in the matter of which was forwarded to his legal insurance. The administrative delays on the part of the legal insurance is what is to be frowned upon in the circumstances. This court takes congnisance of the fact that the applicant is a lay person, even though his actions were not taken swiftly he did not sit on his hands and remain idle. This alone indicated his eagerness to take action on the summons.

[13] It is ordinary practice that before a legal practitioner may act on behalf of an individual the practitioner ought to be instructed. In this instance being instructed to render an opinion on the prospects of success of a client cannot amount to a formal instruction to defend a matter and act on behalf of the client.

[14] The court in *Metropolitan Namibia v Amos Nangolo*[2] stipulated that not only shall an applicant provide a reasonable and acceptable explanation for their non-compliance,

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[1] *Telecom v Nangolo & others* 2015 (2) NR 510 (SC)*; Arubertus v S* (SA 15/2009) [2010] NASC 17 (1 December 2010).
[2] *Metropolitan Namibia v Amos Nangolo* CA 03/2015) [2017] NAHCNLD 2 (30 January 2017).

it must also be shown that the main matter has prospects of success in fact and in terms of the applicable law. A court may however decline to consider the prospects of success on the merits, if the non-compliance is found to be glaring, flagrant and there is no reasonable explanation for the non-compliance. It goes without saying that each case will be determined on its own merits.

[15] In my view I cannot come to the conclusion that the applicants non-compliance is glaring and/ or flagarant. I am of the considered view that the applicant has extended a reasonable explanation for his non-compliance. One should be wary that when court is on recess there is not much that a party to a case can do during this time. The applicant having overcome this hurdle the court will consider the prospects of success.

Prospects of success

[16] The applicants' prospects of success rest on the marital regime of the applicant and his late wife. This is so because the applicant contends that they were married out of community of property by virtue of the Native Administration Proclamation[3] Section 17(6) which is relied upon by the Applicant reads as follows:

'(6) A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

[17] It is common cause that marriages concluded north of the red line are out of community of property, unless the parties made they intention known of their marital

[3] Native Administration Proclamation 15 of 1928

regime to be that of in community of property by way of a declaration. The respondent relies on the consent signed by the applicant in terms of the Credit Agreement Act of 1980 whereby a spouses written consent was required for the purchase of the motor vehicle. To succeed on this ground, the respondent will be required to provide the existence of this declaration. It is strange that in the circumstances the respondent has not provided evidence to that effect as its case depends on it.

[18] What exacerbates this fact is that the letters of authority attached to the Master's Report clearly state that the applicant and the respondent were married out of community of property. It is inescapable that indeed the estate was dealt with as such.

[19] I am of the considered view that based on the aforementioned contention the applicant has reasonable prospects of success and is not merely frustrating the respondent from executing his judgment.

[20] When considering an application for a rescission of a default judgment the law as set out in the well-known case of *Grant v Plumbers*[4] must be considered. This was the approach taken in our courts in the matter of the *Minister of Home Affairs, Minister Ekandjo v Van der Berg*.[5] which finds application as follows:

'(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.'

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

[21] The question then arises, have the applicants met the requirements laid out? I am of the view that they have. I am of the considered view that a reasonable explanation has been proffered by them for the default. The timeframes of they default have been cleary expounded on in their founding papers. There is nothing to indicate or suggest that there was deliberate and culpable remissness on the part of the applicants.

[22] The respondents merely contest the twenty day period in which the applicant failed to bring their application. The applicant does not take the issue further that, nor does the applicant place on record the prejudice, if any, that it is to suffer should the court exercise its discretion in favour of the applicants'. It appears that the applicants' have a bona fide defence to the claim they have convinced the court on their papers, that the defence if proved at the trial, would result in the claim against the applicants falling flat on its face. I am of the view that the applicants have met the threshold statedin *Grant v Plumbers* (supra).

Conclusion

[23] In the premises, I am of the considered opinion that this application should be upheld. The applicants have demonstrated that they are legally entitled to the relief they seek.

Costs

[24] The applicants in this case seek an indulgence although they have been successful in the application, one cannot fault the respondent for opposing the application. There does not appear to be any frivolous or vexatious intent in the opposition. The applicants' are in the circumstances ordered to pay the respondents costs.

Order

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

1. The applicants late filing of the rescission application within 20 days from the date of knowledge as required in terms of the rules is hereby condoned.
2. The application for the rescission of the judgment granted against the 1st and 2nd Applicants in favour of the Respondent in case number HC-MD-CIV-ACT-CON-2019/03638 on 20 April 2020, is hereby granted.
3. The applicant is hereby granted leave to defend the main action instituted by the paintiff/respondent and should in that regard file its notice of intention to defend within ten (10) days of the date of this order.
4. The applicant is ordered to pay the respondents' costs.
5. The matter is removed from the roll and regarded finalised.

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T. S. Masuku

Judge

APPEARANCES

FOR THE APPLICANTS	A. Shimakaleni Of Appolos Shimakaleni Lawyers
FOR THE RESPONDENT	J. C. Van Wyk Of J. C. Van Wyk Attorneys