

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Agrotour Development Initiatives (Pty) Ltd and Francois Van Zyl	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-OTH-2018/03986
		Division of Court: Main Division
		Heard on: 16 September 2021
Heard before: Honourable Mr. Justice Usiku, J		Delivered on: 30 September 2021
Neutral citation: <i>Agrotour Development Initiatives (Pty) Ltd v Van Zyl</i> (HC-MD-CIV-ACT-OTH-2018/03986) [2021] NAHCMD 443 (30 September 2021)		
Order:		
<ol style="list-style-type: none">1. The defendant's application for rescission of the court order dated 24 March 2021, is dismissed.2. The defendant is ordered to pay the plaintiff's costs occasioned by this application.3. The matter is postponed to 11 November 2021 at 09h00 for consideration of the plaintiff's application for default judgment filed on 31 March 2021.4. The plaintiff is directed to be ready on the abovementioned date to lead evidence in support of all its claims.		

Reasons for order:

USIKU, J:

Introduction

[1] This is an application by the defendant, for rescission, in terms of rule 103, of a court order dated 24 March 2021.

[2] On the 24 March 2021, this court issued an order in the following terms:

'Having heard ADV NEKWAYA, on behalf of the Plaintiff and having read the pleadings for HC-MD-CIV-ACT-OTH-2018/03986 and other documents filed of record:

IT IS RECORDED THAT:

The defendant was served with the court order dated 3 February 2021. There is no appearance in court on the part of the defendant. There is no explanation furnished for the non-appearance and furthermore the defendant has not shown cause why sanctions contemplated under rule 53(2) should not be imposed.

The following order is hereby made:

IT IS HEREBY ORDERED THAT:

1. The pleadings filed by the defendant in this matter are hereby struck-out in terms of rule 53(2)(b).
2. The plaintiff is directed to set the matter down for default judgment, if so inclined, on or before 14 April 2021 and file a draft order it seeks, taking into account the concessions made by the plaintiff in the Replication, to the effect that some of the plaintiff's claims have prescribed.
3. The case is postponed to 21/04/2021 at 15:15 for consideration of plaintiff's application for default judgment.'

Background

[3] The above order was a sequel to an order dated 3 February 2021, in the following terms:

'Having heard VIRGINIA O'MALLEY, on behalf of the Plaintiff(s) and MS SARAPHINA PAULUS, on behalf of the Defendant(s) and having read the pleadings for HC-MD-CIV-ACT-OTH-2018/03986 and other documents filed of record:

IT IS RECORDED THAT:

The parties have not filed a pre-trial report. Furthermore, the defendant has not filed witness statements despite the court order dated 19 October 2020 ordering the filing of witness statements. Defendant's legal practitioner has withdrawn.

IT IS ORDERED THAT:

1. The case is postponed to 24/03/2021 at 15:15 for Status hearing (Reason: Status).

2. The defendant is directed to be present in court on 24 March 2021 personally or duly represented, to indicate how he intends to proceed with the matter or alternatively to show cause why the matter should not proceed in his absence.
3. If the defendant decides not to appear on the aforesaid date, the defendant is hereby directed to file an affidavit on or before 10 March 2021, showing cause why sanctions contemplated in terms of rule 53(2) should not be imposed, and the matter proceeds in his absence.
4. It is directed that today's order be served on the defendant by email and proof and/or confirmation of service to be filed of record.
5. A joint status report must be filed on or before 17 March 2021.'

[4] The above order, dated 3 February 2021, was brought to the attention of the defendant on 12 February 2021 (see also para 11 of the defendant's founding affidavit in respect of the present application). The defendant did not file an affidavit contemplated under para 3 of the above court order, nor did he appear in court of the 24 March 2021. However, on the 21 April 2021, the defendant, through his new legal practitioners, indicated that he intends to bring an application to rescind the court order dated 24 March 2021. The plaintiff ultimately filed the present rescission application.

The rescission application

[5] During argument, it was submitted that the defendant's application is brought in terms of rule 103. In his application, the defendant states that when he received the court order dated 3 February 2021, on 12 February 2021, he immediately 'tried to seek new legal presentation' from the office of Evert Gous Legal Practitioners. Having consulted telephonically with Mr Gous, the defendant 'was under the impression' that Mr Gous would appear before court on his behalf on the 24 March 2021. However, upon enquiry, Mr Gous only informed the defendant on the 24 March 2021 at around 12:00 that the defendant had to attend court personally that afternoon, as Mr Gous had not come on record in the matter and had no mandate to act in the matter.

[6] The defendant does not depose to the facts which led to his impression that Mr Gous would appear before court on his behalf on 24 March 2021. Furthermore the defendant did not furnish information about his response to Mr Gous when the latter explained on 24 March 2021 that he had not come on record on the matter and that he had no mandate.

[7] The plaintiff oppose the application. The plaintiff asserts that the defendant's erstwhile legal practitioner e-mailed the defendant on 8 February 2021, informing the defendant that he

needed to attend court on 24 March 2021. In addition thereto, the plaintiff's legal practitioner forwarded an e-mail and a WhatsApp message, alerting the defendant to the content of the court order dated 3 February 2021. According to the plaintiff, the defendant responded that '*I will send for my lawyer*'. The plaintiff submits that the defendant's application fails to meet the necessary requirements and that his application be dismissed.

Legal principles

[8] In terms of rule 103(1) (a) a court may on the application of any party affected, rescind any order erroneously sought or erroneously granted in the absence of the party affected thereby. The applicant for rescission in terms of rule 103 bears the onus to show that the impugned order was granted erroneously. As a general rule, an order 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

Analysis

[9] The issue for determination is whether the order granted on 24 March 2021, was erroneously granted.

[10] The substance of the explanation given by the defendant for his non-appearance in court on 24 March 2021 is that he was under the impression that Mr Gous would appear before the court on 24 March 2021 on his behalf. There is no explanation by the defendant on what led him to form that '*impression*'. In any event there is no affidavit filed deposed to by Mr Gous confirming that facts did actually exist leading a reasonable person to acquire the '*impression*' that the defendant claims to have been under.

[11] In my view, the defendant has not presented a reasonable and acceptable explanation for his failure to appear in court on 24 March 2021. Has the court known on the 24 March 2021 that the reason for the defendant's non-appearance in court was the unexplained '*impression*' the court would still have made the same order it made.

[12] The failure by the defendant to comply with the court order dated 3 February 2021 is serious, since the defendant was in breach of a court order dated 19 October 2020, which had

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

ordered the defendant to file his witness statements. The non-compliance with the court order dated 3 February 2021 was also serious because the defendant was alerted to the fact that failure to comply with that order would attract sanctions in terms of rule 53(2).

[13] I am of the view that the sanctions imposed on the defendant by the court order dated 24 March 2021 are proportionate to the seriousness and significance of the non-compliance, especially when viewed against the background of absence of a reasonable and acceptable explanation for the non-compliance.

[14] In conclusion, I am of the opinion that the defendant has not met the requirements of rule 103 and the application for rescission falls to be dismissed with costs.

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

1. The defendant's application for rescission of the court order dated 24 March 2021, is dismissed.
2. The defendant is ordered to pay the plaintiff's costs occasioned by this application.
3. The matter is postponed to 11 November 2021 at 09h00 for consideration of the plaintiff's application for default judgment filed on 31 March 2021.
4. The plaintiff is directed to be ready on the abovementioned date to lead evidence in support of all its claims.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Ms Jason Kangueehi & Kavendjii Inc. Windhoek	M Schurz Delpport Legal Practitioners Windhoek