

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case Title: Magano Margeret Opperman 1 st Applicant Shalongo Elizabeth Sheehama 2 nd Applicant v Franklin Mathias Respondent	Case No: HC-MD-CIV-ACT-DEL-2020/02873 Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Rakow, J	Date of hearing: 2 December 2021 Date of order: 8 December 2021
Neutral citation: <i>Opperman v Mathias</i> (HC-MD-CIV-ACT-DEL-2020/02873) [2021] NAHCMD 581 (8 December 2021)	
IT IS HEREBY ORDERED THAT: 1. The late filing of the heads of argument is hereby condoned. 2. The judgement granted on 29 September 2020 and the subsequent Writ of Execution issued by this court, is set aside and leave is granted to the applicants to defend the matter. 3. Matter is postponed for a case planning conference to 1 February 2022 at 15h30. 4. The parties to file a case plan on or before 27 January 2022.	
Reasons for orders:	

Rakow J,

[1] This matter came before court as an application to set aside the writ of Execution granted by this Court against the first and second applicant and rescinding or setting aside, in terms of rule 16, the default judgement granted in this matter against the applicants on 29 September 2020. The applicants further seek leave to defend the matter brought against them under this case number.

[2] The judgement of 29 September 2020 in the amount of N\$25 000 was granted against the defendants jointly and severely. The claim had its origin in defamatory statemetns which were made against the respondent on or about 6 June 2020 in the presence of about 7 other persons. The allegation is that the first defendant uttered words to the effect that the respondent touched the ass of the second defendant to which words the second defendant agreed by saying 'yes yes you did'.

Point in limine

[3] The respondents raised the issue in limine that the applicants failed to furnish the required amount of N\$5000 as security and for such a reason they failed to meet the requirements of rule 16 and the matter should therefore be struck from the roll. This complaint was sebssequently remedied, as the applicants indeed furnished the court with the required security before the matter was heard.

The application

[4] The applicants filed affidavits together with confirmatory affidavits explaining the reasons for the delay in defending the main action as well as their bona fide defences against this claim. The first applicant explained that upon receipt of a letter from the legal practitioners of the respondent on 24 June 2020, she approached her legal insurers regarding the claim that was going to be instituted against her and was informed that her insurance does not cover matters relating to defamation. She and the second applicant decided to share the costs between them and appointed Kadhila Amoomo legal practitioners to respond to the letter they received. No response was forthcoming from

the legal practitioners of the respondent.

[5] The second applicant proceeded and opened a criminal case with CR 227/06/2020 against the respondent. On 3 August 2020, a summons was served on the husband of the first applicant. At that stage, she was unable to put her legal practitioners in funds and did not defend the matter. She was further of the mistaken opinion that the criminal matter opened by the second applicant would stay the civil matter. On 8 December 2020, she became aware that a default judgement was granted against her when the deputy sheriff approached her with a writ of execution of property. She again approach her legal insurer and was adviced that she qualify for assistance on 9 December 2020. On 14 December 2020, she consulted with her legal practitioners and they received the instructions from her insurer on 19 January 2021 to proceed and defend the matter. She was further informed that the court went into recess from 15 December 2020 to 16 January 2021 and for that reason, the application could not be filed. She further dealt extensively with the prospects of success and set out the history of the issues between the second applicant and the respondent, showing that the behavior complained about has been coming for some time. She indicates that her statement was simply a question regarding events of the day and based on facts.

[6] The second applicant stated under oath that she opened a case of indecent assault against the respondent in June 2020 whereafter she received a letter of demand from the legal practitioners for the respondent. She instructed, together with the first applicant the firm of Kadhila Amoomo legal practitioners to respond to the said letter, which they did. The combined summons was served on her on 3 August 2020. On 8 December 2020 the first applicant was served with a writ of execution and she became aware of the judgement against her and the first applicant. She explained that she had the genuine belief that the criminal proceedings will first have to be concluded before the civil proceedings will proceed. She was further not in a financial position at the time that she received the summons to provide financial instructions to her legal representative as she was paying for the divorce proceedings of her mother.

[7] She further stated that there are reasonable prospects of success because the matter arose after several instances of the respondent sexually harassing her. The first applicant was also a witness to some of these incidents and the second respondent

confided in her about her discomfort regarding the conduct of the respondent. The words that were uttered by the first applicant were uttered after they and the respondent were at the same gathering and she wanted to leave because he made her feel uncomfortable. She explained to the first applicant her reasons for leaving after which the first applicant confronted the respondent. She herself never published any defamatory statement and only took the first applicant in her confidence. She further indicated that in the alternative, what was said was the truth.

Legal considerations

[8] Rule 16 of the High Court rules 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 for 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.

(4) Rule 65 applies with necessary modification required by the context to an application brought under this rule.’

[9] In the matter of *Krauer and Another v Metzger*¹, Strydom AJA sets out the requirements that need to be met as follows:

'In an application for rescission of a default judgment an applicant must comply with the following requirements to meet with success, namely:

'(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

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

(c) He must show that he has a bona fide defence to 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 the trial, would entitle him to the relief asked for. He need not deal with the merits of the case and produce evidence that the probabilities are actually in his favour.'

[10] On these requirements, Smuts J explained as follows in *Katzao v Trustco Group International (Pty) Ltd and Another*²:

'The requirement of good cause in rule 56(3) itself entails two requisites. Firstly, the applicant must provide a reasonable explanation for his default which would exclude a court from coming to his assistance I where his default was either wilful or due to gross negligence. Secondly, the applicant must establish a bona fide defence to the first respondent's

A claim which is to be established on a prima facie basis in the sense of setting out averments which, if established at the trial, would entitle him to the relief sought.

[39] In examining an applicant's explanation for his default, it has been held that it is clearly incumbent upon an applicant to disclose with a degree of particularity what it was that prevented him from attending court or being represented in court.

[40] It is also well established that a party must meet both requisites, thus establishing a reasonable and adequate explanation for his default as well as reasonable prospects of success on the merits.

¹ *Krauer and Another v Metzger* (2) - 1990 NR 135 (HC).

² *Katzao v Trustco Group International (Pty) Ltd and Another* [2011] NAHC 350.

[41] In determining this application, this court is enjoined by rule 56(1) to have regard to all the circumstances including those set out in rule 56(1)(a) – (h).'

Conclusion

[11] Taken that the court has wide discretion in these applications, I find that I am satisfied that the applicants indeed put forward a reasonable explanation for their default. I further find that on the papers they had at least made out a bona fide defence.

[12] For that reason I make the following orders:

1. The late filing of the heads of argument is hereby condoned
2. The judgement granted on 29 September 2020 and the subsequent Writ of Execution issued by this court, is set aside and leave is granted to the applicants to defend the matter.
3. Matter is postponed for a case planning conference to 1 February 2022 at 15h30.
4. The parties to file a case plan on or before 27 January 2022.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondent
W Chinsembu of Henry Shimutwikeneni & Co Inc	T Luvindao of Weder, Kauta and Hoveka