

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RESCISSON APPLICATION  
REASONS

<b>Case Title:</b> GENIUS EDUCATIONAL SOFTWARE CC  VS  DAVID JOHN BRUNI N.O. AND IAN ROBERT MCLAREN N.O. IN THEIR CAPACITIES AS LIQUIDATORS OF THE SMALL AND MEDIUM ENTERPRISES (SME) BANK LIMITED (IN LIQUIDATION)	<b>Case No:</b> HC-MD-CIV-ACT-CON-2020/04685
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE COLEMAN	<b>Heard on :</b> 11 March 2022
	<b>Order delivered on:</b> 11 March 2022 <b>Reasons released on :</b> 16 March 2022
<b>Neutral citation:</b> <i>Genius Educational Software CC v David John Bruni N.O.</i> (HC-MD-CIV-ACT-CON-2020/04685) [2022] NAHCMD 116 (16 March 2022)	
<b>IT IS ORDERED THAT:</b>  <ol style="list-style-type: none"><li>1. The applicants' late filing of the rescission application is hereby condoned;</li><li>2. The default judgment entered on <b>11 January 2021</b> is hereby rescinded;</li><li>3. The writ of execution issued on <b>13 January 2021</b> is hereby set aside;</li><li>4. Costs of this application is costs in the cause;</li><li>5. The matter is postponed to <b>31 March 2022</b> at <b>15:30</b> for Case Planning Conference hearing (Reason: Rescission Granted); and</li><li>6. The parties must file a joint case plan on or before <b>28 March 2022</b>, in word format.</li></ol>	
<b>Following below are the reasons for the above order:</b>	

## Introduction

[1] This is an application to rescind a default judgment in the amount of N\$ 925, 770.46 granted in favour of the respondents against both applicants in this matter on 11 January 2021. Summons herein was served on second applicant's chosen *domicilium citandi* on another person and it came to his knowledge during December 2021 when the Court was in recess. The judgment came to applicants' knowledge on 27 January 2021. They initiated the application for rescission on 3 November 2021.

[2] The applicants contend that the application for rescission is bona fide and that they have defenses against the claim herein. Applicants raise prescription and claim that judgment was granted for the wrong amount.

[3] The respondents rely on the payments made to interrupt prescription as well as the suspension of prescription under the State of Emergency Regulations promulgated as a consequence of COVID 19. In my view prescription has to be raised as a special plea which is normally adjudicated as part of the trial with evidence. I do not think it is fair to decide the prescription issue on the affidavits filed for the purposes of the rescission application.

[4] In addition, applicants contend that payments were made on the outstanding amount which were not properly accounted for. They also contend that the wrong interest is being calculated on the amount allegedly owed. This in my view justifies allowing the dispute to being ventilated properly on pleadings and during a trial.

[5] The delay in this matter is substantial. In terms of rule 16 a rescission application must be initiated within 20 days. In terms of the common law within a reasonable time. The applicants proffer an explanation for the delay. While it is not a perfect explanation, I am aware of my discretion which is infused with considerations of justice and fairness. A court should be extremely reluctant to simply shut its doors to a party who is visited with a default judgment for a substantial amount.

[6] In the premises, I am inclined to condone the late filing of the rescission application and rescind the default judgment herein. It follows that the writ of execution in pursuance of the judgment should also be set aside. This matter should now proceed to case planning.

Costs

[9] The cost should be costs in the cause

**Judge's signature:**

**Note to the parties:**

Not applicable.

**Counsel:**

**Applicants**

**Respondents**

E Shigwedha  
*of*  
Dr Weder, Kauta & Hoveka Inc. Windhoek

J Schickerling  
instructed by Fisher, Quarmby & Pfeifer,  
Windhoek