

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

“ANNEXURE 11”

Case Title: Minister of Safety and Security Inspector-General Of Nampol v Jesaya Katamba Iyaloo Ndafika Fillemon Tuhafeni Kalola Paulus Amukoto	Case No: HC-MD-CIV-MOT-GEN-2021/00215 Division of Court: High Court, Main Division 1st Applicant 2nd Applicant 1st Respondent 2nd Respondent 3rd Respondent 4th Respondent
Heard before: Honourable Mr Justice Oosthuizen	Date of hearing: 6 April 2022 Delivered on: 24 May 2022
Neutral citation: <i>Minister of Safety and Security v Katamba</i> (HC-MD-CIV-MOT-GEN-2021/00215) [2022] NAHCMD 263 (24 May 2022).	
Result on Rescission Application: Rescission granted, case finalised.	
COURT ORDER	
Having heard Mr Tibinyane , on behalf of the Applicant and Ms Chinsemu , on behalf of	

the Respondents on the 6 April 2022 -

IT IS ORDERED THAT:

1. The late filing of the rescission application is condoned.
2. The default judgment granted on 18 February 2020 in case number HC-MD-CIV-ACT-DEL-2019/03618 is rescinded.
3. Each party shall bear its own costs.
4. Case numbers HC-MD-CIV-ACT-DEL-2019/03618 and HC-MD-CIV-MOT-GEN-2021/00215 are finalised and removed from the roll.

REASONS FOR ORDERS:

[1] Applicant has applied for a rescission of judgment and ancillary declaratory relief 17 months after a default judgment was given against it which sounded in an unliquidated amount of damages for four plaintiffs.

[2] The Court adjudicating on the default judgment application has first removed the default application from the roll on 5 February 2020 due thereto that the service of the summons has lapsed.

[3] Subsequently and in the absence of the defendant (the present applicant), the second motion court Judge rescinded its decision to remove the matter from the roll and granted judgment by default in favour of the present respondents to the tune of N\$200 000 per defendant. This was done on 18 February 2020.

[4] The applicant then defended the matter on 19 February 2020 and launched an abortive rescission application on 21 February 2020 under the case number of the case, HC-MD-CIV-ACT-DEL-2019/03618.

[5] Respondents opposed the rescission application on 27 February 2020 and filed

answering papers on 18 March 2020.

[6] Applicant did not reply and say that it experienced procedural difficulties to file and serve on the original case number as it was registered as finalised and removed from the roll.

[7] Applicant's explanation for the time delay before filing the present application under case number HC-MD-CIV-MOT-GEN-2021/00215 is all but satisfactory.

[8] Respondents have raised, in *limine*, the defence of *lis alibi pendens*. The relief prayed for in the present motion application, although it overlaps the first abortive rescission application concerning rescission, differs from the abortive application in that it pray for condonation and declaratory relief pursuant to Section 13 of the High Court Act, Act 15 of 1990. Respondents also know that the applicants have abandoned the first rescission application and that the first rescission application is not a live issue anymore. It was made clear by the main deponent under the present application. In addition the prejudice to be suffered by the applicant was adequately pleaded.¹ The Court has a discretion to allow this application to continue because it is just and equitable in the circumstances.

[9] Two salient facts underlie each of the rescission applications, one procedural and one substantive.

[10] Firstly the second motion Judge who rescinded his order of 5 February 2020 and replaced it with this order of 18 February 2020 did so without notifying the applicant who was undeniably likely to be affected adversely by the second (replacement) order as envisaged by Rule 18(6).

[11] Secondly the second motion Judge, in giving the replacement order was not apprised of the applicants view that the summons instituting the action of the respondents was served 2 days outside the prescriptive period of Section 39(1) of the Police Act, Act 5 of 1990², because the replacement order was given in applicants absence due thereto

¹ See and compare *Schuetze and Another v Schuetze and Others* 2020 (4) NR 1008 (HC), especially para 14.

² *Khariseb v Ministry of Safety and Security* (SA 68-2018) [2020] NASC (1 July 2020), Paragraph [47].

Respondent's cause of action arose on 8 August 2018. Summons instituting action was served on 9 August 2019.

that it did not receive proper notice (as required by Rule 18(6) of the Rules).

[12] Plaintiffs/Applicants for default judgments being represented by admitted legal practitioners should take the greatest of care and exercise *uberrima fides* when approaching Judge's assistants for variation of Court Orders in chambers in circumstances where they ought to have been aware thereof that they have served summons outside the permissible legal framework and specifically in circumstances where they ought to have known that if opposition was filed by defendants they would likely have been met with a plea of prescription. They are obliged by Rule 19(f) of the Rules of the High Court to comply with deadlines provided for in the applicable law with diligence and promptitude.

[13] Having considered the provisions of Rule 103(1)(a), which was argued before me although not specifically raised in the application under case number HC-MD-CIV-MOT-GEN-2021/00215 together with the aforementioned, this court rescind the order and judgment erroneously granted on 18 February 2020 in the absence of the applicant/defendant affected thereby.

[14] In the premises it is not necessary to deal with the applicant's declaratory relief.

[15] The applicant being dilatory in pursuing the rescission application shall not benefit from a costs order. The respondents being opportunistic in pursuing its opposition shall also not benefit from a costs order.

[16] In line with the overriding objective of the High Court Rules as set out in Rule 1(2) and (3) and in view of my conclusion the following orders are made:

[16.1] The late filing of the rescission application is condoned.

[16.2] The default judgment granted on 18 February 2020 in case number HC-MD-CIV-ACT-DEL-2019/03618 is rescinded.

[16.3] Each party shall bear its own costs.

[16.4] Case numbers HC-MD-CIV-ACT-DEL-2019/03618 and HC-MD-CIV-MOT-GEN-2021/00215 are finalised and removed from the roll.	
Judge's signature:	Note to the parties:
Oosthuizen Judge	
Counsel:	
Applicant(s)	Respondent(s)
Mr Lindrowski Tibinyane Of the Office of the Government Attorney	Mr Henry Shimutwiken Of Henry Shimutwiken & Co Inc