REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: PETRUS IIMBONDI v ULTIMATE SAFARIS (PTY) LTD AND DEPUTY SHERIFF: DISTRICT OF WINDHOEK	**Case No:** HC-MD-CIV-ACT-CON-2021/00261
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Schimming-Chase	**Date of hearing:** 27 January 2022
	Date of order: 10 February 2022
Neutral citation: *Iimbondi v Ultimate Safaris (Pty) Ltd and Another* (HC-MD-CIV-ACT-CON-2021/00261) [2022] NAHCMD 42 (10 February 2022)	
Results on the merits: Merits not considered.	

Having heard **Mr T Ipumbu**, on behalf of the applicant, and **Mr W van Greunen**, on behalf of the first respondent and having read the papers filed of record for HC-MD-CIV-MOT-GEN-2021/00261:

IT IS HEREBY ORDERED THAT:

1. The applicant's rescission application is dismissed.
2. The applicant must pay the first respondent's costs of suit.
3. The matter is removed from the roll and considered finalised.

SCHIMMING-CHASE J

[1] Serving before me is an application for rescission of a court order granted on 26 March 2019. The application, launched on 30 June 2021, was opposed by the first respondent (I will refer to him as respondent, as the second respondent is not relevant to these proceedings).

[2] The brief background to the action – as it appears from the parties' papers – is the following: The respondent sued the applicant during 2018 for damages in the amount of N$40,763.69. The sought damages arose from funds belonging to the respondent which the applicant allegedly misappropriated, alternatively stole from the respondent.

[3] The applicant defended the action and the matter was allocated for case management. Pursuant to a case planning conference, the matter was referred to mediation[1] by a court order issued on 26 September 2018. The same order directed the parties to attend a status hearing to be held on 30 January 2019.

[4] The respondent's legal representative was present at the status hearing on 30 January 2019. However, neither the applicant, nor his legal representative, appeared at the hearing. The applicant's failure to appear as per the court's directions resulted in a postponement of the case to 27 March 2019 for a sanctions hearing. The applicant was ordered to prepare a sanctions affidavit to be filed by 19 March 2019.

[5] The applicant deposed to an affidavit which was filed on the e-Justice platform on 27 March 2019 at 11:45, some three hours before the scheduled sanctions hearing.

[1] The mediation was unsuccessful.

[6] Prior to the filing of the affidavit and unbeknownst to the applicant, the court issued an order on 26 March 2019 in chambers and in the absence of the parties (it was submitted during the hearing of this application that due to an oversight the applicant's legal practitioner only became aware of the court order after the sanctions affidavit had already been filed). The order was issued in response to the applicant's further infraction of the court's directions and reads as follows (quoted in full):

'Having read the pleadings for HC-MD-CIV-ACT-DEL-2019/01083 and other documents filed of record:

IT IS RECORDED THAT:

The defendant has not complied with the court order dated 30/01/2019 and remains in non-compliance with that order. The following order is therefore made:

IT IS HEREBY ORDERED THAT:

1 The pleadings filed by the defendant in this matter including his defence are hereby struck out in terms of rule 53(2)(b);

2 The defendant is directed to pay plaintiff's costs caused by the defendant's non-appearance in court on 30/01/2019 and to pay the plaintiff's costs occasioned by his non-compliance with court order dated 30/01/2019;

3 Judgment is hereby granted in favour of the plaintiff and against the defendant for:

3.1 Payment in the amount of N$40 763.69;

3.2 Interest on N$ 40 763.69, calculated at the rate of 20% p.a from date of summons to date of final payment;

3.3 Costs of suit.

4 Matter is removed from the roll: Case Finalised.'

[7] It is this order which the applicant seeks to have rescinded, contending that the order was erroneously granted in his absence. His contention, as set out in para 12 of the founding affidavit, is based on the following grounds:

'12.1 the order was granted a day prior to the matter was specifically scheduled for sanctions hearing

12.2 considering the discretionary power of the Court in Rule 53 (1) and (2), the order was not just and fair under the circumstances

12.3 the order violated the infrangible common law rule of *audi alteram partem* on the date of sanctions hearing thus caused prejudice to me

12.4 the fair and just approach would have been for the sanctions hearing to be heard in the open court on the date it was scheduled. This is due to the fact I have a valid defence in law as concisely set out in my plea.'

[8] As stated earlier, the disputed court order was granted on 26 March 2019.

This application for rescission was only launched on 30 June 2021.

[9] In his founding affidavit the applicant offered an explanation for his protraction in bringing this application more than two years after the order was made. Briefly, the applicant (a Legal Aid client at the time) explained that when he approached Mr Ipumbu (the legal practitioner who assisted him in the action proceedings and who appears on his behalf in this matter), advised him that he was no longer taking Legal Aid instructions.[2] Due to his dire financial situation, the applicant was left at odds with how to proceed. During the period March to August 2020, the COVID-19 pandemic further frustrated his efforts to obtain legal representation. In mid-2020, the applicant again approached Mr Ipumbu for assistance, and once again was turned away with the advice that the applicant approach the Legal Aid Directorate for assistance. The directorate advised the applicant that an indefinite moratorium had been placed on all Legal Aid instructions. In January 2021 the applicant sought out Mr Ipumbu's assistance, who was still unable to assist him as his Fidelity Fund Certificate had not been issued. Finally, in April 2021, Mr Ipumbu obliged the applicant's request for assistance *pro bono.*

[10] The applicant ended his affidavit with averments made to persuade the court that should he be granted the relief sought, he had good prospects of rebutting the respondent's allegations of theft in the civil action. It is the applicant's case that the respondent's institution of the action was retaliatory, as the applicant (a former employee of the respondent) had taken steps to expose the alleged corrupt activities of the respondent.

[11] The respondent delivered an answering affidavit deposed to by its managing director. The gist of its response was that contrary to the applicant's stance, the court's order of 26 March 2019 was just and fair given the extent of the applicant's non-compliance with the court's orders and Rules of Court.

[12] The applicant had also failed to show reasonable prospects of success on the merits of his defence to the action. Furthermore, the applicant had failed to bring the rescission application within a reasonable time and had thus not complied with rule 103 (1) of the Rules of Court.

[2] The applicant does not state in his affidavit when he approached Mr Ipumbu.

[13] The applicant delivered a replying affidavit. This affidavit was, however, and again, filed out of time. The applicant applied for condonation for failing to deliver his replying affidavit within the ordered time period, but did not engage his opponent prior to bringing the application as required by rule 32 (9). The affidavit is therefore not properly before this court and will not be considered for purposes of this judgment.

[14] Mr Ipumbu, on behalf of the applicant, informed the court that this application was brought in terms of rule 103 as the court had erroneously granted the order sought to be rescinded. It was brought in terms of rule 103 and not 56 because by granting judgment in favour of the respondent, the matter had been brought to finality and the court was *functus officio*. Rule 103 was therefore applicable for purposes of the rescission application[3].

[15] Mr Ipumbu further conceded that the applicant had indeed failed to comply with the court's order, but argued that the sanctions visited on the applicant were not proportional to the applicant's infringement. The imposition of the sanctions contained in rules 53 (a), (b) and (c) were reserved for serious non-compliance. The applicant's failure to comply with the court order was not so serious as to warrant having his defence struck and to have judgment granted against him. It was submitted that the appropriate sanction in the circumstances was only that contained in rule 53 (d) – namely, an order directing the applicant to pay the respondent's costs occasioned by the applicant's non-compliance and nothing further.

[16] Mr Ipumbu invited the court to interpret rule 53 (2)[4] to mean that the sanctions in sub-rules (a) to (d) had to be applied disjunctively. In *casu*, the court

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[3] Geier J, who initially case managed this application, requested the parties to address the court on whether the application had to be brought in terms of rule 103 or rule 56 of the Rules of Court. At the time of hearing the application the parties were at idem that it was appropriate for the applicant to bring the rescission application in terms of rule 103, rendering a determination of the issue unnecessary.

[4] '53 (2) Without derogating from any power of the court under these rules the court may issue an order -
(a) refusing to allow the non-compliant party to support or oppose any claims or defences;
(b) striking out pleadings or part thereof, including any defence, exception or special plea;
(c) dismissing a claim or entering a final judgment; or
(d) directing the non-compliant party or his or her legal practitioner to pay the opposing party's costs caused by the non-compliance.'

had applied three of the four sanctions provided for in the rule. This, it was contended, exacerbated the court's already erroneous finding.

[17] Much was made of the court's decision to disallow the applicant an opportunity to address the court at the scheduled sanctions hearing. It was argued that to make an order prior to hearing the applicant was a violation of the applicant's right to a fair hearing in terms of article 12 of the Constitution. In fact, Mr Ipumbu strongly argued that an amendment of this Court's rules to prohibit the granting of orders without affording parties an opportunity to be heard was necessary, in order to protect the sacrosanct right to a fair hearing.

[18] Mr van Greunen, on behalf of the respondent, argued that in considering the correct procedure to be followed for the relief sought by the applicant, one had to have regard to the content of the order of 26 March 2019. There are two facets to the order, namely the sanctions imposed on the defendant under paragraphs 1 and 2 of the order, and the resultant judgment granted in favour of the respondent under paragraph 3 and its ensuing sub-paragraphs.

[19] Mr Van Greunen argued that a rescission of the judgment did not automatically mean that the sanctions imposed on the applicant were lifted. The effect of the order striking his defence was that even if the applicant were successful in his application for rescission of the judgment, it would still be necessary for the applicant to apply for removal of the bar by virtue of the court striking his defence. This argument was correctly conceded by Mr Ipumbu.

[20] I agree with Mr van Greunen's submissions that in order to obtain the entirety of the relief sought, the applicant had to bring two applications (either separately or simultaneously). Firstly for the rescission of the judgment, and thereafter – and only if the judgement were to be rescinded – an application for relief from sanctions.

[21] Mr van Greunen submitted that the application was brought out of time. He highlighted that rule 103 required the applicant to bring his rescission application within a reasonable time. The application was brought more than two years and three months after the order was made. Mr Van Greunen faulted the applicant for barely canvassing the reason for such a long delay in his founding papers. On this basis, the applicant had not made it out of the starting blocks for the application to be

favourably considered.

[22] Mr Van Greunen argued that it was incumbent on the applicant to give a detailed explanation for his failure to comply with the court order, which he argued had not been done in the applicant's founding papers.

[23] Lastly, Mr van Greunen repudiated the applicant's contention that he had a *bona fide* defence. He criticised the applicant for failing to adduce any evidence of a defence on the merits of the respondent's claim and his resultant failure to show a *bona fide* or *prima facie* defence.

[24] Rule 103 gives the court a discretion to rescind or vary any order or judgment erroneously sought or granted in the absence of the party affected thereby, if the application is, amongst others, launched within a reasonable time.

[25] It is required of an applicant to first satisfy the court that the application is brought within a reasonable time and further that there was an error in the judgment sought or granted in his absence. This must appear ex facie the founding papers.

[26] The applicant's explanation of the 26-month delay is contained in less than half a page under paragraphs 13 and 14 of his founding affidavit. His explanation boils down to the following: Mr Ipumbu's initial refusal to assist him after finalisation of the action proceedings; his lack of finances to secure the services of a legal practitioner and the Legal Aid's moratorium on legal aid instructions; and the COVID-19 pandemic.

[27] Although these factors may very well have been obstacles to the defendant's ability to bring this application within a shorter period of time, there are large gaps in time which remain unexplained. Firstly, there is no explanation for the failure to appear on 30 January 2019. There is also no explanation as to why the sanctions affidavit was filed three hours before the sanctions hearing when the court ordered that the sanctions affidavit be filed by 19 March 2019 already. This was followed by a complete failure to explain what happened between 26 March 2019 and March 2020. An entire year is missing from the founding papers, but for the statement that when he approached Mr Ipumbu he was advised that Mr Ipumbu was no longer taking legal aid instructions. Not even the date when Mr Ipumbu was approached during

this time period is provided. It would appear that Mr Ipumbu was approached again in August 2020, after the lockdown period. Again he was turned away and advised to approach Legal Aid. However a moratorium was in place and it seems that between August 2020 and January 2021 nothing happened, because no explanation for the applicant's inaction is provided. The application for rescission was launched in July 2021.

[28] In *Fleermuys v The State*[5] Geier J made the following remarks in criticism of an appellant who had applied for condonation for the late noting of his appeal:

'[21] A court is obviously dependant on the explanation offered by a party seeking condonation. In order to determine the reasonableness of the excuse offered, the absence of a full, honest and detailed disclosure will obviously detract from the veracity of any explanation offered. In this case - and with reference to all the shortcomings in the explanation offered for the long delay - the conclusion cannot be made that such explanation is reasonable. The appellant thus fails to overcome this hurdle of the enquiry.'

[29] Added to the above is the applicant's replying affidavit in this application which was also filed late without explanation, and without compliance with rule 32 (9).

[30] It would appear, from my understanding of the arguments advanced by Mr Ipumbu, that in spite of the plethora of non-compliances with the rules and the unexplained delays in attempting to comply with same, the *audi alteram partem* rule is cast in stone and the court must not visit sanctions on that party in his or her absence.

[31] This argument is unsound. Firstly, the *audi alteram partem* principle was exercised in the applicant's favour on 30 January 2019, when the applicant did not appear. Then again on 26 March 2019, when the applicant was given until 19 March 2019 to explain his non-appearance. Another opportunity was provided in this application before court and the explanations were wholly unsatisfactory. There is no proper explanation for the two year delay in launching this application before court. This lackadaisical attitude must be laid at the feet of the applicant.

[32] I am not convinced that the applicant has made out a case for bringing his application within a reasonable time as required by the rule. The applicant has thus

[5] *Fleermuys v The State* (CA 39/2013) [2013] NAHCMD 378 (21 October 2013).

failed to overcome the first legal hurdle set by rule 103 and stands to fall the same fate as the appellant in *Fleermuys.*

[33] In light of the aforegoing the application for rescission must fail and the following order is made:

1. The applicant's rescission application is dismissed.
2. The applicant must pay the first respondent's costs of suit.
3. The matter is removed from the roll and considered finalised.

Judge's signature	**Note to the parties:**
	Not applicable.
Counsel:	
Applicant	**First and second respondents**
Mr T Ipumbu Titus Ipumbu Legal Practitioners	Mr W van Greunen Köpplinger Boltman