

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Sash Trading & Earthworks CC and Tsams Construction CC	Case No: HC-MD-CIV-ACT-OTH-2021/02226
Applicant	Division of Court: Main Division
Respondent	Heard on: 07 July 2022
Heard before: Honourable Mr. Justice B Usiku, J	Delivered on: 18 August 2022
Neutral citation: <i>Sash Trading & Earthworks CC v Tsams Construction CC</i> (HC-MD-CIV-ACT-OTH-2021/02226) [2022] NAHCMD 420 (18 August 2022)	
Order:	
<ol style="list-style-type: none">1. The applicant's application for condonation of the late filing of the rescission application, is dismissed.2. The applicant is ordered to pay the respondent's costs occasioned by the application for condonation and application for rescission of default judgment. Such costs are to include costs of one instructing and one instructed counsel.3. The matter is removed from the roll and is regarded finalised.	
Reasons for order:	
B USIKU, J: <u>Introduction</u>	

[1] This is an application for rescission of a default judgment granted by this court against the applicant on 18 July 2021. The rescission application is coupled with a condonation application for the late filing of the rescission application.

[2] The rescission application is brought in terms of rule 16 of the High Court Rules. The respondent opposes both applications.

Background

[3] On 4 June 2021, the respondent instituted action against the applicant. The summons were duly served at the applicant's principal place of business, on certain Ms Frieda Ishidhimbwa, a responsible employee of the applicant, on 15 June 2021.

[4] The applicant failed to enter appearance to defend. The respondent applied for default judgment, which was granted in favour of the respondent on 18 July 2021.

[5] The respondent caused a writ of execution to be issued. On 17 August 2021 the deputy sheriff served the writ of execution on the applicant. The applicant avers that it became aware of the default judgment on 17 August 2021.

Rescission application

[6] The deponent to the applicant's founding affidavit, Mr Abraham Shaanika, states that Ms Frieda Ishidhimbwa, who received summons, 'had forgotten' to give the summons to him. He further avers that, upon receipt of the writ of execution, he instructed his erstwhile legal representatives, Mwandingi Attorneys, to defend the action and to bring the necessary rescission application in respect of the default judgment. The legal representatives filed a notice of intention to defend but did not take any further action, on account that the applicant had an outstanding bill with them which needed to be cleared first.

[7] Mr Shaanika states that after he settled the outstanding bill, he instructed the legal practitioners of the applicant to file the rescission application.

[8] The rescission application was only filed on 16 December 2021. Rule 16 of the High Court

Rules requires that an application of that nature be filed within 20 days after the applicant had acquired knowledge of the default judgment.

[9] With regard to the *bona fide* defence, the applicant states that the respondent:

- (a) sued the applicant on the basis of the lease agreement which did not come into existence;
- (b) failed to indicate in the particulars of claim the time period when the breach of the agreement occurred, since the lease agreement did not come into existence; and;
- (c) failed to indicate how the amounts set out in the invoice attached to the particulars of claim, were arrived at.

[10] As regards the condonation application, Mr Shaanika deposed that he did not know that he needed to bring a rescission application, until he had consulted with Mr Mwandingi of Mwandingi Attorneys. He further avers that Mr Mwandingi could not proceed to file the rescission application immediately as the applicant had an outstanding bill with Mwandingi Attorneys.

[11] The deponent to the respondent's answering affidavit, Mr Quentin Strauss, avers that the applicant is indebted to the respondent in the amount of N\$1 575 512.78 arising from a lease of a Grader which was concluded between the parties. The respondent denies that the applicant has good prospects of success. It also submit that the applicant failed to make out a case for condonation.

Analysis

[12] In my view, the condonation application has to be considered first, because, if the condonation aspect is not successful then that brings the matter to an end.

[13] The application for rescission was brought on 16 December 2021. The applicant, on its own version, become aware of the default judgment on 17 August 2021. Thus, the application was brought about 4 months after the applicant became aware of the default judgment. In my view, the applicant's application was very late.

[14] In its explanation for the delay, the applicant states that its legal representative "could not proceed with the rescission application" (and with the condonation application) as the applicant

had an outstanding legal bill with Mwandangi Attorneys.

[15] It appears that the explanation for the delay in bringing the rescission application is that the applicant did not have sufficient funds to settle its outstanding bill to enable its lawyers to proceed to apply for rescission.

[16] In my view, a claim of lack of funds, on its own, does not constitute a reasonable explanation for the delay. The applicant is required to provide more particularity and details than a mere claim that the reason for the delay was on account insufficient funds on the part of the applicant in order to instruct its legal practitioners. In that regard the applicant is expected to explain the steps the applicant took to raise funds, when and how such steps were taken and when it actually raised the required funds.

[17] In the present matter, the applicant does not explain how, and when, it raised the funds to settle the outstanding bill, and did not furnish any further information on whether there was any further delay after raising the funds, and if there was a further delay, furnish the explanation therefor.

[18] I am, therefore, of the opinion that the explanation for the delay as furnished by the applicant is neither reasonable nor acceptable in the circumstances.

[19] The applicant having not furnished a reasonable explanation for what is a long delay, that should mean the end of the condonation application, without requiring a consideration of prospects of success. In addition to that, I am of the opinion that, in the absence of a reasonable explanation for the delay in bringing the rescission application, and considering that there was proper service of the summons, and the only explanation furnished for failure to enter appearance to defend was that the responsible employee “forgot” to bring summons to the attention of the applicant, the cumulative effect of these factors is such that it renders the application for condonation unworthy of being granted. In the absence of a reasonable explanation for the delay, that is the end of the enquiry.

[20] As regards the issue of costs, I am of the opinion that the respondent is the successful party and is entitled to its costs.

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

1. The applicant's application for condonation of the late filing of the rescission application, is dismissed.
2. The applicant is ordered to pay the respondent's costs occasioned by the application for condonation and the application for rescission of default judgment. Such costs are to include costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded finalised.

Judge's signature	Note to the parties:
B USIKU Judge	Not applicable
Counsel:	
Applicant:	Respondent:
Mr Xomseb Of Appolos Shimakeleni Lawyers, Windhoek	Adv. Lochner (with him Mr Kuhnel) instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek