

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b>	<b>Case No:</b>
Gilbert Jemwa Matildah Kabesha Jemwa	HC-MD-CIV-MOT-GEN-2021/00476
1 <sup>st</sup> Applicant 2 <sup>nd</sup> Applicant	<b>Division of Court:</b>
and	Main Division
First National Bank of Namibia Limited	<b>Heard on:</b>
Manfred J Hennes Deputy Sheriff of Windhoek	11 August 2022
G. B Essop Deputy Sheriff of Windhoek	
Dr. Ngenomeulu Tufikifa Nakale	
Aina Natangwe Uusiku	
1 <sup>st</sup> Respondent 2 <sup>nd</sup> Respondent 3 <sup>th</sup> Respondent 4 <sup>th</sup> Respondent 5 <sup>th</sup> Respondent	
<b>Heard before:</b>	<b>Delivered on:</b>
Honourable Mr Justice Usiku	23 September 2022
<b>Neutral citation:</b> <i>Jemwa v First National Bank of Namibia Limited</i> (HC-MD-CIV-MOT-GEN-2021/00476) [2022] NAHCMD 501 (23 September 2022)	
<b>Order:</b>	
1. The applicants' application for condonation of the late filing of the application for rescission of default judgment granted by this court on 8 September 2019, is dismissed.	
2. The applicants are ordered to pay the costs of the first respondent, jointly and severally the	

one paying the other to be absolved, such costs to include costs of one instructing and one instructed counsel.

3. The matter is removed from the roll and regarded finalised.

### Reasons for order:

USIKU J:

#### Introduction:

[1] This is an application for rescission of a default judgement granted by this court against the applicants (defendants in the main action) on 8 September 2019. 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 103(1) of the High Court Rules. The first respondent (First National Bank) opposes both applications.

#### Background

[3] On the 25 July 2019, the first respondent instituted action against the applicants. According to the return of service, combined summons were served on the applicants personally on 1 August 2019.

[4] The applicants failed to enter appearance to defend. The first respondent applied for default judgment, which was granted in its favour on 8 September 2019. The default judgment ordered the applicants to pay the first respondent N\$ 2 294 361.01 plus interest and costs. In addition, the judgment declared certain Erf No. 713 Auasblick, Windhoek, ("the immovable property") specially executable.

[5] The first respondent caused a writ of execution to be issued. On 21 October 2019, the Deputy Sheriff issued *nulla bona* returns in respect of each of the applicants. In November 2019, the Deputy Sheriff attached the immovable property.

[6] On 13 December 2020, the immovable property was sold in execution for N\$2 800 000,

to the fourth and fifth respondents. On 15 March 2021, the immovable property was transferred into the name of the fourth and fifth respondents.

[7] The applicants aver that they only became aware of the default judgment on 9 October 2020.

[8] On 25 November 2021 (ie more than a year after the applicants acquired knowledge of the default judgment), the applicant launched the present rescission application.

#### Condonation application

[9] I must first deal with the condonation application. If the condonation application is not successful, the rescission applicant also fails.

[10] It is trite law that an application for rescission must be brought within reasonable time, after the applicant became aware of the judgment. Rule 103(1) requires that the rescission application must be brought 'within reasonable time'. Rule 16 requires that such application be brought within 20 days after the applicant acquired knowledge of the judgment. The common law requires that the rescission application be brought within reasonable time.

[11] As stated earlier, the applicants brought their rescission application on 25 November 2021, that is about 13 months after they became aware of the default judgment. In my view the applicants' application is very late. A strong explanation is required for the delay.

[12] As mentioned earlier, the applicants have filed a condonation application together with the rescission application. In their 'application' the applicants do not explain reasons for the late filing of their rescission application. Instead, the applicants allege that the Deputy Sheriff, when he served summons upon them, only informed them to go and make payment arrangements with the first respondent. In effect the 'condonation application' is as good as if there was no application at all.

#### Analysis

[13] It is trite law that an applicant for condonation is required to give:

- (a) a satisfactory explanation for the non-compliance with the rule, in respect of which condonation is sought; and,
- (b) set out a *bona fide* defence to the main action.

[14] As regards to the requirement for a satisfactory explanation, an applicant is required to explain in his affidavit, how the delay, or non-compliance, came about. Insofar as the requirement for a *bona fide* defence is concerned, the applicant must in his/her affidavit, satisfy the court that he has a *bona fide* defence by setting out facts which if proved, constitute a defence to the action.

[15] As stated earlier, the applicants did not explain the reasons for their failure to bring the rescission application between the period of 9 October 2020 (when they acquired knowledge of the default judgement) and 25 November 2021 (when they eventually brought the application).

[16] Furthermore, the applicants did not set out their prospects of success (*bona fide* defence) in the action.

[17] I am of the view that the applicants have failed to meet the requirements for the granting of condonation. The applicants' condonation application therefore stands to be dismissed. That being the case, there will, therefore, be no need to deal with the merits of the rescission application.

[18] As regards the issue of costs, the general rule is that costs follow the event and I am of the view that the general rule should be applied in this matter.

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

1. The applicants' application for condonation of the late filing of the application for rescission of default judgment granted by this court on 8 September 2019, is dismissed.
2. The applicants are ordered to pay the costs of the first respondent, jointly and severally the one paying the other to be absolved, such costs to include costs of one instructing and one instructed counsel.

3. The matter is removed from the roll and regarded finalised.	
<b>Judge's signature</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Applicants:</b>	<b>First Respondent:</b>
G Jemwa, In Person Windhoek	Y Campbell Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek