**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2020/04676

In the matter between:

**DETERT ROOLFS** **PLAINTIFF/RESPONDENT**

and

**NATSCHA VON ZELEWSKI** **DEFENDANT/APPLICANT**

**Neutral citation:** *Roolfs v Von Zelewski* (HC-MD-CIV-ACT-CON-2020/04676) [2022] NAHCMD 529 (3 October 2022)

**Coram:** Schimming – Chase J

**Heard:** **15 September 2022**

**Delivered:** **3 October 2022**

**Flynote:** Practice – Judgments and orders – Rescission of judgment – When to be granted – Defendant applying for rescission of default judgment – Requirement of good cause restated – Reasonable explanation for default, that application be bona fide and bona fide defence – In present case court holding that defendant's explanation for non-compliance with the High Court Rules and court orders wholly inadequate – Application dismissed.

**Summary:** The respondent sued the applicant for breach of a loan agreement in this court in January 2021. The applicant failed to deliver a plea in breach of a court order on two separate occasions. The applicant also failed to comply with an additional order of this court directing her to file an affidavit explaining her failure to file a plea and her failure to appear at court.

*Held*: The applicant's explanations for these non-compliances showed an unacceptably glib and nonchalant attitude to the rules of court and compliance with court orders.

*Held:* In cases where there is a flagrant non-observance of the rules of court coupled with an unsatisfactory explanation for the non-observance, the applicant runs a risk of failing at the first hurdle of the rescission application.

*Held:* Application for rescission accordingly dismissed.

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**ORDER**

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1. The applicant is absolved from filing security for the costs of the default judgment.
2. The application for rescission of default judgment granted on 31 January 2022, is dismissed.
3. The applicant is directed to pay the respondent's costs of suit in the amount of N$20 000 in terms of rule 32(11).
4. The matter is removed from the roll and is regarded finalised.

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**JUDGMENT**

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SCHIMMING-CHASE J:

Introduction

[1] This is an opposed application for rescission of default judgment brought in terms of rule 16 of the rules of this court.

[2] This court on 31 January 2022, granted default judgment in favour of the respondent in the following terms –

'Having heard Ms T Van der Merwe, on behalf of the plaintiff and there being no appearance on behalf of the defendant, and having read the papers filed of record for HC-MD-CIV-ACT-CON-2020/04676.

**IT IS RECORDED THAT:**
The defendant having failed to deliver her plea as per the court order of 20 October 2021 is *ipso facto* barred from [doing] so and the matter is regarded as unopposed.

**DEFAULT JUDGMENT IS GRANTED IN FAVOUR OF THE PLAINTIFF AGAINST THE DEFENDANT IN THE FOLLOWING TERMS:**

1. Payment in the amount of N$ 988 767.90

2. Interest at a rate of 20% per annum from 20 November 2018 to date of final payment.

3. Costs of suit.'

[3] On 22 February 2022, the applicant launched this application wherein she seeks an order in the following terms–

'(a) rescinding and setting aside the default judgment granted on 31 January 2022;

(b) dispensing with the requirement that the applicant should provide security;

(c) granting the applicant leave to deliver a plea; and

(d) costs of suit, if opposed.'

Brief background

[4] During January 2021, the respondent instituted action against the applicant for payment of certain sums allegedly due and payable to the respondent, as a result of a loan agreement allegedly concluded between the parties. The applicant defended the action on 16 April 2021.

[5] A case plan notice was issued on 5 May 2021, calling upon the parties to appear before court for a case planning conference on 16 June 2021. The parties were further called upon to submit a joint case plan, by no later than 11 June 2021.

[6] On 10 June 2021, the respondent's legal practitioner filed a unilateral status report and advised the court that the applicant was in the process of seeking legal aid. The respondent sought a postponement of the case planning conference for those reasons. The matter was accordingly postponed in chambers to 21 July 2021 for a status hearing.

[7] On 15 July 2021, the respondent's legal practitioner filed another unilateral status report, in which the following was reported:

'1. Defendant has not updated the Plaintiff or the court on the status of her legal aid application.

2. The current lockdown measures have been extended to 29 July 2021, and the Defendant will not be able to appear in court personally on 21 July 2021.

3. The matter will have to be postponed for the Defendant to sort out her legal representation.'

[8] As a result of the lockdown due to the global pandemic created by COVID-19, the court accepted that the applicant would not have been able to attend court in Windhoek as she resides in Swakopmund. Therefore, and at the request of the

respondent's legal representative, the matter was postponed again to 18 August 2021 by order dated 19 July 2021.

[9] It is not in dispute that the court order of 19 July 2021 was emailed to the applicant by the respondent's legal representative. On 13 August 2021, the respondent's representative filed another unilateral status report, confirming that the matter had been previously postponed to enable the applicant to secure a legal practitioner, and that the applicant had indicated that she was aware that the matter would be called on 18 August 2021, and that 'she has been informed to be personally present'.

[10] On 17 August 2021, the applicant filed a copy of her legal aid application only. *Ex facie* the documents filed on eJustice, the application for legal aid was only made by the applicant on 29 June 2021, and the date stamp acknowledging receipt of the application was 16 August 2021.

[11] On 18 August 2021, there was no appearance by or on behalf of the applicant. The court accordingly issued a case plan order, in terms whereof the parties were directed to exchange pleadings by certain dates. In terms of that court order, the applicant's plea and counterclaim, if any, were due by 31 August 2021. The case was postponed to 29 September 2021 for a case management conference.

[12] On 10 September 2021, the applicant filed a document from the Directorate of Legal Aid, indicating that Mr L Karsten of Louis Karsten Legal Practitioners was appointed to represent her. Mr Karsten formally came on record and filed a notice of intention to defend on 23 September 2021. It is necessary to point out that the applicant had by then, already not complied with the terms of the initial case plan issued by the court, requiring her pleadings to be filed by 31 August 2021. The respondent had in the meantime filed a discovery affidavit as required by the case plan issued by the court.

[13] Given the date on which the applicant obtained legal representation, the court, on 27 September 2021, made an order in chambers postponing the matter for yet another

case planning conference, to take place on 20 October 2021. Finally and on 15 October 2021, both parties filed a joint case plan and a case planning order was made on 20 October 2021. In the case planning order made on 20 October 2021, the parties were provided with dates to deliver their pleadings, and the applicant in particular, had to deliver her plea and counterclaim, if any, on or before 1 November 2021. The order included an initial mediation referral, after close of pleadings, resulting in a postponement to 8 December 2021, for mediation referral. This is the second time that the applicant was afforded an opportunity to deliver a plea.

[14] Surprisingly, and on 5 November 2021, the applicant's legal representative Mr Karsten filed a notice of withdrawal as legal practitioner of record. The applicant had by this date, and for the second time, not delivered a plea, in breach of the court's order made on 20 October 2021.

[15] In the notice of withdrawal, it was specifically stated that a copy of the notice of withdrawal as well as the court order dated 25 October 2021, had been emailed to the applicant.

[16] Attached to the notice of withdrawal, was correspondence addressed to the applicant via email, also dated 5 November 2021, in which the following was stated:

> 'We refer to the above matter.
>
> Kindly find attached hereto our notice of withdrawal as legal practitioner on your behalf as well as the court order dated the 25 October 2021, for your attention and urgent perusal.
>
> The contents of the court order are self-explanatory.
>
> You are free to liaise with the plaintiff's legal practitioner pertaining to settlement negotiations before **3 December 2021.**
>
> You are directed to appear in court on **9 December 2021 at 14:15**, unless alternative representation is appointed before then.'

[17] In the applicant's favour, it is accepted that the order was made on 20 October 2021, and not 25 October 2021, and that the next appearance date was 8 December 2021, and not 9 December 2021. However it is clear that the court order itself was also mailed to the applicant.

[18] There was no further activity on the eJustice file from 5 November 2021 until 2 December 2021. The respondent's legal practitioner filed yet another unilateral status report indicating that mediation dates could not be obtained, that the applicant had not filed her plea, that her legal practitioner of record had withdrawn, and that the applicant would have to attend court herself for determination of the further conduct of the matter.

[19] On 8 December 2021, the applicant failed to appear again, and only the respondent's practitioner appeared at court. In the result the court made the following order:

'1. The defendant is directed to file an affidavit by no later than 21 January explaining the following:

1.1. her failure to comply with paragraph 1 of the court order dated 20 October 2001;

1.2. her failure to attend court;

1.3. why her defence should not be struck with costs.

2. The plaintiff is requested to ensure that a copy of this order is brought to the attention of the defendant.

3. The case is postponed to 31 January 2022 at 15:30 for a sanctions hearing.'

It is not in dispute the respondent's legal practitioner transmitted a copy of the above order to the applicant via email.

[20] Needless to say, the applicant yet again, failed to file any documents whatsoever. She failed also to file a sanctions affidavit as directed, and she failed to

appear in court on 31 January 2022. On this date, the respondent applied for default judgment and same was granted in his favour.

[21] This is the order which the applicant seeks to have rescinded and set aside in terms of rule 16 of the High Court Rules. In addition, the applicant seeks to avoid payment of the amount of N$5000 as security for the payment of the costs of the default judgment.

Legal principles and application of the law to the facts

[22] Rule 16(2) provides that the court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N$5000, set aside the default judgment on such terms as to it seems reasonable and fair. It is the law that for an applicant for rescission of a default judgment to succeed, he or she is required to show good cause. Good cause has been judicially defined to contain the following requirements namely:

(a) a reasonable explanation for the default;

(b) that the application for rescission is bona fide; and

(c) that the applicant has a bona fide defence to the plaintiff's claim which *prima facie* carries some prospect of success. In this regard, it suffices if the applicant can show to the satisfaction of the court that the averments he or she makes in the application, if proved at trial, would entitle him or her to the relief sought. Furthermore, the applicant need not fully deal with the merits of the case but should produce evidence that the probabilities weigh in his or her favour.

The onus is on the applicant to establish the aforementioned requisites.[1]

[1] *Minister of Home Affairs, Minister Ekandjo v van der Berg* 2008 (2) NR 548 (SC) paras 23-25, and the authorities there collected.

[23] In *Beukes & another v South West Africa Building Society (SWABOU) & others*[2] this court explained:

'[13] In seeking condonation, the applicants have to make out their case on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it . . . .'

[24] In *Balzer v Vries*[3] the approach was explained as follows:

'[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.'

[25] In the determination of what constitutes 'good cause', the court would consider the facts and circumstances of each particular application in the exercise of its judicial discretion.[4]

[26] Given the order I make in this matter; I deal with the issue of security first. The applicant in her affidavit in support of the rescission application asserted that she is indigent and relies on friends and family to survive financially. She further asserted that, for these reasons, she applied for and was granted legal aid.

[27] The respondent takes the view that the applicant ought at the very least to have provided her bank statements to prove that she indeed does not have funds to pay security. Further, that even if she does not provide security, he would be entitled to costs should this application fail. In any event, he adds, the applicant ought to have tendered the costs for these proceedings.

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[2] *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC (5 November 2010) para 13.
[3] *Balzer v Vries* 2015 (2) NR 547 (SC).
[4] *Solsquare Energy (Pty) Ltd v Lűhl* (SA 45-2019) [2022] NASC (25 August 2022) para 68.

[28] I am not satisfied that the applicant has properly set out the reasons why she says she is indigent. It is true that she has not attached any documentation in support of this assertion. However I cannot ignore that the Directorate of Legal Aid approved her legal aid application. In the spirit of the overriding objective of the rules of this court, as it pertains to judicial case management and the imperative to resolve the real issues in dispute,[5] I am inclined, in the particular circumstances of this case, and given the order I make herein, to dispense with the requirement that the applicant provide security for purposes of this application. I now consider whether good cause has been shown.

[29] From the averments contained in the founding affidavit in support of the requirement of good cause, it is not in dispute that the applicant failed to deliver a plea the first time she was ordered to do so in August 2021. This according to her was because she was unrepresented and did not know how a plea should be drafted. In fact it was due to the issue of lack of representation that the applicant was implicitly absolved from having to apply for condonation the first time that the plea was not delivered.

[30] However from 23 September 2021 to 5 November 2021, being the date her legal representative withdrew, the applicant was legally represented, and when the order was made on 20 October 2021, ordering her for the second time to deliver a plea by 1 November 2021, the applicant was legally represented. All the applicant says, without more, is that she was unaware of that court order. Since she had no knowledge of the court order, she did not deliver the plea nor did she appear in court on 8 December 2021.

[31] The applicant acknowledges receipt of the court order dated 8 December 2021 and further concedes that she ought to have appeared in person or by representation. She explained that she only received a copy of the court order made on 8 December 2021 when the respondent's legal representative emailed it to her on 13 December 2021.

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[5] Rule 1(2) of the High Court Rules.

[32] On her own version, the applicant received the court order requiring the delivery of a sanctions affidavit (by 20 January 2022) on 13 December 2021. This she failed to do. Her explanation for this is that she had contacted the Directorate of Legal Aid to appoint a new legal representative since her previously assigned legal representative had withdrawn. She states she was informed by the Directorate of Legal Aid or a staff member there, that a legal representative would be appointed by the hearing date in January 2022. This is another bare denial. No documentation is attached by the applicant showing evidence of her additional communication with Legal Aid, or proof that she would have had a legal representative by 31 January 2022. Even, if true, it was the applicant's duty to deliver a sanctions affidavit, and even the appointment of a legal representative by that date, would make her late, again, for the filing of the sanctions affidavit.

[33] The current legal representative of the applicant was indeed appointed on 28 January 2022, and received the instruction from the Directorate of legal aid on 31 January 2022 after 14:00. The legal representative then came on record on 2 February 2022. To my mind, the applicant could at the very least have appeared in court on 31 January 2022 or communicated in some way or form with the legal representative for the respondent to seek postponement of the sanctions hearing, given that she risked sanctions being imposed on her. There was simply no attempt on her part to comply with the court order.

[34] What strikes at the heart of the matter is that it is apparent from the notice of withdrawal that the applicant's erstwhile representative emailed the applicant the court order of 20 October 2021 postponing the matter to 8 December 2021, on 5 November 2021. In addition, her erstwhile legal practitioner filed an affidavit on 14 September 2022, a day before the hearing of the rescission application in which he confirmed under oath that he transmitted the email attached to his notice of withdrawal to the applicant and that same was received. I do not propose to consider his affidavit further as the applicant has not had an opportunity to reply thereto (although this request was also not made at any time by the applicant). However, what is apparent on an evaluation of the

applicant's founding papers is that she was not entirely honest with this court when she stated that she was not aware of the court order of 20 October 2021. By 5 November 2021, she became aware of the order of 20 October 2021, and she also became aware that she was no longer legally represented.

[35] The applicant is also not entirely frank with her averment that she only became aware of the court hearing of 8 December 2021 on 13 December 2021, when the respondent's practitioner emailed the court order of that hearing to her. It was clearly stated in the order of 20 October 2021, that she must appear at court on 8 December 2021. When the court order of 8 December 2021 was emailed to her by the respondent's legal practitioner on 13 December 2021, she became aware that she had to appear in court on 31 January 2022, especially as there was no clarity on when a legal practitioner would be appointed. She also became aware of the requirement in the order that a sanctions affidavit be filed. All that the applicant states to explain these non-compliances is that she was not aware of the orders and that she had engaged Legal Aid to obtain another legal practitioner.

[36] I am not satisfied with the reasonableness of the explanation given by the applicant, nor do I find it to be *bona fide*. Apart from not taking the court fully into her confidence, the applicant simply did not place enough information in her founding papers to support her contentions. The applicant was provided ample additional time at every postponement to comply with her responsibilities in some way or form. She was provided with more than one opportunity to file a plea, and she was provided with an opportunity to explain her behaviour in an affidavit. The applicant did not even try to place a letter on the eJustice platform to request a postponement. Not a single document was filed by the defendant since she was served with the action in April 2021. I find that the applicant's nonchalant attitude towards defending her claim borders on contemptuous.

[37] Accordingly, I find that the applicant has not provided a sufficient explanation for the default, and that the application is not brought *bona fide*. In light of this finding, I do

not need to consider prospects of success.[6] The application for rescission is to be dismissed in the circumstances.

[38] I see no reason why costs should not follow the event. The applicant must pay the respondent's costs, limited to the amount of N$20 000 in terms of rule 32(11).

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

1. The applicant is absolved from filing security for the costs of the default judgment.
2. The application for rescission of default judgment granted on 31 January 2022, is dismissed.
3. The applicant is directed to pay the respondent's costs of suit in the amount of N$20 000 in terms of rule 32(11).
4. The matter is removed from the roll and regarded finalised.

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E SCHIMMING – CHASE

Judge

[6] *Adriaans v Mcnamara* 1993 NR 188 (HC); *Solsquare Energy (Pty) Ltd v Lűhl* (SA 45-2019) [2022] NASC (25 August 2022).0

APPEARANCES

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|---|---|
| PLAINTIFF/RESPONDENT: | J Jacobs<br>Instructed Ellis Shilengudwa Inc., Windhoek |
| DEFENDANT/APPLICANT: | T Nanhapo<br>Of Brockerhoff & Associates Legal Practitioners, Windhoek |