REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-CIV-MOT-GEN-2022/00284

RM TRADING ENTERPRISES CC **1ST APPLICANT**
RUDOLF ROELIE NEL **2ND APPLICANT**
MARILYN NEL **3RD APPLICANT**

and

DAVID JOHN BRUNI N.O. IN HIS CAPACITY AS LIQUIDATOR OF THE SMALL AND MEDIUM ENTERPRISES (SME) BANK LIMITED (IN LIQUIDATION) **1ST RESPONDENT**
IAN ROBERT MCLAREN N.O. IN HIS CAPACITY AS LIQUIDATOR OF THE SMALL AND MEDIUM ENTERPRISES (SME) BANK LIMITED (IN LIQUIDATION) **2ND RESPONDENT**

Neutral citation: *RM Trading Enterprises CC v Bruni* (HC-MD-CIV-MOT-GEN-2022/00284) [2022] NAHCMD 598 (2 November 2022)

Coram: PARKER AJ
Heard: **18 October 2022**
Delivered: **2 November 2022**

Flynote: Practice – Judgments and orders – Rescission – Application in terms of rule 103(1)*(a)* of the rules of court and in the alternative the common law – Order erroneously sought or erroneously granted in absence of the parties affected thereby.

Summary: Practice – Judgments and orders – Rescission – Application in terms of rule 103(1)*(a)* of the rules court and in the alternative the common law – Having granted the relief upon rules 103(1)*(a)* there was no need to consider the alternative route via the common law – Court had earlier made an order calling on the parties to appear in court on a set down date for the court to hear evidence of the mediator who had mediated in the dispute as to what really happened at the mediation – That is whether settlement was reached between the parties and the terms of the settlement – Instead of conducting the business for which the set down date was appointed, and for which had been called court proceeded to grant a final order without notice to the parties – The defendants were not represented by their counsel – A legal practitioner appeared and made the ambivalent statement unknown to the practice of the court that she was representing defendants and standing in for a colleague, the defendants' legal practitioner – Court finding that the standing-in legal practitioner was not in law the agent of the defendants and so she could not in law have appeared in court to represent the parties – Consequently, court finding that the court that granted the final order committed procedural irregularity – Court finding in that regard that the irregularity was also unconstitutional as the court denied the defendants access to the court – Yet access to the courts is part of the rule of law upon which the Namibian Constitution is established – Consequently, court concluding that the final order was erroneously sought or erroneously granted in the absence of the parties.

Held, focus should be on the nature of the procedural irregularity in granting the order complained of to establish whether order was granted erroneously or sought erroneously.

Held, further, once the court holds that an order or judgement was erroneously sought or erroneously granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for rule 103(1)*(a)* to apply.

ORDER

1. The order granted by the court on 1 September 2021 under case number HC-MD-CIV-ACT-CON-2020/02981 is hereby rescinded and set aside.

2. The respondents, jointly and severally, one paying the other to be absolved, shall pay the applicants' costs on the scale as between party and party, and such costs include the costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] The applicants, represented by Mr Barnard, have brought a rescission application, praying the court to rescind and set aside the order granted by the court on 1 September 2021 under Case No. HC-MD-CIV-ACT-CON-2020/02981 ('the action'). The respondents, represented by Ms Campbell have moved to reject the application. The respondents are the plaintiffs in the action, and the applicants are the defendants. In the instant proceedings we refer to the parties as applicants and respondents as they appear in the notice of motion filed on 1 July 2022.

[2] The applicants have brought the application in terms of rule 103(1*)(a)*, and in the alternative in terms of the common law. I shall only consider the common law grounds, if I reject the rule 103 grounds.

[3] I shall at the threshold deal with three issues raised by the respondents to get them out of the way. The first is the issue of whether the instant proceeding is an

interlocutory proceeding within the meaning of rule 32 of the rules of court. The second issue is whether there has been an undue delay in bringing the application. The third issue is whether the applicant should have approached the court by way of an appeal. I proceed to deal with those issues.

Unreasonable delay

[4] The Supreme Court tells us that 'the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute the proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.'[1] The 'enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.'[2]

[5] It should also be remembered that in considering whether there has been unreasonable delay, it has been 'held that each case must be judged on its own facts and circumstances;[3] and 'so what may be reasonable in one case may not be so in another'.[4]

[6] It is important to note that the issue is not just any delay *simpliciter* but unreasonable delay. The epithet qualifying the noun 'delay' is 'unreasonable'. I accept that the third applicant became aware of the 1 September 2021 order, which is sought to be rescinded, on 8 March 2022, and the present application was filed on 1 July 2022, that is a period which is less than four months. The third applicant has placed before the court what I consider to be sufficient and satisfactory explanation as to why the application was brought on 1 July 2022 and not earlier than that.

[7] This is not a simple rescission application. It would be a foolish person who rushes to court in such a matter at the drop of a hat. Indeed, although comprehensive heads of argument had been filed by both counsel, who are fairly senior practitioners, it took them shy of four hours to make their individual point. This

[1] *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC) para 21.
[2] Loc cit.
[3] *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132.
[4] *Keya v Chief of the Defence Force and Others* ibid para 21.

vindicates my view that this is not a simple, run-of-the-mill rescission application that can be rushed to the court, if a party is minded being careful, sensible and reasonable in seeking relief in the court. The fact that the 'words "within reasonable time" is meant to instil a sense of urgency in the person who wished to act'[5] does not necessarily mean that a party wishing to bring a rescission application should act rashly, without due care and circumspection.

[8] In the instant matter, the third applicant thought it wise to seek legal opinion from counsel first to see if the applicants had reasonable prospects of success before bringing the application. This, in my view, is what a sensible, careful and reasonable person is expected to do before launching into litigation blind. No wonder there are nowadays unceasing floods and floods of applications to amend pleadings which have bedevilled the expeditious disposal of causes and matters. Doubtless, by all account the applicants acted with due care and circumspection and, indeed, reasonably.

[9] On the facts and in the circumstances of the case, I feel no doubt in my mind that the charge of unreasonable delay in bringing the application on 1 July 2022 cannot be pinned on the lapels of the applicants. I hold that there has not be an unreasonable delay in bringing the rescission application.

Is the proceeding an interlocutory proceeding?

[10] As to the issue of the dichotomy between final orders and interlocutory orders, I determined the issue thus in the following passage:

'It has been said authoritatively in 22 *Halsburys* law of England (3 ed): para 506 that an order which does not deal with the final rights of the parties is termed "interlocutory"; and "it is an interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals." Thus, the fact that an order is conclusive as to the subordinate or preliminary matter with which it deals does not make such order conclusive of the main dispute or conclusive of the final rights of the parties, which a decision in due course is to determine. (See *Re Gardner, Long v Gardner* (1894) 71 LT 412 (CA); *Blakey v Latham* (1889) 43 Ch D 23 (CA); *Kronstein v Korda* [1937] 1 All ER 357 (CA); *Guerrera v Guerrera* [1974] 2 All ER 460 (CA); *Salter Rex & Co. v Ghosh* [1971] 2

[5] *Gibeon Village Council v Development Bank of Namibia and Others* NAHCMD 189 (27 May 2020).

QB 597 (CA).) As Lord Esher, MR stated in *Standard Discount Co v La Grange* (1877) 3 CPD 67 (CA) and *Salaman v Warner* [1891] 1 QB 734 (CA), the test was the nature of the application to the court; and not the nature of the order which the court made.'[6]

[11] I move from the yester years of 2009 to 2020 and to the Supreme Court. In *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited*[7] the Supreme Court set out the characterises, which I called the 'Shivute characteristics' in the recent case of *High Power Holdings Investment (Pty) v Imprint Investment (Pty) Ltd*[8] which denote a final judgment or order: An order is final in effect (1) if it is not susceptible to alteration by the court of first instance; (2) if it is definitive of the rights of the parties, ie it must grant definite and distinct relief; or (3) if it disposes of at least a substantial portion of the relief claimed in the main proceeding.

[12] It should be remembered, 'The purpose of the rule is to correct expeditiously an obviously wrong judgment or order.'[9] The 1 September 2021 order is indubitably a final order. The purpose of the instant rescission application is to correct a final order that commanded the applicants to pay an amount of money to the respondents apparently in satisfaction of an alleged debt owed by the former to the latter. Doubtless, the present application is no doubt to correct expeditiously an obviously wrong order; and mind you, that order was not to operate in the interim.

[13] The applicants have applied to the court to set aside that procedurally tainted final order. The order sought is not susceptible to alteration by the High Court. It will be definitive of the rights of the applicants and defendants; and it would be granting definite and distinctive relief, ie the setting aside finally of the final order granted. Furthermore, it will dispose of at least a substantive portion of the relief claimed in the action.

[14] The nature (ie 'the basic and inherent feature' (see the *Concise Oxford Dictionary of Current English*[10]) of the application is a remedy of the setting aside of

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[6] *De Beers Marine (Pty) Ltd v Jacobs Izaaks* [2009] NALCMD 2 (6 February 2009) para 5.
[7] *Marmorwerke Karibib (Proprietary) Limited v Transnamib Holdings Limited* Case No. SA 92/2020 (Judgment delivered on 27 May 2020).
[8] *High Power Holdings Investment (Pty) Ltd v Imprint Investment (Pty) Ltd* [2022] NAHCMD 476 (14 September 2022) paras 8 and 9.
[9] H J Erasmus *Superior Court Practice*, footnote 4 above, at B1-306.
[10] 12ed.

the 1 September 2021 order. An order to set aside such order is not to operate in the interim pending any future proceeding. That is the nature of the application in the instant proceedings.[11] In our law, the remedy to set aside an order is never an interim remedy but a final remedy. That is the nature of the present application. Indeed, at the root of the 'basic and inherent feature' of any application for the remedy to set aside a judgment or order is finality, an undeniable attribute of final judgments and orders.

[15] Ms Campbell says that the rescission application is interlocutory proceedings and counsel relies on *Nekongo NO v First National Bank of Namibia*.[12] There, Masuku J was seized with the rescission of a default judgment. I accept Mr Barnard's crucial submission that unlike the proceeding in *Nekongo NO v First National Bank*, in the instant proceeding, the applicants do not seek to rescind a judgment by default. On the facts and on the law *Nekongo NO* is plainly distinguishable.

[16] For the foregoing reasons, I conclude that the instant proceeding is not an interlocutory proceeding, within the meaning of rule 32 of the rules of court; and so, the 1 September 2021 order is a final order. It follows inevitably that rule 32(9) and (10) do not apply.

Is an appeal, in contradistinction to a rescission, the correct procedure

[17] The respondents assert that the proper procedure that the applicants ought to have pursued was by way of an appeal. I do not agree. The court had committed a procedural irregularity, and a serious one at that. This is no small matter. The court in effect denied the applicants their right to access to the courts and yet 'access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established'.[13]

[18] For the serious and unconstitutional procedural irregularity committed, I have found that the 1 September 2021 order was erroneously sought or erroneously

[11] See *Salman v Warner* [1891] 1 QB 734 (CA), relied on by the court in *De Beers Marine (Pty) Ltd v Jacobs* footnote 5 above.
[12] *Nekongo NO v First National Bank* [2020] NAHCMD 495 (29 October 2020).
[13] *Shaanika and Others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC) para 48.

granted. What the applicants complain of is a matter of procedure, that is, the way the impugned order was made. In our law, an appeal will not be a proper remedy.[14] And fortunately for a person who wishes to apply to rescind such order, the rules of court in rule 103 provide a straightforward procedure. There is also a procedure at common law.

[19] In any case, I know of no authority – and none was referred to me – that, if an order can be attacked by appeal, the court is barred from granting a rescission order and setting aside the impugned order. The prevailing view should be that it ought not to make any difference to the court, through which door the applicant enters.

[20] Consequently, I have no good reason to fault the applicants for approaching the seat of the judgment of the court through the door marked 'For rescission applications'. With the determination of those preliminary issues out of the way, I proceed to deal with the meat of the application.

Was the impugned order granted in the absence of the applicants?

[21] I am aware, as I stated in *Jin Casings and Tyre Supplies CC v Hambabi*, that – 'At the trial of an action, counsel's authority extends, when it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial …'[15]

[22] Furthermore, in *Jin Casings*, I applied the following principle enunciated by the Supreme Court in *Worku v Equity Aviation*:

> '[27] The lawyer and client relationship is no more than that of a principal and agent. As such it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority.'[16]

[23] But it cannot on any pan of legal scales be said that Ms Kloppers was the defendants' agent and, therefore, counsel who represented the defendants. On the papers, it is incontrovertible that Ms Kloppers made an ambivalent statement, which

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[14] *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) para 6.
[15] *Jin Casings and Tyre Supplies CC v Hambabi* [2013] NAHCMD 215 (25 July 2013) para 20.
[16] *Worku v Equity Aviation* 2010 (2) NR 621 (SC) para 27.

is unknown to the practice of the court, that she was representing the defendants and standing in for Ms Rieth, whatever that means. If that was the case, it is inexplicable as to why the 1 September 2021 order reads in material part:

> '… and TERINY RIETH, on behalf of the defendant….'

[24] Such material irregularity cannot be airbrushed. Ms Rieth did not appear at the hearing. The defendants' legal representative, and therefore the agent of the defendants as the principals, is Ms Rieth, and she did not appear at the hearing. Indeed, in the practice of the court, a legal practitioner, who as the agent of a party and, therefore, that party's counsel, does not put on record during the proceedings that he or she was standing in for so and so legal practitioner. Even where the first named legal practitioner is an instructed counsel, he or she does not put on record that he or she was instructed by a particular legal practitioner. He or she rather says that he or she has been instructed by so and so firm of legal practitioners.

[25] The conclusion is inevitable that the 1 September 2021 order, which is sought to be rescinded in the instant proceeding, was granted in the absence of the defendants: It was granted when there was no appearance – properly so called – by the defendants in person or by counsel. I, therefore, with respect, roundly reject Ms Campbell's submission that the application should fail simply on the basis that it was not 'granted in the absence of a party'.

[26] Ms Campbell submitted that the absence of a party does not necessarily render the judgment erroneous. I agree. I, therefore, proceed to consider whether the 1 September 2021 order was erroneously sought or erroneously granted.

[27] That the 1 September 2021 order was erroneously sought or erroneously granted is clear from the facts of the case. The business that the court was to transact on 1 September 2021 is clear for all to see from the 10 August 2021 order. It was ordered then that:

> 'The case is postponed to 01 September 2021 at 09:00 for the mediator to appear in Court to explain what was agreed/settled between the parties at mediation OR for the

mediator to convey such information to the Court in the form of a Report which must be filed not later than 27 August 2021.'

[28] It is a gross and prejudicial irregularity in the proceedings for a court to order parties or their legal practitioners to appear in court for the hearing of a matter regarding issue **X** and then determine issue **Y** and grant a final order in respect of issue **Y**. Doubtless, such occurrence is an irregularity in the proceedings. That is what happened exactly in the court on 1 September 2021, considering the 10 August 2021 order. It is as clear as day that an irregularity in the proceedings occurred then.

[29] 'An order or judgment is erroneously sought or granted if there was an irregularity in the proceedings.'[17] Thus, the focus should be on the nature of the procedural error, irregularity or mistake in issuing the order complained of to establish whether the order was granted erroneously.[18] On the facts and in the circumstances of the case, the court was plainly not entitled to grant a final order without a proper notice to the parties. The court was, therefore, not competent to grant the 1 September 2021 order. 'An order or judgment is erroneously granted if it was not legally competent for the court to have made such an order,' stated Erasmus in his authoritative work *Superior Court Practice*.[19]

[30] Consequently, I hold that the 1 September 2021 order was erroneously sought or erroneously granted. In that regard, it has been said, as Mr Barnard submitted, 'Once the court holds that an order or judgment was erroneously sought or erroneously granted it is not necessary for a party to show good cause for the subrule to apply.'[20] I have found previously that the 1 September 2021 order was granted in the absence of the defendants.[21] Consequently, I hold that the applicants have, *pace* Ms Campbell, made out a case for the relief sought in terms of rule 103(1)*(a)*. Therefore, as I intimated previously, there is no need to consider the common law grounds.

Conclusion

[17] H J Erasmus *Superior Court Practice* (1995) at B1-308.
[18] See *Labuschange v Scania Finance Southern Africa (Pty) Ltd and Others* 2015 (4) NR 1153 (SC).
[19] Loc cit.
[20] Ibid at B1-307-B1-308; and *De Villiers v Axis Namibia (Pty) Ltd* 2012 (1) NR 48 (SC).
[21] See para 25 above.

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

1. The order granted by the court on 1 September 2021 under case number HC-MD-CIV-ACT-CON-2020/02981 is hereby rescinded and set aside.

2. The respondents, jointly and severally, one paying the other to be absolved, shall pay the applicants' costs on the scale as between party and party, and such costs include the costs of one instructing counsel and one instructed counsel.

C PARKER

Acting Judge

APPEARANCES

APPLICANTS:	TA Barnard Dr Weder, Kauta & Hoveka Inc., Windhoek
RESPONDENTS:	Y Campbell JC van Wyk Attorneys, Windhoek