

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Agnes Kwenani v Patricia Ngambo Ndara	Case No: HC-MD-CIV-ACT-DEL-2021/00215 Division of Court: Main Division Heard on: 9 November 2022
Plaintiff	Defendant
Heard before: Honourable Lady Justice Rakow	Delivered on: 06 December 2022
Neutral citation: <i>Kwenani v Ndara</i> (HC-MD-CIV-ACT-DEL-2021/00215) [2022] NAHCMD 664 (06 December 2022)	
Order: 1. The application is dismissed with costs.	
Reasons for order: RAKOW J <u>Introduction</u> [1] This is an opposed rescission of judgment application in terms of Rule 16 of the Rules of the High Court of Namibia. The judgment and eviction order was granted in this court against the applicant/defendant in favour of the respondent/plaintiff. The plaintiff instituted action for the eviction of the defendant from Erf 3466, Kehemu extension 7, Rundu and this order was granted on 20 April 2021. The defendant applied for rescission of this order on 11 October 2021, some 11 months after the default judgment was granted.	

The application

[2] The application of the defendant seeks the following order:

1.1 That the late filing of the application for rescission of judgment by the above Honourable Court on the 20th April 2021 under case number HC-MD-CIV-ACT-DEL-2021/00215 is condoned;

1.2. That the judgment obtained in favour of the Respondent on 20th April 2021 is hereby rescinded and that the Applicant is granted leave to defend the main action.

1.3. That the warrant of ejection awarded against the Applicant is hereby set aside.

1.4. That the claim for payment of N\$24 000 and N\$1200 per month from February 2021 to the date of vacation or ejection be set aside.

1.5. Cost of suit (if opposed).

1.6. Further and or alternative relief.'

[3] In support of this application the defendant explained in her founding affidavit the delay in defending the main action and sets out bona fide defenses for this matter. The defendant's evidence is that she is a lay person who is not fluent in the English language and that when the process of service was effected on her it was not explained. The defendant was pregnant at the time and was called by a man who informed her that he has documents for her. She had no idea what the content of the documents were. The applicant therefore only gained knowledge of the default judgment and its consequences during or about August 2021, when a messenger of the court (sic) informed her. She then wrote a letter to the Rundu Town Council on 30 August 2021 enquiring about the sale of the land where she traditionally stayed. She was informed by the town planner, Mr Kasumbie that he will help her with her legal matter. It was only on 25 September 2021 that she went to see a legal practitioner who informed her that she will need to apply for recession of the judgment granted against her.

[4] She further alleged that her mother was allocated plot 3466 at Kehemu location by the Shambyu Traditional Authority and attached a letter of the head woman of this traditional authority. She also stated that a customary land right was allocated to her mother and grandmother by the Shambyu Traditional Authority before independence and as such she was never compensated or consulted by the Rundu Town Council when they decided to sell these

plots as town lands. She further states that the Town Council was aware that she was residing on the said plot as she made several payments towards water as she has an account in her name for that property.

Arguments by the parties

[5] On behalf of the defendant it was argued that rule 1(3) sets out the overriding objective of the Rules of Court. Without restating the entirety of the Rule, the defendant submitted that it grants this Court a flexibility in applying the rules. It was submit that this is applicable to the case to case meaning of rule 16's requirement of "good cause", as subjectivity may demand. rule 1 (4) (g) states that "the extent to which the parties have had the benefit of legal advice and representation..." is a factor which guides this Court in making its determination. The defendant's explanation for the delay in filing her notice of appearance to defend should be considered with specificity to rule 1 (4) (g) within the framework of judicial case management. As such the spirit of rule 1 should guide the decision of the court.

[6] On behalf of the plaintiff it was argued that the applicant was aware of the default judgment since 20 May 2021 and she further knew that she was a lay person. She should have taken the matter up with the Rundu Town Council. The defendant should have approached the court to set aside the sale contract of the Rundu Town Council and the plaintiff. The plaintiff is the owner of the Erf 3466 and has the deed of transfer to proof her ownership. There is no bona fide defence set up by the defendant, only a letter written that her mother use to live on the said property.

Legal considerations

[7] Rule 16 of the High Court rules reads as follows:

'(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) 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\$5 000, set aside the default judgment on such terms as to it seems reasonable and fair, except that -

(a) the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security; or

(b) in the absence of the written consent referred to in paragraph (a), the court may on good cause

shown dispense with the requirement for security.

(3) A person who applies for rescission of a default judgment as contemplated in subrule (1) must -

- (a) make application for such rescission by notice of motion, supported by affidavit as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security;
 - (b) give notice to all parties whose interests may be affected by the rescission sought;
- and
- (c) make the application within 20 days after becoming aware of the default judgment.

(4) Rule 65 applies with necessary modification required by the context to an application brought under this rule.'

[8] In the matter of *Krauer and Another v Metzger*¹, Strydom AJA sets out the requirements that need to be met as follows:

'In an application for rescission of a default judgment an applicant must comply with the following requirements to meet with success, namely:

- (a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal with the merits of the case and produce evidence that the probabilities are actually in his favour.'

[9] On these requirements, Smuts J explained as follows in *Katzao v Trustco Group International (Pty) Ltd and Another*²:

'The requirement of good cause in rule 56(3) itself entails two requisites. Firstly, the applicant must provide a reasonable explanation for his default which would exclude a court from coming to his

¹ *Krauer and Another v Metzger* (2) 1990 NR 135 (HC).

² *Katzao v Trustco Group International (Pty) Ltd* (A 108/2014 [2014] NACHMD 175 (4 June 2014).

assistance where his default was either wilful or due to gross negligence. Secondly, the applicant must establish a *bona fide* defence to the first respondent's claim which is to be established on a prima facie basis in the sense of setting out averments which, if established at the trial, would entitle him to the relief sought.

[39] In examining an applicant's explanation for his default, it has been held that it is clearly incumbent upon an applicant to disclose with a degree of particularity what it was that prevented him from attending court or being represented in court.

[40] It is also well established that a party must meet both requisites, thus establishing a reasonable and adequate explanation for his default as well as reasonable prospects of success on the merits.

[41] In determining this application, this court is enjoined by rule 56(1) to have regard to all the circumstances including those set out in rule 56(1)(a) – (h).'

[10] In *Bicon Namibia Consulting Engineers & Project Managers (Pty) Ltd v Nkurenkuru Town Council*³, the Court held that:

'Where the applicant fails to show that there is a reasonable explanation for the delay, the court, where it finds that the applicant does have a bona fide defence, should adopt 'the better view', which posits that the failure to provide a reasonable and acceptable explanation for the delay should not be an absolute bar but a factor to be taken into account.'

Conclusion

[11] After studying the documents and affidavits presented by the parties and the court is inclined to accept the explanation for the delay in bringing the rescission application by the defendant. She explained that she did not understand English and was not aware of what was served on her.

[12] The onus however further rests with the defendant to satisfy the court that there is indeed good prospects of success before condonation can be granted for the late filing of the application as well as the application for recession considered. In this instance the plaintiff lawfully bought the property from the Town Council of Rundu. There is no indication what their stance in the matter is. It is further true that the only documentation that the defendant provided to this court, is a letter from the head woman of the traditional authority, which does not provide an affidavit, but only informs the court that she knows the defendant who came with her mother to this certain

³ *Bicon Namibia Consulting Engineers & Project Managers (Pty) Ltd v Nkurenkuru Town Council* HC-MD-CIV-ACT-CON-2019/00462 at paragraphs 53 and 54

plot and has been staying there. There is no indication that the defendant has any claim to this property or that it was awarded to her or her family at any stage. For that reason I do not believe that there is prospects of success and must dismiss the recession application.

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

1. The application is dismissed with costs.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	First Defendant:
T Nanhapo Of Brockerhoff & Associates Legal Practitioners, Windhoek	V Hifindaka Of Ministry of Justice: Legal Aid, Windhoek