

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

RULING

RESCISSION OF JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: Maxwell Maugandize and Lalapanzi Body Corporate	Applicant Respondent	Case No: INT-HC-RECDJDGM-2022/00131 HC-MD-CIV-ACT-CON-2019/00733
		Division of Court: Main Division
Heard before: Honourable Mr Justice Ndauendapo		Heard on: 07 March 2023
		Delivered on: 12 May 2023
Neutral citation: <i>Maugandize vs Lalapanzi Body Corporate</i> (HC-MD-CIV-ACT-CON-2022/00733) [2023] NAHCMD 260 (12 May 2023)		
The order: 1. The application for default judgment granted against the Applicant on 5 February 2020 is hereby rescinded and set aside. 2. The Applicant is granted leave to defend the action instituted against him by the Respondent. 3. The Applicant must file its notice of intention to defend within 5 court days from the date of this		

ruling.

4. The Respondent is ordered to pay the costs of the Applicant subject to rule 32(11).
5. The matter is postponed to 05 July 2023 at 15:30 for case planning conference hearing.
6. The parties must file a joint case plan on or before 30 June 2023.

Reasons for order:

Introduction

[1] Before me is an application for rescission of judgment.

[2] The Respondent (Plaintiff in the main case), Lalapanzi Body Corporate, a juristic person, issued a combined summons against the Applicant (Defendant in the main case), Maxwell Maugandize, an adult male, demanding payment in the amount of N\$56 123.64 for unpaid charges, expenses and assessments that became due.

Background facts

[3] The Respondent issued summons against the Applicant. In the particulars of claim, the Respondent alleged that the Applicant is the owner of No. 2, Unit 27 in the complex called Lalapanzi flats. It further alleged that as owner, the Applicant was liable to pay charges, expenses and assessment that became due.

[4] The combined summons was served on Penelopema Maugandize, the daughter of the Applicant on 23 October 2019. No appearance to defend the summons was entered against the summons. In February 2020, the Respondent set the matter down for default judgment. The notice of set down was not served on the Applicant. On 05 February 2020, this court granted default judgment against the Applicant in chambers.

[5] A writ of execution against movable property was issued. The Applicant owned 100% members interest in a close corporation called NESAs Event Management CC. This interest was attached and sold on auction. It later transpired that the registered owner of unit 27 in the Lalapanzi complex was not the Applicant as alleged by the Respondent, but NESAs Event Management CC.

The recession application

[6] In June 2022, the Applicant, Mr Maugandize launched the recession application in terms of Rule 16 of the Rules of the High Court. In the founding affidavit, the Applicant averred that he was residing in Zimbabwe when the summons was served on his daughter. He further averred that it was his daughter and her mother, Ms Ndinhamba, his then partner, who were residing at unit 27, Lalapanzi complex. Accordingly, he did not receive the summons and it was never brought to his attention.

[7] He averred that he was only informed about the summons in February 2022 through Ms Ndinhamba. By then default judgment was already granted against him. He then instructed her to engage the service of a legal practitioner. His current legal practitioner of record was then instructed. Ms Shilengudwa then addressed a letter to the Respondent's legal practitioner to seek audience with them and to engage them in terms of rule 32 (9) and (10).

[8] The Applicant averred that when he was in Zimbabwe he gave a power of attorney to a certain Mr Mutorwa to act on his behalf. The engagement with the Respondent's legal practitioner took some time and eventually in May 2022, the owner of the close corporation, who bought the 100% interests in NESAs Event Management CC, informed his legal practitioner that he was not prepared to reverse the transaction. In June 2022, the Applicant launched this application for rescission of default judgment.

[9] The Applicant further averred that he was not the owner of No. 2, Unit 27, Lalapanzi complex and that the owner of unit was a close corporation called, NESAs Event Management CC. He presented proof to this court that the unit was registered in the name of the close corporation. He averred that it was his daughter and her mother, who were residing in the unit when the

unpaid charges and expenses were incurred.

[10] The Respondent opposed the application. Mr Fourie deposed to the opposing affidavit. He submitted that the application was brought very late and there is no acceptable explanation for the delay. He averred that the application should have been brought within 20 days after the Applicant became aware of the judgment. He further averred that the application will be prejudicial to the new owner of the unit who bought the member's interest at the auction.

[11] He further averred that the writ of execution and the sale in execution are not being challenged and therefore, even if the rescission is granted, it will be a meaningless victory to the Applicant. He averred that the Applicant was the one responsible for paying the levies and that the Applicant is liable for the charges and expenses.

Submissions on behalf of the Applicant

[12] Ms Kendjella submitted that the Applicant provided an acceptable explanation for not opposing the default judgment. He never received the summons as it was served on his daughter and for some reason the daughter did not bring that to his attention.

[13] She also submitted that the Applicant has a bona fide defense to the claim, as he was not the owner of the unit. Accordingly, he was not in willful default and in the interest of justice the default judgment should rescinded.

Submissions on behalf of the Respondent

[14] Mr Lochner submitted that the application was brought very late, more than 20 days after the Applicant became aware that the Respondent obtained default judgment. He submitted that there is no acceptable and satisfactory explanation for not opposing the default judgment.

[15] He further submitted that it would be highly prejudicial to the owner who bought the members interest on auction if judgment is rescinded. He further submitted that the writ and the

sale in execution are not being challenged.

Determination and applicable legal principles

[16] The issue for determination is whether the Applicant has made out a case for the relief sought?

[17] Rule 16(1) provides that:

‘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 court to set aside that judgment.

16(2) reads: 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 seems reasonable and fair,...’

[18] The Applicant explained that at the time the summons was served on his daughter in October 2019, he was residing in Zimbabwe. His daughter did not inform him of the summons.

[19] The Applicant further explained that he only came to know that judgment was granted against him in February 2022. He then contacted his lawyers who engaged the Respondent’s lawyers. The engagement took some time and eventually the new owner of the close corporation informed them that he was not prepared to rescind the judgment and the sale of the member’s interest.

[20] I am of the view that the Applicant set out a bona fide defense to the Respondent’s claim. The Respondent sued the Applicant solely on the basis that the Applicant was the owner of No. 2, Unit 27, Lalapanzi complex. That was wrong. The owner of the unit was a close corporation by the name of NESAs Event Management CC.

[21] The Respondent averred that the Applicant was the one liable to pay for the charges and expenses of the unit. Even if that was the case, the Applicant was solely sued on the basis that he

was the owner, which is wrong.

[22] The Respondent in its answering affidavit admits that No. 2, Unit 27 Lalapanzi complex is registered in the name of NESA Event Management CC, however, the Respondent failed to plead this information in its particulars of claim. I am of the view that had the Respondent pleaded in its particulars of claim that No. 2, Unit 27 Lalapanzi complex is registered in the name of a CC, default judgment against the Applicant would not have been granted.

[23] It is therefore, not fair and/or just that judgment be granted against a wrong Defendant and on whom the summons was not personally served. It is my respectful view that the Applicant has shown good cause for the relief sought. He has good prospects to successfully defend the action.

[24] The submission by counsel for the Respondent that the Applicant did not challenge the writ of execution and the sale in execution and that even if the rescission application is granted, it will be a hollow victory is irrelevant to the issue that I am called upon to determine.

Conclusion

[25] In the result, I am satisfied that the Applicant has shown good cause for the relief sought.

[26] I accordingly make the following order:

1. The application for default judgment granted against the Applicant on 5 February 2020 is hereby rescinded and set aside.
2. The Applicant is granted leave to defend the action instituted against him by the Respondent.
3. The Applicant must file its notice of intention to defend within 5 court days from the date of this ruling.

4. The Respondent is ordered to pay the costs of the Applicant subject to rule 32(11).
5. The matter is postponed to 05 July 2023 at 15:30 for case planning conference hearing.
6. The parties must file a joint case plan on or before 30 June 2023.

Judge's signature	Note to the parties:
Ndauendapo Judge	Not applicable.
Counsel:	
Applicant	Respondent
R Kendjella Of Anne Shilengudwa Incorporated	Advocate L Lochner Instructed by Philip Swanepoel Legal Practitioners