

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Salamis Island Investments (Pty) Ltd and Penda Express Trading CC Deputy Sheriff: District of Tsumeb	Applicant 1 st Respondent 2 nd Respondent	Case No: HC-MD-CIV-MOT-GEN-2020/00241 Division of Court: Main Division Heard on: 27 April 2023
Heard before: Honourable Mr Justice Usiku		Delivered on: 14 June 2023
Neutral citation: <i>Salamis Island Investments (Pty) Ltd v Penda Express Trading CC (HC-MD-CIV-MOT-GEN-2020/00241) [2023] NAHCMD 324 (14 June 2023)</i>		
Order: <ol style="list-style-type: none">1. The application to rescind the default judgment granted on 20 September 2019, is dismissed.2. The first respondent is directed to have the written agreement duly stamped in terms of the Stamp Duties Act, before it attempts to execute the default judgment.3. The applicant is ordered to pay the first respondent's costs occasioned by the rescission application.4. The matter is removed from the roll and is regarded as finalised.		
Reasons for order:		

USIKU J:

Introduction

[1] In this matter, the applicant seeks rescission of a default judgment granted in favour of the first respondent by this court on 20 September 2019 under case number HC-MD-CIV-MOT-CON-2018/04111.

[2] The aforesaid default judgment is for payment of several amounts totalling N\$2 464 811, together with interest thereon and costs of suit. The amount owing to the first respondent is alleged to be due under a written agreement concluded by the parties on 29 March 2018.

[3] The default judgment was granted in favour of the first respondent only. In this judgment, I shall simply refer to the first respondent as 'the respondent'.

[4] The application for rescission is brought in terms of the provisions of rule 103 of the rules of this court, alternatively, under the common law.

Background

[5] On 11 October 2018, the respondent instituted action against the applicant for the payment of the amounts referred to above. The combined summons was duly served on the applicant on 16 October 2018. For reasons that are not explained, the applicant did not enter appearance to defend.

[6] The respondent set the matter down for default judgment on several occasions and the matter was repeatedly removed from the roll for a variety of reasons. On 10 May 2019, the matter was removed from the roll on account that a period of six months has lapsed after service of summons and that the notice of set-down was not served on the applicant.

[7] Thereafter, the respondent set the matter down for default judgment for 28 June 2019, and a notice of set-down was duly served on the applicant on 11 June 2019.

[8] On 28 June 2019, the matter was removed from the roll on account that it was enrolled on

a wrong roll. Thereafter the matter was set-down to be heard on 19 June 2019, however, on that date the matter was postponed to 20 September 2019 for hearing of the default judgment application.

[9] In the meantime, the respondent caused a notice of intention to amend the particulars of claim to be served on the applicant, on 12 August 2019 and filed the amended particulars of claim on 5 September 2019.

[10] On 20 September 2019, default judgment was granted in favour of the respondent against the applicant.

[11] On 25 November 2019, the respondent obtained a writ of execution against respondent's movable property. The writ of execution was duly served on the applicant on 28 November 2019.

[12] Sale in execution of the respondent's movable property was advertised in the local newspapers on 15 July 2020, which sale was scheduled to take place on 6 August 2020.

[13] On 27 July 2020, the applicant launched an urgent application, seeking to stay the intended sale in execution, pending the adjudication and outcome of the rescission application, set out under part B of the same application. The urgent application was granted in favour of the applicant on 5 August 2020.

[14] This court is now called upon to consider and determine the rescission application. The respondent opposes the application.

Rescission application

[15] In its application, the applicant alleges certain deficiencies in the particulars of claim that, in its view, render them excipable. In that respect, the applicant avers that:

(a) the copy of the written agreement relied upon by the respondent, is not attached to the amended particulars of claim. In my opinion, there is no merit in this allegation. The copy of the agreement is attached to the initial particulars of claim filed on 11 December 2018 and there was no need to re-file it upon the amendment of the particulars of claim.

(b) the written agreement was not stamped in terms of the provisions of the Stamp Duties Act 15 of 1993, at the time when the default judgment was granted.

(c) the ‘non-written contractual based’ amounts pleaded in claims 2, 3, and 4 are pleaded ‘out of step” with the provisions of rule 45(5), (6), (7) and (9). It is not clear to me what the applicant means by ‘out of step’. The respondent has pleaded that the amounts he claims in claims 2, 3 and 4 were being claimed ‘pursuant to the sub-contract agreement’ in question. In any event, I see no substance in the allegation advanced by the applicant on this score.

(d) the default judgment was set down and obtained contrary to the prescripts of rule 15(5) and (6), without notice to the applicant, despite a period of six months having lapsed after service of the summons. I see no merit in this allegation. The respondent has filed a return of service in respect of the notice of set-down referred to in para 7 hereof, showing that a notice of set-down was duly served on the applicant on 12 August 2019. Default judgment was granted 20 September 2020. There is no period of six months from the date on which the notice of set-down was served on the applicant and the date of the granting of default judgment. In addition, I am of the opinion that the respondent did not need to serve another notice of set-down after having served a notice of set-down on 12 August 2019.

(e) certain portions of the written agreement are in a language other than the official language, and there is not translation accompanying the written agreement. I see no merit in this contention. The written agreement is written in two languages, one of which is English. The respondent relies for its claim on the English version of the agreement. In my opinion, this cannot be a ground for rescission in the circumstances.

[16] On the basis of the foregoing defects, the applicant avers that the default judgment was erroneously sought and erroneously granted and that the applicant is entitled to rescission in terms of rule 103, alternatively under common law.

Opposition

[17] The respondent denies that the default judgment was either erroneously sought or erroneously granted. It contends that the applicant chose not to defend the action even after the

notice of set-down was served on it. The respondent therefore submits that the applicant is not entitled to the relief it seeks.

Analysis

[18] An application for rescission brought under the provisions of rule 103 or under the common law must be brought within a reasonable time. What is 'reasonable time' depends on the facts of each case, taking into account the time that has lapsed before the application is brought and the explanation given for the delay.

[19] In the present matter, the rescission application was instituted on 27 July 2020, more than ten months after the judgment was handed down and approximately eight months after the judgment came to the attention of the applicant. The applicant does not explain at all why the application was not brought timeously after the writ or execution was brought to its attention on 28 November 2019.

[20] In this matter, I find that the application was not brought within reasonable time and it should be dismissed for that reason.

[21] Even if I did not come to the conclusion that the application was not brought within reasonable time, I am not persuaded that the defects raised by the applicant in respect of the particulars of claim, warrant a conclusion that the default judgment was erroneously granted as contemplated under rule 103. To succeed on those points, the applicant would have shown that the issues it has raised could not have been resolved by the leading of evidence in relation to respondent's cause of action.¹ In my view, none of the issues raised by the applicant entitle it to the rescission it seeks.

[22] In regard to the issue of the unstamped written agreement, the Supreme Court in the matter of *WS Trading and Investment CC v Capx Finance Namibia (Pty) Ltd*,² endorsed the view that non-compliance with the Stamp Duties Act does not render an unstamped document a nullity and does not render invalid a judgment relating to that document. The court further endorsed a view that an unstamped document may be stamped retrospectively and even after judgment or on appeal. The court supports the idea that when a court is faced with an unstamped document, it

¹ *McKelvey v Cowan NO* 1980 (4) SA 525 at 526 D-E.

² *WS Trading and Investment CC v Capx Finance Namibia (Pty) Ltd* Case No SA 81/2019 delivered on 15 July 2021 paras 14 and 20.

may order that the document be stamped. In the present matter, this court will direct that the written agreement in question be duly stamped before the execution of the default judgment.

[23] Insofar as the issue of costs is concerned, there is no reason for the costs not to follow the event. I shall therefore grant costs in favour of the respondent.

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

1. The application to rescind the default judgment granted on 20 September 2019, is dismissed.
2. The first respondent is directed to have the written agreement duly stamped in terms of the Stamp Duties Act, before it attempts to execute the default judgment.
3. The applicant is ordered to pay the first respondent's costs occasioned by the rescission application.
4. The matter is removed from the roll and is regarded as finalised.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Applicant:	First Respondent:
A Shimakeleni Appolos Shimakeleni Lawyers, Windhoek	(In-person) (Attorneys withdrew), Windhoek