REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

PRACTICE DIRECTION 61

Case Title:	**Case No:** HC-MD-CIV-MOT-GEN-2024/00162
KASIKA CONSERVANCY THE CHAIRPERSON OF THE KASIKA CONSERVANCY COMMITTEE and ELIZABETH KAZUNGWE KASALE MARY KAHUNDU MUNIHANGO SHADRECK MUTAU MUNIHANGO LILIAN MANGA LISWANISO MASUBIA TRADITIONAL AUTHORITY ZAMBEZI COMMUNAL LAND BOARD CAPRIVI FLY FISHING SAFARIS (PTY) LTD T/A CHOBE SAVANNA LODGE 7TH RESPONDENT	**Division of Court:** HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE JUSTICE PARKER AJ	**Date of Hearing:** 16 OCTOBER 2024
	Date of Order: 13 NOVEMBER 2024
Neutral citation: *Kasika Conservancy v Kasale* (HC-MD-CIV-MOT-GEN-2024/00162) [2024] NAHCMD 685 (13 November 2024)	

IT IS ORDERED THAT:

1. The order made on 8 March 2024, granting judgment in default in favour of the respondents under Case No. HC-MD-CIV-ACT-OTH-2023/01893, is rescinded with costs; and the costs include costs of one instructing counsel and one instructed counsel and are capped in terms of rule 32(11) of the rules of court.

2. The said costs must be paid to the applicants by the first, second, third and fourth respondents, the one paying the other to be absolved.

3. The applicants are granted leave to defend the claim in the aforementioned action.

4. The rescission application is finalised and removed from the interlocutory roll.

Following below are the reasons for the above order:

PARKER AJ:

[1] By way of notice of motion, the applicants brought an application to rescind the order made on 8 March 2024, granting judgment in default of appearance to defend the action under Case No. HC-MD-CIV-ACT-OTH-2023/01893, and to be granted leave to defend the said action. The first, second, third and fourth respondents ('the respondents') have moved to reject the application. The fifth to seventh respondents do not oppose the application. Mrs Shifotoka represents the applicants, and Mr Muchali represents the respondents. Before considering the merits of the case, I shall deal with some preliminary objections and matters to get them out of the way.

[2] The first is about the applicants' application to condone the late filing of their counsel's heads of argument. It is noted in capitalities at the threshold that heads of argument are for the benefit of the court and not the parties.[1] Besides, the preparation and filing of heads of argument by counsel are out of the parties' control (see rule (1)(*e*) of the rules of court). The late filing of the applicants' heads of argument has not inconvenienced the court in any way.

[1] *Kurtz v Kurtz* [2013] NAHCMD 178 (27 June 2013).

[3] Besides, I have considered the explanation given for the late filing of the heads of argument. Having done that, I come to the following conclusions: The condonation application was made promptly so much so that the hearing date was still met, within the meaning of rule 56(1)*(f)* of the rules of court. The failure to file the heads in time was not intentional, within the meaning of rule 56(1)*(b)*; and there was sufficient explanation for the failure, within the meaning of rule 56(1)*(c)* of the rules of court. Therefore, I have granted the condonation application in the interest of due administration of justice (rule 56(1)*(h)* of the rules of court), not least because the matter is of great public interest, in particular with regard to the income base of Conservancies established in terms of the Nature Conversation Ordinance 4 of 1975 ('the Ordinance').

[4] It is noted that the respondents do not persist in their preliminary point of *locus standi*, in particular lack of authority. In any case, for the reason given in the closing sentences of para [3] above, I now proceed to consider the merits of the rescission application.

[5] In such the applicant must establish two requisites to succeed:

1. The applicant must set out sufficient and satisfactory reasons for its absence or default, tending to show that the default was not wilful.

2. The applicant must establish a defence on the merits, and it not the same as a good defence. The applicant need only to show a defence that discloses an arguable or triable issue.[2]

[6] Keeping these two requisites in my mental spectacle, I proceed to consider the facts relied on by the applicant for the relief sought. The starting point is to consider whether the default judgment order was sought and obtained in compliance with the relevant rules of court, particularly rule 15(5) and (6) of the rules of court.

[7] The summons was issued on 28 March 2023 and served on the applicants on 9 April 2023. The order granting default judgment was granted in respect of only the default judgment application brought on 27 February 2024. Therefore, the argument by Mr Muchali that the first default judgment application (brought on 12 October 2023) or the second default judgment application (brought on 23 November 2023) had interrupted the running of prescription provided in rule 15(5) of the rules of

[2] *First National Bank of Namibia v Khaebeb* [2024] NAHCMD 638 (28 October 2024) para 10.

court is, with respect, puerile: It has not a phantom of merit. The order granting the default judgment, made on 8 March 2024 could not have been in respect of the first or the second default judgment applications, as aforesaid. Any argument to the contrary does violence to law and logic.

[8] The result is irrefragably this: Since no notice of set down for the hearing of the default judgment application (brought on 27 February 2024) was served on the applicants in non-compliance with rule 15(5) of the rules, the court was not, without justification, competent to grant the order granting default judgment. Six calendar months had lapsed after service of summons, within the meaning of rule 15(5) of the rules of court, when that order was made. As Ms Shifotoka submitted, when the period for doing a thing in terms of any law or the rules of court, is expressed in months, the interpretation of 'month' is that provided by the Interpretation of Laws Proclamation 37 of 1920.

[9] I have undertaken the analysis and conclusions thereanent in paras [7] - [8] to make this crucial point: The order made on 8 March 2024, granting the default judgment, is an incompetent order. An incompetent order cannot be allowed to stand.[3] The application succeeds on this ground alone. It succeeds on the grounds discussed in the succeeding paras [10]-[16] below, too.

[10] On the papers, I find that the respondents have not proved that they are entitled to the claimed amount. The respondents are seeking payment of moneys which were paid by the Caprivi Fly Fishing Safaris (Pty) Ltd t/a Chobe Savanna Lodge (the seventh respondent) to the Kasika Conservancy Management Committee (chaired by the second applicant). The moneys were generated from tourism and tourism related activities carried out on the land occupied by the Kasika Conservancy. The moneys so generated are solely for the benefit of the members of the Conservancy, as defined in the Kasika Conservancy Constitution. The first to fourth respondents are not members of the Kasika Conservancy, and so they are not entitled to any part of such moneys – as simple as that.

[11] The Kasika area was declared as a Conservancy in terms of s 24A (2)(ii) of the Nature Conservation Ordinance 4 of 1975 (as amended). The area is a communal land area in terms of the Communal Land Reform Act 5 of 2002. After the Communal Land Reform Act came into effect, any person who had land rights in respect of a specific piece of communal land must apply to the

[3] *Minister of Finance and Attorney-General v Hollard Insurance Company of Namibia* Case no p8/2018 (SC).

traditional authority in question for the recognition of such land rights and for the ratification of such land rights by the respective Communal Land Board.

[12] The respondents claim that they are members of the Liswaniso Clan, and that the Clan was allegedly granted ownership of the land at Malyazo and Ikuzu village in Kasika and that such ownership was allegedly granted by the Masubia Traditional Authority and ratified by the Zambezi Communal Land Board. The respondents have not produced one iota of evidence to prove what they allege and what particular land right, recognised in terms of the Communal Land Act, was granted. The respondents' allegation remained unproved; it becomes a mere irrelevance.[4]

[13] It is common cause between the parties that the respondents' claim the moneys based on ownership of the land by the Liswaniso family. As Ms Shifotoka submitted correctly, it is plain from the combined summons and application for default judgement that the respondents do not identify the particular right which was granted by the Masubia Traditional Authority and ratified by the Zambezi Communal Land Board, as the Act provides.

[14] In 2007, the seventh respondent, operators of the lodge on the land under the jurisdiction of the first applicant (represented by a Mr Johnathan Moore Gibson) and the Kasika Conservancy Management Committee (the second applicant) (represented by a Mr Alfred Sibongo) entered into an agreement in terms whereof the Conservancy Committee agreed that the seventh respondent operate a lodge on the Conservancy land. It was a term of the agreement that the seventh respondent shall in turn manage the wildlife and tourism activities on the said land for the benefit of the Conservancy members. Thus, the operator has an obligation to pay fees to the Conservancy for the benefit of the said Conservancy members.

[15] In performance of its obligations under the aforesaid agreement 2009, the seventh respondent committed itself to make payment to the Conservancy Committee for the benefit of the Conservancy members. It is this self-same amount which the respondents now claim as moneys owed to them by the applicants.

[16] On the facts discussed in paras [10]-[15] above, I am satisfied that the applicants have established sufficiently and cogently a defence on the merits, and it is not, as I have said previously, the same as good defence. Doubtless, the applicant's defence, if proved in due course, is capable of

[4] *Klein v Caremed Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC).

defeating the respondent's claim. Accordingly, I find that the applicants have not brought the rescission application to delay the respondents' claim.[5] By a parity of reasoning, I am satisfied that the applicants have set out sufficient and satisfactory explanation for their default. Indeed, the explanation debunks any charge that the applicants default was wilful.

[17] Based on these reasons, I find and hold that the applicants have made out a case for the relief sought. Accordingly, costs should follow the event. In the result, I order as follows:

1. The order made on 8 March 2024, granting judgment in default in favour of the respondents under Case No. HC-MD-CIV-ACT-OTH-2023/01893, is rescinded with costs; and the costs include costs of one instructing counsel and one instructed counsel and are capped in terms of rule 32(11) of the rules of court.

2. The said costs are to be paid to the applicants by the first, second, third and fourth respondents, the one paying the other to be absolved.

3. The applicants are granted leave to defend the claim in the aforementioned action.

4. The rescission application is finalised and removed from the interlocutory roll.

Judge's signature	**Note to the parties:**
	Not applicable.
Counsel:	
APPLICANTS	**RESPONDENTS**
E Shifotoka Instructed by Nakamhela Attorneys, Windhoek	J Muchali Of Jermaine Muchali Attorney, Windhoek

[5] H J Erasmus *Superior Court Practice* (1985) at B1-201; *Krauer and Another v Metzger* 1990 NR 135 (HC).