



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT**

Case No.: I 139/2015

In the matter between:

EDI JACKSON

APPLICANT/DEFENDANT

and

ELIA SHUUDIFONYA

RESPONDENT/PLAINTIFF

Neutral citation: *Elia Shuudifonya v Jackson* (I 139/2015) [2016] NAHCNLD 83
(07 October 2016)

Coram: CHEDA, J

Heard: 25/04; 18/07; 23/09/2016

Released: 07 October 2016

Flynote: Where a party obtained a default judgment through citing wrong rules the court may exercise its judicial discretion and rescind the judgment. Where both applicant and respondent are culpable in their non-compliance with the rules each party should pay its own costs. Application for rescission succeeded.

Summary: Applicant applied for a rescission of judgment on the basis of respondent's citation of a wrong rule. Respondent conceded. Further that both parties failed to comply with the Rules of court. Point *in limine* was upheld. Application succeeded as failure to grant would have allowed respondents to snatch a judgment based on a technicality. Each party pay its own costs.

ORDER

The following is the order:

- (1) The point *in lime* is upheld;
 - (2) Applicant's application for rescission of judgment granted on the 19 October 2015 succeeds;
 - (3) The warrant of execution granted on the 10 November 2015 is suspended pending the final determination of the main matter;
 - (4) Applicant is granted leave to defend the main action in terms of the rules;
 - (5) Each party to pay its own costs.
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JUDGMENT

CHEDA, J

[1] This is an application for rescission of judgment. Applicant and responded respectively entered into a partly written and partly verbal agreement, which involved the purchasing of a motor vehicle for N\$55 000 on September 2014. Applicant alleged that he had paid a deposit of N\$20 000 and a balance of N\$35 000 was outstanding. The balance of N\$35 000 was partly set-off by payment of the amount of N\$12 950 which left a balance of N\$22 050 which was to be paid by applicant by the 9 September 2014 which he failed to do. This resulted in respondents suing applicant who failed to enter in appearance to defend. Respondent applied for a default judgment on

the basis that applicant had failed to pay the balance as previously agreed. This application was opposed as it will be shown (ultra).

[2] At the beginning of the hearing both parties agreed not to oppose each other's applications for condonation for late filing of their documents. After hearing them on that point I used my judicial discretion and granted the said condonation, all in the interest of justice.

[3] The default judgment was granted on the 19 October 2015. It is not in dispute that applicant was out of time in filing his application for rescission. Applicant should have brought his application within 20 days.

[4] Applicant in his application stated that he became aware of this judgment against himself on the 11 November 2015, when he was served with a notice of attachment. Rule 16 of the Rules of Court clearly lays down the procedure for applying for a rescission of judgment. The rules state thus:

“Rescission of default judgment

Rule 16 (1) A defendant may, within 20 days after he or she has knowledge of the judgement 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 (my emphasis) for the payment of the costs of the default judgment and of the application in the amount of N\$5000, 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. (my emphasis)

[5] The application for rescission of judgment was filed on 5 April 2016 which is well way off the 20 days required by the Rules. Needless, to say, that applicant seeks condonation for the said delay. This was of course opposed at the beginning of the hearing. Applicant raised a point in *limine* that the default judgment obtained by respondent was erroneously granted in that respondent cited Rule 31(2) instead of Rule 15.. He submitted that it was a wrong rule and that the court was misled and therefore granted it erroneously.

[6] Respondent conceded that indeed this was the case and this citation was a typographical error, which it further submitted that it should be condoned by this court.

[7] Applicant has argued that since respondent conceded this error, he should have applied for an amendment in terms of the rules. In support of this application Ms Mugaviri for Applicant referred the court to the matter of *Standard Bank of SA Ltd v David Francois Naude & Another*¹ 2015 (1) NR 51 (SC) and *Charsley v AVBOB* where *Addelson J* remarked:

“... if there is a material defect in any of the formalities required by the Rules of court, the court should not readily grant summary judgment. On the other hand, where it is clear that the Rules have substantially been complied with and there is no prejudice to the

¹ Case No. 08/2009, delivered 24/03/2009, Eastern Cape High Court, Grahamstown

defendant, I think that the court should condone the failure to comply with a technical requirement of the Rules.”² (my emphasis)

[8] What is clear from these authorities, is that:

- (a) the court, would in the exercise of its judicial discretion, condone non-compliance of the Rules where there has been substantial compliance; and
- (b) that Legal Practitioners are encouraged to be accurate and diligent in their application of the Rules.

[9] This reasoning is in line with trite law that, rules of court are there to ensure the smooth running of the courts, but, however, the courts have arrogated themselves a discretion to apply the said rules with an open mind lest they become slaves of their own rules. Consequently, the noble objective of rendering fairness and justice between man and man will be hallow and result in a judicial mirage.

[10] It is for that reason that the courts should have a human face, in the circumstances. In *Tona Trading Holdings cc v Mvula Rep cc & 2 Others* (1) 164/2014[2015]. I stated:

“[18]...In my view the 20 day period or limitations should not be viewed in isolation. These courts are open to persuasion with regards to the rules of court whose existence is to serve the interests of justice. They are their rules after all. First and foremost they are there in order to prevent injustice between the parties, therefore, they exist in a positive manner, see Mutebwa v Mutebwa 2001 (2) SA 193 (HC). In that case it was pointed out that the fact that an application is brought in terms of one rule, does not prevent it from being brought pursuant of another rule or under common law.”

[11] As an error would have been made, the culpable party is enjoined to apply for amendment in order to make good the said error. Respondent has not done so. In

² Page 5, par. 6.

determining, this point, the court is obliged to examine both reasons for the delay and the *bona fides* of the applicant.

[12] In addition, thereto, he was not possessed of funds which on its own is not a good and compelling reason for one's failure to comply with the Rules. However, what remains sticking like a sore thumb is that the agreement relied upon is both oral and written. This on its own requires clarity by *viva voce* evidence, where necessary.

[13] In *casu* default judgment was granted, but, it now turns out that it was on the basis of a wrong citation of the rules to which the court was misled and consequently granted it.

[14] The misquoted rule, no doubt goes to the root of the judgment and in my view it cannot be allowed to stand. This seems to have been the only mishap and it will not be fair to dismiss the application on that technicality alone.

[15] With regards to condonation, indeed, there has been some considerable delay. These courts will always condone delay depending on the establishment of a good cause shown. Applicant is indignant and a lay man. Although poverty *per se* is not an excuse for failure to seek legal advice, the court can use its inherent jurisdiction by allowing it to stand as such where justice demands that it should be so regarded see *Hange & Others v Orman NLLP* 2014 (8) 451 LCN 19 November 2013 where I stated:

“[19] It is a fact that applicants belong to the previously disadvantaged group of society and some of the consequences of their socio-historical background manifest themselves in their illiteracy. This is a fact which the court, in my view, can ill afford to ignore as by doing so, it will be abdicating its judicial duty of dispensing justice fairly to all manner of people irrespective of their social background.”

[16] There is an indication that the agreements signed and verbally entered to by the parties are contested. Respondent insists that he is entitled to a judgment as he is of the view that he has a good case against applicant. If that is so, I see no prejudice in this matter proceeding in a normal way as both parties will then be accorded an opportunity

to ventilate their cases in an open court. In order to determine this application, the following factors are unavoidably deep rooted in this matter and can be put down as follows:

- (a) the terms and conditions of the written agreement, respondent relied on are disputed. The dispute is exacerbated by the fact that part of the agreement is oral and the other part is written.
- (b) the mode of payment is also in dispute, and
- (c) that both parties are not entirely literate as shown by the contents, manner and style of their written agreement.

[17] In my view, these factors should be taken into account in order to ensure that both parties access justice in a fair manner.

[18] In fact, both parties are altogether culpable in that applicant filed the application for rescission of judgment out of time, while on the other hand respondent also applied for the said judgment citing the wrongful rules. It will, therefore, be unfair for one party to take advantage of the other. They both decided not to oppose each other's applications. This, therefore, calls for a robust approach.

[19] In my view, if applicant is shut out of the judicial process on the face of a glaring error, which error is conceded to by respondent, applicant will be prejudiced and accordingly suffer irreparable damage, see *Standard Bank of SA Ltd (supra)*

[20] Errors of this nature come to light time and again. This, however, does not automatically give a litigant the right to cling on to its own error. It is not proper for a litigant to benefit from its own errors. However, where such an error has occurred and is brought to the court's attention it cannot be ignored.

[21] In *The Inspector-General of the Namibian Police and another v Dausab-Tjjeza* case No. A 191/2014 [2015] NAHCMD 25 (29/2015), Ueitele, J. followed the reasoning in *Bakoven Ltd v G.J Howes (Pty) Ltd* 1992 (2) SA 466 (E) and he emphasised the correct

legal position when he stated that the correct legal position is that these courts will lean in favour of an applicant who cries foul about a judgment erroneously obtained.

[22] These courts continue to follow this principle laid down in the above matter, see *Quenet Capital (Pty) Ltd v TransNamib Holdings Ltd*, case No (1) 2679/2013 (delivered 8 April 2016 Masuku J). In light of all the relevant circumstances surrounding this matter, I find that justice can only be met if the parties are allowed to access the judicial turf and battle it out in a fair manner. This can be achieved if applicant's application is allowed.

Costs

[23] Both parties are culpable in terms of their non-compliance. Therefore, the court has no alternative, but, to depart from the general principle that the costs follow the cause.

[24] The following is the order:

- (1) The point *in limine* is upheld;
- (2) Applicant's application for rescission of judgment granted on the 19 October 2015 succeeds;
- (3) The warrant of execution granted on the 10 November 2015 is suspended pending the final determination of the main matter;
- (4) Applicant is granted leave to defend the main action in terms of the rules;
- (5) Each party to pay its own costs.

M Cheda
Judge

APPEARANCES

PLAINTIFF: C. Tjihero
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

DEFENDANT: G. Mugaviri
Of Mugaviri Attorneys, Oshakati