

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

RULING

<p>Case Title: <i>Lucia Kandume vs David Kristiaan T/A Christian Building Construction</i></p>	<p>Case no: HC-NLD-CIV-ACT-CON-2018/00193</p>
<p>Heard before: Honourable Mr. Justice Damaseb JP</p>	<p>Division of Court: Northern Local Division</p> <p>Heard on : 27 January 2020</p> <p>Delivered on: 29 January 2020</p>
<p>Neutral citation: <i>Kandume v Kristiaan</i> (HC-NLD-CIV-ACT-CON-2018-00193) [2020] NAHCNLD 10 (29 January 2020)</p>	
<p>Ruling:</p> <ol style="list-style-type: none">1. The application for recession of default judgment is dismissed, with costs in favour of the respondent.	

Reasons for Ruling

DAMASEB JP:

1. The matter before me is an application for rescission of a judgment granted by this court on the 29 April 2020. Summons was served on the applicant (as defendant in the main proceedings) by the respondent as plaintiff in the main proceedings on 14 August 2018. It is common cause that he with full knowledge of that process did not enter appearance to defend. According to him, as he was short of funds, went about trying to obtain legal aid but was unsuccessful. He does not explain why he could not as much as just enter appearance to defend to make clear his intent to oppose the proceedings brought against him. It is a notorious fact that that officials of this Court's registry routinely assist unrepresented lay litigants to file notices to oppose on e-justice.
2. After a lapse of about 8 months, and without any effort being made by the applicant to formally resist the summons, the respondent proceeded to obtain judgment and to issue out a writ of execution on 12 June 2019. That catapulted the applicant into action resulting in him filing the resent application for rescission of default judgment which was lodged on 2 July 2019. He provides no explanation why he had not taken steps earlier during the eight months preceding the writ of execution. He also offers no explanation how he all of a sudden came upon funds to engage a private practitioner to prosecute the present proceedings when his posture throughout was that he was short of financial resources to mount a private legal defence. He accordingly failed to offer any explanation for the failure to act at any stage during the eight month-period preceding service of the writ of execution. The above are the material common cause facts on which the rescission application falls to be adjudicated.

3. In *Kambanda v First National Bank of Namibia* (I 4050-2014) [2016] NAHCMD 192 (6 July 2016) Oosthuezzen J stated that: 'It is trite law that an application for rescission must be brought within a reasonable time after the applicant became aware of it. Rule 16(1) define the time periods to be within 20 days after he has knowledge of the default judgment. Rule 103(1) requires "within a reasonable time". The common law likewise would require an application within a reasonable time after the judgment came to the knowledge of the defaulter. . . '.
4. Ueitele J in *Grove Mall (Pty) Ltd v Wago Investments CC T/A Bata Shoes* (CA 12/2017) [2017] NAHCMD 252 (28 August 2017) held that: 'The courts have set out the requirements for the rescission of a judgment given by default in the absence of a party to be the following:
 - (a) A party seeking to rescind a judgment granted by default in his or her absence must give a reasonable explanation of his or her default. If it appears that his or her default was wilful or that it was due to gross negligence the Court should not come to his or her assistance.¹ (Underlined for emphasis)
 - (b) The application to rescind the judgment granted by default in the absence of the party seeking to rescind it, must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.².
5. A person who comes to court to seek redress is just entitled to fair treatment and assistance of the court as the one who is sued. The courts will fail in their duty to act fairly towards all litigants if it allows flimsy excuses by defendants to frustrate satisfaction of judgments obtained following due process.
6. Having been served with Summons on 14 August 2018, and failing to do anything to protect his legal interests until served with a writ of execution and only then springing into action and not adequately or at all explaining how he miraculously

¹ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O), *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) SA 861 (R).

² *Du Plessis v Tager* 1953 (2) SA 275 (O).

came upon funds to afford a private practitioner, is not a reasonable explanation for the inaction and delay on the part of the applicant.

7. The lack of a reasonable explanation negatively impacts on the bona fides of the application. He has therefore not satisfied the test necessary to make out a case for rescission and must fail, with costs.
8. In the result the Application for recession of default judgment is dismissed, with costs in favour of the respondent.

DAMASEB JP

APPEARANCES

APPELLANT:

P Hango

Of Dr Weder, Kauta & Hoveka, Ongwediva

RESPONDENT:

B Boois

Of BB Boois Attorneys, Ongwediva