

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

JUDGMENT

<b>Case Title:</b> Rauna Shipena v Daniel Djuulume & 6 Others	<b>Case No.:</b> HC-NLD-CIV-ACT-CON-2021/00326 (INT-HC-RECDJDGM-2022/00019) <b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice Munsu, AJ	<b>Delivered on:</b> 06 October 2022
<b>Neutral citation:</b> <i>Shipena v Djuulume</i> (HC-NLD-CIV-ACT-CON-2021/00326 (INT-HC-RECDJDGM-2022/00019) [2022] NAHCNLD 108 (6 October 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The judgment granted in favour of the respondent by this court on 22 January 2022 against the applicant in her absence is rescinded.</li><li>2. The applicant is granted leave to file her notice of intention to defend the first respondent's claim by no later than 13 October 2022.</li><li>3. The respondent is ordered to pay the applicant's costs of this application.</li><li>4. The matter is postponed to 14 November 2022 at 10h00 for status hearing.</li><li>5. The parties are directed to file a joint status report on or before 09 November 2022.</li></ol>	
<b>Reasons for the order:</b>	

**MUNSU AJ;**

Introduction

[1] This is an opposed application for rescission of a default judgment granted on 22 January 2022 in this court, in favour of the first respondent (hereinafter referred to as the respondent) against the applicant as well as the second to seventh respondents. The application is brought in terms of rule 16 of this court's rules.

[2] The second to the seventh respondent were cited in the main action solely due to the interest they may have in the matter and no relief was sought against them.<sup>1</sup>

[3] Where reference is made to both the applicant and the respondent, they shall be referred to as the 'parties'.

The application

[4] In her founding affidavit, the applicant avers that: During August 2019, the parties entered into an agreement in terms of which the applicant lent the respondent an amount of N\$ 283 000. The respondent was to use the money to construct a house of a client who had obtained funding from the bank. The parties agreed that the respondent would repay the loan amount on or before October 2019. During the discussions, the applicant conveyed to the respondent that she had enrolled for Doctoral studies at the Colorado Technical University in the United States of America and would require the funds by October 2019 in order to pay for her studies.

[5] The respondent did not repay the loan as agreed. During February 2020, the applicant conveyed her concerns to the respondent and informed him that she could no longer tolerate his continued breach.

[6] On 26 February 2020, the parties entered into a written agreement in terms of which the

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<sup>1</sup> The second to seventh respondents are tenants on the property subject to a dispute between the applicant and the respondent.

respondent would transfer to the applicant a certain erf 6674, Extension 28, Onguta, Ondangwa (the property). Such transfer would be for a period of twelve (12) months pending payment of the loan amount. It was an express, alternatively implied term of the written agreement that failure to pay the loan amount would result in the permanent transfer of the property into the applicant's name and subsequent ownership thereof.

[7] On 03 April 2020, the respondent wrote to the Chief Executive Officer of Ondangwa Town Council giving consent to the Town Council to transfer the property into the applicant's name. The property had a debt of over N\$ 76 000 which required to be settled prior to the transfer. The applicant is presently paying the debt. The applicant avers that the property consists of six units which are rented out and the applicant is exercising control and management of the units.

[8] The applicant further avers that the transfer of the property into her name could not proceed due to the said debt.

[9] In light of the respondent's failure to honour his obligations, the applicant instituted proceedings against the respondent in this Court's Main Division (the first matter) under case number HC-MD-CIV-ACT-CON-2021/02932 in terms of which the applicant seeks an order to compel the respondent to take all necessary steps to finalise the transfer of the property into the applicant's name and an order cancelling the agreement.

[10] On 24 January 2022, the applicant became aware of the default judgment granted against her in favour of the respondent in this Court (the second matter). The applicant received the information through the second to seventh respondents who are tenants at the property and at the time the respondent was at the property with the police. The applicant contacted her legal representative and gave instructions for an application for rescission of

judgment.

[11] The applicant avers that the summons in the second matter was served on a certain Andreas Kalumbu who resides at the property. The applicant states that the said Andreas Kalumbu is not her agent. She avers that she did not receive the summons.

[12] The applicant avers that, at all material times, the respondent was aware that the applicant did not reside at the property but that she resided in Windhoek at Unit B74 Westlane, Pioneerspark; that she operates a consultancy - Royal Ambassadors Consulting Trust with its offices situated in Windhoek; that the agreements entered into between the parties were concluded in Windhoek; that the respondent was at all material times aware of the applicant's legal representative. The applicant avers that service on the property was actuated by malice and with a clear intention to obtain judgment without the applicant's knowledge.

[13] On 25 November 2021 at around 18h57 the applicant was called by someone who introduced himself as the Sheriff whom she informed that she did not reside on the property but that she resided in Windhoek. Nevertheless, he still proceeded to serve the summons on the property. Had she been served, she would have defended the matter.

[14] The applicant complied with rule 16(2) regarding payment of security.

#### The respondent's answer

[15] The respondent admits that he entered into a loan agreement with the applicant for an amount of N\$ 283 000. He avers that he informed the applicant that he was going to pay back the money once he received a progress payment from a Kleine Kuppe project and not that he was going to construct a house for someone.

[16] The respondent avers that he repaid a total amount of N\$ 210 000. The parties then agreed that the remaining balance would be repaid from income generated from leasing the units at the property. The agreement would be for twelve months and would translate into an

amount of N\$ 14 000 per month.

[17] The respondent avers that the transfer of ownership in the property was merely to be effected as security or guarantee for the repayment of the remaining balance as opposed to a permanent transfer of ownership.

[18] The respondent states that the applicant vehemently refused to surrender control of the property at the expiration of the agreed 12 months period and has unlawfully received rental fees from the property after the 12-month contractual period.

[19] The respondent avers that he is the lawful owner of the property. That he has fully paid the applicant all the monies advanced to him.

[20] The respondent avers that the applicant has no '*prima facie*' defence and that her claim is baseless in law and has no prospects of success.

[21] The respondent denies having had knowledge at the time of instituting the summons that the applicant was represented by Mwandangi Attorneys. As for service of the summons on the applicant, the respondent avers that same was served in terms of rule 8(2)(b) on one Mr. Andreas Kalumbu on the instructions by the applicant.

#### The law

[22] In *Nambala v Anghuwo*<sup>2</sup> the Court held that for an application for rescission of a default judgment to succeed, the applicant must show 'good cause'. The Court held further that 'good cause' has been judicially defined to mean that:

- (a) the applicant must give a reasonable explanation for its default;
- (b) the application must be *bona fide* and not made with the sole intention of delaying the plaintiff's claim; and

<sup>2</sup> *Nambala v Anghuwo* (I3570/2010) [2013] NAHCMD 97 (9 April 2013).

(c) the applicant must show that he has a *bona fide* defence which, *prima facie*, carries some prospect of success.<sup>3</sup>

### Evaluation

[23] The applicant seeks rescission of the default judgment on the basis that the summons was not served on her. The applicant is cited as follows in the respondent's particulars of claim:

“The FIRST DEFENDANT is Ms. RAUNA SHIPENA, a major female and current, the receiver of the RENTAL FEES from LALAS COURT ERF 6647, Extension 28 ONGUTA, ONDANGWA TOWN, REPUBLIC OF NAMIBIA”.

[24] Nowhere is it indicated in the respondent's particulars of claim that the applicant resides or carries on business at the property. The summons in the matter was served in terms of rule 8(2)(b) on one Andreas Kalumbu apparently over the age of 16 and at the time in charge of the property. According to the applicant, the said Andreas Kalumbu is not her agent.

[25] The applicant took issue with the fact that her address is not reflected in the respondent's particulars of claim. This is notwithstanding the fact that the respondent is fully aware of her residential address situated at erf 74B Westlane, Pioneerspark, Windhoek. The respondent confirms this assertion in his answering affidavit wherein he states that he held a meeting with the applicant at her place of residence in Pioneerspark. Furthermore, in the first matter that was instituted by the applicant in the Main Division, the applicant cited the parties' physical addresses both of which are situated in Windhoek.

[26] The applicant further points out that the respondent is aware that she operates a consultancy called Royal Ambassadors Consulting Trust with its offices situated in Windhoek. Over and above, the agreements entered into between the parties were concluded in Windhoek. However, none of these addresses were cited by the respondent in the combined

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<sup>3</sup> See *Xoagub v Shipena* 1993 NR 215 (HC); See also *City Council of Windhoek v Pieterse* 2000 NR 196 (LC).

summons. The respondent did not deal with these averments in his answering affidavit.

[27] Thus, while the respondent is aware of the applicant's residential and business addresses, he deliberately omitted same in his combined summons. Surprisingly, when signing off the particulars of claim, the respondent cites his physical address situated in Windhoek, but refers to the applicant's physical address as follows:

'AND TO:     **RAUNA SHIPENA**  
                  **DEFENDANT**  
                  OSHITAYI VILLAGE  
                  ONDANGWA'

[28] I find merit in the applicant's contention that the respondent's citation of the applicant's address and manner of service in this matter was actuated by an intention to obtain judgment without the applicant's knowledge.

[29] Based on what the applicant mentioned in her founding affidavit, the respondent submitted that the applicant was called by the Deputy Sheriff regarding the service of the summons. According to the respondent, common sense dictates that the tenants at the property informed the applicant about the summons. However, there is no averment to satisfy the court that there was proper service in the matter. According to the applicant, she informed the Deputy Sheriff that she does not reside at the property and that she resides in Windhoek. Nonetheless, the Deputy Sheriff proceeded to serve the summons on the property, which summons did not reach the applicant.

[30] In the matter of *Standard Bank Namibia Ltd and Others v Maletzky and Others*<sup>4</sup> the Supreme Court succinctly held as follows:

'The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice. The substantive principle upon which the rules of service are based is that a person is entitled to know the case being brought against him or her and the rules governing service of process have been carefully formulated

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<sup>4</sup> *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) at para [21].

to achieve this purpose and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind.<sup>5</sup>

[31] The respondent's version is that the applicant was conducting business on the property. There is no other reason stated for this assertion other than that the applicant was receiving rental amounts from the property. Placed in its better context, it is common cause that the property belongs to the respondent. It is also common cause that due to the respondent's default on repaying the advanced amount, the parties agreed that the applicant would receive rent from the property. This is the only connection the applicant has with the property. There are numerous ways she could receive the rental amounts. The respondent does not say how the applicant receives the rental amount in order to satisfy the court that service on the property constitutes proper service. I am satisfied that there was no proper service on the applicant in this matter.

[32] The applicant submitted that had this court been made aware of the first matter, it would not have granted the default judgment. This is because the first matter involves the same issue. According to the applicant, the twelve-month period agreed by the parties has lapsed and the respondent has failed to pay back the loan amount he received from the applicant.

[33] The applicant submitted that the respondent has refused to transfer ownership of the property into the applicant's name. This is the reason the applicant instituted proceedings in the Main Division in order to compel the respondent to take all necessary steps to finalise the transfer. The applicant submitted that the respondent could have filed a counter claim in respect of the first matter instead of instituting these proceedings relating to the very same issue subject for consideration in the first matter. I find that the applicant has a *bona fide* defence and prospects of success.

### Costs

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<sup>5</sup> *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others 2013 (1) NR 245 (HC) para [17]; First National Bank of Namibia v Nan Von Schach (HC-MD-CIV-ACT-CON-2020/02921) [2021] NAHCMD 493 (26 October 2021).*



[34] Although it is the applicant that is seeking the indulgence of this court, I am of the view that the respondent should not have opposed this application given the manner in which he cited the applicant's address in his combined summons and the manner in which service was effected. He should therefore be ordered to pay the applicant's costs occasioned by his opposition.

### Order

[35] In the result, it is ordered as follows:

1. The judgment granted in favour of the respondent by this court on 22 January 2022 against the applicant in her absence is rescinded.
2. The applicant is granted leave to file her notice of intention to defend the first respondent's claim by no later than 13 October 2022.
3. The respondent is ordered to pay the applicant's costs of this application.
4. The matter is postponed to 14 November 2022 at 10h00 for status hearing.
5. The parties are directed to file a joint status report on or before 09 November 2022.

<b>Judge</b>	<b>Comments:</b>
MUNSU, AJ	NONE
<b>Applicant:</b> D K NDANA Of Jacobs Amupolo Lawyers, Notaries & Conveyancers. Ongwediva.	<b>Respondent:</b> IN PERSON

