CASE NO.: CA 187/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EDWIN KEJA **Appellant**

and

C. J. VAN ZYL **Respondent**

CORAM: PARKER, A J

Heard on**:** 23 March 2006

Delivered on: 12 April 2006

JUDGMENT

PARKER, A J

[1] In order to determine the appeal before me, it is vitally important that I recount the history of the progression of this matter that lay fallow intermittently for most of the time. The matter originated in the Outjo magistrate's (civil) court as far back as February 2002; but, its genesis lies even in an earlier period, i.e. in January 2000, in the criminal court. The respondent, who was the plaintiff in the Outjo magistrate's court, issued a summons on 15 February 2002 against the appellant, the defendant in that court, for the appellant wrongfully and maliciously setting the law in motion by laying a false charge of stock theft with the Police against the respondent by giving the Police false information. The information was that the respondent had stolen 51 goats, valued at N$17,000.00, belonging to the appellant, from the appellant's farm called

Farm Winnie (the farm). In short, the cause of the respondent's action was malicious prosecution.

[2] In the rest of this judgment, I will refer to the parties as they appeared in the magistrate's court in order to avoid confusion.

[3] The summons was served on the defendant: according to the plaintiff, it was duly served, but as far as the defendant is concerned, it was not. At any rate, the defendant failed to defend the action and so the plaintiff requested and obtained a default judgment on 9 August 2002. On 14 August 2002, the plaintiff's legal representative asked for the issuance of a warrant of execution; the warrant was duly issued on 21 August 2002. The warrant of execution was served on the defendant on 19 November 2003; there had been two previous unsuccessful attempts to serve the warrant, namely, 29 August 2003 and 28 October 2003. With regard to the service of the warrant of execution, too, while the plaintiff avers that it was duly served on the defendant, the defendant contends contrariwise.

[4] In the return of service of the warrant of execution, the messenger of the court remarked that he attempted to attach and remove 30 heads of cattle from the defendant's farm but five adult persons on the farm thwarted his attempt, and according to the plaintiff, deliberately. It was on 19 November 2003 that the messenger of the court succeeded in seizing, removing and laying under judicial attachment 13 heads of "mixed cattle" from the defendant's farm.

[5] It was not until 18 December 2003 that the appellant lodged an application for rescission of the default judgment that had been granted on 9 August 2002, and gave notice that the application would be heard on 30 January 2004. The application was, indeed, heard on that date, and it was dismissed with costs. The defendant filed a botched notice of appeal in this Court on 13 February 2004. The defendant only filed his notice of appeal in terms of rule 51 of the Rules of the Magistrates' Courts (the Rules) on 8 June 2004, but no application for condonation of the defendant's non-compliance with the Rules was filed within the time limit. The present appeal is against the judgment that the learned magistrate handed down on 9 August 2002.

[6] At the outset of the hearing of this appeal, Mr. Mbaeva, counsel for the defendant, wanted to be heard on his application asking the Court to condone the defendant's late filing of his notice of appeal and the late filing of counsel's heads of argument. Mr. Dicks, counsel for the plaintiff, did not oppose the application, and the application was granted.

[7] Considering the nature of the matter before me, I think it is prudent for me to determine the appeal by examining both the granting of the default judgment on 9 August 2002 and the dismissing on 30 January 2004 of the defendant's application for

rescission of the judgment by the learned magistrate.

[8] An application for rescission of default judgment in magistrates' courts is governed by s. 36 of the Magistrates' Courts Act, 1944[1] and rule 49 of the Rules. Rule 49 (1) provides: "Any party to an action or proceedings in which a default judgment is given may apply to the court to rescind or vary such judgment provided that the application shall be set down for hearing on a date within 6 (*sic*) weeks after such judgment has come to his knowledge."

[9] In their authoritative book, the writers of *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa*, have stated that unlike under the pre-1954 wording of the Rules, under the present wording of the Rules, "it is clear that the application must come before the court within the prescribed period, which is now extended to six weeks:"[2] it was one month under the pre-1954 time limit wording.[3] Nevertheless, the time limit may be extended under rule 60 (5) by written consent of the other party and, if such consent is refused, by the court on application.

[10] With subrule (1) should be read subrules (6) and (7) of s. 49, for presumption of knowledge of default judgments is provided in subrule (6), and it reads: "Unless the applicant proves the contrary, it shall be presumed that he had knowledge of such

[1] Act No. 32 of 1944 (as amended).

[2] Baker, *et al.* Vol. II, 7th ed., 1979: p 363-4. The same words that are in the relevant South African Rules are found in the Namibian Rules. But, cf *The Government of the Islamic Republic of Iran v Berend* 1997 NR 140 where this Court was seized with interpreting the words, "A defendant may within 20 days … apply to court …" in rule 31(2)(b) of the High Court Rules. It must be pointed out that the High Court Rules are completely different from the Magistrates' Court Rules.

[3] *Du Plessis v Tager* 1953 (2) SA 272 (O).

judgment within 2 (*sic*) days after the date thereof." And subrule (7) provides: "The court may on hearing of any such application, unless it is proved that the applicant was in wilful default and if good cause be shown, rescind or vary the judgment in question and may give such directions or extensions of time as may be necessary in regard to the further conduct of the action or application."

[11] In *Leweis v Sampoio*,[4] a case which concerns rescission of a summary judgment, Strydom, CJ, writing the unanimous judgment of the Supreme Court, examined these requirements under subrule (7), and came to the following conclusions:

> Although the Courts have studiously refrained from attempting an exhaustive definition of the words 'good cause' they have laid down what an applicant should do to comply with such requirement. In this regard it was stated that an applicant:
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> (a) must give a reasonable explanation for his default;
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> (b) the application must be made *bona fide*; and
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> (c) the applicant must show that he had a *bona fide* defence to the plaintiff's claim.
>
> (See *Grant v Plumbers (Pty) Ltd* 1949 (2) 470 (O) and *Mnandi Property Development CC v Beimore Development CC* 1999 (4) 462 (W).)[5]

The learned Chief Justice continued:

> As to a Court's approach in regard to such an application it was stated in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711E that –
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> > 'An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is,

[4] 2000 NR 186. This case concerns rescission of summary judgment, but the principles enunciated therein apply with equal force to rescission of default judgment because the Supreme Court was interpreting the relevant provisions of rule 49 of the Rules of Court of magistrates' courts.

[5] At 191F-192A.

> rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for rescission is not *bona fide*.'

(See also *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E).)' [6]

[12] It has been stated that the task of the court is first to consider the reason for the applicant's previous non-appearance. If it is proved to have been due to "wilful default", the matter is put to rest, and the application for rescission must be dismissed; the court has no discretion to uphold the application.[7] This principle has found support in *Leweis v Sampoio* where the Supreme Court held that "[O]ur Rule 49(7) of the Magistrates' Court, in contrast to that in South Africa, still specifically prohibits relief when it is shown that the default was wilful."[8]

[13] The question then is, when is default wilful. In *Neuman (Pty) Ltd v Marks*, after reviewing the authorities, Murray, CJ concluded thus:

> The true test, to my mind, is whether the default is a deliberate one – i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing. I can do no better than quote the following passage from the judgment of BOWEN, L.J., in the case of *In re Young and Harston's Contract,* L.R. 31 Ch. Division at pp. 174, 175, a passage approved by GARDNER, J.P., in *Hendriks v. Allen*, 1928 C.P.D. 519,

[6] At 191I-192A.
[7] Baker, *et al.*, *supra,* p 367; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476.
[8] *Supra,* at 192, *per* Strydom, CJ.

> 'The other word which it is sought to define is 'wilful'. That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. Now, if that is all you can get out of the analysis of these words, it becomes plain that to endeavour to classify every conceivable contingency with a view of defining what will be and what will not be wilful default, would be idle. You cannot define the words 'wilful default' more than I have defined them. And I only use the definition for the purpose of shewing that that term is a simple one and not technical at all.'[9]

[14] I will now examine the defendant's conduct to determine if his default was wilful.

[15] According to the plaintiff, the summons was duly served on the defendant in terms of rule 9 of the Rules, but it is the defendant's contention that the summons was never served on him or at all. The reason is that the defendant contends that the summons was not served on him at his residence but was delivered to his "brother" who resided on the farm that is adjacent to the plaintiff's farm. (The "brother" later turned out to be his uncle in the affidavit filed by the defendant!) This issue is important, so I will dispose of it now. From the affidavit filed of record by the defendant, I have no doubt that the defendant is either the owner of the farm or at the least he holds it as a lessee and he carries on the business of farming on that farm. I find further that his uncle, Mr. Ewald Kamapunga, who is over 16 years old, is the one who looks after the farm on the defendant's behalf, i.e. he is the defendant's representative on the farm and as such he was at all material times in control of the farm. From the contents of the defendant's affidavit and Mr. Ewald Kamapunga's affidavit, the inference is overwhelming that both affidavits are deliberately drafted in ambiguous terms so as to conceal the truth and to mislead the relationship between the defendant and the farm, and between the defendant and Mr. Kamapunga. I also find that the farm is a place where the defendant carries on business of farming. Consequently, I conclude that, as was submitted by Mr. Dicks, the summons was duly served on the defendant within the meaning of rule 9 (3) (b) of the Rules.

[16] The bundle of records filed in the appeal shows that the defendant failed to enter appearance to defend the action within the time prescribed therefor by the summons.

[9] 1960 (2) SA 170 at 173A-C.

Pursuant to the Rules, the plaintiff applied for, and obtained, a default judgment on 9 August 2002. As I have recounted previously, on 14 August 2002, the plaintiff's legal practitioners requested the clerk of the magistrate's court, Outjo, to issue a warrant of execution, and it was duly issued on 21 August 2002. The warrant of execution was also served on the defendant on 29 August 2003: this time, too, it was delivered to Mr. Kamapunga. In his confirmatory affidavit, Mr. Kamapunga states that he never received the return of service of the summons and the return of service of the warrant of execution. Nobody said Mr. Kamapunga did; of course, he would not receive them because they are documents that are filed with the court that issued them. In my considered view, Mr. Kamapunga's confirmatory affidavit does not, therefore, assist the case of the defendant in any way or at all: the affidavit is equivocatory and calculated to mislead. In the result, I have come to the conclusion that the warrant of execution was also duly served on the defendant.

[17] In the return of service of the warrant of execution, as I have said previously, the messenger of the court remarks that when on 7 November 2003 he attempted to remove 30 heads of cattle from the farm to a place of safekeeping in execution thereof, he was prevented from doing so by five adult persons. It was only on 19 November 2003 that the messenger of the court succeeded in seizing, removing and laying under judicial attachment 13 heads of "mixed cattle" from the appellant's farm.

[18] In his heads of argument, counsel for the defendant sought to argue that the 13 heads of cattle that were attached did not belong to the defendant, but that they

belonged to the defendant's relatives. I will quickly dispose of this argument. The heads of cattle were attached on 19 November 2003, and they were not sold until on or about 4 December 2003. By that time, the defendant in respect of this matter had already approached his counsel, Mr. Mbaeva. Mr. Dicks argued that there had been no explanation why no proceedings were bought to protect the interests of these relatives, e.g. by interpleader application. I agree with Mr. Dicks. In the result, I have no difficulty in finding that the 13 heads of cattle that were attached and sold in execution of the default judgment belonged to the defendant.

[19] It was at the belated date of 18 December 2003 that the defendant lodged an application for rescission of the default judgment that was granted on 9 August 2002, and gave notice that the application would be heard on 30 January 2004.

[20] The defendant avers that it was only on or about 12 November 2003 that he became aware of the default judgment granted against him when he received a phone call from a "lady" residing on the farm that a messenger had gone to the farm to collect 13 heads of cattle. This evidence is not credible: there is no confirmatory affidavit from this mysterious "lady", if, indeed, there is such a "lady". It is, in any case, curious that all along, the defendant maintained that he never received any process that was served on him through delivery to Mr. Kamapunga on the farm prior to the execution, but suddenly when a messenger goes to the farm to execute the warrant, all of a sudden a "lady" appears to give information to the defendant about the execution. More important, Mr. Kamapunga, to whom the summons and the warrant of execution were delivered at the farm, does not explain in his confirmatory

affidavit what he did with the summons and the warrant of execution. One thing is undeniable; he does not dispute having received the summons and the warrant of execution.

[21] Although the summons was served on the defendant on 20 May 2002, the plaintiff waited for about five weeks to pass before his legal practitioners requested and obtained default judgment on 9 August 2002. That gave the defendant ample time within which to respond to the summons, but he did nothing. Thereafter, it took more than at least one year for the warrant of execution that was issued on 21 August 2002 to be served on the defendant; the first occasion was on 29 August 2003. Again, he did nothing. Even thereafter, it was only when the defendant's heads of cattle were attached on 19 November 2003 that the defendant suddenly sprang into action.

[22] I cannot help but conclude that the defendant's belated action of applying for rescission of the default judgment was not spontaneously inspired by an intention or a desire on his part to bring this matter to finality. He was galvanized into spirited action by the judicial attachment of the 13 heads of cattle on his farm, and their removal therefrom.

[23] Considering the cumulative effect of the facts set out above and the examination I have undertaken in relation to the facts, the only conclusion that can properly be reached is that the defendant, with full knowledge of the summons and the risks attendant on his default, freely took a decision to refrain from appearing. The

defendant knew what he was doing and intended to do just that, i.e. not to enter appearance to the summons. It is, therefore, my decision that the defendant was in wilful default, and upon the authorities,[10] "the matter should be finished." *A fortiori*, "[O]ur Rule 49(7)…, in contrast to that (the rule) in South Africa … specifically prohibits relief when it is shown that the default was wilful."[11]

[24] Nonetheless, it behoves me to deal with the point raised by Mr. Mbaeva in his submission that the case against the plaintiff was withdrawn, implying that he was not acquitted. In a sudden attempt to improve the defendant's case, counsel for the defendant submitted in this connection that the learned magistrate ought not to have found that the plaintiff had proved malicious prosecution against the defendant because the case against the plaintiff was withdrawn; he was not acquitted. The mention of the case having been withdrawn appears in the defendant's supporting affidavit to his notice of motion filed on 18 December 2003 with the Outjo magistrate's court and the plaintiff's summons. There is not one iota of doubt that the defendant did not make the statement about the case having been withdrawn to raise a defence that a case of malicious prosecution could not have been made out. At any rate, he never presented any evidence to the Court to the effect that the prosecution of the plaintiff did not end in the plaintiff's favour.

[25] If the defendant had raised such defence properly and at the right time and had put forward facts in support thereof that the prosecution had not ended in the

[10] *Leweis v Sampoio, supra,* at 192 C; *Grant v Plumbers (Pty) Ltd*, *supra,* at 476; *Baker, et al*., *supra,* p 367.
[11] *Leweis v Sampoio, supra, loc. cit.*

plaintiff's favour when the learned magistrate granted judgment for malicious prosecution,[12] in my view such a defence would have afforded the defendant a triable defence. In that event it would have, therefore, sufficed to make the court consider granting the relief of rescission of the default judgment. But, it must be remembered that the onus was on the defendant to show that his application for rescission of the default judgment taken against him was *bona fide* and that he had a *bona fide* defence.[13] It cannot be said that the defence that was suddenly sprang on both the Court and the plaintiff's counsel during counsel's submission has ever been the case of the defendant. The conclusion is inescapable that the defendant has never intended to raise such defence all along.

[26] In the course of counsel for the defendant's argument, I asked him to explain to the Court as to what part of the defendant's grounds of appeal this defence related. His answer was this dry riposte: "part of the *bona fide* defence." He then referred me to s. 6 of the Criminal Procedure Act, 1977(CPA),[14] which deals with the power to withdraw a charge or to stop prosecution, and it reads:

> An attorney-general or any person conducting a prosecution at the instance of the State or any body conducting an prosecution under section 8, may –
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> (a) before an accused pleads to a charge, withdraw the charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge.
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> (b) at any time after he accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the

[12] See Burchell, *Principles of Delict*, 1993: p 205-7; Neethling, *et al*., *Law of Delict*, 3rd ed., 1999: p 349-352.
[13] *Leweis v Sampoio*, *supra*, at 194 A-B; *Grant v Plumbers (Pty) Ltd*, *supra*, at 476-7; *Brown v Chapman* 1938 TPD 320 at 325.
[14] Act No. 51 of 1977.

> accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.

[27] But, as matters stand, the defendant did not place any evidence before the court *a quo* or this Court to show that the decision of the magistrate's court (criminal) was based on subsection (a) and not subsection (b) of s. 6 of the CPA, i.e. the criminal proceedings terminated before the plaintiff had pleaded to the charge, and not after he had pleaded. As I have said *ad nauseum*, the defendant has never raised this defence in any of his papers in any clear, unambiguous terms, let alone setting out facts, which, if proved, would constitute a good and *bona fide* defence. In the circumstances, I conclude that the defendant did not, either in the magistrate's court or this Court, discharge the onus cast upon him.

[28] One final point: counsel for the defendant put up an argument that made me think that he was labouring under the illusion that the Supreme Court's decision in *Pieter Johan Myburg v The State*[15] was applicable to the present matter. The decision in *Myburg* has no application to the matter before me. The reason being that in that case, the Supreme Court was interpreting the words "shall be released" in art. 12 (1) (b), read with art. 12 (1) (a) and art. 5, of the Namibian Constitution, when it held that those constitutional provisions read together do not "allow a magistrate court to order

[15] Case No.: SA 21/2001. (Unreported)

a permanent stay of prosecution prior to pleading to the merits by an accused."[16]

[29] I have already decided that the defendant was in wilful default within the meaning of rule 49(7) of the Rules. I have also decided that the defendant has not presented any evidence to support his contention that the prosecution of the plaintiff has not ended in the plaintiff's favour and, therefore, the plaintiff's claim for malicious prosecution could not be maintained.

[30] That being the case, the appeal is dismissed with costs.

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Parker, A J

[16] At p 43.

ON BEHALF OF THE APPELLANT Mr. T. N. Mbaeva

(DEFENDANT)

Instructed by: Murorua & Associates

ON BEHALF OF THE RESPONDENT Mr. G. Dicks

(PLAINTIFF)
Instructed by: Engling Stritter & Partners