REPORTABLE

CASE NO.: I571/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NEKOTO JEKONIA **APPLICANT**

and

KATRINA SHIMBULU **RESPONDENT**

CORAM: **NAMANDJE AJ**

Heard on: 5 October 2010

Delivered on: 13 October 2010

JUDGMENT

INTRODUCTION

NAMANDJE, AJ.: [1] The hearing in this matter relates to an application for rescission of judgment brought by the applicant pursuant to a summary judgment entered against him on the 27th of April 2009.

[2] The respondent caused simple summons to be issued against the applicant during February 2010. Upon service of the summons, the applicant instructed his legal practitioners to file a notice of intention to defend. After the filing of the notice of intention to defend he requested further particulars on the respondent's summons. Although that step was irregular as at that time no declaration has as yet been filed by the respondent it is of no consequence at this stage save to note that it marks the first of a series of erratic steps by the applicant's legal practitioners.

[3] The respondent's legal practitioners thereafter filed an application for summary judgment which was set down for hearing on 23 April 2010. The applicant's legal practitioners prepared the applicant's opposing affidavit by 13th of April 2010. The opposing affidavit was thereafter filed on 15 April 2010 within the time period provided for in terms of Rule 32 of the Rules of the High Court.

[4] When the matter was called on 23 April 2010 the applicant's legal practitioners were not in attendance. In terms of the relevant Consolidated Practice Directive of this court, the application was postponed in the absence of the applicant's legal practitioners to Tuesday 27 April 2010 for hearing. The applicant's legal practitioners were again in default of appearance on 27 April 2010. The court proceeded and entered a summary judgment against the applicant.

[5] It was after judgment was summarily entered against the applicant that he instructed his legal practitioners to bring this application. His rescission application was brought in terms of Rule 31 of the Rules of the High Court. Although such Rule is not specifically referred to in the applicant's founding affidavit, impliedly it was brought in terms of that Rule as the applicant paid security of costs in the amount of N$200.00 as provided for in terms of Rule 31(2)(b).

CAN A SUMMARY JUDGEMENT BE RESCINDED IN TERMS OF RULE 31 OF THE RULES OF THE HIGH COURT?

[6] I am of the opinion that Rule 31(2)(b) is meant for situations where a default judgment was obtained after a defendant has fallen into default of delivery of a notice of intention to defend or where after having been served with a notice of bar the defendant failed to file a plea. A summary judgment does not fall into that category. A litigant against whom the High Court had entered a summary judgment, in his absence, can therefore not seek rescission of that judgment in terms of Rule 31(2)(a) and (b).

[7] I find support in this respect in the persuasive comments in the matter of Creative Car Sound and Another v Automobile Radio Dealers Association 1989 (Pty) Ltd, 2007 (4) SA 546 D, par 18 - 20 where the following was stated:

> *"[18] Subrule (2)(a) enables a plaintiff, in a claim which is not for a debt or liquidated demand, to set an action down for default judgment where a defendant is in default of delivery of a notice of intention to defend, or a plea. Subrule (2)(a) enables a defendant to apply to Court within 21 days after he has knowledge of such a judgment, to set aside that judgment. In the present matter the respondent had sued the applicants for the payment of an ascertained amount of money, that is, R720 881. The applicants had through their attorneys delivered a notice of intention to defend. Before the applicants had through a plea, respondent lodged an application for summary judgment in terms of Rule 32. In my view, all this removes this case from the ambit of Rule 31.*
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> *[19] In Louis Joss Motors (Pty) Ltd v Riholm 1971 (3) SA 452 (T), the Court was dealing with an application for rescission of a summary judgment the Court had granted against the applicant in its absence. The Court had to consider the question whether that was a matter which could be dealt with under the provisions of Rule 31(2)(b), which really deals with default judgment. At 454F-H the learned Judge Boshoff said:*
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>> *'A defendant is certainly not in default of a plea where he has delivered notice of an intention to defend and is prevented from proceeding with his defence by an application for summary judgment under and by virtue of the provisions of Rule 32. The fact that he was absent and not represented in Court when the application for summary judgment was heard and granted, does not make the judgment a default judgment of the kind contemplated in Rule 31.'*
>
> *[20] Since a judgment granted against the defendants summarily in their absence is not a default judgment in the sense contemplated by Rule 31, the remedy provided by that Rule is not available to the applicants."* (Own emphasis)

[8] The applicant can therefore not approach this court for a rescission of a summary judgment in terms of Rule 31 of the Rules of the High Court.

CAN A SUMMARY JUDGMENT BE RESCINDED ON ANY OTHER GROUNDS?

[9] In my opinion the court can still use its powers in a bid to do justice between man and man by looking at the totality of the facts placed before it and entertain such application on any common law ground which may be gleaned from the applicant's papers. See Creative Car Sound and Another-supra, par 21 thereof. I intend doing that in this application.

DID THE APPLICANT MAKE OUT A CASE AT COMMON LAW FOR THE RESCISSION OF THE SUMMARY JUDGMENT ENTERED AGAINST HIM?

[10] The law pertaining to rescission of a judgment in terms of common law is set out in Gruttemeyer N.O. v General Diagnostic Imaging, 1991 (NR) 441 (HC) at par H - J where this court stated:

> "In *so far as the application is brought in terms of the common law, sufficient cause must be shown but it has been held that the Court's discretion extends beyond the grounds provided for in Rules 31 and 44. As was said by Trengove AJA in De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042H:*
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> > *'Broadly speaking, the exercise of the Court's discretionary power [under the common law] appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go*

by default'." (Own emphasis)

[11] To that, I should add concise and clear sentiments by Gubbay CJ in Georgias and Another v Standard Chartered Finance Zimbabwe Ltd, 2000 (1) SA 126 (ZS) at p 132 where he stated:

> " *The adoption of those principles to an application to rescind a judgment given by consent enjoins the Court to have regard to:*
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> *(a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;*
>
> *(b) the bona fides of the application for rescission;*
>
> *(c) the bona fides of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established.*
>
> *As has been stated repeatedly too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits."* (Own emphasis)

[12] Further it has been said that when the question of sufficiency of a defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. See furtheer Creative Car Sound and Another-supra at p 555, par 42.

[13] In this matter the applicant promptly gave instructions to his legal practitioners for a notice of intention to defend to be filed. He proceeded and requested further particulars on the respondent's summons albeit that the step was irregular. He also promptly deposed to an opposing affidavit against the respondent's application for summary judgment. When his legal practitioners failed to appear at court for the hearing of the summary judgment application resulting in a judgment against him, he filed this application. From the totality of facts proffered by

the applicant it is clear that all his actions point to a genuine willingness to defend the matter save that his legal practitioners, in disturbing proportions, acted with gross negligence and with inexcusable ineptitude. I am of the opinion that although in some cases the gross negligence of a litigant's legal practitioners may be imputed to such a litigant, this is a case where such should not be the case as the applicant at all times intended to defend the matter. This court finds that a sufficient cause has been shown by the applicant.

[14] During arguments the court alerted the parties to the facts that from the documents produced by the applicant it appears *prima facie* that the services in respect of which the respondent is claiming money for services rendered and materials supplied were not rendered by the respondent but by a close corporation in which she is a member.

[15] Although the applicant's legal practitioners did not directly raise such as a defence it is evident that the applicant in his founding affidavit alleges that he entered into a contract with a close corporation of which the respondent is a member. The respondent did not dispute such allegations. The invoice for work to be done for the applicant reflects that the work and materials were to be done and supplied respectively by Kamwiitulwa Electric and Building Constructions CC. If at the trial it becomes clear that the work was indeed done and materials supplied by the respondent's close corporation and not by the respondent then in my opinion the applicant may have a *bona fide* defence to the respondent's claim. Further the applicant sufficiently makes allegations that the work done was of poor quality. This court finds that there is a reasonable and *bona fide* defence to the respondent's claim. That being the case I will exercise my discretion in favour of rescinding the summary judgment entered against the applicant.

[16] It is clear, that should the applicant's legal practitioners, not have failed to be at court, the matter may have taken a different course. The applicant's legal practitioners are the cause of the applicant's predicament. In fact they handled the applicant's case which gross negligence. The applicant is the one that is seeking indulgence from this court, and not the respondent, I will therefore, in the circumstances, use my discretion to order that the applicant pays half of the

respondent's costs notwithstanding his success.

[18] In the result, I accordingly make the following orders:

(1) The Summary Judgment granted by this Honourable Court on the 27 April 2010 is rescinded and the applicant is granted leave to defend the Respondent's action;

2) Applicant is granted leave to uplift the amount of N$200-00 paid as security.

3) The applicant pays half of the Respondent's costs.

NAMANDJE, AJ.

ON BEHALF OF THE APPLICANT: MR. ELAGO

INSTRUCTED BY: SHIKONGO LAW CHAMBERS

ON BEHALF OF THE RESPONDENT: MR. RUKORO

INSTRUCTED BY: LORENTZ ANGULA INC