'Not Reportable'

CASE NO.: I 767/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FESTUS KATJIUA **First Applicant**

EBEN KATJIUA **Second Applicant**

and

SWABOU INVESTMENTS (PTY) LTD **Respondent**

***CORAM*: PARKER J**

Heard on: 2011 September 27

Delivered on: 2011 September 30

JUDGMENT

PARKER J: [1] The applicants who appear in person brought application by Notice of Motion, filed on 22 February 2011, in which they seek rescission of the default judgment granted on 10 May 2010, that is, some nine months after pronouncement of the judgment, in the following terms:

(1) Declaring the default judgment on 10 May 2010 in this matter as void, alternatively setting aside the said judgment in terms of Rule 44(1)(b).

(2) Further and/or alternative relief.

[2] Thus, the application is based on two alternative grounds, namely, (1) a declaration that the default judgment granted on 10 May 2010 'as void' or (2) setting aside the said judgment in terms of Rule 44(1)(b). In support of the application there is filed the founding affidavit of the second applicant. The respondent, represented by Mr Schickerling, has moved to reject the application.

[3] At the commencement of the hearing of this application, the second applicant informed the Court that the first applicant was indisposed and, according to the second applicant, the first applicant had gone to seek medical attention. There was no medical certificate to that effect placed before the Court. I did not believe the second respondent. She was playing the Court for a fool with such mendacity. At the initial case management conference held on 1 June 2011, I asked the second applicant why her husband, the first applicant, was not in court. The second applicant's response was that the first applicant was at work and 'he was asking from work for permission to come to attend but they say he cannot'. At the hearing of the present application I asked the second applicant what she did for a living. Her response was that she was just at home – as a housewife. I also asked the second applicant what employment the first applicant was engaged in. Her response was that the first applicant, too, was 'just at home' – not employed anywhere. I did not, therefore, as I have said previously, believe that the second applicant told the Court the truth as to why the first applicant failed to attend court.

[4] In the face of such unabashed and dishonourable mendacity and deceit played to the Court by the second applicant, I decided there was no good reason

why the hearing should not proceed. The applicants, as I saw it, were engaged in a disingenuous game of trying to delay the hearing of their application, much to the prejudice of the respondent. Consequently, the hearing proceeded, and both the second applicant and Mr Schickerling made submissions. After the hearing I made the following order:

> '(1) That the application is hereby dismissed with costs; costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel.
>
> (2) That reasons therefor to follow in due course.
>
> And I said then that the reasons therefor would follow in due course; and the reasons now follow.'

[5] In determining the application, I must consider both aspects of the relief sought in prayer 1 of the Notice of Motion, albeit they are couched as alternatives.

[6] As to the declaratory relief; I rehearse what I said in *Anna Nekwaya and Another v Simon Nekwaya and Another* Case No. A262/2008 (judgment delivered on 17 February 2010) (Unreported) at paras 24 and 25:

> '[24] The power of this Court to grant declaratory orders is granted by s. 16 of the High Court Act, 1990 (Act No. 16 of 1990) (*Jacob Alexander v Minister of Home Affairs and Immigration and Others* Case No. A155/2009 (judgment on 9 June 2009 (Unreported) at p. 4). Section 16 provides:
>
> > (d) … (the High Court) in its discretion, and at the instance of any interested person, (has the power) to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

> [25] On the interpretation and application of s. 16(d) of the High Court Act, 1990, I stated as follows in *Jacob Alexander v Minister of Home Affairs and Others* supra at p. 4:
>
> > Interpreting and applying a similar provision, which contains identical words as the Namibian provision quoted above, in s. 19(1)(a) of South Africa's Supreme Court Act, 1959 (Act No. 59 of 1959) in *Government of the Self-Governing Territory of Kwazulu v Mahlangu* 1994 (1) SA 626 (T), Eloff, JP stated at 634B, 'The important element in this section is that the power of the Court is limited to a question concerning a right. The nature and scope of the right might be inquired into, but in the absence of proof of such a right, or at least *a contention that there is such a right*, the Court has no jurisdiction.' (Emphasis added)'

[7] Relying on the authority of *Government of the Self-Governing Territory of Kwazulu v Mahlangu* 1994 (1) SA 626 (T) I stated in *Jacob Alexander v Minister of Home Affairs and Immigration and Others* supra that the important element in s. 16 of Act No 16 of 1990 is that the power of the Court is limited to a question concerning a right. In the instant case, the applicants have not offered one iota of proof of any right or at least a contention that there is such a right. That being the case upon the high authority of Eloff JP in *Mahlangu* supra, this Court has no jurisdiction to grant the relief of declaration sought by the applicants. Accordingly, the application as respects declaration fails.

[8] I now proceed to consider the relief based on rule 44(1)(b) of the Rules which is that –

> '44. (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –

> (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; …'

[9] In these proceedings the Notice of Motion is absolutely clear that the relief sought is based on rule 44(1)(b); and so it is only in respect of that rule that I must direct the determination of the present proceedings application, as far as the rule-based grounds are concerned. In application proceedings where there are a number of grounds in terms of the Rules on which the applicant may base his or her application, and the applicant settles on one rule-based ground, as a matter of law, it is not up to the Court to undertake a fishing expedition to search for other rule-based grounds and decide *ex mero motu* that a particular rule-based ground or grounds – not taken up by the applicant in his or her papers – is or are available to the applicant and then determine the application on the basis of that rule-based ground or those rule-based grounds. Such approach would be unfair, unjust and, indeed, wrong. Keeping these reasoning and conclusions in view, I proceed to determine the present application as to the aforementioned alternative relief in prayer 1 of the Notice of Motion based on rule 44(1)(b) of the Rules only, as far as rule-based grounds are concerned.

[10] An ambiguity or a patent error or omission have been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing the judgment; and the ambiguous language or the patent error or the omission is attributable to the court itself (Erasmus *et al*, *Superior Court Practice*, p. B1-310, and the cases there cited). The applicants have not pointed out to the Court what ambiguity, patent error or omission that is attributable to the Court exists in the judgment granted. It follows that in my judgement, the alternative relief sought in prayer 1, too fails.

[11] But that is not the end of the matter. Rule 44(1) gives the Court the discretion to consider other grounds, but, as I read the rule, those grounds should not be rule-based under paras (a), (b) and (c) of subrule (1) of Rule 44. In this regard, in his submission, Mr Schickerling drew the Court's attention to the common law grounds; and I accept Mr Schickerling's submission that as respects the common law grounds the Court's discretionary power is rooted in considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. In this regard, the requirements that an application for rescission of default judgment must satisfy are, according to the Supreme Court (*per* Strydom CJ) in *Leweis v Sampoio* 2000 NR 186 at 191G-H, that: the applicant must give a reasonable explanation for his or her default; the application must be made bona fides; and the applicant must show that he or she has a bona fide defence to the plaintiff's claim. And furthermore, the application ought to be made within a reasonable time after such judgment is pronounced (*Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)). Thus, the onus is on the applicant to satisfy the Court, among other considerations of justice and fairness, as Mr Schickerling submitted, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default (*Grüttemeyer N.O v General Diagnostic Imaging* 1991 NR 441 at 448I-J, approving *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042H), and *Frans Murangi v Government of the Republic of Namibia* Case No. I 2140/2005 (Unreported) at para 4, relying on *Leweis v Sampoio* supra).

[12] I shall now test these common law requirements against the facts of the present case. The default judgment was granted on 10 May 2010, as I have said more than once; but the present application was filed almost nine months

thereafter. Such delay is not reasonable on any pan of scale; and what is more, no explanation was placed before the Court for such unreasonable delay. And more important; the applicant has also not given any reasonable explanation as to why judgment was allowed to go by default. For these reasons, I find that it would not be just or fair to exercise my discretion in favour of granting the relief sought. Consequently, on common law grounds, too, the application fails.

[13] The respondent raises a point *in limine* in terms of rule 62(4) which is primarily procedural. In the nature of the application and seeing that the application is singularly lacking in merit, as I have demonstrated, I decided that it is in the interest of justice that I overlook the procedural preliminary objection and deal with the merit; as I have done. And having dealt with the merit, the order set out above was made.

_____

PARKER J

ON BEHALF OF THE APPLICANTS: In Person

COUNSEL ON BEHALF OF THE RESPONDENT: Adv. J Schickerling

Instructed by: Van der Merwe-Greeff Inc.