REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: I 3209/2009

In the matter between:

1.1.1.1. **JACOB HERMANUS VAN WYK**

APPLICANT

and

OLD MUTUAL LIFE ASSURANCE COMPANY
OF NAMIBIA **RESPONDENT**

Neutral citation: *Van Wyk v Old Mutual Life Assurance Company Namibia* (I3209/2009) [2013] NAHMD 53 (19 February 2013)

Coram: Schimming-Chase, AJ
Heard: 19 February 2013
Delivered: 19 February 2013

Flynote: Default judgment – Application to declare default judgment void – not launched in terms of Rule 31, 44, or the common law – If launched in terms of common law, delay of one year between date default judgment was granted and date application launched in any event unreasonable. Dispute of fact in motion proceedings – principles restated.

Summary: The applicant applied to declare a default judgment granted by the registrar void, alternatively for an order setting it aside on the grounds that the applicant was not personally served with the combined summons. Applicant sought to impeach the return of service indicating that he was personally served because he did not reside at the address where personal service was effected.

The Court held applying the Plascon-Evans Rule that the dispute of fact raised on the papers regarding service of the combined summons would be resolved in favour of the respondent because there was no genuine dispute of fact raised and because the respondent's statements were far-fetched and untenable.

ORDER

The application is hereby dismissed with costs, such costs to include the costs of one instructing and one instructed counsel

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***EX TEMPORE* JUDGMENT**

SCHIMMING-CHASE, AJ

(b) This is an application for an order declaring the default judgment granted by the Registrar on 21 October 2009 against the applicant in the amount of N$33,355.66 void, alternatively for an order setting aside the default judgment. The application for the above relief was launched on 9 October 2012 almost 3 years after the default judgment was granted.

(c) The applicant failed to file any heads of argument as required by the practice directives of this court. He further failed to provide any reasonable explanation why no heads of argument were filed, nor did he apply for condonation. In terms of practice directive 26(3)(c)of the consolidated practice directives, the parties in an interlocutory application are required to file heads of argument on or before noon on the Friday proceeding the date that the matter is heard. In terms of practice directives 20(6) and (7) dealing with opposed motions, the court has a discretion to hear the application without the applicant's heads of argument where he or she fails to do so. I accordingly exercise my discretion to hear argument without the applicant's heads of argument and to have regard to the submissions made by the applicant in support of the relief sought during oral argument, as well as the legal submissions contained in the applicant's replying affidavit.

(d) The grounds for the application set out by the applicant in his founding affidavit on the merits and in support of a *bona* fide defence, are that he was not informed by the respondent with whom he was previously employed that he owed it any money, and further that he asked one Mr Koeglenberg of the respondent whether there were any monies due to the respondent after he resigned from employment with the respondent and further that Mr Koeglenberg confirmed to the applicant that no money was owed. No confirmatory Affidavit of the said Mr Koeglenberg was provided nor was there any further evidence contained in the founding papers in support of the application to confirm or otherwise corroborate this averment.

(e) As regards the default judgment, the applicant alleged that the default judgment was void because he was not aware of any summons or court case pending against him, and because the summons was never served on him but was instead was "purportedly" served at an address in Katutura whilst he was resident in Khomasdal at the time. I deal with this aspect in more detail below.

(f) The applicant has not applied for rescission of the aforesaid judgment either in terms of Rule 44 or Rule 31 (a) or, it would appear, the common law

which provide a mechanism to apply for rescission of a judgment. As I understand the applicant's submission, the judgment is void and falls to be set aside on its own.

(g) In my view, the application should have been launched in terms of Rule 44(1)(a) as an order or judgment erroneously sought or erroneously granted in the absence of any party effected thereby. However the applicant did not do so and as the application was not so launched, I do not propose to deal with it in terms of that Rule.

(h) The basis of the applicant's contention that the default judgment is void is that the summons was not served on him due to the fact that it was served at the wrong address. In his replying affidavit the applicant alleged that at the time the summons was served he was residing at 23 Koester Street, Khomasdal and not at Ndilimeke Street, Katutura. The applicant further stated that there is no street named Nailimeke Street, but that he used to stay at Ndilimeke Street, Katutura. The applicant finally stated that it was patently untrue that the Assistant Deputy Sheriff at the relevant time served summons on him personally.

(i) The respondent disputes the applicant's allegations. It was alleged *in linine* in the answering affidavit that the applicant had not launched this application within a reasonable time because on the applicant's own version, he became aware of the default judgment on 12 October 2011 and only launched the application to set it aside on 9 October 2012. The applicant in reply stated that as the default judgment is void the question of whether or not it was launched within a reasonable time is irrelevant.

(j) In this regard no application has been launched for condonation for the late launching of these proceedings, nor has an explanation been provided as to why the application was launched at such a late stage. If the application had been launched in terms of the Rules mentioned above or the common law, I hold the view that to launch this application a year later without a satisfactory explanation is unreasonable and that the applicant was derelict in failing to

launch this application after having knowledge thereof for over a year. However, it is still necessary in the interests of justice, to determine whether the judgment is void because if it is void it must be set aside.

(k) As mentioned above, the *gravamen* of the applicant's case is that he was not served with the summons because he resided at a different address at the time. The return of service states the following

> (l) "I the undersigned Gerson Naruseb hereby certify that I have on the 24th day of September 2009 at 14:00 duly served on the above named Defendant Jacob Hermanus Van Wyk the attached Summons by exhibiting the original document to him at his residential address at Erf 6430 Nailimeke Street, Katutura, Windhoek at the same time handing to him personally a true copy thereof and explaining to him the nature and contents thereof."

(m) Mr Naruseb further deposed to an affidavit attached to the answering papers of the respondent where he confirmed that he personally served the summons on Jacob Hermanus Van Wyk (the applicant) on 24 September 2009 at 14h00 and that he then prepared the return of service quoted above.

(n) Based on the applicant's allegations, there is a dispute of fact as to whether the applicant was personally served with the summons which I must resolve according to the Plascon-Evans [1] Rule cited on numerous occasions with approval in our courts.

(o) Ms de Jager appearing for the respondent pointed out that the onus is on the applicant to prove on a balance of probabilities that the summons was not served on him and that the applicant is required to provide clear and satisfactory evidence that the return must be impeached for whatever reason. In this regard she relied on the remarks by Potgieter J in Sussman and Co (Pty) Ltd v Schwarzer [2] where the following was stated:

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[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623; Bahlsen v Nederloff and Another 2006(2) NR 416 (HC); Grobbelaar and Another v Council of the Municipality of Walvis Bay 1997 NR 259 (HC).

[2] 1960(3) SA 94 (O).

(p)

(q) "Mr Beck contended that when such a return is impugned the onus on the Respondent, and he relied on the following passage in the case of Deputy-Sheriff v Goldberg 1905 T.S. at 680 at p 684:

(r) 'It is, I think, clear, in the first place, that if the return can be impeached it can only be impeached on the clearest and most satisfactory evidence'

(s)

(t) Mr Van Heerden, on the other hand submitted that the onus remained on applicant to show that there was a *nulla bona* return on which he was entitled to rely. For that proposition he relied on the following remarks by KRAUSE J. (as he then was) in the case of Finn Bros. and Laurie v Coonk, 1930 T.P.D. 555 at p 559:

(u) *'Prima facie* of course, where there is a *nulla bona* return as stated in the case of Ringer v T. W. Beckett & Co. Ltd 1927 T.P.D. 714, the applicant has the right to sequestrate the estate of the debtor. But in the present case the correctness of the return is questioned, and the onus is upon the applicants to satisfy the Court that, although there might have been an error in the return itself, the return is in fact a *nulla bona* return on which they are entitled to rely. It is still not the words *nulla bona* appearing on the return which are of importance. It is whether the facts as set out in the sub-section have been established and proved and whether the applicants are entitled to rely on those facts as proved.'

(v)

(w) It seems to me that the remarks quoted in the two decisions are not in conflict. The principle that can be deduced from these statements seems to be this: The onus is always on the Applicant to prove that the Respondent has committed an act of insolvency. If an act of insolvency in terms of sec. 8(b) is relied upon the onus is discharged if a return is filed which on the face of it is valid and if the facts therein contained are facts which the applicant can rely upon in terms of sec. 8(b). If the respondent then wishes to impeach those facts then the onus shifts to him to show by clear evidence that although the return shows that the requirements of sec. 8(b) have been complied with they were in fact not complied with and the return is not a proper return. Where, however,

the return itself does not show that the requirements of the sub-section have been complied with, then the onus is not shifted and it rests on the applicant to show that in fact the requirements have been complied with and that the return is in fact a *nulla bona* return."

(x)

(y)

(z) The Plascon-Evans Rule postulates that in deciding disputes of fact in application proceedings, those disputes should be adjudicated on the basis of the facts averred in the founding affidavits which have been admitted by the respondent together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant unless a denial by the respondent is not such as to raise a real genuine *bona fide* dispute of fact or a statement in the respondent's affidavit is so far-fetched or clearly unten able that the Court is justified in rejecting it merely on the papers. This approach remains the same irrespective of the question which party bears the onus of proof in any particular case. [3]

(aa) Section 32 of the High Court Act, 16 of 1990 provides that the return of a Sheriff or Deputy Sheriff or his or her assistant of the steps taken in connection with any such process of the High Court shall be *prima facie* evidence of the matters stated therein. It is also well established that such evidence may however by challenged. [4] Rule 4(1)(a) of the rules of court provides that service of any process of the court directed to the Sheriff and any document initiating application proceedings shall be effected by the Sheriff in one or other of the following manners, namely by *inter alia* delivering a copy thereof to the said person personally. (emphasis supplied)

(bb) The applicant's main contention regarding lack of service relates to the address at which the summons was served. As regards the question of personal service he makes the bare allegation that he was not personally served. Apart from this there is no other averment under oath which shows that the assistant Deputy Sheriff may have served the wrong person or any other logical reason why the assistant deputy sheriff did not serve the summons on the applicant personally. Irrespective of the address where the applicant was served, the return indicates that he was personally served. The applicant admitted that he used to live at Ndilimeke Street but not at Nailimeke Street, Katutura.

(cc) It appears to me that the address for service was a typographical error

[3] Kauesa v Minister of Home Affairs and Others 1994 NR 102 (HC) at 108 G-J.

[4] Greeff v Firstrand Bank Ltd 2012(3) SA 157 (NCK) at 160.

but it is clear from the return that the applicant was personally served by a duly appointed assistant Deputy Sheriff during the course of his duties as such, who had no reason to be untruthful regarding the manner in which service was effected. In my view the bare and unsubstantiated denial of the applicant does not raise a real and genuine dispute of fact on the papers. It is also untenable and I accordingly reject the applicant's version on the papers. In the result I hold that the default judgment was properly granted in the circumstances and is accordingly not void. In light of the foregoing the application is dismissed with costs, such cost to include the costs of one instructing and one instructed Counsel.

(dd)

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EM SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANT:	In person
RESPONDENT:	B de Jager Instructed by Fisher, Quarmby & Pfeifer