REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/02927

In the matter between:

PROMETHEUS INVESTMENTS CC	**1st APPLICANT**
MICHAEL PETER OTT	**2nd APPLICANT**

And

WUM PROPERTIES (PTY) LTD	**1st RESPONDENT**
CONSTANCE PIMENTA	**2nd RESPONDENT**
DEPUTY SHERIFF – WINDHOEK	**3rd RESPONDENT**
REGISTRAR HIGH COURT – WINDHOEK	**4th RESPONDENT**

Neutral citation *WUM Properties (Pty) Ltd vs Prometheus Investments CC* (HC-MD-CIV-ACT-CON-2019/02927) [2021] NAHCMD 364 (11 August 2021)

Coram	Schimming-Chase J
Heard	**8 July 2021**
Delivered	**11 August 2021**

Flynote Practice – Judgments and Orders – Rescission of default judgment – An application for rescission of default judgment may be brought either in terms of rule 16(1), rule 103(1)(a) or the common law depending on the circumstances and facts of the case.

Civil Procedure – Rescission of judgment – erroneously sought and erroneously granted in the absence of any of the parties affected thereby - Rule 103(1)(a) – Default judgment granted on lapsed summons, and on non-compliance with rule 15(5) – Court satisfied default judgment erroneously sought and granted.

Civil procedure – Rescission of judgment – Rule 103(1)(a) - An order or judgment that was erroneously sought or granted in the absence of any party affected by it should without further enquiry be rescinded or varied.

Practice – 'Further steps in the prosecution of an action' – What constitutes for purposes of rule 132(1)(a) – Those which advance the proceedings one step nearer completion, and which, objectively viewed, manifest an intention to pursue the action – A further step must at the very least be accompanied by the active filing or uploading of the court document evincing the further step taken.

Summary Applicants launched an application for rescission of a default judgment in terms of rule 103(1)(a), on the grounds that the judgment was erroneously sought and granted in their absence. The basis for the rescission application was that default judgment had been sought after the summons had lapsed in terms of rule 132(1). The notice of set down was also not served in terms of rule 15(5) and this was not brought to the judge's attention at the time that default judgment was applied for. In opposition, the respondent raised two questions in terms of rule 66(1)(c). Namely, that the application for rescission of judgment in terms of rule 103(1)(a) constituted an irregular step as rescission of default judgments are limited to rule 16, as opposed to rule 103. In the event that that rule 103 was applicable, that the application be struck for failure to comply with rule 32(9) and (10) read with PD29 which provides that applications in terms of rule 103 are interlocutory. Additionally, the respondent contended that the summons had not lapsed, because the notice to amend was signed by the respondent's legal practitioner withing the 6 month period provided for in rule 132(1). Therefore, service in terms of rule

15(5) was accordingly not necessary.

Held, that there was proper service of the summons and particulars of claim on both first and second applicants on 4 July 2019.

Held, that a 'further step' taken, in relation to rule 132(1)(a) must be one that advances the proceedings one stage nearer completion. It must at the very minimum, be an active step accompanied by the delivery, uploading, or filing of the court document evincing the further step taken within the 6-month period envisaged by rule 132(1).

Held, that signing of a notice to amend by the legal practitioners for the respondent, without delivery, uploading, or filing on the eJustice system, cannot be considered a further step in the prosecution of the action, because it is not a step that actively advances the proceedings one step nearer completion.

Held, that the summons lapsed and default judgment could not have been granted in those circumstances, especially in the absence of compliance with rule 15(5) which requires a notice of set down to be served on the defendant before judgment for default can be granted.

Held, that a party who applies for rescission of a default may utilise any or all of the procedures available, either rule 16(1), rule 103(1) or the common law, depending on the circumstances and facts of the case.

Held, that an order or judgment that was erroneously sought or granted in the absence of any party affected by it should, without further enquiry be rescinded or varied.

ORDER

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1. The judgment obtained by the respondent dated 5 June 2020 in HC-MD-CIV-ACT-CON-2019/02927 is hereby rescinded and set aside.

2. **The matter is removed from the Roll and regarded as finalised.**[1]

3. There shall be no order as to costs.

JUDGMENT

SCHIMMING-CHASE J

[1] This is an application for rescission of a default judgment granted on 5 June 2020 in this court, in favour of the first respondent (hereinafter referred to as "the respondent") against the first and second applicants, for payment of an amount of N$2,093,439.79 plus interest and costs. The application for rescission of the judgment is launched in terms of rule 103(1)(a), namely on the grounds that the judgment was erroneously sought and erroneously granted in the absence of a party affected thereby.

[2] The respondent elected not to file opposing papers, and instead filed a notice in terms of rule 66(1)(c). The points raised, as argued by Mr Diedericks appearing for the respondent, are that:

(a) the application for rescission should have been brought in terms of rule 16, as opposed to rule 103(1)(a). The procedure followed by the applicants of launching the application for rescission in terms of rule 103 constitutes an irregular step within the meaning of rule 61, and should be dismissed, alternatively struck from the roll;

(b) in the event that the court finds that the applicants were entitled to proceed in terms of rule 103 (as opposed to rule 16) then and in that event, the application should be struck from the roll for want of compliance with rule 32(9) and (10), read with PD29, which provides that applications in terms of rule 103 are interlocutory.

[1] The previous order made on 11 August 2021 directing the applicants/defendants to deliver a notice to defend, and setting the matter down for further case management was rescinded mero motu on 8 September 2021.

[3] The facts in support of the relief sought are accordingly not in dispute. Those facts relevant to the determination of this matter are the following:

(a) summons was issued by the first respondent on 28 June 2019;

(b) ex facie the particulars of claim, the respondent's claim against the applicants is based on an alleged breach of the terms and conditions of a written lease agreement concluded between first respondent and the first applicant (represented by the second applicant) in respect of certain business property located in central Windhoek. The second applicant and second respondent bound themselves as sureties and co-principal debtors for the performance of the first applicant in terms of the lease agreement;

(c) summons was served on the first applicant on 4 July 2019 by the deputy sheriff at an address expressed in the return of service to be the first applicant's registered address. Service was stated to have been effected "by affixing the abovementioned documentation to the main gate of the premises as no other person was willing to accept service of process";

(d) service was effected on the second applicant on the same date and at the same address by the deputy sheriff, except that the address was expressed in the return of service as the domicilium citandi and executandi of the second applicant, and the summons and particulars of claim was affixed to the main door of the premises (as opposed to the main gate);

(e) the second applicant obtained knowledge of the respondent's claim. He found the summons in the walkway gate to the premises on 5 July 2019, one day after service;

(f) in the lease agreement concluded between the first applicant and first respondent, the first applicant did not appoint a domicilium address. The only

address appearing for the first applicant ex facie the lease agreement was its registered address, which is the address where the first applicant was served on 4 July 2019;

(g) the address for service in relation to the second applicant as surety, remained the same until 30 September 2019, on which date the second applicant communicated his new address to the first respondent via email;

(h) on 24 November 2019, the respondent received a notification from the registrar of court that the summons would be lapsing;

(i) on 12 December 2019, the respondent's legal practitioners prepared and signed a notice of intention to amend the particulars of claim. The notice to amend was uploaded and filed on eJustice on 3 March 2020;

(j) on 30 December 2019, an endorsement was made via the eJustice platform that the summons had lapsed;

(k) on 13 January 2020, the notice of intention to amend was served on the first and second applicants via deputy sheriff at the same address where the combined summons and particulars of claim was served on 4 July 2019;

(l) on 21 January 2020, the second applicant again gave notice to the first respondent that he changed his domicilium address;

(m) on 29 January 2020, amended particulars of claim was served on the applicants by the deputy sheriff also at the same addresses;

(n) a notice of application for default judgment was filed on eJustice on 16 March 2020. It was not served on the first and second applicants as required by rule 15(5);

(o) the matter was removed from the roll on 26 March 2020 for failure to comply with the Stamp Duties Act, 15 of 1993, for failing to provide certain specifications relating to the interest claimed, and for failure to serve the amended particulars of claim on the third respondent;

(p) on 19 May 2020, the respondent filed another application for default judgment, which was similarly not served on the first or second applicants;

(q) on 5 June 2020, default judgment was granted against the first and second applicants.

[4] Mr van Vuuren argued that the summons had lapsed by the time default judgment was applied for and granted, and therefore the judgment was erroneously sought and erroneously granted in the absence of the applicants (within the meaning of rule 103(1)(a)). Once the summons lapsed, the matter came to an end altogether,[2] therefore, the default judgment should be rescinded in terms of rule 103 (1)(a), because the order granted was without legal foundation.

[5] In addition, he submitted that there was non-compliance by the respondent with rule 15(5) when default judgment was sought. This rule provides that if a period of 6-months has lapsed after service of summons, default judgment may not be granted unless a notice of set down for default judgment is served on the defendant, and this procedure was also not followed by the respondent.

[6] Mr Diedericks argued that the proceedings relating to the amendment of the particulars of claim, starting with the preparation of the notice to amend amounted to a further step taken to prosecute the action within the 6-month period from date of service, as envisaged in rule 132(1). Thus, the summons had not lapsed, and it was not necessary to serve a notice of set down in those circumstances.

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[2] *Minister of Law and Order and Others v Zondi* 1992 (1) SA 468 (N) at 471B

[7] In this regard, Mr van Vuuren submitted that the signing of the notice to amend by the respondent's legal practitioners on 19 December 2019 did not amount to a further step in the prosecution of the action, as contemplated by rule 132(1)(a).

[8] There are two main determinations to be made, namely whether the summons has lapsed, and if so, whether the applicant was correct in law to bring a rescission of default application in terms of rule 103. Additionally, this court will, if necessary, determine the respondent's point that the application should be struck for failure to comply with rule 32(9) and (10).[3]

[9] To determine whether the summons has lapsed, the start date is to be calculated from 4 July 2019. This is the date on which there was proper and effective service of process on the first and second applicants. In this regard, the second applicant was served at the address he nominated in his capacity as surety in the lease agreement, and the first applicant (an artificial person) was served at its registered address that was similarly included in the lease agreement. Even though first applicant did not formally nominate a domicilium citandi et executandi in the lease agreement, the registered address was sufficient service given its specific inclusion in the lease agreement. The second applicant also obtained knowledge of the combined summons himself a day after service on 5 July 2019.

[10] Rule 132(1) provides that if summons in an action for payment of a debt is not served within 6-months of the date of its issue or having been served the plaintiff has not within that time after service taken further steps in the prosecution of the action, the summons lapses.[4]

[11] Calculated from 4 July 2019, the 6-month period ended on 6 January 2020. It is not in dispute that no application for extension of time was made under rule 132, and the notice of set down for default judgment was not served on the applicants as required by rule 15(5).

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[3] PD 29 provides that applications brought in terms of rule 103 are interlocutory

[4] This provision is identical to rule 10 of the Magistrate's Court rules relating to lapsing of summons, except that the cut off period is 12 months

[12] Mr Diedericks submitted in this regard that the notice to amend interrupted the 6-month period as it amounted to a further step in the prosecution of the action. The plaintiff's legal practitioners signed a notice to amend on 19 December 2019. However, it was only served on the applicants on 13 January 2020.

[13] A consideration of the authorities dealing with what is considered to be a "further step" in the prosecution of proceedings (in the context of irregular proceedings) show that whatever the 'further step taken, it must be one that advances the proceedings one stage nearer completion. Delivery of a notice of intention to defend, a notice regarding the furnishing of security for costs, by way of example, have been held not to constitute a further step in the prosecution of the claim.[5]

[14] A further step must at the very minimum, be an active step accompanied by the delivery or filing of a court document evincing the further step taken. The signing of a notice to amend by the legal practitioners for the respondent, without delivery, uploading, or proper filing on the eJustice system, cannot be considered a further step in the prosecution of the action, because it is not a step that actively advances the proceedings one step nearer completion. At best for the respondent, the further step in relation to the notice of intention to amend was only taken on 13 January 2020, when the notice to amend was served. In any event, the notice to amend was only uploaded on 3 March 2020.

[15] In the result, the summons had indeed lapsed at the time default judgment was applied for, and default judgment could not have been granted in those circumstances, especially in the absence of compliance with rule 15(5). It is also not in dispute that these facts were not put before the judge at the time default judgment was applied for.

[16] This brings the court to the points raised by Mr Diedericks on behalf of the first respondent, the first being that the application for default judgment should have been launched in terms of rule 16, as opposed to rule 103, and that the application for rescission in terms of rule 103 (1) (a) constitutes an irregular step to be dismissed in the

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[5] Herbstein & van Winsen: *The Civil Practice of the High Courts of South Africa* 5th Ed at 743-744, and the authorities collected there; See also *Eke v Sugden* 2001 (2) SA 216 (E) at 219E-H in relation to the same wording contained in Rule 10 of the Magistrate's Court rules

circumstances.[6] Reliance was placed on the judgment of this court in *Gibeon Village Council v Development Bank of Namibia* [7] where the following was held:

'[9] …. Rule 103 (1) is not, as I have said previously, applicable to the instant proceedings. Indeed, from what applicant says in the quotation in para 7 above, this seems to me clear. Having failed in time to bring the rescission application within the time limit prescribed by rule 16, which is the rule applicable in these proceedings, applicant decided to bring the application in terms of rule 103 (1). But applicant is not entitled to do that. The proceeding is not only irregular, it is also fatal as I demonstrate. I should say that on the grounds of irregular proceedings alone, the application stands to be dismissed for reasons that now follow.

[10] Where the same rules of court prescribe a rule of general application and another rule of specific application on similar matters, it is not open to an applicant to decide what rule he or she fancies and pursue an application according his or her fancy. If, by virtue of the nature of the relief he or she seeks, the rules have specifically provided a procedure for obtaining such relief, but applicant pursues a procedure for general application, such choice amounts to irregular proceedings and fatal.

…

[12] To bring the discussion home; rule 103 (1) is of general application. It applies to the "variation and rescission of order or judgment generally". Rule 103 (1), therefore, concerns any order or judgment *other than* a default judgment. (Italicized for emphasis) Rule 16 on the other hand has specific application. It governs the rescission of default judgments.'

(Emphasis added)

[17] I am in respectful disagreement with the legal principles set out in this judgment, and will accordingly not follow them. I do so for reasons that follow.

[18] The learned Chief Justice Shivute in *De Villiers v Axiz Namibia*[8] held (in regard to the repealed rule 31 and rule 44(1)(a) of the repealed High Court rules – now rule 16 and rule 103(1)(a)), that it is a well-known principle that a judgment taken in the absence of one of the parties in the High Court may be set aside in three ways, namely in terms of

[6] The respondent did not follow the procedure contemplated by rule 61, but the point was taken in terms of the notice filed in terms of rule 66(1)(c)

[7] *Gibeon Village Council v Development Bank of Namibia* HC-MD-CIV-MOT-GEN-2019/00329 [2020] NAHCMD 189 (27 May 2020) P.4 at para 9

[8] *De Villiers v Axiz Namibia* 2012 (1) NR 48 (SC) at para [9] and the authorities there collected

rule 16,[9] or rule 103,[10] or in terms of the common law, depending on the circumstances of the case, and provided that the requirements of the procedure invoked are met. Thus, if a party elects to only utilise one of these three recourses, then the party is bound by that election and must make out a case for the particular relief sought.

[19] Rule 16(1) also provides that a defendant 'may' apply to set aside the judgment granted in default. Rule 103(1)(a) provides that the court 'may' of its own initiative or on application of any party affected *rescind* or vary *any order or judgment.*

[20] I have not been referred to, nor have I found authority that has applied the principle set out in the *Gibeon Village Council* case. I have only managed to gather judicial pronouncements to the contrary, namely cases where the courts have considered (and granted) applications for rescission of a default judgment on the grounds that the judgment was erroneously sought or granted in the absence of the party affected thereby.[11]

[21] Furthermore, following the principle set out in *Gibeon Village Council* would mean that the court cannot *mero motu* rescind a default judgment erroneously sought or granted within the meaning of rule 103(1)(a), and that would effectively interfere with the court's inherent jurisdiction in the circumstances.

[22] Proceeding to apply for rescission of default judgment in terms of rule 103 (1)(a) is therefore entirely permissible, and an applicant would of course have to stand or fall by that election.

[23] The Supreme Court in *De Villiers,*[12] held that an order or judgment that was erroneously sought or granted in the absence of any party affected by it, should without further enquiry be rescinded or varied.

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[9] Now Rule 16(2) of the current High Court Rules in force since 16 April 2014

[10] Now Rule 103(1)(a)

[11] See for example: *De Villiers v Axiz Namibia* 2012 (1) NR 48 (SC); *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA)

[12] *De Villiers v Axiz Namibia* 2012 (1) NR 48 (SC) at para 21

[24] Bearing the dictates of the learned Chief Justice in *De Villiers* in mind, it would be irreconcilable not to hear the matter or to strike the matter from the roll for non-compliance with rule 32 (9) and (10), where a clear error is brought to the attention of the court. This, limited to the circumstances and facts of this matter, will only lead to further delays in the finalisation of this matter, as well as increase costs for both parties. Certainly, this would not be in the interests of the expeditious and inexpensive disposal of this matter on its real merits.[13]

[25] Given the finding that the summons has lapsed, it stands to be set aside in terms of rule 103(1) (a) as erroneously sought and granted. The court will therefore, without further enquiry, rescind and set aside the default judgment granted on 5 June 2020.

[26] By this, I must not be understood as rendering compliance with rule 32 (9) and (10) nugatory. The line of authorities are trite, and non-compliance is generally fatal, subject however to where the court acts *meru motu* or exercises its inherent jurisdiction in exceptional circumstances like the present.

[27] This leaves the question of costs, which lies within the discretion of the court. The general principle in applications for rescission of judgment, is that it is the applicants who craved the indulgence from the court and, unless the opposition was unreasonable, the court would ordinarily order the applicants to pay the costs. Another factor relevant to the question of costs, is that the default judgment was erroneously sought and granted in the absence of the applicants after the summons had lapsed, however the second applicant, who at all material times represented the first applicant, also had knowledge of the respondent's claim practically from the time summons was served.

[28] Another important consideration is the overriding objective of judicial case management and the responsibility placed on legal practitioners to assist the court in curtailing proceedings in terms of rule 19(b). In this regard I am also guided by the following dictum expressed in *inter alia Trans-African Insurance Co Ltd v Maluleka,*[14]

> 'No doubt parties and their legal advisers should not be encouraged to become slack in

[13] See Rule 1 (3); and *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278 F-G.

[14] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278 F-G

the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

[29] In all the circumstances I am of the opinion that it would be reasonable to order that each party pays their own costs in this application. The matter will in any event be case managed further to trial.

[30] The following order is therefore made:

1. The judgment obtained by the respondent dated 5 June 2020 in HC-MD-CIV-ACT-CON-2019/02927 is hereby rescinded and set aside.

2. **The matter is removed from the Roll and regarded as finalised**.

3. There shall be no order as to costs.

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EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANTS	A van Vuuren Instructed by Behrens & Pfeiffer
RESPONDENT	J Diedericks Instructed by Michelle Saaiman Legal Practitioners