

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: ROADS AUTHORITY // ANNEGRIET FINKE & ANOTHER	Case No: HC-MD-CIV-MOT-GEN-2021/00180
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE SCHIMMING-CHASE	Date of hearing: 21 APRIL 2022
	Delivered on: 21 APRIL 2022
Neutral citation: <i>Roads Authority v Finke</i> (HC-MD-CIV-MOT-GEN-2021/00180) [2022] NAHCMD 209 (21 April 2022)	
The order: Having heard Mr Khama , on behalf of the applicant and Mr Small on behalf of the respondent, and having read the papers filed of record: IT IS ORDERED THAT: 1. The application for rescission is granted. 2. The default judgment granted in this court under case number HC-MD-CIV-ACT-CON-2021/00631 on 25 March 2021 is rescinded and set aside. 3. Any process issued by the first respondent on the strength of the said default judgment is set aside. 4. The applicant is given 10 days from the date of this order to deliver a notice of intention to defend in case number HC-MD-CIV-ACT-CON-2021/00631. 5. The first respondent is directed to immediately notify the Registrar of the High Court once the notice of intention to defend is filed so that the matter can be allocated to a	

managing judge.

6. There shall be no order as to costs.
7. The matter is removed from the roll and regarded finalised.

Below are the reasons for the above order:

Schimming-Chase J:

[1] This is an application for the rescission of a default judgment granted by this court in chambers on 25 March 2021 in case number HC-MD-CIV-ACT-CON-2021/00631. The application was launched as an opposed motion under a different case number.

[2] The application for rescission is brought in terms of the provisions of rule 103(1)(a) of the rules of court, on the basis that same was erroneously sought and granted in the absence of the applicant. It is also launched in terms of the common law.¹

[3] The applicant is the Roads Authority, a juristic person duly established in terms of section 2 of the Roads Authority Act 1999, Act 17 of 1999. Its mandate is to inter alia manage the national road network of Namibia. The first respondent is a natural person and the registered owner of certain immovable property located in Windhoek. The second respondent is the Deputy-Sheriff for the district of Windhoek. No relief is sought against the second respondent.

[4] The first respondent instituted action against the applicant on 2 February 2021. The basis of the claim as set out in the first respondent's particulars of claim is that the first respondent and applicant concluded an agreement in terms of which the applicant was obliged to compensate the first respondent for the utilisation of two portions of the first respondent's land for purposes of constructing and widening a national road, in the amounts of N\$400,000 and N\$305,000 respectively.

[5] The agreement was concluded, as alleged in the particulars of claim, by the applicant, represented by one J Mukuka, extending to and furnishing the plaintiff with two written offers for compensation in respect of two portions of land belonging to the first

¹ In an application for rescission under the common law, an applicant is required to establish 'good cause' or 'sufficient cause' for the rescission of the judgment granted in his or her absence in the sense of an explanation for the default and a *bona fide* defence. See *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 SC at para 10.

respondent that were to be utilised for the construction and upgrading of the airport road on 31 July 2020. The first respondent accepted the applicant's offers on 31 August 2020 in writing, and alleged in the particulars of claim that she duly complied with the offer by so accepting and making the portions of land available, and that the applicant, in breach of the agreement failed to pay the aforementioned amounts.

[6] Summons was served on the applicant on 26 February 2021 at the applicant's head office on an employee of the applicant, who indicated via confirmatory affidavit that the documents were served on her, but that the nature and exigency of same was not explained to her. She was only requested to sign receipt of the documents and to provide her name and designation.

[7] Ex facie the combined summons, it is also apparent that there was a typographical error resulting in the applicant being given '0 days' time frame in which to defend the matter.

[8] A notice of set down for default judgment was uploaded indicating that default judgment would be applied for on 26 March 2021. Default judgment was granted in chambers on 25 March 2021 at 08h55. The applicant delivered its notice of intention to defend on the same date at 12h56. The application for rescission judgment was launched on 12 May 2021.

[9] Mr Khama appearing for the applicant argued that the defect in the summons relating to the time frame in which the applicant was to defend the claim, coupled with the failure to explain the nature and exigency of the summons resulted in the judgment being erroneously sought and granted in the absence of the applicant. He further argued that in any event, the claim was not properly made, because in terms of the Roads Authority Act read with the Roads Ordinance 17 of 1972, the first respondent was not the party obligated to compensate the first respondent. Reliance was placed on section 16, and in particular section 16(6) of the Roads Authority Act. This section sets out the mandate of the applicant relating to the management of the national road network, which includes the planning, design construction and maintenance of roads which are part of Namibia's national road network, quality control of materials required for the construction and maintenance of roads, supervision of work and the operation of road management systems, and the performance of any other functions assigned by the Minister of Works and Transport by notice in the Gazette, in order to achieve the objects of the Act.

[10] Section 16(4) provides that the Minister of Works and Transport, after consultation with the applicant may give the applicant a written direction to undertake any road project or programme which the minister considers necessary in the national interest for improving accessibility to or within any area in Namibia, and the applicant shall comply with a direction so given, but subject to the funding of such project or programme from moneys made available either through an appropriation by Parliament or any other source as may be agreed upon by the minister and the applicant. (Emphasis added)

[11] Mr Khama further argued from the founding papers that the first respondent had been previously compensated for other portions of land that were utilised for the construction and widening of the airport road, and was remunerated by the Ministry of Works and Transport. This proof of payment was supplied and not disputed by the first respondent.

[12] In addition it was pointed out by Mr Lutombi, the applicant's chief executive officer and deponent to the founding affidavit that at all material times, the first respondent was made aware that the applicant was acting on behalf of the Ministry of Works and Transport, and that the applicant's role was to coordinate and administratively manage the process, obtain the valuations for the land, ensure that all documents necessary were provided, and that once this process was complete, the payment, as before, would come from the Ministry of Works and Transport, on receipt of a recommendation from the applicant. The first respondent denied that she was informed at any time that the applicant was acting on behalf of Ministry of Works and Transport. However the first respondent could not dispute the proof of payment of her previous compensation from this ministry.

[13] Mr Small appearing for the first respondent argued that the judgment was not erroneously granted. He contended that the defect in the summons was not such that judgment could have been granted erroneously because rule 14(1) provides that a defendant in every civil action is allowed 10 days from service of the summons within which to defend the action. He also referred to rule 14(6) which provides that a notice of intention to defend may be delivered after the expiry of this period, but before default judgment has been granted.

[14] As regards the rescission in terms of the common law, it was submitted that the application was launched approximately 6 weeks after default judgment was granted and

that this was not a reasonable time. He also submitted that there was no bona fide defence in the circumstances.

[15] As regards the judgment being erroneously granted, I am of the view that despite the defect in the summons and the first respondent obtaining the judgment a day before it was indicated in the notice of set down that default judgment would be applied for, the default judgment was not erroneously granted. Rule 14 makes provision for a notice of intention to defend within 10 days of service of summons. Further in terms of rule 14(6), the notice of intention to defend was filed after default judgment was already granted. Ex facie the particulars of claim, a case was made out, and default judgment could have been granted in the circumstances, although the failure to even give due consideration of the enabling legislation in the drafting of the claim is not lost on the court.

[16] As regards the question of whether a case is made out for rescission of the judgment on the basis of the common law, it is incumbent on an applicant to satisfy the court that there is a reasonable explanation for the default, that the application is bona fide and not made with intention to delay the plaintiff's claim. An applicant must further show that he or she has a bona fide defence in the sense of setting out averments which, if established at the trial would entitle the applicant to the relief asked for. The party need not deal fully but must deal sufficiently with the merits of the case.²

[17] It is apparent that the applicant intended to defend the action at the outset. A notice of intention to defend was delivered 4 hours after default judgment was granted. The practitioners for the applicant also checked the court file and based on the notice of set down indicating that the application for default judgment would be heard on 26 March 2021, delivered the notice of intention to defend on 25 March 2021. The applicant also immediately after finding out through its legal practitioners that default judgment was granted, contacted the first respondent's legal practitioners on 31 March 2021 and indicated that it had defended the matter. It was indicated in this correspondence that in law the first respondent was not entitled to the grant of that order. After indicating that they would revert, no response was received from the first respondent's legal practitioners.

[18] After the first respondent's firm did not respond, instructions were received to apply for rescission. Legal counsel was instructed, and legal research was then conducted on

² See *De Villiers v Axiz (Pty) Ltd* supra; *Grove Mall (Pty) Ltd v Wago Investments CC t/a Bata Shoes* (CA 12/2017) [2017] NAHCMD 252 (28 August 2017) at para 19; *Luderitz Tuna Exporters (Pty) Ltd v Cato Fishing Enterprises CC* (I 361/2011) [2013] NAHCMD 166 (18 June 2013) at para 21.

various aspects of the law. The applicant provided additional documents to its legal practitioners which were transmitted to instructed counsel and perused. Consultations were arranged with various employees of the applicant that had personal knowledge of the first respondent's claim. Draft founding papers were prepared and input sought from the various deponents to the founding papers. The applicant further stated that their counsel required time to attend to further research and thereafter the papers were finalised. Although the applicant was scant with the time frames within which these events leading to the launching of the application occurred, I am satisfied that in this case, there was no unreasonable delay. In any event, Mr Small did not make much in argument of the question of reasonable time, relying in the main on the absence of a bona fide defence.

[19] From the foregoing and in the particular circumstances of this case, I hold the view that a reasonable explanation for the default has been provided.

[20] As regards the bona fide defence, I am of the view that a bona fide defence was made out. Firstly, because of the nature of the first respondent's claim, but more importantly because of the applicant's averments to the effect that at no time did it indicate that it would be the party compensating the applicant. Secondly, during the process of considering compensation, the first respondent was advised that the applicant was acting on behalf of Ministry of Works and Transport and therefore as agent of the Ministry of Works and Transport. The applicant's case is that the obligation to pay never lay with it, but the Ministry of Works and Transport. It coordinated the administrative part of the legislative compensation process, and then made recommendations to the Minister of Works and Transport as to the amounts to be paid after the first respondent's portion land was valued for purposes of determining an amount to be paid to the first respondent. It is apparent from the annexures to the applicant's papers that payment of previous compensation to the first respondent was made by the Ministry of Works and Transport.

[21] Section 16(6) of the Roads Authority Act together with the provisions of the Road Ordinance, 1972 bear out the applicant's argument. This legislative aspect is also not denied by the first respondent in her answering affidavit.

[22] On this basis, I hold the view that a bona fide defence is disclosed. Averments have been set out that, if established at trial, would entitle the applicant for rescission to the relief asked for.

[23] In light of the foregoing, the applicant has made out a case for rescission under the common law.

Judge's signature:	Note to the parties:
SCHIMMING-CHASE Judge	Not applicable.
Counsel:	
Applicant	First Respondent
D KHAMA <i>Instructed by</i> Shawka Nyambe Inc., Windhoek	D SMALL <i>Instructed by</i> Theunissen, Louw & Partners, Windhoek