REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		**Case No:**
		HC-MD-CIV-ACT-CON-2021/02129
Gert Jacobus Feris	1st Applicant	**Division of Court:**
Elizabeth Feris	2nd Applicant	Main Division
		Heard on:
and		05 August 2022
James Jacobs	1st Respondent	
Magrita Dorothea Diergaardt	2nd Respondent	
Ansonette Viljoen	3rd Respondent	
Denzel Jarvis	4th Respondent	
Aquarius Investments 150 CC	5th Respondent	
Registrar Of Deeds Office (of Rehoboth District)	6th Respondent	
Heard before: Honourable Lady Justice Rakow		**Delivered on:** 25 August 2022
		Reason released: 29 August 2022

Neutral citation: *Feris v Jacobs* (HC-MD-CIV-ACT-CON-2021/02129) [2022] NAHCMD 439 (25 August 2022)

Order:

1. The application for rescission is dismissed, with costs of one instructing and one instructed counsel. Cost shall not be capped in terms of rule 32(11).
2. The matter is removed from the roll and is regarded finalised.

Reasons for order:

RAKOW J:

Introduction

[1] The applicants and the first respondent know one another for some time and owns farming land situated next to one another. On about 13 December 2018, in Rehoboth the applicant and the first and second respondents entered into a written agreement regarding the sale of a 100 hectare portion of Portion B, which forms part of Portion 2 of the farm Verdruk no 268. The selling price for this piece of land was agreed to be N$600 000, payable to the first and second defendant and the applicant then also had to pay the costs incurred with the registration of the property.

[2] It was the allegation of the first and second respondent that the applicant only paid the amount of N$100 000, and as such still owed them the amount of N$500 000. They served the applicant with a letter of demand dated 28 April 2021 and then proceeded to sue him. The applicant together with the other parties were served but none of the parties indicated that they intend to defend the matter.

[3] On 19/10/2021 this court gave them the following order:

'Default Judgment is granted in favour of the plaintiff against the 1st, 4th, and 6th Defendants in the following terms:

1.1. The transfer of the 100-hectare portion of land to the first defendant be set aside.

1.2. The sixth defendant is ordered to retransfer the 100-hectare portion of land into the first and second plaintiffs' name.

1.3. The sixth defendant is ordered to issue a new registration certificate indicating that the first and second plaintiffs are the owners of the 100-hectare portion of Portion B of Portion 2 of Farm Verdruk 268.

1.4. The first defendant and all other persons unlawfully occupying the undivided portion of Farm Verdruk No 268 measuring 100 hectares is evicted and ordered to vacate the property within 5 (five) days of this order.

1.5. In the event that the first defendant or any other person not vacating the premises, the deputy sheriff for the district of Windhoek is authorized and ordered to take all necessary steps to evict and eject the first defendant and any other unlawful occupiers and/or possessors from the property.

1.6. Costs of suit on a scale as between attorney and client, such costs to include the costs of one instructing and one instructed counsel.'

Explaining the delay in bringing the rescission application

[4] The application before court currently, is an application in terms of rule 16 for the rescission of the above judgment. The applicant explained in his founding affidavit that a warrant of eviction was authorized following the above judgment, and the deputy sheriff, left the said notice at the premises where the applicant resides on 26 November 2021. According to the applicant, it was at that stage that he learned that the summons in the main action was served on him personally on 4 June 2021. He denies that he ever received the summons. He then proceeded to contact a certain Mr Maletzki, who is his business partner as he thought Mr Maletzki was a legal representative. Mr Maletzki indicated to him that he will take care of the matter.

[5] Mr Maletzki apparently drafted some papers and filed an urgent application to stay the eviction, to this court, which was set down for hearing on 21 December 2021 at 9h00. There is no confirmatory affidavit of Mr Maletzki, but from the affidavit of the applicant it seems that he left the matter in Mr Maletzki's hands. He afterwards learned that the application was postponed to 29 December 2021 because Mr Maletzki apparently fell ill and was booked off until 3 January 2022, and as a result the matter did not proceed and was struck from the roll. The applicant only learned of this when he attended the offices of his legal practitioner on 11 January 2022, after they returned from holiday during the festive season. He paid a deposit to his legal practitioner and could only pay over the necessary funds during February 2022.

[6] He further states that his legal practitioner fell ill during the period 22 -23 February 2022 and again during the period 3 – 18 March 2022. He also had to collect various documents. When his legal practitioner returned on 22 March 2022, they consulted and on 31 March 2022 she contacted the legal practitioner for the respondents and requested a rule 32(9) engagement and there-after filed the current rescission application and which application was eventually filed on 5 April 2022.

Service of process on applicant

[7] The applicant denies that he was served with the summons and particulars of claim personally. According to the return of service, the deputy sheriff for the district of Windhoek, Mr Keith Rickerts served these documents on the applicant personally on 4 June 2021 at 14h13. He

did not indicate in the return where he served him, but the address specified on the summons, was portion B of portion 2 of farm Verdruk no 268. He further denies that he at any time received letters of demand from the respondents.

[8] This is denied by the applicant and he attached two uncommissioned documents titled 'affidavit' to his founding affidavit, one from a certain Mr Peter Iyambo Peter who indicate that he travelled from Windhoek to the River Mountain View Estate to sort out issues with his water installation. He picked the applicant up from his office at Kransneus after 12h00 and they spend the whole day together till after 17h00. Mr Harald Maletzky (not the Mr Maletzky referred to above) who also indicated that he saw the applicant that day at Farm Kransneus between 12h30 and 13h30 and later in the afternoon. These documents are, however, not commissioned and therefore cannot be said to be statements under oath and little value is attached to them.

[9] Mr Riekerts on the other hand, filed a supporting affidavit, correctly commissioned, in which he explained in detail how he served two letters of demand and the summons on the applicant. The first letter of demand was served on the mother of the applicant on 14 August 2020 at 16h30 at the farmhouse on farm Kransneus. On 28 April 2021, he again served a letter of demand on the applicant personally at the farm Kransneus. He further remember a request to serve the summons on the defendant personally and proceeded to the farmhouse at farm Kransneus where he found a woman who informed him that the applicant is busy on the farm with some development. He asked her to phone the applicant which she then did. The applicant arrived minutes later and he served him with the summons. He further remembered that when the applicant saw the names on the summons he said something to the effect of 'tell these people not to send me such love letters.'

The defense

[10] The initial relief sought, was on the ground of a breach of contract where the applicant failed to pay for a portion of land that was bought by him from the two respondents. In their particulars of claim they allege that he only paid them N$100 000 of the agreed purchase price of N$600 000. The applicant allege that he in fact paid them N$150 000 and attached an

agreement from Ms Evaristus and Mr Joao for the sale of a portion of farm Kransneus, which monies he allege he picked up on 13 December 2018 and handed over at a coffee shop in Windhoek to the two respondents. He therefore alleges that he paid over N$150 000 to them and not only N$100 000.

[11] He further indicated that he was approached by the respondents in 2016 to assist them with the selling of portions of the farm Verdruk in a 60/40 appropriation. He indicate that he assisted with two sales being that of Ms Hagen and Mr Jacobs, but did not receive his share of the money. As a result of this, the arrangement came to an end in 2017. He further performed some work as part of this development which includes construction of boreholes and roads on the farm at his own costs. He therefore denies that he was indebted to the respondents for the amount of N$500 000. There is however no calculation of the amounts alleged to be owed to the applicant by the respondents, neither is there any document indicating what the costs of the borehole construction nor the roads were.

Legal considerations

[12] Rule 16 of the High Court Rules reads as follows:

'(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N$5 000, set aside the default judgment on such terms as to it seems reasonable and fair, except that –

(a) the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security; or

(b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.

(3) A person who applies for rescission of a default judgment as contemplated in subrule (1) must –

(a) make application for such rescission by notice of motion, supported by affidavit as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security;

(b) give notice to all parties whose interests may be affected by the rescission sought; and

(c) make the application within 20 days after becoming aware of the default judgment.

(4) Rule 65 applies with necessary modification required by the context to an application brought

under this rule.'

[13] It has become trite that the following principles, as set out in *Telecom Namibia Limited v Michael Nangolo and Others*[1], Damaseb JP guides applications for condonation, which is also applicable for consideration in this matter as the applicant failed to bring his rule 16 application within the 20 day period after becoming aware of the default judgment against him.

'1 It is not mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.

2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.

3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.

4. The degree of delay is a relevant consideration.

5. The entire period during which the delay had occurred and continued must be fully explained.

6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court.)

7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of court is flagrant and gross, prospects of success are not decisive.

8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with rules, should be considered.

9. If there are no prospects of success, there is no point in granting condonation.'

[14] In the matter of *Krauer and Another v Metzger,*[2] Strydom AJA sets out the requirements

[1] *Telecom Namibia Ltd v Nangolo and Others* (Case No LC 33/2009, Damaseb JP, 28 May 2012).

that need to be met as follows:

'In an application for rescission of a default judgment an applicant must comply with the following requirements to meet with success, namely:

"(a) He must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal with the merits of the case and produce evidence that the probabilities are actually in his favour."'

[15] On these requirements, Smuts J explained as follows in *Katzao v Trustco Group International (Pty) Ltd and Another:*[3]

'The requirement of good cause in rule 56(3) itself entails two requisites. Firstly, the applicant must provide a reasonable explanation for his default which would exclude a court from coming to his assistance where his default was either wilful or due to gross negligence. Secondly, the applicant must establish a bona fide defence to the first respondent's claim which is to be established on a prima facie basis in the sense of setting out averments which, if established at the trial, would entitle him to the relief sought.

[39] In examining an applicant's explanation for his default, it has been held that it is clearly incumbent upon an applicant to disclose with a degree of particularity what it was that prevented him from attending court or being represented in court.

[40] It is also well established that a party must meet both requisites, thus establishing a reasonable and adequate explanation for his default as well as reasonable prospects of success on the merits.

[41] In determining this application, this court is enjoined by rule 56(1) to have regard to all the circumstances including those set out in rule 56(1)(a) – (h).'

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[2] *Krauer and Another v Metzger* (2) 1990 NR 135 (HC).

[3] *Katzao v Trustco Group International (Pty) Ltd and Another* [2011] NAHC 350. Appeal 108 of 2014) [2014] NAHCMD 175 (04 June 2014).

Discussion

[15] The onus rests on the applicant to satisfy the court that his failure to comply with the 20 day requirement in rule 16 can be explained and was not due to his own negligence. His notice of motion further does not contain a prayer for the court to condone his late filing of the application. When considering the issue of condonation, it is trite that the person seeking condonation needs to give a reasonable explanation for his default and needs to take the court in his confidence and explain his non-compliance taking into account the whole period. In the current instance the court is not satisfied that the initial period from 26 November 2020 until 21 December 2021. He can further not escape the negligence of the person he appointed to assist with his urgent application and the fact that he did not pay closer attention to the matter as from the documents attached to his founding affidavit, it is clear that the application was brought in his name.

[16] A further obstacle that the applicant face, is that from the affidavit of Mr. Riekerts the court must conclude that he indeed received the summons and at least one of the notices of demand personally. The documents the applicant attach to his affidavit is of very little assistance as they are not supporting affidavits. In *Erf No 5 Langstrand No 1 CC and Another v Minister of Regional and Local Government, Housing and Rural Development and Other*[4] van Niekerk J held the following regarding proof of service:

'Section 32(2) of the High Court Act, 1990 (Act 16 of 1990), provides that the deputy sheriff's return shall be prima facie evidence of the matters stated therein. In regard to the equivalent provision namely, section 36(2) of the Supreme Court Act, 1959 (Act 59 of 1959) (previously applicable in South Africa) the authors Herbstein and Van Winsen of the work The Civil practice of the Supreme Court of South Africa (4th ed), state at p. 303:

"….. [I]t is clear that, the return not being conclusive but merely prima facie evidence of service, proof that there has been no or insufficient service will be allowed, although the *maxim omnia praesumuntur rite esse acta* applies to a return of service, and the clearest and most satisfactory evidence will be required to rebut this presumption and to impeach the return."'

[4] *Erf No 5 Langstrand No 1 CC and Another v Minister of Regional and Local Government, Housing and Rural Development* and Other (A223-2006) [2017] NAHCMD 357 (8 December 2017).

[17] The court is therefore not satisfied that the applicant did not receive service of the summons and therefore makes the following order:

1. The application for rescission is dismissed, with costs of one instructing and one instructed counsel. Cost shall not be capped in terms of rule 32(11).
2. The matter is removed from the roll and is regarded finalized.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	
Applicant	**Respondents**
N Ndilula-Ndamanomhata Of Kadhila Amoomo Legal Practitioners, Windhoek	L Lochner On instruction of Engling, Stritter & Partners, Windhoek