

Reasons for orders:Introduction

[1] The court is yet again faced with an application seeking to rescind its judgment. Whereas the second respondent merely filed an explanatory affidavit regarding a side issue that arose in the matter, the main protagonists are the applicant and the first respondent. The applicant acts in person, and Mr Strydom appeared on behalf of the first respondent.

Background

[2] On 1 March 2018, default judgment was granted against the applicant for N\$1 053 321,18 regarding a loan agreement entered into between the applicant and the first respondent under case number HC-MD-CIV-ACT-CON-2018/00054. After an unsuccessful attempt by the second respondent to satisfy the judgment debt, the second respondent issued a nulla bona return of service, which is the subject matter in these proceedings. The first respondent then applied to declare the applicant's immovable property executable. The applicant was served with the notice of the intended application on 19 September 2019. However, the applicant did not file any opposition to the intended application. A return of service, which is also the subject matter of this application, was filed of record, indicating that the applicant was personally served with the notice. On 1 November 2019, this court granted the application to declare the immovable property executable.

The application

[3] The golden thread of the applicant's case, as per her founding affidavit, is that the court order was obtained based on two false returns of service. Hence, the applicant seeks the following relief:

1. Declaring the return of service (nulla bona) filed by the second respondent on 9 September 2019 regarding the writ of execution of the movable property null and void.
2. Declaring the return of service filed by the second respondent on 20 September 2019 regarding rule 108 (2)(a) notice null and void.
3. Declaring that the order declaring the immovable property Erf 2563, Khomasdal Extension 4, Khomas Region, emerged principles which cumulatively considered, the categorical imperatives of the doctrine ex debito justitiae.

4. Declaring all other proceedings consequent to the declaration of applicant's primary home specially executable null and void.
5. Ordering the stay of the writ of execution pending the outcome of this application.
6. Granting the applicant further and/or alternative relief as the court may deem fit to resolve the status quo as at 1 November 2019.'

Submissions by the parties

[4] The applicant complains, in her founding affidavit, that the return of service indicating that the notice of the rule 108 application which was served on her is false as it refers to the applicant as 'Him' and not 'Her'.

[5] Furthermore, another complaint by the applicant is that the nulla bona return of service is false as there was sufficient movable property on the premises to satisfy the judgment debt, namely a vehicle valued at N\$600 000 and furniture valued at N\$100 000. The applicant concludes in her founding affidavit that she seeks to set aside the court order as it is based on false returns of service.

[6] The first respondent opposes the application and raises several points in limine. I will deal with the most prominent points in limine only.

[7] The first point in limine is that the applicant's prayer in the notice of motion, which seeks to declare the court order of 1 November 2019 as 'emerged principles which cumulatively considered the categorical imperatives of the doctrine *ex debito justitiae*,' as incompetent relief.

[8] The second point in limine is two-fold, namely *res judicata* (and *functus officio*), and the upshot of it is that the court cannot entertain the rescission application as it is a matter that meets all the requirements of *res judicata*, i.e. it relates to a judgment that is final and definite on the merits of the case, the matter concerns a judgment given in litigation to which the present parties were parties, and lastly, the cause of action is the same. In addition, or therefore rather, the court cannot revisit the matter as it is *functus officio*.

[9] Finally, a third point in limine is raised, which is also two-fold; unreasonable delay and waiver. The objection is that the application was not brought within a reasonable time as required by rule 103 and the common law, and that the applicant does not provide a reasonable explanation as to why it was only brought three years after the fact. As a result, the applicant

should be deemed to have waived her rights to pursue the application.

[10] I will deal with each point in limine separately.

Legal principles and discussion

[11] Right from the onset, I need to point out that the applicant's papers are lacking and poorly drafted. However, this court takes heed to the approach to lay litigants laid out in the case of *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*,¹ where Maritz JA made the following observations:

[8] Notwithstanding the apparent inadmissibility of the review application and the significant irregularities in its form, it nevertheless disclosed alleged irregularities in the proceedings of the High Court which this Court had to take note of. The applicant is a lay litigant and, as M T Steyn J remarked in *Van Rooyen v Commercial Union Assurance Co of SA Ltd*, it would “be manifestly unjust to treat lay litigants as though they were legally trained...”. They are unlikely to “fully appreciate the finer nuances of litigation” and, I should add, to completely appreciate the principles bearing on the Court’s jurisdiction. Bearing in mind that lay litigants face significant hurdles due to their lack of knowledge and experience in matters of law and procedure and, more often than not, financial and other constraints in their quests to address real or perceived injustices, the interests of justice and fairness demand that Courts should consider the substance of their pleadings and submissions rather than the form in which they have been presented. The applicant might have articulated his grievances ineptly; might have overreached the ambits of his rights; might have adopted the incorrect procedure, but the substance of his complaint – which this Court had to take note of - remained the same. i.e. that the order made against him was vitiated by irregularities in the application proceedings before the High Court and should be reviewed.’ (footnotes omitted)

[12] Applying the above guiding principles to the present matter and when looking at the substance of the application, it is important to note the following:

a) Although the applicant does not seek ‘rescission’ in express terms, it appears that she is essentially trying to pray for an order rescinding the court order of 1 November 2019, which declares the immovable property executable.

b) However, for some odd reason, the applicant does not seek rescission of the default judgment granted on 1 March 2018, which is the underlying causa for the pursuant warrants of execution and, ultimately, the order of 1 November 2019. In this regard, it is necessary to point

¹ *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* (SCR 3 of 2007) [2008] NASC 19 (3 December 2008).

out that in *Le Roux v Yskor Landgoed (EDMS) Bpk en Andere*,² the court held that a writ can only be set aside if the writ is no longer supported by the underlying causa.

Doctrine ex debito justitiae

[13] With regards to the point of incompetent relief, the prayer sought to declare the court order as ‘emerged principles which cumulatively considered, the categorical imperatives of the doctrine ex debito justitiae’. The phrase *ex debito justitiae* simply means as of right. This is a general term the applicant uses without any basis in law or otherwise upon which the applicant claims this relief. The applicant’s application indeed lacks the foundation upon which she contends the judgment of 1 November 2019 should be declared null and void. I am of the view that this relief sought by the applicant is incompetent as this court does not have the power to make such declarations in respect of its court orders. In my view, the objection of incompetent relief for lack of merit stands to be dismissed. This brings me to the next point in limine.

Res judicata / functus officio

[14] The objection taken here is that the matter before the court is res judicata and the court functus officio, and therefore, the court should decline to hear it.

[15] It is trite that the inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments other than in specific circumstances provided for in the rules or the common law. This is because of the importance of litigation being brought to finality and because a court becomes functus officio once it has pronounced a final judgment.³

[16] In the present case, the applicant filed a ‘rescission’ application, and I did not understand counsel for the first respondent’s argument when he argued that a rescission application is not one of the procedural mechanisms under the rules and the common law in terms of which a court may depart from the doctrine of functus officio and the doctrine of finality.

[17] If one has regard to the issues raised in the application, the main complaint is that rule 108 was not complied with as the return of service was wrong in stating that she had insufficient movable property when, in fact, she did and that it refers to her as ‘him’ (although this

² *Le Roux v Yskor Landgoed (EDMS) Bpk en Andere* 1984 (4) SA 257 A-B.

³ *N v N* (2283/2021) [2022] ZAECMKHC 14 (17 May 2022); *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) para 16.

typographical error was not pursued by the applicant perhaps in light of the clarification affidavit filed by the second respondent). Indeed, the applicant would not be able to attack the judgment on this basis on appeal as she would be confined to the four corners of the record. A rescission application would be the only course open to her, especially considering the order was granted in her absence. Although the judgment under attack subsequently became final as it was not appealed, the applicant is still entitled in terms of the rules and the common law to bring an application for rescission of the court order, provided a reasonable explanation is given for the delay in instituting the application. This was confirmed in *RM Trading Enterprises CC v Bruni*,⁴ where this court was faced with a similar objection and held as follows:

[17] The respondents assert that the proper procedure that the applicants ought to have pursued was through an appeal. I do not agree. The court had committed a procedural irregularity, and a serious one at that. This is no small matter. The court in effect denied the applicants their right to access the courts and yet “access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established.

[18] For the serious and unconstitutional procedural irregularity committed, I have found that the 1 September 2021 order was erroneously sought or erroneously granted. What the applicants complain of is a matter of procedure, that is, the way the impugned order was made. In our law, an appeal will not be a proper remedy.⁵ Fortunately for a person who wishes to apply to rescind such order, the rules of court in rule 103 provide a straightforward procedure. There is also a procedure at common law.

[19] In any case, I know of no authority – and none was referred to me – that, if an order can be attacked by appeal, the court is barred from granting a rescission order and setting aside the impugned order. The prevailing view should be that it ought not to make any difference to the court, through which door the applicant enters.’

[18] I see no reason why I should depart from the view adopted by Parker AJ on this issue, therefore, the point in limine of res judicata / functus officio should be dismissed.

Unreasonable delay

[19] The first respondent had another string to its bow and raised the point that the application was not brought within a reasonable time as required by rule 103. The applicant, so the argument

⁴ *RM Trading Enterprises CC v Bruni* (HC-MD-CIV-MOT-GEN-2022/00284) [2022] NAHCMD 598 (2 November 2022).

⁵ *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) para 6.

went on, has waived her rights to pursue the application as she does not explain in her founding affidavit why the application was only brought three years after the fact. How does the applicant fare on this point? The legal position on this score is imperative before dealing with the averments in the founding affidavit.

[20] Rule 103(1)(a) reads as follows:

‘103(1) In addition to the powers it may have, the court may of its own initiative or on application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

a. erroneously sought or erroneously granted in the absence of any party affected thereby.’ (My emphasis)

[21] The applicable legal principles which is considered by the court whether a particular application has or has not been brought within a reasonable time since the event was discussed by Damaseb JP in *Kleynhans v Chairperson for the Municipality of Walvis Bay and Others*⁶ at para 41 of the judgment as follows:

‘[41] In *Ebson Keya v Chief of Defence Forces and 3 Others*,⁷ the court had occasion to revisit the authorities on unreasonable delay and to extract from them the legal principles applied by the Courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernable from the authorities examined:

(i) The review remedy is in the discretion of the Court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest in certainty.⁸ The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.

(ii) If the delay was unreasonable, the Court has discretion to condone it.

(iii) There must be some evidential basis for the exercise of the discretion: The Court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.

⁶ *Kleynhans v Chairperson for the Municipality of Walvis Bay and Others* 2011 (2) NR 437.

⁷ *Ebson Keya v Chief of Defence Forces and 3 Others* Case No. A 29/2007 (NmHC) (unreported) delivered on 20 February 2009 at 9-11, paras 16-19.

⁸ *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C) at 968J-969A; *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F and *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) para 22.

(iv) An applicant seeking review is not expected to rush to Court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.

(v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.

(vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them that a review application is contemplated.⁹ In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.’ (My emphasis)

[22] Bringing the above principles closer to home, the court order under attack was granted on 1 November 2019, and the current application was only filed on 2 February 2023, more than three years after the fact. This court is of the view that the three-year delay in bringing the application is inordinately long, and this inordinately long delay calls for a reasonable and acceptable explanation, which would inform the court in it exercising its discretion as to whether or not to condone the delay. Unfortunately, the applicant’s founding affidavit, in support of the application, does not contain a single word explaining why the application was delayed for more than three years. In light of this fatal shortcoming, the court’s hands are tied as there is nothing to consider for the court to exercise its discretion as instructed in the *Kleynhans* matter.

[23] Counsel for the first respondent implored the court to consider the need to achieve finality in litigation. I agree. In *Disposable Medical Products v Tender Board of Namibia*,¹⁰ Strydom JP said:

‘[132] In deciding whether delay was unreasonable two main principles apply. Firstly whether the delay caused prejudice to the other parties and secondly, the principle applies that there must be finality to proceedings.’

[24] It is common cause that by 12 December 2019 already, the applicant knew about the writ of execution as evidenced by correspondence directed by the applicant’s erstwhile legal practitioner to the first respondent’s legal practitioner of record. As the sale in execution could take place at any time after that, the first respondent was convinced by the applicant through the

⁹*Kruger v Transnamib Ltd (Air Namibia) and others* 1996 NR 168 at 170H et 172A.

¹⁰ *Disposable Medical Products v Tender Board of Namibia* 1997 NR 12 t para 132D.

said erstwhile legal practitioners, on more than one occasion, to halt the sale in execution by offering to repay the outstanding debt by way of monthly instalments to the amount of N\$19 720 and N\$40 000, respectively.

[25] Now, nearly four years after the judgment debt was granted, the applicant's debt has increased in interest, and the applicant is still indebted to the first respondent for N\$1 169 199,84. The prejudice that the first respondent has suffered due to the delay is as clear as day. In light of the applicant's settlement efforts after learning about the writ of execution, coupled with the applicant's failure to provide a reasonable explanation for the delay, the only inference to be drawn is that the applicant had at all material times acquiesced herself with the court order of 1 November 2019, when she instructed her erstwhile legal practitioners to enter into settlement arrangements as opposed to bringing this rescission application. This application is, therefore, not brought in good faith and should be seen for what it is, namely an attempt to frustrate the finality of this court's order. Such conduct should be frowned upon, and in this regard the court deems it imperative to refer to *Sikunda v The Government of the Republic of Namibia*,¹¹ where Mainga J made the following observations:

[92] Judgments, orders, are but what the Courts are about. The effectiveness of a court lies in execution of its judgments and orders. You frustrate or disobey a court order you strike at one of the very foundations, which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth of anarchy. A rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded.'

[26] Having concluded as I did, I am satisfied that the point of unreasonable delay has merit and should be upheld and the application should be dismissed on this basis alone.

Authority

[27] Serving as a last kick of the proverbial dying horse, the applicant sought to bolster her case by raising a new ground of rescission in her heads of argument, in that the first respondent did not authorise its legal practitioners on record to institute the rule 108 proceedings. In this regard, the applicant relies on the *Namfisa v Christian t/a Hope Financial Services*¹² and *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority*.¹³ The contention by the

¹¹ *Sikunda v The Government of the Republic of Namibia* 2001 NR 86 (HC) at 92 B.

¹² *Namfisa v Christian t/a Hope Financial Services* (SA 36-2016) [2020] NASC (20 October 2020).

¹³ *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* 2019 (4) NR 1109 (SC).

applicant has no merit for two main reasons.

[28] Firstly, the facts of the *Namfisa* judgment are distinguishable from this matter. In the *Namfisa* case, it was held that the rescission judgment obtained by *Namfisa* was a nullity as the power of attorney filed by its legal practitioners was not accompanied by a board resolution a resolution of the board as required by the then High Court Rules. The current High Court Rules do not require the filing of a power of attorney. Therefore, the point is weak.

[29] Secondly, in *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd*,¹⁴ it was held that an applicant needed to do no more in the founding affidavit than allege that authorisation had been duly granted. Where that was alleged, it would be open to the respondent to challenge the averments regarding authorisation. In the present matter, the applicant only raised the authority point in her heads of argument for the first time, and the first respondent was ambushed as a result. Therefore, the point fails as it is not raised in the papers. In this regard, I must point out that in the *Namfisa* case, unlike in the current matter, the issue of lack of authority was pertinently raised in the founding affidavit in support of the review application launched in terms of s 16 of the Supreme Court Act 15 of 1990.

Conclusion

[30] Having found that the third point in limine raised by the first respondent has merit, in that the applicant did not bring the application within a reasonable time, the court does not have to determine whether procedural errors flouted the judgment under attack.

[31] My order is as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	

¹⁴ *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298.

Applicant	First Respondent
D Ndunovandu In person, Windhoek	A Strydom (assisted by R Linde) Of Theunissen, Louw & Partners, Windhoek