REPORTABLE

CASE NO: SA 40/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GIBEON VILLAGE COUNCIL	**First Appellant**
and	
DEVELOPMENT BANK OF NAMIBIA	**First Respondent**
ALDRIN BRINKMANN t/a AB CONSTRUCTION	**Second Respondent**
ANNA-LUCIA BRINKMANN	**Third Respondent**
DEPUTY SHERIFF FOR THE DISTRICT OF GIBEON	**Fourth Respondent**

Coram:	MAINGA JA, SMUTS JA, and UEITELE AJA
Heard:	**7 October 2022**
Delivered:	**21 October 2022**

Summary: This appeal attacks the practice of judgments by default being granted in chambers ‘in the absence of the parties’ as being in conflict with s 13 of the High Court Act 16 of 1990, Art 12 of the Namibian Constitution and concerns the ambit of rule 103 of the Rules of the High Court (the rules).

On 26 April 2019, the High Court, in chambers, granted default judgment against the appellant for payment in the sum of N$2 555 821,77 with interest at the instance of the Development Bank of Namibia (DBN). The claim against the appellant was embodied in an alternative claim based on a breach of the cession agreement in which the appellant undertook to pay over to DBN amounts due to the debtors as and when they became due. On 21 August 2019, in terms of rule 103(1)(a) of the rules, appellant launched, on an urgent basis, an application for rescission of the default judgment on the grounds that it was erroneously sought or granted in the absence of the appellant. Although certain clauses in the cession agreement were quoted in the rescission application and there was reference to the particulars of claim, neither document was attached to the founding affidavit.

The court *a quo* dismissed the rescission application, finding that rule 103 did not find application. The court found that rule 103 concerned orders and judgments other than default judgments and that default judgments can only be set aside under rule 16 which requires that such an application be brought within the 20 day time limit specified in that rule; and that the time limit in rule 16 was peremptory. The court *a quo* further found that appellant had failed to place any evidence as to why it could not have brought the application within 20 days after becoming aware of the default judgement. The court *a quo* dismissed the rescission application.

On appeal, appellant argued that the court *a quo* erred in holding that rule 103 is not applicable to default judgments and that they could only be challenged under rule 16. Appellant argued that rule 103 can be invoked where judgments are granted by default.
Appellant further argued that the default judgment of 26 April 2019 was a nullity as it was not set down for hearing in open court and the order was issued in chambers. Appellant argued that this was *ultra vires* s 13 of the High Court Act and in conflict with Art 12 of the Constitution and the appellant's right to a fair trial.

Held that, the High Court in this matter was incorrect in stating that rule 103(1)(a) is only applicable to judgments and orders other than default judgments. The rule contains no restriction of this nature and can be invoked by a party where a judgment by default is obtained against them.

Held that, the fact that an application for rescission is brought in terms of one rule does not mean it cannot be entertained pursuant to another rule or the common law provided of course that the requirements of each of the procedures would be met

Held that, a court would not only have regard to what was before it when granting the judgment but also the facts set out in the rescission application. In this case, the appellant was hampered by failing to include the particulars of claim as part of its rescission application.

Held that, the appellant failed to deal with the evidence in DBN's answering affidavit in its replying affidavit. It instead elected not to do so or to properly dispute DBN's motivated and supported assertion that the payments of the debtors were due.

Held that, the right to a fair and public hearing entrenched in Art 12 vests in persons in the determination of their civil rights and obligations. The appellant did not dispute its rights and obligations in the civil proceedings in the court *a quo* after being accorded the opportunity to do so after the service of the combined summons in civil proceedings.

Held that, the failure to dispute those rights and obligations determined their liability for a judgment by default (provided that the summons disclosed a cause of action), as is plainly indicated in the legal process served upon them. Appellant's rights and obligations under Art 12 are not engaged when it elected not to participate in the proceedings. But once the appellant takes issue with those rights and obligations contended for in the summons, it is entitled to a public hearing in the determination of its rights and obligations. That occurred when it brought its rescission application which was determined following an open and public hearing. The appellant thus cannot claim an infringement of its Art 12 rights if it elected not to dispute the civil proceedings against it when judgment by default was granted against it.

Held that, there was no infringement of the appellant's rights to a fair trial under Art 12.

The appeal is dismissed with corrections made to the court *a quo*'s court order in respect of interest and costs.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and UEITELE AJA concurring):

Introduction

[1] This appeal challenges the practice of judgments by default being granted in chambers 'in the absence of the parties' as being in conflict with s 13 of the High Court Act 16 of 1990 and Art 12 of the Constitution. This appeal also concerns the ambit of rule 103 of the Rules of the High Court (the rules).

Litigation history

[2] On 26 April 2019 judgment by default was granted against the appellant for payment in the sum of N$2 555 821,77 together with interest at the instance of the Development Bank of Namibia (DBN).

[3] On 21 August 2019 the appellant launched an application for rescission of that default judgment.

[4] The rescission application was brought in terms of rule 103(1)(a) of the rules on the grounds that it was erroneously sought or granted in the absence of the appellant.

[5] The application was brought on an urgent basis because steps in execution were imminent.

[6] It was contended that the judgment was erroneously granted. It was stated that the particulars of claim alleged that DBN had granted a loan to two other parties (the debtors) to which the appellant was not party. As security for that loan, the debtors ceded their rights to all their income from the appellant, a village council, in respect of a tender awarded to the debtors by the appellant. It was stated that the particulars also alleged that the appellant had in terms of the cession agreement undertaken to make payments to DBN in repayment of the debtors' loan as and when the debtors became entitled to payment from the appellant.

[7] It was alleged in the rescission application that the payments to DBN would only arise under the cession agreement when they were due to the debtor but that this allegation had not been made in the particulars of claim. In the absence of such an allegation, it was contended that an order against the appellant should not have been granted.

[8] It was also contended that the court should have specified if the order was granted under the main or the alternative claims contained in the particulars of claim. It was also alleged that the order in respect of interest was erroneous because it was with reference to compound interest at the rate of 12,5 per cent per annum 'by agreement'. It was contended that the appellant was not party to the loan agreement and that this was an error.

[9] Although certain clauses in the cession agreement were quoted in the rescission application and there was reference to the particulars of claim, neither document was attached to the founding affidavit.

[10] DBN opposed the rescission application. In DBN's opposing affidavit, the cession agreement was however attached and it was pointed out that as security for their indebtedness to DBN, the debtors ceded all their income from the appellant and that the appellant would be obliged to pay that income directly to DBN as and when that income became due to the debtors.

[11] DBN's answering affidavit further makes it clear that in breach of the appellant's undertakings in the cession agreement, the appellant made several payments directly to the debtors (in excess of N$7,8 million) with only approximately N$1,2 million paid directly by the appellant to the DBN under the cession. As a result, DBN was not able to recoup its loan from the debtors.

[12] DBN denied that the default judgment was erroneously sought or granted. DBN provided evidence with reference to a detailed breakdown of the payments and their dates (where the appellant paid to DBN around N$1,2 million and the sum in excess of N$7,8 million paid by the appellant to the debtors).

[13] In the answering affidavit, it is expressly alleged that the payments which should have been made by the appellant to DBN were due to the debtors with reference to the sums totalling in excess of N$7,8 million which were paid by the appellant directly to the debtors. It is pointed out that those sums would not have been paid had they not been due. This pertinent allegation is not placed in issue or

addressed in reply. The actual payments themselves made by the appellant directly to the debtors are also not placed in issue at all in reply except where it is stated:

> 'The payments that the applicant may have facilitated do not, with respect, disentitle the applicant from relying on section (sic) 103, as a matter of law.'

The approach of the High Court

[14] The High Court dismissed the rescission application, finding that rule 103 did not find application. The court held that rule 103 concerns orders or judgments other than default judgments and that default judgments can only be set aside under rule 16 which requires that such an application be brought within the 20 day time limit specified in that rule. The court further held that this time limit was peremptory.

[15] The court further held that the appellant had failed to place any evidence as to why it could not have brought the application within 20 days after becoming aware of the default judgment.

[16] The court accordingly dismissed the application.

The appeal

[17] The ambit of the appeal is set out in the notice of appeal. It confines the appeal to the High Court's interpretation of rule 103(1) - that it does not apply to default judgments and the finding that the appellant had failed to give a cogent and plausible explanation for the delay in bringing the application. A further ground was that the court below had failed 'to exercise its discretion in favour of rescission particularly

given the good defence the applicant set out in its founding affidavit'. The appellant's written argument seeks to raise matter not covered in the notice of appeal, arguing that the granting of the default judgment in chambers breached Art 12 of the Constitution. This point had however been raised in the rescission application. Given its public importance, the appellant was afforded the opportunity to advance argument on it. DBN did not oppose the appeal and was not represented when the appeal was heard.

Appellant's submissions on appeal

[18] The main thrust of the appellant's argument is that the High Court erred in holding that rule 103 is not applicable to default judgments and that they could only be challenged under rule 16. It was contended that rule 103 contains no limitation of this nature and that the rule can, if appropriate, be invoked where judgments are granted by default. Counsel pointed out that the court's interpretation of rule 103(1)(a) had not been put to counsel during argument. Had this occurred, counsel said that authority of this court to the contrary would have been placed before court. Counsel for the appellant also argued that the court erred in finding that the appellant failed to give a cogent and plausible explanation for the delay.

[19] It was also contended that the default judgment of 9 May 2019 was a nullity as it was not set down for hearing in open court and was heard and granted in chambers. Counsel submitted that this was *ultra vires* s 13 of the High Court Act and in conflict with Art 12(1)(a) of the Constitution and the appellant's right to a fair trial.

Rule 103

[20] It is well settled that a judgment taken in the absence of a party may be set aside in three different ways.

[21] Firstly, there is rule 16, entitled 'Rescission of default judgment' which is cast in terms similar to the previously applicable rule 31. It permits a defendant to apply to the court to set aside a judgment within 20 days of becoming aware of it. A defendant would need to establish good cause to succeed with such an application.

[22] Then there is rule 103(1)(a). The heading of this rule is 'Variation and rescission of order or judgment generally'. It is similar to the previously applicable rule 44(1)(a) and reads as follows:

> '(1) In addition to the powers it may have, the court may of its own initiative or on the 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 . . . .'

[23] Finally an applicant may apply to set aside a judgment under the common law which empowers a court to set aside a judgment obtained in default of appearance provided that sufficient cause is shown.[1]

[24] As was made clear by the Chief Justice in *De Villiers*, a judgment taken in the absence of a party may be set aside by that party in any one of these three ways.[2]

[1] *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) paras 9-10. See also *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1039.
[2] Para 19.

This would include a judgment or order granted by default, as occurred in this matter. An applicant for rescission would need to establish the requisites for the specific remedy invoked. The High Court in this matter was thus incorrect in stating that rule 103(1)(a) is only applicable to judgments and orders other than default judgments. The rule contains no restriction of this nature and can be invoked by a party where a judgment by default is obtained against them, as was confirmed by the Chief Justice in *De Villiers*.[3]

[25] As was also stressed by the Chief Justice in *De Villiers*,[4] the fact that an application for rescission is brought in terms of one rule does not mean it cannot be entertained pursuant to another rule or the common law provided of course that the requirements of each of the procedures would be met.[5]

[26] It does not follow that this lapse on the part of the High Court would mean that the appellant is entitled to rescission of the default judgment obtained against it. An appeal is after all against the result or outcome of the proceedings and not the reasoning employed to justify it. The appellant would need to show that the requisites presupposed by rule 103(1)(a) were established by the appellant.

Did the appellant meet the requisites of rule 103(1)(a)?

[27] The question then arises as to whether the appellant had established that the judgment was erroneously sought or granted in its absence as required by rule 103(1)(a).

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[3] Para 19.
[4] Para 19.
[5] See also *WUM Properties (Pty) Ltd v Promitheus Investments CC* (HC-MD-CN-ACT-CON-2019/02927) [2021] NAHCMD 364 11 August 2021.

[28] Following a detailed survey of authorities concerning rule 44(1)(a) in the previously applicable rules, the Chief Justice in *De Villiers*[6] concluded that a court considering such an application would be entitled to have regard not only to the record of proceedings of the court which granted the impugned judgment or order but also to those facts set out in the rescission application.

[29] It is thus for the appellant to establish that the order against it was erroneously sought or granted. (It is not disputed that the order was granted in the absence of the appellant).

[30] The appellant refers in some detail to DBN's particulars of claim which are surprisingly not formally attached to the founding affidavit and thus do not form part of the record. This court is confined to the record before it.

[31] The claim against the appellant was apparently embodied in an alternative claim based on a breach of the cession agreement. The cession agreement was attached to DBN's answering affidavit. In fulfilment of the debtor's loan agreement with DBN, the appellant undertook to pay over to DBN directly amounts due to the debtors as and when they become due.

[32] The appellant takes the point that it is not alleged in the particulars of claim that the payments claimed from the appellant were payments which were due to the debtors and that the particulars apparently state that DBN 'does not know' if such payments had become due and payable to the debtors.

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[6] Para 22.

[33] It was argued on behalf of the appellant that DBN was not entitled to seek a default judgment against the appellant as a consequence ‘in the absence of evidence put before the court’.

[34] As to this contention, DBN denied that the order was erroneously sought or granted. DBN correctly pointed out that it is irrelevant that the appellant was not party to the loan agreement as the appellant was held liable by virtue of the cession agreement. It is clear from the terms of the deed of cession that the appellant undertook to pay directly to DBN amounts due to the debtors as and when they became due to the debtor.

[35] DBN stated that the appellant was held liable in the particulars for its breach of this obligation in the cession agreement. DBN provided evidence of payments made by the appellant to both DBN (in the sum of around N$1,2 million) and to the debtors in excess of N$7,8 million including the dates upon which those amounts were so paid, as I have pointed out. These payments are not disputed in reply. It is further stated in the answering affidavit that it is to be inferred that the sums so paid by the appellant to the debtors were due and payable and it is claimed that the sums in question were thus due and payable to the debtors. As is already set out, this is not placed in issue at all in reply.

[36] Whilst this point concerning the particulars of claim would not appear to be established in the absence of the particulars forming part of the record, it is in any event clear that it is a point without any factual substratum.

[37] As is made clear by the Chief Justice in *De Villiers*,[7] a court would not only have regard to what was before the court granting the judgment (and in that respect the appellant is already hampered by failing to include the particulars as part of its application) but also the facts set out in the rescission application. In DBN's answering affidavit, not only is the allegation made that the payments to the debtor were due but this is stated with reference to payments made by the appellant to it and the debtors. The appellant was in a position to deal with that evidence in reply but instead elected not to do so or properly dispute DBN's motivated and supported assertion that the payments to the debtors were due. Indeed in the appellant's founding affidavit to the rescission application, a resolution is attached in which its acting chief executive officer (who deposed to the founding affidavit) is reported as stating, after explaining the deed of cession in the context of the loan:

> 'Ms Silas explained to the meeting that instead of paying invoices directly to Mr Brinkman (the debtor), Council should have paid the money to Bank of Namibia (presumably intending to say DBN) until the loan was paid off, and this was never done.'

This statement, although referring to Bank of Namibia, confirms the appellant's breach of the cession agreement.

[38] The rescission application accordingly does not raise a defence to the claim.

[39] The judgment was not on this basis therefore erroneously claimed. Nor was it erroneously granted, in view of the evidence in the rescission application and the undisputed assertion supported by evidence that the payments were so due. This point taking will not avail the appellant.

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[7] Para 22.

[40] It was further argued that the order was erroneously sought or granted because the order does not specify whether it was granted in terms of the main claim or the alternative. Counsel pointed out that the main claim was against the debtors under the loan and the alternative claim was on the basis of the cession. It follows that the order was given pursuant to the alternative claim. This point likewise does not assist the appellant.

[41] Finally, it was contended that the order was erroneously granted because interest was granted at a rate (12,5 per cent per annum) ‘as agreed’ and that a further two per cent penalty interest (per annum) was granted which were in terms of the loan agreement to which the appellant was not a party.

[42] It is correct that the interest granted by the High Court in paragraphs 2 and 3 of its order does not arise from the deed of cession attached to the answering affidavit. It would seem that the court presumably granted its orders on interest with reference to the loan agreement to which the appellant was not a party – even in the absence of the particulars of claim. It follows that the orders relating to interest are incorrect and need to be corrected to a single order granting interest at the legal rate. During oral argument, it was pointed out to appellant’s counsel that this would be more onerous to the appellant. Although not raised in the rescission application or in oral argument, it would also appear that the cost order granting attorney and own client costs would appear to arise from the loan agreement and would thus also not be applicable to the appellant. That would also require correction.

Article 12

[43] The appellant directed both written and oral argument against the practice in the High Court of granting judgment by default in chambers. It was contended that the resultant default judgment offends against the appellant's right to a fair trial protected in Art 12(1)(a) and in conflict with s 13 of the High Court Act and thus a nullity.

[44] Article 12(1)(a) provides:

> 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[45] Section 13 of the High Court Act in turn reads:

> 'Save as is otherwise provided in Article 12(1)(a) and (b) of the Namibian Constitution, all proceedings in the High Court shall be carried on in open court.'

[46] Counsel for the appellant referred to a recent decision of this court in *Ex parte Judge-President of the High Court (Attorney-General of Namibia intervening): In re Ben Willy Kazekondjo & others v Minister of Safety & Security & others*[8] in support of his contention that the granting of a default judgment was contrary to Art 12 and s 13 and is thus a nullity. That case concerned a direction made by a judge in the High Court that the entire proceedings and a court file including a settlement agreement reached at the commencement of a trial and made an order of court be kept *in camera* and inaccessible to the public and the media. That matter, which was heard in open

[8] *Ex parte Judge-President of the High Court (Attorney-General of Namibia intervening): In re Ben Willy Kazekondjo & others v Minister of Safety & Security & others* 2022 (1) NR 1 (SC).

court, concerned a damages action brought by inmates of the Windhoek Correctional Facility against the Correctional Service. The indigent inmates were not represented. When this order was brought to the attention of the Judge-President, he approached the Chief Justice to invoke the review jurisdiction of this court under s 16 of the Supreme Court Act 15 of 1990. This court duly invoked that jurisdiction and set aside that direction as offending against the open court principle embodied in Art 12 and s 13 of the High Court Act. As will become apparent, that decision is however distinguishable from this matter. So too is the decision of a full bench of the Delhi High Court relied upon by counsel.[9] The case provided in the appellant's bundle concerned sentencing in criminal proceedings and did not concern the question of proceedings being in open court. The passage quoted in the appellant's heads would not appear to be from the case cited and provided in its bundle.

[47] The appellant contends that the granting of default judgment infringes its right to a fair trial protected under Art 12. When pressed during oral argument to explain in what respects the appellant's right to fair trial had been violated, counsel was not able to state how his client's rights had been breached, except to point out that if the matter were set down and representatives of the appellant came to know that, they could have appeared in court when it was called. But there is no factual allegation to this effect. The appellant after all took advice only after the judgment was obtained and eventually applied for rescission. That application was duly heard in open court and thereafter determined.

[48] This court recently considered the ambit of Art 12 in the context of a challenge to s 83(1)*(b)* of the Income Tax Act 24 of 1981, which empowers the Minister (of

[9] *Jitender @ Kalla v State of Govt. of NCT of Delhi* on 24 December 2016.

Finance) to file a tax certificate with a clerk of court or the registrar of a competent court, certifying the amount of tax payable by a tax payer. This process has the effect of a civil judgment in favour of the Minister and may be executed accordingly.

[49] As was pertinently pointed out by the Chief Justice in *Minister of Finance of the Republic of Namibia N.O. & others v Kruger & another,*[10] s 83 is not a mechanism to determine disputes over tax liability and that the process did not amount to a 'usurpation of judicial power' as had been found by the High Court. The Chief Justice held:

> '[24] The findings by the High Court that s 83(1)(*b*) gives the Minister the power to obtain a civil judgment without any hearing or notice to the taxpayer; that judicial oversight of the process was lacking, and that the process amounts to usurpation of judicial power are erroneous as they had been arrived at by reading s 83 in isolation. A reading of the Act in context would have revealed that far from not being given notice of the assessment, the taxpayer is given an opportunity to object to the assessment and to have the process envisaged in the Act and case law to take its course.
>
> [25] As noted by the Full Bench in *Hindjou*, it is the failure to object to the assessment which determines the taxpayer's obligation. In that sense each assessment is provisional until the taxpayer decides to object or not. If there is no objection he or she accepts the determination of his or her tax liability and such liability in a sense is determined by consent. If the determination has not been disputed, there would be nothing to be determined by an independent, impartial and competent court or tribunal. Neither Art 12 nor Art 78 is therefore engaged in those circumstances.'

[10] *Minister of Finance of the Republic of Namibia N.O. & others v Kruger & another* (SA 55/2020) NASC (5 August 2022).

[50] When this judgment was raised with appellant's counsel, the contention was that it is irrelevant and does not find application. Whilst the statutory context does differ, the approach of this court is to examine the assertion of a violation of Art 12 right contextually in order to determine whether Art 12 is engaged or not and is violated.

[51] The right to a fair and public hearing entrenched in Art 12 vests in persons in the determination of their civil rights and obligations. When the appellant did not dispute its rights and obligations in civil proceedings after being accorded the opportunity to do so after the service of the combined summons in civil proceedings, the failure to dispute those rights and obligations would determine their liability for a judgment by default (provided that the summons discloses a cause of action), as is plainly indicated in the legal process served upon them. By not disputing the determination of its rights and obligations and electing not to participate in the proceedings, the appellant's rights under Art 12 are not engaged. But once the appellant takes issue with those rights and obligations contended for in the summons, it is entitled to a public hearing in the determination of its rights and obligations. That occurred when it brought its rescission application which was determined following an open and public hearing. The appellant cannot claim an infringement of its Art 12 rights if it elected not to dispute the civil proceedings against it when judgment by default was granted against it.

[52] On the facts before us, there was not an infringement of the appellant's rights to a fair trial protected in Art 12. This appeal is confined to the facts before it and we

decline to be drawn upon hypothetical examples raised in oral argument which themselves involve different factual settings.

Conclusion

[53] It follows that the appeal is to be dismissed although the orders against the appellant relating to interest and costs are to be set aside and replaced with a single order granting interest at the legal rate and costs of suit. As DBN did not oppose the appeal, no order as to the costs of the appeal would arise. The following order is made:

(a) The appeal is dismissed.

(b) Paragraphs 2, 3 and 4 of the order of the High Court dated 21 April 2019 are set aside and replaced by the following:

‘2. Interest at the legal rate from service of the summons to date of payment.

3. Costs of suit.’

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SMUTS JA

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MAINGA JA

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UEITELE AJA

APPEARANCES

APPELLANT:	S Namandje
	Instructed by Government Attorney
RESPONDENTS:	No appearance