SUMMARY

CASE NO. I 1817/2005

CHRIS CONGAS t/a BONA-GENERAL **Applicant/Defendant**

and

FARROK HOSSAINI-GORGAN t/a SEVEN VALLEYS **Respondent/Plaintiff**

SILUNGWE, AJ

05/02/2009

PRACTICE - Judgments and orders – Default judgment – Rescission of – Requirements of – Requirement of Rule 31(2)(b) of Rules of Court that application for rescission be brought within 20 days after applicant has knowledge of judgment – Requirement of Rule 27(3) that Court may, on good cause shown, grand condonation for non-compliance – Good cause – Reasonable explanation/reasons for default to be given – Failure to give reasonable explanation – Gross negligence of applicant – Where default due to gross negligence, Court should not come to applicant's assistance – In case of flagrant breaches of the Rules, especially where no acceptable explanation thereof is given, condonation may be refused – Applicant's explanation unacceptable – Application for condonation dismissed.

CASE NO.: I 1817/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHRIS CONGAS t/a BONA-GENERAL **Applicant/Defendant**

and

FARROK HOSSAINI-GORGAN **Respondent/Plaintiff**
T/A SEVEN VALLEYS

CORAM: **SILUNGWE, AJ**

Heard on: 20/11/2007

Delivered on: 05/02/2009

JUDGMENT:

SILUNGWE, AJ: [1] In these proceedings, the applicant is the defendant and the respondent is the plaintiff in the main action.

[2] On September 2, 2005, the respondent obtained a default judgment against the applicant in the sum of N$150 000-00, plus interest thereon at the rate of 20% per annum and costs of the application.

[3] Thereafter, the applicant launched an application, on January 19, 2006, for rescission of the said judgment. The application was opposed.

[4] Prior to the hearing of the application, the respondent filed a notice to strike specific portions of the applicant's replying affidavit on the ground that such portions were new matters that should have been part of the applicant's founding affidavit. Those portions are: (1) the second line of paragraph (para) 7.31, together with annexure "CC8"; (2) the second sentences of paras. 12.2 and 13.1; and (3) the words: "and I have difficulty in travelling to Windhoek", which appear in the first sentence of para. 18. At the hearing of the matter, Advocate Vivier, for the respondent, urged the Court to strike the allegedly offending portions, but that was countered by Advocate Barnard, on behalf of the applicant.

[5] An examination of the disputed portions of the applicant's replying affidavit clearly shows that there is merit in Advocate Vivier's contention. On that account, the respondent's application to strike the said portions is upheld.

[6] It is common cause that the applicant was late in instituting this application for rescission of the default judgment. As previously indicated, the default judgment was given in favour of the respondent on September 2, 2005, but the application for rescission thereof was

not brought until January 19, 2006. Rule 31(2)(b) of the Rules of the Court requires an applicant to approach the Court for rescission of a default judgment "within 20 days after he has knowledge of such judgment".

[7] In his founding affidavit, the applicant seeks condonation of the late filing of the application. Rule 27(3) stipulates that the "Court may, on good cause shown, condone any non-compliance with the rules". And so, the stumbling block that the applicant faces is the requirement for him to show good cause why the Court should condone his failure to launch the application within the stipulated period of 20 days.

[8] In an application for condonation for non-compliance with prescribed periods of time, in terms of the Rules of the Court, it is trite law that, in order to succeed, an applicant must comply with the following requirements:

1. He must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance.

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

3. He must show that he has a *bona fide* defence to the plaintiff's claim, which, *prima facie*, carries some prospects of success.

See: *Kauer and Another v Metzger* (2) 1990 NR 135 at 139G-I; *Leweis v Sampoio* 2000 NR 186 at 191F-H; *Transnamib Holdings Ltd v Cartstens* 2003 NR 213 at 217E-F.

[9] The applicant avers in his founding affidavit that, upon receipt of the respondent's combined summons on August 16, 2005, he immediately telephonically approached P.D. Theron & Associates, his legal representatives of record, and instructed them to defend the action. Subsequently, a notice of intention to defend was filed on September 6, 2005.

[10] Paragraphs 15.5 and 15.6 of the applicant's founding affidavit read as follows:

> "15.5 Subsequent to the notice a written letter was received by my legal practitioner, Mr P D Theron on the same date informing him that default judgment was granted already on the 2nd of September 2005, a copy of which is annexed hereto marked "**CC 4**". However the said letter was only received by the following day being the 7th of September 2005.
>
> 15.6 Despite several attempts to reach me and inform me about the judgment, my attorney, Mr Theron was unable to reach me and I only learned about the judgment during early October 2005 when an acquaintance of mine informed me about it as a result of a newspaper article that appeared in the Windhoek Observer on 24 September 2005, a copy of which is annexed hereto "**CC 5**". I respectfully refer to the confirmatory affidavit of Mr P D Theron annexed hereto marked "**CC 6**"."

He adds that it was then that he decided to consult with counsel in order to prepare an application for rescission of the default judgment. Thereafter, the consultation took place on October 19 when he was advised by counsel to furnish particulars of other claims against the respondent. This was followed by consultations with his housekeeper and secretary so as to obtain particulars of certain payments which are itemized in annexure "CC 7". The annexure comprises a list of fifteen cheque entries appearing under three columns, namely, Cheque number, Date and Amount. According to the applicant, collation of the particulars that culminated in the compilation of the annexure aforesaid "took some time". The extent of what is meant by the expression "took sometime" has not been explained!

[11] Subsequently, the applicant was advised that those claims had since become proscribed, with the result that he could no longer pursue them. In conclusion, he states as follows:

> "15.10 I would like to point out that the reasons for the delay in instituting this application is due to logistical problems set out hereinbefore as well as the fact that I am based in Oshakati whereas all of the work must take place here. The delay was further aggravated by the fact that when all the relevant instructions were ready counsel was engaged in other matters and therefore could only attend to same during the last weeks of December 2005."

[12] Advocate Barnard submits, on behalf of the applicant, that the delay in instituting this application is due to logistical problems that the applicant, who lives in Oshakati, had in consulting with Mr Theron, his legal practitioner. It is further submitted that, although the actions of the applicant and his legal practitioner cannot be praised, and may be frowned upon, they are not such that should move the Court to refuse to entertain the application. To bolster this argument, Mr Barnard relies on *Leweis v Sampolo* 2000 NR 186 (SC) and *Chairperson of the Immigration Board v Frank and Another* 2001 NR 107 (SC) at 109A.

[13] In his answering affidavit, the respondent denies that the applicant "has any claim whatsoever against" him. He further alleges that the amounts shown is annexure "CC 7" have nothing to do with him. He denies that the delay could have been caused by any logistical problems as there is sufficient communication infrastructure between Oshakati and Windhoek, in the form of telephone and facsimile; and that there are two daily flights, by Air Namibia, between Oshakati and Windhoek.

[14] The applicant avers in very clear terms that Mr Theron, his legal practitioner, became aware on September 7, 2005 (as evidenced by Annexure "CC 4" to his founding affidavit), that the respondent had obtained the default judgment on September 2; he further alleges that,

despite “several attempts” by Mr Theron “to reach” and “inform” him about the said judgment, Mr Theron was “unable to reach” him, adding that he (the applicant) “only learned” of the judgment during “early October”, through an acquaintance of his. Strangely enough, not only does the applicant fail to explain the nature and particulars of what attempts, if any, were allegedly made by Mr Theron, but Mr Theron also fails to disclose, in his confirmatory affidavit, what steps, if any, he took to apprise the applicant of the default judgment. Whether Mr Theron ever tried to convey the requisite information to the applicant by landline telephone or facsimile, or by cellphone or even by E-mail, is any body’s guess. It is, indeed, self-evident that the circumstances of the occasion required Mr Theron to take urgent steps to communicate to his client the all-important information. But that is not all: the applicant further fails to disclose the date upon which the judgment first came to his notice; he is content merely to state that he learnt of it “during early October”. It would thus appear that Mr Theron was unable to communicate with the applicant from September 7 until sometime during early October, a period of about a month! But, even then, consultation with Mr Theron could not take place until 19 October 2005; no explanation is furnished as to why consultation could not take place earlier than October 19.

[15] Mr Theron knew, and certainly ought to have known, that the applicant was required to launch his application for rescission of the judgment within 20 days after becoming aware thereof. It follows that the period of 20 days expired during early November 2005. The applicant does not state when he consulted with his bookkeeper and his secretary; when he received particulars of payments reflected in annexure “CC 7”; when he sent “an exposition” of his claims to Mr Theron; or when Mr Theron transmitted such “exposition” to counsel, besides stating that this was done “sometime during the end of 2005”. Yet, the application for rescission could only be filed on January 19, 2006!

[16] The applicant maintains that the delay in instituting this application was due to logistical problems. It is apparent that sight is lost of the fact that when the applicant was served with the combined summons, he, in his own words "immediately approached Messrs PD Theron & Associates by telephone in order to seek their assistance in having the claim defended". It is obvious that the applicant took prompt action because of the urgency of the matter. If he could take such immediate steps, why then did he seemingly fail to show interest in the progress of the matter by maintaining contract with Mr Theron after the appointment that took place between both of them during "early September 2005" up to early October – a period of approximately one month! Similarly, why did Mr Theron, who was fully cognizant of the time limits imposed by the Rules of the Court, fail to communicate with his client, as a matter of extreme urgency, when he learnt of the default judgment on September 7, 2007, but waited until the applicant communicated with him during early October 2005? When the applicant and his legal representative became aware of the judgment, it took them approximately 3½ and 4½ months, respectively, before the application for rescission could be launched. Notwithstanding all this, it is submitted, rather oddly, that the legal representative's failure in the matter was of a slight degree; and that, although the actions by the applicant and his legal practitioner cannot be praised, and may be frowned upon, they are not such that they should move the Court to refuse to entertain the application! With due respect, I regard these submissions not only as a composite understatement, but also as an attempt to grasp at the straws. Over and above that, I am certainly not persuaded that the delay on the part of the applicant's legal practitioner was of "a slight degree: on the contrary, it was of a substantial degree. As regards the applicant, it is evident that he adopted more than a cavalier attitude towards the action after his appointment with Mr Theron which took place during early September 2005. To compound the situation, he is, by design, noticeably vague in his founding affidavit: for instance, he states that "An

appointment was scheduled with Mr Theron which *for various reasons* only took place during *early September 2005* (para 15.5). He choses not to specify the so called "various reasons". Besides, he does not indicate when in "early September" the appointment with Mr Theron took place! Furthermore, he states, rather imprecisely, that he "only learned about the judgment *during early October 2005*" (para 15.6). In para 15.8, he fails to state when he consulted with his bookkeeper and secretary concerning payments allegedly made to the respondent; how long it took the bookkeeper to put together the particulars he needed; when Annexure "CC 7" was handed to Mr Theron; and when that annexure was furnished to counsel: he is content to merely state that this was done "sometime during the end of 2005".

[17] From the foregoing extracts, it is quite clear that the applicant's founding affidavit lacks forthrightness as well as particularity. In my view, the applicant's allegation that "the delay in launching this application was due to logistical problems" is not only a lame excuse but also spurious. Neither the applicant nor his legal practitioner can escape the blame for the delay in bringing the application for rescission of the judgment. In this regard, I find instructive the following remarks by the South African Supreme Court of Appeal in the case of *Uitenhage Transnational Local Council v South African Revenue Service* 2004 (1) SA 292 at 297H-298A (Paras 6-7) (which, unlike the present matter, was an appeal) which remarks are of application to the case under consideration:

> "[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.
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> [7] The appellant's affidavit consists of a number of generalized causes without any attempt to relate them to the time-frame of its default or to enlighten the Court as to the

> materiality and effectiveness of any steps taken by the appellant's legal representatives to achieve compliance with the Rules at the earliest reasonable opportunity."

Plainly, January 19, 2006, could surely not have been the earliest reasonable opportunity for the applicant to achieve compliance with the Rules.

[18] It is not in dispute that, on October 7, 2005, the respondent took steps to enforce his judgment by filing a writ of execution. Indeed, pages 73 and 74 of the record reflect a notice of execution and the writ of execution, respectively. As Frank, J aptly commented in *Adriaans v McNamara* 1993 NR 188 at 190B-C:

> "It is totally unacceptable that a person knows about a judgment from this Court, knows of a warrant of execution and then labours under the impression according to him that he can wait until the 'Kingdom comes' if his business so demands before coming to this Court to apply for a rescission of judgment. Every reasonable person is aware of the fact that matters and orders emanating from the High Court are not to be trifled with and that one should expediously see one's attorneys or take steps if one feels that such an order has been given on a basis which can be attacked."

In the *NcNamara's* case, the default judgment was granted on November 6, 1992, and, although the judgment came to the applicant's notice on December 27, 1992, he did not launch an application for rescission of the judgment until March 3, 1993 (a delay of just over 2 months), after a warrant of execution had been issued against him. Frank, J found that good cause had not been shown for non-compliance with the Rules of the Court and consequently refused to grant condonation.

[19] The circumstances of this mater are such that I am constrained to find that the default on the part of the applicant was due to such a degree of remissness that it amounted to gross negligence. Where the default is due to gross negligence, as *in casu*, the Court should not come to the applicant's assistance (*Krauer and Another v Metzger*, *supra*, at 139G-H). It has often been said judicially that, in cases of flagrant breaches of the Rules, especially where there is no

acceptable explanation thereof, as in the present case, the indulgence of condonation may be refused, irrespective of the prospects of success. See: *Blumenthal and Another v Thomson NO and Another* 1994 (2)SA 118 (AD) at 121I-122B; *Darries v Sheriff Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 41B-D; *Southern Cape Car Rentals CC t/a Budget Rent a Car v Braun* 1998 (4) SA 1192 (SCA) at 1195H-I; *Immigration Selection Board v Frank* 2001 NR 107 (SC) at 165C-166A-C.

[20] In the premises, the following order is made:

1. The applicant's application for condonation is dismissed with costs.

2. The default judgment must be complied with within 30 days of the delivery of this judgment.

SILUNGWE, AJ

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Adv. Barnard

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COUNSEL ON BEHALF OF THE RESPONDENT/PLAINTIFF:

Adv. Vivier

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