CASE NO.: A 61/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DANIEL MOUTON	**APPLICANT/DEFENDANT**

and

WORKERS ADVICE CENTRE	**1ST RESPONDENT/PLAINTIFF**
HEWAT BEUKES	**2ND RESPONDENT/PLAINTIFF**
HENDRIK CHRISTIAAN	**3RD RESPONDENT/PLAINTIFF**
DEPUTY SHERIFF WALVIS BAY	**4TH RESPONDENT/PLAINTIFF**

CORAM: MANYARARA, A J

Heard on: 15 May 2009
Delivered: 15 May 2009
Reasons on: 19 June 2009

REASONS

MANYARARA, AJ.: [1] This matter was removed from the roll on 15 May 2009 with costs on the attorney and client scale to be paid before the matter is set down with reasons to follow. Mr. Grobler represented the applicant, while Mr. Beukes and Mr. Christiaans represented themselves as the second and third respondents, respectively, as well as the first respondent.

[2] It subsequently came to my attention that Mr. Beukes and Mr. Christiaans are not admitted to practice in this court and therefore are not entitled to the costs ordered. Accordingly, the order is hereby set aside and substituted with the following order –

> *"The respondents are entitled to be reimbursed costs reasonably incurred by them, such costs to be paid before the matter is set down."*

It is for the respondents to approach the Registrar for guidance on claiming the costs awarded to them.

[3] I now set out the reasons for removal of the matter from the roll as follows:

1. On 5 December 2006 the respondents instituted proceedings against the applicant for payment for services rendered plus interest on the amount claimed. The respondents filed an application for summary judgment and the applicant filed a plea denying that he owed the respondents any money. It would appear that the pleadings were then completed; an application for a hearing date was made and the trial was set down for 20 to 23 January 2009. On 17 December 2008 the attorneys representing the applicant withdrew their representation and so informed all concerned of their withdrawal.

2. The matter was called on 20 January 2009 and, upon the non appearance of the applicant, the Court reserved judgment until 30 January 2009 when the following order was made:

   "IT IS ORDERED

   1. *That the 2nd Plaintiff is granted judgment in the amount of N$50,805.00, plus interest thereon at the rate of 20% per annum, calculated from the date of this judgment to the date of payment.*

2. *That the Defendant pays the 2nd Plaintiff his costs, which represent reasonable and necessary disbursements.*

3. *That the 3rd Plaintiff is granted judgment in the amount of N$24,840.00, plus interest thereon at the rate of 20% per annum, calculated from the date of this judgment to the date of payment.*

4. *That the Defendant pays the 3rd Plaintiff his costs, which represent reasonable and necessary disbursements."*

3. On page 2 of the written judgment, the Learned Judge (PARKER J) opined as follows:

"3.1 The defendant did not appear at the trial of the matter by himself or by any legal representative, and no explanation was placed before the Court, establishing why there was no appearance by the defendant in person or by a legal representative for the defendant. Taking into account the fact that summons in the action was filed in this Court on 5 December 2006, that is, more than two years ago, it is my opinion that it would be unfair to delay the trial of the matter, particularly in circumstances where there is no explanation at all before the Court as to why there is no appearance by the defendant in person or by a legal representative for the

defendant. Consequently, I exercised my discretion to proceed with the trial. I requested the plaintiff to prove their claims as the burden of proof lay on them in terms of Rule 40(1) of the Rules of Court. Even though the claim is for a debt or liquidated demand within the meaning of Rule 40(1), I decided to hear evidence because the plaintiffs rely on an oral contract within the meaning of Rule 18(6) of the Rules of Court.

3.2 At the commencement of the proceedings in the trial, Ms Erica Beukes the sole proprietor and manager of the 1st plaintiff informed the Court that the 1st plaintiff was not pursuing any claim against the defendant because all administrative fees due to the 1st plaintiff had been paid by the defendant; and I take it that may be the amount of money the defendant claims he had paid. Consequently, the matter proceeded in respect of the claims of the 2nd plaintiff and 3rd plaintiff only."

4. It is that judgment which triggered the present application and the affidavit founding the application averred as follows:

> *"4.1 Messrs Metcalfe Legal Practitioners never informed me that they would obtain a trial date on my behalf on 15 October 2008, nor was I informed that the matter would be heard during the week of 20 to 23 January 2009.*
>
> *4.2 I had no idea that I had to be in Court on 20 January 2009 and the hearing proceeded without me. At all relevant times I wanted to defend the claims of the Respondents/Plaintiffs and it was not due to any fault on my part that I did not appear in Court on 20 January 2009.*
>
> *4.3 The first time I realised that there was judgment given against me was on Monday 2 February 2009 when the Deputy-Sheriff of Walvis Bay served a Notice of Execution on me. (Annexure "DM2).*
>
> *4.4 I immediately contacted my present legal representatives to approach this Honourable Court to set aside the default judgment against me.*
>
> *4.5 I submit that I was not in wilful default to appear in Court on 20 January 2009 and I humbly pray that the Honourable Court will set the default judgment aside.*
>
> *4.6 I furthermore submit that I have a substantial defence to the claim of the Plaintiffs as set out hereunder."*

[4] The applicant averred that it was only after the Deputy Sheriff served a notice of attachment on 2 February 2009 that he learnt of the judgment issued against him and he "immediately contacted (his) present legal representatives (in the person of Mr. Grobler) to approach this Honourable Court to set aside the default judgment (sic)". The affidavit was only signed on 24 February 2009 but I have been unable to find the notice of set down as the papers have not been collated, paginated and indexed as required by Rule 62(4) of the Rules of Court.

[5] Be that as it may, the matter was called on 20 March 2009 but postponed to a date to be arranged with the Registrar. The reason for the postponement was not disclosed.

[6] The matter was again called on 5 June 2009. On that date the matter was removed from the roll and the respondents were awarded costs reasonably incurred in the matter. The reason for removal of the matter from the roll with an award of costs against the applicant was also not disclosed.

[7] The record of the hearing before me proceeds as follows:

> *"COURT: When did it (should read 'when will it') come before Court?*
> *MR. GROBLER: We have not got a date yet, we must ask for a date on 17 June. It is only on that day that we can get a date."*

The next portion of the record did not clarify the position but, later, the following emerged:

> *"COURT: No, I wish you had averred, made all these averments in your affidavit (than) that you should tell me from the Bar.*
> *MR GROBLER: I submit that this application is only for a rule nisi to stay the execution till the Recession Application is heard.*
> *COURT: I do not see the difference between that, the stay of execution and the application to rescind Judgment, because that is what you want. You want the Judgment rescinded.*
> *MR GROBLER: Yes, My Lord.*
> *COURT: Yes, that is what you want really, not a stay of execution, you want the Judgment itself rescinded.*
> *MR GROBLER: But until the application for Rescission of Judgment is heard, the sale of the house must be stayed for the reasons as set out in my Notice of Motion. It is a balance of convenience favouring my client, that he has no other remedy and that he (intervention)"*

[8] Mr. Grobler was asked if he was tendering wasted costs and he replied as follows:

> *"MR GROBLER: For what must I tender wasted costs?*
> *COURT: Well I mean for this hearing for instance.*
> *MR GROBLER: Tender wasted costs, they can apply for wasted costs for this hearing, but the fact is that I cannot get a date for a Rescission Application before we get new dates.*
> *COURT: And you have done nothing about that so far?*
>
> *MR GROBLER: I cannot do anything, My Lord, the rules of the (intervention)"*

[9] The ensuing debate did not take the matter further as it ultimately emerged that all that Mr. Grobler sought was merely an order to stay execution, in respect of which he had adopted the wrong procedure because there was no evidence of any steps taken by the respondents to sell his client's house "*immediately*." Rescission or setting aside of the default judgment entered against the application on 30 January 2009 is a separate issue for which Mr Grobler has yet to obtain a date for the hearing from the Registrar.

[10] In the result, I was left with no alternative but to remove the matter from the roll on the terms already referred to.

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MANYARARA, J.

ON BEHALF OF THE APPLICANT Mr Grobler

Instructed by:	Grobler & Company
ON BEHALF OF THE RESPONDENTS	In Person