



CASE NO.: A 239/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LLOYD CHARLES UNDERHILL

APPLICANT

and

NEDBANK NAMIBIA LIMITED

RESPONDENT

CORAM: NAMANDJE AJ

Heard on: 6 October 2010

Delivered on: 19 October 2010

JUDGMENT

NAMANDJE, AJ.: [1] In this matter the respondent obtained a default judgment against the applicant on 12 December 2009 pursuant to an application for a default judgment in terms of Rule 31 to the Registrar of the High Court.

[2] The Registrar granted all of the orders sought against the applicant by the respondent in terms of Rule 31(5)(a) of the Rules of the High Court. The respondent's cause of action against the applicant is said to be based on wrongful representations allegedly made by the applicant who at the relevant time was an employee of the respondent.¹ The respondent brought two claims under one summons.

[3] In brief the applicant, at the time when he worked for the respondent, is alleged to have misrepresented to the respondent that two of respondents' customers "*the credit receivers*" have entered into instalment sale agreements with the respondent when in fact they did not, and further when they (credit receivers) were not the signatories to the concerned instalment sale agreements. I must confess it needed not only focus but also patience and tolerance to understand the respondent's particulars of claim. This is because of the inelegant manner in which the particulars of claim are drafted. It is alleged that the respondent because of the applicant's misrepresentations was induced to purchase two vehicles from car dealers and sell such vehicles to the credit receivers through instalment sale agreements. It appears that following the delivery of the two vehicles to the credit receivers they were unable to continue paying monthly instalments resulting in the vehicles being repossessed by the respondent.

[4] In the two claims the respondent claimed from the respondent the outstanding loan balances owed to the respondent by the two credit receivers in terms of the disputed instalment sale agreements, interest *a tempora morae* calculated from certain dates and certain amounts calculated in the amount of N\$20.00 per day in respect of

¹ The respondent is a registered Bank which *inter alia* finances installment sale agreements for the purchase of vehicles.

each claim from the date on which the respondent repossessed the respective vehicles from the credit receivers to the date the vehicle are to be delivered to the applicant.²

[5] Subsequent to the granting of a default judgment by the Registrar of the High Court against the applicant, the applicant brought this application in terms of Rule 31 and Rule 44(1)(a) of the Rules of the High Court. The respondent on the other hand brought a counter application in terms of Rule 44(1)(a) in which it concedes that the default judgment against the applicant was sought and granted erroneously. The respondent however is opposed to the rescission of judgment and contends that the court should only vary, and not rescind, the judgment granted by the Registrar.

[6] As the parties are *ad idem* that the default judgment obtained by the respondent was sought and granted erroneously, I intend to only deal with the applicant's application in terms of Rule 44(1)(a).³ Patently the default judgment was erroneously sought and granted in that there are substantial differences, contradictions and irreconcilable anomalies between the relief sought in the particulars of claim in respect of both the first and second claims looked at against the default judgment sought and granted. The judgment was further, in my view, sought and granted erroneously on other grounds, as certain amounts were claimed when *prima facie* there was no legal foundation for such.

[7] The extent, nature and details of the errors are manifest from the comparison between the respondent's particulars of claim relating to the two claims and the orders

² No case is made out in the papers as to on what basis the respondent sought and was granted an order for the payment of that sum of money and further as to on what basis the vehicles, that on the facts belong to the respondent, are to be delivered in future to the applicant.

³ Rule 44 provides that:

"(44)(1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary –*

(a) *an order of judgment erroneously sought or erroneously granted in the absence of any party affected thereby."*

sought and granted in the application for a default judgment to the Registrar as illustrated below.

"Particulars of Claim

Application for Default Judgment to the Registrar

Claim No. 1

- 1.1 Payment of the sum of N\$72,179.52.
- 1.2 Interest a tempora morae to be calculated on the amount of N\$72,179.52 from the 22nd of September 2005, alternatively from the date after service of summons, further alternatively from the date of judgment to date of final payment.
- 1.3 Payment of the amount of N\$20.00 per day calculated from 30 August 2006 until the date on which defendant takes delivery of the motor vehicle.
- 1.4 Interest a tempora morae to be calculated on the amounts referred to in prayer 1.3 supra, from the date that same is incurred by plaintiff until date of final payment thereof.

Claim No. 2

- 2.1 Payment of the sum of N\$123,439.68.
- 2.2 Interest a tempora morae to be calculated on the amount of N\$123,439.68 from the 20th of October 2005, alternatively from the date after service of summons, further alternatively from the date of judgment to date of final payment.
- 2.3 Payment of the amount of N\$20.00 per day calculated from 16 October 2006 until the date on which defendant takes delivery of the motor vehicle.
- 2.4 Interest a tempora morae to be calculated on the amounts referred to in prayer 2.3 supra, from the date that same is incurred by plaintiff until date of final payment thereof.

Claim No. 1

- 1.1 Payment of the sum of N\$72,179.52.
- 1.2(a) Payment of the sum of N\$38,205.71 being interest a tempora morae to be calculated on the amount of N\$72,179.52 from the 22nd of September 2005 until 15 May 2008 (966 days).
- 1.2(b) Interest on the balance of N\$22,733.73 (after receipt of payment of N\$49,445.79 on 15 May 2008) at the rate of 20% per annum from 16 May 2008 until date of payment.
- 1.3(a) Payment of the amount of N\$16,100.00 (805 days from 30 August 2008 until 12 November 2008 at N\$20.00 per day).
- 1.3(b) Payment in the amount of N\$20.00 per day calculated from 13 November 2008 until the date on which defendant takes delivery of the motor vehicle.
- 1.4 Interest a tempora morae to be calculated on the amounts referred to in prayer 1.3 supra, from the date that same is incurred by plaintiff until date of final payment thereof.

Claim No. 2

- 2.1 Payment of the sum of N\$123,439.68.
- 2.2(a) Payment of the sum of N\$63,444.61 being interest a tempora morae to be calculated on the amount of N\$123,439.68 from the 20th of October 2005 until 15 May 2008 (938 days).
- 2.2(b) Interest on the balance on N\$73,993.89 (after receipt of payment of N\$49,445.79 on 15 May 2008) at the rate of 20% per annum from 16 May 2008 until date of final payment.
- 2.3(a) Payment of the amount of N\$15,160.00 (758 days from 16 October 2008 until 12 November 2008 at N\$20.00 per day).
- 2.3(b) Payment of the amount of N\$20.00 per day calculated from 13 November 2008 until the date on which defendant takes delivery of the motor vehicle.
- 2.4 Interest a tempora morae to be calculated on the amounts referred to in prayer 2.3 supra, from the date that same is incurred by plaintiff until date of final payment thereof.

3.	<i>Cost of suit.</i>	3.	<i>Costs of suit in the amount of N\$1,630.13 calculated as follows:</i>	
		3.1	<i>Legal Practitioner's fees.</i>	1120.00
		3.2	<i>15% VAT</i>	168.00
		3.3	<i>Deputy Sheriff's Fees (19.09.08)</i>	158.13
		3.4	<i>Revenue Stamps</i>	10.00
		3.5	<i>Photocopies Summons 273 x 3 x 2.00</i>	162.00
			<i>Default Judgment and return 3 x 2 x 2.00</i>	12.00
				1630.13
4.	<i>Further and/or alternative relief.</i>	4.	<i>Further and/or alternative relief."</i>	

[8] The errors in the default judgment sought and granted are self revealing as illustrated above. It is evident that the errors are not minor but substantial. Once the court finds that a judgment was erroneously sought and granted it, without further inquiry, will be entitled to rescind or vary the judgment.⁴ It is undisputed that the applicant is affected by the judgment sought and granted. That being the case the facts in *casu* squarely fall within the ambits of Rule 44(1)(a).

[9] Apart from the patent errors that are evident from the judgment sought and granted, the term "*erroneously*" used in Rule 44(1)(a) covers situations where the averments in the particulars of claim do not disclose a cause of action, or more appropriately, where there was nothing before the Registrar or the court to sustain a judgment.⁵ I am of the opinion that the respondent's cause of action relating to the amounts claimed in respect of the fees for the storage of the two vehicles by the respondent to the date such vehicles are to be delivered to the applicant *prima facie* lacks a legal foundation for the judgment sought and granted.

[10] There is another ground why I am of the opinion that some portions of the orders were further erroneously sought and granted. This is in respect of interest claimed a

⁴ See *Tshabalala and Another v Peer*, 1979 (4) SA 27 (T) at p 30.

⁵ *Marais v Standard Bank Credit Corporation*, 2002 (4) SA 892 (W) at p 897.

tempora morae. I am of the view that there was no case made out as to why interest were sought to be paid from the respective dates apparent from the particulars of the two claims if one have regard to the law on claims for *mora* interest as concisely stated in Thoroughbred Breeders' Association v Price Waterhouse.⁶

“The only remaining issue regarding TBA's claim for mora interest relates to the date from which such interest should be calculated. TBA's contention is that the commencement date should be a date earlier than the date of summons because the quantum of its damages was readily ascertainable by PW at such earlier date. I disagree. In the first place the quantum was by no means capable of easy and ready proof and the fact that Reid reported on it cannot be held as an admission by PW against itself. In the second place it fails to recognise the fundamental principle that, however liquidated a plaintiff's claim for damages may be, mora interest can only be calculated from the date when mora commenced.”

(Own emphasis)

[11] Regard being had to the averments in the respondent's particulars of claim, and strictly for purposes of this application, I am of the view that the judgment was erroneously sought and granted in that respect too.

[12] If a defendant is served with summons and fail to file his/her notice of intention to defend, that by no means places him/her at the mercy of the plaintiff to seek any order not legally sought in the particulars of claim served upon the defendant. Considerations of justice and fairness demand that a plaintiff only seek orders sought in the summons when applying for a default judgment, in particular, where the interest of the defendant would be prejudicially affected by any change in the relief sought.

⁶ 2001 (4) SA 551 (SCA) at p 594 G – 595 B.
See also *Intramed (Pty) Ltd (In Liquidation) and Another v Standard Bank of South Africa Ltd and Others*, 2008 (2) SA 466 (SCA).

[13] This court is, on the facts, entitled to exercise its discretion in favour of rescinding the judgment. I do not consider it appropriate, given the substantial nature and extent of the errors, to only vary the judgment. If I were to vary the judgment, that would virtually amount to a complete mutilation of the judgment. In the result, accordingly I grant the following orders:

- (1) The default judgment granted by the Registrar on 12 October 2008 is rescinded and set aside.
- (2) All court processes issued in pursuance of that default judgment are set aside.
- (3) The applicant is granted leave to defend the Respondent's action and the notice of intention to defend should be filed within 10 days.
- (4) The respondent shall pay the applicant's costs.

NAMANDJE, AJ.

ON BEHALF OF THE APPLICANT:

ADV A DENK

INSTRUCTED BY:

VAN DER MERWE-GREEFF INC.

ON BEHALF OF THE RESPONDENT:

MS N BASSINGTHWAIGHTE

INSTRUCTED BY:

KOEP & PARTNERS