IN THE HIGH COURT OF NAMIBIA

CASE NO: CA 14/2011

In the matter between:

GIDEON LISIAS KADHILA **APPELLANT**

and

NDINELAGO MAKILI **RESPONDENT**

CORAM: **DAMASEB, JP**

HEARD ON**:** **18 JULY 2011**

DELIVERED ON**:** **4 AUGUST 2011**

APPEAL JUDGEMENT:

DAMASEB, JP: [1] This is a civil appeal against the judgment of the Ondangwa Magistrates court, granted on 03 September 2010 refusing an application for the condonation for the late filing of a rescission application. The underlying dispute

involved the plaintiff in the main action's (respondent in this appeal) *Mahangu* being allegedly eaten by the donkeys of the defendant in the main action (appellant in this appeal). The plaintiff in the main action claimed, as against the present appellant, the amount of N$ 25 000.00 for the damages allegedly suffered. The issue raised crisply in this appeal is whether it was competent for the clerk of court to grant default judgment in the circumstances. He could only grant judgment in respect of a liquidated claim and not if the cause of action related to an unliquidated claim. The appellant maintains that it was indeed an unliquidated claim.

What is a liquidated claim?

[2] A debt or liquidated demand is a claim 'capable of speedy and prompt ascertainment.' [1] In *Morley v Pederson* 1933 TPD 304, the word 'debt' was held not to include an unliquidated and disputed claim for damages. As will soon become apparent from a consideration of the *bona fides* of the appellant's defence, the appellant disputes that he owns any donkeys at all. In any event, the plaintiff in the main action was required to prove his damages as they are not in the nature of a 'debt' or liquidated demand. The appellant, in his application for rescission, states that the amount of N$25 000 is exorbitant in any event. For that reason, I am satisfied that the claim as framed, was in the nature of an unliquidated demand requiring proof by the plaintiff in the main action.

[3] It follows that default judgement in an unliquidated claim was granted against the appellant on the 17 March 2008 by the clerk of the Ondangwa Magistrate Court due

1 *Fattis Engineering Co (Pty) Ltd v Vendick Spares* (Pty) Ltd 1962(1) SA 736 (T)

to non-appearance of the appellant. This was followed by an application for rescission of judgement filed on 29 August 2008 and set down for 6 February 2009. The matter was struck from the roll due to non-appearance of the appellant or his legal practitioner. The appellant thereafter filed a further application to rescind the 17 March 2008 default judgment, alongside an application for condonation. That application was set down for 27 November 2009 but was again struck from the roll; again due to the non-appearance of the defendant's legal practitioner.

[4] The appellant then sought the services of another legal practitioner who then filed an application for condonation for the late filing and rescission of judgement which was heard and dismissed on 3 September 2010. The application for condonation was refused. It is against that refusal that the appellant now appeals to the High Court. The appeal is unopposed.

[5] In the application for rescission, the appellant alleges that the default judgment was granted without an affidavit from the respondent setting out the extent and nature of the claim as required by the rules of the magistrate's court, considering that this is an unliquidated claim.

[6] The appellant also alleged non-compliance with rule 12(4) of the Magistrate' Courts rules, in that the clerk of the court did not refer the request for judgment for an unliquidated amount to the court for the claim to be liquidated and for appropriate judgment, but had rather entered the default judgement himself.

Rule 12(4) of the Rules of the Magistrate's Court state*:*

> "The clerk of the court shall refer to the court any request for judgment for an unliquidated amount and the Plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the claim. The court shall thereupon assess the amount recoverable by the Plaintiff and shall give an appropriate judgment."

The appellant therefore brought the rescission application under rule 49(11) of the Magistrates Courts Rules which allows an application for a rescission of judgement on the ground that it is void *ab origine.*

[7] In the heads of arguments filed on behalf of the appellant, it has been argued that although the respondent is not required to prove its cause of action, when proceeding on default basis, he/she is required to identify the claim and show whether it is for specific performance or for damages. The court may therefore require oral evidence failing which an affidavit should be used to set out the extent and nature of the claim. It has been held that it is a desirable practice to produce affidavit evidence in order for the deponent to reveal the source of such information and swear that he believes such information to be true, furnishing grounds for his belief: *Galp and Tensley NO* 1966(4)SA 555).

[8] For all of the above reasons, I am satisfied that the default judgment granted on 17 March 2008 was *void ab origine*.

[9] Section 36 of the Magistrates Courts Act 32 of 1944 empowers the court to

rescind or vary any judgment granted by it which was *void ab origine.* Such application may be made not later than one year after the appellant first had knowledge of such voidness. However, the court may condone the non-compliance of the rules and time periods if a reasonable explanation for the non-compliance is offered; and if it is shown that there is a *bona fide* defence which carries some prospects of success. The *onus* is thus on the appellant to furnish an explanation for his default, sufficiently full to enable the court to understand how it really came about. *Silber v Ozen Wholesalers* 1954(2) SA 345.

[10] The appellant in his application for condonation attributes, with justification, his non-compliance with the rules of court to the conduct of his former legal practitioner of record who failed to show up at court resulting in the case being struck two times. In his affidavit in support of the application for rescission, he was also able to demonstrate that he misunderstood the duties of Legal Shield and was, at all times, under the impression that his matter was being handled by Legal Shield when they were under no obligation as insurer to appear at court on his behalf. I am satisfied that there was a reasonable and satisfactory explanation for his failure to prosecute the applications for rescission timeously.

[11] The appellant's endeavour to obtain the services of another legal practitioner when he was failed by the former ones is an indication that he was determined at all times to defend the claim against him.

[12] The judgment sought to be set aside was clearly void *ab origine* and he had a

more than reasonable prospect of it being set aside.

[13] I am therefore satisfied that (i) that the appellant established good cause for the default; (ii) that the appellant established a reasonable and *bona fide* defence. In not so finding and not granting condonation, the magistrate erred. The appeal must therefore succeed.

[14] Accordingly, the magistrate's refusal of the condonation application for the late filling of the rescission of judgment is hereby set aside and is substituted as follows:

> "i) The condonation application is allowed.
>
> ii) The default judgement granted on 17 March 2008 is hereby rescinded and the appellant granted leave to defend the action in accordance with the rules of the Magistrate's Court."

DAMASEB, JP

ON BEHALF OF THE APPELLANT:	Mr N Tjombe
INSTRUCTED BY:	**NORMAN TJOMBE LAW FIRM**
ON BEHALF OF THE RESPONDENT:	No Appearance