''Not Reportable'

CASE NO.: I 1594/2009

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

WILLEM HERMANUS NICO STEENKAMP **Plaintiff**

and

MAX HAMATA **First Defendant**
TRUSTCO GROUP INTERNATIONAL (PTY) LTD **Second Defendant**
FREE PRESS PRINTERS (PTY) LTD **Third Defendant**

***CORAM*:** **PARKER J**

Heard on: 2012 July 20
Delivered on: 2012 August 3

JUDGMENT

PARKER J: [1] The plaintiff instituted action against the defendants. The defendants entered appearance to defend, and they also raised an exception against the particulars of claim. The exception was set down for hearing on 11 October 2010. There was no appearance by the plaintiff in person or by counsel, and so the

Court dismissed the plaintiff's claim on the basis of default of appearance. In reaction thereto, the applicant launched the present application for rescission of the judgment by default. Ms Van der Westhuizen's submission is that the 'application is brought in terms of rules of court (and the common law) although it is not specifically stated in the application'.

[2] I accept Mr Barnard's submission that rule 31(2)(b) does not apply in the present proceeding. If paragraphs (a) and (b) of subrule (2) of rule 31 are read intertextually, as they should, in the interpretation and application of subrule (2) of rule 31, the following emerges irrefragably, that is to say, rule 31(2)(b) applies where the defendant is 'in default of delivery of notice of intention to defend or of a plea' and the plaintiff obtains judgment by default against the defendant (rule 31(2)(a)). Thus, the words '[S]uch judgment' in rule 31(2)(b) refers to the judgment by default granted against a plaintiff on the grounds set out in rule 32(b)(a). Consequently, I also accept Mr Barnard's submission that the authorities on the requirements for rescission in terms of the rules cannot apply where the application is brought in terms of the common law on the basis that the requirements under the two heads differ.

[3] At common law, in order to succeed in his or her rescission application, the applicant must show 'good cause' or 'sufficient cause'. The terms appear to be synonymous in their legal import and they contain two essential elements, and both of them must exist together. They are (1) that the applicant must present a reasonable and acceptable explanation for his or her default, and (2) that on the merits the applicant must have a bona fide claim or defence (as the case may be) which, prima facie, carries some prospect of success. (*Grütemeyer NO v General Diagnostic Imaging* 1991 NR 441). The foundational consideration is that the

applicant bears the onus of establishing sufficient cause for his or her default; and the applicant cannot succeed if only one element is established (*Grütemeyer NO v General Diagnostic Imaging* supra): and this much; both counsel agree, and that is the manner in which I approach the determination of the present application.

[4] It is significant to note at the outset that although the exception was raised by the defendants (respondents in the present proceeding) the plaintiff (applicant in the present proceeding) set the exception down on 22 June 2010 for hearing thereof on 11 October 2010. I shall continue to refer to the parties as plaintiff and defendants. Shortly after the set down on 22 June 2010 the then legal representatives of the plaintiff, Kishi Legal Practitioners, informed the plaintiff that the matter had been set down for hearing on 11 October 2010. The legal representatives added that if the plaintiff wanted these same legal representatives to continue to act for him, then he must pay them – from his own pocket – N$30,000-00. The reason – those legal representatives informed the plaintiff – was that their mandate to represent him had been terminated by Legal Shield/Trustco Insurance ('Legal Shield') of which, apparently, the plaintiff was a member. As the plaintiff could not pay the N$30,000-00 from his pocket, the plaintiff's recourse was to address a letter to the regulatory body NAMFISA enlisting NAMFISA's authority to force Legal Shield to reinstate the insurance in order for those legal practitioners, Kishi Legal Practitioners, to continue to act for him.

[5] In all this what is relevant in the present proceeding is this. The plaintiff was aware of the set down date of 11 October 2010. Thus, the plaintiff was, shortly after 22 June 2010 and at least three months before 11 October 2010, also aware that Kishi Legal Practitioners would not act for him upon mandate granted to them by Legal Shield. There is nothing on the papers to suggest that the plaintiff was either

going to pay the N$30,000-00 deposit to Kishi Legal Practitioners or that Legal Shield would relent and renew its mandate to Kishi Legal Practitioners to continue to represent him; and what is more, there is also nothing on the papers to suggest that the plaintiff was in the process of instructing other legal representatives to represent him. In that event, the applicant should have appeared in court to inform the Court, for instance, that he was in the process of hiring the services of legal practitioners to represent him and if the court could postpone the matter in order for him to obtain legal representation. In my experience, such request is not uncommon in the proceedings of the Court. In this regard, what explanation does the applicant give for allowing judgment to go by default? It is this. He thought that although the mandate to Kishi Legal Practitioners had been withdrawn, as aforesaid, the same legal practitioners would continue to represent him, save that he would have to pay the practitioners' fees from his pocket. Thus, the plaintiff says, it was not his understanding that Kishi Legal Practitioners had withdrawn from record. He also says that, in any case, he was given to understand by Kishi Legal Practitioners that the exception would not be moved, and even if moved would not be successful. Now which is which? The two versions are mutually destructive to each other. If the plaintiff's understanding was truly that Kish Legal Practitioners would represent him at the hearing on 11 October 2010, what did it matter to him whether the exception would be moved or not moved, and if moved would be dismissed. It is significant to note this. The plaintiff does not say that Kishi Legal Practitioners had hold him that they would not appear in court because the exception would not be moved on the basis, for instance, that the defendants' legal representatives had realized that the exception would be dismissed if it was moved. The plaintiff himself acknowledges that Kishi Legal Practitioners had told him that they would not continue to act for him unless and until he made to them a deposit of N$30,000-00. Besides, the plaintiff had made unsuccessful attempt to persuade NAMFISA to force Legal Shield to

reinstate his insurance so that Kishi Legal Practitioners would continue to act for him. What this amounts to it that, as I have said previously, before 11 October 2010, the plaintiff knew and was very much aware that he had not secured the services of a legal practitioner whose fees he would pay from his pocket or whose fees Legal Shield would pay. And so as I have intimated previously, the least and reasonable thing the plaintiff, who has seen it fit to drag the defendants to court to redeem his reputation which, according to him, is worth N$3,000,000-00, should have done was to appear in court in person in order to explain his circumstances to the Court. He did not do that. He was just not in court.

[6] In this regard, Ms Van der Westhuizen, counsel for the plaintiff, submits that the plaintiff's understanding that Kishi Legal Practitioners would continue to act for him but that he would have to pay their fees from this pocket should be put down to the plaintiff being a lay person. With respect, I cannot accept that argument. The plaintiff is not some illiterate villager. He was at the material time an Inspector in the Namibia Police (NAMPOL), and a training officer at that; but, more important, what Kishi Legal Practitioners told him was not about any principle of law. The words 'You must pay N$30,000-00 if you want us to continue to act for you because Legal Shield has withdrawn its mandate to us', or words to that effect, do not constitute a legal principle, requiring a degree in Law to comprehend. I rather accept submission by Mr Barnard, counsel for the defendants, that the plaintiff failed to appear in court for the hearing because he was under the impression that the exception would not be moved and if moved, would be dismissed.

[7] For all the aforegoing reasoning and conclusions. I find that the plaintiff has not given any reasonable and acceptable explanation for the plaintiff's default of appearance, and so he has failed to discharge the onus cast on him in order to

succeed. It follows inevitably that I do not see the need to consider the other essential element, namely, that the plaintiff's claim, prima facie, carries some prospect of success. In my judgement, the plaintiff has failed to discharge the onus of establishing the existence of sufficient cause for his default; and so, he cannot succeed. Whereupon, the application is dismissed with costs, and such costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Adv. C Van der Westhuizen

Instructed by: Dr Weder, Kauta & Hoveka Inc.

COUNSEL ON BEHALF OF THE DEFENDANTS:

Adv. P Barnard

Instructed by: Van der Merwe-Greeff Inc.