



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case no: I 126/2014

In the matter between:

NIKODEMUS MUMBANDJA

APPLICANT

and

SAIMA NEHALE

RESPONDENT

Neutral citation: *Nikodemus Mumbandja v Nehale* (I 126/2014) [2016] NAHCNLD
84 (07 October 2016)

Coram: CHEDA J

Heard: 04/11/2014; 09/02; 26/03/2015; 08/02; 18/04; 06/06; 04/07; 15/08;
19/09/2016

Delivered: 07 October 2016

Flynote: An applicant who applies for a rescission of judgment must file a founding affidavit as he is the one who knows his facts – the legal practitioner should file a supporting affidavit not the other way round. Applicant must present facts which will establish a good cause in order for his non-compliance to be excused. Lack of *bona fides* is an indication that there is no bona fide defence. Where a legal practitioner is requested by another legal practitioner to stand-in for him and fails to attend court he must depose to an affidavit in order to explain why he failed to do so, thus avoiding the court from concluding that, the default by applicant's was unlawful. The

applicant's legal practitioner should file an affidavit confirming and admitting his lack of diligence, negligence and recklessness. Application was dismissed.

Summary: Applicant failed to attend mediation and status hearing. Applicant was not co-operative when called upon to sign affidavit. He blamed his legal practitioner and the instructed legal practitioner for his demise. A default judgment was entered against him with costs. Applicant applied for a rescission of judgment. He did not comply with the rules of court regarding non-compliance and no reasonable explanation was given. Application was dismissed with costs.

ORDER

1. The application for rescission is dismissed with costs.

JUDGMENT

CHEDA J:

[1] Applicant applied for a rescission of judgement in this matter. Applicant was sued by the respondent for a sum of N\$78693.13, plus interest a *tempore morae* and costs. He entered an appearance to defend the matter.

[2] The matter was placed under case management up to a stage where it was referred to a court-connected mediation which was scheduled to take place on the 30 March 2016. It was further placed on case management roll of the 18 April 2016 at 09h00 for a status hearing.

[3] On the 18 April 2016 both applicant and her legal practitioner did not attend court and no explanation for their absence was given and they were regarded as being in default.

[4] In light of this development the court used its discretion and issued a sanctions order in terms of Rule 53 (1) (e) as read with (2) (b) which reads thus:

- “(1) If a party or his or her legal practitioner, if represented, without reasonable explanation fails to –
- (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) comply with a case plan order or any direction issued by the managing judge; or
- (2) without derogating from any power of the court under these rules the court may issue an order –
- (a) ...
 - (b) striking out pleadings or part thereof, including any defence, exception or special plea;”

[5] In the absence of an explanation, a default judgment was granted in favour of the respondent. An application now lies before this court for a rescission of the said default judgment. Ms. Shailemo, for applicant deposed to a founding affidavit on 17 May 2016 which was filed same day. She narrated the background to this matter. Of particular note, is that, she stated that this matter had been set down for mediation on the 30 March 2016 which did not take place due to applicant’s failure to attend. The matter was then set down for status hearing on the 18 April 2016. She herself did not attend to the status hearing, but, had asked a colleague Mr. Nyambe to stand-in for her. Mr. Nyambe also did not attend court and no explanation was given for his non-appearance.

[6] In her founding affidavit she admitted that she was aware of both days for the hearing.

[7] It is her evidence that she contacted applicant on the 25 April 2016 informing him about the dismissal of his defence and that a default judgment had been entered against him. This was 7 days after the said judgment had been delivered. In paragraph 6 of her affidavit she stated the following;

“ on the 25th of April 2016, after receiving the court order from court, I then informed the Applicant/Defendant that his defense is dismissed in terms of Rule 53 (1) (e) as read with (2) (b) of the Rules of the High Court and that Plaintiff is granted the order as prayed for in the summons, because the court was not furnished with reasons as to why he failed to attend mediation or alternatively failed to make travelling arrangements. Applicant/Defendant then informed me that he had not made prior travelling arrangements to attend the mediation because he was not informed of same. Had he been informed he would have attended to the mediation, as he wishes for the matter to be finalized. I stand embarrassed by any oversight and ineptitude on our part and am at pains to express to the above Honourable Court that the unwarranted failure to inform the Applicant/Defendant of the mediation was not as a result of willful action aimed at disrespecting this Honourable Court, its processes, directions or rules in any way whatsoever but merely flows from what must be an unfortunate and deeply regretted oversight. I respectfully re-iterate that the aforesaid was not willful.”

[8] The matter had been referred to mediation before the 30 March 2016. The court had to bend backwards in order to afford the parties a chance to settle.

[9] Ms. Shailemo further stated that, applicant failed to comply with Rule 16 (1) - (3): and the said rule reads thus:

“Rescission of default judgment

Rule 16 (1) A defendant may, within 20 days after he or she has knowledge of the judgement referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N\$5000, set aside the default judgment t on such terms as to it seems reasonable and fair, except that –

- (a) the party in whose favour default judgement has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security; or

- (b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.
- (3) A person who applies for rescission of a default judgment as contemplated in subrule (1) must –
 - (c) make the application within 20 days after becoming aware of the default judgement.”

[10] Applicant did not make an application within 20 days as required by law. Neither did he pay security of costs nor seek a waiver from respondent. This is a must and he was obliged to do so. The rules are quite clear. His reason for his failure to pay is because he had no money.

[11] Applicant deposed to a supporting affidavit on the 13 May 2016 and this was attached to his legal practitioner’s founding affidavit. His legal practitioner not only sought to explain the reasons for non-compliance by applicant, but, went further and argued the legal position in the affidavit. Affidavits should contain facts while legal arguments should be dealt with the heads of argument.

[12] Applicant subsequently filed a founding affidavit as well as in a supporting affidavit wherein he aligned himself to his legal practitioner’s averments. However, on the 08 July 2016, applicant deposed to another affidavit, now headed “founding affidavit” and was filed on the 12 July 2016. This was exactly 2 months after the first one. His legal practitioner also deposed to an affidavit which is now referred to a supporting affidavit. She further deposed to an affidavit relating to condonation for non-compliance with the rules of court regarding applicant’s replying affidavit.

[13] On the 5 August 2016, this court ordered applicant to file his replying affidavit before the 25 August 2016. This he failed to do. Ms. Shailemo on his behalf deposed to an affidavit wherein she explained her difficulty in locating him. She infact stated that she had drafted a replying affidavit for him on the 22nd and 24 August 2016 but failed to get him to sign it.

[14] It is her evidence that, on the 24 August 2016 she tried to contact him to come and sign the affidavit, but, could not manage to do so as he was not reachable. This was due to the fact that he was attending a workshop at Ochaka, Gobabis. The said affidavit was filed on the 06 August 2016 and the application for condonation was filed on the 06 September 2016.

[15] It is not applicant who deposed to this affidavit, but, her legal practitioner. He only deposed to a confirmatory affidavit. In essence there are two founding affidavits before the court.

[16] On the 06 September 2016, Ms. Shailemo further filed an affidavit which she attested to on the same day. This was styled "affidavit" and she laid down the background of the matter and the reasons for her failure to file applicant's replying affidavit timeously. The reasons are the same as shown earlier on.

[17] This affidavit was also accompanied by a confirmatory affidavit by applicant himself and it was signed on the 05 September 2016.

[18] Respondent filed his opposing affidavit on the 22 August 2016. She not in so many words adhered to her summons and particulars of claim. She is vigorously opposed to this application for a rescission of judgment as she is of the view that the rules of court relating to rescission have not been complied with and that application does not have a *bona fide* defence.

[19] In that regard she raised a *point in limine* with regards to the procedure adopted in the application for rescission of a default judgement. It is her argument that;

- 1) the judgment was granted in terms of Rule 53 (1) (e) and (2) (b) of the Rules of the court; and
- 2) rule 16 of the Rules of the Court was not complied with.

[20] With regards to the main application, she vigorously argued that the explanation given for respondent's failure to comply is not sufficient to excuse him at all.

[21] Before dealing with the *point in limine* it is important that I examine the nature of this application.

[22] In an application of this nature, a founding affidavit should be deposed to by the applicant himself or in his absence by someone who can swear positively to the facts. In *casu*, the first founding affidavit was deposed to by the legal practitioner who then went on to state that applicant failed to attend mediation due to the fact that he had other prior travel arrangements and also that he failed to comply with a court order regarding the filing of a replying affidavit due to the fact that he was attending a workshop. All this, came to the legal practitioner's knowledge through her client.

[23] What applicant's legal practitioner should have done is to draft a founding affidavit for applicant himself and hers should have been a supporting affidavit. Although she noticed her error she filed correct ones later, though out of time. A founding affidavit should be by the person who has first hand facts, although under certain circumstances, the representative can do so. However this must be clear in the contents of the said affidavit.

[24] In a founding affidavit, applicant must show that it has an interest in the matter or has a special reason entitling it in bringing the application, through establishing a *locus standi* in the matter. The concept of *locus standi* is used in the sense to bring proceedings, see *B v B 1997 (4) SA 1018 (SECLD) at 1022*.

[25] The general rule applicable in this instance is that an affidavit must stand or fall by the founding affidavit and the facts alleged in it, see *Moleah v University of Transkei 1998 (2) SA 522 (TKH at 533)*.

[26] Applicant must make out a *prima facie* case in the founding affidavit. The *prima facie* case is on a factual basis and those facts are always known by the litigant. Throughout the trial, facts will always belong to litigants and legal practitioners should not and cannot put themselves in the shoes of a litigant irrespective of whatever sympathies a lawyer may have. It is extremely dangerous

for a legal practitioner to associate himself with the facts as this may lead to his cross-examination which is undesirable.

[27] This default judgement came about as a result of defendant's failure to comply with a court order which invites a sanction in terms of Rule 53 in particular Rule 53 (1) (e) and (2) (b) referred to (supra).

[28] Applicant is within his right to apply for a rescission of judgment. However, in doing so it has to follow certain rules. Applicant's legal practitioner argues that it was proper for applicant to file a confirmatory affidavit attached to an opposing affidavit. This, with all due respect is incorrect. A confirmatory affidavit, confirms a founding affidavit as the author of the affidavit is the applicant and must explain his failure to comply with the rules.

[29] In her own founding affidavit the legal practitioner mixed, facts known to her and those known to applicant. In her earlier affidavit she went on to narrate facts which were supposed to have been deposed to by applicant and went on to narrate them on a first person basis. This is an incorrect procedure.

[30] The issue to be determined first, is that of the *point in limine* raised by respondent. She urged the court to find that applicant failed to comply with Rule 16 which requires that an application for rescission should be made within 20 days, and that applicant must tender security in the sum of N\$5000. This is a must unless respondent waives its right or the court orders otherwise.

[31] Both these requirements were not met by applicant. The reason for his failure is that he had no money. I understand him to say that the rules of court should be suspended on the basis of his lack of funds. To me, this is a plea for charity and can never be a legal argument. He who engages himself in a commercial enterprise should appreciate that he does so with the full knowledge of the financial implications of the said enterprise.

[32] Anybody who seeks to benefit from a business enterprise should be prepared to handle both the profit and any other legal obligations. He is also expected to familiarize himself with the legal requirements of his businesses and indeed should

be prudent enough to instruct his legal practitioner where necessary. This is nothing but an advice and attendant desire for prudence.

[33] The principle relating to rescission of judgment is governed by both the statutes and common law as founded in the celebrated cases of *Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)* and *Hardroad (Pty) Ltd v Oribt Motors (Pty) Ltd 1977 (2) SA 151 (c)*.

[34] The applicant is required to show good cause why the judgment should be rescinded. The following facts militate against him:

- a) he failed to apply for rescission of judgment within 20 days of his knowledge of the same;
- b) he could not be located timeously in order to sign the replying affidavit as he had chosen to attend a seminar at the expense of a matter pending in court;
- c) failed to attend a court connected mediation as he stated that he had made other prior arrangements; and
- d) he failed to pay security of costs as required by Rule 16.

[35] Applicant's approach to this litigation was to say the least curt and thus lacked seriousness which translates to negligence and recklessness.

[36] His lack of urgency in both his application for condonation and rescission is a cause for concern. He failed to make out his case on the papers, which is a requirement, as it is through that process that the court can have a clear view of his failure and through it that it can use its judicial discretion to lean in his favour. It has been stated in this jurisdiction for time without number, that an application for condonation is a substantial application and it requires a formal application. Above all, it must be properly done and a legal practitioner must, therefore, be vigilant and diligent when making an application as applicant will be seeking the court's indulgence from a weak strength as it were. It is the duty of applicant to ensure that the court is left with no doubt about applicant's genuineness.

[37] It is trite that such an application is not for the taking, but, must be applied for as soon as he has knowledge of the judgment against himself, he must explain the

reasons for the delay and must show good cause, see *Smith NO. v Brummer 1954 (3) SA 352 (0)*; and in this jurisdiction the celebrated case of *Telekom Namibia Limited v Michael Nangolo & 34 Others Case No. LC 33/2009*. It is not for the taking. It requires prompt action as soon as one has knowledge of his default in compliance with the rules. In determining whether to grant the condonation, the court will take into consideration the following factors:

- a) the degree of the delay;
- b) the reasonableness of the explanation for the delay;
- c) the prospects of success;
- d) the interest in the finality of litigation; and
- e) the need for a speedy of finality in the administration of justice.

[38] I am fortified by the approach adopted by *Masuku J in 1A Bell Co-Namibia (Pty) Ltd and E.S Smith Concrete Industries CC (I 1860/2014) [2015] NAHCMD 63 (23/3/2015)* wherein the learned Judge analysed and crystalised the correct legal position.

[39] It is the duty of applicant to persuade the court to grant it condonation upon its reasonable explanation of its non-compliance, see *Petrus v Roman Catholic Archdioces 2011 NR 637; Teek v President of the Republic of Namibia and Others 2015 (1) NR 51 (SC) at 61E-H and Republic of Namibia & Others and Quenet Capital (Pty) Ltd v Transnamib Holdings Limited (I 2679/2015) NAHCMD 104 (8/4/2016)*. In *Quenet Capital (Pty) Ltd* matter, my brother Masuku J stated that:

“In determining whether the explanation is sufficient to warrant the grant of condonation and with also counter the litigant’s prospects of success on the merits, same in cases of a “flagrant non-compliance with the rules which demonstrate a glaring and inexplicable disregard for the process of the court.”

[40] Ms. Shailemo, attributed her failure to attend court on the 18 April 2016 to her colleague Mr. Nyambe’s failure to come to court as per his undertaking. If this is true, one would have expected Mr. Nyambe to depose to a supporting affidavit to that effect. This was however not done. It again casts down on the credibility of this assertion.

[41] Applicant has a duty to convince the court regarding the reasons for his failure and at the same time that he has good defence. There is no reasonable explanation before the court as to what the delay was. In *Telekom Namibia* matter (supra) the court ably laid the requirements as follows:

- a) condonation must be sought as soon as the non-compliance has come to the fore;
- b) the degree of delay is a relevant consideration;
- c) the entire period during the delay had occurred and contained must be fully explained; and
- d) there is a point beyond which the negligence of the legal practitioner will not avail the party that is legally represented.

[42] Our court's position has not changed and I fully subscribe myself to it.

In *casu*, applicant has been culpable in the following manner:

- a) he filed his application on 12 July 2016, which is 58 days after the defendant was granted; and
- b) he did not pay the security of costs for the application for rescission of judgment.

[43] His reason for non-compliance is based on his financial disability, but, in my mind, this is not true as he was not available at the mediation hearing and also when he was required to sign an affidavit.

[44] In my view, applicant lacked the expected zeal in attending to his matter which now has a bearing on his prospects of success. A litigant who when faced with such a lawsuit should not be expect to be persuaded or enticed by his legal practitioner to comply with the necessary requirements which are essential for his defence. A litigant who displays a cavalier attitude towards impeding danger has himself to blame in the event that the legal process turns out against him.

[45] The legal system protects those who are wise enough to take reasonable steps to seek justice. A laissez-faire approach towards compliance of the rules of court cannot be countenanced by these courts.

[46] Applicant has argued that respondent did not comply with Rule 15 (3) regarding her claim for damages. Respondent has in fact substantially complied with the rules of the court. Applicant's argument, therefore, does not hold water as respondent submitted proof of damages she suffered as a result of the collision solely caused by applicant's negligence.

[47] In this regard, I find that applicant failed to dislodge the burden on him to establish a good cause for the rescission of judgment. In light of the above, the following is the order of court:

1. The application for rescission is dismissed with costs.

M Cheda
Judge

APPEARANCES

APPLICANT: T. Shailemo
Of Inonge Mainga Attorneys, Ongwediva

RESPONDENT: C. Tjihero
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva