



REPORTABLE

CASE NO: SA 71/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

XIZHOU ZHAO

First Appellant

HEBEI XINYIANG CONSTRUCTION CC

Second Appellant

And

XIZHONG HOU

First Respondent

RIGHT PATH INVESTMENTS (PTY) LTD

Second Respondent

Coram: SMUTS JA, ANGULA AJA and SCHIMMING-CHASE AJA

Heard: 01 October 2024

Delivered: 29 January 2025

Summary: This is an appeal against a High Court judgment and orders dismissing the appellants' application to rescind a default judgment. The litigation originated from a 2013 oral agreement concluded by the parties regarding the cancellation of joint investments in close corporations. The terms of the agreement concerned the transfer of member interests, payment considerations and the delivery of certain motor vehicles as a counter-performance. The

respondents claimed that they fully complied with the terms of the agreement and sued the appellants for breach of contract. The appellants defended the action and admitted the conclusion of the agreement and further admitted that the respondents performed some terms of the agreement.

The case went through case management over a period of six years, with the appellants failing to comply with a number of court orders. The final non-compliance was in respect of a court order that they file discovery affidavits. They attributed their non-compliance to the unavailability of the first appellant, who was stuck in China. As a result, their defence was struck, and a default judgment was granted on 1 December 2021.

The appellants subsequently applied for a rescission of judgment, arguing that the judgment was granted in their absence, without notice, and without being afforded an opportunity to explain their non-compliance. They also contended that the claim for the delivery of motor vehicles had become *res judicata* between the parties. The respondents opposed the application, asserting that the appellants were represented when the defence was struck and when the matter was postponed for the application for default judgment. Furthermore that the appellants had failed to allege that their case had prospects of success.

The High Court held that the default judgment was neither erroneously sought nor granted in the appellants' absence of the appellants, as their legal practitioner was present when the proceedings were postponed for the application for default judgment hearing.

On appeal, the central issues were the validity of the *res judicata* defence and whether the default judgment was erroneously granted in the appellants' absence.

Held that, the defence of *res judicata* did not exist as a fact. The judgment which the appellants contended to have settled the disputes between the parties did not relate to the same parties and was based on a different cause of action.

Held that, the default judgment was not erroneously granted. The legal practitioner for the appellants was present on 17 November 2021 when the proceedings were postponed to 1 December 2021 to consider the application for default judgment. He failed to appear at the proceedings on 1 December 2021 while he knew the date to which the proceedings were adjourned and for what purpose. The application for default judgment was served on the legal practitioner through the E-justice platform. Thus, the order was not granted in the absence of the appellants.

Held that the appellants' application for condonation for non-compliance with the court's rules is granted.

Held that, the appeal had no prospects of success and as a result, it was dismissed with costs.

APPEAL JUDGMENT

ANGULA AJA (SMUTS JA and SCHIMMING-CHASE AJA concurring):

Introduction

[1] This is an appeal against the judgment and orders of the court *a quo* dismissing, with costs, the appellants' application for rescission of a judgment granted by default. The default judgment was granted following the striking of the appellants' defence due to non-compliance with the court's orders.

Proceedings before the High Court

[2] In February 2015, the respondents instituted an action against the appellants and three other close corporations. It was alleged that during April 2013, the first respondent, acting on his behalf and on behalf of the second respondent, concluded an oral agreement in terms of which the joint investments

in the close corporations would be cancelled. In terms of the oral agreement, the first appellant would transfer his 37 per cent member interest in the second respondent to the first respondent; and the first appellant would transfer 50 per cent of his member's interests in two close corporations. It was a further term of the oral agreement that the second appellant would return the second respondent three motor vehicles and that the first respondent would pay an amount of three million to three close corporations owned by the first appellant and that the first respondent would also relinquish all his member's interests in the three close corporations to the first appellant. The respondents alleged that they complied with their obligations in terms of the oral agreement; however, the appellants breached the agreement.

[3] The appellants defended the action. In their plea, they admitted that there was an oral agreement to cancel the joint investment in the close corporations. They further admitted that the first respondent paid certain monies and that certain members' interests in the close corporations were relinquished. They also admitted that the first appellant transferred his member's interest to the second respondent.

[4] In its judgment dismissing the application for rescission of judgment, the court *a quo* narrated the history of the matter, which showed that it dragged on through case management for six years and made no progress.

[5] The breakpoint occurred on 4 August 2021, when the appellants were ordered to file their discovery affidavit by 17 September 2021, and the matter was

postponed to 17 November 2021 for a pre-trial conference. When the matter was called on 17 November 2021, the appellants had not filed their discovery affidavit as per the court's previous order. The legal practitioner for the appellants had filed a status report, not an affidavit, stating that he could not file his client's discovery affidavit because his client, the first appellant, who is a Chinese national, had not returned from China.

[6] On that day, 17 November 2021, the court *a quo*, in the presence of the appellants' legal practitioner, struck the appellants' defence due to their non-compliance with the court's order. The matter was postponed to 1 December 2021 for the hearing of the application for default judgment to be launched by the respondents.

[7] When the matter was called on 1 December 2021, the appellants' legal practitioner did not appear whereupon the respondents' legal practitioner moved for an order for default judgment, which the court granted.

[8] Thereafter, on 15 December 2021, the appellants applied for a rescission of the default judgment against them in terms of Rule 103 and the common law. They contended that their defence was struck without being notified that the court intended to strike their defence; without being afforded an opportunity to explain why they failed to file their discovery affidavit; and without the court indicating that it intended to impose sanctions on them.

[9] The appellants further contended that the default judgment was erroneously sought and granted in their absence. They contended further that the claim for the delivery of the motor vehicles was *res judicata* between the parties, and for that reason, the default judgment was erroneously granted.

[10] The respondents opposed the application and contended that the default judgment was neither granted in the appellant's absence nor was it erroneously granted. Furthermore, that the appellants had failed to allege that they had prospects of success in the event the application for rescission was granted.

[11] The court *a quo* found that on 17 November 2021 before the defence was struck, the court *a quo* asked the legal practitioner for the appellants, that given the appellants' history of non-compliance with the court's previous orders, whether there was any reason why the appellants' defence should not be struck. According to the court, the legal practitioner did not offer any reason but only stated that he was leaving the matter in the hands of the court.

[12] The court further held that rule 103 does not apply in the circumstances where the affected party was informed that an order would be sought and such party failed to attend the hearing or to participate in the proceedings. In this regard, the court pointed out that the legal practitioner for the appellants was present on 17 November 2021 when the matter was postponed to 1 December 2021 for an application for default judgment.

[13] Regarding the appellant's reliance on the common law grounds, the court found that the appellants had failed to provide a reasonable explanation for their default and further failed to demonstrate that they have a bona fide defence with a reasonable prospect of success. The court accordingly dismissed the application with costs. Aggrieved by the court's order, the appellants launched the present appeal.

Grounds of appeal

[14] The appellants advance four main grounds of appeal. First that the court *a quo* erred in law by failing to deal with the defence of *res judicata* raised by the appellants. It is contended that the *res judicata* principle precluded the court from granting the order to deliver the motor vehicles. Therefore, the judgment was sought and granted erroneously.

[15] Second, that the court failed to find that the striking of the appellants' defence was made in their absence and thus deprived them of further participation in the proceedings relating to the default judgment.

[16] Third, that the court *a quo* erred in law in finding that the appellants had notice on 17 November 2021, when the proceedings were postponed to 1 December 2021, in the presence of their legal practitioner, that an application for default judgment would be made on 1 December 2021.

[17] Fourth, that the court a quo erred in law in finding that rule 103 does not apply in circumstances where an affected party was informed of the hearing and that relief would be sought against such party and the party declines or fails to attend or participate in those proceedings.

The parties' respective submissions

On behalf of the appellants

[18] Mr Diedericks argued the appeal on behalf of the appellants. He submitted in his heads of argument and during the hearing that it was not open to the respondents to seek a judgment for the delivery of the motor vehicles where that dispute was finally disposed of in a case which served before Oosthuizen J. Accordingly, so the argument went, the default judgment was erroneously granted. Counsel sought to rely on this Court's judgment in *De Villiers v Axiz Namibia*¹. Counsel submitted that the fact that such a defence was absent on papers was irrelevant. He submitted that the court could rely on the allegation in the founding affidavit filed in support of the application for rescission of judgment. Therefore, the default judgment ought to have been rescinded.

[19] Counsel further pointed out that the appellants had no notice that the court would, on 17 November 2021, consider imposing sanctions as contemplated by rule 53(2)(b).

¹*De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC).

[20] Mr Diedericks argued further that an order striking out a defence is a discretionary remedy. It must be considered upon reasons advanced by a party who faces an order directing it to advance reasons why sanctions should not be imposed. In the present matter, he submitted, the appellants were not afforded that opportunity. Counsel relied for this submission on the judgment of this Court in *Minister of Health and Social Services v Matheus Amakali*²

On behalf of the respondents

[21] Ms Delport argued the appeal on behalf of the respondents. Counsel argued that the defence of *res judicata* did not find application to proceedings before the court *a quo*, and as such, the default judgment was not erroneously granted. Counsel pointed out that the judgment by Oosthuizen J in *Right Path Investments (Pty) Ltd v Hebei Xinjian Construction CC (unknown 460 of 2014)* [2017] NAHCMD 118 (20 April 2017) (the second respondent and the first appellant) dealt with the presumption in law relating to ownership of the motor vehicles in question as opposed to possession. The claim was based on *rei vindicatio*, whereas in this matter, the cause of action was based on a breach of an oral agreement.

[22] In response to the appellants' argument that they were not given notice of the sanctions hearing, counsel pointed out that the record showed that they had been afforded sufficient opportunity from May 2021 to November 2021 to comply with the court orders which they consistently did not comply with. Furthermore, the court asked the appellants' legal practitioner to explain the reason for the

² *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC).

non-compliance with the court's previous order to file the discovery affidavit. Instead, the legal practitioner opted to leave the matter in the court's hands without making any submission, resulting in the court exercising its discretion by striking out the appellants' defence.

[23] In so far as the appellants chose to rely on the provisions of rule 103(1), counsel argued that the rule is only applicable where an order had been granted in the absence of an affected party. Counsel relied on *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty-Two*,³ where it was held that the rule does not apply to situations where a litigant was afforded an opportunity to explain the default and he or she fails to do so, or where his or her reasons are found not to be good and sanctions imposed pursuant thereto.

[24] Regarding the appellants' reliance on the common law requirements for rescission of default judgment, Ms Delport pointed out that the requirements are that the applicant is required to show sufficient and good cause; that he or she has a bona fide defence; and further demonstrate that he or she has reasonable prospects of success on the merits. Counsel pointed out that the appellants had failed to allege that they had met those requirements.

Analysis

³ *Tsumeb Mall (Pty) Ltd v Hallie Investment Number Two Hundred and Twenty-Two* t/a Spur & another 2019 (3) 734.

[25] I proceed to consider whether there are merits in the appellants' grounds of appeal taking into account counsels' respective submissions as well as the applicable legal principles.

[26] The first ground is that the court *a quo* erred in not dealing with the defence of *res judicata*. The term *res judicata* means that a judicial decision has settled the dispute between the same parties.⁴ This Court in *De Villiers (supra)* held, at para 22, that when a court considers an application for rescission of default judgment, it would be entitled to have regard not only to the record of the proceedings of the court that had granted the impugned judgment or order but also to those facts set out in the affidavit in support of the application for rescission.

[27] It is common cause that in the present appeal, the pleadings did not refer to the judgment by Oosthuizen J, which the appellants contend settled the dispute between the parties concerning the ownership of the three motor vehicles. The allegation concerning *res judicata* was made in the founding affidavit in respect of the application for rescission of judgment. The question arises whether the defence of *res judicata* exists as a fact. In my view, Ms Delport is correct in her submission that the judgment by Oosthuizen J did not meet all requirements of the defence of *res judicata*. The only requirement met was that it was a final judgment. However, the judgment was not between the same parties or based on the same cause of action.⁵ The first appellant and the first

⁴ Black's Law Dictionary.

⁵ Amlers's Precedents of Pleadings, 4th Ed at p 273.

respondent were not parties to that dispute. As counsel correctly pointed out, in that matter, the cause of action was based on *rei vindicatio*, whereas in the proceedings before the court a quo, the cause of action was based on the breach of an oral agreement relating to those motor vehicles.

[28] The record shows that the judgment by Oosthuizen J was delivered on 20 April 2017. The appellants' plea had already been filed on 8 April 2016. The appellants admitted in their plea in paragraph 5 that there was an oral agreement between the parties to cancel the joint investment in the close corporations; and that some terms of the agreement were complied with. No amendment to the plea was filed to reflect that the claim for the delivery of the motor vehicles had become *res judicata* as alleged by the appellants. The parties filed a joint case management report on 21 April 2021, which stated that no amendment to the pleadings was anticipated and that they would abide by the pleadings. The report further recorded that the parties attempted mediation but were unsuccessful.

[29] Given the foregoing facts, I am of the view that the court a quo was entitled to ignore the appellants' allegation that a defence of *res judicata* existed. It was an afterthought, not supported by surrounding circumstances. Therefore, the court a quo did not err in ignoring the so-called defence of *res judicata*. The default judgment was not erroneously granted. It follows, thus, that the ground of appeal relating to the defence of *res judicata* fails.

[30] I move to consider the second ground of appeal, namely that the appellants' defence was struck in their absence and thus deprived them of further

participation in the proceedings relating to the default judgment. Mr Diedericks is correct in his submission that an order striking a defence entails the exercise of a discretion by the court and must be considered upon reasons advanced by a party who faces an order why sanctions should not be imposed. The defence was struck in the presence of the appellants' legal practitioner. The record shows that he was asked by the court to make representations as to why his clients' defence should not be struck. Instead of making representations, he simply said that he would leave the matter in the court's hands.

[31] This court made it clear in *Amakali (supra)*⁶ that a party whose defence has been struck even where a litigant is barred from supporting the defence, he or she has the right to appear and to address the court on why the claim or parts of it should not be granted as the pleadings stand. The legal practitioner for the appellants failed to appear while he was still on record and was aware of the date when the application for default judgment would be moved. He could, for instance, have made submissions relating to the *res judicata* defence, which was belatedly raised in the application for rescission of judgment. He remained on record for the appellants until 21 January 2022, when he filed his notice of withdrawal as a legal practitioner for the appellants. There was no explanation by the appellants in their application for rescission of judgment as to why their legal practitioner did not appear before the court on 1 December 2021. This ground of appeal equally fails.

[32] The next ground of appeal is closely related to the one I just dealt with above. It is to be recalled that the appellants contended that the court *a quo* erred

⁶ Para 55.

in law in finding that the appellants had notice that an application for default judgment would be moved on 1 December 2021. Furthermore, that the knowledge by the appellants' legal practitioner did not mean that the judgment was not granted in the absence of the appellants.

[33] I have already found that the legal practitioner for the appellants was present on 17 November 2021 when the proceedings were postponed to 1 December 2021 to consider the application for default judgment. He did not ask for leave from the court to withdraw as a legal practitioner for the appellants for lack of instructions. The application for default judgment was served on him *via* the E-justice platform. He failed to appear at the proceedings on 1 December 2021 without leave of the court while he was still on record and knew the date to which the proceedings were adjourned and for what purpose. He filed a confirmatory affidavit in the application for rescission of judgment in which he confirmed that he was the legal practitioner of record for the applicants. He had an opportunity to explain his absence from court on 1 December 2021 in his confirmatory affidavit but he failed to do so. In the circumstance, the court *a quo* was correct in holding that the order was not granted in the absence of the appellants.

[34] The last ground of appeal is that court *a quo* erred in law in finding that rule 103 does not apply to a situation where a party was informed of a hearing and the relief that would be sought against such a party and a party declined to attend the proceedings. Counsel for the appellants referred the court to

judgments where it has been held that an application for rescission is the appropriate remedy for a party whose defence was struck.⁷ It is correct that the view expressed by the court a quo in that regard was unfortunate and incorrect. It appears, however, that on a proper reading of the judgment, despite that remark, the actual reason for the court dismissing the application it found that ‘the defendants do not have legitimate ground for rescission either within the ambit of rule 103(1) or the common law.’

[35] It was common cause that the appellants did not satisfy the requirements for the rescission of judgment based on the common law principles. The court was thus correct in its finding in that regard.

Appellants’ application for condonation

[36] The appellants seek condonation for the late filing of their heads of argument as required by rule 17; condonation for the late filing of the second appellant’s resolution; and condonation for the late filing of rule 11(10) report.

[37] An appellant seeking condonation for non-compliance with the rules must satisfy specific requirements. He or she must provide a reasonable, acceptable and bona fide explanation. He or she must provide a full, detailed, and accurate explanation for the whole period of delay. He or she must further satisfy the court

⁷ *Tsumeb Mall v Halie Investment Number Two Hundred and Twenty-Two and Another* (1724/2916) [2019] NAHCMD 201 (21 June 2019); *Josephina Kiipule Kalimba v Remigius Hafeni Kalimba* (HC-MD-CIV-ACTMAT-2018/00569) [2019] NACHMD 212 (28 June 2019).

that there are reasonable prospects of success on appeal. The application must be brought as soon as non-compliance has been detected.

[38] In considering whether an appellant has satisfied the foregoing requirements, the court also considers the prejudice suffered by the other litigants in the appeal and the court's convenience and the avoidance of delay in the administration of justice.

[39] Those factors are not considered in isolation but against each other, and further, depending on each case, they need not all be considered. For instance, there is an interplay between the prospects of success and the degree of non-compliance. The higher the likelihood of the prospects of success, the less weight is given to non-compliance. Conversely, the more glaring and flagrant the degree of non-compliance, the less weight is given to the prospect of success.

[40] The question is now whether the appellants have satisfied those requirements. Regarding the late filing of the heads of argument, rules 17(1) and (2) provide that an appellant's heads of argument must be filed not more than 21 days before the hearing date. This appeal was set down for hearing on 1 October 2024. The appellants' heads of argument ought to have been filed on or before 1 September 2024. It was, however, filed on 2 September 2024 – a day late. The legal practitioner explained that he had committed a calculation error in that he calculated the 21 days backwards from the date of the appeal hearing, which was 1 October 2024 to 2 September 2024. He explained further that it was only on

Sunday, 1 September 2024, that he discovered his error when he read the judgment of this Court in the *De Klerk* matter.⁸

[41] I am satisfied with the explanation given by the legal practitioner. The explanation sounds bona fide. Also, a calculation error resulting in a one-day shortage is not that significant. No prejudice has been suffered by anybody involved in the appeal. The explanation is, therefore, accepted.

[42] With regard to the late filing of the second appellant's resolution, the first appellant deposed that the resolution was provided to his legal practitioner of record as early as 20 September 2022 which ought to have been filed with the power of attorney authorising the legal practitioner to prosecute the appeal. The legal practitioner, however, omitted to file the resolution when he filed the power of attorney. The legal practitioner filed a confirmatory affidavit confirming his omission. Regrettably, he did not explain the circumstance under which the omission occurred.

[43] Both the power of attorney and the resolution are dated 20 September 2022. Furthermore, the revenue stamp on the power of attorney was defaced on 21 September 2022. Since the power of attorney was filed timeously, it mitigates the omission to file the resolution timeously. I am satisfied that the explanation is both reasonable and bona fide. No prejudice has been caused to anybody by the late filing of the resolution.

⁸ *De Klerk v Penderis & others* SA76/ 2020 [2023] NASC (1 March 2023).

[44] Rule 11(10) prescribes that the legal practitioners for the parties must, within 20 days of the noting of the appeal, hold a meeting to eliminate part of the record which is not relevant for the determination of the appeal and must thereafter, within 10 days file a report with the registrar. In this appeal, the meeting was held in compliance with the rule. However, the report was filed late. The appellants accordingly seek condonation for the late filing of the report.

[45] The first appellant deposed that the parties 'respective legal practitioners held the prescribed meeting on 20 September 2022, well within the time period prescribed by the rule, and the report was compiled and signed on 21 October 2022. According to the first appellant, the appellants' legal practitioner, 'from sheer inadvertence and regretful omission,' failed to file the report with the registrar. The legal practitioner filed a confirmatory affidavit to that effect.

[46] In my view, there has been substantial compliance with the rule. The failure to file the report within the time prescribed by the rule did not cause prejudice to anybody involved in the appeal. From the number of petty non-compliances by the legal practitioner for the appellants, it would appear that there was a lack of diligence in handling this appeal. He would be better advised to pay attention to the time period prescribed by the rules of this court if he is to continue to practise in this Court.

[47] In the circumstances, I am satisfied that the appellants have provided a reasonable and acceptable explanation for their non-compliance with the rules, which are not glaring in degree. Condonation is to be granted.

Conclusion

[48] Even though condonation is to be granted, the appeal is without prospects for the reasons already set out when the grounds of appeal were considered.

Order

[44] In the result, the following order is made:

1. The application for condonation for the appellant's non-compliance with the rules of this Court is granted and the appeal is re-instated.
2. The appeal is dismissed.
3. The appellants are to pay the respondents' costs.

ANGULA AJA

SMUTS JA

SCHIMMING-CHASE AJA

APPEARANCES

APPELLANTS

J Diedericks (with him JA Comalie)

Instructed by BD Basson Incorporated

RESPONDENTS

A Delport

Of Delport Legal Practitioners