NOT REPORTABLE

CASE NO. A 17/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LUBBE'S AUTO CENTRE CC **APPLICANT**

and

DRUPPEL INVESTMENTS CC **RESPONDENT**

CASE NO. A 16/2011

LUBBE'S AUTO CENTRE CC **APPLICANT**

and

GROUT INVESTMENTS CC **RESPONDENT**

CORAM: CORBETT, A.J

Heard on: **29 NOVEMBER 2011**

Delivered on: **30 MAY 2012**

JUDGMENT

CORBETT, A.J: .

[1] At issue in these matters, are separate applications for rescission of judgment. The relevant facts of both the matters under case number A17/2011 and A16/2011 are identical, except that the respondents in both matters are different entities. The matters revolve around the same principles of law. By agreement between the parties both applications were argued together and identical heads of argument were filed in respect of both matters. In the circumstances, I deal with both applications jointly in this judgment. Where I refer to the respondent, reference is to both Druppel Investments CC and Grout Investments CC, unless otherwise indicated. The parties are referred to as in the main application, the applicants for rescission being the respondents in the main application.

[2] In the Druppel matter, the applicant sought and obtained default judgment against the respondent upon the following facts:

[2.1] During April and May 2009 the applicant entered into an agreement with the respondent in terms whereof the applicant would act as a transport agent for the respondent in securing work for the respondent's trucks. The applicant would be paid a commission for so acting.

[2.2] It was a further term of the agreement that the respondent would be liable for any expenses or disbursements relating to the operation of the trucks, such liabilities to include legal costs, and import and export agency fees.

[2.3] It was further agreed that the applicant would ensure that the trucks were in good running order by rendering mechanical services in supplying materials and spare parts for the trucks in order that the respondent might keep and maintain the trucks in running order.

[2.4] The applicant states that it rendered the services and provided the parts and materials for which it produced invoices, claiming that the respondent is indebted to the applicant in the amount of N$506,680.08.

[2.5] In order to ensure the safety of the respondent's trucks the applicant was obliged to rent premises for the trucks and provide security services. The applicant produced invoices for such services amounting to

the sum of N$207,090.76 up to and including 28 February 2011. The applicant claims that it further incurred expenses and disbursements on behalf of the respondent in the amount of N$62,857.90.

[2.6] The applicant accordingly claims that in terms of the agreement between the parties the amount of N$776,628.74 became due, owing and payable during April 2010. In view of the invoice dates, I assume that this date is a typographical error and should be a reference to April 2011.

[2.7] The applicant claims that the respondent's representative agreed that the respondent was indebted to the applicant and that the respondent's position was that it was not in a position to immediately make payment of the outstanding liability but would do so over a period of time.

[3] Similarly in the Grout matter, the applicant sought and obtained default judgment against the respondent upon the following facts:

[3.1] During April and May 2009 the applicant entered into an agreement with the respondent on the same terms as the Druppel agreement.

[3.2] The applicant claims that it rendered the services and provided the parts and supplied materials in terms of invoices issued by it in the sum of

N$162,877.16. It further claims that it was obliged to rent premises for the trucks and provided security services in the sum of N$200,853.23, together with further disbursements of N$47,469.00.

[3.3] The applicant accordingly claims that the amount of N$411,199.39 became payable to it during April 2010. Again this date – in the light of the invoices relied upon – should probably read April 2011. Due to payments made by the respondent to the applicant and further credits passed, the outstanding balance due was N$321,072.40.

[3.4] The applicant further claims that the respondent's representatives agreed that the respondent was indebted to the applicant and that an undertaking was made to pay off the liability on a periodic basis.

[4] Before considering the merits of the application for rescission, I will first deal with a contention sought to be advanced on behalf of applicant that the application for rescission was brought in terms of Rule 31(2)(b) and not the common law.

THE BASIS OF THE APPLICATION FOR RESCISSION

[5] The main thrust of Mr Van Vuuren's argument, on behalf of the applicants, was that the respondents appear to have brought the application for rescission in

terms of the provisions of Rule 31 (2) (b). Counsel accordingly contended that the respondents had not complied with the provisions of that Rule and for this reason alone the application for rescission should be refused. Mr Barnard, on behalf of the respondents, submitted that the application for rescission was brought within confines of the common law.

[6] It is correct that in the founding papers the respondents do not state whether the application for rescission is brought by virtue of Rule 31 (2) (b), Rule 44 or the common law. A party may bring any such application by virtue of either Rule or the common law, depending upon the facts of the matter and, in the case of Rule 31 (2) (b), the timing of the application. In terms of Rule 31 (2) (b) the application must be brought within 20 days of the respondents having knowledge of the default judgment and upon the respondents furnishing security as provided for in the Rules. *In casu* the respondents did not furnish security and it would then be safe to assume that the respondents did not place reliance upon Rule 31 (2) (b).

[7] It is permissible for an applicant in an application for rescission of judgment granted by way of default to approach the Court both in terms of Rule 31 (2) (b) and the common law. In both cases the applicant for rescission must show "*good cause*". However, I am of the view that generally an applicant for rescission should for clarity's sake state whether the application is brought in

terms of the Rules, and which particular Rule, or the common law, and whether the application is brought in terms of both in the alternative.

[8] However, the fact that the respondents have not stated in this application that the application is brought in terms of the common law, does not put the applicant at any disadvantage. This is so because the principles underpinning both such applications in respect of good cause, are the same. There is, in my view, nothing in addition that the applicant would have to deal with should it incorrectly assume that the application is brought in terms of Rule 31 (2) (b) rather than the common law. In any event, at the hearing, Mr Barnard made it quite clear, as he did in the respondents' heads of argument, that the application was brought in terms of the common law and Mr Van Vuuren would have been aware of this fact upon receipt of the heads of argument prior to the hearing of this matter. I accordingly find that the point *in limine* raised by the applicant in this regard, has no merit.

RESCISSION IN TERMS OF THE COMMON LAW

[9] The respective applications were served on the respondents on 15 February 2011. The respondents failed to file a notice of opposition to the applications or any opposing papers and accordingly on 25 February 2011 this Court granted default judgment against the respondents in the aforementioned

sums. The respondents now seek rescission of such judgments. The respective applications are brought in terms of the common law.

[10] The South African Appellate Division has shed light on a rescission of judgment sought under the common law:

> "The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (*Cf Athanassiou v Schultz, 1956 (4) SA 357 (W) at 360 G* and *Verkouteren v Savage, 1918 AD 143 at 144*). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being *functus officio*, and judgments could only be set aside on the limited grounds mentioned in the *Childerley* case." [1]

[11] Trengove AJA further stated in the *De Wet* case, *supra*:

> "Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The *onus* of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, *inter alia,* that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42(1), and those specifically mentioned in the *Childerley* case." [2]

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[1] De Wet and Others v Western Bank Ltd, 1979 (2) SA 1031 (A), at 1041B - E
[2] De Wet case, *supra* at 1042G - H

[12] In the case of *Childerley v Estate Stores and Standard Bank of SA Ltd* [3] it was held that in terms of the common law a judgment could be set aside on the grounds of fraud, j*ustus error,* the instances in the Rules of Court where judgment was given by default and, in certain exceptional circumstances, when new documents had been discovered.

[13] The following has further been stated in the *Nyingwa* case[4]:

> "It follows that any judgment, including a summary judgment, can be rescinded under the common law. If the merits of the dispute were considered before summary judgment was granted, rescission can follow only on the grounds set out in the *Childerley* case; if the merits were not considered and the judgment was granted by default, the grounds for rescission are virtually unlimited, and the only prerequisite is that 'sufficient cause' therefor must be shown. It follows that, if an answering affidavit, or evidence, has been considered by the Court before it grants summary judgment, the Court would then have considered the merits of the case and its judgment cannot then be held to be by default, even if there was no appearance for the defendant when the application was heard.
>
> In the present case the defendant was not only in personal default, but his defence had also not been presented by way of affidavit or oral evidence and the Judge therefore granted summary judgment without having had the opportunity of considering the merits of the case. This Court must therefore in this application decide whether 'sufficient cause' has been shown to rescind the judgment."

[14] The Courts generally expect an applicant in a rescission application to show good cause by –

[14.1] giving a reasonable explanation for his or her default;

[14.2] showing that his or her application was made *bona fide*; and

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[3] 1924 OPD, 163

[4] Nyingwa v Moolman NO, 1993(2) SA 508 (Tk GD), 511J - 512C

[14.3] showing that he or she has a *bona fide* defence to plaintiff's claim which, *prima facie*, has some prospect of success.[5]

[15] The Courts have generally taken more of a benign approach to applications for rescission. It has accordingly been stated that:

> "An application for rescission is never simply an enquiry whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence and hence that the application for rescission is not *bona fide.*" [6]

[16] Strydom CJ in the *Leweis* –matter further stated:

> "A reading of the above cases shows that although the fact that the default may be due to gross negligence it cannot be accepted that the presence of such negligence would *per se* lead to the dismissal of an application for rescission. It remains however a factor to be considered in the overall determination whether good cause has been shown, and would weigh heavily against an applicant for relief." [7]

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[5] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape), 9 E – F; Grant v Plumbers (Pty) Ltd, 1949 (2) SA 470 (O), 476; Chetty v Law Society, Transvaal, 1985 (2) SA 756 (A), 764 I – 765 F; Principles applied in Namibia in Leweis v Sampoio, 2000 NR 186 (SC);Kamwi v Law Society of Namibia, 2007 (2) NR 400 (HC), 404 A – B, para [15]; Minister of Home Affairs, Minister Ekandjo v Van der Berg, 2008 (2) NR 548 (SC)

[6] De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd, 1994 (4) SA 705 (E), 711 E; Quoted with approval in Leweis –case, *supra*, 191 I – 192 A

[7] Leweis –case, *supra*, 192 B - C

[17] This line of reasoning was implicitly accepted in the *Van der Berg* –matter where Chomba AJA quoted from an unreported judgment of Maritz AJA (as he then was) in the matter of *TransNamib Holdings Ltd v Garoeb,* where the following was stated:

> "Litigants have a constitutional right to a fair trial in the 'determination of their civil rights and obligations'. In the adjudication of those rights and obligations, the Courts of law have a fundamental duty to do justice between the parties by, inter alia, allowing them a proper opportunity to ventilate the issues arising from their competing claims and assertions." [8]

[18] It is against this jurisprudential backdrop, that the respondents' explanation for their default falls to be determined.

EXPLANATION FOR DEFAULT

[19] In the founding affidavits to the applications for rescission the respondents state that it was a term of the agreement between the parties that the applicant as their agent, would act in their best interests at all times. This is not disputed by the applicant. The terms of the agreement included the obligation that the applicant take all reasonable steps to obtain business for the respondents' trucks, to report regularly to the respondents on the state of the business, to pay over the proceeds derived from the operation of the business on a regular basis and

[8] Van der Berg –case, *supra*, 583 E - F

that the applicant would then be entitled to receive commission on the net proceeds after deduction of the expenses incurred in operating the businesses.

[20] The respondents further allege that they placed their full trust in the applicant. Various visits were undertaken by the respondents to the premises of the applicant which brought them under the impression that the business was being run properly. The applicant however did not report on the business activities or pay over any monies to the respondents. Accordingly, on 20 September 2011 Mr Pepe Hatewa went to the premises of the applicant at Rundu and found that the respondents' trucks were no longer on the premises. He made enquiries and Mr Dries Lubbe, the managing member of the applicant, informed him that the trucks had been sold and that he should contact the applicant's legal practitioners. The respondents then sought legal advice and through their legal representatives obtained copies of the relevant documents from the Court file. The respondents were thus informed by their legal practitioners on 23 September 2011 that default judgment had been granted against them. The respondents further ascertained that their trucks had been sold in execution and most had been purchased by or on behalf of the applicant.

[21] From the return on the Court file it would appear that the applications had been served on the registered address of the respondents, and particularly on the receptionist Ms Streitwolf. Ms Streitwolf did not know what to do with the documents, but then forwarded the documents to Ms Danielle Mouton who deals

with company secretarial documents. It appeared from the close corporation documents that reference was made to a Mr Ivo dos Santos. Attempts were made to contact Mr Dos Santos telephonically but without success. When Mr Dos Santos could not be contacted, the documents were sent to the respondents using the address P O Box 86626. However, this was the wrong address since the respondents' address is P O Box 86636. The respondents pointed out that even if the correct address had been used it is unlikely that the documents would have come to the respondents' attention as they attended to the post box in Windhoek irregularly.

[22] The respondents further claim that the applicant knew that the managing members of the respondents only visited Windhoek irregularly and that it was likely that the main application would not come to the respondents' attention should it be served on the registered address. The respondents state that had they known about the application they would have taken all the necessary steps to oppose the main application.

[23] The respondents further state that once they knew that judgment had been obtained against them, they expeditiously took all the necessary steps to bring this application for rescission. This is not disputed by the applicant.

[24] In the circumstances, I am satisfied that the respondents have given a reasonable explanation for their default. Whilst questions can be asked about the

manner in which the respondents' administrative responsibilities were conducted and the apparent lack of attention to administrative detail by the persons appointed by them to attend thereto, it cannot be said of the respondents that they were willful or grossly negligent in failing to oppose the main application. I also accept, given the trucks and trailers were the sole assets of the respondents, that had they had knowledge of service of the main applications on them, steps would have been taken to oppose same.

BONA FIDE DEFENCE

[25] The respondents state that they have a *bona fide* defence to the main application. In determining this issue, it is not necessary for the Court to consider fully the merits of the case, but simply to determine whether the averments set out by the respondents would constitute a defence to the applicant's claim once established in evidence at the trial of the matter.

[26] In advancing a defence to the relief sought in the main application, the respondents contend that the applicant does not dispute that a relationship of agency arose out of the agreement entered into between the parties. In summary, such obligations include that the applicant had a duty of care towards the respondents [9], the applicant as agent must exercise reasonable care [10], must

[9] SDR Investment Holdings Co. (Pty) Ltd and Others v Nedcor Bank Ltd and Another, 2007 (4) SA 190 (CPD), paras[50] and [54]; The Law of Agency, Kerr, 6th Ed., p. 141
[10] Lenaerts v JSN Motors (Pty) Ltd and Another, 2001 (4) SA 1100 (W), p. 1108, para [35]; Page v First National Bank and Another, 2009 (4) SA 484 (E), 488 [11]; The Law of Agency, *supra*, p. 136

account to the respondents [11], keep accounts of the business [12], and had a duty to pay over any such money arising out of profits from the business [13].

[27] It is not disputed by the applicant that it had an obligation to source work for the respondents' trucks. In so doing, it had to act diligently. It is also not gainsaid by the applicant that during the relevant period there was more than enough business available for transport companies. This is confirmed by Mr Benjamin Groenewald who operates a trucking business in Namibia. Mr Groenewald also served on the Board of the Namibia Logistics Association and is fully acquainted with the cost of operation of trucking companies. He calculated that each such truck and trailer could conservatively have earned N$50,000.00 net per month. Mr Groenewald's evidence is not gainsaid by the applicant. The opinion expressed by Mr Groenewald is confirmed by Mr Steve Leukes, who operates a courier business and also served on the Board of the Namibia Logistics Association. This opinion is also not refuted by the applicant.

[28] The applicant responded by stating that the respondents' trucks could not be used as they were in a bad condition and constantly needed repairs. It is further stated on the applicant's behalf that licenses for the trucks expired in August 2009 and thereafter for that further reason could not be used. These allegations were countered by previous employees of the applicant who stated that the trucks worked regularly during this period. In my view, the applicant's

[11] Doyle v Board of Executors, 1999 (2) SA 805 (C), p. 813; The Law of Agency, *supra*, p. 153
[12] The Law of Agency, *supra*, p. 154
[13] The Law of Agency, *supra*, pp. 143 & 155

version is somewhat undermined by the statement that the trucks were not used after August 2009 because of the licensing –issue, but at the same time stating that they were not used because they constantly needed repairs. This point is underscored by the invoices attached by the applicant in the main application revealing that repairs were effected to the trucks up to February 2010, i.e. some months after the applicant claims the trucks were not used. The respondent's further allegation that the trucks could not be used because they were old and had odometer readings in excess of one million kilometers, is undermined by certain of the invoices in respect of such trucks which reveal kilometer readings far below this reading. It is also peculiar – if the applicant's version is to be believed – that constant repairs were needed when the applicant states that in the Druppel –matter the trucks only did four trips to Angola, whilst in the Grout – matter one trip was done to Katima Mulilo.

[29] On this basis the respondents claim that the applicant used the trucks on a continuous basis, must have earned income, and whilst earing such income failed to pay over the net earnings to the respondents. They claim further that the earnings would have far exceeded the cost to maintain the fleet. On this basis the respondents state that not only would they refute the applicant's claim should they be entitled to defend the matter, but that they would have a counter-claim far in excess of the amounts claimed by the applicant.

CONCLUSION

[30] On the basis of what I have summarised above, I am of the view that the respondents have a *bona fide* defence, which, *prima facie* – at the very least – carries some prospects of success. On this basis I find that the respondents have made out a case for rescission of the judgment in terms of the common law granted against them by default.

[31] The respondents seek an order that should the rescission application be opposed, that they be entitled to costs. I do not consider that the applicant's opposition to the rescission application is frivolous or that there is not some substance to the points taken by the applicant. I accordingly am of the view that the issue of costs should be dealt with on the basis that the costs be costs in the cause.

[32] As a result, the order I make in case number A 17/2011, is as follows:

[32.1] The default judgment granted on 25 February 2011 is set aside.

[32.2] The respondent is directed to file its notice of opposition within 10 days from the date hereof, whereafter the matter shall take its normal course.

[32.3] The costs of this application shall be costs in the cause.

[33] As a result, the order I make in case number A 16/2011, is as follows:

[33.1] The default judgment granted on 25 February 2011 is set aside.

[33.2] The respondent is directed to file its notice of opposition within 10 days from the date hereof, whereafter the matter shall take its normal course.

[33.3] The costs of this application shall be costs in the cause.

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CORBETT, A.J

ON BEHALF OF THE APPLICANTS:

Adv. A. van Vuuren

Instructed by Erasmus & Associates

ON BEHALF OF THE RESPONDENTS

Adv. P. Barnard

Instructed by Lorentz Angula Inc.