REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3961/2011

In the matter between:

1.1.1.1. **LÜDERITZ TUNA EXPORTERS (PTY) LTD**
APPLICANT

and

CATO FISHING ENTERPRISES CC **1st RESPONDENT**
REGISTRAR OF THE HIGH COURT **2nd RESPONDENT**
DEPUTY SHERIFF - LÜDERITZ **3rd RESPONDENT**

Neutral citation: *Lüderitz Tuna Exporters (Pty) Ltd v Cato Fishing Enterprises CC (*I 3961/2011) [2013] NAHCMD 166 (18 June 2013)

Coram: Schimming-Chase, AJ
Heard: 20 March 2013
Delivered: 18 June 2013

Flynote: Practice – Judgments and orders – Rescission of judgment – Distinction between applications in terms of Rule 31(2)(b), Rule 44(1)(a) and common law restated – Applications in terms of Rule 31(2)(b) requiring good cause, *bona fide* defence and prospects of success at trial – Rule 44(1)(a) not encompassing such requirements – Applications under the common law requiring sufficient cause vesting the court with a wider discretion. Rule 44(1)(a)

not applicable on the facts as applicant could not show that the default judgment was erroneously sought or irregularly granted in its absence – As regards Rule 31(2)(b) and the common law, applicant not satisfying court with regard to good cause or sufficient cause. Applicant was in wilful default. Its conduct gave rise to the inference that there was no *bona fide* defence and that the application for rescission was also not *bona fide*.

Summary: The applicant applied for rescission of default judgment some 3½ months after it was granted. Applicant sought to argue that the judgment should be rescinded in terms of Rule 44(1)(a) because the particulars of claim were excipiable (vague and embarrassing) on the grounds of non-compliance with Rule 18(6). Applicant did not deny the terms of the agreement pleaded. Its defence was based on additional terms. As regards the question of good cause, the applicant's explanation for its failure to apply timeously for rescission until it became aware of the default judgment was accepted, albeit with some reservation. However for a significant period of time after the writ of execution was served on the applicant there was inaction on the part of the applicant. This inaction was not properly explained, if at all. This was not a case where blame could be laid at the doors of the applicant's legal practitioners. The applicant on the facts simply did not evince a serious intention to timeously provide instructions to its lawyers for purposes of explaining the reasons behind the default and for applying for rescission. The applicant was accordingly in wilful default. The approach approved in *inter alia* Minister of Home Affairs; Minister Ekandjo 2008 (2) NR 548 (SC) at 581C-I, to the effect that the correct approach is not to look at the adequacy or otherwise of the reasons for the failure in isolation, but that the explanation must be considered in the light of the nature of the defence and all the circumstances of the case was adopted. The court held that the conduct of the applicant gave rise to the inference that there was no *bona fide* defence and that the application for rescission was not *bona fide* either. Application accordingly dismissed with costs.

ORDER

The application for rescission of judgment is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an application for rescission of a default judgment granted by the Registrar, coupled with an application for condonation for the late launching of the application for rescission. Certain other ancillary relief is sought which is not dealt with at this stage as the ancillary relief flows from and is dependent on the success or failure of the main relief sought. The application is brought in terms of both Rules of Court (Rule 31(2)(b) and 44(1))a)) and the common law. No relief is sought against the second and third respondents. I shall in this judgment for ease of reference, refer to the first respondent as “the respondent”.

(c) The applicant is represented by Mr Jones and the respondent by Ms de Jager. It is necessary to firstly set out the history of the matter as well as the grounds advanced by the applicant in support of the rescission sought.

(d) On 2 September 2011, the respondent instituted action against the applicant for payment of the amount of N$174,172.17 plus interest and costs. The claim against the applicant was based on an alleged oral agreement concluded between the parties during June 2010 in terms of which the applicant rented berthing space from the respondent for its vessel on a month to month basis in the amount of N$28,750.00 per month. The amount claimed by the respondent in the action is for outstanding rental in respect of the berthing space allocated to the applicant in terms of the oral agreement from June 2010 until December 2010, which the respondent alleged the applicant failed, despite demand, to pay. The respondent attached to its particulars of claim a statement dated 31 December 2010 setting out the amounts allegedly owed by the applicant in respect of outstanding rental.

(e) On 23 September 2011, the applicant defended the action. From this date, and at all material times, the applicant was represented by the same firm of legal practitioners. On 5 October 2011 a request for further particulars was delivered on behalf of the applicant. On 6 October 2011 the respondent delivered an application for summary judgment which was opposed. Only the notice to oppose the summary judgment application was annexed to the founding papers in support of the application for rescission. In any event, the respondent did not persist with the summary judgment application.

(f) On 29 November 2011 the respondent withdrew the action against the applicant. As the notice of withdrawal did not embody a tender for payment by the respondent of the wasted costs, the applicant on 14 December 2011 delivered an application on notice for an order of costs against the respondent in terms of Rule 42(1)(c). This application for costs was opposed by the respondent. The respondent's opposing affidavit in the application for costs was only filed on 23 February 2012.

(g) On 16 December 2011 the applicant was again served with a combined summons on behalf of the respondent for exactly the same relief sought by it in the earlier action which was later withdrawn. *Ex facie* the return of service the summons was served on an employee of the applicant. The only difference in the later summons apart from the case number is that the applicant was cited as a close corporation and not as a company with limited liability, as was the case in the earlier action. This second action was not defended by or on behalf of the applicant. The respondent applied for and was granted default judgment by the Registrar in terms of Rule 31(5) on 17 February 2012. This is the judgment which the respondent seeks to have rescinded.

(h)

(i) The application for rescission of judgment was delivered on 28 May 2012, some three and a half months after default judgment was granted. The facts advanced in support of the application for rescission, as well as for the delay in launching it by the applicant's sole member Mr Jose L Calaca are the following:

"The summons was served on Mrs Burger.[1] She informed me thereof but since the applicant's offices closed for the holidays on 16 December 2011 I requested her to put it in my file to be attended to when the applicant commenced with its operations again on 16 January 2012. By this time the offices of the applicant's legal practitioners had also closed for the festive season. I am advised that this period is also *dies non*.

When I returned to the offices of the applicant on 16 January 2012 the applicant had to attend to the preparation of the vessels for the crayfish season which had by then already opened. As a result I forgot to forward the summons to the applicant's legal practitioners for advice. I further point out that this was also a very busy time since the applicant also during this time moved its offices from the harbour to the middle of Lüderitz.

I further point out that when the summons was received I was not really concerned about it since I thought the first respondent had by accident served the same summons twice. I noted from a perusal of LTE9 that the content of the particulars of claim are almost identical to that of LTE1, apart from the citation of the defendant.

During or about 26 March 2012 the applicant gained knowledge of a default judgment the first respondent obtained against the applicant during February 2012. Immediately upon gaining knowledge of the judgment the applicant informed its legal practitioners of record of the said judgment. The applicant's legal practitioners requested an explanation why LTE9 had not been forwarded to them or defended. The applicant's legal practitioners of record also proceeded to obtain copies of the documentation in the new action instituted by the first respondent against the applicant.[2]

(j) Unfortunately during this time the applicant had difficulty with its emails. All the applicant's emails were received by Mr Magnus Zicker of Blomeha Fishing (Pty) Ltd on behalf of the applicant and then forwarded to the applicant's offices. This included also the emails forwarded by the applicant's legal practitioners to the applicant in respect of the aforesaid communications.

[1]The applicant's bookkeeper.

[2]In this regard a writ of execution was served on the applicant on 23 March 2012.

(k) I further also was not at the office of the applicant during this time having left Lüderitz on 16 December 2011 on the vessel and only returned to Lüderitz on 18 January 2012. I only returned to the office on 19 January 2012 and proceeded to peruse the various emails which had been forwarded to the applicant including the aforesaid emails from the applicant's legal practitioners of record.

(l)

(m) I thereon proceeded to reply to the said emails from the applicant's legal practitioners of record on 23 April 2012. I advised that the summons had been received when the applicant was closed for the festive season and when it was served I believed that same was the previous summons as per the initial action instituted by the first respondent against the applicant. By the time that the said summons was served on 16 December 2011 the applicant had not yet been advised that the first respondent had in fact withdrawn its initial action.

(n)

(o) I further point out that during April 2012 to May 2012 there were several public holidays and myself and the relevant staff members involved in this matter were on leave. Furthermore the applicant's computers used for sending and receiving emails also broke down during April 2012 which further frustrated communication between the applicant and its legal practitioners of record.

(p)

(q) I am advised that during the week of 11 May 2012 counsel was briefed to prepare a rescission application herein. It however materialised from the consultations of applicant's legal practitioners herein with counsel that counsel required further information and documentation in order to advise on the matter and prepare these papers. Not all the required information and documentation was readily available and I first had to obtain same. This was further frustrated by the fact that due to applicant having moved offices, its documentation was in disarray and not readily available.

(r)

(s) I further point out that *inter alia* due to the aforesaid maintenance of the applicant's vessels during this time I could only attend to counsel's request while at the applicant's offices in Luderitz. I also could not travel to Windhoek due to the aforesaid. I was required to personally attend to and oversee the maintenance of the vessels."

(t) Mr Calaca also pointed out that the papers in support of the rescission application were finalised during the week of 15 to 20 May 2012, but were only delivered on 28 May 2012.

(u) As regards the applicant's defence to the respondent's claim, Mr Calaca stated that the applicant disputed the amount claimed by the respondent. He submitted that the respondent's particulars of claim were excipiable and irregular for want of compliance with Rule 18(6). In particular reference was made to the allegation of an agreement in the respondent's particulars of claim without the necessary particulars as to whether it was oral or in writing, where it was concluded and the representatives of the parties who concluded it. It was also stated that no annexures were annexed to the particulars of claim and that the respondent failed to specify and particularise the exact amounts payable in respect of the berthing "rental" and electricity utilised.

(v)

(w) It was also stated by Mr Calaca that the applicant accepted that it was liable to the first respondent but that he was unable as at date of deposing to the founding affidavit in support of the application for rescission, to establish the exact amount due as a result of the vague manner in which the first respondent's particulars of claim was set out. The applicant was apparently not clear which portion represented the rental and which portion was charged for electricity utilised by the applicant. It was also stated that the amount claimed by the respondent included amounts that it charged the applicant to which it was not entitled.

(x) It is necessary to point out at this stage that the applicant admitted the conclusion of an agreement along the terms alleged by the respondent, in particular that an oral agreement was concluded in terms of which berthing space was made available to the applicant by the respondent at a monthly payment of N$25,000.00 per month. It is certain terms of the agreement that the applicant had a problem with. In this regard it was alleged that it was within the contemplation of the parties that the applicant required berthing space directly next to the jetty in order for the applicant to conduct annual maintenance of its vessel and to load and offload heavy duty equipment onto and from its

vessel. It was apparently also within the contemplation of the parties that the applicant was in the business of fishing for profit and that in the event of the vessel not being berthed directly next to the jetty, delays would be occasioned in the maintenance and other activities pertaining to the vessel.

(y)

(z) The applicant averred that the respondent breached the agreement by failing to ensure that the applicant's vessel was availed berthing space directly next to the jetty. In some instances the applicant's vessel was triple banked (alongside other vessels and not directly next to the jetty) making it impossible for the applicant to attend to the maintenance of the vessel as required and to utilise the berthing space as it intended to. The applicant alleged that it raised its grievance regarding the aforementioned issues, but the respondent simply failed to comply with its obligations. It also alleged that the respondent in material breach of its obligations, allowed another vessel to be docked alongside the jetty for approximately 3 months during 2010. Furthermore the applicant alleged that it moved its vessel to the Namport syncrolift during December 2010, and during this time did not make use of the respondent's berthing space, yet the respondent continued to render invoices for the full rental amount. It was accordingly denied that the applicant was liable for rental for the period December 2010.

(aa) The respondent in its answering papers denied that it was a material term of the agreement that the berthing space would be located directly next to the jetty. In support of that denial, it stated that it does not charge different rates in respect of a vessel berthed directly next to the jetty or for a vessel double or triple banked, and that the rental rates were all the same, irrespective of where the vessel was berthed. The respondent mentioned that Namport, for example, charges different rates depending on the location of the berthing space. The respondent averred that in any event it was not at any stage informed that the applicant needed berthing space directly next to the jetty in order for the applicant to conduct annual maintenance to the vessel. Had such need been communicated to the respondent, arrangements would have been made.

(bb) The respondent further stated that the applicant initially requested

berthing space for one month only to effect maintenance. When the respondent noticed that there was no maintenance activity at the vessel, Mr Calaca on behalf of the applicant was confronted and asked whether he intended to commence with maintenance. Mr Calaca replied that maintenance would be commenced soon. However the applicant failed to move the vessel to the syncrolift at the end of the first month and instead continued to utilise the respondent's berthing space. The respondent was as a result occasionally required to move the applicant's vessel to make space next to the jetty for other vessels which needed to discharge or load goods. It was pointed out that the respondent only charged for the rental of berthing space for the period up until 10 December 2010 and that the applicant's vessel was triple banked until 14 December 2010. In the event that the applicant utilised any berthing space for any period beyond 10 December 2010, it was not charged for it and not held liable for it.

(cc) Having set out the factual background above it is necessary to shortly state the law governing applications for rescissions of judgment.

(dd) The requirements for a successful application for a rescission under Rule 31(2)(b) were succinctly set out in Grant v Plumbers (Pty) Ltd[3] as follows:

(a) He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.

(b) The application must be bona fide and not made with the intention of merely delaying the plaintiff's claim.

(c) He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, will entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are

[3]1949 (2) SA 470 (O) at 476-477.

actually in his favour.[4]

(ee) In Erasmus, Superior Court Practice[5] it was pointed out that an applicant must set out the reasons for his absence or default because it is relevant to the question whether or not his default was wilful. An application which fails to set out these reasons is not proper, but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to his relief. If the applicant was in wilful default the application will normally fail. Before a person is said to be wilful default, the following elements must be shown:

(a) Knowledge that the action is being brought against him;

(b) A deliberate refraining from entering appearance, although free to do so; and

(c) A certain mental attitude towards the consequences of the default. The true test with regard to the mental attitude aspect appears to be whether the default is a deliberate one, i.e. when a defendant with full knowledge of the circumstances and of the risks attendant on his default freely takes a decision to refrain from taking action.

(ff) The proper approach to adopt in regard to a reasonable explanation was set out in De Witts Auto Body (Pty) Ltd v Fegden Insurance Co Ltd[6] as follows:

> "An application for rescission is never simply an enquiry whether or not to penalise 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 wilful or negligent or otherwise, gives rise to the probable inference that there is

[4]Quoted with approval in Minister of Home Affairs, Minister Ekandjo v Van der Berg 2008 (2) NR 548 (SC) at par [19]; Namcon CC v Tula's Plumbing CC 2005 NR 39 (HC) at 41B-D; Mutjavikua v Mutual & Federal Insurance Company Ltd 1998 NR 57 (HC) at 59D-F.

[5]At B1-201-202 and the authorities collected there.

[6]1994 (4) SA 705 (E) at 711E.

no bona fide defence, and hence that the application for rescission is not *bona fide*."[7]

(gg) I am also in respectful agreement with the dictum of Strydom CJ in Lewies v Sampoio[8] where he stated after dealing with the relevant authorities mentioned above that:

"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."

(hh) The test was also set out thus in TransNamib v Garoeb[9] as follows:

"The conflicting facts and contentions advanced by and on behalf of the litigants in the application for rescission of judgment presented the presiding officer with the difficult task of balancing two sets of competing interests (cf De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at 711H - I). On the one hand is the interest of the respondent in maintaining the validity of the judgment granted in his favour. Albeit obtained by default, it remains a regular judgment by a competent Court of law which, in the normal course of events, must take effect. As such, it normally terminates the lis between the parties and demands satisfaction by the defaulting litigant, if necessary, by execution. The finality of a judgment is an important aspect in the administration of justice and the expeditious satisfaction or execution thereof reaffirms and strengthens public confidence in the justice-system and is an important meganism (sic) through which the Courts assist to maintain law and order in society. In addition to the respondent's interest in the finality of the judgment obtained is also the interest of the Court that its rules and procedures must be equally applied and adhered to by all litigants.

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[7]Approved in Minister of Home Affairs v Van der Berg *supra* at para 22 and Lewies v Sampoio 2000 NR 186 (SC) at 191 I – 192 A. .

[8]*Supra* at 192B.

[9]Unreported Supreme Court decision delivered on 4 August 2005 at page 6-7.

> On the other hand is the interest of the defaulting litigant in maintaining and presenting his defence. If such a litigant demonstrates a potentially good defence on the merits, the Courts will normally be reluctant to let a default judgment pass without proper adjudication. Litigants have a constitutional right to a fair trial in the determination of their civil rights and obligations (art 12(1)(a) of the Constitution). In the adjudication of those rights and obligations, 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 or assertions. To the extent that that right is limited by the entry of default judgment if a litigant fails to comply with the procedures prescribed for the presentation of his or her case, a litigant who has shown substantive merits in his or her defence and good cause for the non-compliance will not be deprived of a just resolution in due course. In the absence of gross negligence or wilful disregard of its rules, the Court will not shut its doors to a bona fide litigant with a good defence just because of his or her failure to comply with the Rules." [10]

(ii) As far as the common law is concerned the applicant is required to show sufficient cause. However, the court's discretion extends beyond the grounds provided for in Rules 31 and 44. In De Wet and Others v Western Bank Ltd[11], Trengrove AJA (as he then was) stated as follows:

> "Broadly speaking, the exercise of the court's discretionary power [under the common law] 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."[12]

(jj) The term "sufficient cause" cannot be precisely defined but it is clear that

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[10]Quoted with approval in Minister of Home Affairs v Van der Berg *supra* at 577 par 35.

[11]1979 (2) SA 1031 (A) at 1042H.

[12]Quoted with approval by Hannah AJ as he then was in Grüttemeyer N.O. v General Diagnostic Imaging 1991 NR 441 (HC) at 448H-J.

in principle the two essential elements are:

(a) that the party seeking relief must present a reasonable and acceptable explanation for default; and
(b) that on the merits that party has a *bona fide* defence which *prima facie* carries some prospects or probability of success.[13]

(kk) Rule 44(1)(a) provides that the court may in addition to any other powers it may have *mero moto* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

(ll) In De Villiers v Axiz Namibia (Pty) Ltd[14] Shivute CJ succinctly explained the differences between an application brought under common law and one pursuant to Rule 44 as follows:

> "The difference between the application brought under the common law and the one brought pursuant to rule 44(1)(a) (the rule) is that in the case of the former, an applicant is required to establish 'good cause' or 'sufficient cause' for the rescission of the judgment granted in his or her absence in the sense of an explanation for his default and bona fide defence while in the latter case 'good cause' need not be shown. (See, for example, Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (C) at 417I; Herbstein and Van Winsen's The Civil Practice of the High Courts of South Africa 5 ed vol 1 by Cilliers, Loots and Nel on 938.)"

(mm) It is well established that an order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order.[15] Unless an applicant for rescission can prove an error or irregularity the requirement of the Rule will not be satisfied and

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[13]Herbstein & Van Winsen, The Civil Practice of the High Court of South Africa, 5th ed Vol 1 at 938.

[14]2012 (1) NR 48 (SC) at par [10].

[15]Bakoven Ltd v J Howes (Pty) Ltd 1992 (2) SA 466 (E) at 472H.

rescission cannot be granted under this Rule.[16]

(nn) It was argued on behalf of the applicant that the default judgment should be rescinded in terms of Rule 44(1)(a) because the particulars of claim did not comply with Rule 18(6) of the Rules of Court. Thus, so it was argued, the particulars were vague, embarrassing and irregular, as a result of which the default judgment was erroneously sought and granted in the absence of the respondent. The non-compliance complained about related to the failure by the respondent to indicate in the pleadings whether the contract was oral or written and where and by whom on behalf of each of the parties it was concluded as well as the absence of annexures.

(oo)

(pp) In support of this submission reliance was placed on the case of Marais v Standard Credit Corporation Ltd[17] where it was held in essence that Rule 44(1)(a) covers a matter where for want of an averment there is no cause of action, i.e. nothing to sustain a judgment. In that case the particulars of claim did not disclose a cause of action, and the court set the default judgment aside in terms of Rule 44(1)(a) because in the result, the order granted was without legal foundation and as such, was erroneously granted for the purposes of the Rule.

(qq) A consideration of the respondent's particulars of claim reveals a clear cause of action, although the failure to comply with Rule 18(6) renders the pleading vague and embarrassing. It is important to note that an exception based on the fact that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. Therefore an excipient will only succeed if she can show serious prejudice in the event that the allegations are not expunged.[18] The facts of Marais v Standard Credit Corporation are distinguishable as the particulars disclosed no cause of action. This is not the situation in this case, and the applicant can hardly be prejudiced,

[16] Tom v Minister of Safety and Security 1998 (1) All SA 629 (E) quoted with approval in De Villiers v Axiz *supra* at par [21].

[17] 2002 (4) SA 892 (W) at 897A.

[18] See Trope v South African Reserve Bank and Another 1992(3) SA 208 (T) at 211 B-C; Trustco Capital (Pty) Ltd v Atlanta Cinema CC and others unreported judgment of Geier J delivered on 12 July 20-12 in case no 3628/2010.

considering that it admitted the conclusion of the agreement in the founding papers. Thus, the reliance on Rule 44(1)(a) is misplaced and fails.

(rr) It remains for me to determine whether or not the applicant has made out a case for rescission under Rule 31(2)(b) alternatively the common law. In this regard I am to determine *inter alia* whether the applicant has shown good or sufficient cause, and whether the applicant has put up sufficient facts to warrant the exercise of the court's discretion in its favour in line with the principles summarised above. I am also mindful of the principle that an applicant is required to place a clear and proper explanation of the reasons for his default before the court, the absence of which would reflect on the *bona fides* of the application.

(ss) It should also be taken into consideration that this application was not made within 20 days as required by Rule 31(2)(b) but some 3 months later. Condonation was applied for, and good cause must equally be shown.

(tt)

(uu) I have considered the applicant's explanation for the default. I accept that the applicant (a layperson) has provided the court with a reasonable explanation regarding the first portion of its inaction subsequent to the receipt of the summons on 16 December 2011, because the offices of the applicant as well as its legal practitioners were closed until 16 January 2012. It is also accepted, although with some reservation, that the applicant had to attend to the preparation of vessels for the crayfish season after the deponent's return on 16 January 2012 and that Mr Calaca as a result also forgot to forward the summons to the applicant's legal practitioners. One can even understand that Mr Calaca laboured under the belief that the first respondent had served the same summons twice. Up until this stage the applicant's explanation is reasonable. However, the same cannot be said for the events from 26 March 2012 onwards. By this date, the applicant gained knowledge of the default judgment through the service of a writ of execution. The explanation for the events subsequent to this date must be considered.

(vv) The applicant upon receipt of the writ on 26 March 2012 immediately

informed its legal practitioners of record of the judgment. The legal practitioners requested an explanation why the second summons had not been forwarded to them. The applicant in this regard stated that during this time it had difficulty with its emails and that all the applicant's emails were received by Mr Magnus Zicker of Blohema Fishing (Pty) Ltd on behalf of the applicant and then forwarded to the applicant's offices. It is clear from the emails that on 2 occasions the applicant's legal practitioners requested instructions and sent those instructions to Blohema Fishing on instruction of the applicant, which is common cause. Yet there was no timeous response to these emails. In particular, on 30 March 2012, the applicant's legal practitioners requested further instructions. The applicant was also advised on that date what it had to prove for a successful application for rescission. It was specifically stated by the applicant's legal practitioners that certain aspects needed to be explained to court, especially with regard to what happened subsequent to the receipt by Mr Calaca of the summons. No response to this letter dated 30 March 2012 was provided by the applicant. Another letter was sent on 9 April 2012, some 2 weeks later with the words "URGENT" written on it. In this letter it was specifically stated:

> "We refer to our letter dated 29 March 2012, and urgently look forward to receiving your instructions in the light thereof."

(ww) Mr Calaca's explanation on behalf of the applicant was that he proceeded to reply to the emails on 23 April 2012. What he did between 26 March and 23 April 2012 and between 23 April and 11 May 2012 is not clear at all. All that is averred in this regard, is that there was difficulty with the emails, but exactly what difficulty prevented Mr Calaca from responding timeously to his practitioner's urgent request for instructions and advice is absent. Then there is the somewhat confusing allegation that Mr Calaca was not at the office of the applicant "during this time" having left Lüderitz on 16 December 2011 on the vessel and only returned to the office on 19 January 2012 after which he "proceeded to peruse the various emails". He replied to the said emails on 23 April 2012. There is also the allegation that between 23 April and 23 May 2012 there were "several" public holidays and the relevant staff were on leave. How

many holidays there were during this period, and which staff members were on leave is not explained at all.

(xx) It appears from the above explanation that despite protestations to the contrary, the applicant appeared unconcerned or insouciant after becoming aware of the default judgment through service of the writ of execution on 26 March 2012. The matter simply lay fallow. After receipt of the writ of execution the applicant was fully aware of what awaited it should it not take action, but there is no proper explanation for the inaction. A person who is determined to defend a claim against him and who wants to pursue a counterclaim and damages should be significantly more proactive after receiving the writ of execution or have a clear explanation for failing to be proactive. The applicant at the very least could have asked one of its employees to stay on top of things or appointed someone to deal with the matter while Mr Calaca was away. Even the vague allegation that there were “several” holidays between 23 April 2012 and 23 May 2012 and that his staff went on leave is at best glib. There were holidays, but not several holidays. It highlights the unperturbed manner in which the applicant went about exercising his rights. The applicant’s unexplained inaction was undertaken at is own peril.

(yy)

(zz) In this regard, the applicant also cannot dispute that it was aware, from the date that the first summons was issued in September 2011 of its defences to the respondent’s claims. It is noteworthy that in all this time, the applicant has failed to provide even an approximate calculation of the damages allegedly suffered by it from institution of the first summons in September 2011 to the date that the affidavit in support of the rescission application was deposed to, namely 23 May 2012. This aspect is apparently still being quantified. Furthermore the applicant alleged that counsel required more documentation after being briefed. This documentation is not even identified, considering that almost all the annexures to the founding affidavit comprise pleadings and court documents which could have been sourced by the applicant’s attorneys.

(aaa) In my view, in light of the aforegoing the applicant was in wilful default, and it gives rise to the inference that there is no *bona fide* defence. Thus, the

application for rescission is not *bona fide* on the facts and neither sufficient cause nor good cause has been shown by the applicant to warrant an exercise of the court's discretion in its favour.

(bbb) In light of the above, the application for rescission fails and I make the following order:

> The application for rescission of judgment is dismissed with costs, such costs to include the costs of one instructing and one instructed attorney.

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EM Schimming-Chase

Acting Judge

APPEARANCES

APPLICANT:	Mr JPR Jones Instructed by F Erasmus & Partners, Windhoek
RESPONDENTS:	Ms B de Jager Instructed by MB de Klerk & Associates, Windhoek