REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LCA 31/2008

In the matter between:

ADCON CC **APPELLANT**

and

WILKE SACK **RESPONDENT**

Neutral citation: *Adcon CC v Sack* (LCA 31-2008) [2013] NALCMD 18 (10 June 2013)

Coram: VAN NIEKERK, J

Heard: 13 November 2009; 13 April 2012; 19 October 2012
Delivered: 10 June 2013

Flynote: **Labour law** – Labour Act, No 6 of 1992 - Application for rescission of default judgment under rule 22 of rules of district labour courts – Applicable principles re-stated

ORDER

1.
    1. The appeal is upheld.
    2. The order of the court *a quo* dismissing the application for rescission of the default judgment is set aside and replaced with the following order:
        2.1 The default judgment is set aside.
        2.2 The respondent is given leave to defend the complaint.
2.

JUDGMENT

VAN NIEKERK, J:

[1] This appeal arises from a decision by the district labour court under the now repealed Labour Act, 1992 (Act 6 of 1992). The appellant appeals against a decision by that court to dismiss the appellant's application for rescission of a default judgment granted on 18 October 2006.

[2] The background of the matter is as follows. On 5 April 2005 the respondent instituted a labour complaint in the district labour court against the appellant in which he claimed payment of the amount of N$51 912.17 for loss of salary and other benefits on the grounds of constructive dismissal. The appellant delivered a reply in which it inter alia disputed that the respondent was in its employ. The appellant alleged that the district labour court did not have jurisdiction over the matter as the respondent resigned from the appellant's employ on 1 April 2002 and since June 2002 had been acting as a consultant and receiving commission.

[3] On 29 September 2006 the appellant's erstwhile legal practitioners withdrew from the matter and provided the appellant's postal address to the respondent's erstwhile lawyers. On 10 October 2006 these lawyers sent a notice of set down for trial of the matter on 13 October 2006 to the appellant by registered post.

[4] The matter was heard in the absence of the appellant on Friday, 13 October 2006. In a judgment dated 18 October 2006 the district labour court granted default judgment in the respondent's favour. In the judgment the chairperson stated that the appellant had failed to attend the hearing on 13 October 2006 despite an earlier agreement to the trial date and despite having been informed of same by means of the notice of set down. The court therefore allowed the respondent to present its case in terms of rule 10(4) of the district labour court rules which provides for a determination of the complaint notwithstanding the failure of the other party to appear.

[5] On 8 December 2006 the appellant launched an application for rescission of the default judgment, accompanied by an application for condonation for its late filing. The latter application was not opposed, but the rescission application was opposed. The outcome was that the chairperson dismissed the rescission application.

The respondent's first point *in limine*

[6] Counsel for the respondent raised a point *in limine* regarding the appellant's application for condonation for the late noting of the appeal. In the light thereof that agreement was later reached after the matter was initially argued before this Court that the said application should have been brought in the district labour court, which the appellant eventually successfully did, this point falls away.

The respondent's second point *in limine*

[7] Notice of a second point *in limine* was given in the respondent's heads of argument. The point is that there allegedly is non-compliance with rule 4(2) of the rules of the Labour Court, resulting further therein that there is no authorisation for the appellant's legal representatives

to prosecute the appeal. It was submitted on behalf of the respondent that the appeal should accordingly be dismissed.

[8] Rule 4 deals with the representation of parties and provides in sub-rule (2), inter alia, that where the party is a company it may be represented by one of its directors or other officers or office bearers, provided that a resolution of the company authorising such person to represent it is filed with the registrar of the Labour Court before the hearing. I understood counsel for the respondent to imply that this rub-rule also applies in the case of a close corporation. I shall assume, without deciding, that this is so.

[9] Respondent's counsel pointed to the power of attorney that was filed by Mr Gogol in his capacity as member of the appellant 'duly authorized thereto' in which he appointed the appellant's legal practitioners of record to note and prosecute the appeal. He further pointed to the fact that, until he raised the point in his heads of argument, there was no resolution by the appellant authorising Mr Gogol to represent the appellant. However, the day before the appeal was heard, the appellant filed a resolution taken three days before by the 'directors' of the appellant authorising Mr Gogol, *inter alia*, to sign any power of attorney to prosecute any appeal against a judgment affecting the appellant.

[10] It is so that in appeals prosecuted under the High Court rules, rule 7(2) of the High Court rules provides that the registrar shall not set down the appeal unless the legal practitioner has filed a power of attorney together with the application for a date of hearing of the appeal. Failure to comply with this sub-rule means that the appeal shall in terms of sub-rule 49(6)(a) be deemed to have lapsed. There are no similar provisions in the Labour Court rules.

[11] Furthermore, I think that the provisions of rule 4(2) should be read with section 18(2) of Act 6 of 1992, which deals with the right to appear in proceedings before the Labour Court. Rule 4(2) has nothing to do with the right of a party to instruct a lawyer to prosecute an appeal. Failure to file the resolution mentioned in rule 4(2) therefore does not affect the authority of the legal representatives of the appellant to prosecute the appeal. Even if I am wrong in holding thus, it seems to me that the filing of the resolution with the registrar 'before the hearing' as required by rule 4(2) cured the defect complained of. The second

point *in limine* is accordingly dismissed.

The grounds of the appeal

[12] The appellant raises several grounds of appeal in the notice of appeal. It is not necessary to deal with all of them. In my view the appeal turns around only two of these, which are formulated as follows:

> '1.3 the learned Chairperson found the appellant had not provided a reasonable explanation for his default, alternatively he failed to judiciously apply the facts deposed to be the Appellant in support of his reasons for non-appearance at the hearing of the Complaint;'

and

> '1.7 the learned Chairperson failed to consider or apply his mind at all to the question of whether the Appellant had a *bone fide* defence .....;'

The approach to applications for rescission of default judgment

[13] The matter is to be approached on the basis of rule 22 of the rules of the district labour court, which provides (the insertion is mine):

> '*Rescission of judgments*
>
> 22. (1) Any party to a complaint in which a judgment or an order by default has been made in terms of rule 10(3) or (4) [the reference should be to rule 10(4) or (5) – see *Hitula v Chairperson of District Labour Court Windhoek and Another* 2005 NR 83 p90E-G], may apply to the chairperson to rescind or vary such judgment or order, provided that the application is made within 14 days after such judgment or order has come to his or her knowledge.
>
> (2) Every such application shall be an application as contemplated in rule 20, and supported by an affidavit setting out briefly the reasons for the applicant's

absence or default, as the case may be, and, where appropriate, the grounds of opposition or defence to the complaint.

(3) The chairperson may on good cause shown rescind or vary the judgment in question and give such direction as to the further conduct of the proceedings as he or she may deem necessary in the interest of all the parties to such proceedings.'

[14] Although rule 22 reads slightly differently, it is nevertheless useful to have regard to authorities which deal with rescission applications in terms of similarly worded rules of other courts, e.g. rule 31 of the High Court rules. In *Mutjavikua v Mutual & Federal Insurance Company Ltd* 1998 NR 57 (HC) at p59D-G

'In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 it was held that an applicant in the position of the present applicant should comply with the following requirements:

(a) He 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) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of averments which, if established at the trial, would 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 actually in his favour.

These requirements have been approved in numerous cases in South Africa and were also approved in *Metzler v Afrika*, an unreported decision of the High Court given on 2 November, 1995. I respectfully agree that they represent what is required of the applicant in the instant case.'

(See also *Namcon CC v Tula's Plumbing CC* 2005 NR 39 (HC) at p41B-D.)

[15] In *Leweis v Sampoio* 2000 NR 186 (SC) the Supreme Court qualified the statement about gross negligence in the previous quotation when it *inter alia* stated at p191G-192B:

‘Although the Courts have studiously refrained from attempting an exhaustive definition of the words 'good cause' they have laid down what an applicant should do to comply with such requirement. In this regard it was stated that an applicant:

(a) must give a reasonable explanation for his default;

(b) the application must be made *bona fide*; and

(c) the applicant must show that he has a *bona fide* defence to the plaintiff's claim.

(See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) and *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W).)

As to a Court's approach in regard to such an application it was stated in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711E that -

> “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 no *bona fide* defence and hence that the application for rescission is not *bona fide*.”

(See also *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E).)

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. (*HDS Construction* case *(supra)*.)’

(This view was endorsed in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 SC at 53C. See also *City Council of Windhoek v Pieterse* 2000 NR 196 (LC) at 198A-D).

[16] In *Meyer v Beyleveld N.O. and Another* 1958 (4) SA 539 (TPD) at 543D-E the Court referred with approval to the remark made by Gardiner, JP in *Newman v Ayten* 1931 CPD 454 at p455, where the learned judge stated:

> '...[I]n a case of doubt as to whether there has been wilful default or not the magistrate should be in favour of allowing a defendant to purge his default. It is only when it is quite clear that the default was wilful that the magistrate should refuse to reopen.....It is a very drastic provision in our magistrate's courts which enables judgment to be taken by default, and magistrates should not refuse to reopen where there is a doubt as the whether the default may have been otherwise than wilful; they should lean rather towards reopening than toward refusing.'

[17] The second part of this statement was quoted with approval by Hoff, P in *Town Debt Collecting CC & Another v Boois & Another* NLLP 2002 (2) 392 NLC at 397.

The judgment of the court *a quo*

[18] The chairperson considered the explanation offered by the appellant for its default and concluded that the appellant put the blame on its legal representative. He found that the appellant did not provide sufficient detail for him to assess the reasonableness and acceptability of the explanation and that, on a balance of probabilities, the appellant was in wilful default. On this basis he dismissed the application.

The merits of the appeal

[19] In the affidavit in support of the application for rescission the appellant sets out more details about its defence to the respondent's complaint. From these details it becomes clear that the appellant's case is that the respondent resigned earlier from its employ to become a subcontractor who rendered a monthly tax invoice to the appellant for services rendered. The respondent admits that he resigned because he would gain some benefit related to income tax. Although he admits that he became a 'subcontractor' he alleges, he was still in effect an

employee who had all his former benefits.

[20] Ms *Schimming-Chase* pointed towards the judgment delivered by the learned chairperson in the court *a quo* from which it is clearly evident that he did not give any consideration whatsoever to the appellant's defence. She submitted that this failure constituted a misdirection and that, as the appellant had indeed raised a *prima facie* defence in respect of which there are strong prospects of success, it should have been allowed to prove that the relationship between the parties was not one of employment.

[21] The respondent's counsel conceded, rightly so in my view, that the prospects of success in relation to the appellant's defence are 'excellent'. However, he submitted, the appellant's failure to explain its default is so inadequate that the court *a quo* was justified in rejecting the application for rescission on this ground alone.

[22] In considering the submissions of both parties I bear in mind that in matters such as these it is trite that the court *a quo* has a very wide discretion which must be judiciously exercised and that a court of appeal should not readily interfere with the exercise of that discretion (*Minister of Home Affairs, Minister Ekandjo v Van der Berg, supra,* p578C; p578I). As was stated by the Supreme Court (at p578J-579A):

> 'An appellate court will, therefore, not interfere with the discretion unless it is clearly satisfied that the lower court has exercised it on a wrong principle and that it should have been exercised in a contrary way, or that the exercise of the discretion by the lower court has occasioned a miscarriage of justice.'

[23] In the *Van der Berg* matter the Supreme Court emphasised that justice ought to be done between the parties by balancing the need, on the one hand, to uphold the default judgment, and the need, on the other hand, to prevent a possible injustice of a judgment being executed which should never have been granted in the first place (at p581J-p582B). It quoted (at p. 581C-F) with approval the following extract from

De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at p711C-I:

> ''The magistrate's reasons correctly place emphasis on the neglect of the defendant's attorneys which is, after all, the most significant feature which resulted in default judgment being taken against their client. But he does so out of context. The correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an all-important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation of the defendant's *bona fides*, and thereby to decide whether or not, in all the circumstances, it is appropriate to make the client bear the consequences of the fault of its attorneys as in *Saloojee and Another NNO v Minister of Community Development* 1965(2) SA 135 (A).' [the underlining is mine]

[24] In my view the learned chairperson in this matter did not follow the correct approach as set out in the passage above. He looked at the adequacy or otherwise of the appellant's reasons for failing to appear at the hearing in isolation without examining it in the light of the appellant's defence and therefore misdirected himself.

[25] As far as the explanation provided by the appellant is concerned, I bear in mind that rule 22(2) requires that an applicant for rescission of default judgment should 'briefly' set out the reasons for the applicant's absence or default. Although no argument was addressed on this point, I think nevertheless that the requirement set by courts in relation to an explanation in terms of rule 31(2)(b) of the High Court rules, namely that the explanation should be sufficiently full for the court to be able to assess the applicant's *bona fides,* with the proviso that the explanation should be without prolixity and to the point, stating the essential facts, also applies to rule 22 cases.

[26] In the rescission application Mr Gogol, the managing director on behalf of the appellant stated that he received the notice of set down by registered post on 18 October 2006, which

was after the hearing date. On the same date he addressed correspondence to both the clerk of the district labour court and the respondent's lawyer informing them about the short service and also stated that he had been informed by the appellant's erstwhile lawyer, Mr Gous, that the trial date would be during March 2007. In the letter to respondent's lawyers he asked that they revert to him about the matter. Copies of this correspondence are attached to his affidavit.

[27] No reply was forthcoming. During November 2006 the appellant received a copy of the default judgment by post, where after it consulted its current legal practitioners and action was taken to prepare and lodge the rescission application.

[28] Mr Gogol further stated that the appellant's lawyers never informed him that the hearing date was 13 October 2006. He mentioned that the appellant's erstwhile legal representatives had withdrawn, as a result of which he had no further communication with them.

[29] In the respondent's opposing affidavit, confirmed by his then legal practitioner, he states that on 13 June 2006 the then district labour court chairperson postponed the matter to 13 October 2006. He makes the allegation that, at that time, the appellant was represented in court by a lawyer. He also attached a letter dated 26 June 2006 by his lawyers to the appellant's lawyer, Mr Gous, confirming the date of hearing. However, the transcribed record of the district labour court proceedings on 13 June 2006 indicates that only the respondent's lawyer was present and that the chairperson recorded that the matter was postponed to 13 October 2006 'as agreed with Mr Gous.' The respondent further states that the notice of withdrawal of the appellant's erstwhile lawyers was served on his lawyers on 2 October 2006. The notice of set down was sent to the appellant *ex abundante cautela*.

[30] In reply Mr Gogol mentions for the first time that he had a telephonic discussion with Mr Gous (he does not state the date of this discussion) and that the latter informed him that the matter had been postponed to March 2007. Mr Gogol states that he subsequently on 2 June 2006 faxed a letter to Mr Gous in which he requested an urgent fax in reply inter alia confirming the postponement. He states that this 'by implication also indicates that I was adamant to be informed of the court date, and that I had no intention of ignoring the rules of

court, or disobeying practice and procedures of this court.' He does not mention whether he received any response to his request for information.

[31] Mr Gogol further states that, although he was aware that the appellant's legal practitioners had withdrawn, he did not receive the notice of withdrawal. He does not state how and when he became aware that they had withdrawn, but reading his affidavit in context, it is clear that he already knew this on 18 October when he received the notice of set down.

[32] The appellant's explanation is indeed patchy in places. One would have expected more detail about precisely when the appellant learned that its lawyers had withdrawn and whether there was an answer to the request on 2 June 2006 for more information. One also expects that proof that the fax of 2 June 2006 was indeed sent be provided. There is no confirmatory affidavit attached by Mr Gous and there is no explanation provided for this failure. On the other hand, it is so that courts under the Labour Act are permitted to follow a more relaxed approach on hearsay evidence.

[33] The chairperson states in his judgment that the appellant did not explain what it did to expedite the matter so that the court can ascertain its diligence in defending the complaint. In my view it is reasonable to accept that the appellant became aware of the fact that his lawyers withdrew at about the time the notice of withdrawal was dated, namely 29 September 2006. From the appellant's explanation provided it is clear that it did nothing from this date to the date of hearing on 13 October 2006. I do not think in the circumstances where the appellant understood that the matter would be proceeding during March 2007 and bearing in mind that the appellant was the respondent, not the complainant on whom there is a duty to prosecute his complaint, that a failure to take any steps during a period of about two weeks is unacceptable to such a degree that the conclusion can be drawn that the appellant was in wilful default as the chairperson found. It cannot even be said that he was grossly negligent. I agree with the submission on behalf of the appellant that the chairperson's finding is based on an injudicious assessment of the facts.

[34] What is clear is that the appellant from the start opposed the complaint, filed a reply and set up a strong defence, the details of which became clearer in the affidavit filed in support of the application for rescission. Even though the appellant's explanation for its default may be vague in some respects, this certainly is a case where the 'principle that a strong case may compensate for a weak explanation' should have been applied to effect justice between the parties. (See *Dimitri Metzler v Benjamin Jacobus Afrika* (High Court Case No. I 1387/1994 – unreported judgment delivered on 2 November 1995) at p. 3).

[35] The result is therefore as follows:

1. The appeal is upheld.
2. The order of the court *a quo* dismissing the application for rescission of the default judgment is set aside and replaced with the following order:

   2.1 The default judgment is set aside.
   2.2 The respondent is given leave to defend the complaint.

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K van Niekerk

Judge

APPEARANCE

For the appellant: Adv E M Schimming-Chase

Instr. by Etzold-Duvenhage

For the respondent:

Mr Anderson
of Bazuin-Halberstadt Legal Practitioners

and later: Mr Nederlof
of Nederlof Inc