CASE NO.: LCA 17/2004

SPECIAL INTEREST

SUMMARY

MINISTER OF TRADE AND INDUSTRY versus **GLORIA HARAKUTA**

DAMASEB, P

13/07/2005

RULE 22 OF THE RULES OF THE DISTRICT LABOUR COURT: RESCISSION OF JUDGMENT

- Appeal against refusal of application for rescission of judgment.

- Legal practitioner of applicant for rescission of judgment incompetently and negligently conducting matter; effect thereof on application for rescission.

- Strength of applicant's defence to claim considered a critical factor.

CASE NO.: LCA 17/2004

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

MINISTER OF TRADE AND INDUSTRY **APPELLANT**

and

GLORIA HARAKUTA **RESPONDENT**

CORAM: DAMASEB, PRESIDENT

Heard on: 2004.10.04

Delivered on: 2005.07.13

JUDGMENT

DAMASEB, P: This is an appeal against an order of the District Labour Court, Windhoek (DLC), per Mr. Britz, dismissing an application for rescission of judgment granted by default (per Mrs Nathaniel) in terms of Rule10(4) of the Rules of the DLC.

On the 23rd of October 2003, when Mrs. Nathaniel was called upon to consider the application for default judgment, Mr Rukoro (a labour consultant representing the respondent in the court *a quo*), made the following submission:

> "My submission is that the Respondent failed to adhere to Rule 6 conference and failed to attend court today … I therefore apply for a default judgment in terms of Rule 10(4)."

The Court (Mrs Nathaniel) then said:

> "I perused through the file, and I can see that the Respondent was served with notices to both attend a Rule 6 conference on 28th August 2002 and today's Court hearing. There is a reply filed with the clerk of the Court, which in effect means that the respondent is aware of today's hearing. The respondent is absent from Court with no reason given or explanation. Rule 10(4) is clear and this Court believes that the respondent is aware of it. The complainants' application for default judgment is granted." [my emphasis]

These proceedings took place on 23rd October 2002.

Rule 10(4) provides as follows:

> *"If a Respondent who has been duly served with a copy of the complaint and a notice of the hearing as provided for in rule 5(2), fails to reply to the complaint within the time provided in rule 7 or fails to appear at the hearing, the chairperson may, if in his or her opinion the facts relating to the complaint are sufficiently established, determine the complaint and make such an order as is*

authorized by the Act, notwithstanding the respondent's failure to reply or to appear, as the case may be."

The appellant then applied for rescission of the judgment granted by default. Rescission of judgment is governed by Rule 22 of the Rules of the DLC. The following grounds were relied upon in the application for rescission of judgment:

(i) The legal representatives of the appellant were not served with a notice of the Rule 6 conference; were not aware that the matter was set down for hearing or that the Rule 6 conference was scheduled earlier;

(ii) The failure to attend the hearing on 23rd October 2002 was not willful as the legal representative was not aware of it.

(iii) The dismissal of the respondent (Complainant in the Court *a quo*) was substantively and procedurally fair as she had occasioned a loss of more than N$60 000-00 to the appellant. In the application, the history of the matter is set out of how the respondent , in an unauthorized way and using a fax-line of the appellant , made private calls which amounted to in excess of N$60 000-00. The disciplinary hearing that was conducted is also referred to; the fact that she was, after being found guilty as well as the fact that she was , afforded a period of 30 days within which to settle the debt or face dismissal; and that she never paid the debt within such period and was thus dismissed.

The respondent in her answering affidavit to the application for rescission of judgment does not deny that she used the fax-line of her employer to make long-distance calls in the amount claimed. She claims though that such calls were

allowed as long as she paid to government the value of the calls. She says that she offered to pay the outstanding debt in installments of N$200-00 per month and that the offer was accepted and that she performed in terms thereof and that for that reason, her dismissal was unfair. She does not deny that she faced misconduct charges and was found guilty following such a hearing. In regard thereto she says in her answer in reference to paragraph 10 of the founding affidavit[1], that:

> "While this paragraph is admitted I respectfully submit that the disciplinary hearing erred in both fact and law when it made the unreasonable recommendation that I should pay the said amount within 30 days. The said hearing further committed an error when it found that should I be unable to pay I should be dismissed, while they did know as they knew what my salary per month was that I would not be able to pay. Suffice it to say, the Applicant/Respondent had no problem with the fact that I had used its facilities in the way that I did but only had a problem with the fact that I could not repay the money over a shorter period of time. I respectfully submit this constitutes no valid and fair reason for my dismissal." (my emphasis)

[1] Paragraph 10 of the founding affidavit in the rescission application says:
"Complainant was called again to a hearing on the 10th August 2001 (see copy of letter to complainant marked Annexure "RG"). The Disciplinary hearing was held on the 10th August 2001, and it recommended that the Public Service Commission be approached for its recommendation to discharge complainant. (See copies of the Minutes Marked Annexure "RG").

The respondent, needless to say, disputes that the appellant was not in willful default.

The respondent seems to rely on two documents for the allegation that she had the permission to make private calls as long as she paid for them. I propose to quote these two documents in full:

The first one reads thus:

"MINISTRY OF TRADE & INDUSTRY

INTERNAL MEMORANDUM

TO: *ALL MTI STAFF*

FROM: *MR A P NDISHISHI*
PERMANENT SECRETARY

DATE: *18 MAY 2001*

SUBJECT: COST CUTTING MEASURES

I would like to bring to your attention measures that might help us in our exercise to reduce our expenditures.

1. TELEPHONE CALLS

1.1 *All staff-member's telephones should only be open for local calls except the ones for Directors and Deputy Directors.*

1.2 *For a staff member to call outside Windhoek a written approval from the Director of the relevant Directorate should be submitted to the switch-board operator, where the number to be called and the reasons are to be indicated.*

1.3 *Telephone computer printouts must be verified by the Directors in the presence of the staff member concerned and returned to the accounts section without delay.*

1.4 *Private calls shall be paid for in full at the end of the month following usage."*

The second one reads thus:

"INTERNAL MEMORANDUM

TO: *All Officials*

FROM: *Mr M G Kuyonisa*
Acting Permanent Secretary

DATE: *7 August 2001*

RE: TELEPHONE USE

1. *This memo serves to inform all officials to apply for approval when making international/national calls.*

2. *Attached find a form that needs to be completed whenever an international/national call is due to be made as well as information on how to operate a telephone.*

3. *The register which all telephone users must keep should be in place and must also be updated.*

4. *A four-digit code will be allocated to all telephone users, which will enable only the user to make a call from his or her telephone.*

5. *This code will also register the users name whenever a call is made whether its from your telephone or any other telephone.*

6. *In future regular spot checks will be made in order to make certain whether these records are kept.*

7. *Your usual co-operation is highly appreciated."*

Mr Britz handed down written reasons dismissing the application for rescission of judgment. The first point the learned chairperson raises in his written

judgment is that the appellant failed to comply with Rule 7(3)[2], even up to the stage that the rescission of judgment application was heard. As I have shown by reference to Mr Rukoro's submission in court on 23rd October 2002, and the

remarks of Mrs Nathaniel, the reason why default judgment was granted was on account of the failure of the respondent to be present at the hearing. Failure to file a proper reply was never an issue. It was therefore improper for Mr Britz to have raised the issue at the stage of the rescission of judgment proceedings. Appellant was entitled to assume that judgment was granted for the reason asked for by the respondent, and stated by Mrs Nathaniel as the basis on which she granted judgment by default. It must be the reason that the appellant never dealt with the Rule 7(3) failure in the application for rescission. Mr Britz's reliance thereon in his judgment and to refuse rescission on that basis , is therefore improper and amounts to a misdirection. I do not think that the fact that the issue was raised in the answering papers by the respondent (i.e. that she was never served with the reply) changes the picture. In any event, Mr Dicks, for the appellant, in argument, raises the point that the attempt by the appellant to serve the reply properly was frustrated by the fact that the respondent failed, as required by the Rules of the DLC , to provide her physical address. There is merit in this argument. I need not deal any further with this point.

[2] Rule 7(3) of the Rules of the District Labour Court provides:

(3)Except with leave of the chairperson on good cause shown, a respondent who has not served a reply in accordance with this rule shall not be entitled to take any part in the proceedings of the court."

Another point taken up by Mr Britz in his judgment is what he refers to as the failure by the appellant to comply with Rule 20 of the Rules of the District Labour Court "*as there is no proof that the notice of motion, filed with the clerk of the District Labour Court on 13th November 2002, as well as the notice of amendment to the notice of motion filed on 3rd December 2002, were delivered according to the definition of "delivery" or deliver in Rule 1".*

This issue was never raised in the respondent's answering affidavit. Besides, the respondent opposed the application for rescission and filed opposing papers. She therefore had notice of the proceedings. In the light of the issue not having been raised by the respondent in her answering papers, it was improper, and thus a misdirection, for Mr. Britz to rely on the point in the way he did and to found the basis for refusing the rescission application.

As regards the failure of the appellant to attend the Rule 6 conference, Mr Britz seemed satisfied that the respondent only got to know on 27th August 2002 that the conference will be held on 28th August 2002; i.e. one day before it was held. Mr Britz also seemed to entertain doubt that the legal representative of the respondent was aware of the date of the Rule 6 conference. He said:

> "This time Mr Asino didn't slip up again but now the Applicant/Respondent failed themselves when they didn't bring the date of the Rule 6 hearing under the attention of Mr Asino. If they did bring it under the attention of Mr Asino then Mr Asino could inform the labour inspector that he received too short

notice and that he would like a postponement of the Rule 6 conference. The Applicant/Respondent could ask for a postponement of the Rule 6 conference without assistance from Mr Asino. It is common practice that a postponement of the Rule 6 conference is granted if one party received too short notice of it."

The learned chairperson Mr Britz was thus satisfied that the respondent gave too short a notice of the rule 6 conference to the appellant but still held it against the appellant that they did not do anything about it.

In order to succeed with the application for rescission of judgment, the appellant, as Mr Britz rightly said, had to:

(i) give a reasonable explanation for its default;
(ii) show that the application was *bona fide*; and
(iii) show that it has a *bona fide* defence to the claim of the complainant.

(See *Xoagub v Shipena* 1993 NR 215 at 217 D-G; *Rothe v Asmus & Another* 1996 NR 406 at 410 A-J; and *City Council of Windhoek v Peterse* 2000 NR 196 at 198 A-D.)

The learned chairperson, Mr Britz, was satisfied that there was willful default. I agree with him in part only; and that is in so far as his comments relate to the conduct of the legal representative of the appellant.

Having considered all the circumstances in this matter (which it is unnecessary to repeat in this judgment), I must agree with Mr Dick's submission, for the appellant, that the respondent at all times wished to defend the complaint lodged against it by the respondent. I am also satisfied that default judgment was obtained against the respondent because of the incompetence and negligence of

its legal representative. The record is replete with examples of the incompetence and negligence of respondent's legal representative from the office of the Government Attorney.

In his judgment Mr Britz said the following:

> "The facts and circumstances in this case is different from those in R v Chetty 1943 AD 321 although the excuses offered by the attorney concerned are in both
>
> cases unsatisfactory, the Applicant/Respondent in this particular case is also responsible for failure to attend the Rule 6 conference and appearing at court on 23rd October 2002 as well as failure to secure presence of its representative or informing the representative about the date of the hearing."

The evidence shows that on 27th August 2002 the secretary of the Permanent Secretary of the appellant had knowledge that the rule 6 conference was to be held on 28th August 2002. The evidence does not show if she (as a lay-person) appreciated the import of such a conference nor that she brought it to the

attention of her superior, the Permanent Secretary. In any event, respondent, through the secretary, had only one day's notice of the rule 6 conference. I think not too much ought to be made of the failure to attend the rule 6 conference in the way the learned chairperson Britz had done.

The above quotation from Mr Britz's judgment conveys the impression that he places the blame for non-appearance on 23rd October 2002 squarely on the doorstep of the respondent. If, as the Court had done, it was accepted that the respondent's legal representative was aware of the date of the hearing[3] but did

not show up, the fact that the officials of the appellant did not show up at Court, pales into insignificance. They were legally represented and were entitled to be advised what to do about the hearing. The fact that the legal representative of appellant was not present at the hearing points to the conclusion, in my view, that he did not sit down with the clients to consult for the hearing. Is it surprising in those circumstances that they did not show up at the hearing? The blame is to be placed squarely at the doorstep of the legal representative whose duty, as officer of the Court, is to prepare for the hearing including pre-cognizing witnesses and requiring their presence at the hearing.

In my view, therefore, and in view of the incompetent and negligent conduct of the case by the legal representative of the respondent, this case will turn on whether or not the appellant must be held responsible for the remissness of its

[3] This is what Mr Britz says in his judgment (at p. 38 of the record): *"It is hardly impossible (sic) [he meant possible] to believe that Mr Asino was unaware of the date of the hearing in the District Labour Court because the private secretary of the Applicant/Respondent has signed for receiving the notice of the date of the hearing and she said that all documents related to this matter were furnished to the office of the Attorney-General."*

legal representative. That inquiry, however, I only intend to deal with if I am satisfied that the appellant is *bona fide* in its application and has a *bona fide* defence to the Complaint. If I am satisfied that there is no *bona fide* defence, the appeal must fail; even without the need for considering whether or not the remissness of its legal representative must be held against it. Mr Britz found there was no *bona fide* defence to the complaint. Was he right?

The Complaint *in casu* is one of unfair dismissal on the basis that the dismissal was "*procedurally and substantively unfair."*

The appellant's case (vide the Reply) is that the complainant admitted guilt to a charge of misconduct involving the use of the appellant's fax machine "*during*
official working hours, after hours and over week-ends to make unauthorized private long distance calls which amounted to N$61 803-71." Appellant's case further is that the complainant pleaded guilty and was discharged from the Public Service after she failed to take advantage of the offer to repay the outstanding debt within 30 days.

As I pointed out earlier, the respondent seems to rely on the two documents dated 8th May 2001 and 7th August 2001 for the proposition that she was allowed to make private calls as long as she paid for them. The conduct she is accused of, it appears, happened prior to these two circulars. She however

relies on them and therefore I will accept, as did Mr Britz, that their contents were in effect when she made the phone calls - which, it is common cause, were largely calls to Brazil; made, not from the ordinary phone, but from the employer's fax-line.

The document of 18th May 2001, in para 1.4 says:

> "Private calls shall be paid for in full at the end of the month following usage."

I do not think that the document of 7th August 2001 is in any way supportive of the case of the respondent. I think it goes against her. I will however disregard it for the purposes of this judgment and will only assume that at the time she made

the calls the policy of her employer was that *' private calls are allowed as long as the employee pays them at the end of the month following.'*

The respondent suggested, and this persuaded Mr Britz, that the fact of her inability to pay the outstanding debt in full, as was required by the appellant after the respondent was found guilty by the Disciplinary Hearing, showed that her dismissal was unfair because of the unreasonableness of such an ultimatum in view of the fact that the respondent was aware that she only earned N$900 after deductions. Not only is this assertion at odds with the one that the appellant accepted her offer to pay N$200 per month , but the

reasoning loses sight of the fact that the respondent's case is that private calls are allowed as long as one pays for them at the end of the following month. The admission that she was unable to pay the outstanding amount in full, in my view, is irreconcilable with the assertion that she was allowed to make the calls she did: How could the employer have authorized calls which they know the respondent would not be able to pay in terms of the Policy Directive? Besides, the Treasury Instructions promulgated on the authority of s 24 (1) of the State Finance Act, 31 of 1991 state as follows:

> *"An employee of the State is allowed to use an official telephone for urgent private calls within reasonable limits. The costs of private local calls are not recovered from such a person provided that he does not abuse the privilege.*
>
> *The cost of all private phonograms and trunk calls, including trunk calls that can be dialed directly, shall be recovered.*
>
> *All possible steps shall be taken to prevent the misuse of official telephones. In addition to efficient supervision, a ministry shall keep a central register for all official telephones."*

Under the heading, "Recovery of debt to the State, the Treasury instructions state:

"(1) Unless otherwise prescribed, debts owing to the State (except where the conditions of payment are determined by law, agreement, etc.) may, at the

discretion of accounting officers and without reference to the Treasury be recovered by means of installments, <u>provided</u> that –

a) *due cognizance be taken of the debtor's standing and financial position in determining the period of repayment; and*

b) *<u>the debt is recovered within a period of 12 months</u>.*

(2) *a) In terms of section 11(4)(b) of the Act debts shall only be handed over*

to the State Attorney for collection if the accounting officer carried into effect the provisions of section 11(1) of the Act and could not succeed in collection the debt.

b) The State Attorney may in consultation with the accounting officer at

his discretion and without reference to the Treasury recover debts to the State by means of installments, including installments for a period longer than 12 months.

c) *All cases where the debtor's legal representative made an offer shall always first be referred to the State Attorney before the offer for*

installments, irrespective of the period connected therewith, is accepted." [my emphasis]

The respondent's case is that she entered into an agreement to pay the outstanding amount in monthly installments of N$200-00 per month. Even without going into the inherent probabilities of that version, *the Treasury Instructions* require that debts must be recovered within a period of 12 months. If the respondent is to pay the amount due in installments of N$200-00, it would take more than 25 years (excluding interest) to pay back the debt. The version of the respondent that it was agreed that she would pay the debt in installments of N$200-00 is therefore implausible. The appellant, in my view, had satisfied the test of a *bona fide* defence. I make bold to say that the Complaint in this case comes perilously close to being vexatious.

As I said earlier, the appellant had throughout evinced the wish to defend the complaint but was let down by its legal representative. I cannot see therefore on what basis it can credibly be argued that the application for rescission is not *bona fide*; especially because what is involved is the misuse of public funds.

I am satisfied, therefore, that the appellant showed that it is *bona fide* and has a *bona fide* defence to the respondent's claim. The only issue now for me to

consider is whether the application should have failed in any event because of the demonstrable remissness of the legal representative of the appellant.

I already remarked that there is ample evidence of remissness and incompetence on the part of the appellant's legal representative in the handling of the whole matter. I reject the learned chairperson Britz's view that the respondent itself was remiss in their handling of the matter. Even if it was, I do not think it was of such nature to have them penalized in the way they were.

Now, should the appellant escape because the remissness is attributable to its legal representative?

Learned chairperson Britz referred to the matter of *Solojee and Another v Minister of Community Development* 1965 (2) SA AD at 141 B-E for the proposition that a litigant will in certain circumstance be penalized for the remissness of its legal representative. That restatement of the law followed in the wake of the decision of the same Court, in *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 23, also making plain that depending on the circumstances of a case, the remissness of the attorney will not be visited upon the litigant.

At the end of the day, each case is to be approached on its own facts.

It has been said by Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (at 771 E-F) as follows:

> *"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. The magistrate's discretion to rescind the judgment of this court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties...."*

(See also *Buckle v Kotze* 2000 (1) SA 453 at 458 D-I.)

In casu the record shows clearly that upon receipt of the Complaint the appellant instructed the government attorney to represent it in opposing the Complaint. The Reply was filed with the Court on time; meaning instructions were given about what the appellant's defence in the matter was. On the day of the hearing, the appellant (however they came to be aware of it) contacted the office of the Clerk of the District Labour Court and asked that the matter be stood down until in the afternoon. That they always intended to oppose the matter can therefore not be in doubt. Their legal practitioner failed them though.

I am unable, on the facts of this case, to say that the appellant was willful in the sense that *"import the notion of a deliberate act by the perpetrator who knows what he is doing, intends what he is doing, and is willing that the consequences of his default should follow."* (See *Micor Shipping (Pty) Ltd v Treger Golf & Sports (Pty Ltd* 1977 (2) SA 709 (W) at 713 D.)

Abuse of public property and misappropriation of public funds by government officials are on the ascendancy. It is important that the Court not send a wrong signal that such conduct will be condoned. The amount involved in this matter is so high when compared to the income of the respondent. There is no realistic chance of her ever being able to repay it. In view of her conduct leading to the misconduct charges against her, the complaint, as I already said, comes perilously close to being vexations. The appellant has a strong defence against the claim of the respondent, and has also evinced the desire to defend the matter.

It is settled law that the fact that the applicant for rescission has a strong defence to the claim, and the importance of the case may, in an appropriate case, compensate for any weakness there may be in his case establishing absence of willful default. The present is such a case.

I am satisfied that this is a proper case, despite the remissness of the legal representative of the appellant, to exercise the Court's discretion to rescind a judgment granted by default. I must make it very clear to the government

lawyers that the conclusion that I came to here was justified by the peculiar facts of this case and that the result in this case must not be taken to mean that rescission of

judgment will be granted as long as a government agency is able to show that there was gross negligence or incompetence in the office of the government attorney.

In the premises:

1. The appeal succeeds.

2. The order of Chairperson Britz refusing the application for rescission of judgment is set aside.

3. The appellant's application for rescission of judgment granted by default on 23rd October 2002 by Chairperson Mrs Nathaniel, is allowed.

_____

DAMASEB, P

ON BEHALF OF THE APPLELLANT	**Mr G Dicks**
Instructed by:	**Government-Attorney**
ON BEHALF OF THE RESPONDENT	**Mr T N Mbaeva**
Instructed by:	**Mbaeva & Associates**