CASE NO.: SA 4/98

IN THE SUPREME COURT OF NAMIBIA

In the matter between

HENDRIK LEWIES

APPELLANT

And

ALFONSO SAMPOIO

RESPONDENT

CORAM:. Strydom, C.J.; Dumbutshena, A.J.A. *et* O'Linn, A.J.A.

HEARD ON: 2000/04/13

DELIVERED ON: 2000/08/22

APPEAL JUDGMENT

STRYDOM, C.J.: This is a matter which originated in the Magistrate's Court, Windhoek. The appellant, who was the plaintiff in that court, issued summons against the respondent, the defendant, for payment of the amount of N$5 000,00 in respect of money lent and advanced. To avoid confusion I will continue to refer to the parties as they appeared in the Magistrate's Court.

The summons was duly served on the defendant at his place of business at Michael de Kock street, Katutura, Windhoek on 28 November 1995. The defendant thereupon entered appearance to defend which was served on the legal practitioners of the plaintiff on 5 December 1995. Together therewith the defendant also served a request for further particulars. The response of the plaintiff was to serve and file a notice of application for summary judgment. In this notice the defendant was informed that the application would be made on 23 January 1996.

So far the pleadings in this matter. What further happened is partly set out in the record kept by the magistrate and an affidavit filed by the defendant when he applied for a rescission of judgment. The record further shows that on 23 January 1996 the matter was postponed by agreement to 6 February 1996. On this date nobody appeared for the defendant as a result of which the plaintiff asked for and was granted summary judgment and costs. Up to this stage no affidavit was filed by the defendant in opposition of the application for summary judgment.

Nothing further happened until 18 March 1996 when notice was given by the defendant of an application for rescission of the judgment granted by the court on 6 February. This application was set down for hearing on 26 March on which day it was postponed by agreement to 9 April. On 9 April the application was again postponed, seemingly by agreement, to 23 April. On 23 April there was again no appearance and the matter was removed from the roll by the magistrate.

The matter lay fallow until 24 September 1996 when the defendant again filed an application for rescission set down for 26 September 1996 and to which was attached the same affidavit of the defendant filed in the application for rescission which was dated 26 March 1996 which was removed from the roll by the magistrate on 23 April because of non appearance by the parties. After various postponements the matter was at last heard on 30 October 1996. After argument the application was dismissed with costs. I will later deal more fully with the judgment of the learned magistrate.

What explanations there are for these lapses and non-compliance with the Rules of the Magistrates' Court must be gained from the affidavit of the defendant filed when he applied for rescission of judgment and what his legal representative verbally informed the magistrate when the matter was argued. In the affidavit, dated the 18th March 1996, defendant explained that immediately after the summons was served on him he went to see his attorney who then entered appearance to defend and filed a request for further particulars. Defendant further stated that he was informed by the attorney that he would revert back to him regarding the matter. Defendant further stated that after notice was received of the application for summary judgment, a letter was addressed to him by his attorney, dated 20 December 1995, informing him of the application and requesting him to contact the legal practitioner. Defendant said he never received this letter. The first time he realised that summary judgment was taken against him was when the messenger of the court turned up at his workplace with a Warrant of

Execution. Defendant said that he then immediately contacted his firm of legal practitioners who informed him that the practitioner, who previously had dealt with the matter, had left the firm and that the matter had been taken over by another member of the firm. This practitioner advised him to apply for rescission of the judgment. Defendant therefore submitted that he was not in willful default concerning his non-compliance with the Rules of Court. No attempt was made whatsoever to explain why, on two occasions defendant, or his legal representatives, did not turn up for court on dates which were determined, either with the co-operation of defendant's legal practitioners, or which were specifically requested by them.

During argument of the matter on the 30th October 1996 defendant's legal practitioner informed the magistrate that he could give no explanation as to why no one appeared to represent the defendant on 6 February 1996 when summary judgment was granted. Likewise he informed the court that he did not know why he himself was not in court on 23 April 1996. He further stated that on 8 May 1996 he was by letter informed by plaintiff's attorneys that the matter was removed from the roll on 23 April and that they had instructions to proceed with execution. To this letter the legal practitioner responded that he still held instructions to apply for rescission of the summary judgment. However, action was only taken on 24 September 1996 when the application for rescission was again set down for hearing. One cannot help but think that this belated action was not spontaneously inspired by an intention to bring the matter to finality but that it was triggered off by the fact

that a vehicle of the defendant was attached by the messenger of the court in view of the judgment debt and that it was due to be sold in execution.

These then were the facts on which the magistrate decided to dismiss the application for rescission of judgment with costs.

This decision was taken by the defendant on appeal to the High Court. In doing so the defendant changed his legal practitioners and at the appeal he was now for the first time represented by the firm of Basil Bloch. The appeal was heard by two Judges of that Court who gave judgment for the defendant on 19 June 1998. The Court set aside the summary judgment and granted the defendant the opportunity to defend the action and to file further pleadings in terms of the Rules of the Magistrates' Court.

The Court further awarded costs *de bonis propriis* on a party and party scale against the law firm and or the two individual legal practitioners who dealt with the matter. This order was in favour of the plaintiff. Defendant's legal practitioner, who represented him in the appeal, was ordered to pay the costs, if any, occasioned by the second and third paragraphs, as well as paragraph (g), of the notice of appeal which the Court found to have been unnecessary and unreasonable.

The plaintiff thereafter applied for and obtained leave to appeal to the Supreme Court. The defendant also filed a notice in which he asked the

Court *a quo* to interpret its judgment in respect of costs. According to defendant the Court *a quo* overlooked the fact that the defendant was successful in the appeal and neglected to award defendant his costs in regard to the appeal. The Court *a quo* declined to deal with the matter. It seems that the Court *a quo* deliberately made no order as to costs. Defendant was persuaded to let his application stand as a counter-appeal. The defendant subsequently withdrew from the proceedings with the result that we did not have the advantage of argument on his behalf.

The grounds of appeal on which the plaintiff was granted leave to appeal by the Court *a quo* are as follows:

> "1. The learned Judges erred on the law and/or on the facts in upholding the appeal and/or setting aside the Summary Judgment granted against Respondent in favour of the Appellant on 6 February 1996, (by the learned Magistrate, Schickerling), and more particularly on the following grounds:
>
> 1.1 The learned Judges erred in finding that the Summary Judgment granted in the absence of the Respondent and his legal representative, in the circumstances of this case, amounted to a default judgment that can be rescinded under section 36(a) of Act 32 of 1944, and particularly because

of the fact that no and/or insufficient reasons were advanced by the Respondent as to why the legal representative was not present.

1.2 The learned Judges erred in holding that the initial rescission application filed by the Respondent was filed within the permissible 6 week period, and more particularly because:

1.2.1 The learned Judges erred in applying the presumption as envisaged in Rule 49(6) of the Rules of the magistrates' Court, incorrectly in the circumstances of the case, as the onus of rebutting the presumption is on the respondent and not the Appellant.

2. The learned Judges erred in not finding that the Magistrate was correct in her decision that the application for rescission on behalf of the Respondent could not be heard as he was in willful default and/or because the Respondent did not comply with the Rules of the Magistrates' Court in setting down the rescission application.

3. The learned Judges erred in not finding that the Respondent was in willful default and/or that the Respondent's application was not *bona fide*, and particularly if regard is had to the principle that the onus is on the Respondent to prove that he was not in willful default and/or that the application is *bona fide*.

4. The learned Judges erred in finding that the application dated 23 September 1996 which was set down for 1 October 1996, was not a new application.

5. The learned Judges erred, even if they were correct that the application dated 23 September 1996 was not a new application, in not taking into consideration that there was still no explanation by the Respondent for the delay of approximately 6 months prior to the matter being set down again.

6. The learned Judges erred in finding that the Magistrate should have condoned the Respondent's non-compliance with the Rules of the Magistrate's Court and particularly if regard is had to the fact that the learned Magistrate exercised a discretion in not condoning the Respondent's non-compliance."

Before us Mr. Heathcote, who appeared for the plaintiff, supported the judgment of the magistrate and submitted that the Court *a quo* was incorrect when it disturbed the decision of the magistrate. In addition to the reasons supplied by the magistrate Mr. Heathcote submitted that Rule 49(1) of the magistrate's court requires an application for rescission to be set down and heard within six weeks after a default judgment had come to the knowledge of an applicant. If such application is out of time an application for condonation should be launched in terms of Rule 60(5) asking for the extension of the period of six weeks. Counsel further submitted that until such condonation has been lodged and granted the magistrate cannot entertain a late application for rescission of judgment. Relying on the case of Goldman v Stern 1931 TPD 261 counsel submitted that the removal from the roll of the first set down of defendant's application for rescission had the effect that the second set down of the application was out of time and as there was no application for condonation for the non-compliance with Rule 49(1) the magistrate was correct in dismissing defendant's application.

At this juncture it is necessary to look at the judgment of the learned magistrate and the judgment on appeal by the learned Judges. The magistrate dismissed the defendant's application mainly on two grounds. Firstly she found that the set down of 26 September 1996 was a new or fresh set down and as it was outside the time limit of six weeks laid down by Rule 49(1) and as there was no application for the extension of that period the matter could not be entertained. Secondly

the magistrate found that the combined conduct of the defendant and his legal practitioners was of such a nature that in the absence of an acceptable explanation the bona fides of the defendant was in question and that the court could not come to his assistance. However, the magistrate conceded that a triable defence was raised by the defendant in his affidavit which would have sufficed but for the shortcomings set out above.

If I understood the judgment of the High Court correctly that Court came to the conclusion that the defendant's application for rescission, set down for 26 March 1996, was within the time laid down by Rule 49(1). The Court *a quo* further found that the set down of the application on 26 September 1996 was not a fresh set down but merely a set down of the first application. Also relying on the Goldman-case, *supra*, the Court *a quo* found that the removal of the application from the roll on 23 April 1996 only suspended the set down with the effect, so it seems, that when the matter was again set down, some five months later, the first set down was revived and continued to ensure procedural compliance with Rule 49(1).

In discussing the grounds of appeal raised by defendant and dealing with the acceptance or non-acceptance by the magistrate of his explanation for the delay in making his application, the Court came to the conclusion that these grounds were totally irrelevant and not at all applicable. The court, correctly in my opinion, found that no explanation for any delay was given by the defendant, but seems to have then been

of the opinion that no explanation was necessary due to the fact that the application for rescission was timeously made. In this regard the Court *a quo* was probably misled by the way in which the grounds of appeal were drafted. The point of the delay in moving the application was a separate issue which only arose after the matter was set down on the 26th March 1996. What should also have been addressed by the grounds of appeal was the non-acceptance by the magistrate of the defendant's explanation for his default to take the necessary and timeous steps to oppose the plaintiff's application for summary judgment.

The Court *a quo*, so it seems to me, lost sight of the fact that Rule 49(7) empowers the Court, hearing an application for rescission of judgment, to rescind or vary such judgment if it was proved that the default was not willful and if good cause was shown. 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 (WLD).)

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 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*." (See also H.D.S. 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. (H.D.S. Construction (Pty) Ltd-case, *supra*, at p. 546.) Our Rule 49(7) of the Magistrates' Court, in contrast to that in South Africa, still specifically prohibits relief when it is shown that the default was willful.

In the present matter I am of the opinion that the defendant and his legal representatives were grossly negligent. What is more at no stage was it even attempted to explain this default. The only explanation that was put before the Court was defendant's allegation that a letter written

to him on 20 December 1995 by his legal representative went astray. Although it was indicated that a copy of this letter would be attached to defendant's affidavit this did not materialize. From the 7th December 1995 defendant's legal practitioner was aware that an application for summary judgment would be made on the 23rd January 1996. On that date the legal practitioner succeeded to obtain a postponement of this application till 6 February 1996. Notwithstanding the fact that this postponement was arranged in co-operation with the defendant's legal practitioner seemingly in an attempt to contact him before that date to be able to defend the summary judgment proceedings, the implication to be gained from defendant's affidavit is that no such attempt was made. This is difficult to believe. There is no explanation that during any time it was impossible to reach the defendant. It seems that the messenger of the court had no problem in finding the defendant on the two occasions that he was called upon to execute the warrant. Again one would have expected an explanation of why the defendant was not contacted or why he could not be reached. The person who could explain this was the previous member of the firm of legal practitioners who represented the defendant but it seems that no attempt was even made to obtain an affidavit from him. If it was not possible to obtain an affidavit one would expect the defendant to have said so. The same reasoning applies in respect of the non-appearance of defendant's legal practitioner on 6 February which has lead to summary judgment being granted against the defendant.

Then, on the 23rd April, when defendant was *dominus litis,* there was again no appearance on his behalf which lead to the matter being removed or struck from the roll. Once again no explanation for this default was given except that the legal practitioner lamely stated that he could not explain his non-appearance. It, however, goes further than that. Even if for some unexplained reason the legal practitioner did not turn up for court on 23 April, a date which he himself has set, one would have expected that as soon as he became aware of his neglect he would have done something to rectify the position by setting the application again down as soon as possible. This did not happen. Notwithstanding the fact that a letter was written by the legal practitioners of the plaintiff to defendant's legal practitioners informing them that they were going to issue a warrant of execution to implement their judgment, it still took months before the matter was again revived by a notice of set down for 26 September 1996, and this only after the messenger of the court brought the defendant a second visit. It seems that defendant's legal practitioner only became aware that the matter was no longer on the roll after he was so advised by plaintiff's legal practitioners.

There can be no doubt that the legal practitioners of the defendant must take much of the blame for what had happened. However, although one could perhaps understand the defendant's lack of interest in his own affairs so far as the summary judgment proceedings were concerned and that he may have thought that everything was in the safe hands of his legal practitioner, his lack of interest in his rescission application is difficult to understand. He knew now that to leave everything to his

legal practitioner could have dire consequences. He also knew that the ball was now in his court and that he could only stave off the judgment against him if he was successful with his application for rescission. Nevertheless he was content to sit back for months without making any enquiries of what had become of his application, only to take action again once steps were taken by the plaintiff to enforce his judgment.

It seems that the defendant and his legal representatives were content to do nothing and were only forced into action every time plaintiff attempted to execute on his judgment.

Regarding negligence on the part of a litigant's legal representatives there are many instances where the Courts nevertheless condoned such neglect and it was pointed out by the South African Appeal Court that a client should not unqualifiedly be held responsible for the neglect of his legal representative. (See *inter alia* Webster and Another v Santam Insurance Co Ltd 1977(2) SA 874(A) at 883 and Vleissentraal v Dittmar 1980(1) SA 918 (O) at 922 B - D.)

However, the very least that can be expected of a litigant under such circumstances is that he would place a proper explanation before the court to explain such neglect. The absence of a proper explanation reflects on the bona fides of the application. (See Du Plessis v Tager 1953(2) SA 275 (O) at 279 A - 280 F; Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A) at 353 D - H; Saloojee and Another, NN.O v Minister of Community Development 1965(2) SA 135(A) at p. 140.) The

present case is also not one where it can be said that the bona fides of the defence was so manifest and that from all the facts the inference was overwhelming that the defendant intended to raise such defence all along, that an incomplete or unacceptable explanation could be excused. (See De Witts Auto Body Repairs-case, *supra*.)

The onus was on the defendant to show that his application for a rescission of the summary judgment which was taken against him was bona fide and that he had a bona fide defence. His incomplete explanation of why he did not timeously defend such action and the total lack of any explanation regarding the default of his legal representative to appear on 6 February and 23 April together with the unexplained further delays which occurred until the matter was at last set down on 26 September 1996, raise an inference that there was no acceptable explanation for such neglect and that such delays were caused with the intention of extending as far as possible payment of plaintiff's claim. This is further strengthened by defendant's own inaction and his seemingly total lack of interest in the proceedings which he himself had instituted. It was on these issues that the magistrate exercised her discretion and refused the application of the defendant to rescind the summary judgment given against him.

As pointed out earlier the Court *a quo* on appeal did not give any consideration to this issue because it was incorrectly of the opinion that as long as the application for rescission was timeously made no explanation was required for the non-compliance with the Rule of the

Magistrates' Court and other defaults. The Court *a quo* also placed great reliance on the fact that the magistrate conceded that the defendant's defence could have been bona fide but for the combined neglect of the defendant and his legal representatives. I think what the magistrate had in mind was to say that the defence put up by the defendant in his affidavit was a triable defence and would have sufficed but for the conduct of the defendant and his legal practitioners which was of such a nature that it gave rise to the reasonable inference of lack of bona fides. A reading of the authorities show it is not enough to raise a triable defence it must also be shown that that defence is bona fide.

The Court *a quo* also blamed the plaintiff for not setting the matter down himself and, in so doing, apply for appropriate relief. It seems to me that the Court *a quo* here had in mind the provisions of Rule 22 of the Magistrates' Court Rules where in terms of sub-rule (1) a defendant in a trial action is given the right to set the matter down if a plaintiff does not do so within 24 days after the close of pleadings. In regard to applications in the High Court similar provision is made in Rule 6(5)(f) for the setting down of an application by a respondent where an applicant fails to do so within the allotted period. No similar provision is made in Rule 55 of the Magistrates' Court Rules. In the case of In re Pennington Health Committee 1980(4) SA 243 (N) Howard, J. (as he then was), came to the conclusion that the word "action" as used in the various provisions of Act 32 of 1944 and the Rules bears the narrow meaning of a proceeding that is commenced by the issue of a summons. In my opinion the language used in Rule 22 also does not leave any

doubt that the Rule applies to actions commenced by summons and does not include applications. Consequently I am satisfied that appellant is not also to be blamed for the inaction and delay in this matter.

For the reasons set out herein before I have come to the conclusion that the mainly unexplained disregard for the Rules of the Magistrates' Court, the other unexplained defaults and delays caused by the legal practitioners of the defendant or by himself combined with the general conduct of the defendant were of such a nature that it gave rise tot he reasonable inference that the defence of the defendant, and hence the application for rescission, was not bona fide. I am therefore of the opinion that the magistrate's dismissal of the application based on the lack of bona fides on the part of the defendant was correct.

Because of the conclusion to which I have come it is not necessary to deal with Mr. Heathcote's submission that the matter was set down outside the period of 6 weeks laid down by Rule 49(1) and that in the absence of an application for the extension of that period the magistrate could not came to the assistance of the respondent.

In the result the following order is made:

1. The appeal succeeds with costs.
2. Paragraphs 1 and 2 of the Order of the Court *a quo* are set aside and the following order is substituted:

"The Application for rescission of judgment is refused with costs."

signed G.J.C. STRYDOM, C.J.

I agree.

Signed E. DUMBUTSHENA, A.J.A.

I agree.

Signed B. O'LINN, A.J.A.

COUNSEL ON BEHALF OF THE APPELLANT: Adv. R. Heathcote

INSTRUCTED BY: V/D MERWE-GREEFF

NO APPEARANCE ON BEHALF OF THE RESPONDENT