CASE NO. SA 24/2003

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**HEWAT BEUKES** **FIRST APPELLANT**

**ANNEMARIE WENTZEL** **SECOND APPELLANT**

And

**CIC HOLDINGS LTD** **RESPONDENT**

**CORAM:** O'Linn, A.J.A. Chomba, A.J.A. *et* Mtambanengwe, A.J.A. ,

**Heard on**: 2005/04/04

**Delivered on**: 2005/06/24

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**APPEAL JUDGMENT**

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**O'LINN, A.J.A.:** I have divided this judgment into various sections as follows:

I: INTRODUCTORY REMARKS AND FACTS WHICH ARE EITHER COMMON CAUSE OR NOT SERIOUSLY DISPUTED BY THE PARTIES.

II: THE LEGAL ISSUES RAISED.

III: CONCLUDING REMARKS.

I: INTRODUCTORY REMARKS AND RELEVANT FACTS WHICH ARE EITHER COMMON CAUSE OR NOT SERIOUSLY DISPUTED BY THE PARTIES

1. This is an appeal by Hewat Beukes, first appellant and Annemarie Wentzel, second appellant against CIC Holdings Ltd, respondent. In view of several applications where the parties are applicants in one instance and respondents in another, I will hereinafter refer to the parties as Beukes, Wentzel and CIC Holdings to avoid some confusion. Beukes and Wentzel each appeared without a legal practitioner in this Court and in the High Court but Wentzel throughout merely associated herself with the arguments of Beukes.

In the District Labour Court Beukes was not a respondent but appeared as the representative of Wentzel. Beukes was cited as first respondent in the Court *a quo* and as first appellant before this Court. Although the Labour Act provides in Section 19(3) that any complainant may be represented in a District Labour Court by any person duly authorized by the complainant, notwithstanding that he/she is not a duly qualified and registered legal practitioner, Beukes could and did represent Wentzel in the District Labour Court, but could not represent Wentzel as such in the High Court and in this Court. Both he and Wentzel thus represented themselves.

CIC Holdings did not appear in the first District Labour Court hearing presided over by magistrate Shaanika on 3 March 2003, but was represented by Advocate Heathcote, instructed by Engling Stritter and Partners, at the hearing on 22.4.2003 and subsequently in the High Court and before us in the hearing of this appeal.

2. Wentzel was employed by CIC Holdings from a date in 1974 until 3rd October 2001, when she left the employment after resigning.

3. A dispute arose between Wentzel and CIC Holdings. Wentzel held the view that she was entitled to a much larger sum than that paid to her, especially from the proceeds of an incentive Trust Fund set up by CIC Holdings for the benefit of its employees as well as proceeds from a share trust scheme.

4. Wentzel launched proceedings before the District Labour Court for the recovery of the amounts allegedly due to her up to and including 16th October 2002.

4.1 On 16th of October 2002 the notice of hearing of the complaint was served on the respondent CIC Holdings giving the date of the intended hearing as 3rd March 2003. The notice was duly served in terms of Rule 5 of the Rules of the District Labour Court on the complainant Wentzel and the respondent

CIC Holdings. The notice was in accordance with the prescribed Form 3(a) of the Rules, which *inter alia* informs the respondent as follows:

> "You are required to file your reply to the complaint with the clerk of the Court and to serve a copy of your reply upon the complainant within 14 days of service of the complaint upon you. Your reply must state whether you intend to oppose the complaint and, if so, must contain sufficient particulars so as to inform the complainant of your grounds of opposition. Except with leave of the Court, on good cause shown, a respondent who has not filed a reply, within the time prescribed, will not be entitled to take any part in the proceedings…..
>
> The complaint has been referred for settlement to a labour inspector at (Address or telephone number) and you must cooperate with the labour inspector and attempt to settle the dispute before the date of hearing. If you fail to file a reply to the complaint within a period of 14 days or fail to appear at the hearing, the Court may determine the complaint and make such award or order as is authorized by the, Act, notwithstanding your failure to file a reply or to appear……"

4.2 There was a conference between the parties and the labour inspector as provided for in Rule 6, but no record of this conference was available at the Court hearing on 3/3/2002.

4.3 Respondent did not give notice of opposition within 14 days and did not appear at the hearing on 3rd March nor at any subsequent hearing thereafter.

5. Beukes, on behalf of Wentzel appeared at the hearing on 3.3.2002 and asked for a default judgment for an amount of N$99 198.03 plus 20 percent interest.

5.1 A default judgment was obtained.

5.2 The only record of the proceedings of the District Labour Court hearing on 3/3/2002, was that attached to the Founding Affidavit of one Nico Du Raan, the general manager of CIC Holdings, in the application proceedings in the High Court launched on 25th April 2003. This record was not certified as a true record of those proceedings and contained several obvious mistakes in the wording. Du Raan, on behalf of CIC Holdings, did not dispute any of the statements contained in this record even though it was obvious that this record was an abbreviated record as noted down by the presiding chairperson and contained some obvious mistakes as will be discussed hereinafter. The Chairperson Shaanika noted the following on this record:

> "Complainant lodged an application for a default judgment in absentia of respondent. He was duly served 16/10/2002 at place of business, Corner of Isine Northern Industry. Respondent did not file a reply nor notice of opposition…"

It is further clear from this record that Beukes then stated:

> "Respondent didn't turn up this hearing – I therefore ask for default judgment in terms of claim unlawful detention. She resigned in September 2001. Various benefits have to be paid out May 2002 but it was not paid out."

Then various amounts allegedly due were set out and Beukes said according to the record:

> "Total amount N$99 198.03 claim ask the Court to deduct her this money with 20% per annum." (The underlined word deduct' probably meant 'award').

The record then continuous:

> "Court asks for somebody in the Court to go out and call a representative from CIC Holdings …Respondent CIC Holdings called three times @ 10:00 am but to no response."

It is then recorded:

> "Court: Default judgment granted in favour of complainant. Respondent in absentia occur to pay complainant an amount of N$99 198.03 that entails share trust, ordinary shares and other ordinary shares with 20% interest per annum thereof or else show good case to why the order should will be made final on the 14/3/2003 @ 10:00 am."

The said record further stated:

> "Complainant Rule 6 was held over, went back to Labour Inspector Aron Seibeb he promised that he would file Rule 6 letter dated 21/1/2003 and marked as Exhibit "A"."

Exhibit “A” was however not attached to the record produced by Mr. du Raan.

It is reasonable to assume that the underlined word “occur” in the order should read “ordered” and the underlined word “will” in the last line of the order should read “not”. The order is then reasonably intelligible and would read:

> “Default judgment granted in favour of applicant. Respondent in absentia ordered to pay complainant an amount of N$99 198.03 that entails share trust, ordinary shares and other ordinary shares with 20% interest per annum thereon or else show a good case why the order should not be made final on the 14th/3/2003 @ 10:00 am.”
>
> (I underlined the words inserted in the record for those which were obviously wrong).

It must be noted from the outset that although the last part of the aforesaid default judgment was in the form of a conditional order and not in the form of a conventional *rule nisi*, that part of the order was thereinafter continuously referred to as a “*Rule nisi*”.

5.3 The aforesaid record shows that Beukes at no stage asked for a *rule nisi* or some other form of provisional order. He only asked for a default judgment for the stated amounts and interest. There is also no indication of the reason for adding a condition to the default judgment as provided for in the rules.

There was no request by or on behalf of respondent for condoning its default in not complying with the above stated Rule 7. Not only did CIC Holdings not show any good cause, but no good cause for such condonation appears from the record. The effect of the provisional part of the aforesaid default judgment was that CIC Holdings was now allowed to take part in the proceedings on a purported return day of a provisional order, whereas Rule 7(3) provides that a respondent who has not complied with subrules (1) and (2) of Rule 7, "shall not be entitled to take part in the proceedings of the Court."

5.4 The aforesaid provisional order was not served on the respondent, probably because the respondent had failed to comply with Rules 7(1) and 7(2) and consequently was not entitled to take any part in the proceedings of the Court.

5.4 CIC Holdings however knew the date of hearing and was obviously in a position to ascertain what transpired in Court on that date. CIC Holdings

nevertheless neither paid nor gave any notice at any stage of an intention to show cause (or make a good case) why the default judgment should not be made final on the 14th and did not appear on the 14th March.

As a consequence the complainant also did not appear on the 14th March 2003 or at any time thereafter and no further hearing took place on that date.

6. On the 2nd April 2003, Beukes, on behalf of Wentzel applied to the Clerk of the Court for a Warrant of Execution against CIC Holdings. The Clerk of the Court then issued such a warrant. In the warrant, the authority for the warrant was stated to be a judgment of 3rd March 2003 and not the 14th March and the judgment debt was stated to be N$128 960 and the total due also N$128 960. In another column on the right hand side of the warrant it was stated that the judgment debt obtained was N$128 960.43, the words added: "(excluding interest still to be added to the capital amount)."

However in the second paragraph of the right hand column it is said in the authorization to the sheriff.

> "This is therefore to authorize and require you to raise on the property – Cnr Iscor and Sollingen Streets, Northern Industrial Area of the said Execution Debtor, the sum of N$128 960.43,

> together with your costs of this execution and pay to the said Execution Creditors Attorney the aforesaid sum of 128 960.43 and return to this Court what you have done by virtue thereof."

It appears from the above that the words "excluding interest still to be added" is inconsistent with the paragraph immediately following where the authorization to the Deputy Sheriff makes no mention of interest still to be added to the capital amount but only "your costs of the execution" to be added.

It is obvious that the amount of N$128 960 includes 20 % interest on N$99 198 as from the date when Wentzel left the employment of CIC Holdings, i.e. 3rd of October 2001, up to and including the date of the issue of the warrant on 2nd April 2003, i.e. a period of approximately 18 months. This amount of interest was then capitalized to bring the judgment debt, which included 20% interest, to N$128 879, which is only N$81 short of the capitalized amount as reflected in the warrant. This small discrepancy is probably an error in calculation.

The statement in the first paragraph on the right hand side, that the judgment debt amounted to N$128 960.43 (excluding interest still to be added to the capital amount) is then also not inconsistent with the statement that the

judgment debt is N$128 960.43 in that the interest up to the date of the issue of the warrant on 2nd April 2003 was already capitalized and included in the amount of N$128 960.43 but does not include interest from that date until actual payment. Interest for that period i.e. from date of Warrant of Execution until final payment could obviously not be included in the amount for which the Deputy Sheriff was authorized to execute and could only be added at a later date when the matter is brought to finality by full payment of the capital amount plus interest until date of payment.

The probable reason why the warrant refers to a judgment on the 3rd of March and not the 14th March 2003, was because it was thought, rightly or wrongly by Beukes as well as the clerk of the Court, that it was the judgment of the 3rd of March which became final on the 14th March 2003 by mere operation of law, when CIC had still not shown any cause why the judgment of the 3rd should not be made final.

The Warrant of Execution was handed to the Deputy Sheriff on 3 April 2003 for execution.

7. No attachment was ever made of any property of CIC Holdings because when Mr. Hennes, or a deputy of Mr. Hennes presented the warrant to an official or employee of CIC Holdings, another official, who was said to be the accountant, according to Mr. Hennes, said he will pay the warrant.

This person was never identified by CIC Holdings and no affidavit from such person was filed in the High Court proceedings. The cheque by CIC Holdings made out to the Messenger of the Court for payment of the purported judgment debt was also never produced by any of the witnesses for CIC Holdings in their affidavits.

The only cheque produced was the cheque drawn on the Messenger of the Court Trust Account in favour of Wentzel for the amount of 128 960.43.

7.1 It was not stated in the affidavits in the High Court when Mr. Hennes first informed CIC Holdings of the Warrant of Execution and precisely when CIC Holdings handed over its cheque to Mr. Hennes or one of his deputies.

In the replying affidavit by Nel, the accountant of CIC Holdings in the High Court proceedings, this cheque drawn on the account of the Messenger of the Court Trust Account at Barclays National Bank, was attached.

The cheque bore an endorsement in the top right hand corner – “stop payment”.

According to Nel, the words “stop payment” “was only inserted subsequent to payment having been made to the respondents, and when the Deputy

Sheriff informed Bank Windhoek about the fact that the warrant was set aside." Nel did not say precisely when and by whom and in which Bank this endorsement was made and whether or not he was present when this was done.

8. Mr. Hennes in turn gave a cheque for an amount of 128 960.43 dated 17.4.2003 to Wentzel on or before that date drawn on the Messenger of the Court Trust Account and made out to Wentzel.

9. Wentzel paid that cheque into her banking account at Bank Windhoek on Saturday the 19th April 2003 and requested special clearance.

10. On Tuesday 22nd of April about 10:30 Beukes received a telephone call from one Kutzner, who identified himself as a legal representative of CIC Holdings. Kutzner informed him that CIC Holdings would apply in the District Labour Court at 11:00 for the setting aside of the Warrant of Execution.

10.1 Beukes attended the hearing beginning at 11:00 but despite his objections, the hearing continued until about 15:30 when judgment was given setting aside the Warrant of Execution.

10.2 Mr. J J F Britz presided over this hearing of the District Labour Court.

11. Although the legal representatives of CIC Holdings indicated before the District Labour Court hearing on 22 April 2003 that CIC Holdings would later bring an application for the setting aside of the purported default judgment of 3 March 2003, it never brought such an application.

12. On 25th April 2003, at 15:30, CIC Holdings brought an *ex parte* application against both Beukes and Wentzel as first and second respondents, for a *rule nisi* and interim interdict for payment of the amount of N$128 960.43, jointly and severally and a purported interim interdict.

The interim interdict granted *ex parte* was however in the form of a mandamus, operative with immediate effect. That part read:

> "2.1 That the respondents pay the amount of N$128 960.43 to the applicant jointly and severally, the one paying, the other to be absolved;
>
> 2.2 that the Deputy Sheriff of the District of Windhoek be authorized to attach so much of the movables and/or immovables of the respondents, in satisfaction of this order, but that no sale in execution shall take place, or any

moveable so attached be paid over to the applicant, pending finalization of this application."

12.1 This form of interdict was rightly described by Beukes as "punitive". It should not have been granted *ex parte*.

13. The *rule nisi*, issued by His Lordship Mr. Justice Mainga was confirmed by her Lordship Justice Gibson in her judgment on 1st August 2003.

14. Beukes and Wentzel appealed to this Court by notice of appeal dated 16th October 2003 against the judgment of the High Court delivered on 1st August 2003. The notice of appeal also set out the grounds of appeal and these grounds make it clear that the appeal is against the whole of the judgment.

II. THE GROUNDS OF APPEAL AND THE LEGAL ISSUES RAISED

1. The High Court had no jurisdiction to hear the matter.

2. The learned judge presiding in the High Court dealt with this objection as follows:

> "The respondents have attacked the present proceedings on the grounds that this matter is one for the Labour Court only, because by virtue of Section 18 of the Labour Act, the Labour Court has exclusive jurisdiction in labour disputes. Mr. Heathcote has submitted rightly that this is true but only in certain respects – as is made clear in Section 18 itself.
>
> On the question of the validity of the warrant, Mr. Heathcote argued that the effect of non-appearance of the parties on the 14th March 2003, was that the *rule nisi* granted by the District Labour Court on 3/3/2003 lapsed."

The learned judge articulated her finding as follows:

> "In the instant case there was, as is common cause, no appearance by the respondents to argue for confirmation nor did the applicant appear to ask for the discharge of the rule. Thus the *rule nisi* simply fell away. It follows therefore that any steps taken on the strength of that lapsed rule are simply null and void, and, that must include any monies paid in execution of such order, for there was no judgment upon which to levy execution. The cause of action thus become one of delict, and this Court is

the right and proper forum to pronounce on the rights and wrongs of the situation."

3. In my respectful view, the learned judge seriously misdirected herself in this regard. I say so *inter alia* for the following reasons:

(i) From the very outset the learned judge wrongly assumed that the tailend of the default judgment was a "Rule Nisi" in the conventional sense as it was used in the High Court and Courts of the same status in South Africa, whereas the said tailend of the order was not in the form of such a conventional *Rule Nisi* and was not even referred to as a *Rule Nisi* by the Chairperson who issued it. At best the phrase used was a conditional order, whereby CIC Holdings could avoid payment of the default judgment, provided it showed a good case on the 14th March why the default judgment should not become final or be made final. Consequently the Court failed from the very beginning to distinguish the unique type of conditional order issued by the Chairperson of the District Labour Court from the aforesaid conventional *Rule Nisi's* lawfully issued in other Courts in accordance with the procedures of those Courts. In the result the High Court, as well as the District Labour Court, simplified a difficult issue by again assuming: There was no appearance for the complainant on the return day, "thus the Rule Nisi simply fell away". And because the *Rule Nisi*

fell away, there could be no valid warrant of execution and because the warrant of execution was invalid, there could be no valid payment by the alleged debtor CIC Holdings to Wentzel.

(ii) None of the decisions referred to is any authority for the proposition that once a delict is allegedly committed by an employee in the course of a dispute with an employer, it is no longer a labour matter and the Labour Court's exclusive jurisdiction falls away.

(iii) Beukes and Wentzel never accepted that the default judgment obtained on 3/3/2003 against CIC Holdings was a nullity and thus of no force and effect; but only that the "*rule nisi*" part was a nullity. According to them the warrant of execution was valid and the receipt of the payment made by CIC via the Messenger of the Court, was lawful. The fact is that the labour dispute between CIC Holdings and Wentzel remained unresolved. This dispute was that Wentzel and her representative Beukes claimed throughout, that CIC Holdings owed her an amount of N$99 198.03 plus interest at the rate of 20% from the date of her leaving the employment of CIC Holdings, being 3rd of October 2001 up to and until date of payment and had obtained a judgment and warrant of execution and payment via the Messenger of the Court in that regard. Furthermore, the very issue of the judgment granted by the District Labour Court on 3.3.2003, the warrant of

execution and the payment by CIC Holdings, were still in dispute when one aspect, being the payment by CIC Holdings and its claim of repayment of the amount, was taken to the High Court on the basis of urgency. As appears from the judgment, of the High Court, the whole question of the validity of the judgments of the District Labour Court on 3 March 2003 and 22 March 2003, the validity of the warrant and the payment in regard thereto, were disputed before the High Court. The High Court even made findings on these issues, even though there was no appeal or review before it and the time for such review and/or appeal to the Labour Court had not expired.

(iv) The Labour Court has the power *inter alia*, to hear appeals and reviews from the District Labour Court in accordance with Section 18 of the Labour Act.

Section 18(1)(d) also empowers that Court, where urgent relief is required, to grant such urgent interim relief until a final order is made in terms of subparagraph (b) and (c) of Section 18(1).

Furthermore, in terms of subsection (3) of Section 18, the Labour Court has, in the exercise of its powers and functions, “all the powers of the High Court of Namibia under the High Court Act of 1990 (Act 16 of 1990), as if its proceedings were proceedings conducted in, and

any order made by it were an order of, the said High Court of Namibia."

In the circumstances there was no legally justifiable reason for excising one aspect of a dispute and take it to the High Court on the ground that that aspect of the dispute constitutes a delict. By doing so, the crux of the dispute was left unresolved.

(v) It was never the intention of the Labour Act to allow a piecemeal resolution of different aspects of what essentially was and remains a labour dispute and to allow those aspects to be decided in different courts, namely the Labour Courts on the one hand and the High Court on the other.

(vi) It appears that the learned judge had failed to consider the impact of the extent of the exclusive jurisdiction of the Labour Court, provided for in Section 18(1)(g) which reads as follows:

"The Labour Court shall have exclusive jurisdiction generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law." (The emphasis is mine).

The attempt to recover the payment made by the employer CIC Holdings to the former employee Wentzel, in payment of the amount alleged by Wentzel to be due to her, is certainly covered by the wide wording – "any labour matter" and is furthermore covered by the words "incidental to its functions under the Act."

Even if the attempt to recover the payment on the basis that it was made under the influence of a District Labour Court order which had lapsed and a warrant of execution issued in pursuance thereof and even if the acceptance and appropriation of such a payment by the employee amounted to a delict in the common law, the common law in such a case is again covered by the words in Section 18(1)(g) which expressly says: "….any labour matter, whether or not governed by the provisions of this Act, any other law or the common law."

It must be kept in mind that the Labour Act, No. 6 of 1992 set up a hierarchy of Labour Courts and other institutions to deal exclusively with labour matters and *inter alia* "to promote sound labour relations and fair employment practices."[1]

[1] Preamble to the Labour Act No. 6 of 1992.

In this regard the following provisions of the Labour Act and the rules are significant:

Section 20 of the Act provides that an order for costs may not be made against any party by the Labour Court or District Labour Court unless such Court is of the opinion that a party has, "in instituting, opposing or continuing any such proceedings, acted frivolously and vexatiously."

Section 21 provides that any party to proceedings before the Labour Court can only appeal to the Supreme Court if special leave is obtained on petition to the Supreme Court "on any question of law,"

Rule 10(1) of the Rules of the District Labour Court provides that:

> "the hearing of a complaint shall be conducted in such manner as the chairperson considers most suitable to the clarification of the issues before the Court and generally to the just handling of the proceedings and the Chairperson shall, so far as it appears appropriate, seek to avoid formality in the proceedings and, except in terms of the provisions of Section 110 of the Act, shall

not be bound by any law relating to the admissibility of evidence."

Rule 10(3) provides *inter alia* that any complainant may be represented by a person designated by the Permanent Secretary, Labour or Human Resources Development, and any complainant or respondent may be represented by his own advocate or attorney or by any other person authorized by such complainant or respondent, as the case may be.

(vii) The procedure as to complaints and its hearing is simplified to achieve the objects of the Act.

4. The Learned Judge Gibson in the instant case, relied for her judgment on several decisions of other courts, mostly referred to by Mr. Heathcote, counsel for CIC Holdings and dealing mostly with the procedures relating to the issue and effect of a *rule nisi*.

In doing so, the Court failed to give proper consideration to the procedure prescribed in District Labour Courts relating to default judgments and the procedure to set such judgment aside.

The Court relied on the following decisions but had failed to distinguish them from what is required in Labour Courts:

(i) "In *Fisher v Fisher* 1965 (4) 641 TPD the Court held that "once a *rule nisi* was set aside or has already lapsed, it was not the purpose of Rule 27 to revive it. A *rule nisi* is an order of Court to which a fixed time for being legally effective is attached. Once that period has elapsed, the *rule nisi lapses*."

(My free translation from the Afrikaans)

The *rule nisi* issued in *Fisher v Fisher* was the usual order in an action for divorce where the *rule nisi* calls upon the defendant to restore conjugal rights on or before a certain date and to show cause on a second date why the order should not be made final. This type of *rule nisi* was specifically provided for in Rule 27(1) of the Rules of Court to suit the special circumstances of a divorce action.

The Court also found that Rule 27(1) of the Uniform Rules of the Supreme Court of South Africa which provides that the Court may extend any period laid down in the rules on good cause shown, cannot be invoked to <u>extend a rule nisi</u> which has already been set aside or which has already lapsed.

The Rule 27(1) referred to in this case, corresponds to Rule 27(1) of Rules of the High Court of Namibia. However Rule 27 (3) of the Namibian rules provide that the High Court can, on good cause, condone any non-compliance with the rules.

Rule 27(4) provides:

> "After a *rule nisi* has been discharged by default of appearance by the applicant, the Court or a judge may revive the rule and direct that the rule so revived need not be served again."

The learned judge in *Fisher v Fisher* did not refer to or consider any *rule nisi* with provisions such as that in the above quoted Namibian Rule 27(3) and 27(4). Rule 27(4) was only enacted later.

The decision in *Fisher v Fisher* in regard to the revival of the rule nisi would probably have been different if the Court applied Rule 27(3) or if Rule 27(4) was available. *Fisher v Fisher* is consequently distinguishable and is no authority for the Namibian High Court and even less so for the Namibian Labour Courts in this regard.

But what has apparently been missed by counsel for CIC Holdings and the Namibian High Court, was that *Fisher v Fisher's* ruling was restricted to not reviving a rule nisi which had been discharged or had lapsed.

The learned judge in Fisher in actual fact issued a new *rule nisi*, in order to make it unnecessary to institute action *de novo* and in order to prevent the wasting of time and to save costs.

Fisher's case, in view of the new *rule nisi* granted, is not any justification for the procedure followed and order made by Chairperson Britz in the second District Labour Court.

It further follows that if Rule 27(4) applied to our District Labour Court, then the second District Labour Court under the chairmanship of Mr. Britz, would have had direct authority to revive the *rule nisi* in that case even on the assumption that it had lapsed.

Rule 21 of the rules of the Namibian District Labour Court provides as follows:

> "The chairperson may, upon application and on good cause shown, at any time –
>
> (a) condone any non-compliance with the rules;

(b) extend or abridge any period prescribed by these rules, whether before or after the expiry of such period."

Rule 21(a) and (b) therefore corresponds to Rule 27(1), 27(2) and 27(3) of the Rules of the High Court, but do not have a specific provision regarding a *rule nisi* as contained in Rule 27(4) of the Rules of the High Court.

Nevertheless Rule 21(a) read with Rule 21(b) are wide enough to cover an order such as that provided for specifically in the High Court Rule 27(4). It seems that subrule (4) was enacted to leave no doubt that such an order may be given in the High Court, in the light of decisions in South African courts, such as *Fisher v Fisher* which cast doubt on whether the Courts in South Africa had the power to reinstate a *rule nisi* once it had been discharged or had lapsed.

I have no doubt that even if the District Labour Court had the power to issue a *rule nisi*, it would also have the power by virtue of rule 21(a) and 21(b), to either revive such *rule nisi* or issue a new rule, rather than merely assuming that the rule had lapsed and that that was the end of the matter.

(ii) The decision in Cohen Lazer & Co TPD 1922 at 142, relied on by counsel for CIC and the High Court, is also distinguishable and of no

assistance in the present appeal. In that case – there was no judgment at all – only a written request for a default judgment. Without any judgment, the Clerk of the Court was induced to issue a warrant of execution.

In the instant case, the complainant went through all the stages set by the rules and obtained a judgment. There is no evidence that the clerk of the Court was induced to issue the warrant of execution as was the case in Cohen Lazar and Company. To apply to the instant case the remarks of the judge in that case as to how "revolting" such an act is, is clearly not justified; neither could it justify the urgency for CIC to apply for the warrant of execution to be set aside as null and void.

(iv) The next case relied on by the Court was *Karabo & Others v Kok & Others* 1998 (4) SA 1014. This was a decision of the Land Claims Court established in terms of the Extension of Security of Tenure Act 62 of 1997 to give effect to the provisions and aims of that particular Act.

It follows that the judgment in that case dealt with the provisions of the aforesaid Act and some provisions of the Labour Relations Act 66 of 1995.

On the 7th January 1998, the Magistrate in Krugersdorp issued an order which read:

> "That the Deputy Sheriff is ordered to eject respondents from a property known as part 103 of the farm Lindley, district Krugersdorp. Should the respondents wish to provide reasons why the order of ejectment and costs should not be made final, they should for that purpose appear before Court on Wednesday, 28th January 1998, at 08:30. The respondents may anticipate the return date on 12 hours notice to the applicants." (My free translation from the Afrikaans)

On 26th January the 64 labourers filed a notice stating that they would oppose the application. On the 30th January 1998, after the return date was extended to 4th February, the respondents filed their opposing affidavits.

On the return date, the matter was argued by both sides. The provisions of the Tenure Act were brought to the Court's attention. The Magistrate then struck the matter from the roll pending an action already instituted.

The Land Claims Court was also a Court of automatic review in cases under the Extension of Security of Tenure Act. When the matter was brought before the Land

Claims Court the Court, per Geldenhuys, J in the course of its judgment *inter alia* said:

> "The applicants are correct in their view that the order which the magistrate gave on 7th January 1998, no longer exists. Although the wording of the order may not be as clear as desired, it was apparently intended to be of force only until the return date, when it would in the normal course of events either be confirmed or discharged. If none of that happens, the order lapses."

It was on this remark that Mr. Heathcote, counsel for CIC Holdings and the learned judge *a quo* relied as some authority in the instant case for its finding that as the rule was neither confirmed on the return date nor discharged, it lapsed. This was the practice in the case of proper *rule nisi's* when such orders are provided for in terms of the rules of such courts. At any event, the order referred to by Geldenhuys J was apparently unclear and when the matter was eventually raised before Geldenhuys J, the magistrate's court that initially issued the order, had already struck it from the roll on the return date, because it did not comply with provisions of the Tenure Act.

The Land Claims Court itself indicated that the Tenure Act was an involved piece of Legislation. Geldenhuys, J also remarked that there was no acceptable explanation why the order was applied for *ex parte* with no notice to the labourers.

In the application for default judgment before the District Labour Court, different rules apply to attain the aims of the Labour Act. In the instant case Beukes, on behalf of Wentzel, applied for a default judgment to which Wentzel was entitled, in view of the failure of CIC Holdings to give notice of opposition, and of the nature of their defence.

Although a sort of conditional default judgment was granted, the respondents were no longer entitled to be heard and at any event had not, after the issue of the alleged "*rule nisi"*, given any indication that it intended showing cause on the return date why the order of the 3rd March should not become or be made final. In the instant case, there was no duty on the applicant to appear on the return date and no rules requiring such appearance. In the circumstances, it was not the default judgment as such that lapsed, but the "*rule nisi"*, part, assuming for the purpose of this argument, that the "*rule nisi"* part was not null and void from the start.

In conclusion in this regard, the Karabo decision is not helpful in the instant case.

(iv) Another decision referred to was *Shindling v Southern Union Manufacturing*, CPD 1933, at 607. In that case it was said that the Magistrates Court, where

a writ had been issued, was the right Court to set aside an attachment. The Court held that a litigant wishing to apply for a setting aside of an attachment must first exhaust its remedies in that Court. Only if such remedy was wrongly refused in such Court, could the applicant proceed to the High Court. This case does also not assist CIC Holdings in this case.

It is accepted that CIC Holdings had first to approach the Court of first instance, namely the District Labour Court if it wished to apply for the setting aside of the judgment, or warrant of execution or an attachment made in terms thereof. But in the instant case there was no attachment. Instead there was payment by the debtor, CIC Holdings and thereafter an application for setting aside the warrant and following on that, an application to the High Court for repayment of the amount paid and an interdict.

On the analogy of the Shindling decision, it could rather be argued that the latter application had also to be brought in the District Labour Court and if unsuccessful, then an appeal or review to the Labour Court and not to the High Court.

(v) The decision in *Williams v Landmark Properties SA and Another*; Witwatersrand Local Division, 1998 (2) SA 582, was also relied upon but does not assist CIC Holdings. The headnote of the report correctly sums up the case as follows:

> "The applicant had brought an application *ex parte* for the attachment *ad confirmandum jurisdictionem* of certain monies held by the second respondent on behalf of first respondent. A rule nisi had been granted which, *inter alia*, provided that the applicant was to institute an action against the first respondent within 30 days of the order, failing which the order would lapse and the monies repaid to second respondent.
>
> The applicant failed to institute the action within 30 days of the order. The Court held, on the extended return day of the *rule nisi*, that it was not empowered by Rule 27(4) of the Uniform Rules of Court to revive a *rule nisi* which had lapsed because of the fulfillment of a resolutive condition being *in casu* the failure to have taken a prescribed step timeously."

The decision in *Fisher v Fisher supra* was referred to because Rules 27(1) and 27(2) were interpreted in that decision. Rules 27(1) and 27(2) were then the rules applicable to the Court of the Witwatersrand Local Division. The decision of the Court in *Fisher v Fisher* to issue a fresh *rule nisi* to avoid unnecessary costs was also noted but it was pointed out that Rule 27 was in later years amended by the addition of paragraph (4) which read:

> "After a *rule nisi* has been discharged by default of appearance by the applicant, the Court or a Judge may revive the rule and direct that the rule so revived need not be served again."

This Rule 27(4) was later in 1990 incorporated in Rule 27(4) of the Rules of Court of the High Court of Namibia.

According to Wunsh J, who gave the judgment of the Court in the Williams case, "the amendment was, so it seems, inspired by cases like *Fisher v Fisher, (supra)* often sequestration and liquidation applications in which there was no appearance for the applicant on the return day of a *rule nisi*…"

Wunsh J referred to the following dicta of Fleming DJP in the case *of S & U TV Services*:

> "Rule 27(4) discloses no intent to override or detract from the rights or interests of a litigious opponent or of 3rd parties…."

> "Neither does it diminish the need to care for such interests. The application of Rule 27(4) must therefore be strongly influenced by the particular instance before Court."

Wunsh J, then concluded:

> "Therefore, even if Rule 27(4) empowered the Court to revive and extend a rule nisi which has lapsed because of a resolutive condition, I have to cautiously look at the prejudice caused to the first respondent by the revival of the lapsed order in this case."

In the present case, the order issued by the District Labour Court did not call on Wentzel, the then applicant, to do anything, but called on respondent CIC Holdings, to show cause why the default judgment for a specified amount should not become final.

It was thus a resolutive condition, but one which the respondent CIC Holdings had to fulfill and not the applicant Wentzel. The Rules of the District Labour Court only provide in one instance for the applicant to appear and that is at the hearing of the complaint provided for in Rule 10(4) which provides: "If the complainant fails to appear at the hearing, the chairperson may dismiss the complaint." (The hearing here referred to is the hearing of the complaint in terms of Rule 10). The respondent on the other hand is disqualified in terms of Rule 7 from taking part in the proceedings if such

respondent had failed within the stipulated time of 14 days, to file a notice of opposition in terms of Rule 7(1) or 7(2) unless the Chairperson had on good cause shown, given leave to the respondent to further participate in the proceedings. However the respondent retains the remedy provided by Rule 22, for the rescission of any judgment or order given by default.

The application for this remedy must however be lodged within 14 days after such judgment or order has come to his or her knowledge. The order given on 3 March 2002, was such a “judgment or order”.

In the instant case, the respondent at no stage gave any notice of any intention to show cause, did not appear at the hearing or show cause on the return day of the so-called "rule nisi", why the default judgment against it should not be made final.

5. The Rules of the District Labour Court have no provision for a *rule nisi*. Even if the rules of the Magistrates Court could be invoked, those rules only provide for a *rule nisi* in the case of an interdict *pendente lite* obtained *ex parte* in terms of Rules 56 and 57 and in the form as provided in the prescribed Form No. 16.

Rule 56 provides for arrest *tamquam suspectus de fuga*, interdicts, attachments to secure claims and *mandamenten van spolie* read with Section 30 and 31 of the Magistrates Court Act 32 of 1944 as amended.

Rule 57 provides for attachment to found or confirm jurisdiction, read with Section 30 *(bis)* of the Magistrate's Court Act.

At no stage was a *rule nisi* asked for or given in the District Labour Court, purporting to be in terms of the Magistrate's Court Act and its rules aforesaid.

In Courts of law where *rule nisi's* are issued in accordance with the governing Act and rules, the form of *rule nisi* issued in the instant case by the District Labour Court on 3rd March 2003, is not allowed and is not used.

6. A default judgment for a money debt is also never made subject to a *rule nisi*. Rule 22 of the Rules of the District Labour Court specially provides for applying subsequently for the setting aside of default judgments. Consequently there is no need and no justification whatever for a *rule nisi* to be attached to the default judgment for a money debt.

7. Mr. Heathcote also referred in his argument before the High Court to the case of *Clissold v Cratchley and An.*, [1910] KB 244, but the Honourable Gibson

J did not refer to it or rely on it. This important decision does not in the least support the case of CIC Holdings but rather tends to affirm an argument by Beukes that the warrant of execution had become a nullity when CIC Holdings paid the judgment debt by cheque.

The Kings Bench Division in this case held in effect that when a judgment debt is paid, a writ of execution issued thereafter is a nullity as the judgment upon which it would otherwise have been premised is fully satisfied. In these circumstances, the application to the District Labour Court to set aside the warrant, was unjustified and should have been dealt with by the High Court as a nullity.

This point was also made by Mr. Beukes. The point was strengthened by the fact that the Messenger of the Court had followed up the receipt of the CIC cheque by paying it into the Messenger of the Court Trust account and had in turn handed over this Trust Account cheque to Wentzel in payment of the debt.

The warrant of execution had thus been overtaken by subsequent events. That being so there was not only no urgency for setting aside the warrant of execution, but the whole basis for the application had fallen away.

8. The proceedings of the District Labour Court on 22 April 2003 under Chairmanship of Mr. Britz relied on by CIC Holdings and the High Court, was also gravely irregular in other respects.

8.1 The application for setting aside was not brought on written notice, but by telephone on half an hours notice. It was not accompanied by any supporting affidavit and contained no indication of the order requested. There is no provision in the Rules of District Labour Court for an application of this nature and in this form. Rule 20 however provides:

> "Unless otherwise provided in these rules, an application in terms of these rules to the Court for an order affecting any person, shall be by delivery of a notice (form 15) in which it shall be stated briefly the terms of the order applied for and the date when the application will be made to the Court, which date shall be not less than 5 days after delivery to such person of such notice."

Although Rule 21 allows the Chairperson to condone any non-compliance with the Rules on good cause shown, there was no reason whatever why at

least a notice setting out the order sought could not and should not have been served, even if there was urgency.

8.2 At any event, even if there was urgency, the urgency must not be self-induced, i.e. come about by the negligence and fault of the party who comes to Court on an urgent basis. In this matter the order relied on for the warrant was already made on the 3rd March 2003. If CIC Holdings did not know about this development, it was clearly due to its own reckless or negligent conduct or that of its legal representatives.

The warrant of execution was already issued on the 2nd April 2003 and must have come to the notice of CIC Holdings on or before the 16th April 2003, when CIC Holdings handed its cheque for the purported judgment debt to Mr. Hennes, the Deputy Sheriff or one of his deputies.

Mr. Hennes, called by CIC Holdings as their witness in the District Court proceedings, admitted under cross-examination that he had served the warrant on CIC Holdings already on 4th April 2003, together with a copy of the judgment of the 3rd March 2003. The Deputy Sheriff did not then or at any time thereafter, attach any property of CIC Holdings, in pursuance of the warrant.

Asked by Beukes in cross-examination what happened the day after the 4th April, Hennes testified:

> "I send out my officer to execute the warrant. You must have the right prospective of the whole thing. If you take a warrant of execution it is not a criminal case. I take it to the person to inform him. Alright, I've got a warrant of execution against you. Are you going to pay or are you not going to pay? I myself did not deal with this Warrant of Execution – it was dealt by one of my deputies. My deputy went on Tuesday the 8th went there and a certain Mr. du Raan was not present. He has to show us – he has to point out executable items and he was not present he could only be back on last Tuesday. And last Tuesday, Mr. Engelbrecht then went to CIC and Mr. du Raan was present and said no – wait this whole story has to be something about. And I believe from then on pressure was put onto tem and we have approached again on Wednesday morning. On Wednesday morning we went there and a certain Mr., I'm not sure what his name is – he was the accountant said 'we will pay the warrant but can it be kept because they are going to file an appeal.' My words were to him, '…Right if you present that cheque to me, I have to put it into my trust account nowhere – there's no other way about it. Because if I

> go with the warrant of execution that cheque must be made out to the Messenger of the Court. And I can have it in my trust account but if you want me to, if I have to keep it in my trust account, I must have written authority that you are appealing and that must be stamped by the Court. Then only can I keep an amount in my trust account. That is the procedure.'"

It is clear from the above testimony, of its own witness, that CIC Holdings had ample opportunity to take whatever legal action it was entitled to, but on proper notice and in proper form so that the opposing party is not prejudiced or so that such prejudice is reduced as far as reasonably possible in the circumstances.

8.3 What now remained for CIC Holdings was to apply for an interdict *pendente lite,* which could even have been obtained *ex parte*, as is provided in Rule 56 and Form 16 of the Rules of the Magistrate's Court, which would be applicable also in the District Labour Court by virtue of its Rule 27(2). However it will be noted that even an *ex parte* application in such a case would have had to be "upon affidavit, stating shortly the facts upon which the application is made and the nature of the order applied for."

Such application for an interdict *pendente lite* would have had to cite not only Wentzel as the first respondent, but the Messenger of the Court/Deputy Sheriff as second respondent, in view of his/her interest in the cheque, drawn on the Messenger's trust account, which the Messenger/Deputy Sheriff had in turn given to Wentzel.

8.4 Notwithstanding the objection made by Beukes *in limine* and the objections in the course of the leading of evidence by Mr. Heathcote on behalf of CIC Holdings, Beukes was placed in the position where he had no opportunity to prepare on the law applicable, for cross-examining and meeting the *viva voce* evidence produced by CIC Holdings and for considering and possibly launching a counter application and a counterclaim.

8.5 Mr. Heathcote called Mr. Kutzner, the attorney for applicant and Mr. Hennes the Deputy Sheriff/Clerk of the Court. It was not made clear in the evidence what the correct designation of Mr. Hennes was. These witnesses were cross-examined by Mr. Beukes.

During the cross-examination of Hennes it was made clear by Beukes that the cheque by the Messenger issued to Wentzel, had already been paid into her bank for collection. The issue was then raised of whether Hennes had ordered the cheque to be stopped and he denied it. The Court adjourned to 14:00. At the resumption at 2pm Beukes asked for an inspection at the Bank

to establish who ordered payment of the cheque to be stopped. After resumption of the proceedings at 2pm, he told the Court that the Bank had informed him that it had instructions not to pay out the cheque. He argued that it is important to establish who had stopped payment of the cheque, because if applicant CIC Holdings had done so, it was a unilateral action pre-empting the remedy it was asking in Court. Beukes now also took the point that the Deputy Sheriff who had issued the cheque was not cited as respondent. He said that:

> "The case law says that the person who perpetrated the action that is the Deputy Sheriff issuing the cheque has not been cited. To whom does the Court want to give an order? I do not understand? Is it to …"

The Chairperson then overruled the objection against the non-citing of the Deputy Sheriff on the ground that he was only dealing with an application to set aside the warrant. The application for the inspection at the Bank was also refused. As to the point that someone had pre-empted the Courts function to decide on the remedy asked for, the following exchange took place between him and the Court:

> "Until this morning it is trite law and I can bring documents if I have time to do so. Case law that says (intervention)
>
> MR CHAIRMAN: The whole time now since 12:30 until now?
>
> MR. BEUKES: My Lord is that time? Is that time to run into the Bank and try to find a cheque that had been stopped? And then I must still bring documents?
>
> MR CHAIRMAN: No I am referring to the case law…"

8.6 Beukes decided to call no witnesses. In this regard he said:

> "I would have brought evidence but its clear my evidence is of no consequence it is pointless that I do bring evidence before this Court."

8.7 Mr. Heathcote then addressed the Court and in the course thereof also referred to several decided cases. Mr. Beukes again referred to the failure to bring the application in the proper way and said he and Wentzel were disadvantaged as a result thereof. He pointed out that CIC Holdings and their lawyers had notice of the warrant and all relevant facts already on the

14th and that there was no justification for not complying with the Rules on the ground of alleged urgency.

Beukes also pointed out:

> "But then what the Court normally does in cases like that is to issue a *rule nisi* and show on the return date but not even that…" (He was referring here to what CIC Holdings should have asked for before the District Labour Court on the 22nd of April 2003 and what that Court could do.

8.8 In the course of the Chairperson's judgment he committed an irregularity by relating as part of his judgment, that he had allegedly called in his clerk who's signature appeared on the warrant of execution. He then said:

> "And I called her in and we did some effort to try and stop this possible use to sign and issue a warrant of execution for whatever amount any person would like to get. But then I was informed that it was in fact not issued but completed by the Clerk of the District Labour Court it was just brought from somewhere it was either brought from the Labour Inspectors or whatever and they only stamp it and sign it without even

> checking it or comparing it with a possible order. So that is luckily for once not the mistake of the Clerk of the District Labour Court as far as the amount is concerned. As far as issuing a warrant of execution against property without even comparing indeed it is a slip up from the Clerk of the District Labour Court…"

The clerk of the Court was not called as a witness. What the Chairperson related as their conversation was at any event confusing. One could not distinguish what the clerk allegedly explained and what the learned chairperson commented and what was an allegation of fact and what mere conjecture.

8.9 When dealing with the interest the chairperson had this to say:

> "Secondly as far as the judgment debt is concerned I think it is clear enough that although the attempt to a Court order or an attempt to a default judgment on the 3rd of March made note of interest to be added from whenever I don't know. But even from p4 of the bundle handed in excluding interest still to be added to the capital amount. I don't think that even if the Court order that interest of 20% should run from 20th

> September 1999 until the 3rd of March 2003. That that interest became part of the capital amount. The judgment debt remains 99 198 and not a cent more, a cent less."

This is notwithstanding the following explanation by Beukes in the course of argument shortly before judgment by the Chairperson the Honourable Britz:

> "What I have asked in the judgment it is said she resigned in September. I set out various amounts which were payable by September at that date. And I said that I asked for 20% to be awarded as interest. Now obviously when interest decrease and the time of judgment it becomes part of the capital amount. And this is an argument that can go for payment of pension etc. I do not have the legal documents here in front of me but interest running before judgment becomes part/of the capital amount."

The learned chairperson ignored this explanation and did not care to take issue with it. The fact of the matter was that if complainant was entitled to the "capital" amount of N$99 198.03, she would also have been entitled to

interest on that amount at the rate of 20% per annum from date that she left the employment of CIC Holdings to date of payment.

The interest for the period from the date of leaving the employment and the date of the warrant of execution was 18 months and one day. This interest could therefore be capitalized and was capitalized bringing the amount of the judgment debt to the amount stated in the warrant as the capital amount. The amount still due for interest from the date of the warrant to date of payment, could not be capitalized at the date of the warrant and not included. Consequently the words in the right hand column in the warrant giving the judgment debt as N$128 960.43 followed by "(excluding interest still to be added). (See also supra, Section I, point 5.6). It was thus a misdirection by the learned chairperson when he held that: "The judgment debt remains N$99 198.03 and not a cent more or a cent less.

8.10 The said Chairperson further misdirected himself when he failed, *suo moto*, to correct the patent error in the judgment in not specifying the date from which the interest would run to the date of payment. If the facts as to these dates were unclear, he should have ensured that he obtained the full record, certified as correct, of the District Labour Court hearing on the 3rd March 2002 and/or had these dates clarified in *viva voce* evidence. As it stood, the chairman on the 14th March had the uncontested statement in argument by Beukes as to what he had asked for on 3/3/2002 and from which date the

interest had to run. The date up to which interest had to run, as being the date of payment, follows as a legal principle which is trite law.

There can be no question about his power to correct such a patent error. I refer here to Section 36(c) of the Magistrate's Court Act which is made applicable to the District Labour Court by Section 19(4) of the Labour Act 6 of 1992.

Section 36 as a whole reads as follows:

> "What judgments may be rescinded.
>
> The Court may upon application by any person affected thereby, or, in cases falling under (c), *suo moto* –
>
> (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
>
> (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;

(c) correct patent errors in any judgment in respect of which no appeal is pending;

(d) rescind or vary any judgment in respect of which no appeal lies…"

8.11 The learned Chairperson misdirected himself by not correcting or setting aside the "*rule nisi*" part of the order of 3/3/2002, which part Beukes had submitted was *null and void*.

The learned chairperson on 14/3/2002 uttered further confusing arguments such as:

> "…Even if it was (a default judgment) it still says nothing. Because I can't make sense out of that attached a further *rule nisi* or a judgment or whatever it is supposed to be. Even if I am wrong that it was in fact a proper judgment still the Warrant of Execution is (indistinct). Therefore the Warrant of Execution issued on the 3rd of April is then hereby cancelled…"

Earlier in the judgment the learned Chairperson at least gave a more intelligible reason but still confusing. He referred to the words at the end of the judgment reading:

> "And it would be made final". "In other words it would have been made final on the 14th March. It was not final on the 3rd of March. Short and sweet as that. On the 3rd March nothing happened and this whole *rule nisi* lapsed. If it didn't lapsed it is still a *rule nisi* until if you ignore the 14th March."

If the learned Chairperson could not "make sense out of that attached a further *rule nisi*," he should have realized, that this part of the default judgment, particularly also in the light of the fact that there was no authority or justification for the attachment of such a clause to a default judgment in the District Labour Court or Magistrate's Court, was in fact either a "patent" mistake or an order which is "*ab origine void*" and should have struck it down as such.

If Mr. Beukes's objection and argument in regard to this part being a nullity was not sufficient, the failure of the complainant to bring an application on notice to set aside the rule nisi part, should have been condoned and the aforesaid "*rule nisi*"

part of the order set aside as "*ab origine void*" and the application for setting aside of the warrant of execution refused.

8.12 The learned Chairperson further misdirected himself when dealing with whether or not he should do anything about the rule nisi and argued:

> "I actually can't make any order as far as the rule nisi is concerned because if I make an order that the rule nisi be revived it will be expected from me if the applicant again fails to appear that I must make lets call it an order of the 3rd of March to be final. I can't. So there is no order as far as the rule nisi is concerned."

The reasoning here is absurd and unintelligible and also a refusal to act in the letter and spirit of the Labour Act. The applicant before him was CIC Holdings. Surely if CIC Holdings once again failed to appear at a revived return date, the order of the 3rd of March should have become final on such revived return date (again assuming the *rule nisi* was proper, for the sake of argument).

Whether the application by the CIC Holdings to the District Labour Court and the procedure followed was flawed or not and whether or not the order for cancellation of the warrant should not at least have been accompanied by a further order reviving the "*rule nisi"* or extending the return date, was not properly considered.

9. The first impression when reading the judgment of Gibson J in the High Court is that the learned judge regarded the judgment of District Labour Court of 22 April 2003 as a sort of fait accompli, as a result of which the High Court was entitled to assume jurisdiction. On the other hand the High Court did express itself on the correctness or otherwise of the judgment of the District Labour Court, notwithstanding that it was not sitting as a Court of Appeal or Review and in fact had no jurisdiction to do so.

In this regard the Court stated:

> "There is enough evidence on balance on the papers to enable the Court to assess the validity or lack of it of the warrant of execution and to decide whether monies paid out on the strength of the irregular warrant were legally and validly paid."

The learned judge further stated in another part of the judgment:

> "Clearly therefore, the District Labour Court had the power to set aside the warrant."

This much is conceded as far as it goes. The learned judge then however proceeded:

> "Once that was done the matter before the Labour Court was at an end unless one or other side appealed, or otherwise had the matter reviewed." (My emphasis added)

9.1 I have already indicated supra that the Labour Court continued to retain exclusive jurisdiction by virtue of Section 18(1)(g) of the Labour Act and need not repeat that. However, the matter at the time of the launching of the urgent application in the High Court on the 25th April 2002, was also not at an end, because the time for a review and appeal to the Labour Court had not expired when the High Court assumed jurisdiction. As a matter of fact, Wentzel had scarcely emerged from the proceedings of the District Labour Court also brought as a matter of urgency on 22 April 2002, when she was confronted with an application in the High Court, also brought on an alleged urgent basis, but with the difference that her legal representative in the District Labour Court, was now cited as a first respondent and could no

longer act as her representative. The High Court saw the application before it as a means to bring the mater to finality as a matter of urgency. The urgency of giving CIC Holdings its remedy was stressed. This is apparent from the following reasoning by the Court.

> "There is enough evidence on balance on the papers to enable the Court to assess the validity or lack of it of the warrant of execution and to decide whether the monies paid out on the strength of the irregular warrant were legally and validly paid."

The application in the High Court at the stage when it was brought thus pre-empted the right of Wentzel to take the decision of 27 April 2003 in the District Labour Court on appeal or review to the Labour Court and usurped the function of the Labour Court.

Such appeal or review by Wentzel, would have meant that the judgment of the District Labour Court setting aside the warrant of execution, could be overruled. That would then mean that the payment by CIC Holdings to Wentzel allegedly in satisfaction of the warrant of execution, could not be recovered because the warrant which was allegedly null and void, was in fact valid. By pre-empting a review or appeal to the Labour Court, the jurisdiction of the High Court would then stand in opposition to that of the Labour Court and a chaotic position would ensue.

Surely such a situation cannot be tolerated. That is another reason why Section 18(1)(g) of the Labour Act gave exclusive jurisdiction to the Labour Court in what were essentially labour disputes.

9.2 As I understand the attitude of CIC Holdings and their legal representatives and which was upheld in the High Court judgment, a delict was committed by Beukes and Wentzel in obtaining a warrant of execution in some underhand manner without a judgment to support it and then obtained payment from CIC Holdings, via a cheque of the Deputy Sheriff, and then appropriated the proceeds of the cheque also in such fraudulent and underhand manner.

9.3 Although I have shown that such allegations, even if true, would still not take the matter out of the jurisdiction of the Labour Court, I find it necessary to deal with the grounds of these allegations as put forward by CIC Holdings and their legal representatives and articulated and accepted by the High Court. The learned judge said:

(i) "On the 3/4/2003 a warrant of execution for an amount of N$128 960.43 was issued by the clerk of the Court under obscure circumstances."

In another part of the judgment she again referred to the obtaining of the warrant and commented:

> "Given the circumstances of this case, especially the dubious circumstances in which the warrant came into existence…"

I have extensively dealt supra in Section I, point 6 with the obtaining of the warrant and the reasons for the action of Wentzel and Beukes in that regard. I also dealt fully with the legality and correctness of the proceedings in the District Labour Court on the 3rd of March and 22 April 2003.

From the above it is clear that Wentzel was entitled to get a default judgment, without any qualification or condition. Wentzel and Beukes *bona fide* believed that Wentzel was entitled to payment from CIC Holdings and took the matter to the appropriate tribunal. Wentzel and Beukes again clearly believed that the burden in the "*rule nisi"* part to show cause on the 14th of March 2002 was on the CIC Holdings and it was not necessary for them to appear on the return day. They similarly believed that Wentzel was entitled to obtain a warrant of execution after the 14th of March 2002 and did obtain such warrant. The meaning of the wording on the warrant of execution, the capitalization of the 20% interest has been explained in paragraph 6 of Section I of this judgment. Even if the order in the

judgment of 3rd March 2002 did not stipulate the date from which the interest had to run, the fact is that if Wentzel was entitled to the capital sum of 99 198.03, she would also have been entitled to the interest to run from the 3rd of October 2001 until date of payment.

Even if the judgment as it appears in the uncertified record produced by Nel, the witness for CIC Holdings, was defective in not stipulating the date from which the interest had to run, there was no evidence whatever that the warrant was obtained "under obscure circumstances" or "dubious circumstances". The clerk of the Court was never called upon to testify and to explain why he issued the warrant as he did and Beukes in his affidavit explained his state of mind and there was nothing to controvert that.

(ii) "When the warrant was served on the applicant by the Deputy Sheriff there was panic."

The applicant, through one of its representatives issued a cheque for the full sum in favour of second respondent. Again there was no evidence to substantiate this allegation. The person who issued the CIC cheque was not identified by CIC Holdings and no statement was filed by that person to explain the circumstances under which the cheque was drawn and handed over to the Deputy Sheriff.

Hennes, the Deputy Sheriff/Messenger of the Court did testify on behalf of CIC Holdings at the second District Court hearing on the 22 April 2003 and divulged that he had already informed CIC Holdings about the warrant on the 4th April 2003 and served it by the 8th April and CIC handed him a cheque in payment by the 17th April 2003.

CIC Holdings was also represented throughout by instructing legal counsel and senior legal counsel in the District Labour Court on 22 April 2003 and in the High Court as from the 25th April 2003. There was no reason for "panic" on the side of CIC Holdings. I must conclude in the circumstances that the learned judge made a wrong assumption and thereby misdirected herself.

(iii) "The facts of this case are of real concern. That a warrant of execution should have been issued

without any order of the Court to back it, be served by the Deputy Sheriff on the applicant is bad enough, the respondents actions, for by then they were acting together, in going to the bank, even as proceedings to set aside the warrant were in progress, and to secure the clearance of the cheque before returning to Court to

> continue the proceeding is an affront to standards of decency in any society, if not dishonest."

This whole paragraph of accusations and severe criticism of Beukes and Wentzel, is not built on a solid foundation and is not justified. I say so for the following reasons:

(a) I have already dealt with, supra, obtaining of the warrant and its service on CIC Holdings and found the actions of Beukes and Wentzel understandable and reasonable in the circumstances.

(b) Although they were acting together, the complainant Wentzel was acting on the advice of Beukes. Even if criticism of deception could be leveled at Beukes in this regard, that criticism could not be applied to Wentzel. I also sincerely doubt whether there was any evidence for such a criticism against Beukes.

(c) There was no evidence that Beukes and Wentzel "deceptively" went to the Bank during the adjournment. There was no evidence whatever that either Beukes or Wentzel or both of them went to the Bank "deceptively" and/or "to secure the clearance of the cheque." (The Court even failed to indicate which cheque it had in mind, was it the

cheque drawn by CIC Holdings and issued to the Messenger of the Court or the cheque of the Messenger to Wentzel). What was probably relied on by the Court, and misunderstood by it, was the affidavit of the witness Gille, who said in her affidavit in support of the case of CIC Holdings:

> "The request for clearance voucher for the cheque in the amount of N$128 960 was received by First National Bank from Bank Windhoek on 22 April 2003. The cheque was signed by the Messenger of the Court and made out to the second respondent herein (one Wentzel)".

Gille did not say that Beukes and/or Wentzel came to the Bank to ensure the clearance, and also not that this happened during the Court adjournment, but only that this request was from "Boland Bank".

The uncontested version of Beukes and Wentzel was that Wentzel asked her Bank for urgent clearance, when she paid in her cheque to her Bank, Boland Bank on the 19th April 2003. Although Gille testified that the "clearance process" was completed at approximately 14:03 on 22 April 2003. What was meant by "clearance process" was

also not explained. It probably merely meant that a "clearance voucher" for payment of the cheque was given by First National Bank to Bank Windhoek. It does not say when the money was actually paid to Wentzel.

(d) The Court completely misconstrued certain paragraphs of the affidavit by Beukes in support of her finding that

> "The extent of the deception is spelt out by first respondent in his supplementary affidavit, where he says: 'On the 22 April 2003 at 11:00 I raised objection that I was instructed by second respondent that the first National Bank would not clear the cheque, because it was stopped by the Deputy Sheriff and that the applicant was merely attempting to abuse and use the Court to legitimize and legalise this unlawful action;
>
> 8. Under cross-examination I asked the Deputy Sheriff whether he had stopped the cheque. He denied that he had done so;

9. Over the lunch hour I went to the said Bank when an official refused to respond to my query whether the cheque had been stopped."

The first respondent points to the endorsed 'stop payment' on the cheque which is an exhibit in the papers. The applicant explains that this only occurred after the warrant was set aside. My bold view is that the probabilities support the applicant's version. In any event what first respondent says above is in conflict with his own words, a few paragraphs down in his own affidavit. At paragraph 12 of his supplementary affidavit he reports,

She, (meaning second respondent) informed me that she was informed by the Bank that the Deputy Sheriff had phoned over the lunch hour to the First National Bank to clear the cheque.'"

There is no conflict as alleged by the learned judge. The learned judge did not say in which affidavit the "applicants version" is

contained and did not give any reason why "her bold view is that probabilities support the applicants version" regarding the time and stage when the endorsement "stop payment" was placed on the Messenger of the Court cheque made out to Wentzel. The said paid cheque was paid into her account on the 19th April 2003 and urgent clearance requested but not completed until 22/4/2003. When considering the evidence of Hennes that the representative of CIC Holdings had asked him not to pay out the CIC cheque immediately but to hold it in reserve, it was quite possible that the "stop payment" endorsement on the Messenger of the Court cheque could have been placed on the cheque prior to the actual order by the District Labour Court on 22/4/2003 between 3-4 pm to cancel the warrant of execution.

At any event, if the Court allowed the inspection asked for by Beukes this issue could easily have been cleared up. The applicant CIC Holdings, who brought the urgent application on ½ hours notice of the application by telephone, was in the best position to bring that evidence before Court by *viva voce* evidence of the person who stopped payment. It must be remembered that Beukes and Wentzel were brought before Court unprepared, without notice of the application and the order sought and without the opportunity to prepare evidence and Wentzel's defence.

(e) As to the alleged conflict between paragraph 9 and, 12 of the Supplementary Affidavit by Beukes filed in the High Court application, the conflict is more apparent than real.

> In paragraph 9 of his supplementary affidavit, Beukes said that – "over the lunch hour I went to the Bank when an official refused to respond to my query whether the cheque had been stopped."

In paragraph 12 he again said:

> "She (meaning) second respondent informed me that she was informed by the Bank that that the Deputy Sheriff had phoned over the lunch hour to the First National Bank to clear the cheque."

The two above statements can be reconciled. Paragraph 12 does not say or purport to say that Wentzel was at the Bank during the lunch hour and that she was informed during the lunch hour.

She could have been informed by the Bank at a later stage that the Deputy Sheriff had phoned over "the lunch hour to the First National Bank" to clear the cheque. That would explain why the so-called "clearing process" was completed as Gille says, at 14:03 on 22 April 2003, because the Deputy Sheriff/Messenger of the Court ordered his cheque to be cleared, in the light of the insinuations by Beukes that the said cheque was stopped unilaterally and unlawfully. The probability is that the order to stop payment came from Hennes, the Messenger of the Court, because he was the only person who could order his Bank to "stop payment" of the cheque drawn on the "Messenger of the Court's Trust account" and also the only person who could again reverse that order and say – "clear the cheque".

This explanation of the alleged conflict is further strengthened by the fact that in paragraph 9 above quoted, Beukes expressly said that: "Over the lunch hour I went to the Bank…" This fact is also confirmed by the certified record of the hearing of the District Labour Court on 22 April 2003 where Beukes told the Court: "I've gone to the Bank…" It follows that the uncontested evidence was that Beukes went to the Bank over the lunch hour – not Beukes and Wentzel.

In my respectful view it follows from the above that there was no justification for the finding that "the depth of the attempt to mislead by the respondents is also shown in paragraph 25 of the applicants' founding affidavit.

(iv) The learned judge then gives the final reason for her harsh criticism of Beukes and Wentzel. She says:

> "The depth of the attempt to mislead by the respondents is also shown in paragraph 25 of the applicant's founding affidavit.
>
> 'In fact after lunch on 22 April 2003, the first respondent stated to the Court that during the lunch hour, they (the respondents') endeavoured to get payment in respect of the cheque, but that they were informed that the cheque was stopped. The second respondent then accused the applicant (and its legal practitioners) of illegal tactics.'"

The Court then continues:

> "This statement is not refuted by the respondents. In dealing with this paragraph among others, the first respondent referred to the affidavit of second respondent to counter the applicant's claim. The second respondent however has also omitted to deal with serious allegation."

In my respectful view, the learned judge also misdirected herself in this regard.

(a) I deal firstly with the last paragraph quoted above from the judgment. The fact is that first respondent did refute the allegations appearing in paragraph

25 of the applicants' affidavit by stating in paragraph 65 of the Beukes affidavit:

> "Ad paragraphs 23 - 29 thereof.
> These paragraphs are devoid of all truth and relevance and will be dealt with by second respondent."

Second respondent in turn said in paragraph 3 of her affidavit in regard to paragraph 65 of the Beukes affidavit:

> > "I have read the affidavit of Hewat Beukes in this matter and I confirm the truth of the contents therein as far it pertains to myself."

Although these denials were of a general nature, it is a far cry from the Court's criticism that:

> "This statement is not refuted by the respondents."

Beukes further pointed out in his paragraph 34 referring to paragraph 1 of the statement of Du Raan, the general manager of the applicant:

> "The deponent did not attend the hearing to which he refers and he was not personally acquainted with the facts in reference to the hearing."

Although CIC Holdings filed answering affidavits, there was no replying affidavit by Du Raan. The allegation that he was not present in the District Court was thus not refuted.

A curious situation arose here. CIC Holdings in reply filed an affidavit by one Nel, allegedly an accountant of the applicant. Nel now alleged that he is acquainted with the facts. But even he, does not say that Du Raan was present at the hearing. Nel however says that "applicant stands by its allegations in the founding affidavit". There was no explanation why Du Raan did not file a replying affidavit. Nel furthermore does not refer to any allegation by Beukes and Wentzel in any respect. The same applies to the affidavits of applicant's new witnesses, Gille, an employee of First National Bank and Kutzner, the attorney of CIC Holdings. The allegation by Du Raan in paragraph 25 of Du Raan's affidavit relied on by the Court is thus either hearsay or mere conjecture.

(b) Furthermore, the record of the hearings at the District Labour Court on the 3rd and 22 March 2003 were not before the High Court and the Beukes protest in this regard was also overruled. That record if duly authenticated and certified as correct, would have showed the correctness or otherwise of the allegation made by Du Raan in paragraph 25 of his founding affidavit. The record of the hearing on the 22nd April 2003 was however part of the appeal record.

What this record indicates is that Beukes had told the Court on the resumption of the hearing after the lunch break:

> "My Lord I have to ask for an inspection. I've gone to the Bank and they've received instructions not to pay out that cheque. Now its pointless to continue with this matter if the respondent came to this Court to legitimize the unilateral actions, which only the Court may do… I am asking for the right because if the Court should find that they have, I cannot produce proof if they have stopped the cheque themselves – then it's a pre-emption of the role of the Court. So I ask for an inspection. The Bank is not far from here My Lord…"

There is no conflict between this record and the aforesaid Beukes affidavit.

> The part of Du Raan's affidavit in paragraph 25 to the effect that Beukes had told the Court that "they endeavoured to get payment for the cheque" is clearly untrue."

This analysis also demonstrates, in my respectful view, that there were no reasonable grounds for finding that the two respondents had been guilty of grave deception or fraud. It also follows that there were no reasonable grounds for finding that a delict had been committed by Beukes and Wentzel and for citing Beukes as a respondent in the application in the High Court.

Mr. Heathcote, for CIC Holdings, did not find it necessary in his heads of argument and in his *viva voce* argument before us to raise any new points. He was confident enough to prepare only very brief heads of argument wherein he associated himself with the judgment and reasons for it given by the learned Gibson J. It is therefore not necessary to deal separately with any of the points dealt with in argument by Mr. Heathcote.

Beukes and Wentzel also took the point *in limine* at the hearing of the appeal, that the respondent CIC Holdings, did not file a proper power of attorney not only in this Court, but also not in the High Court. In view of the result arrived at in this appeal, I find it unnecessary to deal with that objection.

In the result the following order is made:

1. The appeal succeeds.

2. The order of the High Court of 1 August 2003 is set aside, as well as any attachment made of property of the appellants in regard thereto.

3.1 The order of the District Labour Court of 3 March 2003 is amended to read:

> "Default judgment is granted in favour of the complainant for payment by respondent to complainant of an amount of N$99 198.03 together with interest at the rate of 20% per annum on that amount from 3 October 2001 to date of payment."

3.2 The order of the District Labour Court of 22 April 2003 cancelling the warrant of execution dated 2nd April 2003, is set aside.

4. CIC Holdings Ltd is given leave to apply within 14 days of this judgment, for the setting aside in accordance with Rule 22 of the Rules of the District Labour Court of the default judgment as amended in paragraph 3.1 supra and to apply simultaneously for the setting aside of the warrant of execution dated 2nd April 2003, should the application for setting aside the default judgment be successful.

5. The respondent is ordered to pay the taxed costs of the appellants both in this Court and in the Court *a quo*.

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**O'LINN, A.J.A.**

I agree.

_____

**CHOMBA, A.J.A.**

I agree

_____

**MTAMBANENGWE, A.J.A.**

**COUNSEL ON BEHALF OF THE APPELLANTS: In Person**

**COUNSEL ON BEHALF OF THE RESPONDENT Mr. R Heathcote**

**Instructed by:** **Engling, Stritter & Partners**