REPORTABLE

CASE NO 19/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF HOME AFFAIRS, **APPELLANT**

MINISTER JERRY EKANDJO

And

JOHANNES JURIE JACOBUS VAN DER BERG **RESPONDENT**

CORAM:	Shivute, CJ, O'Linn, AJA *et* Chomba, AJA
HEARD ON:	2005/10/05
DELIVERED ON:	2008/12/12

CONCURRING JUDGMENT

SHIVUTE, CJ:

[1] I have had the benefit of reading in draft the separate judgments rendered with erudition by my Brothers O'Linn, AJA and Chomba, AJA. The facts of the case and the applicable legal principles are amply set out in the two judgments

and it serves no useful purpose to recount them in detail. It suffices to say that after the Court *a quo* had heard argument on behalf of the parties, it made the following orders of which orders 2-6 have been appealed against:

> "1. The application for condonation for the late filing of heads of argument by respondent is granted.
>
> 2. The application for "re-instating" (sic) the application for rescission of the default judgment is refused.
>
> 3. The application for rescission of the default judgment is refused.
>
> 4. The application for condoning the respondent's failure to timeously set down the application for rescission of judgment is refused.
>
> 5. The respondent is ordered to comply with the judgment issued against him by this court on 19 August 1994 within five days from this order being granted, failing which respondent is called upon to show cause on 29 October 2004 at 10h00 hours why an order should not be granted in terms whereof respondent is committed to imprisonment for a period to be determined by this court.
>
> 6. Respondent is ordered to pay costs of this application on an attorney and client scale."

[2] In his draft judgment my Brother O'Linn AJA holds that order number 5 of the judgment of the Court below amounted to a *rule nisi* which had not been finally disposed of by that Court and therefore not yet ripe for appeal. O' Linn AJA has ordered its remittal to that Court to be disposed of accordingly. In the meantime he has found it apposite to make a determination on the remaining orders,

namely orders 2 - 4 and 6. In the result he proposes to dismiss the appeal and to mulct the appellant in the costs of the appeal.

[3] My Brother Chomba AJA on the other hand proposes the making of an order allowing the appeal and substituting the order of the Court *a quo* with an order in terms of which the order committing the appellant for contempt of court is set aside and directing the appellant to file a notice to defend the action within 10 days from the date of the judgment. At the same time he too proposes to mulct the appellant in costs, both in this Court and the Court below.

[4] I regret that I am unable to agree with the judgment and order (save the order as to costs) proposed by my Brother O'Linn, AJA and I set out, in brief, the reasons for so disagreeing.

[5] The proposed dismissal of the appeal effectively disposes of the kernel of the appeal, which is the dispute about the motor vehicle which was confiscated by members of the Namibian Police Force following the arrest of the respondent on the charge of dealing in rough or uncut diamonds in contravention of section 28(b) of the Diamond Industry Protection Proclamation No 17 of 1939. The proposed dismissal of the appeal means that as the default judgment granted by the Court *a quo* on 19 August 1994 is not ordered to have been stayed pending the outcome of the *rule nisi* proceedings, nothing would preclude the respondent, if so advised, from attempting to execute the judgment prior to the conclusion of

the *rule nisi* proceedings. If execution in fact takes place, then the *rule nisi* proceedings would be rendered an exercise in futility.

[6] Order number 5 of the Court *a quo*'s judgment as I perceive it has a two-fold effect: First, it requires compliance with the default judgment; and secondly, if the appellant does not comply within the prescribed time, he would have to show cause why an order should not be granted for him to be committed to prison for contempt of court. At the contemplated *rule nisi* proceedings the issue which order number 5 would raise would be open for argument as to whether or not compliance with the default judgment should be ordered. What if the appellant was to succeed in asserting his justification for not complying with that judgment? Assuming that by then O'Linn, AJA's judgment had been executed, an untenable situation would ensue.

[7] There is every probability that one or other of the parties to the *rule nisi* proceedings would appeal against the decision in those proceedings and the matter would then have to return to the Supreme Court all over again. That in my view would be cumbersome.

[8] Further, in the judgment of O'Linn, AJA an attempt has been made to give some interpretation to section 34 *ter* of Proclamation 17 of 1939 (section 34 *ter*). It is trite that normally an appellate court can make a determination only on those matters upon which parties to an appeal have been heard and the matter has

been fully argued. My understanding of the case is that the matter of the interpretation of section 34 *ter* was raised by counsel for the appellant only to the limited extent to show that the appellant had an arguable case regarding his understanding of the meaning of section 34 *ter* and that the meaning contended for on behalf of the appellant should be one of the factors to be considered in determining whether or not the appellant had a good and a *bona fide* defence to justify the rescission of the judgment. We were not asked to make a determination on the meaning of section 34 *ter* or to ascertain the intention of the Legislature in enacting the section. It is therefore not necessary for this Court to express any firm opinion on the interpretation or the extent of the application of section 34 *ter* at this stage.

[9] It does not appear to me to be right to disregard the possible effect of the interpretation of section 34 *ter* on the overall result of the case and then proceed to enter judgment in favour of the respondent. If the interpretation of that section is found to be as espoused by the appellant, namely that the vehicle in question was forfeited to the state by operation of law, then the respondent would in effect benefit from his own crime. This would offend against the principle of "*ex turpi causa non oritur actio*" (from a dishonourable cause an action does not lie) which maxim may well be applicable to the facts of the case and which was undoubtedly meant to promote justice.

[10] I appreciate that a very inordinate delay was occasioned in this case. That fact should not, however, justify sacrificing justice; one wrong does not justify another. Moreover, as Chomba, AJA rightly observes in his judgment, this is a case in which remittal of the issue of interpretation of section 34 *ter* would involve no risk of fading memories of witnesses or non availability of witnesses because of immoderate delay. That issue can be competently argued by lawyers even after the elapse of a long time since evidently no witnesses would be required for this exercise.

[11] For these reasons I concur in the judgment of my Brother Chomba, AJA. I agree that the appeal ought to succeed and I further concur with him in the orders he has proposed and more so for the reasons he has given for the grant of those orders.

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SHIVUTE, CJ

REPORTABLE

CASE NO. SA 19/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF HOME AFFAIRS, **APPELLANT**

MINISTER JERRY EKANDJO

And

JOHANNES JURIE JACOBUS VAN DER BERG **RESPONDENT**

CORAM: SHIVUTE, C.J., O'LINN, A.J.A. *et* CHOMBA, A.J.A.

HEARD ON: 2005/10/05

DELIVERED ON: 2008/12/12

APPEAL JUDGMENT

O'LINN, A.J.A.: I have subdivided this judgment into the following sections:

I: INTRODUCTION

II: THE BACKGROUND TO THE APPEAL

III: THE QUESTION: CAN THE ISSUE OF CONTEMPT OF COURT BE PROPERLY DECIDED IN THIS APPEAL

IV: THE APPEAL AGAINST ORDERS 2, 3 AND 4 AND 6 OF THE JUDGMENT

V: FINAL REMARKS

I. INTRODUCTION

[1] This is an appeal by the appellant, the Honourable Minister Jerry Ekandjo against a judgment by Hoff J in the High Court in favour of one Johannes Jurie Jacobus van der Berg, the respondent herein.

[2] For the sake of convenience the parties will be referred to hereinafter as Minister Ekandjo and Van der Berg respectively.

[3] Before us, Mr Corbett appeared for Minister Ekandjo, instructed by the Government Attorney and Mr Heathcote, instructed by Kruger, Van Vuuren and Co, for Van der Berg.

II: THE BACKGROUND TO THE APPEAL

[4] The background of the case is set out adequately in the judgment of the Court *a quo* and it will suffice if I repeat the relevant part but substitute for the terms applicant; and "respondent", wherever these are used in the judgment, the words "Van der Berg" and "the Minister" respectively.

> "Van der Berg was arraigned together with one other person in the Magistrate's Court on a charge of contravening section 28 (b) of Proclamation 17 of 1939 as amended alternatively contravening section 28(a) of the same Proclamation.
>
> It was alleged that Van der Berg unlawfully dealt in rough or uncut diamonds alternatively that he possessed aforesaid diamonds.

Van der Berg and his co-accused pleaded not guilty and after a trial on 22 February 1994 both were found not guilty on the basis that the State failed to prove that “rough or uncut diamonds” were used in the deal.

It appears to me common cause that during an illegal transaction Van der Berg pledged a motor vehicle (the vehicle) and N$20 000.00 for the acquisition of rough and uncut diamonds from an agent employed by respondent.

On 26 May 1994 Van der Berg instituted an action in the High Court for damages in the amount of N$110,000.00 in respect of a vehicle confiscated by the Namibian Police members when Van der Berg was arrested for the alleged contravention of the provisions of Proclamation 17 of 1939.

Minister Ekandjo failed to file a notice of intention to defend the action.

On 19 August 1994 default judgment was granted in favour of Van der Berg and on 6 September 1994 a warrant or execution was issued ordering the attachment of movable goods of the Minister. (The attachment was never executed probably because of the view that execution against property of the government is prohibited by law).

On 20 September 1994 the Minister lodged an application for rescission of judgment against the default judgment granted on 19 August 1994.

The matter was set down on 23 September 1994 but thereafter by agreement postponed *sine die*.

At the time of lodging the application for rescission of judgment the State also lodged an appeal against the acquittal of Van der Berg in the aforementioned criminal case.

It was agreed between the parties that the application for rescission of judgment would be kept in abeyance until the finalisation of aforementioned criminal appeal.

The State was successful in its appeal and the verdict given in the magistrate's Court was set aside. The order by the magistrate that the vehicle confiscated should be returned to the applicant was also set aside on appeal.

It was in addition ordered that the trial must be reconvened and proceeded with from the point where the State has closed its case. (The order for the return of the vehicle to police custody was merely intended to restore the status quo as an exhibit in police custody of the vehicle in view thereof that the trial was ordered to be reopened).

The trial Court reconvened as instructed and subsequently convicted the applicant of dealing in rough and uncut diamonds in contravention of the provisions of Proclamation 17 of 1939.

After the rehearing of the criminal case and in a letter dated 14 February 1996 applicant's instructing attorney of record informed the Government Attorney that since the vehicle in question was never handed in at Court and never forfeited to the State by the magistrate whether respondent would be prepared to settle the amount as set out in the default judgment or whether it is necessary to set the matter down again.

There was no response. On 28 February 1996 a second letter was forwarded to the Government Attorneys.

On 5 March 1996 a reply was received requesting that the matter be kept in abeyance until 25 March 1996 in order to enable the Government Attorney to investigate the matter, to consult with their client i.e. the Minister and to make recommendations, promising to revert back without further delay.

It appears from the documents filed that Van der Berg had in the interim appealed against his conviction in respect of the criminal charge of dealing in rough and uncut diamonds. On 17 June 1996 the appeal judgment was delivered and the result was that Van der Berg's appeal succeeded to the extent that his conviction on the main charge of dealing was set aside but substituted

with one of an attempt to deal in rough and uncut diamonds. His sentence however remained the same namely: N$3000 or 3 years imprisonment plus a further four (4) years imprisonment wholly suspended on condition appellant was not convicted of a crime in terms of section 28(b) of Proclamation 17 of 1939, during the period of suspension.

There were further exchanges of correspondence between the parties and on 12 July 1996 Van der Berg was informed that the opinion of a State Advocate attached to the Office of the Prosecutor-General was to the effect that Van der Berg was not entitled to any damages since in terms of the Provisions of Proclamation 17 of 1939 as amended the vehicle in question had been automatically forfeited to the State.

Subsequently, however, according to Van der Berg, various discussions took place between his instructing attorney and legal practitioners practicing at the Office of the Government Attorney in an effort to finalise the matter.

There were further exchanges of correspondence between the parties but no conclusion to the matter could be reached which prompted Van der Berg to approach this Court for the aforementioned relief.

The Minister opposed the relief prayed for and the application was set down on 28 July 2000. On this day the Minister applied for an order postponing the hearing of the application, permitting the Minister to file supporting affidavits in opposition to the application filed by Van der Berg, and permitting the Minister to reinstate the application for rescission of judgment filed of record on 24 September 1994.

It appears from the documents filed that a notice was filed on behalf of the Minister that an application would be made on 5 September 2000 for an order in the following terms:

> (a) re-instating the application for rescission of judgment filed of record on behalf of Minister Ekandjo on 20 September 1994;

(b) condoning the Minister's failure to timeously set down the application for rescission filed of record on 20 September 1994;

(c) rescinding the judgment entered against the Minister on 26 August 1994, in the alternative dismissing Van der Berg's cause of action;

(d) dismissing the application filed of record by Van der Berg on 14 July 2000."

[5] The judgment now appealed against was delivered by Hoff J on 24.9.2004. He made the following orders at the conclusion of his judgment:

"1. The application for condonation for the late filing of heads of argument by the respondent is granted.

2. The application for "re-instating" the application for rescission of the default judgment is refused.

3. The application for the rescission of the default judgment is refused.

4. The application for condoning respondent's failure to timeously set down the application for rescission of judgment is refused.

5. The respondent is ordered to comply with the judgment issued against him by this Court on 19 August 1994 within five days from this order being granted failing which respondent is called upon to show cause on 29 October 2004 at 10h00 why an order should not be granted in terms whereof respondent is committed to imprisonment for a period to be determined by this Court.

6. Respondent is ordered to pay the costs of this application on an attorney and client scale."

[6] A notice of appeal on behalf of the Minister was filed on 30th September 2004 which reads as follows:

"**BE PLEASED TO TAKE NOTICE** that the above-named Appellant hereby appeals to the Supreme Court of Namibia against that part of the judgment of the High Court of Namibia, Hoff J presiding, in case number A215/2000 in respect whereof the following orders were made against him on 24 September 2004:

1. the application for "re-instating" the application for rescission of the default judgment is refused.

2. the application for rescission of the default judgment is refused.

3. the application for condoning respondent's failure to timeously set down the application for rescission of judgment is refused.

4. the respondent is ordered to comply with the judgment issued against him by this Court on 19 August 1994 within five days from this order being granted failing which respondent is called upon to show cause on 29 October 2004 at 10h00 why an order should not be granted in terms whereof respondent is committed to imprisonment for a period to be determined by this Court.

5. respondent is ordered to pay the costs of this application on an attorney and client scale."

[7] Order 5 of the judgment is in the form of a *rule nisi*, calling upon the Minister to show cause on the 29th October 2004 why an order of civil imprisonment should not be granted against him, should he fail to comply with the judgment against him within 5 days of the order to pay. Although the *rule nisi* had not yet been adjudicated on, the notice of appeal was filed ignoring the said *rule nisi*. Furthermore, the notice of appeal was filed without first having applied for and obtained leave to appeal, notwithstanding that leave was probably necessary, in view of the fact that at the time of the noting of the appeal, the *rule nisi* part of the judgment had not been followed up on the return date, being 29th October 2004. Neither was the *rule nisi* confirmed or discharged.

[8] On that date, i.e. 29th October, "the matter" was again postponed by agreement between the parties until the 29th November 2004.

[9] There is no record in the papers prepared for appeal by the Government-Attorney on behalf of the Minister of the fate of the aforesaid postponed matter on the postponed date being 29th November 2004 or thereafter. (See Vol 3 p326 of the appeal record).

[10] What does appear in the appeal record, Vol 2, p184-192, is an affidavit by the Minister dated 25.10.2004, filed after the Minister's notice of appeal filed on 30.9.2004, and without any indication in the appeal record whether or not the said affidavit by the Minister was served on Van der Berg or his attorneys or

brought to their notice or to the notice of Judge Hoff who had presided in the High Court on the 29th October 2004. On that date the matter was postponed by agreement until 29th November 2004.

[11] The appeal record takes the matter no further. However it was established from the Registrar of the High Court that on 29th November the matter was further postponed to 7th February 2005. On 7th February it was again postponed to a date to be arranged with the Registrar, but no such date has been arranged to date, probably because of the pending appeal to the Supreme Court.

[12] At any event it is obvious that Van der Berg and his legal representatives never had the opportunity to reply to the aforesaid affidavit by the Minister prior to the decision and handing down of the judgment in the High Court.

[13] It also follows that the trial judge had no opportunity to consider and deal in his judgment with the said affidavit. He consequently at the time of his judgment correctly accepted that there was no reply by the Minister.

[14] The Minister's said affidavit was probably intended to be the Minister's response to the *rule nisi*, but this issue was not taken to its logical conclusion in the High Court proceedings.

[15] It further follows that the Minister's said affidavit could also not be relied on by the Minister in this appeal.

III: THE QUESTION: CAN THE ISSUE OF CONTEMPT OF COURT BE PROPERLY DECIDED IN THIS APPEAL

[16] The contempt of Court issue initiated by the *rule nisi* was not brought to its logical conclusion in the Court *a quo* and was consequently not ripe for appeal to the Supreme Court, unless special leave was applied for and granted in accordance with section 18(3) of the High Court Act No. 16 of 1990 as amended. This subsection provides as follows:

> "No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the Court, shall be subject to appeal, save with the leave of the Court."[1]

[17] There is also some doubt whether in the circumstances of this case, the whole appeal should be struck down as not properly before Court.

[18] I have however come to the conclusion that there was a final judgment by the High Court on the issues covered by orders 2, 3, 4 and 6 of the aforesaid judgment, which read as follows:

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[1] See further: *Vaatz & Another v Klotsch & Others*, SA 26/2001 dated 11/10/2002 NmS, unreported. *Rossouw v Commercial Bank of Namibia*, SA 8/2002 dated 24/01/2003, NmS, unreported. *Aussenkehr Farms (Pty) Ltd & Another v Minister of Mines & Energy & Another*, SA 6/2002 NmS, dated 5/03/2003. *Government of the Republic of Namibia v Wamwice & Others*, Case No. 250/2001 dated 21/05/2003.

> “2. The application for 'reinstating' the application for the rescission of the default judgment is refused.
>
> 3. The application for the rescission of the default judgment is refused.
>
> 4. The application for condoning the respondent's failure to timeously set down the application for rescission of judgment is refused.
>
> 6. Respondent is ordered to pay the costs of this application on an attorney and client scale.”

[19] Order No. 5 is in the form of a *rule nisi* which introduces the issue of Contempt of Court and which could only be concluded in further proceedings on or after the return day. On that day the *rule nisi* could have been discharged after a proper ventilation of the issues and may have dispensed with the need for a further appeal. It is clearly separable from orders 2, 3, 4 and 6. It is practical, just and equitable, particularly in the light of the endless and unjustified delays in this litigation, that at least these issues be finally disposed of at this juncture. If the appeal is dismissed in respect of these orders, the Contempt of Court issue as contained in order No. 5 can be referred back to the Court *a quo* to hear and decide the issue.

IV: THE APPEAL AGAINST ORDERS 2, 3 & 4 & 6

[20] The decision of the Court *a quo* as contained in orders 2, 3 and 4, effectively dismissed the application by the Minister for the rescission of the default judgment against him in his capacity as Minister.

[21] The Honourable trial judge in his judgment dealt exhaustively and thoroughly with every fact and legal point relied on by the legal representatives of the parties and in the end dismissed the applications on behalf of the Minister for reinstating the application for rescission of the default judgment; the application for condoning the Ministers failure to timeously set down the application for the rescission of judgment; the application for the rescission of the default judgment.

[22] I have thoroughly considered those reasons including the argument before us on appeal from both sides and can find no ground for interfering with the findings and decision reached by the learned trial judge. It is trite law that as the judge of first instance he had a discretion to exercise and one with which this Court on appeal can only interfere if the judgment is clearly wrong or if there were irregularities and/or misdirections justifying the setting aside of the findings and conclusions of the Court *a quo*.

[23] Many decisions, South African as well as Namibian, were quoted in the Court *a quo* and before us which laid down the requirements for an applicant to

succeed in an application for setting aside a default judgment. The Court *a quo* relied mainly on *Grant v Plumbers (Pty) Ltd* wherein the following requirements were laid down:

> "(a) he must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance;
>
> (b) His application must be *bona fide* and not made with the intention of merely delaying plaintiffs claim;
>
> (c) He must show that he has a *bona fide* defence to plaintiffs claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour." [2]

[24] The Court *a quo* further relied on the decision in *Greenberg v Med & Veterinary Laboratories (Pty) Ltd*[3] for the well-known principle that the onus is on the applicant to establish the aforementioned requisites.

[25] The principles laid down in the *Grant v Plumbers* case, were confirmed and expanded in the authoritative Namibian Supreme Court decision of *Lewies v Sampoio*, written by Strydom CJ, with Dumbutshena AJA and O'Linn AJA concurring.[4]

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[2] 1949 (2) SA 470 (O)
[3] 1977 (2) SA 277 at 278H
[4] 2000 NR 186 SC at 191 F-H

[26] After referring to decisions such as *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd*.,[5] the learned Judge Strydom said:

> "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 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. 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 wilful.
>
> 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 & Another v Santam Insurance Company Ltd* 1977 (2) SA 874 (A) at 883 and *Vleissentraal v Dittmor* 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.
>
> A reading of the authorities show that it was not enough to raise a triable defence; it must also be shown that such a defence is *bona fide*.
>
> For the reasons set out hereunder I have come to the conclusion that the mainly 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 to the reasonable inference that the defence of

[5] 1994 (4) SA 705E at 711E

> 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."
> (My underling connotes my emphasis.)

[27] *TransNamib Holdings Ltd v Bernhardt Garoeb* was another decision of the Namibian Supreme Court dealing with these issues[6]. In both the *Lewies v Sampoio and the TransNamib Holdings v Garoeb* the Supreme Court also referred to the judgment of Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd*, supra and particularly the following dictum from that decision:

> "The magistrate's discretion to rescind the judgment of the Court is therefore primarily designed to do justice between the parties. He should exercise that discretion by balancing the interest of the parties, bearing in mind the considerations referred to in *Grant v Plumbers (Pty) Ltd* supra and *HDS Construction (Pty) Ltd v Wait* supra and also prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice.
>
> In the present case this involves weighing the need, on the one hand, to uphold the judgments of the Courts which are properly taken in accordance with accepted procedures, and, on the other hand, the need to prevent a possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence and without his defence having been raised and heard."

[6] Case No. 26 of 2003, unreported 2005.08.04

[28] In *H.D.S. Construction (Pty) Ltd v Wait*[7] referred to in the aforesaid decision, it was stated that not only was a *bona fide* defence required but the applicant must also show that his application is *bona fide*.

[29] The Court pointed out however that the absence of gross negligence in relation to the default is not an essential or absolute criterion for the granting of relief under Rule 31(2)(b). "It is but a factor to be considered in the overall determination of whether good cause has been shown although it will obviously weigh heavily against the applicant for relief."

[30] Strydom, CJ, summarized the requirements for a successful application to rescind a default judgment as follows in the *Lewies v Sampoio* judgment:

> "An applicant
>
> (a) must give a reasonable explanation for his default;
>
> (b) the application must be made *bone fide*; and
>
> (c) the applicant must show that he has a bona fide defence to plaintiff's claim."

[31] Much has been said in the above quoted decisions and in many others about the Court's duty to consider and decide an application for rescission of a default judgment in a balanced and fair manner. But that requirement

[7] 1979 (2) SA 298 (E) at 300F-301C

presupposes that the following fundamental human rights entrenched in the Namibian Constitution, will always be implemented.

> “Art 10: All persons shall be equal before the law.”

[32] That requires, e.g. that where an individual citizen such as Van der Berg in this case, finds it necessary to sue the State, with a Minister as the nominal defendant/respondent, such citizen shall be treated as "equal before the law.”

[33] Furthermore, Art 12(1)(a) will be applicable. This Article provides:

> “(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial Court or Tribunal, established by law…
>
> (b) A trial referred to in sub-article (a) hereof shall take place within a reasonable time failing which the accused shall be released."
>
> (This sub-article specifically refers to criminal trials, but it is generally conceded that it also applies to civil matters because subparagraph (a) applies in the first place to civil rights and obligations and in addition to criminal charges.)

[34] In addition the Supreme Court Act and Rules, the High Court Act and Rules the Magistrates Court Act and Rules, the common law and the broad body of statute law are integral parts of the Rule of law.

[35] The Court Rules are devised to enable a person *inter alia* to apply for default judgment if no defence is noted within a stipulated time and for the default judgment to be set aside if application is made within a specified time. One can argue endlessly about balance, fairness and justice but the applicable legal rules are itself based on balance, fairness and justice and the litigant must in the first place follow those rules to achieve balance, fairness and justice.

[36] If the Courts do not apply the rules and the laws, the Rule of Law will be abrogated and justice will be unattainable.

[37] Some observations regarding the facts in this dispute must be made:

(i) Van der Berg served summons against the Minister on the office of the Government Attorney on 27th May 1994.

(ii) On 19th August 1994 the following default judgment was entered against the Minister in terms of Rule 31 of the High Court when still no notice of appearance to defend had been filed:

"(a) Judgment in the amount of N$130 249 in respect of damages;

(b) Interest thereon at the rate of 20% per annum with effect from 23 February 1994 to date of payment;

(c) Judgment in the amount of N$4000 per month with effect from 23 April 1994 until the payment of the amount claimed in terms of paragraph 1 supra;

(d) Interest a *tempore morae* thereon at the rate of 20% per annum."

(iii) According to Mr Bock, a government employee, he allegedly filed an application for rescission of the default judgment on 20th September 1994.

(iv) Security for costs contemplated by Rule 31(2)(b) was allegedly tendered on 23 September 1994.

[38] Although the Court *a quo* accepted that an application for rescission of judgment had been filed, the Court correctly refused to accept that security had been tendered in terms of Rule 31(2)(b). This Rule provides as follows:

"A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of R200 set aside the default judgment on such terms as to it seems meet."

(My emphasis added.)

[39] Although the requirement of "good cause" has been interpreted in many authoritative Court decisions differing in emphasis the wording of the Rule as to the requirement of giving security is straightforward and without complication. The question is simply: "Has the applicant given security or not?" If not, an essential requirement of the application has not been complied with: If the documents have been destroyed by the Registrar in accordance with Rule 64, such fact could not serve as a shield for the applicant for rescission.

An essential requirement for a rescission application was thus not complied with.

[40] This alleged application was not taken further for many years to come.

[41] It is common cause that the Registrar had pursuant to the provisions of Rule 64 destroyed documentation relating to the application for rescission of judgment since there had been no activity for a period of three (3) years in regard to the alleged rescission of judgment since the filing of the last document. This provision indicates that non-activity for three (3) years justifies the inference that the matter referred to in the said documents will not be taken further after the lapse of three years without activity. The Rule also implies that it will be unreasonable to reopen an application where the documents relating thereto, have been destroyed in accordance with the said Rule.

[42] The Minister did not himself file any reply and it was left to a bundle of witnesses, including the government attorney, clerks in his Ministry and others, to attempt to state his case and to attempt to explain why they had not taken the necessary steps. These excuses were generally inadequate and unconvincing. Some were that the documents had disappeared from the office, others that a clerk fell ill. Why the necessary steps were not taken by others, were not explained. It has apparently not penetrated the burocracy in these offices that it is the Minister who had to take a stand and take the final decisions regarding the litigation, otherwise it would be meaningless for the law to provide for the Minister to be sued in his nominal capacity.

[43] Mr Goba, who appeared for the Minister in the Court *a quo*, contended that the reason why the Minister did not do anything to pursue the rescission application was because he believed that on the basis of a legal opinion that applicant is not entitled to damages since the motor vehicle in question had been automatically forfeited by operation of law, that the forfeiture of the vehicle in any event relate to criminal conduct, and respondent was not wilful in his failure to pursue the rescission application since “if your legal practitioner gives you legal advice and you take that advice whether or not its correct, you cannot be blamed for taking that advice.”

[44] The above contention is in direct conflict with the allegation by the Minister’s representative that the Minister was unaware of the action against him

and the default judgment. Furthermore Goba's statement is inconsistent with the statement filed by the Minister subsequent to the judgment which however forms part of the appeal record and in which the Minister said under oath:

> "5. I have at all times had no knowledge of the existence of the default judgment nor the applications mentioned above. I only became aware of this matter when the judgment dated 29th September 2004 was reported in the press." (The judgment referred to is apparently the judgment appealed against).

[45] This plea of ignorance is also inconsistent with a letter by the Government attorney dated 5th March 1996 to Van der Berg's attorney wherein the Government attorney stated:

> "We however wish to request you to keep the matter in abeyance until 25th March 1996 in order for us to investigate the matter, consult with our client to make recommendations whereafter we shall revert back to you without further delay."

[46] One wonders how this letter can fit in with the defence of ignorance on behalf of the Minister.

[47] It is also inconceivable that if the Minister was kept in ignorance by both the State Attorneys office and his own Ministry, that he does not say whether or not he was surprised and shocked by not having been informed by either of them of the summons and subsequent default judgment issued against him and whether or not he took any steps against any of them for their neglect. Such information

would make the excuse more credible. At any event it will be a travesty of justice if a citizen must be prejudiced because the Minister, his Ministry the State Attorney and the whole burocracy with all the financial and other resources available to them, are unable and/or unwilling to act expeditiously when involved in litigation with a citizen. After all, the individual Minister is responsible to the whole cabinet and is required by Article 78 of the Namibian Constitution to "accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this constitution and the law."

[48] The Constitution itself provides in Article 78(4) that "the Supreme Court and the High Court shall have the inherent jurisdiction … to regulate their own procedures and to make court rules for that purpose". Without these rules these Courts cannot function properly and non-compliance therewith will gravely undermine the Rule of law. When a minister is involved in litigation, whether it is in a personal or nominal capacity, he or she is bound to abide by these rules and ensure compliance with the aforesaid Article 78(3) of the Constitution.

[49] The picture which emerges in this case of how the minister, officials and the Government Attorney functioned in this matter, is a cause for serious concern and surely not a basis for the minister on which to re-open a default judgment rightly obtained by a citizen after so many years.

[50] I do not agree at all with the argument of Mr Goba about the relationship between attorney and the Minister and the suggested slavish following by the Minister of the Government attorney's advice.

[51] The Minister cannot in a case like the present shield to the same extent as ignorant individuals behind the acts and omissions of attorneys, be they wilful or grossly negligent or merely incompetent. Neither can the Minister shield behind the wilful, or grossly negligent acts or the incompetence of the Ministry, because a grave responsibility is placed on the Minister, firstly by the Constitution itself and secondly by the President, the Prime Minister, his colleagues and the people of Namibia.

[52] Apart from a period of approximately one (1) year and nine (9) months from 23 September 1994 to 17th June 1996, the delay of more than five (5) years until 10 September 2001 was thus entirely caused by the negligence of the Minister and the representatives in his Ministry and in the offices of the Government Attorney.

[53] Only when on 10th September 2001 an application was launched by Van der Berg to arraign the Minister on Contempt of Court charges for failing to honour the default judgment, was a new application launched on behalf of the Minister for rescission of the default judgment as a defence against the Contempt of Court proceeding.

[54] A further delay was then caused from 10th September 2001 when argument was heard in the Court *a quo* and 24th September when judgment was given. Should this Court now in May/June 2007 allow the appeal by setting aside the default judgment, it will mean that Van der Berg, who had already undergone considerable punishment for having committed a serious crime after being caught in a police trap, will have to start legal proceedings *de novo* after 13 years, should he wish to obtain redress from the State, for having allowed his vehicle to be "damaged beyond economical repair as well as parts removed, whilst in police custody.

[55] I must point out that as far as I am aware, the level of remissness and negligence seen in the instant case, has not been equalled in any case referred to before us where an application for rescission of a default judgment succeeded. You cannot therefore justify the setting aside of the default judgment in the instant case because a balanced and fair approach led to the setting aside of such judgment in some of the other cases.

[56] For the purpose of my decision in this case, I will assume that the argument on behalf of the Minister that the motor vehicle was automatically forfeited to the State is at least reasonably arguable, even though the Court at no stage had made a declaration of forfeiture.

[57] But it is obviously not enough to obtain a rescission of the default judgment if an applicant has an arguable and even *bona fide* defence.

[58] If it was otherwise, it would mean that if you have a bona fide defence, you can even set aside a properly granted default judgment after a delay of thirty (30) years even without any reasonable and *bona fide* explanation.

[59] Much of the Minister's case turn on the interpretation and application of Section 34 *ter* of Proc. 17 of 1939 which reads as follows:

> "Notwithstanding anything to the contrary in any other law contained, any money or property which a person has paid or delivered to a member or agent of the Namibian Police in terms of an agreement for the delivery or acquisition of diamonds, shall upon the conviction of that person of an offence under this proclamation in connection with such agreement, be forfeited to the State."

[60] This is also not a case where a very strong defence compensates for a very weak explanation.

[61] Although the defence based on section 34 *ter* of Proclamation 17 of 1939 is reasonably arguable, there is much to be said for the argument that an order of forfeiture should be made by the Court before it is effective. The argument that the forfeiture is “automatic” is an inference, not a word used in section 34 *ter.* What the Legislature intended is not entirely clear, but it seems the most reasonable possibility that the Legislature had in mind is an order of forfeiture by

the Court that decides the facts, such as whether the accused is the owner of the vehicle or other object and whether he or she has in fact "paid or delivered money or property to a member or agent of the Namibian Police in terms of an agreement for the delivery or acquisition of diamonds."

[62] It is difficult to believe that the Legislature had intended that some policeman or entity in the police will decide these facts and apply the law as they see it without a Court order. Such an interpretation could lead to uncertainty in the application of the law and is in particular inconsistent with the letter and spirit of the Namibian Constitution wherein the Rule of Law is entrenched and in respect of which the Courts play the decisive rôle in implementing it.

[63] Although it has been shown on behalf of the Minister that this defence is reasonably arguable, it is not strong enough to compensate for the extremely weak explanation for default. As a matter of fact:

(i) There is no reasonable explanation for the default;

(ii) The application was not made *bona fide*;

(iii) The application is in conflict with the letter and spirit of Art. 12(1)(a), 12(1)(b) and 78(3) of the Namibian Constitution.

[64] After completing my draft judgment, the intended draft judgment of my learned brother Chomba, A.J.A., has been brought to my attention. I find it helpful in the circumstances of this case to briefly comment on the facts and issues raised by him.

(i) My learned brother Chomba conceded that "the defendant's conduct amounted to inexcusable negligence" and was "grossly negligent". (My emphasis.)

The so-called inexcusable negligence is not put forward by the defendant Minister, but based on the findings of Hoff, J. in the Court *a quo* and our own findings in this appeal. The question then arises how the requirement of a "reasonable explanation" and a "*bona fide* application" can be met by a litigant Minister who has himself failed to give an explanation. In my respectful view both the aforesaid requirements were not complied with by the defendant Minister, and this is the *crux* of the judgment by Hoff, J. when he exercised his judicial discretion in refusing the application for rescission.

(ii) My brother also relies on the judgment in *Grant v Plumber* wherein the first requirement was:

> "He must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance".

But in this case it was conceded by my brother that there was "inexcusable negligence" which amounted at least to "gross negligence" and that "he is largely to blame that the matter protracted for years". Consequently, this Court should not come to his assistance. But in his proposed judgment, the contrary is done. The second requirement in the aforesaid decision is:

> "His application must be bona fide and not made with the intention of delaying plaintiff's claim".

Again my brother Chomba apparently finds that this requirement has been complied with. But how can an application be bona fide when the Minister does not himself reply and in the reply by subordinates "inexcusable negligence" is apparent. The intention to delay the claim, should be inferred from the facts. It must also be noted that the requirement of a *bona fide* explanation is distinct from and independent of the requirement of a *bona fide* defence. The onus is on the Minister/defendant to prove these requirements. He has failed to do so.

(iii) My brother also relies on the aforesaid judgment of Maritz, A.J.A., as he then was, where the latter said in *TransNamib Holdings Ltd v Bernard Garoeb*:

> "Litigants have a constitutional right to a fair trial in the "determination of their civil rights and obligations" (Article 12(1)(a) of the Constitution). In the adjudication of those rights and obligations, courts of law have a fundamental duty to do justice between the parties by, *inter alia*, allowing them a proper opportunity to ventilate the issues arising from their competing claims or assertions."

Maritz, A.J.A., is also quoted as having pointed out in the aforesaid decision:

> "The finality of a judgment is an important aspect in the administration of justice and the expeditious satisfaction or execution thereof reaffirms and strengthens public confidence in the justice-system and is an important meganism through which the courts assist to maintain law and order in society. In addition to the respondent's interest in the finality of the judgment obtained is also the interest of the Court that its rules and procedures must be equally applied and adhered to by all litigants."

However, the point is that in this case, the defendant Minister in fact had "a proper opportunity to ventilate the issues arising from their competing claims and assertions" but failed to use this proper opportunity and that such failure was "inexcusable".

The Court cannot allow a matter to drag on for decades because the Minister and the administration and its attorney's "inexcusable" conduct, notwithstanding the resources available to them in a legal dispute with a citizen who does not have those resources available to him or her.

To allow such matter to drag on indefinitely and for more than a decade because of such "inexcusable conduct" by such Minister, the administration and the government attorney, is the precise opposite of the requirement "to do justice between the parties".

Justice between the parties is also not merely a question of making a suitable cost order at the end of the day. Before that stage a litigant has to be in a position to pay costs to legal representatives. There is much more to it than such a solution to do justice between the parties as must be apparent from the Namibian Constitution and the Court Rules and interpretation thereof herein referred to. It is also apparent from the above that the prejudice inherent in the situation cannot be eliminated because "failing memory" would play no part in the eventual result as put forward by my brother. To order the litigation to start *de novo* and to provide for another appeal, may take many more years to reach finality. The question

is: Would such a procedure do justice between the parties? I think not. This will indeed be a travesty of Justice in my respectful opinion. It will also strengthen the accusation by many of "judicial timidity" on behalf of the Courts.

(iv) My learned colleague says that "for the foregoing reasons, and particularly because in my view, the defendant did raise a triable defence, I do not agree with the conclusion arrived at by my brother…"

This notwithstanding the fact that all the authorities referred to by my learned brother, indicate that it is not enough to have a *bona fide* triable defence.

(v) The contempt of court issue: This issue was not decided in the Court a quo before appeal by defendant Minister and it is not appropriate for this Court to give judgment or even to express a firm opinion at this stage on the merits of such an appeal.

For these reasons I persist in my intended judgment.

[65] In the result, the following order should in my view be issued by this Court:

1. The appeal is dismissed and the orders of the Court *a quo* made on 24/9/2004 and numbered 1, 2, 3 and 4 and 6 are confirmed.

2. Ad order No. 5:

   (a) The Court proceeding in regard to this order, is referred back to the Court *a quo* to be continued from where it left off when it was postponed on the 7th February 2005 to a date to be arranged with the Registrar.

   (b) The parties and their legal representatives shall within 14 days of this judgment arrange a date with the Registrar for the continuation and completion of the proceeding envisaged in order No. 5 of the judgment.

3. The appellant is ordered to pay the costs of appeal.

_____

O'LINN, A.J.A.

ON BEHALF OF THE APPELLANT: Mr A W Corbett

Instructed by:

Government-Attorney

ON BEHALF OF THE RESPONDENT:

Instructed by: Mr R Heathcote

Van Vuuren & Partners

REPORTABLE

CASE NO 19/2004

IN THE SUPREME COURT OF NAMIBIA

IN THE MATTER BETWEEN

THE MINISTER OF HOME AFFAIRS, **APPELLANT**

MINISTER JERRY EKANDJO

and

JOHANNES JURIE JACOBUS VAN DER BERG **RESPONDENT**

CORAM	**:**	Shivute, CJ, O'Linn, AJA, et Chomba, AJA
HEARD ON	**:**	2005/10/05
DELIVERED ON:		2008/12/12

APPEAL JUDGMENT

Introduction

CHOMBA, A.J.A:

[1] This civil appeal is a sequel to a criminal case in which the respondent, Johannes Jurie Jacobus van Der Berg (Van der Berg) was involved. For a better appreciation of the issues in this appeal, it is necessary to briefly refer to that criminal case before setting out those issues.

[2] Van der Berg was arraigned together with one Jaco Hamman in the magistrate's court in Mariental. The two were charged under the Diamond Industry Protection Proclamation No. 17 of 1939. In this judgment I shall refer to that statutory enactment simply as Proclamation 17 of 1939. The main charge against the two accused was under section 28(b), it being alleged that they wrongfully and unlawfully dealt in rough or uncut diamonds, and the alternative charge was under section 28(a) which alleged that they wrongfully and unlawfully possessed the said rough or uncut diamonds.

[3] A trial ensued following upon pleas of not guilty which both accused had entered. At the close of the prosecution case the magistrate found that the evidence adduced in support of the main charge fell short of proving the identity or nature of the merx which the accused allegedly wrongfully and unlawfully dealt

in. Needless to mention that that defect in the evidence similarly applied to the alternative charge. Therefore, the trial magistrate found both accused with no case to answer on both counts and acquitted them. The State was not satisfied with the magistrate's verdict. It appealed to the High Court where O'Linn, J upheld the appeal. See *S v van der Berg* 1995 NR 23 (HC). The learned appeal Judge consequently made two important orders at 76 H – J *viz*:

> "2. The decision of the trial magistrate in discharging accused No. 2, the respondent in this case, at the end of the State case and his finding of 'Not guilty and discharged' is set aside, including his order that the vehicle in question be returned to accused No. 2.
>
> 3. The trial must be reconvened and proceeded with from the point where the State had closed its case and it must proceed from that point to its conclusion."

[4] At the reconvened trial the State recalled some of their witnesses and then closed their case. Van der Berg, without much ado, closed his case without leading any evidence whatsoever. The upshot was that he was convicted on the main count of wrongful and unlawful dealing in rough or uncut diamonds.

[5] It is evident from the record of appeal before us that even at the reconvened trial, the merx still remained unproved to have been diamonds. This was because when Van der Berg appealed against his conviction, he was partially successful. The appeal was heard by a bench of the High Court consisting of two Judges, namely Teek, J, as he then was, and Gibson, J. Delivering the judgment

of the Court, Teek, J stated the following, in the unreported judgment of *Johan van der Berg v S* delivered in the High Court on 17/6/1996, which I shall quote in *extenso* on account of the significant bearing it has on the current appeal:

> "However, that is not the end of the matter. The State has proved beyond reasonable doubt that the appellant contacted Kirsten and requested him to find some diamonds for him '… because there is a lot of money in it'. Kirsten contacted the diamond branch and the security division of CDM and informed them about the appellant's intentions. This resulted in a trap being laid for the appellant whereby 101 objects were handed over by the police to Kirsten. Kirsten negotiated with the appellant for the purchase of these objects. Appellant had in his possession a pocket calculator, long small pliers and a golden magnifying glass. He used the magnifying glass to sort out the objects. Thereafter he told Kirsten that '…there was bad diamond but it was good parcel in general (*sic*).' The price was fixed at R120 000. Negotiations took place concerning the payment of the purchase price. Appellant offered his vehicle worth R100 000 and a cheque in the amount of R20 000 as security. Transfer of ownership forms were obtained from the magistrate's office and these were filled in. Appellant handed the transfer of ownership forms and a cheque in the amount of R20 000 to Kirsten. The objects were handed to appellant who put them in a small bag and put it in his left hand pocket of his jacket. The appellant was then arrested.
>
> The evidence adduced and the facts proved and accepted in this case do not prove the commission of the offence the appellant was charged with, whether on the main or alternative counts. The merx the appellant brought or dealt in was not proved to have been what he intended to be or set out to by or deal in, namely diamonds. In order for the accused to be guilty of the alternative charge, it is necessary to prove that the objects found in his possession were indeed diamonds and not worthless pieces of glass or stones, irrespective of his belief what these objects were. However, I am satisfied that the evidence proves that the appellant's actions constituted an attempt to buy rough and uncut diamonds

> in the light of the State's failure to prove that the 101 objects used in the operation were the same 101 objects tested and evaluated by Reddie as diamonds. Whether or not the objects the appellant bought were proved to be diamonds, the appellant's intention was, at all material times, to buy diamonds and not worthless pieces of glass or stones. The accused is therefore guilty of an attempt to commit the offence charged. Vide section 256 of the Criminal Procedure Act no. 51 of 1977.
>
> In the circumstances the appellant should have been convicted of attempted dealing in rough and uncut diamonds."

[6] Van der Berg was consequently convicted of the offence of attempt to deal in rough or uncut diamonds contrary to the same section of Proclamation 17 of 1939 dealing with the main charge.

[7] The foregoing are the essential details of the criminal proceedings which preceded the inception of the proceedings which set in train the civil case from which the current appeal ensues. Now we can move on to the civil action.

The Essential Facts of the Appeal

[8] Let it be mentioned at the outset that the pith of this appeal hinges on the motor vehicle to which reference has been made earlier when outlining the details of the criminal case. The motor vehicle namely, a Nissan Sani was, as we have seen from the judgment of Teek, J part of the R120 000 agreed purchase price for the 101 objects.

[9] After Van der Berg's acquittal at the no-case-to-answer stage, and in the light of the original magistrate's order directing the return of the motor vehicle to him, it was evidently not so returned. Instead it remained in the police custody and was continuously in such custody since 1992. The acquittal was pronounced in 1994 according to the appeal record. Van der Berg in due course instituted a civil action in which he averred in his particulars of claim that the motor vehicle was damaged beyond economical repair while in the custody of the police. Therefore he claimed its market value and other monetary reliefs. The Minister of Home Affairs whose portfolio included responsibility for the police force of Namibia was sued as the defendant to the action. For the sake of convenience I shall from now henceforth in this judgment refer to Van der Berg as the plaintiff and the Minister of Home Affairs as the defendant.

[10] Notwithstanding that proper service of the Court process in the action aforementioned was effected upon him, the defendant took no steps by way of defending the action. However, his ministry officials referred the process documents to the office of the Government Attorney. Regrettably, due to apparent official red tape and failure of coordination, the Government Attorney's office also failed to file a notice to defend the action. In the result, on 19 August 1994, the plaintiff obtained judgment in default. Thereafter on 5 September 1994, the plaintiff issued out a warrant of execution to enforce the default judgment.

[11] The last mentioned step taken by the plaintiff prompted the Government Attorney on behalf of the defendant to lodge an application for rescission of the default judgment. It is pertinent to mention that the institution of the civil action followed after the plaintiff had been acquitted by the magistrate in the criminal proceedings. The State had filed an appeal against the plaintiff's acquittal and that appeal was pending at the time when the plaintiff was granted the default judgment on 19 August 1994. When, therefore, the application for rescission of that judgment was set down for hearing, both parties thereafter agreed that the hearing of that application should be adjourned *sine die* pending the determination of the State's appeal. The Court which was to hear the application granted an order of adjournment accordingly. That was on the 23 September 1994.

[12] The criminal appeal terminated when the judgment by O'Linn, J was delivered in March 1995. In terms of the agreed *sine die* adjournment, the application for rescission ought to have been reactivated, but it was not.

[13] A number of letters were remitted by the plaintiff's lawyers addressed to the defendant's office and demanding the return of the Nissan Sani vehicle. The demand for the return of the vehicle was grounded on the argument that "the vehicle in question was never forfeited to the State by the learned (trial) magistrate". The Government Attorney on behalf of the defendant made a written request addressed to the plaintiff's lawyers that the matter be left in

abeyance pending an investigation into the status of the said motor vehicle. The Government Attorney promised to revert back in due course. However, nothing was done to honour the promise, which prompted the plaintiff's lawyers to, in desperation, lodge an application dated 6 July 2000 seeking, *inter alia*, the following relief from the Court:

> "1. Ordering the Respondent to comply with the judgment issued against him by this Honourable Court on 19 August 1994 (annexed hereto marked 'A') within five days from this order having been granted, failing which the respondent is called upon, to show cause on 18 August 2000, why an order should not be granted in terms whereof the Respondent is committed to imprisonment for a period to be determined by this Honourable Court."

[14] The service of notice of the aforementioned application jolted the defendant's lawyers to action by lodging a notice of application seeking the following reliefs, that is to say-

> "(1) Re-instating the application for rescission of judgment filed of record by the Applicant on 20th September, 1994
>
> (2) Condoning the Applicant's failure to timeously set down the application for rescission filed of record on 20th September 1994 for hearing.
>
> (3) Rescinding the judgment entered against the Applicant on 26 August 1994, in the Alternative dismissing the plaintiff's cause of action
>
> (4) Dismissing the application filed of record by the Respondent on 14th July 2000

(5) Costs of suit only in the event of this application being opposed."

[15] The judgment mentioned in (3) above was in fact the default judgment of 19th August 1994. The application referred to as having been filed on 14 July 2000 was the application of 6 July 2000 seeking the committal of the defendant to prison for contempt of Court for his failure to honour the default judgment. It was that application which was the subject of proceedings in the Court *a quo* and from which the present appeal emanates. Hoff, J, who presided over those proceedings granted judgment in favour of the plaintiff and in the result made the following orders:

"1. The application for condonation for the late filing of heads of arguments by the respondent is granted.

2. The application for 're-instating' the application for rescission of the default judgment is refused.

3. The application for the rescission of the default judgment is refused.

4. The application for the condoning the respondent's failure to timeously set down the application for rescission of judgment is refused.

5. The respondent is ordered to comply with the judgment issued against him by this Court on 19 August 1994 within five days from this order being granted failing which respondent is called upon to show cause on 29 October 2004 at 10h00 why an order should not be granted in terms whereof respondent is committed to imprisonment for a period to be determined by this Court.

6. Respondent is ordered to pay the costs of this application on an attorney and client scale."

[16] The notice of appeal filed on the defendant's behalf on 29 September 2004, shows that the defendant was aggrieved by the preceding orders numbered (2) to (6). However, in the conclusion of his heads of argument he prays for relief in the following terms:

> "In conclusion, it is submitted that the appeal should succeed with costs and that the order of the Court *a quo* should be replaced with an order that the rescission for judgment be granted and that the appellant be given a period of 10 days from the handing-down of the judgment herein to enter appearance to defend."

[17] This compendious prayer is vaguely couched, but my understanding of it is that the defendant is seeking from this Court an order, the effect of which would restore his application for rescission and at the same time grant it. He consequentially craves an order allowing him within ten days to file a notice to defend the plaintiff's action commenced on 26 May 1994.

[18] In essence, therefore, the present appeal raises issues which are akin to those which arise when a party seeks rescission of a judgment which was entered against him or her on the ground of his or her default in taking a

necessary step in the course of litigation. In the current case, these issues are the following:

(a) whether the defendant has offered a plausible explanation for his failure to prosecute the rescission application which he lodged on 20 September 1994;

(b) whether the application he subsequently lodged for reinstatement of the said rescission application was *bona fide* and not merely intended to delay the plaintiff's claim; and

(c) whether he has disclosed a *bona fide* defence to the said claim.

[19] The *cause célèbre,* which has been cited by both sides in this appeal and which encapsulates the three considerations set out in the proceeding paragraph is *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 47 (O). The following are the bench-marks which that case sets out, *viz:*

(1) The defaulting party must give a reasonable explanation for his default. If it appears that his default was willful or due to gross negligence, the Court should not come to his assistance.

(2) His application for rescission must be *bona fide* and not merely made with an intention of delaying the plaintiff's claim.

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

[20] I shall now consider each of the foregoing bench-marks in the light of the heads of argument and oral submissions made on behalf of the parties to this appeal.

Reasonable Explanation of Default

[21] It has already been shown herein that the default judgment against the defendant was granted on 19 August 1994. By Rule 3(2)(b) of the High Court Rules a defendant against whom a default judgment has been entered may within twenty days after becoming aware of the judgment, upon notice to the plaintiff, apply to set aside or rescind the judgment. And he has to show good cause for the default. The defendant only filed the application for rescission on 20 September 1994, which was outside the period allowed. Despite that application

being belatedly filed, the plaintiff appears to have informally condoned the lateness. The return date for the application for rescission was 23 September 1994, but by consent of the parties the hearing thereof was postponed *sine die* pending the determination of the appeal which the State had lodged against the plaintiff's acquittal in the criminal proceedings. That appeal was determined in March 1995. The defendant did not cause the rescission application to be restored to the active roll soon after the appeal's determination. He did so in August 2000 when he applied for the reinstatement of the earlier application which by then was believed to have been destroyed by the Registrar of the High Court pursuant to the powers vested in him by Rule 64 of the Rules of the High Court. It will be seen that at the time of the reinstatement application the defendant was over five years out of time. It was for that lengthy delay that he has to offer a reasonable explanation.

[22] In tackling the issue of offering a reasonable explanation for the delay to prosecute the rescission application, it has been argued on the defendant's behalf that the approach which this Court ought to adopt is to take cognisance of the *dictum* occurring in the South African case of *De Witts Auto Body (Pty) Ltd v Fedgen Insurance Co. Ltd* 1994 (4) SA 705 (ECD) (at page 711E), to wit:

> "An application for rescission is never simply an inquiry whether or not to penalize a party for this 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*."

[23] Another quotation in aid of the foregoing was culled from the judgment delivered by this Court in the case of *Lewies v. Sampoio* 2000 NR 186 (SC) at page 192 B-C where the following statement occurs:

> "……although the fact that that 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 application for relief."

[24] The explanation offered on the defendant's behalf for the above stated delay boils down to the following, that is to say –

(1) there was an agreement between the parties that the application for rescission should be postponed *sine die.*

(2) that the above step was taken for the reason that there was a desire by both parties to obtain finality in the criminal appeal proceedings.

(3) that it appeared to the legal team representing the defendant that the plaintiff was of the view that he was not entitled to the return of the vehicle since it had been forfeited to the State; and

(4) accordingly both parties did not proceed with the finalization of the rescission application on the one hand, and on the other, the application for committal of the defendant.

[25] Regarding the failure to file a notice to defend the action commenced by the plaintiff, the explanation was that;

(a) the defendant's legal representative on record was on sick leave from the last week of May 1994 until his return to the office in the first week of July 1994.

(b) Although the summons instituting the plaintiff's action was served on the defendant, it was referred to the Government Attorney's office on 27 May 1994 and ended up on the desk of one Mr. Edmond Bok, the very officer who was on sick leave.

(c) the summons was then misfiled and the defendant's legal representatives only became aware of the default judgment long afterwards; and

(d) while arguing that the defendant's legal representatives were not in willful default in not entering on the defendant's behalf a notice to defend, it was alternatively contended that if the said legal representatives were negligent such negligence should not unqualifiedly be blamed on the defendant.

Whether the Defendant has a *Bona Fide* Defence

[26] Two defences are relied on in this regard, namely;

(1) That the ownership of the motor vehicle at the centre of the present litigation, namely the Nissan Sani was transferred from the plaintiff to one Werner Francois Kirsten.

[27] I shall immediately comment and make a determination on the foregoing defence.

[28] This defence was relied on even in the Court *a quo,* but was out rightly rejected. I agree with the judge's view for rejecting it. The documentation produced in support of this purported transfer was not appropriately certified to be true documentation as there was no indication of when, where and by whom it was certified. The judge held as a matter of fact that it was clear that neither Bok nor Inspector Fouche, who ought to have had firsthand knowledge of the change

of ownership, had in fact any such knowledge. The claimed transferee of the ownership, namely Kirsten, gave no evidence whatsoever of the transfer. There was therefore, no credible and/or admissible evidence to verify the transfer.

[29] It is my considered view that this defence does not, *prima facie,* have a stamp of *bona fides.* In terms of the bench-marks prescribed by the *Grant* case, *supra,* an applicant for rescission who claims to have a *bona fide* defence is required to make out a *prima facie* case, in the sense of setting out averments which, if established at the trial, would entitle him to the relief of rescission. According to the record of appeal, no such arguments are apparent. In my view, therefore, the prospects of success of that defence were dim.

[30] The second defence canvassed before us was couched in the following terms in the heads of argument:

> "Subsequent to the filing of the application for rescission it has become apparent that even though the respondent was ultimately on appeal only found guilty of an attempt to deal in rough or uncut diamonds, this still entitles the Namibian Police and the Court to require that the respondent's vehicle be forfeited to the State…."

[31] It is quite evident to me that the foregoing defence is premised on section 34 *ter* of Proclamation 17 of 1939. That section provides:

> "notwithstanding anything to the contrary in any other law contained, any money or property which a person has paid or delivered to a member or agent of the

> Namibian Police in terms of agreement for the delivery or acquisition of diamonds, shall upon conviction of that person of an offence under this Proclamation in connection with such agreement, be forfeited to the State."

[32] In short, the second defence relied upon is that by the law set out in section 34 *ter* of Proclamation 17 of 1939, the vehicle at the centre of the civil action was automatically forfeited to the State upon the conviction of the plaintiff for attempting to deal in diamonds. (See quotation from Teek, J. judgment, *supra*)

Plaintiff's Responses as to Reasonable Explanation and *Bona Fide* Defence

[33] In response to the proffered explanation for the delay not only of not filing a notice to defend the action commenced by the plaintiff, but also that of not timeously prosecuting the application for rescission of the default judgment, Mr. Heathcote, counsel for the plaintiff, advanced the following arguments on behalf of the plaintiff. He said it took the defendant some five years before he was jolted into action to follow up the rescission application and that the defendant did so only after the plaintiff had instituted committal proceedings. Reference was also made to the protracted discussions which transpired between the parties' legal representatives with a view to finalizing the dispute. Mention was further made of the fact that some legal representatives of the defendant had given indications suggestive of an intention on the defendant's part to accede to the plaintiff's claim. In this regard, a Mr. Brisley was reported to have said that the defendant would pay the capital amount claimed although not the interest.

Additionally, it was argued that a Ms. Hanekom had mentioned to the plaintiff's legal representatives that she had told the police that the plaintiff should be paid his money as claimed in the civil action.

[34] Yet another argument submitted on the plaintiff's behalf was that the defendant has at one time acknowledged that the default judgment was valid at the time when it was obtained. From the foregoing, it was ultimately argued that the defendant was grossly negligent in the manner he treated the default judgment after he had been made aware of it. To that end, the following condemnatory statements made by the judge *a quo* in the judgment appealed from were cited as vindication of the alleged gross negligence, *viz:*

> "In my view the conduct of the respondent is most unreasonable since he was not only, at least, grossly negligent in failing to prosecute the application for rescission of the default judgment but allowed an unacceptably long period of time to lapse before instituting this 're-instatement' application. It appears to me that the respondent was only jolted into action when applicant gave notice of this intention to enforce the default judgment. For the aforementioned reasons I am not persuaded that I should exercise my discretion in favour of granting the prayers of re-instatement of the application for default judgment." (see at page 175, record of appeal, lines 22-29, vol. 2)

And –

> "Regarding the reason for the inactivity by the respondent during the aforementioned period it in my view sounds quite hollow and cannot be regarded as a reasonable explanation." (Page 177, vol.2, at lines 33, *ibid*)

[35] To reinforce the foregoing arguments, Mr. Heathcote cited two cases in which this Court had prescribed tests which should be surmounted in order to succeed in an application for rescission of default judgment. The cases are *TransNamib Holdings Ltd v. Bernhardt Garoëb,* No. 26/2003 (unreported) and *Lewies v. Sampoio* 2000 (*supra*). He particularly quoted the dictum of Maritz, AJA in the former case in which he said:

> "The conflicting facts and contentions advanced by and on behalf of the litigants in the application for rescission of judgment presented the presiding officer with the difficult task of balancing two sets of competing interests (c.f. *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd,* 1994 (4) SA 705 (E) at 711H-I). On the one hand is the interest of the respondent in maintaining the validity of the judgment granted in his favour. Albeit obtained by default, it remains a regular judgment by a competent Court of law which, in the normal course of events, must take effect. As such, it normally terminates the *lis* between the parties and demands satisfaction by the defaulting litigant, if necessary, by execution. The finality of a judgment is an important aspect in the administration of justice and the expeditious satisfaction or execution thereof reaffirms and strengthens public confidence in the justice-system and is an important meganism (*sic*) through which the Courts assist to maintain law and order in society. In addition to the respondent's interest in the finality of the judgment obtained is also the interest of the Court that its rules and procedures must be equally applied and adhered to by all litigants.
>
> On the other hand is the interest of the defaulting litigant in maintaining and presenting his defence. If such a litigant demonstrates a potentially good defence on the merits, the Courts will normally be reluctant to let a default judgment pass without proper adjudication. Litigants have a constitutional right to a fair trial in the 'determination of their civil rights and obligations'. (Article 12(1)(a) of the Constitution). In the adjudication of those rights and obligations, Courts of law have a fundamental duty to do justice between the parties by*, inter alia,* allowing

them a proper opportunity to ventilate the issues arising from their competing claims or assertions. To the extent that that right is limited by the entry of default judgment if a litigant fails to comply with the procedures prescribed for the presentation of his or her case, a litigant who has shown substantive merits in his or her defence and good cause for the non-compliance will not be deprived of a just resolution in due course. In the absence of gross negligence or willful disregard of its rules, the Court will not shut its doors to a *bona fide* litigant with a good defence just because of his or her failure to comply with the Rules.

…

In a long line of judgments the Courts have by precedent distilled the essential criteria by which to determine whether 'good cause' has been shown for default judgments to be rescinded or varied. In *Leweis v Sampoio* 2000 NR 186 (SC) at 191G-H this Court approved the following content given to the requirements implied by that phrase in *Grant v Plumbers (Pty) Ltd*, 1949(2) SA 470 (O) 476-477:

> '(a) He must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence, the Court should not come to his assistance.
>
> (b) His application must be *bona fide* and not made with the intention delaying the plaintiff's claim.
>
> (c) He must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.'"

[36] Mr. Heathcote rightly stated that it was trite law that where the Court *a quo* exercised a discretion, the Court of appeal should not readily interfere with that exercise of the discretion, and he quoted for that proposition the case of *Myburg Transport v. Botha t/a SA Truck Bodies* 1991 NR 170 (SC) in which the following parameters were pronounced –

> "2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.
>
> 3. An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.
>
> 4. An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all relevant principle facts and principles."

[37] Mr. Heathcote further urged it upon this Court that there was no legal substance whatsoever in the defendant's contention – that the Nissan Sani motor vehicle aforementioned became automatically forfeited in terms of section 34 *ter* of Proclamation 17 of 1939. To reinforce this argument, he submitted that it was common cause that the said vehicle was never produced as an exhibit in the

criminal trial and that the trial magistrate had made no order of forfeiture in respect thereof. He then proceeded to give reasons why the interpretation given by the defendant to section 34 *ter* was unacceptable.

Evaluation of the argument as to the reasonable explanation and *bona fide* defence

[38] I cannot agree more with Mr. Heathcote's contention that an appellate Court should not lightly interfere with a discretion exercised by a lower Court. It is an established and settled principle of law that there is a presumption that a trial Court judge has rightly exercised his discretion, that is to say that he has judicially exercised it. An appellate Court will, therefore, not interfere with the discretion unless it is clearly satisfied that the lower Court has exercised it on a wrong principle and that it should have been exercised in a contrary way, or that the exercise of the discretion by the lower Court has occasioned a miscarriage of justice.

[39] *In casu*, it is pertinent to state that the defendant defaulted inordinately in prosecuting the application for rescission of the default judgment. Therefore, all he had to rely on in making his tardy application for the reinstatement of the application for rescission was a hope that the Court *a quo* would condone his default and exercise its discretion in his favour. Unfortunately his conduct did not endear him to the Court *a quo* as the *dictum* earlier quoted from that Court's judgment clearly indicates.

[40] The undoubted inference to be drawn from that *dictum* is that the learned trial judge did not regard as reasonable the explanation given by the defendant to account for his default. It is also implicit from the same dictum that he was not satisfied that the application for the reinstatement of the application for rescission was *bona fide*. Although he did not say so explicitly, the inference I draw from the above quoted extract from his judgment is that the judge felt that the application for reinstatement of the rescission application was made solely for the purpose of delaying the plaintiff's claim.

[41] I shall now focus on the treatment which the judge *a quo* gave to the third limb of the requirement outlined in the *Grant* case, *supra*. This is the requirement that the application for rescission should disclose a *bona fide* defence. In this regard I reiterate that the main pillar of the defence disclosed on perusal of the papers of this appeal was that the default judgment became unenforceable when the bench of the High Court consisting of Teek, J and Gibson, J convicted the plaintiff of an attempt to deal in rough or uncut diamonds. This was because the opinion which was given to the defendant by the Government Attorney's office was that the conviction meant that the Nissan Sani vehicle became automatically forfeited to the State. The trial judge considered the counter argument on behalf of the plaintiff on this issue of automatic forfeiture. The following is the relevant extract from the judgment of the Court *a quo* starting from page 169 at line 21 of the record of appeal:

"It was also submitted on behalf of the applicant that the provisions of section 34 *ter* of the Diamond Industry Proclamation 17 of 1939 as amended is of no assistance to the respondent and cannot be regarded as a 'defence'."

[42] At that stage the judge quoted the provisions of section 34 *ter* and then went on to say:-

"It was submitted that section 34 *ter* cannot avail the respondent since (a) applicant was convicted after the judgment has been granted; (b) the applicant was not convicted of 'an offence under (*this Proclamation*)' – this was based on the fact that in the criminal appeal judgment it was held that since the State did not prove that the *merx* bought or dealt in were indeed diamonds. The Court however, found that since the intention of appellant (applicant) was at all material times to buy diamonds and not worthless pieces of glass or stone that he attempted to contravene the provisions of Proclamation 17 of 1939 and convicted him of an attempt to deal in rough or uncut diamonds.

It was in this regard submitted that an attempt to commit an offence contrary to the provisions of Proclamation 17 of 1939 does not constitute an offence *'under this proclamation*' since the Proclamation 17 of 1939 does not make provision for an *'attempt'* to contravene its provisions as an offence under that proclamation.

I cannot agree with this submission. In my view a conviction for an attempt to contravene a provision of a statute is indeed a conviction under such statute. (See section 256 of the Criminal Procedure Act 51 of 1977); (c) that it is common cause that the vehicle had not been forfeited by the magistrate at the conclusion of the criminal trial. This in my view may be true but if the submission of the respondent is correct that the motor vehicle in question is in terms of the provisions of section 34 *ter* automatically forfeited to the State then it appears *prima facie* that the magistrate need not specifically make a forfeiture order.

> However, on the basis of the factors mentioned in Grant's case, the respondent need not prove this *'legal interpretation*' on a preponderance of probabilities in order to succeed in his application for a rescission of judgment." (p 170 to p171 line 6, *ibid*)

[43] The necessary implication from the foregoing extract is that the learned trial judge did accept that the defendant had disclosed a *bona fide* defence. That notwithstanding, he attached little or no weight to it because of his earlier determination that the defendant was guilty of willful or gross negligence in not pursuing with diligence his rescission application, and because he was not satisfied that the explanation for the delayed ameliorative action was reasonable.

[44] The present case bears a striking similarly to that of *De Witts Auto Body Repairs (Pty) Ltd*, *supra.* In that case *De Witts Auto Body Repairs (Pty) Ltd*, the appellant, had a default judgment entered against it arising from the following circumstances: De Witt, the son of the Managing Director of the appellant, was involved in a motor traffic accident while driving a motor vehicle belonging to the appellant. The motor vehicle was insured with the respondent, Fedgen Insurance Co. Ltd. In consequence of the accident the appellant made a claim in relation to the damage caused to the vehicle as a result of the accident. Fedgen Insurance Co. Ltd, paid R9 500. Unbeknown to Fedgen Insurance Co. Ltd. De Witt the driver was allegedly under the influence of alcohol at the time of the accident. He was therefore, charged and prosecuted for drunken driving.

[45] It was a condition and term of the insurance contract that the insurer would not be liable to make good any damage caused to the insured vehicle if the driver of it was under the influence of alcohol at the time of the accident. When therefore the insurer became aware of De Witt's prosecution, it instituted a claim under *condictio indebiti* for the recovery of the R9 500. On the instructions of the insured a notice to defend was entered but no plea was filed in defence. In due course – and I must emphasize that that was after a protracted and lengthy period during which the insurer's lawyers by letters were reminding the insured of the need to file a plea but to no avail – the insurer obtained a default judgment. As in the present case, the insured did not honour the default judgment and after yet another protracted period the insurer sought to execute the default judgment. In the meantime De Witt was acquitted on the drunken driving charge. That occurrence gave greater credence to the need to defend the insurer's action for the recovery of R9 500 but still no plea was filed. Again as in the present case, the insured was spurred to action only when an attempt was made to execute the default judgment. The insured then applied to the Court – the application was prosecuted in the magistrate's Court – to rescind the default judgment. In the exercise of his discretion the magistrate dismissed the application on the ground of willful and gross negligence.

[46] The appeal against the refusal of the application for rescission was heard by Jones, J. The following is an extract from his judgment on page 711C-I:

> "The magistrate's reasons correctly place emphasis on the neglect of the defendant's attorneys which is, after all, the most significant feature which resulted in default judgment being taken against their client. But he does so out of context. The correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an all-important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation of the defendant's *bona fides*, and thereby to decide whether or not, in all the circumstances, it is appropriate to make the client bear the consequences of the fault of its attorneys as in *Saloojee and Another NNO v Minister of Community Development* 1965(2) SA 135 (A). An application for rescission is never simply an inquiry 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*. The magistrate's discretion to rescind the judgments of his Court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in *Grant v Plumbers (Pty) Ltd (supra)* and *H.D.S Construction (Pty) Ltd v Wait (supra)* and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence being raised and heard."

[47] Jones, J, says in the just quoted extract that in order to do justice between the parties the magistrate ought to have balanced on the one hand the need to

uphold the default judgment and, on the other hand, the need to prevent a possible injustice of a judgment being executed which should never have been granted in the first place. On the facts of *De Witt's* case (*supra*) the default judgment was obtained on the ground that the insurer ought not to have paid the accident claim because De Witt the driver of the insured vehicle was believed to have been under the influence of alcohol at the time of the accident. However, when De Witt was acquitted the default judgment could no longer be sustained. The dismissal of the rescission application had the effect of sustaining the default judgment, but in the judgment of Jones, J, that was tantamount to sustaining an injustice. I agree with him.

[48] In the proceedings for rescission of the default judgment the disclosure of De Witt's acquittal quite clearly therefore was indicative, *prima facie,* of a *bona fide* defence to the insurer's claim. Notwithstanding the willful default or negligence on the part of the insured in allowing the default judgment to be obtained, the appellate judge held that having regard to the *bona fide* defence disclosed on behalf of the insured, the latter could not "be accused of raising (the defence) for some spurious motive, such as delay". In the event the appellate judge found that the magistrate, in rejecting the application for rescission, had wrongly exercised his discretion. He effectively upheld a judgment which should not have been obtained in the first place. Doing so did not promote justice between the parties. In the event the judge allowed the appeal.

[49] By parity of reasoning, if in present case the State's interpretation of section 34 *ter* of Proclamation 17 of 1939 were to be found at the trial of the plaintiff's action to be correct, then the default judgment might well be found to be a *non sequitur* and therefore to be a judgment that did not promote justice between the parties. I am of the firm view that the learned trial judge *in casu* did not, as Jones, J put it in *De Witt Auto Body (Pty) Ltd*, *supra*, consider the defendant's explanation, be it good, bad or indifferent, in the light of the disclosed defence. Disclosure of a *prima facie bona fide* defence is an all important consideration as Jones, J, pointed out. In any case a *bona fide* defence disclosed at the time of applying for rescission of a default judgment is not intended to be a cast iron defence. The question of how good or bad that defence is, is an issue which should be determined at the trial of the main action. As stated in *Grants's* case, *supra*, "it is sufficient if (the defendant) makes out a *prima facie* defence, in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not fully deal with the merits of the case and produce evidence that the probabilities are actually in his favour."

[50] In the light of the foregoing, I must say, with due respect, that the concluding argument in the heads of argument submitted on behalf of the plaintiff, discrediting the interpretation espoused by the defendant regarding the meaning of section 34 *ter* was precocious. That argument ought to be submitted at the trial.

[51] Regarding the requirement to give a reasonable explanation for the delay in seeking rescission of the default judgment, it cannot, in the present case, be argued with great verve that the defendant's case was meritorious. There was undoubtedly a dereliction of its responsibility by the Government Attorney's office in failing to expeditiously deal with the rescission application. As for the palliative explanation concerning Mr. Bok's inability to attend to this matter on account of his indisposition, surely some other officer in the Government Attorney's office could have gone to the Court even for merely applying for an adjournment pending Bok's return to duty. With regard to the inaction attributed to the perceived interpretation of section 34 *ter* aforesaid, that was a matter which had to be vindicated in the Court in the proceedings of the main action.

[52] The foregoing notwithstanding, I share the view expressed in *Lewies v Sampoio*, *supra*, that although the fact of 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. Indeed as was also stated by Jones, J in *De Witts Auto Body (Pty), supra,* "(a)n application for rescission is never simply an inquiry whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our Courts." The Court's over-riding duty is to do justice between the parties. While dealing with the issue of *bona fide* defence, I am constrained to echo the observation of Maritz, AJA as he then was, in the case of *Transnamib Holdings*

*Ltd v Bernhardt Garoëb***,** *supra*. Quoting from Article 12 (1)(a) of the Namibian Constitution, he stated the following:

> "Litigants have a constitutional right to a fair trial in the 'determination of their civil rights and obligations'. In the adjudication of those rights and obligations, the Courts of law have a fundamental duty to do justice between the parties by, *inter alia*, allowing them a proper opportunity to ventilate the issues arising from their competing claims and assertions."

[53] It is my firmly held opinion that in this case the key to doing justice between the parties can only be unlocked if the parties are afforded the opportunity of ventilating the issue arising from a proper interpretation of section 34 *ter* of Proclamation 17 of 1939. I am alive to the fact that referring this matter back to the Court *a quo* will occasion further delay in this litigation which has been going on since 1994. This notwithstanding, I am confident that the inordinate delay which has occurred will not, at the end of the day, result in failure of justice. Cases which depend on adducing evidence of witnesses can falter by such reasons as fading memories or non-availability of witnesses who were once available but are no longer to be found. Luckily, the present case is not one of those which become casualties of human failings. This case entails only arguments by legal practitioners regarding the meaning of section 34 *ter*, namely whether there was automatic forfeiture of the Nissan car upon conviction of the plaintiff or whether forfeiture had to be expressly ordered by the magistrate's Court which tried the plaintiff in the criminal proceedings to which reference was made at the start of this judgment.

[54] I do appreciate that Courts have coercive power to penalize litigants who fail to comply with rules of procedure in litigation. Since, however, the ultimate, constitutional and fundamental duty of Courts is to do justice, it is justice which must prevail. Indeed rules were made in order to be obeyed and to be disobeyed at a penalty. I, however, do not believe that justice must, per force, be sacrificed in the promotion of obedience to rules. Moreover, Courts do nonetheless have what I will call compensatory power to assuage any inconvenience which may have been caused to a party who is a victim of certain breaches of procedural rules. Courts can condemn the guilty party in all costs arising from his or her breaches.

[55] For the foregoing reasons, and particularly because in my view the defendant did raise a *prima facie* triable defence, I do not, with due respect, agree with the conclusion arrived at by my brother, O'Linn, AJA, that this appeal should be dismissed in as much as that conclusion is basically grounded on the gross negligence in the conduct of the defendant as considered above. I must hasten to add that I entirely agree that the defendant's conduct did amount to inexcusable negligence. This concession notwithstanding, my inclination is to allow the appeal for reasons already explained.

Whether the Application for Rescission was *Bona Fide*

[56] Under this heading are to be considered not only the original rescission application, but also the application for reinstatement of the rescission application. I shall dispose of this summarily. Both the explanation for the delay in filing the notice to defend and that in relation to the tardy application for reinstatement were offered in order to secure a chance to ventilate the defence under section 34 *ter* aforesaid. In my view, therefore, since that defence was *prima facie bona fide*, the explanations offered cannot be said to have been so offered merely in order to delay the plaintiff's claim. I hold that both applications were made in earnest and that they were both *bona fide*.

Contempt of Court

[57] By the fifth of the orders made by the Court *a quo* the defendant was required to comply with the judgment of 19 August 1994, failing which he was called upon to show cause why he should not be committed to prison for contempt of Court. The defendant was aggrieved by that order and hence an additional reason for this appeal.

[58] Both in his written heads of argument and in oral submissions, Mr. Corbett contended that based on South African case and statute law it was inopportune to commit a Minister of State to prison for a misfeasance committed by his Department. He cited two cases supporting that point of view. The first one he

cited was *Mjeni v Minister of Health and Welfare***,** Eastern Cape 2000(4) SA 446, at pages 453I-454B, in which Jafta, J, made the following dictum:

> "However, the difficulty with which the appellant was faced in this matter is the common-law rule which excludes the use of contempt of Court proceedings in enforcing an order for the payment of money coupled with the statutory provision prohibiting execution against State property. The common-law distinction between orders *ad pecuniam solvendam* and those *ad factum praestandum* regarding contempt of Court proceedings would not, in my view, make sense in cases where the State is the judgment debtor in the light of the provisions of s 3 of Act 20 of 1957. It would simply mean that the judgment creditor cannot enforce the judgment in the event of failure to pay whereas his counterparts would be able to do so against judgment debtors who are private persons. Effectively, it would mean those who sue the State run the risk of obtaining hollow and unenforceable judgments. The State could just ignore such judgments with complete impunity."

[59] The second was *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003(4) SA 477 (TPD) where Southwood, J's dictum is recorded at page 505B-F as hereunder:

> "While it is clear that the facts of the present case are clearly different from the facts in *Minister of Finance v Barberton Municipal Council (supra) and Schierhout v Minister of Justice (supra)*, I am not persuaded that the remarks regarding the interpretation and ambit of the relevant sections in the Crown Liabilities Act were made *obiter*. In my view, they were essential parts of the reasoning in both cases. But even if they were *obiter dicta*, they were made by the highest Court of the land (at the time) and are deserving of great respect. It is unlikely that any other Court would not regard itself as bound by the interpretation of the relevant sections. In *Schierhout v Minister of Justice* (*supra*) Innes, CJ, (at 110-11) clearly regarded himself as bound by the interpretation he gave to the provisions of the Act in *Minister of Finance v Barberton Municipality* (*supra*).

> I consider this interpretation to be binding on me. I therefore reluctantly conclude that s 3 of the State Liability Act would preclude the execution of a committal order against a Minister or other public official where the State has deliberately not complied with an order of Court. I say reluctantly because I find the reasoning of Jafta, J in *Mjeni (at* 452C-453H and of Ebrahim, J in the *East London Transitional Council* case at 1138C-1140I) compelling."

[60] In agreeing with the *dicta* of both Jafta, J and Southwood, J in the preceding cases, I want to give an additional reason why it is inopportune to make committal orders against Ministers of State. I take judicial notice of the notorious fact that tenure of office in positions of Minister is sometimes quite ephemeral. A Court may very rightly make an order against a Minister as nominal head of a particular Department of State, but in the interim period before the order is effected that Minister may be transferred to another Department and another person takes over. Worse still, the Minister in office at the time of making the order may be removed from Cabinet altogether. The poser then is whether the order is to be enforced against the succeeding nominal head or against the individual who was head of that Department at the material time, or should it be directed against the new nominal head in place of the one who was dismissed from Cabinet. In my considered opinion it would be preposterous to enforce the order against any of the persons in the changed scenario.

[61] In the present case, the papers show that the Minister of Home Affairs at the time of the commencement of the present suit was the Honourable Jerry Ekandjo. But he does not currently hold that office; he was replaced some time back. I do not believe this Court would be taken seriously if Hon. Ekandjo or even the incumbent Minister of Home Affairs was to be compelled to comply with the fifth order of the Court *a quo.* The order

has lost meaning firstly because the appeal should be allowed and secondly because it would be ludicrous to enforce it in the changed situation.

[62] For the foregoing reasons I do not endorse the committal order.

[63] Having earlier found that the defendant had by and large satisfied the bench-marks in *Grant's* case, *supra*, regarding rescission, the only issues remaining to be resolved in this appeal are those relating to condonation and costs.

Condonation

[64] Under this heading the defendant sought condonation for his failure to file the record of appeal timeously in compliance with Rule 5(5) of the Rules of this Court. The application was opposed.

[65] The effect of refusing a condonation application is that the applicant would be barred from presenting his appeal. In this case by consent of the parties' counsel, all arguments covering both the condonation issue and the merits were ventilated and heard by us. I have now reversed the judgment of the Court *a quo* on the merits. It would be a contradiction in terms to reject the application for condonation. The effect of my judgment is, as I shall presently indicate, that this case should go forward and be considered on the merits in the Court below, that is in regard to the plaintiff's civil action. In the circumstances I hereby grant the application for condonation.

Costs

[66] The Judge in the lower Court described the defendant's conduct in regard to this litigation as being grossly negligent. I agree it was. Despite that he is now being allowed an opportunity to have a hearing in the light of the apparent plausibility of the defence he disclosed against the claim, I think that his sluggish and negligent conduct needs to be visited with strong condemnation in terms of costs. He is largely to blame for the fact that this matter protracted for years up to the time it came to this Court. In the final analysis I would make the following orders:

1. The appeal is allowed.

2. The orders of the Court *a quo* are set aside and I substitute therefor the following orders:

"(a) The application for reinstatement of the application for rescission is allowed;

(b) the application for rescission of the default judgment is allowed and consequently;

(c) the default judgment is set aside;

(d) the order relating to committal is set aside;

(e) the defendant is directed that within 10 days from the date hereof he must file a notice to defend the plaintiff’s action; and

(f) the plaintiff's action, inclusive of the interpretation of section 34 *ter* of Proclamation 17 of 1939, should be set down for hearing before a different constituted Bench and as a matter of priority."

3. The defendant shall bear all costs in this Court and the Court below.

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CHOMBA, AJA

I agree.

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SHIVUTE, CJ

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