Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 1107/2011

In the matter between:

CMI BUSINESS ENTERPRISES CC	**Applicant**
and	
THEO SEPTEMBER	**First Respondent**
DEAN SEPTEMBER	**Second Respondent**
ROLAND PAULSON	**Third Respondent**
In re	
THEO SEPTEMBER	**First Applicant**
DEAN SEPTEMBER	**Second Applicant**
ROLAND PAULSON	**Third Applicant**
And	
CMI BUSINESS ENTERPRISES CC	**Respondent**

Heard: 30 May 2014

Delivered: 26 June 2014

Summary: Application for Rescission. Different description of dispute in referral to CCMA and in statement of case – Jurisdiction. What constitutes good cause.

JUDGMENT

GUSH J

[1] The applicant in this matter applies to rescind, in terms of section 165(a) of the Labour relations Act 66 of 1995 (LRA) alternatively in terms of rule 16 A (1)(a)(i) of the rules of this Court and further alternatively, the common law:

a. the order of this Court granted by default on 15 August 2012; and

b. the default judgment of this Court granted on 12 February 2013.

[2] The respondents had referred a dispute to the CCMA alleging unfair discrimination which dispute was set down for conciliation before a Commissioner appointed by the CCMA. On receipt of the referral of the dispute the applicant's instructed a Mr Andrew Lewis, an official of Ad Finem Employers Organisation, of which the applicant is a member, to deal with the dispute. Lewis attended the conciliation on behalf of the applicant. The dispute was not resolved and the Commissioner issued a certificate certifying that the dispute between the applicant and the respondents concerning unfair discrimination remained unresolved.

[3] During January 2012, the respondents filed an application with this Court in which application, they claimed to have been automatically unfairly dismissed on the grounds that the applicant had unfairly discriminated against them, and claimed compensation for the unfair dismissal. The respondents averred that the dismissal was a constructive dismissal.

[4] Despite the applicant having been represented by Lewis, the official of the Ad Finem Employers Organisation at the conciliation, the respondents served the application on the applicant itself. On receipt of the application, the applicant again instructed Lewis to represent it.

[5] According to the applicant, Lewis contacted the applicant's managing member, Cronje (the deponent to the rescission application's founding affidavit), on 16 January 2012 in order to take instructions. Attached to the founding affidavit is an e-mail dated 16 January 2012 that appears, read in context, to be the extent of the instructions given to Lewis.[1] There is nothing in the founding affidavit suggesting that the Lewis was given any further instructions. Or that Lewis misconstrued his instructions.

[6] Lewis in turn, on 20 January 2012 filed an opposing affidavit on behalf the applicant and recording that Ad Finem Employers Organisation had been appointed to accept notice and service of all documents. Lewis deposed to the applicant's opposing affidavit recording *inter alia* that the respondents submissions were not true and that "it is the [applicant's] submitions that the [respondents] are misleading the court with the application as they have left their employment without notice and seek avenues for compensation"[2] (sic). In essence, the opposing affidavit avers that the allegations in the respondents' statement of case are either "fabricated", "denied" or "untrue".[3]

[7] Under the heading "legal issues", Lewis states that the respondents' application "does not qualify with section (187) of the act or section (186E) of the act of the LRA 1995"[4] (sic). This clearly indicates that Lewis, who was present at the conciliation, clearly understood the respondents' claim to be based on an automatically unfair dismissal (section 187) and a constructive dismissal (186(e)).

[8] The e-mail referred to above and the opposing affidavits stand in stark contrast to the affidavit filed by the applicant in support of this application. I shall deal with issue further below.

[9] The pleadings having closed, the respondents called for the matter to be enrolled for a pre-trial conference and the matter was duly enrolled for the

[1] Annexure CMI 14 page 88 of the pleadings.
[2] Notice of opposition page 60 of the pleadings.
[3] Annexure CMI 06 pages 56 – 64 of the pleadings.
[4] Page 64 of the pleadings.

parties to conclude the pre-trial minute before a Judge at court on 15 August 2012.

[10] The applicant failed to attend court on 15 August and the following order was granted by default:

1. The respondent has failed to attend the pre-trial conferences directed by the court.

2. The matter has now become unopposed.

[11] In due course the respondents applied for the matter to be set down for default judgment and the matter was duly enrolled on the unopposed roll, on notice to both parties, on 8 February 2013 for default judgment. The applicants once again failed to appear. Judgment was reserved and handed down on 12 January 2013.

[12] It is this judgment that the applicant wishes to have rescinded. The judgment reads as follows:

1. having considered the application for default judgement and confirmatory affidavits, I am satisfied that the [respondents] were constructively dismissed by the [applicant] when they resigned and 13 September 2011 after being required to work under intolerable working conditions which entailed racial abuse, and racially discriminatory treatment in a variety of forms including disparate treatment when it came to accommodation, food and the like. The extent of the abuse is reminiscent of an era of white supremacy whose traces should long have vanished.

2. The [applicant] failed to attend the pre-trial conferences down before the court and 15 August 2012 and the learned judge ordered that the matter would be heard as a default judgement.

3. In the circumstances, I find that the [respondents] were dismissed for an automatically unfair reason based on their race, in terms of section 187 (1) (f) of the Labour Relations Act 66 of 1995 ("the LRA"). On the question of relief, given the facts of the matter, there is no reason not to award the maximum compensation the LRA permits. In calculating the [respondents']

monthly earnings I have used the lower level of the salary range claimed by the [respondents].[5]

[13] the learned judge granting default judgement ordered that the applicant pay the respondents R240,000; R240,000 and R192,000 and that the applicant pay the respondents costs.

[14] The respondents' attorneys demanded payment of the judgment. Annexed to the applicant's founding affidavit is a facsimile dated 12 February 2013 addressed to Lewis by the respondents' attorneys demanding payment of the amount of R672,000. Also attached is a similar facsimile dated 5 March 2013. A copy of the writ of execution dated 15 March 2013 was also addressed to Lewis. This writ was, according to the applicant, served on it on 3 April 2013.

[15] The applicant avers that on 12 March 2013, Lewis contacted the applicant and advised that respondents "now wants R672,000"(sic) but avers that it had only learnt of the default judgment on 3 April 2013.

[16] The applicant filed this application on 2 May 2013.

[17] The applicant's founding affidavit sets out a chronology of "material facts"; submissions in support of its rescission application with regard to its reliance on section 165 of the LRA alternatively rule 16 A of the Labour Court Rules; and under the heading the **Common Law - Good Cause** the facts and averments that it avers constitutes a reasonable and acceptable explanation for its default.

[18] In the founding affidavit the applicant states:

a. the respondents were not entitled to the order granted on 15 August 2012 and the default judgment granted on 12 February 2013;

b. the applicant is entitled to have the order granted on 15 August 2012 and the default judgment granted on: February 2013 rescinded on the grounds that:

[5] page 81 – 83 of the indexed pleadings

i. It had been erroneously sought and/or granted in its absence; alternatively

ii. That it has shown the existence of good cause.

[19] It is necessary to consider in turn whether the order and judgment were granted erroneously and if not whether the applicant has shown the existence of good cause by providing a reasonable and acceptable explanation for its default and that it has a *bona fide* defence.

[20] Section 165 of the LRA deals with the power of the Labour Court to vary or rescind orders. It provides that:

> 'The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order-
>
> (a) Erroneously sought or erroneously granted in the absence of any party affected by that judgment or order; ...'

[21] Rule 16 A of the Rules of the Labour Court sets out that:

> '(1) The court may, in addition to any other powers it may have-
>
> (a) Of its own motion or on application of any party affected, rescind or vary any order or judgment-
>
> (i) Erroneously sought or erroneously granted in the absence of any party affected by it;
>
> (ii) ...
>
> (iii) ...; or
>
> (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.'

[22] An application for rescission in terms of Rule 16A(1)(b) must be brought within 15 days of the party acquiring knowledge of the order or judgment granted in its absence.[6]

[6] Rule 16A(2)(d)

[23] In the matter of *Griekwaland Wes Koöperatief v Sheriff, Hartswater and Others: In re Sheriff, Hartswater and Others v Monanda Landbou Dienste,*[7] the court held:

> 'The requirements for filing an application under any of these rules are different. In terms of rule 16 A(1)(b) read with rule 16A(2)(b), an application to rescind or vary an order or a judgment must be brought within 15 days. The 15-day requirement does not apply to both rule 16A(1)(a) and the common law. See *Edgars Consolidated Stores Ltd v Dinat & others* (2006) 27 ILJ 2356 (LC). The other difference between the two rules is that, whilst rule 16A(1)(b) requires an applicant to provide a reasonable explanation for his or her default, this requirement does not apply to an application in terms of rule 16 A(1)(a)'.[8]

[24] In *SA Democratic Teachers Union v Commission For Conciliation, Mediation & Arbitration and Others,*[9] this Court quoted with approval what was held in *Sizabantu Electrical Construction v Guma and Others*[10] viz:

> 'In short, good cause is not required to be shown if a judgment or order was **erroneously** granted in the absence of a party'.[11] (My emphasis)

The first question therefore to be decided is whether the order was granted erroneously. If the circumstances and facts show that the order was granted erroneously the respondent need not to establish that it has good prospects of succeeding in its defence of the applicant's application, and the order must simply be rescinded.[12] If however the order was not erroneously granted the respondent is obliged to establish that it has a reasonable and acceptable explanation for its default and that it has a *bona fide* defence and good prospects of succeeding in its defence, should the order be rescinded.

[25] It is common cause that the applicant did not file its application for rescission within 15 days of acquiring knowledge of the default judgment. The applicant

[7] (2010) 31 ILJ 632 (LC).
[8] *Griekwaland Wes Koöperatief* at page 635 para 9.
[9] (2007) 28 ILJ 1124 (LC) at para 17.
[10] (1999) 20 ILJ 673 (LC); [1999] 4 BLLR 387 (LC).
[11] *Sizabantu Electrical Construction* at para 17 page 1129.
[12] See Erasmus et al *Superior Court Practice* (1994, Juta) at B1-308A.

learned of the judgment on 3 April 2013 and launched this application on 2 May 2013.

[26] The first basis upon which the applicant relies in seeking rescission of the order and judgment is that the judgment was granted erroneously.

[27] Whether it was granted erroneously depends on the facts and in this matter whether the court was procedurally entitled to grant an order in favour of the applicant in the absence of the respondent..

[28] Erasmus *et al* in *Superior Court Practice,*[13] when dealing with the equivalent rule in the High Court viz: Rule 42 "Variation and rescission of orders" set out that:

> 'The court does not, however, have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs *(a)–(c)* of the subrule does not exist.
>
> The rule should be construed to mean that once one of the grounds are established for example that the judgment was erroneously granted in the absence of a party affected thereby, the rescission of the judgment should be granted'.[14]
>
> 'An order or judgment is erroneously granted if there was an irregularity in the proceedings ... Rescission was refused where the applicant had failed to notify the registrar of companies of a change of address and a summons had been served in accordance with the rules at the office properly notified to the registrar as the applicant's registered head office. The courts have also consistently refused rescission where there was no Rule 42 irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney'.[15] [Footnote omitted]

[29] What constitutes an "order erroneously granted" is set out in Harms *Civil Procedure in the Supreme Court*[16] :

> an order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts, if none too, would have precluded from a

[13] *Supra*.
[14] Eramus *et al* Superior Court Practice at B1-306G.
[15] Eramus *et al* Superior Court Practice at B1 308A and B1-309.
[16] Harms Civil Procedure in the Supreme Court; Lexus Nexus

procedural point of view from making the order. The error need not fear ex facie the record. But this does not mean that if the party is procedurally entitled to judgment it could be said that the judgement had been granted erroneously because of court was unaware of the defence defendant could have raised but did not.(footnotes omitted)[17]

[30] In the matter of *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd,* [18] the Supreme Court of Appeal dealt with the decision in *Topol* and held the following:

> ' In *Nyingwa* at 510F – G, White J relying on *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C) said:
>
> > 'It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'
>
> In *Topol,* an application was dismissed in the absence of the applicants on the basis that the respondent had given notice to the applicants of the setting down of the application and that the applicants despite their knowledge of the hearing were in default. The application for rescission in terms of Rule 42(1)(a) was successful. White J, in *Nyingwa*, understood the factual position in *Topol* to have been that notice of the set down of the application had not been given to the applicants and that the dismissal of the initial application was for that reason held to have been erroneous. If that had indeed been the factual position in *Topol*, the respondent in that matter would procedurally not have been entitled to a judgment in its favour, the granting of the judgment would for that reason have been erroneous and there could have been no objection in the rescission application to evidence to the effect that proper notice of set down had in fact not been given.
>
> *Frenkel* was a case in which a default judgment was rescinded on the basis that it had been granted under a misapprehension. The misapprehension

[17] B42.4 page B – 301 [issue 43]
[18] 2007 (6) SA 87 (SCA).

would seem to have been that the legal representatives wrongly assumed that the capital sum claimed had not been paid. It was, therefore, not a case of a judgment having been granted erroneously but a case of a judgment having been sought erroneously. In *Holmes,* the rescission of a default judgment was not granted on the basis of the judgment having been granted erroneously. Although not altogether clear it would appear that White J misunderstood the factual position in *Topol*. It seems to me that notice of set down had been given in that case but that the Judge who granted default judgment was held to have granted the judgment erroneously by reason of the subsequently disclosed fact that the defaulting party had not been in wilful default. Erasmus J had shortly before the judgment by White J in *Nyingwa* differed from the finding in *Topol* and said that in light of the fact that the *Topol* matter had been properly enrolled and that all the Rules of Court had been complied with, the plaintiff was quite within its rights to press for judgment in terms of the Rules (see *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 472D). *Bakoven* Ltd contended that judgment had erroneously been granted against it in that although the matter had been properly set down for trial it did not have knowledge of such set down. Erasmus J said:

> 'An order or judgment is ''erroneously granted'' when the Court commits an ''error'' in the sense of a ''mistake in a matter of law appearing on the proceedings of a Court of record'' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was ''erroneously granted'' is, like a Court of appeal, confined to the record of proceedings.'

He concluded that the judgment granted against Bakoven Ltd in its absence could not be said to have been erroneously granted 'in the sense contemplated in Rule 42(1)(a), as applicant cannot point to any error or irregularity appearing from the record of proceedings'.[19] [Footnote omitted]

[31] The Court in *Lodhi* went further and held:

> [17] in any event a judgement granted against the body in its absence cannot be considered to have been granted erroneously because of the existence of the defence on the merits which had not been disclosed to the judge who granted the judgement.

[19] *Lodhi 2 Properties Investments CC at* pages 92 – 93 paras 18 – 21.

And concluded

> [25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in Stander. See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 - 10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by this the Judge who granted the order.[20]

[32] The question as to whether the order and judgment in this matter were made erroneously are dependent upon:

a. firstly was the court on the papers before justified in granting the order; and

b. secondly was there a procedural error which led to the order being granted the judgment in the absence of the applicant?

[33] In respect of the first issue, viz: was the court entitled to grant the order, the applicant in addition avers that the judgment was granted erroneously in that, had the court been aware of the nature of the respondents' referral of the dispute to the CCMA, it would not have granted judgment on the grounds that the dispute had not been conciliated.

[34] The applicant specifically avers that the dispute forming the subject of the respondents' statement of claim had not been referred to the CCMA and accordingly had not been conciliated prior to it be referred to this Court and therefor the court did not have jurisdiction to consider the matter.

[20] *Lodhi 2 Properties Investments CC* at page 94 para 25.

[35] It is so that the respondents' referral of the dispute to the CCMA is not a masterpiece of clarity and is categorised as a dispute involving unfair discrimination. At the conciliation, the dispute was recorded as being unresolved and categorised as being a dispute involving unfair discrimination. The applicant argued that the respondents' cause of action in their statement of case was not the dispute referred to conciliation, namely unfair discrimination, but an alleged automatically unfair constructive dismissal. The respondents in their statement of claim set out in some detail the nature of the alleged unfair discrimination and alleged that this unfair discrimination primarily on the basis of their race had led to their decision to resign in circumstances where their continued employment had become intolerable.

[36] In dealing with the nature of the dispute referred to the CCMA, both the applicant and the respondents rely on the decision in *NUMSA vs Driveline Technologies.*[21] The applicant relied on that part of the judgment where it was held that:

> 'to me it is as clear as daylight that the wording of section 191(5) imposes the referral of the dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour court for adjudication. I cannot see what clearer language the legislature could have used other than the language chose to use in section 191 (5) it had if it had intended that the referral dismissal dispute to conciliation to be a precondition to such dispute be arbitrated or being referred to the Labour court for adjudication.'

[37] The respondent cited the judgment of Conradie JA where he held

> In exercising its discretion the court will undoubtedly ask itself whether the dispute, in the sense of the essential quarrel between the parties, had been submitted to conciliation. It is the factual matrix which should be looked at. The idea of the act, after all, is that parties should, in the presence of a knowledgeable outsider, have an opportunity of talking over the differences before going to court.[22]

[38] This view finds resonance in rule 15 of the rules for the conduct of proceedings before the CCMA that came into effect in 2003.

[21] 2000 1 BLLR 20 LAC.
[22] At page 24 para 8

[39] The essence of the decision in Driveline Technologies is that the dispute between the parties must be referred to conciliation before it is arbitrated or adjudicated.

[40] It is clear from section 191 of the LRA that it refers to disputes about both unfair dismissals and unfair Labour practices. It requires that such dispute to be conciliated and that if the dispute is not resolved it may be referred either to arbitration or to the Labour Court.

[41] In addition, the applicant referred to the categorisation of the dispute by the respondents where they marked the box reading "Unfair Discrimination: S10 of the Employment Equity Act" as being authority for the fact that the dispute that formed the respondents' cause of action was not the dispute that was referred to the CCMA for conciliation.

[42] The applicant appears to have lost sight of the provisions of rule 15 of the Rules for the Conduct of Proceedings before the CCMA that provides that the nature of the dispute must be identified "as described in the referral document **or as identified by the Commissioner during the conciliation process**". It goes without saying that in order to attempt to conciliate the dispute, it is necessary for a Commissioner to determine the nature the dispute. This would not be possible if a conciliating commissioner was precluded from enquiring into the nature the dispute because the referrer of the dispute did not absolutely accurately describe the dispute.

[43] The form LRA 7.11 is the prescribed form that the parties who wish to refer disputes to the CCMA for conciliation must complete. This form is not a pleading but is designed to facilitate the referral disputes to the CCMA for conciliation. Under the heading nature of the dispute, the referrer is given a number of options and invited to "tick only one box". The only reference on this form to unfair discrimination has a reference to section 10 of the Employment Equity Act. In disputes such as the dispute that forms the respondents' cause of action in their statement of case, the form does not provide for the categorisation of the dispute as an automatically unfair dismissal on the grounds that the employer has unfairly discriminated against

the erstwhile employee. To strictly interpret the nature and description of the dispute in the referral would simply serve to frustrate the function of the Commissioner tasked with conciliating the dispute having in particular identified the nature of the dispute.

[44] In this matter, it is abundantly clear that during the course of the conciliation the dispute that was referred to conciliation was determined to be a dispute based on unfair discrimination that warranted referral to the Labour Court. Lewis attended the conciliation and it is inconceivable that he did not report back to the applicant as to what had transpired during the conciliation. In the statement of opposition, Lewis states that the respondents had absconded and that the court had no jurisdiction.[23] This convincingly suggests that that Lewis was aware of the nature of the respondents' dispute that was conciliated, viz that it involved an allegation that they had been dismissed.

[45] It is inconceivable that had the nature the dispute as set out in the statement of claim been at odds with the dispute conciliated that this issue would not have been raised in the opposing affidavit by Lewis, who had attended the conciliation.

[46] The Commissioner identified the dispute as one pertaining to unfair discrimination and, albeit gratuitously, advised the parties that the dispute could be referred to the Labour Court. There can be no doubt that the respondents' cause of action embodied in their referral namely that they were constructively dismissed is based on unfair discrimination.

[47] The Labour Court's jurisdiction to consider disputes is set out in section 157 of the LRA. It provides that the court may refuse to determine any dispute if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation. In this matter, it is abundantly clear that the dispute between the applicant and the respondents **was** referred to conciliation and that **a certificate of outcome recording that the dispute had not been resolved was issued**. On the strength of this alone there can be no doubt that the court had jurisdiction to consider the matter.

[23] Pleadings page 60.

[48] As there was clearly no error in the procedure, or any mistake, that resulted in the court granting the order and the default judgment, I am accordingly not persuaded that the court in the circumstances granted the order and judgment erroneously.

Given that the applicant's did not refer the application for rescission within the 15 day time period provided for in Rule 16A(2)(d) what remains to be considered is whether the applicant has satisfied the the common law requirement that its application was brought within a reasonable time and thereafter whether it is entitled to an order rescinding the order on the grounds that that the applicant has established good cause in that it has a reasonable and acceptable explanation for its default and that it has a *bona fide* defence and good prospects of succeeding in its defence should the order be rescinded. .

[49] Dealing firstly with the issue of whether the applicant brought its application within a reasonable time, it is clear that with the exercise of reasonable care, the applicant should have enquired from Lewis why the amount of compensation claimed by the respondents had been determined to be R670,000. At very least on being advised that this was the amount and that he, Lewis, "had to see an advocate", it is not unreasonable to have expected the applicant to make further enquiries. I am, however, not satisfied that the delay from 12 March 2013 to the date on which the application was brought cannot be said to be a reasonable time.

[50] As far as the issue of good cause is concerned the requirements are considered at length in *De Wet and Others v Western Bank Ltd*,[24] where it was held that the court had a discretion to decide whether to grant an applicant the indulgence of granting rescission of a default judgment or order "having regard to all the circumstances of the case including the [applicants] explanation for the default".[25]

[24] 1979 (2) SA 1031 (A).
[25] At page 1043.

[51] In *Shoprite Checkers v CCMA and Others*, [26] the LAC explained the requirements to show good cause in a rescission application:

> 'The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a prima facie defence.'

[52] In *Northern Province Local Government Association v CCMA and others*;[27] it was held that:

> 'An applicant for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defence to the plaintiff's claims.'[28]

[53] In *MM Steel Construction CC v Steel Engineering & Allied Workers Union E of SA and others,*[29] when dealing with these elements the court held that:

> 'Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.'[30]

[54] In summary, therefore, the basic test for an applicant wishing to show good cause is that it must satisfy the court that its explanation is reasonable and *bone fide* and that it has a *prima facie* defence.

[55] In considering whether it is fair and just to grant the indulgence, it is necessary to consider all the circumstances including the interests not only of the applicant but those of the respondents.

[56] The applicant's explanation for its default is that its chosen representative did not keep it advised of what was happening or what had transpired in the matter but had simply allowed the default order to be taken and subsequently

[26] (2007) 28 ILJ 2246 (LAC).
[27] (2001) 22 ILJ 1173 (LC).
[28] at 545 para 16.
[29] (1994) 15 ILJ 1310 (LAC).
[30] at 1311J-1312A.

the default judgment. In essence, it blames its predicament entirely on the ubiquitous Mr Lewis of the Ad Finem Employers Organisation which it was a member.

[57] The applicant elected to use the services of an employer's organisation of which it was a member. There is no indication as to whether it used the services previously and whether if it had it had received proper service. The absence of such an explanation weighs against the applicant.

[58] Equally concerning is the failure of the applicant to provide either an explanatory affidavit from Lewis as to what transpired with the matter or even a confirmatory affidavit regarding his failure to deal with the matter properly. The applicant does not even attempt to explain why there is no affidavit from Lewis.

[59] The only excuse the applicant offers is that on various occasions in response to telephone calls from one of its an employees (a Ms Meiring) that Lewis had assured her the matter was in hand. Only one date is mentioned in this regard namely 23 January 2012 some seven days after the applicant had given instructions to Lewis to oppose the application. It is suggested without any further detail that Meiring telephoned Lewis "at least once every month from February 2012 up to and including March 2013 to enquire into the status of the dispute." This explanation is improbable. It is highly unlikely that if Meiring had been that diligent in making all these telephone calls that she would not have recorded the dates on which the telephone calls were made; made some contemporaneous note; or addressed some form of memo to the applicants members, and in particular Cronje.

[60] The deponent to the founding affidavit, Cronje, avers that he met with Lewis twice during September with regard to other matters and that he too coincidently was assured, as was Meiring, that all was in order.

[61] The bald averment by the applicant without any further detail that it regularly contacted Lewis is improbable. The applicant's initial attitude towards the respondents' application is graphically illustrated by the extent of instructions given to Lewis as set out in the e-mail annexed to the applicant's papers in

this application.[31] Not only is there is nothing in the applicants papers to suggest that Lewis was given any further instructions. The opposing affidavit filed by Lewis reflects the applicant's instructions. It must be borne in mind that the applicant had had sight of the respondents' statement of case when Lewis was given instructions as the statement of case had been served on the applicant itself.

[62] The applicant attaches to its founding affidavit an email addressed to Lewis in response to having received the respondents statement of claim. The e-mail reads as follows:

> Lanklaas gehoor, ek hoop dit gaan goed? Hierdie drie manne wat sulke lelike aantuigings teen my maak, is geld soekers. Jy moet aaseblief probeer om hierdie saak te wen. Ek wil n siviele saak van naamskending teen hulle maak, ek het baie wit swart en kleurlinge wat vir my werk wat kan getuig dat hierdie aantuigings teen my n klomp snert is. Ek is wel baie streng maar het nog nooit iemand aangerand of sleg behandel of enige politiek in my besigheid bedryf nie. Ek is onder die indruk hierdie manne wil vir my laat sleg lyk in die hof om die hof se simpatie te kry. Ek was net goed vir hulle, my opinie is dat hierdie manne agter geld is, hulle skuld my duisende waarmee hulle weggeloop het toe hulle gedros het."

[63] Lewis's notice of opposition and opposing affidavit in essence reflect, albeit almost incoherently, the contents of the applicant's e-mail. This stands in stark contrast to the now detailed explanation given by the applicant in its founding affidavit in this application. This suggests that the applicant at the commencement of this matter approached the respondents' application in an unseemly cavalier and dismissive manner.

[64] I am not satisfied that the applicant has managed to establish that its explanation for its default is reasonable and *bona fide*.

[65] It is so that in *MM Steel Construction CC v Steel Engineering & Allie*d *Workers Union,* it was held that the absence of a reasonable explanation is usually fatal if not necessarily so.

[31] Page 88 of the pleadings.

[66] Although the explanation offered by the applicant does not satisfy the test of reasonableness or *bona fide*, it is necessary to consider whether the applicant's defence suggest that it has a *prima facie* defence to the respondents' claim.

[67] The applicant offers no explanation for the defence raised in Lewis's notice of opposition and affidavit and in particular the contents of the e-mail. It cannot be gainsaid that the notice of opposition and opposing affidavit initially filed by lewis on the instructions of the applicant amounted to what was a disdainful and simple bare denial all the allegations raised in the respondents' statement of claim. This opposing affidavit does not disclose a *bona fide* defence.

[68] Nowhere does the applicant suggest that it had not had sight of or been given a copy of Lewis's notice of opposition and opposing affidavit and accordingly it is inconceivable that it was not aware of the defence initially pleaded. Despite this the applicant offers no explanation whatsoever regarding the contents of the notice of opposition and opposing affidavit nor does it seek to distance itself from this defence.

[69] Faced with the judgment the applicant now endeavours, in its rescission application, to provide some form of defence which now includes a detailed response to or explanation for the specific issues raised by the respondents. This must of necessity raises serious questions regarding the *bona fide* nature of the applicant's defence.

[70] It is not unreasonable in the circumstances to conclude that at the time the respondents' statement of claim was served the applicant disdainfully dismissed the claim as being brought simply by "manne", "geld soekers" who were making "lelike aantuigings". This suggests that the defence and supposed explanation now raised by the applicant is no more than a simple and cynical attempt to satisfy the court that the applicant has a *bona fide* defence. In the circumstances and for the reasons set out above, I am not persuaded firstly that its explanation is reasonable and *bone fide* and that it has a *prima facie* defence; or secondly that it is fair and just to grant the applicant the indulgence it seeks.

[71] As far as costs are concerned there is no reason in law or fairness why cost should not follow the result.

[72] I accordingly make the following order:

a. Neither the order the order of this Court granted by default on 15 August 2012 nor the default judgment of this Court granted on 12 February 2013 were granted erroneously;

b. The applicant has failed to provide a reasonable and acceptable explanation for its default or that it has a *bona fide* defence and good prospects of succeeding in its defence should the order be rescinded; and accordingly;

c. The applicant's application is dismissed with *costs*.

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D H Gush

Judge of the labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:	Adv E Cosyn
	Instructed by Klopper Jonker Inc
FOR THE FIRST RESPONDENT:	Luway Mongie Bowman Gilfillan Attorneys