

HELD AT MASERU

In the matter between:

MINISTER OF HEALTH
PRINCIPAL SECRETARY, MINISTRY OF HEALTH
ATTORNEY GENERAL

1st APPLICANT
2nd APPLICANT
3rd APPLICANT

and

MOTSEKUOA TEBOHO KHOELE

RESPONDENT

JUDGMENT

22/02/17

Practice and procedure - Application for rescission of judgment granted by default - Essential elements thereof restated - Mainly two, reasonable explanation for the default and a bona fide defence that has prospects of success - Applicants' Counsel claiming that she was sick on the day of hearing and further that applicants have prospects of success in that the claim had prescribed and that the injuries sustained by the respondent were a result of his misconduct - Court finds explanation for the default unreasonable and the applicants lacking a bona defence - Application dismissed.

1. This is an application for the rescission of a judgment obtained by default by the respondent on 09th July, 2015 on the basis of lack of representation for the applicants despite having been duly informed of the date of hearing by this Court. The crux of the dispute between the parties is a workmen's compensation claim instituted by the now respondent against the applicants. A brief factual background is that the respondent had been engaged by the Ministry of Health, then the Ministry of Health and Social Welfare as an HIV/AIDS Counsellor on a contractual basis. The current dispute arose out of an incident that occurred on 26th March, 2009 at Koali Clinic in the Berea district where the respondent was stationed wherein he was shot in the stomach by a security officer, sustained injuries and subsequently admitted to hospital. The latter had apparently intervened in an altercation between the respondent and a fellow colleague. It was following this incident that the respondent filed a workmen's compensation claim under the ***Workmen's Compensation Act, 1977.***

2. It is worth mentioning that the claim was only lodged on 27th November, 2013 when the accident had occurred on 26th March, 2009. The claim was never made good hence the respondent sought the intervention of this Court. The applicants, then respondents,

filed opposing papers and the matter was set down for 28th March, 2015. There was no representation for the applicants on the day of hearing and the matter proceeded by default. In reaction, applicant's Counsel filed a rescission application which is the subject of the current dispute.

3. The basis of applicants case is that on the set day of hearing, applicants' Counsel was physically indisposed. Applicants submit that they have a **bona fide** defence to respondent's claim which **prima facie** carries prospects of success in that they raised a special plea of prescription to the claim and further that his injury was not connected to his duties but was a result of his misconduct. The rescission application is vehemently opposed.

EVALUATION BY THE COURT

4. Principles regulating rescission applications are trite. In **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others**¹ per Van Reenen J., the Court stated that:-

In terms of the common law, a Court has a discretion to grant rescission of judgment where sufficient or good cause has been shown. 'But it is clear that in principle and in the long - standing practice of our Courts, two essential elements of "sufficient cause" for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his [or her] default; and***
- (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospects of success.***

These essentials of "**sufficient cause**" were laid down in an earlier case of **Chetty v Law Society of Transvaal**.² It is not sufficient if only one of these elements is established.

5. Briefly, in granting rescission of judgment, the Court must be satisfied, firstly, that the applicant was not deliberately or intentionally in default, and secondly, that he or she has a **bona fide** defence against the claim which resulted in the default judgment. These principles have been reiterated in a number of cases including **Loti Brick v Thabiso Mphofu**,³ **Napo Thamae and Another v Agnes Kotelo and Another**⁴ and **CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd**.⁵ The Court is therefore confronted with two main questions:

¹ 1996 (4) SA 411 at 417J - 418D

² 1985 (2) SA 756 A at 765 B - C per Muller J.A.,

³ 1995-1996 LLRLB, 446 at 450

⁴ C of A (CIV) No. 16/2005

⁵ LAC (2007 - 2008) 463 at 473 (No. 5 of 2008)

- i. Whether applicants' Counsel's failure to attend the hearing on 26th March, 2015 was reasonable; and
- ii. Whether on the merits, applicants have a bona fide defence, which **prima facie** has some prospects of success.

6. Applicants' Counsel's reason for the delay was that she was ill on the day of hearing, and was therefore not in wilful default. Respondent's Counsel insisted, on the other hand, that applicants' Counsel's failure to attend the otherwise scheduled hearing was wilful in that she could have communicated her inability to attend the hearing to the Registrar of this Court or requested one of her colleagues to seek a postponement on her behalf. He submitted further that the matter had earlier been postponed at the instance of applicants' Counsel, and again that she failed to prove that she was indeed sick. Assuming, without acceding, that applicants' Counsel could have been unwell on the set date of hearing, we feel she ought to have taken steps to ensure that the Court is alerted either through her office or through the office of the Registrar of this Court. Communication channels are so diverse these days that even a Short Message System (SMS) would have sufficed. In our opinion, she failed to take sufficient steps to inform the Court of her failure to attend. This was either an act of recklessness on her part or lack of seriousness in approaching this matter. The Court is not pleased at all. It therefore finds the explanation unconvincing and unacceptable.

7. The second enquiry simply answers the question whether the applicants would be successful in the main case if the order of rescission were to be granted. In order to establish a **bona fide** defence, the applicant must set out averments which, if established at the trial, would entitle him or her to the relief he or she asks for.⁶ As aforementioned, Applicants' Counsel submitted that they had a **bona fide** defence that carried prospects of success on the merits for two main reasons, firstly, that respondent's claim is prescribed and secondly, that he did not sustain the injury whilst executing his duties, and the injury has therefore not arisen "**in the course of employment**" as required by the **Workmen's Compensation Act, 1977**. She averred that the respondent is the one who initiated the fight and the security guard was acting in self defence when he shot him. She submitted that she has made out a clear case for the rescission of the judgment granted in favour of the respondent.

8. Addressing applicants' Counsel's averments in motivation of prospects of success, applicants appear to have in a way acceded to the claim. It is a million dollar question why the applicants reported the accident to the Labour Department for assessment of compensation if it felt it did not occur "**in the course of employment**" rendering it not liable. It is common cause that the 1st and 2nd applicants reported the accident to the Labour Department through submission of **LD Form W/C9 - "Notice by Employer of accident causing injury to or death of Workman"**⁷ dated 13th February, 2014. The

⁶ Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)

Van Aswegen v Macdonald Forman & CO., Ltd 1963 (3) SA 197 (O).

⁷ Marked annexure MTK1 to respondent's originating application

purpose of this notice is to facilitate the assessment of compensation due to the injured or deceased workman by the Labour Department. The latter duly made an assessment through **LD FORM W/C 2** on 17th March, 2014, computed it at **Thirty - Three Thousand, Ninety Four Maloti and Eighty - Seven Cents (M33 094. 87)** and remitted it to the applicants.

9. It is also puzzling that, despite the alleged accident having occurred around 26th March, 2009 and the respondent only having lodged his workmen's compensation claim on 27th November, 2013, the applicants proceeded to remit his claim to the Workmen's Compensation Section of the Labour Department, but then turn around to claim prescription. Why was the defence of prescription not raised then? It is common cause that the applicants through their Human Resource and Compensation Manager referred respondent's claim for compensation to the Workmen's Compensation Section (Labour Department) on 18th February, 2014 through a savingram referenced **MOH/HR/R8/P2**, thereby endorsing the claim.

10. Respondent alleged in his originating application that the applicants had already processed payment and he was asked to collect a cheque when the then Principal Secretary cancelled it before his very eyes. If this allegation were to be established as true, it would also be absurd why the applicants went to the extent of processing payment only to plead a **bona fide** defence to the claim later.

ORDER

Having found Applicants' Counsel's explanation unconvincing and having further established that applicants do not have a **bona fide** defence that carries any prospects of success on the face of it, the Court comes to the following conclusion that:-

- i) The application for rescission is dismissed;**
- ii) The judgment of this Court handed down on 09th July, 2010 stands; and**
- iii) There is no order as to costs.**

THUS DONE AND DATED AT MASERU THIS 22ND DAY OF FEBRUARY, 2017.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

R. Rampa
Assessor

I concur

S. Makhasane
Assessor

I concur

For the Applicants : Adv., S. Mats'osa - Attorney General's Chambers
For the Respondent : Adv., M. Ntabe - M. Ntabe Chambers

ANNOTATIONS

STATUTES REFERRED TO

Workmen's Compensation Act, 1977

CITED CASES

Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411
Chetty v Law Society of Transvaal 1985 (2) SA 756 A
Loti Brick v Thabiso Mphofu 1995-1996 LLRLB, 446 at 450
Napo Thamae and Another v Agnes Kotelo and Another C of A (CIV) No. 16/2005
CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 - 2008) 463 (No. 5 of 2008)
Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)
Van Aswegen v Macdonald Forman & CO., Ltd 1963 (3) SA 197 (O).