REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: C144/08

In the matter between:

BELLS BANK NUMBER ONE (PTY) LTD **Applicant**

and

THE NATIONAL UNION OF MINE WORKERS **First Respondent**

LEFU AND TWENTY OTHERS **Second and Further Respondent**

Heard: 10 May 2011

Delivered: April 2012

Summary: Postponement application – absence of good and strong reasons – rescission application – wholesale disregard of rules of Court

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JUDGMENT

VAN VOORE AJ

[1] On 26 April 2010 Cheadle AJ handed down a judgment against Bells Bank Number One (Pty) Ltd (the company). The company was ordered to, *inter alia*, retrospectively reinstate Lefu and the 20 other individual employees previously dismissed by it and was ordered to pay costs of suit. Further, the employees were ordered to report for duty by 14 May 2010. That judgment was granted in the absence of the company.

[2] On or about 27 May 2010 the company launched an application an application to rescind the judgment of 26 April 2010. The rescission application is purportedly one under rule 16A of the rules of this Court. The hearing of the rescission application was set down for hearing on 11 May 2011. At the commencement of the hearing counsel for the company applied for a postponement of the hearing of the rescission application. The postponement was not granted. The reasons for that order are set out below. After the postponement application was dealt with counsel for the company the applied for condonation for the late filing of the rescission application. At the time I ordered that the parties also argue the rescission application.

[3] A number of factual claims are made which are unsupported by affidavits. The judgement of 26 April 2010 apparently it came to the company's attention on or about 28 April 2010 and the company first delivered a notice of motion supported by an affidavit on 27 May 2010. In the circumstances the rescission application is out of time. When launching the rescission application the company did not also apply for condonation. A condonation application was brought during argument in this Court on 11 May 2011. However for the reasons that appear later in this judgment, even if accompanied by an application for condonation, that would not resolve the other problems with the application.

[4] The rescission application was served on 27 May 2010. The respondents delivered an answering affidavit on 28 June 2010. That affidavit was nine days late. The respondents have applied for condonation for a late filing of the answering affidavit. That condonation application is unopposed. The company did not file a replying affidavit. On 12 July 2010 the Registrar issued

a directive calling upon the parties to file heads of argument in the rescission application. The company was required to file heads of argument within 15 court days of 12 July 2010. The company's heads of argument were due on 2 August 2010. The company did not file heads as required. In fact when this matter came before me on 10 May 2011 the company had still not filed heads of argument. The late filing of the respondents' answering affidavit in the rescission application is condoned.

[5] The respondents took steps to have the rescission application enrolled for hearing. The opposed rescission application was set down for hearing. The respondents delivered heads of argument on or about 29 April 2011. The notice of set down in respect of the enrolment of the opposed review application was delivered to the legal representative of both parties.

[6] At the hearing of the rescission application counsel for the company informed the Court that she was instructed on the evening of 9 May 2011, the day before the hearing of the rescission application, to appear for the respondent. Counsel for the company informed the Court that her instructions were to apply for a postponement of the hearing of the application and to tender costs. Counsel further informed the Court that on Friday 9 May 2011, two working days before the hearing of this matter Mr O'Donavan, the company's attorney, wrote a letter to the respondents' attorney requesting a postponement. This is confirmed by the respondents' attorney. Counsel further informed the Court that on the evening of 9 May 2011 she advised Mr O'Donavan, the company's attorney, that the writing of a letter would not be sufficient and that an application for a postponement must be launched. Even assuming that an application could properly launched on 9 May 2011, the company advances no proper explanation for the fact that an application for a postponement was first launched on 10 May 2011. The notice of set down in respect of the rescission application was properly served on the company's attorney.

[7] The stated reasons which the company contends motivates an application for a postponement are that the attorney moved offices in December 2010 and this matter was 'over-looked and omitted' from the list of files for notices of

change of address' and that as a consequence notices and correspondence in this matter did not come to his attention until after a notice of change of address was served and filed during March 2011. Importantly, a copy of the notice of change of address is not attached to the affidavit in support of the application for a postponement. Furthermore examples of similar notices served in other matters in which the attorney is involved are also not attached. The company's explanation is not a full explanation and is lacking in detail. The company's attorney says, on affidavit, that he moved offices in December 2010. Prior to moving offices in December 2010 he would then have been required to serve a notice of change of address on relevant persons such as the applicant's attorney. The fact that he did not do so prior to moving from his Parkmore offices and, on his own version, only did so during March 2011, discloses gross negligence on his part. Even if true, and this is a matter open to some doubt given the absence of facts and details, this cannot properly be the basis of an application for a postponement.

[8] The company's attorney further claims that he has been required to attend to a part- heard trial set down for hearing in the Westonaria Magistrates' Court for 10 May 2011. It appears that this is offered by way of explaining his failure to appear in this Court on 10 May 2011. This claim, even if true, is troubling. The company's attorney does not say when the Magistrate's Court matter was set down for hearing on 10 May 2011. He does not provide a notice of set down or any document in support of his claim. The attorney does not give the Court any indication of the nature of that other matter. Nor does the attorney place before the Court steps taken by him in an attempt to arrange alternative dates for the Magistrates' Court matter, alternatively steps timeously taken by him to arrange alternative dates for the hearing of the opposed rescission application. Interestingly, it appears that the attorney's December move and the alleged flooding during February 2011, to which I will return shortly, did not impact negatively on his ability to prepare for and be present at the Westonaria Magistrates' Court. Given these deficiencies in the company's explanation, the explanation amounts to no explanation at all and in some respects does not ring true.

[9] The company's attorney further claims that his offices were flooded during February 2011 and that in the clean-up operation his office file in this matter was misplaced. The attorney goes on to say that "I have last week located the file after a thorough search, but my client's draft replying affidavit, together with the consultation notes, is lost." This appears all too convenient. The attorney does not say precisely when during February the flooding took place. No facts in substantiation of the alleged flooding are put forward. Moreover it appears that it took from sometime in February all of March and April as well as the first few days of May 2011for the attorney to locate the file. This is an extraordinarily long period. No explanation is offered for the period of more than two months that it took to locate the file. The attorney does not say when he commenced the clean-up operations. The attorney says nothing of the extent of the flooding and so it is not possible to assess whether a period of more than two months is justified. It is also significant that the timing of the location of the files coincides rather conveniently with the letter to the respondents' attorney requesting a postponement of the hearing of the rescission application. In addition, whilst the files were apparently located the draft replying affidavit and consultation notes were not. It is quite remarkable that the company's attorney could think that so thin and obviously problematic a purported explanation amounts to a reasonable explanation. Of very serious concern indeed is that the explanation is offered in part for the failure to deliver a replying affidavit. The answering affidavit of 28 June 2010 was served by registered post. A replying affidavit, if any, was due well before the end of July 2010. The attorney moved offices in December 2010. By then he was in receipt of the opposing affidavit for at least five months. The alleged flooding took place some time in February 2011. The attorney's December 2010 move and the alleged flooding of February 2011 do not and cannot explain the failure to deliver a replying affidavit. The attorney does not say when he first took instructions in relation to the applicants' answering affidavit. The fact that the attorney thinks that a move in December 2010 and an alleged flooding in February 2011 could explain the company's failure to deliver an affidavit during July of 2010 displays gross negligence and a wilful disregard of the rules of this Court.

[10] On the facts the December 2010 move, the other matter at the Westonaria Magistrates' Court and the alleged flooding is all that is offered in support of an application for a postponement. Given the deficiencies and indeed serious problems with this explanation, I am ineluctably drawn to the conclusion that the request for a postponement is not one made in good faith. The request for a postponement must be viewed also against the backdrop of the company's failure to appear in the Labour Court on 26 April 2010. This does disclose a pattern of unpreparedness and attempts to avoid the alleged unfair dismissal dispute being finally determined. It is the position under our law that an applicant for a postponement must show 'good and strong reasons'.[1] A Court should be slow to refuse a postponement. Where fairness and justice require it[2] I have already dealt with this above. Further an application for a postponement must be *bona fide*.

[11] In this matter the application for a postponement was launched on the very day of the hearing. Further the application is not supported by a full and satisfactory explanation of the circumstances that gave rise to it. In all of the circumstances the Court is drawn ineluctably to the conclusion that the postponement application is indeed a tactical manoeuvre for the purpose of obtaining an advantage to which the company is not entitled. This is a matter in which the prejudice caused to the employees by a postponement cannot be compensated by an appropriate order of costs or indeed any 'other ancillary mechanism'. As matters stand there is no replying affidavit in the opposed rescission application. This is but one disadvantage that the company seeks to overcome. Differently put it appears that through the application for a postponement the company seeks, *inter alia*, to secure for itself an advantage (the delivery of a replying affidavit) to which it is plainly not entitled.

[12] In the circumstances the application for a postponement is dismissed with costs.

<u>The condonation application</u>

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1 *McCathy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA) at 494D.*
2 *Madintsky v Posenberg 1949 (2) SA 392 (A) at 398 – 9*

[13] In the result the condonation application must be dealt with. At the commencement of argument counsel for the company handed up an application for condonation of the late filing of the rescission application. The judgment of Cheadle AJ came to the attention of the company on Wednesday 28 April 2010. A rescission application, if any, should have been delivered by 12 May 2010. Instead the rescission application was delivered on or about 27 May 2010. The rescission application is some 10 days late. The company waited until 10 May 2011 to apply for condonation. An application was handed up in Court on 10 May 2011. At no time before 10 May 2011 did the company attempt to serve a condonation application on the applicants' attorney. Under our law a litigant who has failed to comply with the rules of Court must apply for condonation without delay. This principle was again confirmed in the matter of *Allround Tooling (Pty) Ltd v NUMSA* [1998] 8 BLLR 847 (LAC) para 8. It took the applicant from May 2010 until 10 May 2011 to apply for condonation. Moreover, counsel for the company informed the Court that she was instructed to apply for condonation only in the event that the company's postponement application was refused. Knowing that it must apply for condonation without delay, the company applied for condonation nearly a full calendar year after the rescission application was launched. The company and its attorney have acted with wilful disregard of the law as it relates to the timing of a condonation application and the rules of this Court. The irresistible inference is that the timing of the condonation application was, in large measure, a tactical manoeuvre.

[14] The affidavit in support of the company's condonation application says nothing of its timing. This in itself is telling. In attempting to explain the delay the company's attorney's affidavit says that Mr G Marinus (Marinus) of Werksmanns Attorneys, incorporating Jan S de Villiers Attorneys, was the company's attorney of record until 20 April 2010, a week before the trial. It is then alleged that an agreement was concluded between Marinus and Mr Cloete, the respondents' attorney that the matter would not proceed on 26 April 2010 but that it would commence on Wednesday 28 April 2010. Interestingly this assumes that the company's attorney would be in a position to proceed on Wednesday 28 April 2010. However other allegations made in

the affidavit appear to give the lie to this assumption. For example it is alleged that the Court file was made available to the attorney on 6 May 2010 and to the company on 8 May 2010, having been uplifted from the Court file on 3 May 2010. Nowhere is it alleged that the company's attorney was already in possession of the Court file or indeed a copy of the file of Marinus. In fact at paragraph 19 of the affidavit in support of the condonation application the company's attorney says that:

> 'For the purpose of acquainting myself with the matter and drafting the rescission application I required Marinus' file which contained the notes and correspondence and client's documents relating to this case. I was however not able to obtain a copy of the file. I asked the applicant to find copies of these missing documents. However the previous owners of the applicant had employed an employer's organisation Employer's Service Organisation of South Africa (ESOSA) to conduct the matter on its behalf. The employer's organisation, in turn, had instructed Marinus. Neither of them co-operated with me or the applicant's representatives. In the circumstances, it was eventually not possible to obtain copies of the client's documents which had been supplied to the employer's organisation and the launching of the rescission application was considerably delayed on account of this difficulty.'

[15] It is important to observe that in an affidavit dated 10 May 20111 a claim is made that Marinus did not co-operate with the company's attorney in his attempts to acquaint himself with the matter and to prepare a rescission application. This allegation is astounding. The rescission application itself makes a number of allegations concerning discussions and communication as between Marinus and Cloete. In fact in the affidavit in support of the rescission application it is alleged that Cloete and Marinus had reached an agreement that the matter would not proceed on 26 April 2010. The rescission application was accompanied by an unsigned confirmatory affidavit of Marinus. The impression sought to be conveyed to a reader of the rescission application is that the company's attorney contacted Marinus and consulted with him for the purposes of preparing a rescission application. Nearly one

year after the rescission application was launched it is alleged that Marinus was not co-operating with the company's attorney and that the company's attorney did not get from Marinus a copy of his file. This does compromise the rescission application itself. Either the rescission application was prepared following consultations with and co-operation of Marinus and information gleaned from such consultation and co-operation or it was not. On the basis of the attorney's affidavit of 9 May 2011 the inescapable conclusion is that there were no consultations (telephonically or otherwise) with Marinus which informed the preparation of the rescission application.

[16] Moreover the company's attorney says that the first occasion on which a Mr Christopher Kimber (Kimber) of the company was available for a consultation was 27 May 2010. This is offered apparently for the rather limited purpose of the rescission application. However if indeed the company's attorney was in a position to proceed with a trial whether on 26 April 2010 or 28 April 2010 he would have said so. O'Donavan's affidavit would have said that he met with Mr Kimber for the purposes of trial preparation before 20 April 2010 (being the date on which Marinus withdrew as the attorney of record). The affidavit would have said that he had familiarised himself with most if not all of the material and relevant documents and that he had consulted with witnesses as part of his trial preparation before 20 April 2010. Being ready on or before 20 April 2010 is a necessary part of the applicant's case in the rescission application as the applicant in that application contends that an agreement was reached that the matter would not proceed on 26 April but rather on 28 April 2010. As matters stand there is no factual basis that would properly support a conclusion that the company had taken the necessary steps so as to be ready for trial on 28 April 2010. The company's attorney and the company itself have not played open cards with this Court. There is more that is unsaid than said. The Court is left to make sense of allegations which at first blush appear to record a logical and coherent sequence of events but on a proper reading and analysis do no such thing. Regrettably I am compelled to the conclusion that the company has not applied for a postponement in good faith nor has it applied for condonation in good faith. The attorney's affidavit alleges that:

'(b) The Applicant seriously intended to appear and conduct its defence at the trial hearing; and

(c) The Applicant was not aware that the Respondent would proceed with the trial hearing on Monday, 26 April 2010;'

[17] A proper analysis of the pleading does not support these allegations.

[18] The minimum requirements of an explanation were set out in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 353 where it was said that:

> 'The defendant must at least furnish an explanation of his own default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.'

[19] In further attempting to explain the delay the company's attorney again seeks to rely on an alleged agreement between Marinus and Cloete. I have sufficiently dealt with this issue.

[20] In addition the company's attorney alleges that he was unable to attend to the preparation of a rescission application timeously because of other commitments and in particular CCMA arbitrations on Monday 11 May, Thursday 13 May and Friday 14 May 2010. This does not improve the company's position. So busy an attorney ought not to accept an instruction in circumstances where the previous attorney of record withdrew some four days before the date of trial. The attorney would have known of his many other commitments well before 20 April 2010. One must assume that, with an awareness of the consequences for his client should he be unable to properly execute its instructions, he accepted the mandate. In those circumstances, the explanation that he was overly busy is not available to the company's attorney.

[21] The explanation offered for the failure to apply for condonation earlier amounts to no explanation at all, alternatively is at best very weak. The manner in which the company and the attorney have conducted this litigation

since late April 2010 discloses a disregard of the rules of Court and the law in relation to the timing of a condonation application. This conduct is indeed wilful. On this ground alone, condonation should properly be refused.

The rescission application

[22] I have nonetheless considered the rescission application. The company alleges an agreement between Marinus and Cloete that the trial would not proceed on 26 April 2010. There is nothing by way of factual matter that supports the allegation that such an agreement was reached. The rescission application makes a number of allegations in relation to Marinus and his dealings with Cloete. No confirmatory affidavit has been filed from Marinus. In the circumstances the company was required to be present in Court on 26 April 2010 and there is no proper explanation for its absence. In the matter of *Grant v Plemmers (Pty) Ltd* 1949 (2) SA 470 (O) the Court held that a party must:

> '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.'

[23] The National Union of Mine Workers (the union) and Lefu and the 20 other individual employees (the employees) referred an alleged unfair dismissal dispute to this Court for adjudication. A notice of set down was issued on informing the parties that the trial had been set down for the period 26 to 30 April 2010. Both parties received that notice of set down. Cloete representing the union and the employees was in Court on 26 April 2010. The company was not. Until 20 April 2010 the company was represented by Jan S de Villiers attorneys. Jan S de Villiers withdrew as the attorneys of record on 20 April 2010. The circumstances in which they withdrew or the reasons for their withdrawal are not canvassed in the papers presently before this Court. On 26 April 2010 the matter was called and indeed heard. After hearing the case of the union and employees a judgment was handed down against the company.

[24] One of the company's principal grounds is that there was an agreement between its then attorneys of record, Jan S de Villiers, and Mr Cloete on behalf of the union and the employees that the matter would not in fact proceed on 26 April 2010 but rather on some later date. In support of the claim that there was such an agreement the company relies on communications between its then attorneys of record (Jan S de Villiers) and Cloete. The company makes the claim that during March 2010 there was a discussion between the attorneys regarding the issue of the trial date as allocated by the registrar and that this discussion led to an agreement that the trial of the matter would commence on Wednesday 28 April 2010 and not on 26 April 2010. The company further claims that the registrar was persuaded by the parties' respective legal representatives to permit the matter to start on Wednesday 28 April 2010 rather than on Monday 26 April 2010. Moreover the company claims that its then attorney discussed the issue of the 'date of the commencement of the trial with Cloete again on 15 or 16 April 2010' and that Cloete confirmed his agreement that the trial would commence on Wednesday 28 April 2010.

[25] On the back of these claims held up as evidence of agreement the company makes a number of very serious allegations against Cloete. The company contends that Cloete was under a duty to 'honour his agreement' and to inform the Court of the 'existence of the agreement'. The company goes further and says that Cloete failed to keep his word. These are serious allegations. However a proper assessment of matters sees a very different picture emerging. The company's rescission application is supported by the affidavit of one Kimber. A number of material factual claims are made in Kimber's affidavit in relation to communications and contact that the company's previous attorneys apparently had with Cloete. These are matters that are not within Kimber's knowledge. The file contains an unsigned confirmatory affidavit in the name of the company's previous attorney of record. That affidavit remains unsigned and accordingly there is no confirmatory affidavit before this Court. There is no substantiation of the claims made of an agreement which flowed out of various alleged communications between the attorneys. To obtain such an affidavit from the

company's then attorneys of record would not be a difficult task. If the claims made in relation to the company's then attorneys of record and Cloete are true (did in fact come to pass) then there is no good reason why those claims would not be confirmed on affidavit. The absence of such an affidavit is telling. In the circumstances the company's claims of an agreement that the matter would not proceed on 26 April 2010 (even assuming that such an agreement could be concluded without the support or sanction of the registrar or indeed the Judge allocated to hear the matter) are without proper foundation. Absent proof of an agreement that the matter would not proceed on 26 April 2010, the company's rescission application is seriously compromised. As at that date of the hearing of the rescission application the company had not advanced any proof in support of its claims of an agreement between the attorneys.

[26] A number of very serious allegations were made against Cloete. As matters stand, these allegations are unsubstantiated and have no support in the facts of what transpired. A party, and in particular one is legally represented, would be well advised to be quite sure of the facts prior to making such serious and potentially damaging allegations. It appears that the company, in pursuit of its attempts to undo a judgment granted against it, was quick to charge dishonour and unethical behaviour against Cloete. Those allegations against Cloete are entirely without foundation. When the matter came before me on 10 May 2011 there was still nothing by way of substantiation of the company's claims of agreement. This Court cannot tolerate conduct such as that displayed by the company.

[27] The legal principles in relation to an application for rescission of a default judgment in this Court are well known. An applicant in a rescission application must demonstrate a reasonable explanation for the default and in relation to the merits of the dispute, a *bona fide* defence which, *prima facie*, carries some prospect of success.

[28] In the matter of *Chetty v Law Society, Transvaal* (1985) (2) (7) 56 (AD) the Court held that:

'But it is clear that in principle and the longstanding 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 default; and

ii) That on the merits such party has a *bona fide* defence which, prima facie carries some prospect of success. (*De Wet's* case Supra at 1042: *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A): *Smith N.O. v Brummer and Another: Smith N.O. v Brummer* 1945 (3) SA 352 (O) at 357-8.)

It is not sufficient if only one of these two requirements is met for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be neglected if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the Applicant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on

16 September 1980 of the *rule nisi* issued on 22 April 1980,'

[29] The company absented itself from Court on 26 April 2010. It alleges that that absence was the result of an agreement between the attorneys that the matter would not proceed on 26 April 2010. As appears from the respondents' answering affidavit, Cloete denies such an agreement. The other party to the alleged agreement, Mr Grant Marinus (Marinus) of Jan S De Villiers has not confirmed that such an agreement was reached. Marinus withdrew as the company's attorneys of record on 20 April 2010, just days before the trial. In the rescission application it is not alleged that the company's new attorneys of record consulted with Marinus in the preparation of the rescission application. It is not alleged that he initially co-operated but subsequently refused to co-operate. Nothing of the sort is offered.

[30] On the basis of the facts before this Court, the only reasonable conclusion is that there was no agreement that the trial would not commence on 26 April 2010. The consequence of this is that the company's default in appearing at Court on 26 April 2010 cannot be explained by an agreement the matter would not proceed on that day. The company has offered no reasonable or satisfactory explanation for its failure to appear in Court on 26 April 2010. In the result the company has offered no reasonable explanation whatsoever for its failure to be in Court on 26 April 2010.

[31] In all of the circumstances I make the following order:

31.1 The application for a postponement is dismissed with costs.

31.2 The application for condonation is dismissed with costs.

31.3 The application to rescind the judgement of 26 April 2010 is dismissed with costs.

VAN VOORE AJ

Appearances:

For the Applicant:	Adv S. Harvey
Instructed by:	Patrick O'Donavan Attorneys
For the Respondents:	N. Cloete
Instructed by:	N. Cloete Attorneys Inc.