REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 108/2014

In the matter between:

STANLEY NICK KATZAO **APPLICANT**

and

TRUSTCO GROUP INTERNATIONAL
(PTY) LTD **1st RESPONDENT**
MANFRED HENNES **2nd RESPONDENT**
(in his capacity as the Deputy Sheriff of Windhoek)

Neutral citation: *Katzao v Trustco Group International (Pty) Ltd (A 108/2014 [2014] NACHMD 175 (4 June 2014)*

Coram: SMUTS, J
Heard: 16 May 2014
Delivered: 4 June 2014

Flynote: Application for rescission of judgment given in the absence of a party under the erstwhile Rule 37 (16). Applicable principles restated. The court also stressed the change in litigation culture brought about by judicial case management, stressing that parties

cannot sit idly by and do nothing with regard to their cases. Explanation involving inaction found to be inadequate and the court also finding that the defence raised lacked reasonable prospects of success. Application dismissed.

ORDER

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1. The order issued by the registrar is corrected to reflect the sum of N$115 637, 32 as being the judgment amount.

2. The application is dismissed with costs. These costs include those of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

[1] The applicant, defendant in a trial action, applies for rescission of judgment granted against him under Rule 37(16) of the erstwhile Rules of Court on 9 April 2014.

[2] The judgment was granted in the sum of N$115 637, 32 together with interest *a tempore morae* on that amount from 1 March 2007 to date of payment and costs, including the costs of one instructed and one instructing counsel. The defendant's defence was also struck with costs and his counterclaim dismissed with costs. The amounts reflected in the ensuing court order however differed from the judgment actually granted. This aspect is further dealt with below. A warrant of execution was issued pursuant to the court order and the applicant's Porsche motor vehicle was attached by the deputy sheriff pursuant to that writ on 24 April 2014. The deputy sheriff is cited as the second respondent in this application.

[3] In this application, the applicant applies to rescind the judgment and order granted against him on 9 April 2014 and for further orders reinstating his plea and counterclaim and cancelling all process including the warrant of execution and sale in execution pursuant to the court order of 9 April 2014. The applicant also seeks an order releasing his motor vehicle from judicial attachment and restoring it to him.

Factual background and pleadings

[4] The factual background which led to this application is sketched in the affidavits filed on behalf of the parties.

[5] The applicant is a former senior employee of the first respondent, which in turn was the plaintiff in the trial action. The applicant was an employee until his resignation on 16 February 2007. After his resignation, the first respondent instituted an action against him claiming two amounts, namely N$90 000 in lieu of the failure on the part of the applicant to give three months' notice of his resignation a further claim in the amount of N$100 000 being the repayment of a bonus paid to him. In respect of the latter claim (for the repayment of the bonus), a letter of 8 August 2006 is attached to the particulars of claim specifying the terms of the payment of a performance bonus of N$100 000 which stated:

> 'In the event you resign within one year from date hereof, you shall be liable to pay back the said N$100,000.00 to the company.'

[6] The particulars of claim however also state that the first respondent was indebted to the applicant in the sum of N$74 362, 68 in respect of accrued leave and an entitlement under an employee's fund. The balance of N$115 637, 32 was thus claimed from the applicant.

[7] In his plea, the applicant denied being liable in respect of either sum to the first respondent. The defence raised in respect of the first claim was that he had been constructively dismissed by the first respondent. In respect of the second claim, it was alleged that the letter amounted to a variation of his

employment agreement and had not been signed by all the parties and he denied he was liable to repay that bonus. The applicant also filed a special plea, denying the jurisdiction of the High Court to hear the matter. He stated that the Labour Court had exclusive jurisdiction to hear the matter under s 81 and/or s 19(1) of the Labour Act, 6 of 1992.

[8] The applicant also instituted a counterclaim. It was also based upon a constructive dismissal and he claimed three months' notice pay in the sum of N$90 000 plus the further amount of N$74 362, 68 in respect of accrued leave pay and his entitlement under the employees fund referred to.

[9] After the closure of the pleadings, the special plea was set down in the course of judicial case management. It was argued on 25 October 2011 and judgment was delivered in respect of the special plea on 24 November 2011, dismissing the special plea. An appeal to the Supreme Court was noted, but the appeal lapsed.

[10] The reason given for the lapsing of the appeal is stated in the founding affidavit of this application to be that the applicant was advised that it was not possible to note an appeal against that judgment. The applicant further stated in his founding affidavit:

> 'I then left the matter in the hands of my legal practitioners (Conradie & Damaseb) waiting to be informed as to what the next cause (*sic)* of action. I was at all times under the impression that what remained was that the court would allocate a date in due course and that my legal practitioner would in turn furnish me with such a hearing date for the respondent's case and my counterclaim. I did not hear from my legal practitioner for quite some time. I however took it that whenever they needed me, I will be contacted.
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> Towards the end of March 2014 and the beginning of April 2014 I was unable to receive my post mails due to the fact that I did not have the key of the post box I was using. The key was given to my girlfriend's brother who, I was informed, misplaced it.'

[11] The applicant refers to his "girlfriend" (without even reference to her name although a confirmatory affidavit is provided by a Ms Tjitendero) obtaining a new key for the post box on 8 April 2014. He further states:

> 'On 8 April 2014 whilst in China on a business trip I was telephonically contacted by my girlfriend. She informed me that she just collected mails in the post box. She informed me that she collected a registered mail which she says needed my urgent attention.'

[12] The mail was read to the applicant informing him that the trial action was scheduled for a status hearing in the course of judicial case management on 9 April 2014.

[13] The applicant further states that he immediately telephonically contacted Mr D Conradie who said he had withdrawn from the matter. The applicant states that this was a surprise to him. He states that he asked Mr Conradie when he had withdrawn and was informed that this had occurred during 2013. He further stated that he asked Mr Conradie to attend court on 9 April 2014 on his behalf. He states that Mr Conradie initially declined that request stating that he no longer acted on his behalf but after pleading with Mr Conradie, the applicant states that he agreed to attend court on 9 April 2014 on condition that they would have a serious talk about their relationship upon the applicant's return from China. The applicant states that he did not have any further discussion with Mr Conradie and assumed he had attended court on that date. He returned to Namibia from China on 20 April 2014, pointing out that 21 April 2014 was a public holiday and that he tried to contact Mr Conradie on 22 April 2014 without success.

[14] When attending what was termed "my criminal case" at the Regional Court, Katutura on 24 April 2014, the applicant states that the deputy sheriff confronted him with a warrant of execution and proceeded to attach his Porsche motor vehicle. He enquired from the first respondent's legal practitioners who were present at the time as to the basis of the writ and was informed that judgment had been granted against him on 9 April 2014.

[15] The applicant further states that he conducted a search for the notice of withdrawal referred to by Mr Conradie and received a receipt from Nampost for an envelope to Conradie & Damaseb which had not been claimed by him. The receipt was dated 11 April 2013. He points out that the receipt suggested that the notice of withdrawal had been sent back to Conradie & Damaseb.

[16] The applicant further states in his founding affidavit that he was unaware of the withdrawal of his legal practitioners and of the status hearing set down for 9 April 2014, prior to being telephonically informed of that on a previous day whilst in China.

[17] He referred to the court order which reflected that judgment in two amounts had been granted against him, namely N$90 000 and N$74 362 and stated that this was erroneous as the plaintiff's claim only amounted to N$115 637, 32.

[18] In support of his application, the applicant states that he had a *bona fide* defence and good counterclaim. In support of the contention that there had been a constructive dismissal, the plaintiff states that the first respondent secured his resignation "through undue influence and in an oppressive manner put me under unbearable circumstances and forced me into a resignation without the requisite 3 months' notice". He claims that his resignation was thus "forced". As background, he states that he was suspended in his employ by the first respondent on 24 November 2006 pending a disciplinary hearing. He further states that he had a meeting with the Managing Director of the first respondent on or about 13 December 2006 and that the latter had requested him to resign his employment and invited proposals and conditions for his resignation. He states that he provided proposals in response to this invitation on 14 December 2006 and was informed that on 22 December 2006 that these were not accepted. He further states that he was orally requested to resign and that similar requests had been made to his legal representative. He states as a result of these "coercive measures", he instructed his erstwhile legal practitioners, Conradie & Damaseb, to resign on his behalf on 17 February 2007. He submits that these circumstances amount to a constructive dismissal. In the alternative,

he argues that the first respondent had waived the requirement of three months' notice.

[19] The applicant does not state which rule is invoked in this application. Like the first respondent, I assume it is Rule 56 (read with Rule 138). The applicant does however also contend that the order was erroneously granted with reference to the judgment amounts contained in the court order. This was not persisted with in reply after the transcript of the proceedings was attached. This aspect is referred to below.

[20] This application is opposed by the first respondent. An answering affidavit was filed. In it, the point is squarely taken that the applicant had failed to explain what steps he took after the dismissal of the special plea in 2011 until 8 April 2014 when informed of the status hearing. The point is made that for a period of some 2 ½ years the applicant had no communication with his legal practitioner and made no attempt to enquire as to the status of the matter and provide instructions. The point is made that it is unsurprising that the applicant's erstwhile legal practitioners withdrew in April 2013.

[21] The point is also taken that the applicant had provided no explanation why the notice of withdrawal had not come to his attention. A contention is advanced that this was a further indication of indifference on his part.

[22] The first respondent denied that the applicant had provided a sufficient and acceptable explanation for the failure to take steps which had resulted in the judgment having been granted against him. It was further contended that the applicant was grossly negligent and that the applicant could not divest himself of the responsibility of taking steps in relation to the trial action. It was also pointed out that the notice of withdrawal was sent by registered mail to the correct address of the applicant who failed to provide an explanation as to why it had not been claimed.

[23] The first respondent's head of legal services who deposed to the affidavit stated that after the writ had been served upon the applicant on 24 April, a

meeting was held at the deputy sheriff's office. In the course of that meeting, the first respondent's legal representative had contacted Mr Conradie by telephone and spoken to him on speaker phone. In the course of that discussion, the applicant had pertinently asked Mr Conradie if he had remembered that he had contacted him and asked him to go to court. Mr Conradie had answered unequivocally that he had told the applicant that he was not going to court and that he did not even have a power of attorney.

[24] Mr Conradie was contacted subsequently by the first respondent's legal representatives. He confirmed that he had been contacted by the applicant from China and that he had informed him that he would not attend at court. A confirmatory affidavit was filed on behalf of Mr Conradie when the matter was called.

[25] It was also stated in the answering affidavit that the first respondent's legal practitioner of record had sent a notice of a status hearing scheduled for 5 March 2014 at 15h30, in terms of Rule 37(9) issued by this court in February 2013 by registered mail to the applicant.

[26] The first respondent also referred to the fact that on 5 March 2014 this court made an order that the status hearing was postponed to 2 April 2014 at 15h30. The applicant did not appear in court on 5 March 2014. The court order postponing the matter specifically provided that, should the applicant not appear in court on 2 April 2014, his defence may be struck with costs and his counterclaim be dismissed with costs. A copy of this order was forwarded to the applicant by registered mail. A further notice by court postponing the matter to 9 April 2014 was also forwarded to the applicant by registered mail. The point is raised in the answering affidavit that the applicant only refers to the latter item sent by registered mail in respect of the court hearing on 9 April 2014 but does not refer to the earlier items sent by registered mail in February 2014, at a time when, upon his own version, the key of the post box had not as yet been misplaced.

[27] The first respondent also attached the transcription of the proceedings on

9 April 2014 from which it clearly appears that the court granted judgment in the sum of N$115 637, 32 (and not the two sums stated in the court order) and furthermore struck the applicant's defence and dismissed the counterclaim with costs.

[28] As to the contention made by the applicant that he had been constructively dismissed by the first respondent, this was denied by the first respondent. It was pointed out that no factual basis was laid for the contention of a constructive dismissal. It is further stated that the applicant was suspended and subjected to a disciplinary hearing on charges of corruption. After some evidence was given, the applicant resigned and the contention is advanced that this was a tactical manoeuvre to avoid the disciplinary hearing from continuing.It was confirmed that the resignation was received in a letter addressed to the first respondent by the applicant's erstwhile legal practitioners of record on his behalf. In it, there is no reference to it being a forced resignation or constructive dismissal or with any reservation or rights. It is also denied that the first respondent requested the applicant's resignation or that there was any pressure upon him to resign.

[29] In the replying affidavit, the applicant states that he had not alleged that there had been absolutely no contact with his legal practitioner for a period of almost 2 ½ years. But he stated that there were long periods during which he did not hear anything in relation to the matter. He states that there had been "no word" from Mr Conradie concerning the matter or that he had the intention to withdraw. However no specificity is given concerning the communications - both with regard to when they occurred and what was stated in them.

<u>Parties' submissions</u>

[30] Mr Namandje who appeared on behalf of the applicant argued that the judgment by default against the applicant was a far reaching remedy against a litigant and that the court should be loathe to close its doors to a party once an explanation is provided for the default of appearance in the course of judicial case management. He submitted that the applicant had placed sufficient

material before court to satisfy the requirement of an acceptable explanation for the applicant's default and submitted that the relief sought should be granted.

[31] Mr Heathcote SC who, together with Mr P Barnard, appeared for the first respondent argued that the applicant had failed in respect of both legs of the requirement of good cause by failing to establish a reasonable and acceptable explanation for default and furthermore by failing to establish a *bona fide* defence which *prima facie* enjoys some prospects of success. He stressed that it was not sufficient for the applicant to establish one of these requisites and that both needed to be established.[1] Mr Heathcote further submitted that the applicant's explanation for his default was so cursory that it was not reasonable or acceptable and that the application should be dismissed for this reason alone.[2]

[32] Mr Heathcote also contended that the Supreme Court had recently established that disputed facts – in relation to the applicant's explanation – are to be determined in accordance with the *Plascon-Evans* rule and that the version of the first respondent is to be accepted. He referred to *Rally for Democracy v Electoral Commission for Namibia*[3] in support of this contention.

[33] In that matter, the court *a quo* had refused to grant the appellants leave to supplement their papers in an election application. In doing so, the court *a quo* had approached the disputed facts raised in support of the application to supplement the papers (in relation to the conduct of the parties during the discovery process) on the basis of the rule established in *Plascon-Evans*. The Supreme Court dealt with this issue in the following way:

> '[99] The appellants' principal attack on the finding of the court a quo is that it erred in the evidential approach which it adopted to decide the multitude of

[1] *Grüttemeyer NO v General Diagnostic Imaging* 1991 NR 441 at 448 J; *Chetty v Law Society, Transvaal* 1985(2) SA 756 (A) at 764-765.

[2] *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007(2) NR 675 (HC) at 687 E-G.

[3] 2013 (3) NR 664 (SC).

factual disputes on the papers about the conduct of the parties during the discovery process. They contend that, because the application to condone the filing of the appellants' application outside the time-limit provided for by s 110(1) of the Act was an interlocutory matter, the court should have adopted an approach similar to that applied in the case of interim interdicts. The approach proposed in Webster v Mitchell (to assess whether an applicant has made out a prima facie case for an interim interdict) has been formulated as follows:

> "The use of the phrase prima facie established though open to some doubt indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to some doubt."

Instead of this approach to the factual disputes, the appellants complain, the court a quo adopted and applied the *Plascon-Evans* approach. That approach has conveniently been summarised in *Republican Party of Namibia and Another v Electoral Commission of Namibia and Others* as follows:

> "It is trite law that where conflicts of fact exist in motion proceedings and there has been no resort to oral evidence, such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent. The facts set out in the respondents' papers are to be accepted unless the court considers them to be so far-fetched or clearly untenable that the court can safely reject them on the papers.'"[4]

and

[4] *Supra* par [99] at 711.

'[101] We appreciate that appellants' application for leave to supplement their papers may be interlocutory to the subject matter of the main dispute but, as to the substance of the application, the court must be satisfied that the explanation as to why they did not put the facts or information before the court at an earlier stage is adequate; that it was not due to mala fides or culpable remissness on their part and that, regard being had to all the circumstances, the affidavit should be allowed. As Franklin J put it in *Cohen NO v Nel and Another* —

> "Where an affidavit is tendered in motion proceedings, both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court; he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although his affidavit is late, it should, having regard to all the circumstances, nevertheless be received. On any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit is always an important factor."

[102] Save to the extent that the merits of the main proceedings may be a relevant consideration in an application of this nature and require of the court to consider whether those proceedings enjoy reasonable prospects of success, the determination of the substance of the application requires final adjudication of the adequacy of the explanation and the other facts and circumstances relevant to the introduction of further affidavits. Hence, in instances where factual disputes arise on affidavit that are not resolved by reference to oral evidence, those disputes fall to be determined on the approach adopted in the *Plascon-Evans* case in applications of this nature. On this approach, the two authorities relied on by the appellants are clearly distinguishable: In *SOS Kinderhof International v Effie Lentin Architects* the High Court dealt with an application for rescission of judgment and in *Hepute and Others v Minister of Mines and Energy* it dealt with a rule 47 application for security. Hence, we agree with the court a quo that the approach to factual disputes applied therein does not find application in these proceedings.'[5]

[5] *Supra* par [101] to [102] at p 712.

[34] Mr Heathcote argued that in interlocutory applications the *Plascon-Evans* approach is to be applied where there are disputed facts and that this had been established in this Supreme Court judgment. He correctly pointed out that the *Plascon-Evans* rule was applied to disputed facts in relation to the explanation provided by the applicant in those proceedings for the need to supplement its papers and contended that this approach would also apply to an explanation given in a rescission application.

[35] The difficulty with his argument is that the Supreme Court specifically found that applications for rescission of judgment, represented by the authority of a full court in *SOS Kinderdorf International v Effie Lentin Architects*[6] and applications for security in *Hepute and others v Minister of Mines and Energy*[7] are distinguishable. It is not clear to me why, upon the analysis of the Supreme Court, a rescission application should be distinguishable in respect of the adjudication of the adequacy of an explanation provided. Obviously the consideration as to whether a defence enjoys prospects of success is a different matter, as is also stated by the Supreme Court. But the Supreme Court found that a rescission application is distinguishable and the matter referred to, *SOS Kinderdorf* is a decision of the full bench and thus binding upon me.

[36] The analysis as to the approach to be adopted in respect of disputed facts, so carefully set out by the Supreme Court, would, with respect, appear to be sound. But that court expressly stated that the application of the *Plascon-Evans* approach to disputed facts in interlocutory proceedings was distinguishable from rescission applications with reference to *SOS Kinderdorf*. The court in the latter matter approached the issue in a far less considered and almost perfunctory manner. The only basis given for rejecting the *Stellenvale* rule in the *SOS Kinderdorf* matter was that it would not apply to applications where final relief was not sought and that in a rescission application, a matter is not finally decided. But that fundamental basis would appear to have been rejected in the more closely reasoned approach of the Supreme Court quoted

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[6] 1992 (NR) 390 (HC) at 399 B-C.

[7] 2007(1) NR 124 (HC) at 130.

above. Indeed, the sufficiency of an explanation or its adequacy is finally determined one way or another in a rescission application although of course the matter itself is not finally determined if the rescission application were to be granted. It is thus not clear to me why the determination of the adequacy of an explanation in a rescission application should be distinguishable in respect of the approach to disputed facts in interlocutory proceedings articulated by the Supreme Court (where the adequacy of an explanation was adjudicated for the purpose of applying to supplement papers).

[37] Upon the application of either approach, it would seem to me that the applicant has not established a reasonable and acceptable explanation for his default as I set out below. It is accordingly not necessary for me to express any further view in this interesting debate.

Applicable principles

[38] The requirement of good cause in Rule 56(3) itself entails two requisites. Firstly, the applicant must provide a reasonable explanation for his default which would exclude a court from coming to his assistance where his default was either wilful or due to gross negligence. Secondly, the applicant must establish a *bona fide* defence to the first respondent's claim which is to be established on a *prima facie* basis in the sense of setting out averments which, if established at the trial, would entitle him to the relief sought.[8]

[39] In examining an applicant's explanation for his default, it has been held that it is clearly incumbent upon an applicant to disclose with a degree of particularity what it was which prevented him from attending court or being represented in court.[9]

[40] It is also well-established that a party must meet both requisites, thus establishing a reasonable and adequate explanation for his default as well as

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[8] *Grüttemeyer NO v General Diagnostic Imaging supra* at 448 C-E.

[9] *Chetty v Law Society, Transvaal supra* at 766 A-B.

reasonable prospects of success on the merits.[10]

[41] In determining this application, this court is enjoined by Rule 56(1) to have regard to all the circumstances including those set out in Rule 56(1)(a) to (h).

Application of principles

[42] The applicant's special plea was dismissed on 24 November 2011. The applicant's statement of leaving "the matter in the hands of my legal practitioners (Conradie & Damaseb) waiting to be informed as to what the next cause of action" *(sic)* for the next 2 ½ years and making no enquiry or attempts to establish the position in the matter during that period does not in my view constitute a reasonable and adequate explanation for the applicant's ultimate default. It was only during a relatively short period from the end of March 2014 to the beginning of April 2014 when, upon his own version, the applicant was not able to receive mail at his post office box. Prior to that, he would have been clearly able to do so. He provided no explanation why he did not claim the registered item sent by his legal practitioner of record in April 2013, withdrawing as his legal practitioner of record. Nor is there any reference in his founding affidavit to the items sent by the first respondent's legal practitioners in February and early March 2014 referring to the earlier status hearing which was then postponed to April 2014.

[43] The applicant's difficulties do not end there. When informed of the court hearing on 9 April 2014 and that the applicant was at risk of his defence being struck and counterclaim being dismissed with costs in the event of his non-appearance, he is eventually spurred into action and telephoned Mr Conradie, his erstwhile legal practitioner.

[44] It is common cause that such a call was made. Its contents, however, are the subject of a dispute. The applicant states that he requested Mr Conradie to

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[10] *Chetty v Law Society, Transvaal supra* at 765 D-F.

appear in court on his behalf on 9 April 2014. Mr Conradie, however, emphatically denies this. In support of his denial he refers to the fact that he did not have a power of attorney on behalf of the applicant following his withdrawal and unequivocally states that he did not agree to appear on his behalf. When the matter was called on 9 April 2014, Mr Conradie did not appear and there was no appearance on behalf of the applicant. The applicant made no further enquiry until after his return on 20 April 2014. He did not request Ms Tjitendero, who had alerted him to the hearing, to make any follow up (to obtain confirmation of the alleged appearance and what had transpired). Nor had he done so himself by telephone, text message or email. After his return, he refers only to a single attempt to phone Mr Conradie on 22 April 2014. The fact remains that he had not made contact with Mr Conradie (and made little effort to do so) subsequent to his request to the latter to appear in court on his behalf until the warrant of execution was served upon him on 24 April 2014 – and even then the call was made to Mr Conradie, not by him, but by the first respondent's legal practitioner.

[45] Upon the approach set out in *SOS Kinderdorf*[11] to disputed facts, the probabilities do not in my view favour the applicant's version with regard to an undertaking by Mr Conradie to appear in court on the facts of this matter. Upon the application of the test in *SOS Kinderdorf*, the probabilities are against such an undertaking having been made. This finding would also arise upon the application of the *Plascon-Evans* approach by accepting the version of Mr Conradie tendered by the first respondent.

[46] There is also the applicant's failure to make <u>any</u> enquiry of his erstwhile legal practitioners with regard to the conduct of the trial action after the dismissal of the special plea in November 2011 until receipt of the notice on 8 April 2014. For some 2 ½ years, he took no interest in his case. He did not take the trouble to enquire as to its conduct with his instructing legal practitioner. Unsurprisingly they withdrew in April 2013. After being challenged in this regard in the answering affidavit, he vaguely states in reply that there had been some contact

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[11] *Supra*.

between himself and the legal practitioner because the latter handled another unspecified matter for him. But no specificity whatever is provided as to the contact and no allegation whatever is made of any enquiry of whatever nature about the conduct of this matter. Their notice of withdrawal in April 2013, sent by registered mail, was, he acknowledges, not claimed by him. No reason is given for this.

[47] On his own version, it is clear to me that the applicant was grossly negligent, in his approach to his case and that he has thus not established a reasonable and acceptable explanation for his default. This form of gross neglect, unacceptable even before the advent of judicial case management[12] (JCM), is even more so following its introduction, given the fundamental change to litigation culture brought about by JCM, as was stressed by the Supreme Court.[13] After referring to the objectives of JCM, that court spelt out the changes in the approach to litigation and in respect of the obligations of parties in the following way:

> [87] 'This radical departure is apparent from the objectives JCM which include:
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> "(a) to ensure the speedy disposal of any action or application;
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> (b) to promote the prompt and economic disposal of any action or application;
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> (c) to use efficiently the available judicial, legal and administrative resources;
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> (d) to provide for a court-controlled process in litigation;
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> (e) to identify issues in dispute at an early stage;

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[12] *Nyingwa v Moolman NO* 1993(2) SA 508 (TkGD) at 512 G-H.

[13] *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) approving *De Waal v De Waal* 2011 ((2) NR 645 (HC).

(f) to determine the course of the proceedings so that the parties are aware of succeeding events and stages and the likely time and costs involved;

(g) to curtail proceedings;

(h) to reduce the delay and expense of interlocutory processes…"

[88] And the JCM Rules spell out the obligations of the parties and their legal representatives, which is to :

"(a) assist the managing judge in curtailing the proceedings;

(b) comply with rule 37 and other rules regarding judicial case management;

(c) comply with any direction given by the managing judge at any case management conference or status hearing; and

(d) attend all case management conferences, pre-trial conferences and status hearings caused to be arranged by the managing judge." '

The Supreme Court concluded:

[89] 'The main purpose of the JCM is to bring about a change in litigation culture. The principal objectives of the JCM are to: ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement; increase the cost effectiveness of the civil justice system and to eliminate delays in litigation; promote active case management by the courts and in doing so, not only facilitate the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources; and inculcate a culture among litigants and their legal representatives that there exists a duty to assist the court in furthering the objectives of JCM.

> [90] With the advent of the JCM Rules where all parties to the proceedings have the obligation to prosecute the proceedings and assist the Court in furthering the underlying objectives, it would be highly relevant to consider any inaction on the part of the parties. And there is no place for defendants to adopt the attitude of "letting sleeping dogs lie" and for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be asserted.'

[48] Taking this into account in the context of all the circumstances set out in this application, including those listed in Rule 56(1)(a) to (h) which were specifically referred to by the applicant although some, but not all, were indirectly canvassed. The result is that the applicant's explanation is both unreasonable and inadequate and thus unacceptable. It follows that the application would fall to be dismissed on this ground alone.

Prospects of success

[49] Mr Heathcote also argued that the applicant had also failed to establish a defence which, if established at the trial, would *prima facie* enjoy prospects of success. He correctly points out that the claim of a constructive dismissal, central to both the plea and counterclaim, is unsupported by any factual averment as to what constitutes what is merely labelled "oppressive conduct" "undue influence" and what was "unbearable" and how these led to a forced resignation. The only factual averments contained in the founding affidavit and in the amended plea concerned allegations of requests on the part of the first respondent's Managing Director directed to the applicant to resign after he had been suspended on charges of corruption. One such request, the applicant alleges, was made at a meeting in mid December 2006 when, according to the applicant, the first respondent's Managing Director said that the applicant should make proposals for a resignation. He states that he did so and that these were rejected on 22 December 2006. That instance, as pleaded, would certainly not on its own be sufficient to support a defence and claim based upon constructive dismissal. He further states that he subsequently resigned on 16 February 2007 after the first respondent's lawyers had approached his lawyers for his

resignation and that there had been approaches to him personally to do so. It is not explained as to quite how these requests for his resignation, which are in any event denied by the first respondent's Managing Director, amounted to his employment becoming intolerable or unbearable.

[50] The onus would after all be upon the applicant to establish at the trial a constructive dismissal in the sense of proving that his resignation was not voluntary and that it was not intended to terminate the employment relationship. Once having done so, the enquiry would then shift as to whether the employer had without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. A court would then, having regard to the employer's conduct as a whole and in its cumulative impact, determine whether the effect of that conduct judged reasonably and sensibly was of such a nature that the employee could not be expected to put up with it.[14]

[51] Apart from the requests for resignation and the subsequent resignation through his legal practitioner, there are no other factual averments raised to support the epithets or descriptive terms used such as "oppressive conduct" and the like. It is clearly incumbent upon an applicant in proceedings of this nature (as well as in his pleadings) to refer to and plead the factual circumstances which constitute unbearable or oppressive conduct. The mere characterisation of conduct by use of those terms without providing sufficient factual averments to support them, is clearly insufficient.

[52] Not only is there this inadequacy, but the letter of resignation itself on 16 February 2007 was directed by the applicant's erstwhile legal practitioners to the first respondent. The firm merely confirmed that it acted on his instructions and gave notice of his resignation with the first respondent with immediate effect on that date. There was no statement as to any coercion or unbearable or oppressive circumstances which gave rise to it. There was also no statement of

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[14] *Kavekotora v TransNamib Holdings and another* 2012(2) NR 443 (LC) at par [27] on p 449, following *Murray v Minister of Defence* 2009(3) SA 130 (SCA) at par [8].

any reservation of rights or the faintest suggestion of being done under protest. The letter of resignation by his legal practitioners was thus unqualified.

[53] I also take into account what was stated in the answering affidavit that the resignation followed evidence given at a disciplinary enquiry concerning allegations of corruption on the part of the applicant. At that enquiry, he was represented. After the initial evidence and before the enquiry could progress, his immediate resignation was given through his legal representatives.

[54] On the materials placed before me, the defence and claim based upon a constructive dismissal has not been sufficiently raised in such a manner to establish reasonable prospects of success.

[55] No factual averments are raised to support duress or coercion. It is incumbent upon the applicant to have done so and meet the requirements of the test for duress as articulated by the Supreme Court in *Namibia Broadcasting Corporation v Kruger and others*.[15]

[56] Nor did the applicant raise factual matter in support of a defence of waiver. It is likewise incumbent upon a party pleading waiver to discharge the onus of establishing its requisites such as a decision to waive or abandon on the part of the first respondent, either expressly or an implied abandonment.[16] The applicant has not pleaded waiver in the sense of alleging a decision on the part of the first respondent to abandon the right having been conveyed to him or even an implied abandonment by conduct plainly inconsistent with an intention to enforce the right relied upon by the applicant.[17]

[57] It follows that the applicant has also failed to establish a *bona fide* defence which, if established at the trial, would enjoy reasonable prospects of

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[15] 2009(1) NR 196 (SC).

[16] *Borstlap v Spannenberg* 1974(3) SA 695 (A); *Feinstein v Niggli* 1981(2) SA 684 (A).

[17] *Borstlap v Spannenberg supra* and *Traub v Barclays National Bank Ltd* 1983(3) SA 619 (A) at 634.

success. The applicant would also by reason of the failure to have established this requisite, result in the application being dismissed.

Conclusion

[58] In all the circumstances, I conclude that the application is to be dismissed with costs.

Costs

[59] The first respondent has engaged two instructed counsel and requested a cost order which would include their engagement. Mr Heathcote argued that complex questions of law were raised by the application and that the first respondent should be reimbursed for those costs.

[60] This application is essentially one for the rescission of a judgment granted by default of a party. The issues raised in applications of this nature would not ordinarily warrant the engagement of two instructed counsel. This application falls within that characterisation.

[61] In the exercise of my discretion, I do not consider that the issues raised in this application are of such a nature to justify the employment of two instructed counsel. A cost order to include the costs of one instructed counsel and one instructing counsel would in my view be appropriate in the exercise of my discretion.

Court order

[62] It remains for me to point out that the order of 9 April 2014 issued on behalf of the Registrar needs to be corrected. It did not reflect the order which I gave in court that day. The order actually given was judgment in the amount of N$115 637, 32. The order issued by the Registrar is to be corrected to reflect

the amount of the order actually given by this court.

Order

1. The order issued by the registrar is corrected to reflect the sum of N$115 637, 32 as being the judgment amount.

2. The application is dismissed with costs. These costs include those of one instructed and one instructing counsel.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	Mr S Namandje Sisa Namandje & Co
FIRST RESPONDENT:	R Heatcote SC assisted by P Barnard Instructed by: Engling, Stritter & Partners