

**IN THE LABOUR APPEAL COURT
(HELD AT JOHANNESBURG)**

CASE NO: JR 997

IN THE MATTER BETWEEN:

KAEFER INSULATION (PTY) LIMITED

APPLICANT

AND

**THE PRESIDENT OF THE INDUSTRIAL COURT
MASHIDA DENNIS LEGODI
ABSOLOM MKONE
NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

FOURTH RESPONDENT**

JUDGMENT

KROON JA:

[1] This is an application for the review of a decision of the industrial court that was given by the second respondent (“LEGODI AM”) who, as additional member of that court, presided over proceedings concerning a dispute between the applicant and the third respondent. In those proceedings the third respondent was represented by one NTLEKO, a legal officer in the employ of the fourth respondent, a registered trade union, of which the third respondent is a member. The first respondent is the president of the industrial court.

[2] At the outset it should be stated that the first and fourth respondents, who have no legal interest in the present proceedings, ought not to have been joined as respondents.

[3] The first and second respondents did not seek to oppose the application. The third and fourth respondents did initially file a notice of opposition. That opposition was, however, subsequently withdrawn.

[4] At the conclusion of a disciplinary hearing held on 30 August 1995 the third respondent was found guilty on a charge of theft and dismissed from his employment with the applicant. The dismissal became the subject of a dispute between them and the matter was referred to the relevant industrial council having jurisdiction, such referral having taken place on 10 October 1995. A dispute meeting was held on 6 November 1995, but no resolution of the matter was achieved. There was no extension of the thirty day period fixed in section 27A (2) of the Labour Relations Act, No. 28 of 1956 ("the Act") for the settlement of such a dispute.

[5] On 9 May 1996, or possibly some days thereafter - the precise position is not clear - the third respondent, represented by the fourth respondent, instituted proceedings against the applicant in the industrial court in terms of section 46 (9) of the Act. The relief sought by the third respondent was his reinstatement in his erstwhile employment with retrospective effect as from the date of his dismissal, alternatively, an award of compensation. The cause of action relied upon by the third respondent was in essence that he was in fact not guilty of the alleged theft and details of his defence to the charge were set out. Implied in his statement of case was the contention that his dismissal had constituted an unfair labour practice.

[6] The applicant opposed the proceedings. Its defence was of a two-fold nature. In addition to reliance on the allegation that the third respondent had been properly convicted on the charge of theft, in substantiation of which the applicant set out a number of averments, the applicant invoked a point **in limine**. It was to the following effect : in the absence of an extension thereof the thirty day period referred to in section 27A (2) of the Act had expired on 9 November 1995; in terms of section 46 (9)(b)(i) of the Act the third respondent had been obliged to refer the dispute to the industrial court for determination not later than ninety days after 9 November 1995, i.e., by no later than 7 February 1996; the third respondent had failed to comply with this prescription, the proceedings in the industrial court having been instituted more than three months after 7 February 1996; the third respondent's application was accordingly fatally defective and the industrial court had no jurisdiction to entertain same.

[7] I would interpose the comment here that subject to what follows the point **in limine** was well taken in law. However, in terms of section 46 (9)(b)(i) the industrial court is empowered, on application to it, to condone the late referral of a dispute to it on good cause

shown.

[8] There was, however, no response on behalf of the third respondent to the applicant's statement of its defence, which was filed on 31 May 1996, and, specifically, no application by the third respondent for condonation of the late referral of the matter to the industrial court was forthcoming.

[9] The point **in limine** was set down by the Registrar of the industrial court for hearing on 23 January 1997 and proper notice thereof was given to both parties. On that day the applicant was represented by an attorney, Ms K. FULTON. There was, however, no appearance on behalf of the third respondent. Ms FULTON successfully moved the presiding officer, LEGODI AM, for an order upholding the point **in limine** and dismissing the third respondent's application in terms of section 46(9).

[10] On 11 March 1997 NTLEKO, on behalf of the third respondent, filed what purported to be an application for rescission of the aforesaid judgment. That document (quoted **verbatim**) read as follows:

“APPLICATION FOR RECISION OF JUDGMENT : I.C.K. 11/2/00425

Sirs

Kindly the applicant party hereby applying for rescision of the judgment on the above matter. The judgment given on the 23/01/97 should be rescinded for the following reasons.

1. An application for request to change the date was made on 13/01/97. This was confirmed with the registrar telephonically on the 14/01/97.
2. The applicant representative i.e The Union officiall incharge and dealing with the matter was tight up at the Paul Hoff in Pretoria in the matter between E. Maphanga and Gulf Steel (PTY) LTD NH 11/2/23613 a full Trail for two days i.e 23/24/01/97.

The attached latter of 13/01/97 has the clarity and affidavit on the question of

in limine.”

The attached letter read as follows:

“13 January 1997

TO: INDUSTRIAL COURT OF SOUTH AFRICA

ATT: THE REGISTRAR

FRM: NUMSA HIGHVELD REGION

SUBJECT: APPLICATION FOR THE POST-PONMENT

CASE NO: 11/2/00425

Sir

This case is on the 23/24/01/97 for the point in limine:

I therefore propose that the matter be set down for two days, the 1st day deals with the point in limine and a trial whole day, and finally the following day.

Thank you

A.K. NTLEKO
REGIONAL LEGAL OFFICER
p.p. KAEFER INSULATION”

As will appear later, this letter had been sent to the Registrar by NTLEKO, but a copy thereof was not sent to either the applicant or its attorneys, who were on record. The reference to an “affidavit” in the notice of application for rescission was never elucidated.

[11] Three other documents contained in the record require to be mentioned. The first is a document titled “APPLICATION FOR POST-PONMENT Of I.C.K No 11/2/00425”. It was addressed to the Registrar and the applicant, but, as will appear later, it was in fact not sent to either. It read as follows:

“This is to confirm that the applicant party would not be present for the

scheduled point in limine on 23/01/97.

On 23/23/01/97 the applicant representative is tight up with NH 11/2/23613 at Paul Hof Pretoria i.e full Trail. The affidavit on point in limine would be filed immediately on receipt of a new date and should be two days please i.e one for point in limine and one for full trail.

Thank you

‘(signature)’

P.P. A.K. NTLEKO
REGIONAL LEGAL OFFICER

DATE : 21/01/97"

[12] The second document, a copy of which was telefaxed by NTLEKO to the applicant's attorneys on 13 May 1997, was in draft affidavit form. The proposed deponent thereto was NTLEKO. The document was titled "AFFIDAVIT ON LATE FILLING". It canvassed the alleged reasons why the application of the third respondent in the industrial court had only been launched during May 1996 and, in somewhat terse detail, raised the contention that the third respondent had favourable prospects of success in that application. The inference is that it was the intention that an affidavit substantially in the terms set out in the draft would at some stage be utilised in support of an application for condonation of the late institution of proceedings in the industrial court. However, such an affidavit was never signed nor attested and, as already mentioned, no application for condonation was ever brought.

[13] The third document was titled "APPLICATION FOR CONDONATION FOR LATE FILING". It, too, was in draft form and the proposed deponent was also NTLEKO and, according to the attestation clause, the affidavit was to be signed by him during January 1997. Although the draft dealt with NTLEKO's involvement in the matter as from the end of April 1996 insofar as this had a bearing on the late institution of proceedings in the industrial court it did not canvass the reasons why those proceedings had not been launched prior to 7 February 1996. No sense can be made of a paragraph therein purporting to deal with the third respondent's prospects of success on the merits of the application in terms of section 46(9). Neither the coming into being of this document nor its inclusion in the record was explained. One may speculate, however, that it was the initial draft of an affidavit intended to be used in support of an application for condonation of the late institution of proceedings in the industrial court. It, too, was, however, never signed nor attested.

[14] On 10 June 1997 the applicant filed and served a notice of its intention to oppose the third respondent's application for rescission of the judgment delivered on 23 January 1997. That notice was supported by an affidavit deposed to by one Klempgen, the financial director of the applicant. In that affidavit the following points, **inter alia**, were taken: good and

sufficient cause had to be shown before a court would rescind an earlier judgment given by it; good and sufficient cause embraced both an acceptable explanation for the default on the part of the party seeking rescission and the demonstration by that party of a **bona fide** claim; **in casu** the two allegations contained in the application for rescission of judgment bore only on the first of these two requirements; the allegations were, however, not only not made under oath, but were also bald and sketchy and, in addition, failed to explain why the third respondent had not himself attended the hearing on 23 January 1997; the allegations did not bear on the second requirement referred to above and there was no evidence before the court of the existence of a **bona fide** claim, a requirement that related not only to the third respondent's claim that he had been wrongfully dismissed, but also to any claim to condonation of the late institution of proceedings in the industrial court.

[15] The application for rescission was heard on 11 June 1997, LEGODI AM again being the presiding officer. At the hearing NTLEKO handed to Ms FULTON and to LEGODI AM copies of three documents, viz., the "APPLICATION FOR POST-PONMENT" dated 21 January 1997, referred to earlier in this judgment, and two telefax transmission reports, the one reflecting that a telefax of two pages had been transmitted to the Department of Internal Affairs on 11 March 1997 and the other similarly reflecting that a telefax of two pages had been sent to the applicant on the same date.

[16] No further papers were filed on behalf of the third respondent in support of the application for rescission or in response to the applicant's opposition thereto. However, NTLEKO was given leave by LEGODI AM to place evidence before him by way of **viva voce** testimony. NTLEKO was thereafter cross-examined by Ms FULTON. His evidence proceeded thus:

- (a) Subsequent to receiving the notice of set down for the hearing on 23 January 1997 he received a notice of set down for the hearing of another matter in another industrial court on 23 and 24 January 1997. That matter was part heard and the

resumed hearing would take up the whole of the allotted two days, whereas the hearing of the present matter on 23 January 1997 would only have lasted a few hours. He therefore decided that he should accord precedence to the part heard matter and secure a postponement of the hearing of the present matter. To that end he telefaxed the letter of 13 January 1997, referred to above, to the Registrar. (It may be recorded here that the letter was in fact received by the Registrar and bore his stamp of the same date, but he omitted to place the letter in the file and it was not before the court at the hearing on 23 January 1997.) He had given instructions for a copy of the letter to be telefaxed to the applicant, but although he had been told that that had been done, he had been unable to find any proof thereof and he could accordingly not dispute the applicant's denial that it had received the letter.

(b) On subsequently perusing his copy of the letter he observed that although the letter bore the heading "SUBJECT : APPLICATION FOR THE POST-PONMENT", the body of the letter did not in terms seek a postponement of the hearing and he considered that such an intention might not be ascribed to it. He accordingly drafted the document dated 21 January 1997, referred to above, and gave instructions that it be telefaxed to both the Registrar and the applicant. Again, however, he could find no proof that his instructions had in fact been carried out and he accepted that he was not in a position to dispute a denial that the instructions had been followed. At the time, however, he had been under the impression that both the letter of 13 January 1997 and the document dated 21 January 1997 had been telefaxed to the applicant. For that reason he had not deemed it necessary directly to contact either the applicant or its attorneys of record in connection with the postponement he desired.

(c) It was his stance that, as had been his experience in the past in other matters, if the applicant was not amenable to the postponement it would have made that attitude known to him. In any event, so he contended, the reasons contained in the second document for his unavailability on 23 January 1997 were so cogent that any reasonable person would have accepted their sufficiency and the situation was accordingly not one where he had even been required to request a postponement, and it had been sufficient for him to intimate that, for the reasons furnished, he would not be present at the hearing.

(d) At a stage he seemed to contest the proposition put to him that a postponement would only have happened if his opponent had agreed thereto or if the court had so ordered, but the basis on which he did so was anything but clear. He later added that he had also telephonically advised the Registrar that he would not be present at the hearing on 23 January 1997.

(e) In the circumstances he had advised the third respondent that it would not be necessary for him to attend court on that day.

(f) It had not been practicable for him to appoint a substitute legal officer to stand in for

him at the hearing because, in the absence of any affidavit having been filed - apparently the reference was to an affidavit in support of an application for condonation of the late institution of the proceedings - such substitute officer, a stranger to the matter, would not have had sufficient information to deal with the matter. Secondly, if indeed such substitute officer had been available he would have had to be seconded from another regional office of the fourth respondent, and for head office to have approved thereof, good reason would have had to exist.

(g) In the light of the documents which, as he supposed the position to be, had been sent to the applicant, it had in his opinion not even been necessary for anyone to attend court on his behalf merely to confirm his unavailability.

(h) It was his suggestion that if he was not present on 23 January 1997 and the reasons for his non-attendance were in fact not known, the court should have issued an order - apparently in the form of a rule **nisi** - calling upon him to furnish reasons for his non-attendance, and if he failed to do so, only then could a final judgment have been given against his client.

(i) In explanation of the two telefax transmission reports referred to above he stated that during March 1997 he had been advised by workers at the applicant's plant that a manager had told them that the applicant had won the case against the third respondent when NTLEKO and the third respondent had not turned up for the hearing. He, NTLEKO, had, however, told the workers that he had applied for a postponement of the matter. He contacted the manager to complain of his "provocation" of the workers, but the manager advised him that, armed with the judgment of 23 January 1997, he had in fact advised the workers as they had conveyed to NTLEKO. The manager accepted NTLEKO's offer to "refax" the document dated 21 January 1997 to him and NTLEKO thereupon telefaxed a copy thereof both to the applicant and to the Registrar of the court.

[17] It requires mention that during the course of his evidence NTLEKO did not seek to deal with either the merits of the third respondent's claim against the applicant in the main

application or any answer the third respondent might have had to the point **in limine** invoked by the applicant. In his initial address to the court he did contend that his client had a strong case on the merits in that, so he said, persons who were involved in the case would come to testify on the third respondent's behalf, and that good reason existed for his being in default on 23 January 1997 and that such default had not been the result of "deliberate ignorance". In his replying address, and clearly in response to the argument addressed to the court by Ms FULTON (i.e., that for good and sufficient cause to be established for the rescission sought, the third respondent had had to show, **inter alia**, that he had a **bona fide** counter to the point **in limine**, but had failed to do so) NTLEKO argued that the question of the grounds on which condonation for the late institution of proceedings would be sought had not had to be canvassed by him and such canvassing would in fact have been improper; that was not the purpose of the proceedings then before the court; that issue would only arise after, and if, the court granted the rescission sought.

[18] LEGODI AM granted the application for rescission and intimated that the reasons for that decision would be furnished later. The reasons were furnished on 20 June 1997. In those reasons he recorded - and this is borne out by the transcript of the proceedings on 23 January 1997 - that he had not been willing to entertain Ms FULTON's application that the point **in limine** be adjudicated on the basis that the third respondent was in default. He had considered that such a procedure would be a waste of time and the judgment obtained meaningless because the third respondent was likely thereafter to bring an application for the rescission of the judgment. He had strongly suggested to Ms FULTON that the most reasonable thing to do in the circumstances was to postpone the matter with costs for a stated period and to order the third respondent to file an affidavit to explain why he was not in court

or represented on 23 January 1997. Ms FULTON had, however, insisted on being heard and intimated that she would deal with any application for rescission if and when that became necessary. It was in those circumstances that the order of 23 January 1997 was issued. The reasons proceeded further as follows:

(1) The industrial court has a discretion to rescind its own orders on good cause being shown. The discretion has to be exercised judicially. The court will generally not close the door to a litigant who has shown good reasons for his default.

(2) NTLEKO's decision to accord precedence to the part heard matter over the present matter on 23 January 1997 made sense and was reasonable.

(3) Because there was no proof that the document dated 21 January 1997 had been sent to either the Registrar or the applicant, it fell to be ignored. However, because the letter of 13 January 1997 had been received by the Registrar - it bore his official stamp - cognizance had to be taken thereof. That letter had not been in the court file on 23 January 1997. Had he been aware thereof he would have refused to proceed by way of default and would instead have postponed the matter with costs.

(4) NTLEKO had sufficiently explained why he had not arranged for someone to appear in his stead even if only to explain why he, NTLEKO, was not available to proceed with the matter.

(5) In the light of (2), (3) and (4) NTLEKO had given a satisfactory and convincing explanation, which was sufficient and good, for his absence from court on

23 January 1997. He was only to be faulted for failing to make sure that the documents dated 13 and 21 January 1997 had in fact been telefaxed to the applicant. On the ground alone that the third respondent had established sufficient reason for the default in question the application for rescission should succeed. A failure to demonstrate good prospects of success on the merits should in those circumstances, i.e., the existence of sufficient reason for the default, generally not result in the dismissal of an application for rescission.

(6) In any event, as to facts relevant to determining whether it would be fair and just to grant the indulgence of rescission he could have regard to the third respondent's statement of case, and that reflected that a **prima facie** case had been made out.

(7) He could not agree with the argument that NTLEKO had been negligent and that such negligence should be imputed to the third respondent. All that NTLEKO did was to tell the third respondent not to attend court on 23 January 1997 because he had applied for a postponement. What else could have been expected of the third respondent in such circumstances? The industrial court has shown its reluctance to deprive an innocent party of having its day in court and in the absence of gross negligence on the part of NTLEKO the third respondent could not be punished.

[19] The applicant thereafter launched the present proceedings for the review of the decision reached by LEGODI AM. The relief sought by the applicant was an order:

“1.1 That the proceedings before the Second Respondent as the party who presided over the proceedings of the Industrial Court under case number ICK 11/2/00425 in the matter between Absolom Mkone and Kaefer Insulation (Pty) Ltd and the order which was given by him on 11 June 1997, rescinding an

order which was given by him on 23 January 1997 by default, be reviewed, corrected and set aside.

1.2 That the aforesaid order be substituted by an order that the Third Respondent's application for rescission of the order granted by default on 23 January 1997 be dismissed.

1.3 That those Respondents who oppose the application be ordered to pay the costs thereof, jointly and severally, the one paying the others to be absolved."

[20] The contention on behalf of the applicant was in short that the decision of LEGODI AM was vitiated by gross irregularities, including irregularities that followed on a misinterpretation of the applicable legal principles.

[21] While the decision is not appealable - unlike the earlier decision of 23 January 1997 which had a final definitive effect on the case and was therefore appealable the later decision was merely interlocutory in effect and did not dispose of any portion of the main case - it is not to be gainsaid that it is reviewable in terms of the principles applicable to common-law review, the industrial court not being a court of law. Those principles were set out by CORBETT CJ in **Hira and Another v Booysen and Another** 1992 (4) SA 69 (A) at 93-94 as follows:

"To sum up, the present day position in our law in regard to common-law review is, in my view, as follows:

(1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common law review. (See the *Johannesburg Consolidated Investment* case *supra* at 115.)

(2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the *Johannesburg Stock Exchange* case *supra* at 152A-E.

(These grounds, stated with reference to a decision of the president of the Johannesburg Stock Exchange, were listed as follows - see the passage at 84F of the

judgment in *Hira's* case:

‘Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the “behests of the statute and the tenets of natural justice” ... Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he failed to apply his mind to the matter in the manner aforesated.’)

(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person’s conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may be justifiably be said that, by reason of its error of law, the tribunal ‘asked itself the wrong question’, or ‘applied the wrong test’, or ‘based its decision on some matter not prescribed for its decision’, or ‘failed to apply its mind to the relevant issues in accordance with the behests of the statute’; and that as a result its decision should be set aside on review.

(6) In cases where the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different, but it is not necessary in this

case to expand on this or to express a decisive view.”

[22] Notwithstanding that members of the industrial court are appointed by reason, **inter alia**, of their knowledge of the law that court, as already stated, is not a court of law, and it is clear that the question of the interpretation of the applicable legal principles is not left to the exclusive jurisdiction of the industrial court. See **Photocircuit SA (Pty) Ltd v De Klerk NO and De Swart NO and Others** 1991 (2) SA 11 (A). In that case the industrial court had based its decision to order the reinstatement of dismissed workers upon findings that the employer’s conduct in refusing to comply with a request from the employees and their trade union that the employer deduct union subscriptions from the employees’ wages and pay same directly to the union, had amounted to an unfair labour practice; that a strike embarked upon by the employees in protest against that conduct had been a legal one; and that the dismissals of the employees for participation in the strike had consequently been unfair and unreasonable. The decisions of the industrial court were held to be justiciable by means of review as they had been reached by a failure to appreciate the cogency of a clause in an industrial council agreement declared by the Minister in terms of sec 48(1)(b) of the Act to be binding on, **inter alia**, the employer, the effect of which was to prohibit the employer from making the deductions in question and the fact that, in terms of sec. 53(1) of the Act, non-compliance with the prohibition would constitute an offence. Had the industrial court given due consideration to these aspects it would have come to the opposite conclusion and would have been driven to hold that there had been no unfair labour practice, no legal strike and no unfair or unreasonable dismissals. Simply stated, the industrial court had arrived at two grossly unreasonable decisions. See, too, **Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO & Andere** (1990) 11 ILJ 971 (T), also a review of the

decision of the presiding officer in industrial court proceedings, referred to in the judgment as the first respondent. At 973D-G ELOFF DJP (as he then was) is reported as follows (I have taken the liberty of translating the Afrikaans into English):

“It requires no argument that this court does not without anything more have appellate jurisdiction in respect of the decision of the first respondent. It has only the right to review in accordance with the common-law. It has also been decided time and again that the court will only exercise that power under certain specific circumstances, **inter alia**, where the first respondent’s decision is so grossly irregular that it warrants the inference of **mala fides** or improper influence or that the first respondent failed at all to apply his mind to the matter. In the statutory context of labour law such a decision can also be assailed if the first respondent followed clearly incorrect principles applicable in that field (sic) or left material factors out of consideration. In so saying I do not intend to convey that there is yet a type of appeal, but I consider that where it is clear that the first respondent threw material principles overboard it can be said that he did not sufficiently apply his mind to the matter to the extent demanded of him by the law. If that is clear then his decision is reviewable.”

[23] With respect, I am unable to subscribe to much of the reasoning of LEGODI AM. My comments thereon are set out in the paragraphs that follow:

[24] It is correct that like our ordinary courts the industrial court has a discretion to rescind its own orders on good cause shown and that that discretion must be exercised in a judicial manner in accordance with the principles laid down over the years by our courts. **M M Steel Construction CC v Steel Engineering & Allied Workers Union of SA & Others** (1994) 15 ILJ 1310 (LAC) at 1311G; **Thompson’s Security Services (Pty) Ltd v Laubscher** (1995) 16 ILJ 393 (LAC).

[25] As to what constitutes sufficient cause it will suffice to refer to the judgment in **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A). At 764I - 765E, 767I - 768D and 768I, respectively, the following passages appear:

“The appellant’s claim for rescission of the judgment confirming the rule *nisi* cannot be brought under Rule 31 (2)(b) or Rule 42(1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.) The term ‘sufficient cause’ (or ‘good cause’) defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn’s Executors v Gaarn* 1912 AD 181 at 186 per INNES JA.) 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 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; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (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 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. And ordered judicial process would be negated 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.

Mr *Wentzel’s* main argument in regard to the application for rescission was that on the merits the appellant would, if now given the opportunity to oppose the application for removal of his name from the roll, have good prospects of success. Indeed, his argument on the reasonableness of the explanation given by the appellant for his failure timeously to file opposing affidavits occupies only a very small part of his lengthy and detailed heads of argument. As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant’s explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (Cf *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.) But this is not to say that the stronger the prospects of success the more

indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that the appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof.

But, on the other hand, it is also reasonably possible that the Court might have considered that a less severe disciplinary measure than removal from the roll be taken. To that extent the appellant might have satisfied the second of the two essential requisites for rescission. But this does not assist him in the final result because of his failure to satisfy the other essential requisite.”

In the light of this judgment, which was in fact referred to by NUGENT J in the **MM Construction** case *supra* I am, with respect, unable to align myself with the comments of the learned Judge at 1311I - 1312A to the effect that there may be cases where the absence of one of the essential elements referred to in **Chetty's** case will not necessarily be fatal to an application for rescission. On the other hand, the further comment of NUGENT J that where the two elements are present they are to be weighed together with other relevant factors in determining whether it would be fair and just to grant the application (which the learned Judge categorised as an “indulgence”, a description about which I have reservations) is in keeping with what was said in **Chetty's** case.

[26] In **Chetty's** case reference was made to the requirement that on the merits there should be a **bona fide** defence. In that case the applicant for rescission had been the respondent in an application against whom a default judgment had been given. In the present case the third respondent had been the applicant whose claim was dismissed on the basis of

his default. The merits therefore relate to a **bona fide** claim. Precisely what was embraced in that claim is an aspect to which I will revert presently.

[27] Similarly, the comments in the **M M Construction** case *supra* at 1312H and in the **Thompson's Security** case *supra* at 395A-B that what was required in respect of the "merits" element was averments by the applicant which, if proved, could reasonably result in the court's making a different determination from that already made, were dictated by the circumstance that a determination had been made and it was that determination that was sought to be rescinded. **In casu** no determination was made, but the application was dismissed on the basis of the point **in limine** invoked by the applicant in the present proceedings. The "merits" element therefore required averments by on or behalf of the third respondent demonstrating that, **prima facie**, he had some prospect of successfully securing a determination in his favour. Again, precisely what those averments were required to canvass is an aspect to which I will revert later.

[28] It is also correct that in the exercise of its discretion the court, on the issue of whether an acceptable explanation has been tendered for the default in question, will be slow to penalise a litigant, who was personally innocent, for the neglect of his attorney or other representative. The authorities are, however, clear that the line will be drawn somewhere and that the stage may be reached where, notwithstanding the personal innocence of the litigant, he will be visited with the consequence of gross neglect on the part of his representative and, in appropriate cases, be non-suited.

[29] **In casu** it may be accepted that the third respondent personally was innocent.

[30] However, in my judgment, the conduct of NTLEKO, insofar as it bears on the sufficiency of the explanation for the default of appearance, falls to be criticised severely and I agree with the submission of counsel that the conclusion of LEGODI AM that NTLEKO

had given a satisfactory explanation for his default was one so at variance with the facts that the only inference to be drawn is that he failed properly to apply his mind to the matter. I accept, without deciding, that the interposition of the set down for hearing of the part heard matter, which would have occupied two days in court, constituted sufficient reason for NTLEKO to decide that that matter should be accorded precedence over the present matter, which would have required only a few hours of court time, and that on that basis he should seek a postponement of the present matter. But his **modus operandi** in that regard was quite unacceptable. Not only should he, as LEGODI AM held, have satisfied himself that the two documents in question had indeed been telefaxed to the applicant - and, in fact, the telefaxes should have been sent to the applicant's attorneys who were on record as such - but he should also have ascertained what the applicant's attitude was in regard thereto. However satisfied he himself may have been as to the cogency of the reason why he sought the postponement, and even if he had been justified in proceeding on the assumption that the telefaxes had indeed been sent, he was not entitled to assume that the grant of a postponement would be a mere formality. The fact that in the past there had been a negative response from the opposing party where he had adopted the same **modus operandi** and the matter had to be pursued further, did not entitle him to assume that in the absence of such a response the postponement would automatically follow. What he did not say was that it was his experience that in the absence of such a response a postponement in fact ensued. Even if he had had such an experience it would not follow that he had sufficient grounds to accept that the same result would ensue **in casu**. It would seem that his attitude was no more and no less than that in the light of the reason why he had to be engaged elsewhere on the date in question both the court and the applicant had willy-nilly perforce to accept his non-attendance and postpone the matter. For obvious reasons such an approach is untenable.

Accepting that he himself could not appear on the date in question he could at least have arranged for someone else to appear in his stead in order to press for a postponement on the grounds set out in the document dated 21 January 1997 to which (notwithstanding that he might have been entitled to assume that same had been received by the applicant) he had neither received nor sought a positive response. On what grounds he thought, as he claimed, that in the absence of his attendance at the hearing the matter would be postponed and he would merely be called upon to tender, by a later date, an explanation for his non-attendance, is not clear. One suspects that he had had sight of a transcript of the proceedings on 23 January 1997 during which LEGODI AM had evinced - wrongly, as will be shown below - a strong preference to adopt such a course, and that he had simply adopted the expedient of incorporating that attitude into his argument.

[31] However, notwithstanding the severe strictures to be passed on NTLEKO's conduct and accordingly on the sufficiency and reasonableness of the explanation tendered for the default, and my finding that LEGODI AM had not properly applied his mind to the matter, I am, in the result, on a consideration afresh of the issue, not persuaded that this is a case where the third respondent, innocent as he personally was, should be visited with vicarious responsibility for his representative's conduct to the extent that he should have been non-suited. On that limited basis I am prepared to accept that a sufficient explanation for the third respondent having been in default on 23 January 1997 was placed before the industrial court.

[32] I have grave difficulty in understanding the reluctance of LEGODI AM on 23 January 1997 to entertain the matter on the basis that the third respondent was in default of appearance. On the papers before him there had been due notice to the third respondent of the date of the hearing; the third respondent was in default of appearance; there was no explanation before him of that default. In those circumstances the insistence of the applicant's attorney that the matter proceed is readily understandable and the circumstance that LEGODI AM, apparently by reason of past experience, apprehended that an application for rescission of the judgment would follow later was neither here nor there. The position would have been no different even had the letter of 13 January 1997 been placed before him during the course of the hearing on 23 January 1997. Although that letter was headed "APPLICATION FOR THE POST-PONMENT" the body of the letter, insofar as it had to be considered as setting out grounds for a postponement, was incomprehensible and in fact set out no such grounds. The applicant's representative would have been quite entitled to adopt the stance that the letter should be ignored and the matter proceed on a default basis. One cannot have the situation where a matter is not proceeded with simply because one of the

parties causes to be placed before the court a document which amounts to no more than an unsubstantiated request for a postponement. LEGODI AM's comments smack of an attitude, quite contrary to principle, that a postponement is there simply for the asking.

[33] The mere fact, as accepted in [31] above, that a sufficient explanation for the third respondent's default on 23 January 1997 was placed before the court **a quo**, was not, contrary to what was held by LEGODI AM, by itself sufficient for the grant of the application before him. In terms of **Chetty's** case **supra** it was further incumbent on the third respondent to demonstrate the second essential element, the existence of a **bona fide** claim having some prospect of success. As will be shown below, LEGODI AM's erroneous interpretation of the legal principles involved resulted in his leaving certain material factors out of consideration, failing to ask himself all the right questions and failing to apply his mind to the relevant issues in accordance with the behest of the applicable legal principles, the consequence of which was a gross irregularity in the proceedings.

[34] **In casu** the **bona fide** claim which the third respondent was required to demonstrate embraced not only averments relating to his claim that he had been wrongfully dismissed, but also averments to counter the point **in limine** invoked by the applicant. The reason therefor is that in order to succeed in his claim against the applicant the third respondent would have had to be successful on **both** the aspects referred to.

[35] In regard to the first aspect, i.e., the merits of the claim that the third respondent was wrongfully dismissed, I agree with the submissions made by the applicant's attorney in the court **a quo**, viz., that any allegations contained in the draft affidavits referred to earlier were, firstly, to be ignored because, not having been made under oath and being hearsay to boot,

they did not constitute admissible evidence in the court **a quo** and, secondly - the details need not be set out - in any event too vague and sketchy for any reliance to be placed thereon. What LEGODI AM did rely on was the contents of the statement of case filed on behalf of the third respondent in the main application. Here again, however, the difficulty is that the allegations therein were not confirmed under oath in the proceedings in the court **a quo**. In these circumstances I incline to the view that no regard could or should be had thereto, that in relying thereon LEGODI AM committed a gross irregularity in having regard to considerations that ought not have been taken into account. However, for present purposes I am prepared to proceed on the basis, without so deciding, that LEGODI AM validly had regard to the allegations in question. On that basis, and notwithstanding that counsel's submission that the allegations in the statement of case are so vague that no proper assessment of the merits of the third respondent's dismissal can be made on a reading thereof, was certainly not without merit, I am persuaded that the statement of case sufficiently sets out averments - again, the details need not be set out - to satisfy the requirement of alleging a **bona fide** claim in respect of the alleged wrongful dismissal.

[36] The position is, however, different in regard to the aspect of a demonstration of a **bona fide** claim (or "defence") in the form of a counter to the applicant's invocation of the point **in limine**. In the court **a quo** the applicant's representative contended that the third respondent had failed to meet this requirement. She did so on a two-legged basis. Firstly, she submitted that the contents of the two draft affidavits referred to earlier in this judgment did not constitute evidence before the court **a quo** and there was no other evidence bearing on the aspect in question. In the alternative she submitted that even if it were permissible to have regard to the contents of the draft affidavits, those contents were too sketchy to

constitute a sufficient demonstration of a **bona fide** claim in respect of the aspect in question. I incline to the view that the alternative argument was in fact valid. It is, however, unnecessary to set out the details on which this view is based. The reason therefor is that I consider that there is no answer to the submission that the draft affidavits were not evidence before the court **a quo** and no other evidence was placed before the court **a quo** on the aspect in question. Whatever might have been the intention with the draft affidavits, neither of them was signed or attested and the contents thereof were not incorporated into, or adopted by, the evidence given by NTLEKO in the court **a quo**. Nor did he tender any other evidence on the aspect in question. On the contrary, as indicated earlier, he adopted the stance that the third respondent's counter to the point **in limine** was not something which required to be canvassed during the proceedings in the court **a quo**, and that the question of an application for condonation of the late institution of the proceedings in terms of section 46(9) would only arise if, and when, the application for rescission were granted. It would seem that this stance found favour with LEGODI AM in that nowhere in his reasons for judgment did he avert to the issue whether the third respondent had successfully met the requirement of establishing a **bona fide** counter to the applicant's invocation of the point **in limine**. In so doing LEGODI AM materially misdirected himself on the legal principles involved. As pointed out earlier, it was incumbent on the third respondent, **inter alia**, to demonstrate, as an essential prerequisite, that he had a **bona fide** claim in the form of a counter to the point **in limine**. That the third respondent, through his representative, NTLEKO, did not even attempt to do; instead, the stance was adopted that it was unnecessary to do so. That stance, adopted by LEGODI AM, was not only wrong in law, but also indeed fatal to the application for rescission of the judgment of 23 January 1997. It resulted in LEGODI AM's failing to direct his mind to, and consider, a very material aspect, viz., whether an integral part of the

second essential element required to be shown had been demonstrated. That was a gross irregularity which vitiated his decision.

[37] It need hardly be stated that this is not a case where the matter should be remitted to the court **a quo**. The absence of any evidence of a **bona fide** claim in the form of a counter to the point **in limine** must inevitably result in the conclusion that the application for rescission should have been dismissed.

[38] In the result there will be an order in terms of paragraphs 1.1 and 1.2 of the notice of motion filed in the present proceedings.

KROON JA

I agree

MYBURGH JP

I agree

FRONEMAN DJP

DATE OF HEARING: 2 February 1998

DATE JUDGMENT DELIVERED: 4 February 1998

FOR APPLICANT:
Hayman Godfrey Inc

A.E. FRANKLIN instructed by Bowman Gilfillan

FOR RESPONDENTS:

No appearance