Minister of Home Affairs v Van der Berg, Case No. 19/2004, Supreme Court of Namibia, delivered 12 December 2008

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CORAM: Shivute, CJ, O'Linn, AJA, et Chomba, AJA

The foundation of this appeal is a criminal case that started in 1994. The respondent, Accused No. 2 in the criminal trial, was charged in the Magistrate's Court with a contravention of section 28(a) (possession of rough or uncut diamonds) and section 28(b) dealing in rough or uncut diamonds) of the Diamond Industry Protection Proclamation No. 17 of 1939[1]. He was discharged at the end of the State's case. The Magistrate also made an order that a vehicle belonging to the respondent, which was part of the alleged diamond deal and impounded by the police, be returned to the respondent.

The vehicle was not returned. The State appealed against the judgment. The appeal[2] succeeded, and Justice O'Linn ordered that the trial magistrate's decision be set aside, including his order that the vehicle in question be returned to Accused No. 2. The case was referred back to the Magistrate's Court to reconvene from the point at which the State had closed its case.

The State recalled some witnesses and Van der Berg closed his case without leading evidence. He was then convicted on the main count of wrongful and unlawful dealing in rough or uncut diamonds. However, on appeal on 17 June 1996, the conviction was set aside and replaced with a conviction of attempted wrongful and unlawful dealing in rough or uncut diamonds.

However, in the light of the discharge in the Magistrate's Court and the order to return the vehicle, Van der Berg instituted a civil action in which he stated that the motor vehicle had been damaged beyond economical repair while in police custody. The Minister of Home Affairs did not defend the application and, on 19 August 1994, the plaintiff obtained judgment in default. When Van der Berg issued a warrant of execution, the Minister lodged an application for rescission of the default judgment. When the application was set down for hearing, the State appeal against the Magistrate's Court judgment was still pending. The parties agreed that the hearing be adjourned sine die in anticipation of the appeal hearing, and the Court ruled accordingly.

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1 Hereafter Proclamation 17.

2 See *S v Van der Berg,* 1995 NR 23 (HC).

Despite several letters by Van der Berg's legal practitioners to the Government Attorney, and a promise by the Government Attorney that they would look into the matter of the vehicle's statement, nothing happened after Judge O'Linn's appeal judgement, after the second Magistrate's Court judgment, or after the appeal by Van der Berg.

On 6 July 2000, Van der Berg again approached the Court, requesting it to order the respondent – the Minister – to comply with the judgment issued against him on 19 August 1994. The Minister responded with an application requesting the Court to reinstate the application for rescission of judgment of 20 September 1994, condone the Minister's failure to timeously set down the application for rescission, and to rescind the judgment entered against the Minister on 26 August 1994, or, in the alternative, dismissing the plaintiff's (i.e. Van der Berg's) cause of action.

The High Court per Justice Hoff granted judgment in favour of Van der Berg. In response, the Minister appealed to the Supreme Court. Justice Chomba, writing the majority judgment in a 2–1 split decision, summarised the issues of the case as follows:

Whether the defendant had offered a plausible explanation for his failure to prosecute the rescission application which he lodged on 20 September 1994

Whether the application he subsequently lodged for reinstatement of the said rescission application was bona fide, and not merely intended to delay the plaintiff's claim, and

Whether he had disclosed a bona fide defence to the said claim.

Looking at the first issue, the Court pointed out that *at the time of the reinstatement application, the defendant had been over five years out of time*. The Minister's explanation for the failure to file a notice to defend the action started by Van der Berg in 1994 was given as having to deal with administrative issues in the Office of the Government Attorney. More important, however, were the reasons for not restoring the rescission application to the active roll after the appeal had been decided.

The appellant (the Minister) believed that when Van der Berg had been convicted of an attempt to deal in rough or uncut diamonds in contravention of section 28(b) of Proclamation 17, the vehicle was automatically forfeited to the State. This was also seen by the Court as the basis for determining whether the Minister had a bona fide defence.

The section in the Proclamation that the Minister relied on, namely section 34 ter, reads as follows:

(N)otwithstanding anything to the contrary in any other law contained, any

money or property which a person has paid or delivered to a member or agent of the Namibian Police in terms of agreement for the delivery or acquisition of diamonds, shall upon conviction of that person of an offence under this Proclamation in connection with such agreement, be forfeited to the State.

The Court found that there was indeed a possibility that the Minister's interpretation of the section was correct, and commented as follows:

By parity of reasoning, if in [sic] present case the State's interpretation of section 34 ter of Proclamation 17 of 1939 were to be found at the trial of the plaintiff's action to be correct, then the default judgment might well be found to be a non sequitur and therefore to be a judgment that did not promote justice between the parties.

While the Court did not disagree with the court a quo that the State had acted negligently in the process, relying on *De Witts Auto Body (Pty) Ltd v Fedgen Insurance Co. Ltd*[3] and *Lewies v Sampoio*,[4] the Court stated that negligence alone could not *per se lead to the dismissal of an application for rescission*.

The Court also pointed out that, if the appeal succeeded, it would make no sense to condone the committal. Relying on two South African cases,[5] and pointing to the fact that the Minister at the time of default judgment, Hon. J Ekandjo, was no longer the Minister of Home Affairs, the Court said the following:

The order has lost meaning firstly because the appeal should be allowed and secondly because it would be ludicrous to enforce it in the changed situation.

Consequently, the appeal succeeded and the Court made the following orders:

1. The appeal is allowed.

2. The orders of the Court *a quo* are set aside and I substitute therefor the following orders:

(a) The application for reinstatement of the application for rescission is allowed;

(b) the application for rescission of the default judgment is allowed and consequently;

(c) the default judgment is set aside;

(d) the order relating to committal is set aside;

3 1994 (4) SA 705 (ECD).
4 2000 NR 186 (SC).
5 *Mjeni v Minister of Health and Welfare*, Eastern Cape 2000(4) SA 446, and *York Timbers Ltd v Minister of Water Affairs and Forestry and Another*, 2003(4) SA 477 (TPD).

(e) the defendant is directed that within 10 days from the date hereof he must file a notice to defend the plaintiff's action; and

(f) the plaintiff's action, inclusive of the interpretation of section 34 *ter* of Proclamation 17 of 1939, should be set down for hearing before a different constituted Bench and as a matter of priority.