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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3062/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

31/8/2017
DATE

.....
.SIGNATURE

In the matter between:

N D

Appellant

and

W V

Respondent

JUDGMENT

FISHER J:

[1] This is an appeal against an order handed down in the the Magistrate's Court sitting in terms of the Domestic Violence Act 116 of 1998 (*"the Act"*), refusing the setting aside of the confirmation of a protection order.

[2] The appellant and the Respondent were previously in a romantic relationship. The relationship ended, and the respondent alleged that, in the aftermath of the breakdown, she was physically and verbally abused by the appellant and that this conduct also constituted emotional and psychological abuse. An interim order was granted by the Magistrate on the strength of the respondent's allegations and a return date was set for 26 April 2016.

[3] It is not in dispute that the appellant was timeously informed of his right to appear on the return date and provide reasons as to why the order should not be confirmed. He was informed also that if he did not appear he was in jeopardy of having the order confirmed against him.

[4] S 6(1) of the Act provides that, if the respondent does not appear on the return date and the court is satisfied that (a) proper service has been effected on the respondent; and (b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence, the court "*must*" issue a protection order in the prescribed form. The terms of the section are peremptory. Reference to the application for the order shows that it was properly issued by the Magistrate.

[5] In terms of s 10(2), if the court is satisfied that “good cause” has been shown for the setting aside of the protection order, it may issue such an order.

[6] In *Chetty v Law Society of Transvaal* 1985 (2) SA 756 (A) at 756 Miller JA defined the test for determining good cause thus:

“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 of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. 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. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980.

[7] At 767J–769D: the learned Judge expounded further as follows in relation to the application of this test:

"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 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." (See also Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at paragraph 11)

[8] The appellant proffers only one sentence in explanation for his failure to appear on the return date: *"...I could not attend as I was booked off ill by a Dr. L. N. Basongo as from 22nd of April 2016 to the 29th day of April 2016."* As purported substantiation for this explanation he attached a doctor's note dated 22 April 2016 which states that the *"nature of the the illness"* is *"bronchitis"* and recommends that he be on *"sick leave"* for the period 22 to 29 April 2016. Pertinently, the note gives no diagnosis although there is provision made for such diagnosis to be made. The appellant annexed also a leave request form made by him to his employer on the strength of the note.

[9] The Magistrate found that his failure to appear was not explained merely by stating that he was booked off work because of a sickness of the nature of bronchitis. In my view, the Magistrate cannot be faulted in his finding that this explanation is unacceptable. On the face of it, it is no

explanation at all. No detail is given as to the nature of the symptoms suffered by the appellant, which may have prevented him from making his way to the scheduled court date. It does not follow from the fact that a general practitioner recommends that a person does not attend work that he is unable to attend important court proceedings. In any event, the note is not provided under oath and it is thus not evidence.

[10] In *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR), Murray CJ helpfully characterised wilful default as follows (at 173A):

“The true test, to my mind, is whether the default is a deliberate one – i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing”

[11] In *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803 King J followed this approach and held as follows:

“More specifically in the context of a default judgment ‘wilful’ connotes deliberateness in the sense of knowledge of the action and of the consequences, its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.”

[12] Applying the above principles, it is clear that the judgment was properly granted by the Magistrate in accordance with the prescribed procedure. Taking into account what can only be seen as a deliberate decision by the appellant not to attend court on the return date; this Court cannot find that the approach of the Magistrate was not a proper exercise of discretion.

I thus order as follows:

1. The appeal is dismissed with costs

D FISHER
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I Agree:

K PILLAY
ACTING JUDGE OF THE HIGH COURT OF SOUTH
AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 1st August 2017.

Judgment Delivered: 31st August 2017

APPEARANCES:

For the Applicant: Adv Sheioagh Instructed by Diemieniet Attorneys.

For the Respondent: Adv Nkhumane Instructed by Legal Aid.

