



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal no. A73/2022

In the matter between:

THE MINISTER OF POLICE

Appellant

and

MOATLHODI PIET KUKARE

Respondent

CORAM: VAN ZYL, J et POHL, AJ

HEARD ON: 3 OCTOBER 2022

JUDGMENT BY: POHL, AJ

DELIVERED ON: 6 OCTOBER 2022

INTRODUCTION:

- [1] This is an appeal against the whole of the judgment and order made by the Magistrate in the Court a quo, in terms whereof the Appellant's application for rescission of a default judgment granted against it, was dismissed.

BACKGROUND:

- [2] The relevant background is as follows:
- [2.1] The Respondent issued summons against the Appellant in the Court a quo for wrongful arrest and detention (as claim A) and what he termed "*a claim for humiliation, injury to dignity and contumelia*" (as claim B). Respondent claimed an amount of R200 000.00 in respect of each claim.
- [2.2] When the trial commenced on 7 April 2021, there was no appearance by the Appellant or his attorney. The Appellant's attorney, Mr Chauke, denies that he was ever apprised of the trial date, or that he received or had sight of any notice of set down prior to 7 April 2021. The Respondent, who was represented by his attorney, Mr Mogwera of Mogwera Attorneys of Hartswater, then obtained judgment by default against the Appellant in the amount of R100 000.00 on each claim, without adducing any oral evidence, or evidence in writing. This was confirmed by Mr Mogwera, who also appeared before this Court in this appeal.
- [2.3] At all relevant times hereto, the Respondent's action in the Court a quo was defended by the Appellant. The latter was throughout represented by Mr Chauke of the State Attorney (Bloemfontein). The Appellant had filed a notice to oppose the action, which was followed by a plea.
- [2.4] In the plea the Appellant, inter alia, pleaded that the arresting officer had reasonable and bona fide belief or suspicion that the Respondent committed

the crime of robbery. The Respondent placed no evidence before the Court to contradict this aspect.

- [2.5] It is common cause that pleadings and notices were exchanged between the Appellant and the Respondent's attorneys by means of emails and/or faxes. The Appellant's attorney's email was GChauke@justice.gov.za and his fax number was 086 476 3098. The Respondent's attorney's email was taumogwera@yahoo.com and his fax number was **053 473 0126**. These email addresses and fax numbers appear at the foot of the pleadings filed by the Appellant and the Respondent.
- [2.6] It is common cause that the notice of set down of the trial date (i.e. the date upon which the default judgment was granted), was never sent to the Appellant's attorney **by the Respondent's attorney** by email or fax. It would appear that at best, the notice of set down was sent to the Appellant's attorney **by the Clerk of the Court a quo**. This email, which appears at page 98 of the record, was apparently sent by the Clerk of the Court to the Respondent's attorney with the reference "CC" Chauke Giyani (Appellant's attorney). It is unclear to what email address the "CC" was sent. A notice of set down for **7 April 2021**, unsigned by the Respondent's attorney was apparently attached to this email. It is in fact only signed by the Clerk of the Court. It was apparently also sent by fax on 18 February 2021. The fax number appearing at the top of page 59 of the record is **086 207 2763**. This fax number is clearly not the fax number of the Appellant's attorney, referred to in paragraph 2.5, supra. Mr Chauke's fax number, **086 476 3098**, however does appear at the top of page 57. There is no affidavit by the Clerk of the Court that forms part of the record.
- [2.7] The email which is found at page 98 of the record, refers to documents attached to it. These documents are found at pages 99 to 101. These documents bear the following inscription at the top: "page 4, 5 and 6 of 6". The record however does not contain pages 1, 2 and 3 of 6 of this email and fax. The original papers

of the Court a quo, which were filed with the Registrar of this Court, contains the complete set, including pages 1, 2 and 3 of 6. What is most significant about these documents are the following: Page 1 of 6 is a letter written by Mr Mogwera to the Clerk of the Court dated 18 February 2021. In this letter Mr Mogwera informed the Clerk of the Court that the Appellant's attorney advised that they are available "from February 2021". As confirmation of this, he attached a letter from the Appellant's attorney dated 11 November 2020 (Page 3 of 6). In this letter, the Appellant's attorney indicated that they are available for trial from the week of 8 February 2021 and specifically stated that the matter should be set down "**beyond**" that date. Despite this and to top it all, Mr Mogwera requested the Clerk of the Court to set the matter down for **7 April 2021**.

- [2.8] After the default judgment was granted on 7 April 2021, the Appellant's attorney filed an application for rescission of the default judgment. The Court a quo however refused this application for rescission on 8 March 2022. It is against this refusal of the rescission that this appeal lies.

- [2.9] The application for rescission was issued on 09 November 2021, thus 7 months after the date of default judgment.

- [2.10] It needs to be mentioned that the Court a quo gave an ex tempore judgment directly after argument was heard on the application for rescission. In this judgment the court a quo, in dismissing the application for rescission, inter alia found that the matter was properly set down because the Clerk of the Court sent the notice of set down to the Appellant's attorney. After the ex tempore judgment, the Appellant's attorney requested the Magistrate for reasons in terms of Rule 51(1) of the Magistrates' Courts Rules. To this request, the Magistrate responded and, inter alia, added that the Appellant was also in wilful default.

- [2.11] On 16 February 2021, the Respondent's attorney sent an email to the appellant's attorney, suggesting 14 April 2021 and 21 April 2021 as trial dates. It thus did not refer to or include the eventual trial date of 7 April 2021, when judgment by default was obtained.
- [2.12] Mr Chauke declared that he only became aware of the default judgment when this was communicated to him in the middle of April 2021. Mr Mogwera, who throughout these proceedings appeared for the Respondent, declared that his office communicated the trial date of 7 April 2021, to the Appellant's attorneys. This is denied by Mr Chauke.
- [2.13] The main thrust of the Appellant's application for rescission is based on the provisions of Rule 49 (8) of the Magistrates Court Rules, alternatively, in terms of the Common Law. On Appeal, Mr Mazibuko, who appears for the Appellant, argues that the judgment was granted by mistake and Rule 49 (8) is thus applicable. The mistake lies in the fact that the Clerk of the Court and not the Respondent's attorney sent the notice of set down. In the premises, according to him, the trial was not properly set down and is thus rescindable in terms of Rule 49 (8). He also argued that, having delivered an ex tempore judgment, it was impermissible for the Court a quo to elaborate and add different grounds for its decision when it furnished the reasons for judgment pursuant to the request for reasons.
- [2.14] Mr Mogwera argues that because the Appellant was duly appraised of the trial date, it had to bring the application for rescission under and in terms of the provisions of Rule 49 (1), as opposed to Rule 49 (8). His argument is that there was no "mistake" that would make Rule 49 (8) applicable. According to the argument, the application for rescission had to be brought within 20 days of obtaining knowledge of the judgment and not 7 months later and there is and was also no proper application for condonation before Court. Mr Mogwera also argues the Appellant did not show good cause as to why the judgment should

have been rescinded and that the Magistrate was thus correct in refusing the rescission.

- [2.15] The deponent to the founding affidavit in the rescission application was the Appellant's attorney, Mr Chauke. In this affidavit, he states that he is the Appellant's duly authorized attorney of record and that he was duly authorized to depose to the affidavit. The Respondent did not utilize the procedure of Rule 52 (similar to Rule 7 of the Uniform Rules of Court) to challenge the attorney's authority.

THE APPLICABLE LEGAL FRAMEWORK:

- [3] Section 36 (1) (a) and (b) of the Magistrates' Courts Act, Act 32 of 1944 provide as follows:

"36. WHAT JUDGMENTS MAY BE RESCINDED:

- (1) *The Court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu -*
- (a) *Rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;*
- (b) *rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;"*

- [4] Rule 9 (9) (a) of the Magistrates' Courts Rules, provides as follows:

- "(9)(a) Service of any notice, request, statement or other document which is not process of the Court may be effected by delivery by hand at the address for service given in the summons or appearance to defend, as*

the case maybe, or by sending it by registered post to the postal address so given: provided that subject to Rules 5 and 13, service of such notice, request, statement or other document may be effected by sending it by facsimile or electronic mail to the facsimile address or electronic mail address given in the summons or notice of intention to defend, as the case may be.”

[5] Rule 12 (4) and (7) (a) provide as follows:

- “(4) *The Registrar or Clerk of the Court shall refer to the Court any request for judgment for an unliquidated amount and the plaintiff shall furnish to the Court evidence either oral or by affidavit of the nature and extent of the claim, whereupon the Court shall assess the amount recoverable by the plaintiff and give appropriate judgment.*
- (7) *The Registrar or Clerk of the Court may refer to the Court any request for judgment and the Court may thereupon –*
- (a) *if a default judgment is sought, call upon the plaintiff to produce such evidence either in writing or oral in support of his/her claim as it may deem necessary;”*

[6] Rule 22 (1) provides as follows:

“22. **SET-DOWN FOR TRIAL:**

- (1) *The trial of an action shall be subject to the delivery by plaintiff after the pleadings have closed, of notice of trial for a day or days approved by the Registrar or Clerk of the Court: Provided that if the plaintiff does not within 15 days after the pleadings have been closed deliver a notice of trial, the defendant may do so.”*

[7] Rule 49 (1) and (8) provide as follows:

“49. **RESCISSION AND VARIATION OF JUDGMENTS:**

- (1) *A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to Court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and a Court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5 A).*
- (8) *Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.”*

[8] In the decision of **Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)** the Court, in dealing with Rule 42 of the Uniform Rules of Court, where the test is whether a judgment was granted “erroneously” and thus rescindable, decided, inter alia, as follows in paragraph [24]:

“[24] Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of proceedings having been given to him, such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such

record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules, whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously."

THE APPLICATION OF THE FACTS TO THE LEGAL FRAMEWORK:

- [9] The first question that falls for decision is whether or not proper notice of the trial on **7 April 2021**, was in fact given to the Appellant. This Court, being a Court of Appeal, is of course confined to what is contained in the record of appeal and the original papers of the Court a quo, filed with the Registrar.

- [10] There is a direct and substantial dispute of fact between the parties as to whether or not the Respondent's attorney communicated the trial date to the Appellant's attorney telephonically prior to the trial date. This aspect cannot be resolved on the record before the Court and this Court is consequentially compelled to make the finding as to whether or not there was proper notice of the trial date that came to the Appellant and/or his attorney's notice, on the documentation and evidence that form part of the record. Put differently, did Mr Chauke have notice or constructive notice of the trial date prior to **7 April 2021**.

- [11] It is common cause that it was the Clerk of the Court and not the Respondent's attorney that sent a notice of set down by fax and email. The Respondent relies heavily on Annexure **MPK1** in this regard. This annexure is found at pages 98 to 101 of the record. This is an email which was apparently sent by the Clerk of the Court, a Mr Njesie Nhlapo. He apparently also sent the same documents per fax. From the email at page 98, it is clear that the Clerk of the Court sent the mail to the Respondent's attorney and it indicates that it was sent "CC" to Mr Chauke.

No email address of Mr Chauke however appears on page 98. As indicated, there is no affidavit by Mr Nhlapo, which was filed in the rescission application by the Respondent. It is thus unknown what email address of Mr Chauke was used by Mr Nhlapo and it is thus impossible to find that this email in fact reached Mr Chauke. Mr Chauke denied in the Appellant's replying affidavit that he received same.

- [12] The email at page 98 furthermore bears no name of the case in question. At best it refers to a "trial date for case 03/2020", which is the case in question. It also refers to attachments, without indicating how many and what they are. It however does refer to a trial date of **7 April 2021**. Even if it is accepted that page 99 and 100 (Application for a trial date) and 101 (Notice of set down for 7 April 2021) was also sent by fax by the Clerk of the Court, it remains a notice of set down which was only signed by the Clerk of the Court and not by the Respondent's attorney. It was thus not set down by the Respondent, who was dominus litis. It must be remembered that the notice of set down bears the trial date of 7 April 2021, which was written in by hand by the Clerk of the Court with a pen according to Mr Mogwera. That is why it was sent with the Application for a trial date. In the absence of an affidavit by the Clerk of the Court, it therefore begs the question: Did the Clerk of the Court mean that that date is available if taken up by the parties? If so, it was not a proper notice of set down.
- [13] Even if it is accepted that the Clerk of the Court attempted to set the matter down for trial when he sent the notice of set down, it is in direct conflict to the clear provisions of Rule 22 (1), which allows the Plaintiff and thereafter the Defendant to set a matter down for trial and not the Clerk of the Court. It must be remembered that the Magistrate Court is a "Creature of Statute" and is thus only allowed to do what the Magistrates' Courts Act empowers it to do. To allow a set down by the Clerk of the Court as proper set down is thus clearly outside the ambit of the empowering statute and its rules. The Court a quo should therefore never have granted default judgment under these circumstances. See in this

regard the decision of **L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2) 1971 (4) SA 532 (C)** at page 535 F-G. The judgment was therefore void ab origine as envisaged by Section 36 (1) (a) and (b) of Act 32 of 1944 and should have been rescinded. The Appellant's uncontradicted allegations about the arresting officer's reasonable and bona fide belief that the Respondent committed the crime of robbery, clearly amount to a valid and bona fide defence. That would thus also suffice to bring the application for rescission within the realm of Rule 49 (3) and thus rescindable under Rule 49 (8) as being void from the beginning. It matters not whether or not the Appellant relied on that ground or not.

- [14] Although the facts in the **Lodhi 2 Properties Investments CC**-case, *supra*, dealt with a judgment granted erroneously, the very same situation is applicable here. In this case, the party (Respondent), in whose favour the judgment was given, was also not entitled to judgment, because of an error in the proceedings (the set down by the Clerk of the Court). It therefore had to be rescinded. In any event, a judgment granted by "mistake" is a judgment granted "erroneously". For this reason also, the judgment was obtained due to a mistake common to the parties as envisaged by Section 36 (1) (b) of Act 32 of 1944. The mistake, which is common to the parties is of course the true date of trial. The fact is that the Respondent believed that the matter was properly set down for 7 April 2021, whereas the Appellant believed that the matter would be set down for either 14 or 21 April 2021. There clearly is a direct link between the said mistake and the granting of the default judgment by the Court a quo.
- [15] The findings in paragraphs [13] and [14], *supra* clearly brings the application within the realm of Magistrates' Courts Rule 49 (8). This means that the Appellant brought its application for rescission in time, namely within one year of obtaining knowledge of the voidness and/or mistake. It therefore did not have to bring the application for rescission within 20 days of obtaining knowledge of the judgment as contemplated by Rule 49 (1).

- [16] Although the Respondent very cursorily refers to Rule 49 (6) in his opposing affidavit, which in essence deals with a situation where somebody else but the person against whom the judgment is granted, brings the application, it is clear to me that nothing much turns on this. As indicated in paragraph [2.1], *supra*, Mr Chauke was the attorney who acted for the Minister of Police. One can hardly imagine somebody in these circumstances who would be more qualified, with all the intimate knowledge of the facts to depose to the affidavit. On the facts of this case he was duly authorised to depose to the affidavit for rescission. It remains an application by the Minister of Police and not by Mr Chauke. Over and above this, the Respondent did not challenge Mr Chauke's authority and utilise the provisions of Rule 52. See in this regard the decision of the Supreme Court of Appeal in **Pauline Masibe Masako v Molefe Stephens Masako 2022 (3) SA 403 (SCA)** at paragraphs [8] to [13].
- [17] In the premises, I would uphold the appeal and set aside the Court a quo's judgment and order, in which the application for rescission of the default judgment was refused.
- [18] There is also another reason why this Court cannot allow the Court a quo's judgment by default to stand. The Respondent's claims in the main action are both illiquid claims for unliquidated amounts. No evidence either oral or on affidavit were presented to the Court a quo on either the merits or the quantum which could have enabled the Court to properly assess the merits and the appropriate amounts on quantum, if any, that should be awarded to the Respondent. Despite this lack of evidence, the Court a quo apparently arbitrarily awarded amounts of R100 000.00 in respect of each of the claims. Even if the Appellant was in proper default, the Court a quo should have insisted on such evidence on the merits and the quantum. It did not do so. Once again it matters not whether or not the Appellant took this point, as long as it is in conflict with the law, which it is. That was graciously conceded by Mr Mogwera.

ORDER:

[19] The following order is thus made:

1. The appeal is upheld with costs.
2. The Court a quo's judgment and order dated 8 March 2022, and the judgment and order dated 22 March 2022, are set aside and substituted with the following:

- "1. The default judgment granted against the Applicant on 7 April 2021, under case number 03/2020, is rescinded.
2. The warrant of execution issued on 25 May 2021, against the property of the Applicant (The Minister of Police), is set aside.
3. The First Respondent (Moatlhodi Piet Kukare) is ordered to pay the costs of the application."


p.p. L. Le / R. POHL, AJ

I concur:


C. VAN ZYL, J

On behalf of the Appellant:

Adv. M. S. Mazibuko

Instructed by:

Office of the State Attorney
Bloemfontein

On behalf of the Respondent:

M. R. Mogwera

Instructed by:

M R Mogwera Attorneys
Hartswater