



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: A52 / 2021

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

12 MAY 2022
DATE

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SIGNATURE

In the matter between:

MINISTER OF POLICE

APPELLANT

and

GIDEON SIBUYI

FIRST RESPONDENT

THE SHERIFF: PRETORIA CENTRAL

SECOND RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 12 May 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] This is an appeal against an order of the Bushbuckridge District Court (court *a quo*) dated 27 October 2020 in which the application for rescission of judgment that was granted against the appellant was dismissed with costs. Summons was issued in that court by the Respondent against the Appellant on 14 November 2017 for damages emanating from assault, unlawful arrest and detention perpetrated by the Appellant's employees in service of the South African Police Services (the SAPS), amongst whom was a certain Inspector Khoza. The Respondent's particulars of claim reflect that this incident took place within the Kruger National Park precinct in April 2017, the exact date of which was not mentioned. It was also not specified as to where the detention took place and the duration thereof. A total of R200 000.00 was claimed as damages suffered by the Respondent.

[2] The Appellant filed a notice to defend through the State Attorney and no plea was filed thereafter. The notice to defend was sent to the Respondent and to Clerk of the Court via registered post. This was also sent to the Respondent by email. When no plea was forthcoming, the Respondent

sent a notice of bar to the Appellant on 16 February 2018 via an email address provided by the attorney working for the State Attorney, to whom the matter was allocated, Mr. E Scharf. On 25 October 2019, and after hearing evidence by the Respondent, Magistrate Sibuyi granted a judgment by default in which he awarded R150 000.00 to the Respondent as damages plus costs. It is this order that the Appellant sought to have rescinded before another Magistrate. This application was dismissed with costs on 27 October 2020. This appeal is against the judgment dismissing the rescission application.

[3] The following background appears from the application before the court *a quo*. It was only after the Sheriff visited the offices of the Appellant armed with a warrant of execution that Mr. Sibanyoni, a legal officer for the Appellant became aware of the existence of the default judgment against his employer. He is the one who deposed to the founding affidavit in support of the rescission application. It appears from this affidavit that upon learning of the existence of the judgment against the Appellant, he enquired and found that the attorney to whom the matter was allocated at the State Attorney, Mr. E Scharf had left the employ of the State Attorney.

[4] The file involving this claim was passed over from Mr. Scharf to Mr. Caleb, an assistant State attorney. According to his affidavit, the last document exchanged between Mr. Scharf and the Respondent's attorneys was a letter sent to TK Machitele Attorneys, the Respondent's attorneys, in which Mr. Scharf questioned if the Respondent had complied with section 2 of the State Liability Act, No. 20 of 1957 (the State Liability Act), by serving the summons on the State Attorneys. There was no response to this letter. There was no other pleading in the file including the notice of bar or the judgment. This in essence explained why the rescission application was

only brought on 27 February 2020, some four months after the default judgment was granted against the Appellant.

[5] Mr Sibanyoni's affidavit also deals with the aspect of a valid defence against the claim by the Respondent. The Kruger National Park where the incident is alleged to have taken place, falls under Skukuza Police Station. There is no Inspector Khoza working at Skukuza Police Station. There is furthermore, no record of the Respondent being detained at that police station during the month of April 2017. There is equally no record of a case of assault being reported by the Respondent. In essence, the incident that gave rise to the judgment being granted against the Appellant was disputed.

[6] The Appellant submitted before court *a quo* that the default judgment was granted because the court was under a mistaken belief that the Respondent had complied with the State Liability Act and the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002, (the Institution of Legal Proceedings Against Certain Organs of State Act). It was submitted that the Respondent failed to comply with the State Liability Act in that he did not serve the summons on State Attorney offices as provided in the Act.

[7] It was further submitted that he failed to comply with the Institution of Legal Proceedings Against Certain Organs of State Act in that he did not serve a notice of his intention to institute legal proceedings against the Appellant in accordance with the Act. As for the letter apparently sent by registered post in an attempt to comply with the Institution of Legal Proceedings Against Certain Organs of State Act, the address to which the letter was posted was unknown to the Appellant and did not belong to him. It is noteworthy that the letter in question was directed to the Office of the Minister of Police at Private Bag x 922, Pretoria, 0001. The person who

posted the letter however did not send it to this address. It was posted to Private Bag x 22, Pretoria, 8001. No reasons were advanced for this discrepancy.

[8] The last submission made on rescission application was that the quantum awarded for damages was excessive and not in line with the damages awarded for similar claims by the courts.

[9] **The law.**

The rescission application was premised on Rule 49(8) of the Magistrates' Court Rules which provides,

“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.”

[10] As for the wide discretion that a court has in rescission of a judgment, one needs to read Rule 49(1) which provides,

“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 the 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...”

[11] The Appellant needed to bring the application within 20 days after obtaining knowledge of the judgment if he intended to rely on Rule 49(1) or bring a condonation application for bringing this after the prescribed period. There was no need for condonation application given that the application was based on the provisions in Rule 49(8). It is much easier to

prove that “a good cause” exists justifying a rescission of a judgment as its discretion is wider and the requirements are not exhaustive.¹ A good cause includes but not limited to the existence of a substantial defence.² As for judgment granted by mistake, in fraud or any other reprehensible or improper conduct which compelled the Court to come to grant the judgment, this has nothing to do with the question of whether the mistake was one of law or one of fact; the question was merely whether the other party should be permitted to take advantage of the mistake.³ The court may still refuse to rescind a judgment which is void *ab origine* if the party seeking its rescission fails to disclose a *bona fide* defence.⁴

[12] Before the court *a quo*.

In a one-page judgment, the court *a quo* dismissed the rescission application citing mainly, the reason that the Appellant was in wilful default. As for non-compliance with the State Liability Act, the court *a quo* held that it could not be correct that the Appellant’s office “was not served or was not aware of the claim.” It reached this conclusion based on the steps the Appellant took in filing a notice to defend the action. It held further that the Institution of Legal Proceedings Against Certain Organs of State Act advocates for access to courts and cannot be used to limit access to courts in circumstances where the Respondent (referring to the appellant in this appeal) was aware of the claim. The court *a quo* further held that the Respondent (the appellant) lacked a *bona fide* defence and made no elaboration on its finding in this regard.

¹ *Abraham v City of Cape Town* 1995 (2) SA 319 (C) at 321I–J.

² *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G.

³ *Otto en ‘n Ander v Heymans* 1971 (4) SA 148 (T).

⁴ *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds* 2007 (2) SA 1 (SCA) at 4F.

[13] It appears from the judgment that the court *a quo* misconstrued the submissions by the Appellant based on the State Liability Act and the Institution of Legal Proceedings Against Certain Organs of State Act. It was not the Appellant's submission that it was not aware of the claim. The submission was that the Respondent was bound to serve the summons on both the Appellant and the State Attorney, and not just one of these institutions. The Institution of Legal Proceedings Against Certain Organs of State Act also provides that within six months of the incident that gives rise to the claim, the claimant should give notice of his/her intention to institute a claim on the office of the Provincial and National Commissioner of Police.⁵ Not only did the Respondent fail to send the notice to the correct postal address of the Appellant, but he failed to notify the provincial and National Commissioner of Police of his intention to institute the legal proceedings.

[14] Failure to comply with the provisions in the two legislations should not be seen as a bar from accessing the courts as the court *a quo* held. If this was the position, there would be no need to apply for condonation when a party fails to comply with these statutes and a good cause exists for non-compliance. The court *a quo* had the jurisdiction to hear the condonation if one was brought.⁶ This however required a substantive application to be brought. In *Minister of Safety & Security v Jonas NO and another*,⁷ a Magistrate's decision to condone non-compliance without a substantive application before her was reviewed and set aside.

⁵ See section 4(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act.

⁶ See *Tshisa v Premier of the Free State and Another* (A6/2009) [2009] ZAFSHC 119; 2010 (2) SA 153 (FB) (19 November 2009) where Musi CJ dismissed a point *in limine* in which it was argued that the Magistrate lacked the jurisdiction to hear the application for condonation brought in terms of the Institution of Legal Proceedings Against Certain Organs of State Act.

⁷ [2013] JOL 30103 (ECG)

[15] As long as courts are satisfied that the debt has not been extinguished by prescription; that good cause exists for the failure by the creditor; and that the organ of State was not unreasonably prejudiced by the failure to give notice; condonation should be granted when sought.⁸ The court *a quo* made no finding on non-compliance with these two statutes and simply reached its findings under the presumption that there was indeed no compliance on the part of the appellant. The decision it reached suggests that once summons was served on the Appellant and a notice to defend was filed, the Appellant could not raise a defence or special plea on the non-compliance as it became aware of the claim against it. This cannot be the case as the appellant was within its rights to still raise special pleas of non-compliance with the statutes even when on record.⁹

[16] I find that the court *a quo* misdirected itself when it dealt with the application for rescission of judgment as though lack of wilful default in the present case was a prerequisite for the rescission. It is only ‘where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who does not wish to defend the proceedings, the applicant must satisfy the court that he or she was not in wilful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his or her knowledge.’¹⁰

[17] Under Rule 49(8), there is no requirement that the applicant should not be in wilful default. The applicant needs only to show mistake or fraud. Even if the Appellant had to show that there was no wilful default on its part, it is not clear how the undisputed facts on how the attorney in

⁸ See *Madinda v Minister of Safety & Security* 2008 (4) SA 312 (SCA).

⁹ *Minister of Safety & Security v Jonas NO and another (Supra)*.

¹⁰ See Rule 49(4).

the employ of the State Attorney left the employment and how the file was inherited by a new attorney can constitute wilful default on the part of the client, the Appellant. In the same vein, it is not clear how a defence disputing the arrest and the detention substantiated by an affidavit confirming that the person alleged to have arrested the Respondent does not work for the Appellant, can be construed as not being a *bona fide* defence.

[18] I find therefore that the court *a quo* erred in dismissing the rescission application for the reason that that the Respondent was in wilful default. The court *a quo* should have found that the default judgment would not have been granted had that court been aware that there had not been compliance with the State Liability Act and the Institution of Legal Proceedings Against Certain Organs of State Act and that no condonation was sought and granted by the Respondent.

[19] For these reasons, I would propose the following order:

[19.1] Appeal is upheld with costs.

[19.2] Then order of the court *a quo* is hereby set aside and replaced with the following:

“The rescission of a judgment dated 25 October 2019 granted in default is hereby granted. The Respondent is ordered to pay the costs of the application for rescission of the judgment aforesaid”.



TV RATSHIBVUMO**JUDGE OF THE HIGH COURT**

I agree and it is so ordered.

**MF LEGODI****JUDGE PRESIDENT****MPUMALANGA DIVISION OF THE HIGH COURT**

FOR THE APPELLANT: : **ADV DD MOSOMA**

INSTRUCTED BY : **STATE ATTORNEY**
: **MBOMBELA**

FOR THE RESPONDENT : **TK MACHITELE ATTORNEYS**
BUSHBUCKRIDGE

DATE HEARD : **29 APRIL 2022**

JUDGMENT DELIVERED : **12 MAY 2022**