

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION-MTHATHA)**

CASE NO. CA & R62/2019

In the matter between:

MBIZANA LOCAL MUNICIPALITY

Appellant

and

LUNGISA TEYISE

Respondent

JUDGMENT

GWALA AJ

1. This is an appeal against the decision of the Magistrate for the District of Mbizana (the court, *a quo*) in terms of which the court, *a quo* refused the appellant's application for the rescission of the default judgment. In the main the appellant contends that it provided adequate explanation for its default and disclosed a bona fide defence to the respondent's claim, therefore the court, *a quo* erred in dismissing the application for the rescission of default judgment.
2. The background to the matter is that the respondent instituted an action in the court, *a quo* claiming payment of an amount of R63, 094.48. The

respondent's claim was that in terms of a deed of sale entered into between the appellant and himself he was entitled to all benefits arising from the property which was the subject matter of that deed of sale. On the other hand, the appellant entered into a lease agreement with a third party in terms of which the third party was given permission to place advertising boards on the walls of the property and paid monthly rental to the appellant.

3. The respondent claimed that as a result of the lease agreement the appellant reaped some benefits from the property which otherwise was due to him in terms of the deed of sale and thus the appellant was somewhat unduly benefited. It then instituted an action in the court, *a quo* claiming that benefit. The appellant defended the action and appointed attorneys in Mthatha who in turn appointed other attorneys back in Mbizana as correspondent.
4. On Friday 27 January 2017, the respondent served a notice of bar upon the correspondent attorneys representing the appellant. The appellant was required to file its plea within five days from the date of service of the notice of bar. The plea was due on 03 February 2017. The appellant failed to deliver its plea or any subsequent pleading within that period and it became *ipso facto* barred.

5. On 08 February 2017, the appellant delivered a “notice of exception” upon the respondent’s attorneys. It contended that the particulars of claim were vague and embarrassing and accordingly afforded the respondent an opportunity to remove the cause of complaint within 15 days of service thereof failing which it would take an exception.
6. The respondent, apparently, was content with his pleading and did not remove the cause of complaint. Instead he filed what he called “*notice of objection to the proposed exception by the defendant*”. The appellant on the other hand did not file an exception as initially indicated despite the fact that the cause of complaint was not removed within 15 days.
7. On 14 September 2017, the respondent took an initiative to deliver upon the appellant’s correspondent attorneys a notice of set down in terms of which the exception was set down for hearing on 13 October 2017. It escapes me what would happen on 13 October 2017. In my view there was no longer an exception to set down to begin with because the appellant’s notice of exception had lapsed when it did not deliver the exception within 10 days upon the expiry of the 15 days for the removal of complaint which, as I said, was not removed.¹

¹ Rule 19 of the Magistrates’ Court Rules provides:-“**19 Exceptions and applications to strike out**

(1) (a) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, the opposing party who intends to take an exception shall, within the period allowed for filing any subsequent pleading, deliver an exception thereto, as provided in paragraphs (b) and (c).

8. As aforesaid, it is not clear what would happen on 13 October 2017. The following appears though from the reasons for judgment filed by the court, *a quo* that “... *The matter was set down for hearing of the exception on 13 October 2017 but was eventually heard on 04 April 2018. The objection to the exception raised by the plaintiff was upheld...*”
9. There does not appear to be a procedure for objection to exception in the Magistrate Court Rules. I was unable to find one. Perhaps what was intended was to raise an objection that the step taken by the appellant to file an exception at a time when it was *ipso fact* barred constituted irregular proceedings in terms of Rule 60A. However, if that was the intention, the notice of objection did not take a form compliant with that Rule in many respects.² Perhaps the notice of objection was simply a notice to oppose which ordinarily is not necessary in respect of exceptions.

(b) A party who intends to take an exception shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity of removing the cause of complaint within 15 days of such notice.

(c) A party who intends to take an exception shall, within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver the exception.

² Rule 60A of the Magistrates' Court Rules provides:- Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—
 - (a) the applicant has not himself or herself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his or her opponent an opportunity of removing the cause of complaint within 10 days; and
 - (c) the application is delivered within 15 days after the expiry of the second period mentioned in subrule (2)(b).

10. On 09 October 2018, the respondent delivered a notice of set down which was served upon the appellant's correspondent attorneys. In terms of that notice the matter was set down for hearing on 26 October 2018. The appellant did not appear in court on 26 October 2018. The court, *a quo* granted the default judgment which was sought to be rescinded culminating to this appeal.
11. On 06 December 2018, the appellant delivered an application for the rescission of the default judgment which was set down for hearing on 16 January 2019. The application for the rescission of default judgment was opposed by the respondent. It was opposed on the basis that the appellant did not give adequate explanation for its default, that it failed to disclose *bona fide* defence and that its founding affidavit was basically hearsay. The founding affidavit was deposed to by the appellant's attorneys.
12. The appellant's explanation of the default was to the effect that although the respondent served the notice of set down upon the correspondent attorneys, the latter did not bring it to the attention of the appellant's attorneys and that for unexplained reasons the correspondent attorneys did not appear in court on its behalf.
13. The court, *a quo* did not accept this explanation. The court, *a quo* did not accept the founding affidavit in support of the appellant's application for rescission of default judgment either on the basis that it was hearsay since it

was deposed to by the attorney and not by someone within the appellant or by the person from the firm of the correspondent attorneys.

14. The finding that the founding affidavit contained hearsay was, in my view, incorrect and cannot be supported. It was the attorney who had knowledge that he was not furnished with the notice of set down by his correspondent attorneys and as such did not know about the set down. It was the attorney who did not appear in court and only him, could attest to the reasons for not appearing in court. Even if the founding affidavit as a whole contained hearsay, the portion dealing with the explanation for default was not hearsay. The court, *a quo* erred in rejecting the founding affidavit.
15. On the question as to the *bona fide* defence, the appellant explained that a portion of the respondent's claim had prescribed. On the face of it, prescription was a defence that the appellant intended to raise once the default judgment was rescinded. The court, *a quo* equally did not accept that the appellant had a bona fide defence hence it dismissed the application for the rescission of the default judgement.
16. The defence of prescription is a complete and competent defence in law. If successful, it disposes of the claim or a portion thereof. In this matter the benefits that the respondent sought to recover date as far back as 2002. Unless otherwise shown by the respondent part of the claim indeed has prescribed. Whether it is so or not is a matter for this court to decide.

17. The issue to be decided in this matter was whether there was a good or sufficient cause. If there was, then the court, *a quo* erred in dismissing the application for rescission.
18. It has authoritatively been held that an applicant for rescission of default judgment will show good cause: - *by giving a reasonable explanation of the default; by showing that the application is made bona fide; and by showing that the applicant has a bona fide defence to the plaintiff claim, which prima facie has prospects of success.*³ In my view the appellant satisfied these requisites.
19. In an application for rescission of default judgment such as this was, the law does not require of the applicant to show absence of gross negligence on its part. The courts have not accepted that the absence of gross negligence in relation to the default is an essential criterion, or an absolute pre-requisite for the granting of the rescission.⁴

³ See *Colyn v Tigger Food Industries Ltd t/a Meadow Feed Meals (Cape)* 2003 (6) SA (1) SCA at Para 11; See Also *Grant V Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477; See also *De Wits Auto Body Repairs (Pty) Ltd v Fedgen Insurance Company Ltd* 1994 (4) SA 705 at 708 (H).

⁴ See *Saraiva Contraction Pty) Ltd v Zululand Electrical &Engineering wholesalers (Pty) Ltd* 1975 (1) SA 612 D at 615.

20. Even the wilful or gross negligence is not determinative of an application for rescission of default judgment. It is but a factor to be considered in the overall determination of whether a good cause has been shown.⁵
21. Importantly, there is authority that a good defence compensates for a poor explanation of default.⁶ As I see it, prescription is a good or substantial defence that would compensate for any poor explanation. Whether such defence will succeed or not is a matter for trial.
22. The requirement that the applicant for the rescission of default judgment must show a good cause is normally satisfied if there is evidence of the existence of a substantial defence which the applicant intends to prosecute conscientiously in the event of the judgement being rescinded.⁷
23. The requirement that the applicant for the rescission for default judgment must show the existence of substantial defence does not mean that the applicant must show probability of success in the main motion or trial. It suffices if the applicant is able to show a *prima facie* case, in the form of the existence of an issue which is fit for trial. It suffices for instance if the

⁵ See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Company (Pty) Ltd* 1994 (4) SA 705 at 709 D.

⁶ See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Company (Pty) Ltd* 1994 (4) SA 705 at 709 E.

⁷ See *Riddles v Standard Bank of South Africa Ltd* 2009 (3) SA 463 (T) Full Bench para 9

applicant sets up some averments which, if established at the trial, will entitle him/her to the relief sought.⁸

24. In an application for rescission of default judgment the applicant does not have to deal fully with the merits of the case. All that is required is that the grounds of defence must be set forth in sufficient details to enable the court to conclude that there is a *bona fide* defence and that the application is not made merely for the purposes of harassing the respondent.⁹
25. In this matter I am satisfied that the appellant did explain its default. It was not furnished with a notice of set down by the correspondent attorneys. For that reason, it or its attorneys did not know that the matter was set down. In my view, that is a reasonable explanation. The explanation was wrongly excluded by the court, *a quo*. It excluded it simply because in its view the affidavit in support of the application for the rescission of default judgment was hearsay. The court, *a quo* misdirected itself in this regard.
26. Even if that explanation was poor, on the authorities referred to above, the presence of a *bona fide* defence would compensate for the poor explanation for the default. Indeed, the appellant disclosed its defence to the action, namely that part of the claim had been extinguished by prescription.

⁸ See *Riddles v Standard Bank of South Africa Ltd* Supra at para 9

⁹ See *Riddles v Standard Bank of South Africa Ltd* Supra at para 9

27. I am satisfied that the appellant did disclose a *bona fide* defence and provided explanation for the default. I have already held that the court, *a quo* misdirected itself when it rejected the affidavit in support of the application for rescission of default judgment on the basis that it was hearsay.

28. I am of the view therefore that the appeal should succeed. Accordingly, I propose the following order:

28.1 that the appeal is upheld with costs;

28.2 that the order of the court, *a quo* is set aside and substituted with the following order:

“1. the application for the rescission of default judgment is upheld;

2. costs of the application shall be costs in the main action”.

M Gwala
Judge of the High Court of South Africa (Acting),
Eastern Cape Division, Mthatha

I agree, and it is so ordered.

RWN BROOKS
Judge of the High Court of South Africa,
Eastern Cape Division, Mthatha

Counsel for the Appellant: Adv Khunju

Counsel for the Respondent: Adv Ngumle

Date of Hearing: 22 November 2019

Date of Judgment: 26 November 2019