

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 23 / 2017

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED. ✓

DATE: 27/10/2017 SIGNATURE:

In the matter between:

MINISTER OF POLICE

APPELLANT

and

MPHO MODIBA

RESPONDENT

 JUDGMENT

SIKHWARI AJ

[1] This is an appeal against the judgment and order of the Magistrate Court for the district of Tzaneen held at Kgapane, the court *a quo*, in terms

whereby the appellant's application for rescission of judgment was dismissed with costs on attorney and client scale on 28 February 2017.

- [2] The appellant was the defendant in the main action in the court *a quo* where the respondent was the plaintiff. The respondent had sued the appellant for damages arising from a claim for unlawful arrest when the respondent was arrested on 5 October 2014 at Ramodumo village by members of the South African Police Service on allegations that the respondent was in possession of a dangerous weapon; to wit a knife. Upon being arrested the respondent gave an explanation that he was coming from his homestead and he wanted to slaughter and skin a cow with that knife.
- [3] After the closing of pleadings, the matter was set down for trial on the 24 August 2016. The appellant did not appear in court on that day. The court *a quo* granted judgment in favour of the respondent in the amount of R100 00.00 (hundred thousand rand), with costs.
- [3] The appellant then approached the court *a quo* in terms of rule 49 of the rules of the Magistrate Court with an application for the rescission of the aforesaid judgment. The court *a quo* dismissed the application with costs on attorney and client scale. The appellant's appeal is directed against the whole judgment of the court *a quo* in refusing the rescission application as well as granting the punitive costs order.
- [4] Appellant's explanation for the failure to appear in court is that the file was being handled by a certain attorney in the employ of the State

Attorney in Pretoria. This attorney was then suspended due to some disciplinary charges. The aforesaid erstwhile attorney left employment without handing over the file to anyone to prosecute the case further. The appellant became aware of the default judgment when the appellant was served with a writ of execution by the sheriff.

- [5] Rule 49(1) of the Magistrate Court Rules states that *“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: Provided that the 20 days’ period shall not be applicable to a request for rescission or variation of judgment brought in terms of surule (5).”*
- [6] In the case of *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at page 353A it was held that *“it is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motive”*.
- [7] In my view, the explanation of the appellant relating to his failure to appear in court meets the requirement for showing lack of willful default on his part. The appellant has successfully shown that the failure to appear in court was not out of willful default on his part.

- [8] It is trite law that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence of the existence of a *bona fide* defence. The *bona fide* defence does not mean that the appellant must show probability of success. It will suffice if the appellant may show a *prima facie* defence or the existence of an issue which is fit for trial (See *Galp v Tansley* NO 1966 (4) SA 555 (C) at page 560B).
- [9] In the case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para [11], Jones AJA stated that "... the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476, *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300f-301C, *Chety v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765F)"
- [10] The appellant's plea in the court *a quo* was a bare denial disclosing no defence. In the application for rescission, the appellant relied on section 40(1)(a) of the Criminal Procedure Act 51 of 1977, as amended, in order to justify the arrest and explain his *bona fide* defence. The appellant further relied on the fact that upon his arrest the respondent admitted guilt and paid an admission of guilty fine.
- [11] Section 40(1)(a) of the Criminal Procedure Act 51 of 1977, as amended, states that "a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence".

- [12] In the circumstances, such a defence is not sustainable in view of the fact that the respondent was arrested on the 5 October 2014. The purported admission of guilty fine was paid on the 1 October 2014. It means that the admission of guilt was paid four days before the occurrence of the arrest. The version of the respondent is that he was arrested on the 5 October 2014 and was released on warning on the 7 October 2014. The person who allegedly paid the admission of guilty fine is reflected as one C Modiba, not the respondent.
- [13] Reliance on section 40(1)(a) of the Criminal Procedure Act of 1977 is misplaced. The arresting officer did not even bother to investigate the explanation of the respondent that he was going to slaughter a cow. The respondent was arrested in the village where it is a common practice to slaughter cows with a knife for various events like funerals and celebrations. There is no evidence that the respondent was posing threat to members of the public with his knife.
- [14] In the case of *Minister of Safety & Security v Sekhoto* 2011 (5) SA 367 (SCA) at page 373D-E the Supreme Court of Appeal held that the arresting officer should entertain a suspicion to arrest, and further that the suspicion must rest on reasonable grounds from the facts or information taken upon oath. In this case the reasonable ground of the suspicion to arrest is lacking. It was held further in *Sekhoto* (at page 378B) that "... from information taken upon oath, there is a reasonable suspicion that the suspect has committed the alleged offence".

[16] In the circumstances, the court *a quo* was correct in dismissing the appellant's application for rescission of judgment. The appeal will fail in this regard.

[17] The appellant's appeal is further directed against the punitive costs order of the court *a quo*. Costs fall within the discretion of the court *a quo*. The said discretion must be exercised judicially. There are no bases upon which the court *a quo* relied to justify its departure from the normal trend that costs be on party and party scale. No evidence of malice or recklessness on the part of the appellant were advanced to justify a punitive costs order.

[18] In my view, the costs order was arbitrary. In the case of **Road Accident Fund v Forbes (CA 197/05) [2006] ZAEHC 47(28 September 2006)** in para [5], Jones J stated that "a decision is arbitrary if it is capricious, variable, uncertain, an unrestrained exercise of personal whim without reference to any sensible or relevant criteria"

[19] The appeal therefore partially succeeds against the punitive costs order granted by the court *a quo*.

[20] I accordingly propose the following order:

1. That the appeal is dismissed with costs.

2. That the order of the court *a quo* is set aside and replaced with the following:

"the application for rescission of judgment is dismissed with costs on party and party scale"



**MS SIKHWARI AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

I agree, and it is so ordered.



EM MAKGOBA JP

**JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

For Appellant	:	Adv MM Thipe
Instructed by	:	L Molepo Inc Attorneys
For Respondent	:	Adv D Mphahlele
Instructed by	:	TJ Machete Attorneys
Date of hearing	:	13 October 2017
Date of Judgment	:	27 October 2017