

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Handwritten Signature]</i>	
Date <i>27/10/2017</i>	

CASE NO: HCA 21/2017

In the matter between:

TINTSWALO LEAH MHLARHI**APPELLANT**

and

TZANEEN STAAL INDUSTRIEe (EDMS) BPK**RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] This appeal raises a question whether a summary judgment granted in the Magistrate's Court is capable of being rescinded in terms of Section 36(a) of the Magistrate's Courts Act 32 of 1944, read with Rule 49 of the Magistrate's Courts Rules. The judgment concerned was granted in the Magistrate's Court for the district of Tzaneen held at Tzaneen, the Respondent herein being the Plaintiff and the Appellant herein being the Defendant. For the sake of convenience I will continue to refer to the parties as the Plaintiff and the Defendant respectively.
- [2] The Plaintiff had issued summons against the Defendant claiming a total amount of R 222 477.08 (in three separate claims) being in respect of arrear rentals and damages arising out of breach of a lease contract. Upon service of summons the Defendant instructed her previous attorneys, MS Maponya Attorneys of Tzaneen who entered appearance to defend the action on 19 September 2016. On the 21 September 2016 the Plaintiff's attorneys served and filed an application for summary judgment.

The Defendant's then attorneys, MS Maponya Attorneys failed to serve and file Opposing Affidavit in order to resist the application for summary judgment.

- [3] On the date of the hearing of the application for summary judgment, on 27 October 2016, an attorney from MS Maponya Attorneys Mr Moloto, appeared on behalf of the Defendant without having filed opposing papers. He asked for a postponement which was refused and summary judgment was granted with costs.
- [4] The Defendant terminated the mandate of MS Maponya Attorneys and instructed the present attorneys of record, Bosman Attorneys of Polokwane to act on her behalf. On the 12 December 2016 Bosman Attorneys made an application for rescission of the summary judgment granted on 27 October 2016. The application for rescission of the judgment was heard on 3 February 2017. The application was not heard on the merits but was dismissed on a point *in limine* raised by Plaintiff's attorney.
- [5] In its point *in limine* the Plaintiff contended that at the hearing of the application for summary judgment the Defendant was represented by her previous attorney, Mr Moloto and therefore the judgment granted against her was not a default judgment for purposes of Rule 49.

Plaintiff submitted furthermore that the judgment of the 27 October 2016 is not one which is capable of being set aside in terms of Rule 49.

- [6] The following recording appears from the Court a *quo* record of the 2 February 2017 when the application for rescission of the summary judgment was dismissed:

"Point in limine is upheld with costs. Application for rescission of judgment cannot be said to be granted by default as Mr Moloto appeared for the Respondent on 27 October 2016 in the application for Rule 14"

- [7] In the present appeal the Appellant's contention is that since no opposing papers to resist the summary judgment had been filed, in effect the summary judgment was unopposed and the judgment was thus granted by default. That the summary judgment is subject to rescission of judgment.

- [8] This appeal, as I have already said, is against the finding of the Magistrate that the summary judgment granted in the Magistrate's Court is not capable of being rescinded in terms of Section 36(1)(a) of the Magistrate's Courts Act, read with Rule 49 of the Magistrate's Court Rules.

- [9] The relevant portion of Section 36(1)(a) of the Magistrate's Court Act 32 of 1944 read as follows:

"36(1) The Court may, upon application by any person affected thereby.....

(a) Rescind or vary any judgment granted by it in the absence of the person against whom the judgment was granted"

- [10] It is immediately to be noticed that the power of rescission provided for in Section 36(1)(a) is not in any way limited in its application to any particular type of judgment, provided only that it was "in the absence of" a person concerned that the judgment was granted. There is in other words no suggestion in Section 36(1)(a) that the remedy is limited to cases of default judgments granted in the absence of such a person, and that it excludes summary judgment granted in the absence of such a person. On the contrary, the interpretation of the express wording of Section 36(1)(a) makes it clear that the Magistrate's Court's power to rescind judgments granted in the absence of the person concerned includes the power to rescind summary judgments.

- [11] It is trite that the power of rescission provided by Section 36(1)(a) of the Magistrate's Courts Act, read with Rule 49 of the Magistrate's Courts Rules, is applicable to summary judgments granted in the absence of a party such as the Defendant in this case.

See: **Sundra Hardware v Mactro Plumbing 1989 (1) SA 474 (TPD) at 478 E.**

In the circumstances, the Court *a quo* was wrong in ruling that the summary judgment in the present case was not capable of being the subject of an application for rescission of judgment. The Court *a quo* should have dismissed the point *in limine* and proceeded to hear the application for rescission on its merits.

[12] A further question that arises in this appeal is the following:

Whether a defendant who failed to file opposing affidavit in a summary judgment application is in default even if his legal representative or himself is in attendance at Court.

It is common cause that the Defendant herself did not attend Court on 27 October 2016 when summary judgment was granted. However her legal representative, Mr Moloto was in attendance though he had not filed an opposing affidavit of the Defendant. Was the Defendant in default?

[13] In **Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD)** it was held that: where the Defendant files an affidavit in opposition to an application for summary judgment, the Court is not entitled to ignore such affidavit and it cannot be said that the Defendant is in default because he (or his Counsel) fails to appear when the application is heard.

Where summary judgment is granted under these circumstances there is, accordingly no “default” and the Defendant cannot apply for rescission of the judgment on such ground.

[14] Equally in **First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD)** it was held that where a Defendant in summary judgment proceedings is in default of appearance, but has nonetheless filed opposing papers, the Court is obliged to consider the matter on the merits before it, in the absence of the Defendant.

[15] The principle enunciated in the abovementioned decided cases in [13] and [14] above is to the effect that where opposing papers have been filed in an application for summary judgment, there can be no “default” even if the Defendant or the legal representative is absent from Court.

It is my view that by parity of reasoning, where opposing papers have not been filed there is a “default” even if the Defendant or the legal representative is present at Court.

[16] It is clear from the principles laid down in the abovementioned authorities that what is important in opposing a summary judgment is the filing of opposing papers. The presence or attendance of a Defendant or Counsel at Court without opposing papers is tantamount to a default. Mr Moloto’s attendance at Court on 27 October 2016 was immaterial since he could not have given evidence from the bar. For the Court *a quo* to hear him on the merits of the application there should have been an opposing affidavit filed. Failure to file an opposing affidavit constitutes default for purposes of an application for rescission of judgment.

[17] The Court *a quo* did not hear or consider the application for rescission of the summary judgment on the merits. The application was dismissed on a point *in limine*. Consequently this Court, sitting as a Court of appeal cannot enter into the merits of the application which the Court *a quo* never entertained. To do so will be going outside the scope of the appeal before us.

[18] This Court will however exercise its inherent powers to set aside the decision of the Court *a quo* and allow the case to proceed on the merits in the Court *a quo*. In this regard the case I am referring to is the application for summary judgment.

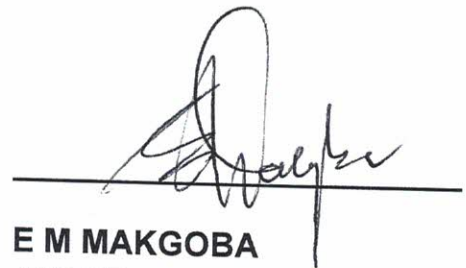
[19] Upon setting aside the judgment and order of the Court *a quo* granted on 2 February 2017 regarding the point *in limine*, the Plaintiff's application for summary judgment will be resuscitated and become pending before the Court *a quo*.

In the interest of justice the Defendant should therefore be given an opportunity to file an opposing affidavit in opposition to the pending application for summary judgment. The Court *a quo* is directed to proceed to hear the opposed application for summary judgment.

[20] Accordingly, the following orders are made:

1. The appeal is upheld with costs.
2. The order made by the Magistrate is set aside and is substituted by the following:

"The point *in limine* is dismissed with costs"
3. The matter is referred back to the Magistrate Court in order that he may deal with the summary judgment application.
4. The Appellant is directed to serve and file her opposing affidavit in opposition to the application for summary judgment within 20 (twenty) days of the granting of this order.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

I agree,



**M S SIKHWARI
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

Heard on : 13 October 2017

Judgment Delivered : 27 October 2017

**For Appellant : N Bosman
: Bosman Attorneys
Polokwane**

For Respondent : Adv. I A Van den Ende

**Instructed by : Stewart Maritz Basson
c/o Franco Marx Attorneys
Polokwane**