REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **A3091/2016**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

17-2-17

Date: **WHG VAN DER LINDE**

In the matter between

Top Ten Catering and Security Services CC	Applicant
and	
Sinclair Consulting (Pty) Limited	Respondent

Judgment

Van der Linde, J:

Introduction

[1] This is an appeal against the dismissal by a Magistrate of an application for rescission of a default judgment. The application for rescission was opposed, but only nominally, since a

notice of intention to oppose was filed, but no answering affidavit. The appeal was likewise unopposed.

[2] The statutory framework within which the rescission application had to be decided, is made up of Magistrates' Court Rules 49(1) and (3), and s.36(1)(a) of the Magistrates' Court Act 32 of 1944. These provide as follows.

"Rescission and variation of judgments
49. *(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 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 subrule (5).*

(2) ...

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."

"36 What judgments may be rescinded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 who that judgment was granted;...".

[3] These provisions, and their similar forebears, have been applied to mean that a successful applicant for rescission will have given a reasonable explanation for her default; her application will have been bona fide; and she will have shown a bona fide defence to the plaintiff's claim.[1]

[4] Thus the applicant's affidavit is required to have set out *"the reasons for the defendant's absence or default and the grounds of the defendant's* (the appellant's) *defence to the claim"* and, if so, whether either *"good cause"* was shown, or the court ought to have been satisfied that there was *"good reason"* to rescind the judgment. Importantly, these issues must be

[1] Some of the leading cases are Grant v Plumbers (Pty) Ltd, 1949 (2) SA 470 (O); Silber v Ozen Wholesalers (Pty) Ltd, 1954 (2) SA 345 (A); HDS Construction (Pty) Ltd v Walt, 1979 (2) SA 298 (E); and De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd, 1994 (4) SA 705 (E).

considered within the context of the affidavit as a whole, since not doing so, would constitute a misdirection that would entitle a court of appeal to inference in the exercise by the court a quo of its discretion.[2]

[5] The Magistrate also approached the matter from this perspective,[3] but concluded that the appellant was unable to explain its default of appearance;[4] and held that the court a quo was unable to conclude that the rescission application was bona fide.[5]

The facts

[6] The facts, thus uncontested, are that the summons was served personally on the appellant's Chief Executive Officer, Mr Patrick Dlamini, on 10 September 2015. He perused it, and then gave it to a messenger in his office to deliver to the appellant's attorneys for purposes of legal advice and defence. The particular firm of attorneys dealt with all the appellant's legal matters, and *"... all legal documents received at our offices are immediately delivered to them for purposes of legal advice and defence."*[6]

[7] As it happened, the summons was only delivered to the attorneys on 22 October 2015,[7] by which time, unbeknown to either the appellant or its attorney, judgment had already been given on 29 September 2015. On the same day, an attorney's clerk, Mr Malebana Boshomane, looked for but could not find the court file, the reason recorded at the clerk's office being to inspect the *"return of service."* [8] However, the file was not available. On the next morning Mr Boshomane served a notice of intention to defend.

[8] Mr Dlamini came to know of the judgment only when at around 28 January 2016 he received an email from the plaintiff's attorneys advising him of this fact.[9]

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[2] Compare De Witts Auto Body Repairs supra at p709 in fin.
[3] Reasons in terms of rule 51(1), p41, para [2].
[4] Ibid.
[5] Ibid, p42, para [6].
[6] Founding affidavit ("FA"), p6, para 10.
[7] Ibid, para 11.
[8] PD3, p26.
[9] FA, p7, para 15.

[9] Concerning the merits of the appellant's intended defence, the appellant accepted that a contract had been concluded with the plaintiff whereby the latter would design and implement a turnaround strategy for the defendant.[10] The deponent accepted too that performance of the agreement would take place in three phases, the first of which was comprised of diagnostic review and assessment.[11] The contract price too was negotiated, being R60 000 per month, and Mr Dada was assigned to the contract.[12]

[10]However, the deponent says that in negotiating the contract the plaintiff presented itself as an expert in the fields of diagnostic review and turnaround, and said that the plaintiff would improve the appellant's business.[13]

[11]When Mr Dada commenced with the purported execution of the contract, it became clear, said the deponent, that the plaintiff was not an expert in the fields stipulated.[14] When Mr Dada was approached about this, he undertook to speak to Mr Given, his partner. He did this, and returned saying that Mr Given had agreed to a reduction in the price of the contract to R10 000 per month.[15]Mr Dada was however to proceed with the job. After three months of payments but no progress, the parties agreed to cancel the agreement.[16]

[12]As to the adequacy of the reasons for the default, the court a quo concluded that the explanation given was tantamount to no explanation at all.[17]In consequence it held that the court was unable to assess how the default came about.

[13]As to the adequacy of the grounds of the defence, the court a quo reasoned that the assertion that Mr Dada was not an expert in the fields stipulated in the agreement, was a mere inference not substantiated by facts.[18] It concluded too that the assertion of an agreed

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[10] FA, p9, para 24.
[11] Ibid.
[12] FA, p9, paras 24, 25.
[13] Ibid.
[14] FA p9, para 25.
[15] Ibid.
[16] Ibid.
[17] Reasons, p41, para 2.
[18] Reasons, p41, para 3.

cancellation was lacking in particulars,[19] and as to the assertion that the payments agreed upon had been made, it said that this was needlessly bald, vague and sketchy.[20]

The approach of a court of appeal

[14]The next consideration is the approach to be adopted by this court to the consideration of the appeal. In particular, is this court free, sitting as it does on an appeal against the exercise of a discretion[21] by the court a quo, to substitute its own discretion for that of the court a quo? Or can it only do so if it is able first to conclude that the court a quo misdirected itself? Put differently, was the discretion exercised by the court a quo a discretion in the narrow sense or one in the wide sense?

[15]In Tjospomie Boerdery, Stegmann, J writing for a full bench in a judgment that has been widely followed since, suggested the following answer:[22]

"In the light of all these considerations, I come to the conclusion that the legal position governing the present appeal may be summed up in the following propositions:
1. There is no rule of law to the effect that in every appeal against the exercise of any discretionary power vested in the court of first instance the Court of appeal has no jurisdiction to interfere with the decision appealed against unless such decision is shown to have been unjudicial in one of the respects mentioned in Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335D - E.
2. In an appeal against the exercise of a discretionary power by a court of first instance, the first task of the Court of appeal is to examine the nature of the discretionary power, and to decide whether it belongs to the category of discretionary powers contemplated by the decision in Ex parte Neethling and Others.
3. If the power is found to belong to such category, the Court of appeal has no jurisdiction to interfere with the exercise of the power decided on by the court of first instance unless such decision is shown to have been unjudicial in one of the respects mentioned in Ex parte Neethling and Others, ie that such decision was capricious, that it was based on a wrong principle, that it was not reached by unbiased judgment, or that it was not based on substantial reasons.

[19] Reasons, p42, paras 3, 4.
[20] Reasons, p42, para 5. Here the court was relying on Breitenbach v Fiat SA (Edms) Bpk, 1976 (2) SA 226 (T), a case decided in a different context.
[21] Jones, J in DeWitt at 709.
[22] In Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another, 1989(4) SA 31 (T) at p40 ff. see also the full bench in Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another, 1999(4) 799 (W), and the cases annotated on it, including ABSA v Molotsi, [2016] ZAGPJHC 36 (8 March 2016), a full bench judgment.

4. If the discretionary power is not found to belong to such category, the Court of appeal must decide to what category it does belong. One possibility is that it may be found to belong to the same category as the discretionary power in Mahomed v Kazi's Agencies (Pty) Ltd and Others 1949 (1) SA 1162 (N).
5. If the power is found to belong to the last-mentioned category, the function of the Court of appeal is to hear all such arguments as may be addressed on the basis of the record before it, and to give due consideration to the decision of the court of first instance.
6. In some cases it may be possible to conclude that the exercise of the discretionary power by the court below was 'wrong' in some sense other than the sense of 'unjudicial' contemplated by Ex parte Neethling and Others. However, discretionary powers being what they are, there is usually no objective criterion according to which the exercise of such power can be judged to be 'right' or 'wrong'. The criteria according to which it may be judged to be 'judicial' or 'unjudicial' are dealt with in Ex parte Neethling and Others. However, there are always criteria according to which the exercise of a discretionary power may be judged to be 'appropriate' or 'inappropriate'. Such criteria depend upon the circumstances of the particular case. In the very nature of things, therefore, when the subject-matter of an appeal is the exercise of a discretionary power of the kind referred to in para 5 above, the Court of appeal is not bound to uphold the decision of the court below unless satisfied that such decision was 'wrong'.
7. In an appeal against the exercise of such a discretionary power, the function of the Court of appeal is to consider whether, in the light of all relevant factors, the exercise of the power by the court of first instance was appropriate to the circumstances of the particular case. If it was, the appeal must fail. If it was not, the Court of appeal must exercise the discretion anew, and must substitute its own discretion for the discretion of the court below.
That concludes the first question in this appeal."

[16]Cloete, J (as he then was) explained in Bookworks that the categorisation of discretions in the narrow sense, implying limited scope for interference on appeal, as being founded in the notion that the court of first instance is in a better position to exercise the discretion, was not always sound. The learned judge said (emphasis supplied):[23]

"And then there is the discretion vested in a civil court as to the incidence of costs, which is pre-eminently an example of a discretion in the narrow sense: Fripp v Gibbon & Co 1913 AD 354; Warner v Reid and Others (supra at 311 and 313). In each of these latter three instances an appeal Court is in, or can for practical purposes be placed in, as good a position as the trial court to make a decision. The justification for the reluctance of a Court of appeal to interfere must therefore be sought on other grounds. <u>The justification, it seems to me, is to be found in the fact that different judicial officers, acting reasonably, could legitimately come to different conclusions on the same facts, coupled with a policy decision dictated by the purely practical consideration that, if an appeal were to be allowed in such cases, appeal</u>

[23] At 806.

Courts would be overburdened by unsuccessful litigants hoping that the majority might differ from the conclusion of the court below."

[17]I would propose that in the case of a discretion to grant or refuse a rescission of a default judgement, the discretion being exercised is of the second, the wider, type principally for the following three reasons. First, the court a quo is confronted with the simple application of fact on affidavit to a statutory provision. A court of appeal is in as good a position as the court a quo to engage with this endeavour.

[18]Second, the grant or refusal of an application for the rescission of a default judgment has a final and definitive effect on the rights of litigants. If a default judgment is not rescinded, a litigant will find itself forever bound by the judgment. The general approach to appeal jurisdiction has been one in which judgments that are final in effect have been considered as appealable.[24] An approach that affords wide latitude to a court of appeal against the refusal of an application to rescind a default judgment, would fit with that approach.

[19]And third, all law must be interpreted in the light of the values underlying the Constitution; and the development of the common law must promote the spirit, purport and objects of the Bill of Rights. These include, of course, the fundamental right of access to courts under s.34.

[20]To be true, access may be regulated, but it is suggested that an approach that allows an appeal against the exercise of a discretion to exclude access to courts, rather than to constrain such an appeal by limiting it to those cases of misdirection a quo, more accords with the constitutional imperative.

[21]It follows that in my view this court is free to approach this appeal untrammelled by first having to find some misdirection by the court a quo.

Re-assessing the appellant's case

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[24] Compare ss. 16, 17 of the Superior Courts Act 10 of 2013.

[22]The first issue is the explanation for the failure to have entered appearance to defend in time. The explanation has been given above. No doubt the appellant's representative could have followed up. But he did put the summons in the pipeline for treatment in the expected way. And there is no suggestion that this method has failed the appellant before. There is the point too that a consultation took place at which the appellant was preparing its defence.[25] The attorney there said that he was awaiting the notice of bar from the other side before he could file the plea.

[23]But whatever one makes of the attorney's explanation, the fact of a consultation in preparation of the plea conveys that the deponent must have been put at ease that the matter was in the safe hands of the appellant's attorneys, and was being attended to.

[24]In my view, the explanation given adequately provides the reasons for the appellant's default, for the following reasons. First, the appellant did not ignore the summons but sought to bring it to the attention of its attorneys, in the way that it always did. Second, there nothing suggests that that method was unreasonably unreliable. Three, a subsequent event, the consultation, would reasonably have created a sense of security that the matter was being attended to properly.

[25]The second issue concerns the grounds of the defence. The contents of the affidavit have been set out above. There is the assertion of an agreed variation; there is the assertion of an agreed cancellation; there is the assertion of a reason for that agreed cancellation; and there is the assertion of payment of what was owing under the agreed variation. In purely technical terms, a defence is disclosed. Is the disclosure too lacking in essential detail to render it credible?

[26]In my view not. The deponent is not required to convince the court that the party will succeed in the trial. All a deponent need do, in addition to disclosing valid grounds of a

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[25] FA, p7, para 14.

defence, is to depose to an affidavit that is not inherently unconvincing, or which does not smack of tell-tale signs dishonesty or opportunism.

[27]In my view that standard has been met in the present case. I would propose the following order:

(a) The appeal is allowed.

(b) The judgment of the court a quo is altered to read:

(i) "The default judgment of this court granted on 5 October 2015 under case number 44682/2015 is rescinded.

(ii) The warrant of execution issued on 25 January 2016 under case number 44682/2015 is set aside.

(iii) The defendant is granted leave to defend the action."

WHG van der Linde
Judge, High Court
Johannesburg

I agree, and it is so ordered.

B Vally
Judge, High Court
Johannesburg

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