

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA & R 123/2016
Heard on: 20/02/2017
Delivered on: 17/03/2017

In the matter between:

THEUNIS JOHAN KRUGER

APPELLANT/DEFENDANT

And

VAN DER WATH & KIE

RESPONDENT/PLAINTIFF

Coram: Pakati J et Mamosebo J

JUDGMENT ON APPEAL: RESCISSION OF JUDGMENT

MAMOSEBO J

- [1] This is an appeal noted in terms of Rule 51 of the Magistrates Courts Rules against the judgment, order and the reasons of the decision of acting Magistrate PP Tshweu delivered on 08 October 2015 at Kuruman

Magistrate's Court for her refusal to rescind the default judgment granted on 24 February 2009.

- [2] The appellant is Theunis Johan Kruger a former sole member of a close corporation registered as THEUNIS JOHAN KRUGER t/a ALL-IN-ONE CC with registration number 2007/021962/23. The respondent is Van der Wath & Kie, a company registered with the Council for Debt Collectors with registration number 0016580/06.

- [3] Before the arguments could commence Adv Olivier, for the appellant, addressed us on the aspect of security for costs because it was raised in the heads of argument by Adv Sieberhagen appearing for the respondent, relying on Rule 51(4) of the Magistrates Court Rules. Counsel for the respondent subsequently abandoned the argument as that would have meant a postponement to enable the appellant to comply with the requirement. As a result the non-compliance with the Rule 51(4) was condoned. See *Pilane v Northern Cape Tractors (Pty) Ltd* [1971] 3 All SA 346 (NC).

- [4] On 06 June 2007 the appellant received and completed an application for credit facilities from NKB Traders (Pty) Ltd t/a Lumber City Kuruman. He also completed and signed a surety form attached to the application for the credit facility. The CC was liquidated and later deregistered. The amount obtained through the credit facility remained unpaid.

- [5] On 13 February 2007 the respondent entered into a cession agreement with Lumber City. The debt by the appellant was ceded to the respondent.

- [6] On 03 October 2008 the respondent issued a simple summons against the appellant for the payment of R99 999.99 for goods sold and delivered, interest at 15.5% per annum from the date of the *mora* (when the summons was served) to date of final payment and costs. The appellant failed to enter an appearance to defend. At the expiry of the *dies default* judgment was granted on 24 February 2009. The appellant brought an application for rescission of the judgment on 29 October 2014: five years and seven months later which was dismissed by the Magistrate.
- [7] Rule 49 of the Magistrates Court Rules provides:
- “(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).”* (Emphasis added)
- [8] The prerequisites that the appellant must satisfy under this sub-rule are the following:
- (9.1) The application must be brought within 20 days of having obtained knowledge of the judgment;
 - (9.2) Good cause must be shown.
 - (9.3) If the appellant relies on the ground that rescission must be granted because the default judgment is void *ab origine* the application must be filed within one year after the appellant had knowledge of such voidness, fraud or mistake.

- [9] The essential question to be determined is whether the appellant has demonstrated whether the default judgment was erroneously sought or granted, or whether the judgment is void *ab origine* or was obtained by fraud or mistake.
- [10] The appellant's contention was that the Magistrate erred:
- 11.1 In finding that the appellant does not have a *bona fide* defence to the respondent's claim;
 - 11.2 In finding that the appellant was in wilful default;
 - 11.3 In dismissing the point *in limine* raised by the respondent that Rule 49(8) was not applicable to a rescission of judgment;
 - 11.4 In finding that the default judgment was properly granted whereas the suretyship agreement was not attached to the summons;
 - 11.5 In finding that the default judgment was not granted erroneously and therefore not *void ab origine*;
 - 11.6 In finding that the judgment granted against the appellant in his personal capacity was correct whereas it was the close corporation that bought and received the goods sold by the respondent.
- [11] It was argued on behalf of the appellant that the fact that the summons upon which the default judgment was granted was issued in the Magistrate Court in the District of Kuruman it is excipiable based on the Court's lack of jurisdiction which rendered the default judgment *void ab origine*. This argument lacks merit. The appellant was served personally at 29A Bosman Street, Kuruman. The same address appears on the surety form signed by the appellant. There was compliance with

the provisions of s 28(1) (a) of the Magistrate's Court Act, 32 of 1944, which stipulates that:

“28 Jurisdiction in respect of persons. – (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:

(a) Any person who resides, carries on business or is employed within the district or regional division.”

The appellant was cited in his personal capacity. **I therefore find that there was no misdirection on the part of the Magistrate to hold that the Magistrates Court Kuruman had jurisdiction to hear the matter.**

- [12] The appellant argued further that it was the close corporation and not him in his personal capacity that was in wilful default. This assertion was not supported on paper. It is not in dispute that the appellant, as the sole member, was the alter ego of the close corporation. This is what the appellant deposed to in his founding affidavit:

“I wanted [to] start a construction business and register a close corporation as to protect myself [in] my personal capacity should my business entity suffer any sort of difficulties or losses. I therefore decided to register a close corporation (hereinafter referred to as the CC) for the benefits this entity offered me against creditors and because of the advantages that it is a legal entity and can trade as such. In particular, I was aware of the benefit as in terms of s 2(3) of the Close Corporations Act 69 of 1984 (hereinafter referred to as “the Act”) where a/the member of the CC incur no personal liability when the matters for the CC is in the normal sense of business for the CC's affairs. In this regard I refer the Honourable Court to the relevant section:

‘2 Formation and juristic personality of close corporations.

(3) Subject to the provisions of this Act, the members of a corporation shall not merely by reason of their membership be liable for the liabilities or obligations of the corporation.’’

[13] It is also questionable that the appellant as the sole member of the CC would not have known about the debts of the CC, particularly the credit facility provided by Lumber City Kuruman in respect of which he had signed as surety. That he had marital problems and moved several times within the specified period cannot be described as a *bona fide* defence. In my view the argument raised by the appellant pertaining to the summons is technical and not a matter of substance and is capable of being amended. These technicalities nevertheless cannot assist him on the question of a *bona fide* defence. When the appellant was personally served with the summons on 09 October 2008 he could have denied that the amount of R99 999.99 was due and payable to Lumber City, Kuruman, but he tacitly accepted his indebtedness. **I therefore find that there was no misdirection on the part of the Magistrate to hold that the appellant was wilful in his conduct.**

[14] Mr Olivier submitted that Rule 49(8) finds application in that where a party is seeking rescission of a judgment on the basis that it was *void ab origine* or was obtained by fraud or mistake, the application must be served within one year after the applicant first gained knowledge of such voidness, fraud or mistake.

[15] What the appellant omitted to point out is that he had signed as surety on 06 June 2007 when he applied for a credit facility. He only made reference to the credit facility application attached as “K2” and yet the completed and signed surety form was attached to “K2”. The form reads:

“Ek, die ondertekende Johann Kruger, Identity Number provided, verbind hiermee myself as Borg en Mede Hoofskuldenaar ten behoewe van NKB TRADERS (Edms) Bpk, vir die behoorlike en stiptelike nakoming deur All- in –One Konstruksie van al sy verpligtinge teenoor die genoemde NKB TRADERS (Edms) Bpk, hetsy dit tans verskuldig, opeisbaar en betaalbaar is, of in die toekoms verskuldig, opeisbaar en betaalbaar gaan word deur Hoofskuldenaar.

Ek doen hiermee afstand van die volgende regseksepsies:

- 1. Non causa debiti (geen skuld oorsaak nie);*
- 2. Errore calculi (berekeningsfoute);*
- 3. De duobus fel pluribus reis debende (indien meer dan een borg, dan gesamentlik of afsonderlik aanspreeklik);*
- 4. Beneficium ordinis sei excussiones (borge en mede-hooskuldenaars gesamentlik en afsonderlik aanspreeklik);*

Vir doeleindes van hierdie borstelling, kies die borge hiermee as domicilium citandi et executandi (synde adres waarborg geag word altyd teenwoordig wees) te:

Bosman Street 29A, Kuruman.”

- [16] The fact that the appellant had bound himself as co-principal debtor entitled the respondent to elect who it wanted to claim against to recover its debt since they were jointly and severally liable. The appellant cannot be correct in his argument that he cannot be held personally responsible for the debt and further that the close corporation should have been joined as a party. Mr Olivier sensibly abandoned this ground. It is clear from the suretyship agreement that the appellant has renounced the benefit of excussion, and can therefore not insist that the CC be excused first.

- [17] Mr Olivier submitted that the summons upon which the default judgment was granted may be deemed to be an irregular step, alternatively, excipiable based on the provision of the Magistrates Court Rules on where a plaintiff sues a cessionary. Rule 5 (9) of the Magistrates Courts Rules of Court provides:

“Where the plaintiff sues as cessionary the plaintiff shall indicate the name, address and description of the cedent at the date of cession as well as the date of the cession.”

- [18] Counsel also argued on behalf of the appellant that the written cession agreement was not annexed to the summons as required by Rule 6(6) and 12(6) and that the agreement was not contained in the Magistrate’s Court file when the judgment was delivered; an aspect denied by the respondent and rejected by the Magistrate. Although the Rule requires the plaintiff to indicate the name, address and description in the summons, such omission is not of such nature that it renders the process *void ab origine*. In its answering affidavit the respondent explained that the original cession agreement was filed at Court on 11 February 2009 and that judgment was delivered on 24 February 2009.

- [19] In the address made before the Magistrate the following is apposite:

“Respondent: Yes your worship so that is why my learned colleague basically states that he never disputed that he has to pay the money, we dispute that the defendant should not pay the money, the claim should have been lodged against the CC, the CC applied [for] the credit.

Court: But you do not dispute that the money is owed.

Respondent: Your worship the CC took, received the goods yes, the CC received the goods.

Court: Yes the CC received the goods, you do not dispute that?

Respondent: No

Court: You do not dispute that the respondent has a surety against the CC?

Respondent: No

Court: You also do not dispute the cession that it happened?

Respondent: Your worship we did not, the cession was never basically discussed as thoroughly in the summons so that is why we never dwelled upon that as well as the suretyship agreement.

Court: But it is in the bundle.

Respondent: Yes

Court: Yes, so all those things you do not dispute but what you are stating is that the summons [was] erroneously issued against the defendant and they did not include it instead of the CC.

Respondent: Because the CC is an entity on its own.

Court: So that is why.

Respondent: That is the basis of our defence, your worship; it is that the CC received the goods in their capacity as a legal entity, and that he never received the goods. Therefore he is not liable but the CC is for the receiving of the goods.”

- [20] Streicher JA’s remarks in ***Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*** 2007 (6) SA 87 (SCA) at 95D – F (para 27) are instructive:

“..[I]n a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis

that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

- [21] It is clear to me that the appellant failed to enter an appearance to defend. He then subsequently sought advice from his attorney after he was in gainful employment and several years after the default judgment was granted. It is also clear from the address made to the Magistrate that the so-called 'error' was based on the premise that the judgment ought to have been granted against the CC and not the appellant. This contention has not been substantiated at all. The conduct of the appellant in this application was wilful. We cannot come to his rescue.
- [22] It is necessary for me to end by addressing the inordinate delay in furnishing reasons for her decision by the Magistrate. The judgment was delivered *ex tempore* on 08 October 2015. The appellant's legal representative requested reasons for judgment on 09 October 2015 which were only furnished by the Magistrate on 26 May 2016, about 7 months later. Adjudicating disputes and delivering properly crafted and well-reasoned judgments promptly is the core function of a presiding officer. The expression justice delayed is justice denied still holds absolutely true. Such prolonged delay may render the judgment useless and prejudice the judgment creditor immensely. The supine attitude by the Magistrate may even have breached the Magistrates' Code of Conduct where she

informed Mr Nico Van Noordwyk, the attorney representing the appellant at the Magistrates Court that:

*“Ek het die Landdros versoek vir ‘n skriftelike uitspraak en is daar aan my vermeld dat sy aan my sal verskaf **sodra sy kans kry.**”*

[23] Rule 51 (1) stipulates:

*“(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer **shall within 15 days** hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing –*

(a) The facts he or she found to be proved; and

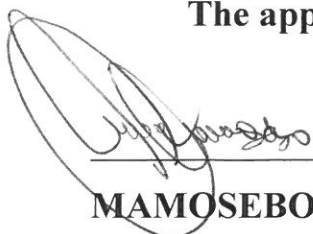
(b) His or her reasons for judgment.”

[24] The appellant clearly lacked a *bona fide* defence. His argument lacked merit and stands to be dismissed. The Magistrate has applied her mind properly. I cannot therefore find any misdirection in her finding that the appellant lacked a *bona fide* defence.

[25] What remains is the question of costs. There is no reason why the costs should not follow the result. The calculation of interest and costs claimed must not offend against the *in duplum principle*.

[26] In the result, the following order is made:

The appeal is dismissed with costs.



MAMOSEBO J

NORTHERN CAPE HIGH COURT

I concur

Bu Pakati

PAKATI J

NORTHERN CAPE HIGH COURT

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Instructed by:

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