IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 02/2016

In the matter between:

NQABAKAZI SITOLE

Vs

ABSA BANK LIMITED

APPEAL JUDGMENT

BROOKS AJ

[1] The appellant is an adult female insurance broker who gives her address in the affidavits to which she has deposed in this matter as "Zimbane Administrative Area, Mthatha." The respondent is a public company with limited liability duly registered as a bank and credit provider in accordance with the laws of the Republic of South Africa.

[2] The appeal is directed against a judgment of the magistrate's court for the district of Mthatha given on 13 October 2015 and in which an application brought by the appellant for the rescission of a judgment granted against her by default on 16 September 2014 was dismissed by the additional magistrate with costs. It is apparent from the judgment in the court *a quo* that an accompanying application for the setting aside of a warrant of execution was also dismissed with costs.

[3] The application for rescission of the judgment in the court *a quo* was opposed. The answering affidavit was deposed to by the risk mitigation manager employed by the respondent and who had all the documentation and electronic records pertaining to the contractual relationship between the appellant and the respondent in his possession and under his control.

[4] In terms of provisions of Rule 49 (1) of the Magistrate's Court Rules of Court the appellant was required to make her application for rescission within twenty days of gaining knowledge of the existence of the judgment taken against her by default. In assessing whether or not she complied with this rule, the allegations made by her in the founding affidavit are unhelpful. All she states is that she became aware of the existence of the judgment "only in /about 2015". (*sic)* The founding affidavit was deposed to on 12 March 2015 and the notice of application issued is dated 16 February 2015. Inasmuch as the application was served on the respondent's attorneys on 17 March 2015, it is assumed that the notice of application was incorrectly dated and that it was in fact issued on 16 March 2015, thereby commencing the application proceedings on that date.

[5] Some assistance in this regard may be gleaned from the respondent's answering affidavit which refers to, and annexes, a copy of an electronic mail print out which shows that on 11 February 2015 the appellant's attorney addressed a letter to the respondent's attorney setting out a proposal for the settlement by the appellant of the indebtedness to the respondent. Whilst in all probability the ability of the appellant's attorney to address such a letter on 11 February 2015 indicates that the appellant knew of the existence of the judgment earlier than that date and was able to give the matter thought and give

instructions to her attorney accordingly, I am prepared for present purposes to assume, in the absence of any better information from the appellant, that on 11 February 2015 she came to know of the judgment. The effect of the provisions of Rule 49 (1) of the Magistrate's Court Rules of Court is that the appellant ought to have launched her application for rescission of the judgment on or before 2 March 2015. The application papers disclose no reason for her failure to do so. Nor was any application for condonation placed before the magistrate in respect of this failure. On this ground alone the application for rescission of the judgment could have been dismissed. At best for the appellant, her failure to comply with the provisions of Rule 49 (1) of the Magistrates' Court Rules of Court is a factor which affects the assessment of her *bona fides* in bringing the application for rescission.[1]

[6] In an application of this nature it is incumbent upon an applicant to place evidence before the court which demonstrates the following:

1. He or she must give a reasonable explanation for his or her default; if the default is wilful or due to gross negligence, the court should not come to his or her assistance;

2. The application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim;

3. The applicant must show that he or she has a *bona fide* defence. It is sufficient if he or she makes out a *prima facie* defence which does not deal fully with the merits or produce evidence that the probabilities favour the applicant.[2]

[1] CAROLUS v SAAMBOU BANK LIMITED; SMITH v SAAMBOU BANK LIMITED 2002 (6) SA 346 (SECLD).
[2] HDS CONSTRUCTION (PTY)LTD v WAIT 1979 (2) SA 298 (E) 300 F – 301 C; GRANT v PLUMBERS 1949 (2) SA 470 (O) 476-477.

[7] In amplification of the first requirement of an application for rescission of a judgment, it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about.[3]

[8] Whilst it is for the applicant to give a reasonable explanation for his or her default, the *onus* of proof to establish wilful default rests with the respondent.[4]

[9] The requirement that an applicant must show the existence of a substantial defence does not mean that he or she must show a probability of success. It is sufficient if he or she shows a *prima facie* case, or the existence of an issue which is fit for trial.[5] In this regard, the following principles are useful:[6]

> "…judgment by default is inherently contrary to the provisions of s 34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for decision, the court must on the one hand balance the need for an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first place. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while among others this requirement incorporates showing the existence of a *bona fide* defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced is not a good reason why the

[3] SILBER v OZEN WHOLESALERS (PTY) LTD 1954 (2) SA 345 (A) 353 A.
[4] MAHOMED ABDULHA v CHOCHAN 1933 NPD 334.
[5] SANDERSON TECHNITOOL (PTY) LTD v INTERMENUA (PTY) LTD 1980 (4) SA 573 (W).
[6] RGS PROPERTIES (PTY) LTD v ETHEKWINI MUNICIPALITY 2010 (6) SA 572 (KZD) 575 G-576 C.

> application should not be granted. That said, however, the nature of the defence advanced must not be such that it *prima facie* amounts to nothing more than a delaying tactic on the part of the applicant."

[10] In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits, it is necessary, in my view, to consider the nature of the relief sought. The effect of rescission would be to render the existing order a nullity. Neither advantage nor disadvantage can flow therefrom. The applicant is entitled in appropriate circumstances to claim that the *status quo ante* be restored.[7] Accordingly, in my view the grant of rescission can be likened to the grant of interim relief and the proper approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to determine whether, on those facts, the applicant is entitled to relief.[8]

[11] An examination of the content of the affidavits filed in the application brought in the court *a quo* reveals that the appellant complains that service of the summons was irregular with the result that she did not receive the summons. Although the appellant placed the sufficiency of the service of the summons in issue, her application papers in the court *a quo* did not include the return of service. Reference is made to the manner of service in the magistrate's judgment and counsel before us were in agreement that the judgment was correct in describing that service was by way of affixing the summons to a principal door (apparently the return of service in counsels' possession referred to a principal gate) in Mazi zini Location, Zimbane Administrative Area, Mthatha. In the agreement she entered into with the respondent, the appellant gave this address as her *domicilium citandi et executandi*. In these

[7] SECURIFORCE CC v RUITERS 2012 (4) SA 252 (NCK) 261 D-E.
[8] SPUR STEAK RANCHES LTD AND OTHERS v SADDLES STEAK RANCH, CLAREMONT, AND ANOTHER 1996 (3) SA 706 (C) 714 E.

circumstances the magistrate concluded that the appellant could not be heard to complain that the address was "too vast an area" to effect proper service. She stressed that the *onus* had been on the appellant to give the respondent an address at which she could be reached. She also highlighted the fact that the terms of the return of service indicated clearly that there was some sort of residence where the service was effected. In assessing whether or not the magistrate misdirected herself in this regard, the court observed that the affidavits deposed to by the appellant do not disclose an address which is more specific or detailed than the one she nominated in her agreement with the respondent. In the circumstances, I am of the view that the magistrate was correct in dismissing the appellant's complaint about the service by affixing at her nominated address.

[12] It is clear from the founding affidavit that in setting out her defence to the claim, the appellant acknowledges her indebtedness and explains that she was attempting to bring her arrears up to date when the respondent closed her bank account. She states that she was not given a chance to negotiate the issue and claims that this attitude on the part of the respondent is "unfair" because the respondent was aware that she could not "afford such a huge cash payment at once and for all"(*sic*). The reference is to the final payment, or residual amount, shown on the face of the agreement to be R79 485, 00. The appellant stated that she had approached the bank for credit. She concludes the founding affidavit with the following statement:

> "I desire fair opportunity with the Respondent to engage in a reasonable settlement of the matter out of Court, taking into account various factors, including the present economic climate and the re-opening of the Bank Account into which I have been paying the instalments in respect of the said car."

[13] It is apparent from the respondent's answering affidavit that this desire to settle the outstanding indebtedness was first expressed on 3 June 2014 when the appellant's husband first contacted the respondent and advised that he was the one responsible for paying for the vehicle, that it was "in for repairs" and that as he did not have money to settle the account he would like to do so by a continuation of instalments. The respondent advised the appellant's husband that the respondent's policy restricted it from restructuring the account and accordingly (full) settlement of the account was required.

[14] It is to be noted that the telephonic contact made by the appellant's husband with the respondent appears to have been prompted by the despatch to the appellant by way of prepaid registered post sometime around 30 May 2014 of a notice in terms of s129 of the National Credit Act. A South African Post Office report was attached to the respondent's summons indicating that this registered letter had reached the relevant post office and that a first notification of its existence had been sent out to the appellant. However, a copy of the s129 letter and a copy of the South African Post Office report was not included by the appellant in her application. In the absence of any indication to the contrary, it is reasonable to assume that the s129 letter was also addressed to the appellant at her chosen *domicilium citandi et executandi*, the same address to which the summons was directed, and that the registered letter was received and prompted the telephonic contact. In my view, this serves further to indicate that the appellant's complaint about the service of the summons is without substance.

[15] The appellant's replying affidavit attempts to import into the matter all sorts of arguments in principle about the inadequacy of the expression of the terms of the agreement relating both to the address nominated by the appellant

and the identification of the residual amount payable in terms of the agreement. It also imports the notion that the appellant was unaware of what she had signed. Not only it is trite that an applicant in motion proceedings cannot make out a case in his or her replying affidavit, but it is plain from the legalese and third person used in the replying affidavit that it reflects the handiwork of the appellant's legal representative and not the appellant's own state of mind. For these reasons, it is not necessary to have regard to the content thereof in ascertaining whether or not the appellant has a *bona fide* defence to the action. Even if one did, the thread of acknowledgment of indebtedness and liability can still be detected therein. Moreover, the appellant does not indicate any legal basis upon which she might be excused from the consequences of having applied her signature to the agreement.[9] In my view, the appellant has failed to disclose a *bona fide* defence.

[16] It follows that, the appellant has failed to satisfy the requirements for a rescission of the judgment granted against her by default and the conclusion set out in the magistrate's judgment are correct.

[17] In these circumstances the appeal cannot succeed. There is no reason why costs should not follow the result.

[18] The following order issues:

> "The appeal is dismissed with costs."

[9] AFROX HEALTHCARE BPK v STRYDOM 2006(6) SA 21 (SCA).

R.W.N. BROOKS

JUDGE OF THE HIGH COURT (ACTING)

PAKADE J:

I agree.

L.P. PAKADE

JUDGE OF THE HIGH COURT

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Appeal heard on:	**29 April 2016**
Judgment delivered on:	**10 May 2016**