

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: A143/2015

DATE: 8 MAY 2015

In the matter between:

WAMKULUS CONSTRUCTION AND

MAINTENANCE CC

Appellant

And

SEBOKUBOKU CONSTRUCTION AND WATER

SUPPLY

Respondent

JUDGMENT

STRAUSS, AJ:

1. This is an appeal against an order of the Regional Court for the Division of Limpopo, dismissing the rescission application by the appellant to have a default judgment granted against it on 7 May 2013 set aside. The appellant contends that the default judgment granted against it was void *ab initio* due to the fact that the judgment was granted against it whilst it was not a party to the litigation before the court *a quo* when default judgment was granted.
2. The appellant argues that it was not a party cited in the action when judgment was granted due to the fact that the front page of the summons identifies the appellant as:

“Wamakakulus Construction and Maintenance CC, a close corporation with registration no 2005/144763/23 and registered address being 132 Snyman Street, Polokwane, 0699 and whose and

further particulars are to the plaintiff unknown”

3. Thus, the citation of the summons clearly refers to a close corporation, the appellant herein. However, the description of the particulars of claim in the body of the summons describes the appellant as follows:

“The defendant is Willem Albert Myburgh Oberholzer, a sole proprietor trading as Wamakulus Construction and Maintenance with Identity No [...] and main place of business being 139 Snyman Street; Bendor, Polokwane, whose further particulars are to the plaintiff unknown.”

4. The appellant thus argues that the summons depicts a close corporation while the body of the particulars of claim identifies a natural person, Mr Oberholzer.

5. Default judgment was granted on 7 May 2013 against the close corporation and not against the natural person. Thus the appellant argues that the close corporation was not a party to the proceedings as it was not cited in the particulars of claim. Therefore no judgment could be granted against it and as a result the judgment granted is void *ab initio*.

6. The appellant brought an application to have the judgment rescinded in terms of Rule 49(8) of the Magistrate’s Court Rules, in terms of this rule a rescission application may be brought within one year of date of judgment.

7. The application was opposed by the respondent in the court *a quo* and several points *in limine* were raised, the only relevant point *in iimine* raised was that the appellant had not set out a bona fide defence in its application for rescission as it had simply relied on the defence that the wrong party was before court when default judgment was granted, and had therefor not set out a defence to the merits of the respondent’s monetary claim.

8. The only question therefore that this court has to answer is if the appellant when bringing the application for rescission had indeed, as in terms of Rule 49 of the Magistrate’s Court had a put forth a defence.

9. The court *a quo* when hearing the application correctly found that the appellant had the intention to defend the matter and was not wilful in its failure to defend the matter. The court *a quo* also found that there was a reasonable explanation for the default of the appellant.

10. The court *a quo* however found that the appellant had not set out a defence to the merits to the respondent’s claim that was *bona fide*, but had only set out a technical defence in that the citation of the appellant was different on the summons than in the particulars of claim. Therefore the appellant’s defence was simply that the incorrect party was before court when judgment was granted which was not an answer to

the merits of the claim.

11. The court *a quo* gave a coherent judgment in the sense that all the relevant case law in regards to applications of this nature. The court *a quo* also considered the citation of the appellant and found that the contradictory citation of the appellant could in terms of the prescripts of Rule 55 and Section 111 of the Magistrate's Court Act, be regarded as a mere misnomer.

12. The court *a quo* by reasoning found that an application in terms of section 111 or Rule 55A for an amendment of the summons and/or particulars of claim is likely to have been ordered so as to put the real issues before court for prompt finalisation.

13. However, on the facts of this case such amendment was never granted or requested by either the respondents or ordered by the court *a quo*. Thus, when the judgment was granted the summons and particulars of claim as to the appellant before court against which judgment was sought was contradictory.

14. The respondent's also set out in their opposition to the application for rescission that the attorney drafting the particulars was aware of the fact that the summons and particulars of claim refer to different parties but due to an oversight from the attorney, he failed to rectify the typographical error that had occurred in the citation of the appellant.

15. The summons was issued on 3 April 2013 and default judgment was requested on 27 April 2013 by the respondent but was only granted on 7 May 2013 against the close corporation. Having knowledge of the error in the summons and particulars the respondent's attorney persisted incorrectly in the absence of an amendment, to apply for judgment without seeking an amendment from the court *a quo*.

16. The court *a quo* found that the application and the defence set out therein by the appellant was based on a technicality and that the appellant never addressed the defence he had to the monetary claim in the action.

17. The court *a quo* found that an application brought in terms of Rule 49(8) does not assist the appellant due to the fact that he still needed to state his defence. The court *a quo* referred to the case of **WM Mentz & Seuns (Edms) Bpk v Katzake 1969 (3) All SA 218 (T)** where Boshoff, J held in a decision regarding summary judgment, that in an application to resist summary judgment the applicant had to set out a bona fide defence against the action.

18. The WM Mentz case is distinguishable from this matter as the Mentz matter dealt with a summary judgment in which the plaintiff failed to attach the liquid document on which their claim was based to the summons. The respondent in the Mentz matter merely therefore relied on several technical errors in the application for summary judgement but set out no defence as to the merits.

19. Thus, I find that the reliance on the Mentz matter by the court *a quo* is misplaced due to the fact that in the Mentz matter the technical defence was a defence raised on the strict forms and procedures that find application in summary judgments and was not in general a reference to a “*bona fide*” defence that has to be set out by a party in any rescission application.

20. In *casu* the technical defence raised by the appellant is one that the citation of the parties brought about that the incorrect party was before court when judgment was granted. This is in a way conceded by the respondent due to the fact it conceded in the appeal that an amendment of the parties was and would be necessary to bring the correct party before court, and that the pleadings would have to be subsequently amended.

21. The defence raised by the appellant herein is not simply a defence to technicalities in form. It is a defence raised in substance due to the fact that the substitution of parties will have to take place, alternatively an amendment to bring the correct party before the court, as a natural person and close corporation are different legal personas.

22. The appellant in bringing the application for rescission had set out a *bona fide* defence before the court *a quo* and the court *a quo* was incorrect in finding that no such *bona fide* defence had been set out.

23. The rules specifically make provision for the fact that a defence has to be set out. It does not require that a *bona fide* defence must be set out on the merits. By analogy a defence raised of jurisdiction or *litis constatio* or *res judicata* in essence is a technical defence that does not speak to merits, but would raise a defence to merits, due to the fact that it raises an issue that has to be ventilated between the parties during the course of trial.

24. The respondent, well knowing that its particulars of claim and summons refer to different parties, had an obligation to amend such pleadings prior to it applying for default judgment in the court *a quo* and by not doing so it opened the avenue for the appellant to bring an application for rescission of the judgment simply on that point.

25. The legal principles applicable to a judgment granted where it was void *ab initio* are set out in ***Siiom v Wallachs Printing & Publishing Co Ltd 1925 (TPD) 650***. It is set out in ***S v Absalom 1989 (3) SA (A) at 164*** that if such a judgment was granted against any party, that party may even ignore such a judgment without setting it aside.

26. It is therefore clear that the respondent instituted action against a natural person but obtained judgment against a close corporation.

27. In the event that default judgement was not granted the appellant would have been able to raise an exception and/or file a plea, and it would or could have raised such plea and or exception, not with reference to the body of the summons, but against the particulars of claim.

28. I therefore find that the court a *quo* was incorrect in not granting the rescission of the judgment and I therefore propose the following order:

1. The appeal is upheld.
2. The order granted by the court a quo dismissing the application for rescission of default judgment is set aside and replaced with the following order:

“The default judgment granted in the Regional Court for the Regional Division of Limpopo held at Polokwane under case number LP/PLKJRC438/13 is rescinded on the basis that it is void ab initio.”[^]

3. The matter is referred back to the court a quo to proceed before another magistrate
4. The respondent is ordered to pay the costs of this appeal.

BY ORDER

STRAUSS, AJ

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

R TOLMAY, J

JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT: ADV JCG HAMMAN

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ATTORNEY: CORRIE NEL INC