

IN THE HIGH COURT OF SOUTH AFRICA**[EASTERN CAPE LOCAL DIVISION: MTHATHA]****CASE NO. CA&R 63/2015**

Date heard: 20 November 2015

Date delivered: 24 November 2015

In the matter between:

MINISTER OF POLICE

Appellant

and

LUSINDISO NONGWEJANE

Respondent

JUDGMENT

BROOKS AJ:

[1] On 17 February 2015 the appellant launched an application for the rescission of a judgment which had been granted by default in favour of the respondent on 18 June 2014 by the magistrate in the Regional Court Division of the Eastern Cape held at Mthatha. The application for rescission was opposed by the respondent and a full exchange of affidavits occurred between the parties.

- [2] On 14 April 2015 the magistrate dismissed the application for rescission and directed the appellant to pay the costs of the application.
- [3] In the notice of appeal filed of record on behalf of the appellant, reference is made to an appeal against the whole of the judgment and order delivered by the magistrate on 5 May 2015. However, in the written reasons for the judgment and order furnished on 17 August 2015 at the request of the appellant, the magistrate makes reference to the order having been given on 14 April 2015. The confusion appears to have arisen from the inclusion in the record of proceedings of two copies of the order made by the magistrate on the application for rescission. The first is dated 14 April 2015 and the second is dated 5 May 2015. Both documents express the order made by the magistrate in substantially the same terms. It is plain that the present appeal is directed against the order of the magistrate in which the application for rescission was dismissed with costs. There being no reason to suspect that the magistrate made any error in the provision of the written reasons for the judgment and order, the correct date of the order would appear to be 14 April 2015. Nothing turns on the erroneous reference in the notice of appeal to 5 May 2015 and accordingly it is accepted that the reference should be to the order dated 14 April 2015.
- [4] Section 36 (1) of the Magistrates' Court Act 32 of 1944 empowers a court:

- (a) to rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
- (b) to rescind or vary any judgment granted by it which was void *ab origine*, or which was obtained by fraud or by mistake common to the parties;
- (c) to correct patent errors in any judgment in respect of which no appeal is pending; and
- (d) to rescind or vary any judgment in respect of which no appeal lies.

[5] Rule 49 of the Magistrates' Court Rules of Court deals with the subject more fully, prescribing the procedure to be followed and the content of the affidavits which must be filed in support of the application for rescission. Sub-rules 1 to 6 deal with the rescission or variation of "default judgments"; sub-rules 7 and 8 deal with the rescission or variation of judgments other than "default judgments" and sub-rule 9 deals with the correction by a magistrate of his or her own accord of errors in a judgment. Sub-rules 1 to 3 cater for a defendant wishing to defend the action in which judgment has been granted by default against him or her.¹

[6] Whilst the application for rescission commences with a claim that it is brought in terms of Rule 49 (8) of the Magistrates' Court Rules of Court, it is plain from the content thereof that in fact the applicable rule is Rule 49 (3) of the Magistrates'

¹ THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SOUTH AFRICA VOLUME II, Jones and Buckle, Tenth Edition 2012, Juta and Company (Pty) Ltd, Rule 49-2.

Court Rules of Court and that the application has been sufficiently widely presented to encompass that rule.²

[7] Rule 49 (3) of the Magistrates' Court Rules of Court provides as follows:

"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."

[8] It has been held³that:

"An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and the accompanying conduct by the defaulters, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in GRANT v PLUMBERS

² BAKOVEN LTD v GJ HOWES (PTY) LTD 1992 (2) SA 466 (E) 468 I – 469 A; NYINGWA v MOOLMAN NO 1993 (2) SA 508 (Tk) 509 I – 510D.

³ DE WITTS AUTO BODY REPAIRS (PTY) LTD v FEDGEN INSURANCE CO LTD 1994 (4) SA 705 (E) 711 E-G.

(PTY) LTD⁴ and HDS CONSTRUCTION v WAIT⁵ and also any prejudice that might be occasioned by the outcome of the application.”

[9] The following well established principles must also be borne in mind in the evaluation of an application for rescission under Rule 49 (3) of the Magistrates’ Court Rules of Court:

- (a) the defendant must at least furnish an explanation of his or her default sufficiently full to enable the court to understand how it really came about, and to assess his or her conduct and motives⁶; and
- (c) a measure of flexibility is required in the exercise of the court’s discretion and an apparently good defence may compensate for a poor explanation.⁷

[10] In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits filed in the application for rescission, it is necessary to consider the nature of the relief sought. The effect of rescission would be to render the order a nullity. Neither advantage nor disadvantage can flow therefrom. The applicant is entitled to claim that the *status quo ante* be restored.⁸ 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

⁴ 1949 (2) SA 470 (O).

⁵ 1979 (2) SA 298 (E).

⁶ SILBER v OZEN WHOLESALERS (PTY) LTD 1954 (2) SA 345 (A) 352 G.

⁷ ZEALAND v MILLBOROUGH 1991 (4) SA 836 (SE) 838 D.

⁸ SECURIFORCE CC v RUITERS 2012 (4) SA 252 (NCK) 261 D-E.

by the respondent which the applicant cannot dispute and to determine whether, on those facts, the applicant is entitled to relief.⁹

[11] The following relevant facts emerge from a reading of the affidavits filed in the application for rescission:

- the summons commencing the action was not served upon the appellant but was served upon the office of the state attorney on 19 September 2012;
- the state attorney did not look to the appellant for instructions to defend the action on 6 November 2012;
- on 5 December 2012 a notice to plead was served upon the office of the state attorney;
- no plea was filed by the state attorney;
- on 28 March 2014 the respondent filed a request for default judgment with the clerk of the court but did not serve a copy upon the state attorney;
- on 2 April 2014 the respondent filed a notice of set down with the clerk of the court enrolling the application for default judgment for hearing on 9 May 2014 but did not serve a copy upon the state attorney;
- notwithstanding the fact that the claim expressed in the summons was for the payment of unliquidated damages in the amount of R200 000,00, no oral evidence was placed before the magistrate in support of the application for default judgment; instead, reliance was placed on a brief “damages affidavit”;

⁹ SPUR STEAK RANCHES LTD AND OTHERS v SADDLES STEAK RANCH, CLAREMONT, AND ANOTHER 1996 (3) SA 706 (C) 714 E.

- on 18 June 2014 the magistrate granted judgment by default in favour of the respondent in the amount of R 200 000,00 together with interest and costs of suit;
- unaware of the judgment by default, on 2 September 2014 the state attorney outsourced the matter to the appellant's attorneys of record;
- Consultations were held for the purposes of preparing a plea;
- on 8 October 2014 a plea was filed on behalf of the appellant;
- on 26 January 2015 the appellant's attorneys of record were advised telephonically by the state attorney that judgment by default had been granted against the appellant on 18 June 2014;
- the application for rescission of the default judgment was launched on 17 February 2015;
- the consultations held for the purposes of preparing a plea revealed that the retired policeman identified in the particulars of claim denied perpetrating any assault upon the plaintiff. Unlawful physical assault being the plaintiff's pleaded cause of action, this means that the appellant has a substantive defence to the action;
- in the circumstances the appellant wishes to defend the action and file a plea.

[12] Whilst it is not a requirement of the Magistrates' Court Rules of Court that a request for default judgment or a notice of set down in respect thereof be served upon a defendant who has failed to file a plea, which is a requirement of the Uniform Rules of Court, service of such documentation in such circumstances would have been a

salutary exercise which may have rendered it unnecessary for the appellant to make application for the rescission of the judgment granted by default in due course. In my view, a consideration of the relevant evidence reveals that the appellant has given a satisfactory explanation of the failure to file a plea timeously and of the concomitant failure to oppose the application for judgment by default in due course. In addition, the founding affidavit discloses a *bona fide* defence which the appellant wishes to rely upon in defending the action. The inevitable conclusion is that the application for rescission of the default judgment was *bona fide* and complies with all the requirements of Rule 49 (3) of the Magistrates' Court Rules of Court.

[13] It is necessary to address a further issue. In terms of the provisions of Rule 12 (4) of the Magistrates' Court Rules of Court, the clerk of the court shall refer to the court any request for judgment for unliquidated amount and the plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the claim whereupon the court shall assess the amount recoverable by the plaintiff and shall give an appropriate judgment.

[14] Normally the *quantum* of damages should be established by oral evidence, but in special circumstances the court may accept evidence on affidavit¹⁰. Neither the content of the particulars of claim nor the content of the brief affidavit filed in support of the application for default judgment disclose special circumstances which would justify the acceptance of evidence on affidavit. Even if there were, the brevity

¹⁰ NEW ZEALAND INSURANCE CO LTD v Du TOIT 1965 (4) SA 136 (T).

of the content of the affidavit filed renders it insufficient as proof of the damages claimed.

[15] If there is not sufficient evidence to enable the court to assess the damages, or if the damages are too remote, the default judgment will be refused ¹¹. Given the insufficiency of the evidence on *quantum*, the default judgment in this matter ought not to have been granted.

[16] It follows that I am of the view that upon a consideration of all the evidence and relevant factors before him, the magistrate ought to have granted the application for rescission of the default judgment. In the circumstances the appeal must succeed and the magistrate's order issued on 14 April 2015 must be set aside.

[17] An application for rescission of a default judgment is regarded as an indulgence and, as a general rule, the applicant would be ordered to pay the costs of such an application if the respondent's opposition thereto was reasonable.¹² I am of the view that in the circumstances of this matter, set out fully in the founding affidavit in a manner which allowed the respondent very little room for objective and justifiable opposition and which exposed a lamentable poverty in the application for default judgment, opposition to the application for rescission of the default judgment was

¹¹ DURBAN CITY COUNCIL v PETERSEN 1970 (1) SA 720 (N) 724 H - 725 A; MONUMENTAL ART CO v KENSTON PHARMACY (PTY) LTD 1976 (2) SA 111 (C) 118 F.

¹² PHILLIPS t/a SOUTHERN CROSS OPTICAL v SA VISION CARE (PTY) LTD 2000 (2) SA 1007 (C) 1015 G-H.

unreasonable. In such circumstances, the respondent ought to have borne the costs of the application for rescission.

[18] The following order will issue:

“1. The appeal succeeds with costs.

2. The order of the magistrate issued on 14 April 2015 under case number

EC/MTHA/RC 811/12 is hereby set aside and replaced with the following order:

(a) The judgment by default granted on 18 June 2014 under case number EC/MTHA/RC 811/12 is hereby rescinded and set aside.

(b) The respondent is hereby directed to pay the costs of the application for rescission.”

RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

DAWOOD J:

I agree.

FBA DAWOOD

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Mr M Notyesi of

MVUZO NOTYESI INC, MTHATHA

For the respondent: Mr VV Msindo of

VV Msindo & Associates, MTHATHA