

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: CA&R 54/13

**Date Heard: 29 November 2013
Delivered On: 15 December 2015**

In the matter between:

SAMUEL DANKYI ANSONG

Appellant

And

EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

I should note upfront that this judgment was supposed to have been written by Hinana AJ.

[1] This is an appeal against an order made by the magistrate, Butterwoth dismissing an application for rescission of judgment. The order and reasons thereof read as follows;

“Judgment and reasons

Having heard both attorneys for applicant and respondent.

The court is of the view that application for rescission be dismissed with costs.

That found that:

Rule 49 (3) not complied with.

It is void aboriginare, there must be an affidavit showing the bona fide defence in the main action.

Good cause must be shown as to why applicant was in default.

The court found that the judgment which forms the cause of the application was for cancellation of lease agreement.

In the circumstances the application for rescission is dismissed with costs.”

B. Background facts:

[2] The respondent issued summons against the appellant on 5 July 2004 seeking the following order;

“(a) That the lease agreement be declared to be cancelled;

- (b) An order ejecting the defendant from the property described as 6 Timber House, Caravan Park, Butterworth together with all those occupying it by a date to be determined by the court;
- (c) An order directing that should the defendant and those occupying not have vacated the premises by the date determined by the court, that eviction be carried out by and under the control of the Sheriff of the court assisted by the South African Police Services insofar as it may be necessary;
- (d) Judgment in the amount of R14 394, 87;
- (e) Interest on the capital at the rate of 3% above the prime rate offered by First National Bank from time to time;
- (f) Costs of suit;
- (g) Further and/or alternative relief.”

[3] The return of service, though faint, reflects that the summons was served personally at the place of residence of the appellant on 13 July 2004. Furthermore, the record of proceedings reflects that a notice in terms of Section 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation Act No 19 of 1998 (*the PIE Act*) was filed with the clerk of the court on 6 July 2004 after it had been served on one Zukiswa Sompeta (*Sompeta*) who is a secretary at the appellant’s place of employment. There is no indication that the notice in terms of Section 4 (2) was served on the appellant. The appellant did not defend the action resulting in default judgment against him.

[4] On 28 August 2012, the appellant brought an application for rescission of the default judgment. The appellant averred in his supporting affidavit that the default judgment was void *ab origine* and was erroneously granted in complete disregard of the provisions of Section 4 of the PIE Act by a failure to serve the notice in terms of

Section 4 (2) of the PIE Act (*the notice*) on him personally and (b) the respondent sought a declarator which was outside the jurisdiction of the magistrate's court.

C. **Appellant's case:**

[5] The appeal is before us on the following grounds;

- “1. The Learned Magistrate erred and misdirected himself in not appreciating and understanding that the appellant in his founding affidavit has set out reasonable grounds for his failure to make opposition in the main case.
2. The Learned Magistrate erred and misdirected himself in finding that the appellant has not disclosed that he has a **bona fide** defence in the main case as the appellant has raised a legal defence which goes straight to the fact that the judgment given against him in the main case, was erroneously given in total disregard of Section 4 of Act 19 of 1998.
3. The Learned Magistrate erred and misdirected himself in not appreciating that the application for rescission was based on voidness of the judgment.
4. Such other reasons as will appear after receipt of a statement referred to in Rule 51 (8) of the Rules regulating the conduct of the proceedings of the magistrate's court of South Africa and, in this regard the appellant reserves his right to supplement his reasons for the appeal.”

[6] Mr Nkubungu, for the appellant, submitted that the notice was served on Sompeta and not on the unlawful occupier i.e. the appellant. He further argued that the fact the notice was not served on the appellant, proves the reason why the appellant was not at court when the matter was heard.

D. Respondent's case:

[8] In opposing the appeal, the respondent raised the following point of law;

- “1.1 Non-compliance with the rules of the above honourable court in particular Rule 49 (3) of Rules of Magistrate's court, which rule requires an applicant in the application for rescission of judgment to state clearly and concisely the reasons of the default as well as the prospects of success on the main case.
- 1.2 Failure to comply with this requirement renders the applicant's application to be defective.
- 1.3 I submit that the applicant has failed to comply with this requirement and therefore the applicant's application is fatally defective and stands to be dismissed with costs on a punitive scale.” (sic)

[9] Mr Hobbs, counsel for the respondent, argued that the appellant failed to comply with the peremptory requirements of Rule 49 (3) of the magistrate's court act.

E. Analysis:

[10] Firstly, it is common cause that the affidavit in support of the application for rescission does not allege a defence to the main action. Mr Nkubungu, did not argue that there is a defence raised in the affidavit other than relying on the failure to serve the notice. In fact, he could not have argued otherwise because the affidavit by the appellant is silent in this regard.

[11] Secondly, it is further common cause that the notice was served on Sompeta at the appellant's offices and the summons was served on the appellant personally.

This therefore puts paid the fact that the appellant was not aware of the proceedings against him. Being aware of the proceedings against him, the appellant failed to file a notice of intention to defend.

[12] I am of the view that once I uphold the point in *limine* raised by the respondent, there shall be no need for me to deal with the other points raised by Mr Nkubungu. However, I think it is prudent of me to deal briefly with the points raised by Mr Nkubungu.

[13] The effect of not complying with the statutory requirement (*the notice in this matter*) is not per se fatal. I found support for this proposition in the case of *Unlawful Occupiers, School Site v City of Johannesburg*¹ wherein the Supreme Court of Appeal found that the notice, which stated that the application was being brought in terms of Section 4 (1) instead of Section 6 of the PIE Act was a mistake. Furthermore, that case, the grounds of the application stated in the notice were insufficient to meet the requirements of Section 4 (5) (c). Despite these shortcomings, the court held as follows;

“Nevertheless, it was clear from the authorities that even where the formalities required by statute were peremptory, it was not every deviation from the literal prescription that was fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.”²

¹ 2005 (4) SA 199 (SCA)

² Page 209 F-G and case cited therein

[14] In my view, central to the application before this court is whether there is compliance with Rule 49 (3) of the Magistrate's Court and the reasons for being in default.

[15] Rule 49 (3) of the Magistrate's Court Rules reads 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 of default and the grounds of the defendant's defence to the claim.”

[16] In my view, the non-compliance with Rule 49 (3) is fatal to the case of the appellant. The following dictum by Zuluman JA³ finds application in this matter;

“[6] Put differently, the provisions of the Rule 49 (3) are peremptory when a court considers an application to rescind a default judgment. More particularly, the wording of the subrule makes it clear that the grounds of the defendant's defence to the claim must be set out. Where the objection is that the judgment was void *ab origine*, compliance with Rule 49 (3) nevertheless involves further proof of the existence of a valid and *bona fide* defence to the claim.”

Consequently, the appeal is dismissed with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

³ *Leo Manufacturing CC v Robor Industrial (Pty) Ltd* 2007 (2) SA page 4 para D

I agree.

M N HINANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Applicant: Mr Nkubungu *instructed by*
Makade Inc

MTHATHA

Respondent: Adv Hobbs *instructed by*
Ross G M Sogoni Inc

BUTTERWORTH