

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A187/2013

In the appeal between:

MAIN STREET 421 (PTY) LTD

Appellant

and

GOLDFIELDS DEVELOPMENT (PTY) LTD

Respondent

CORAM:

DAFFUE, J *et* MOTLOUNG, AJ

JUDGMENT BY:

DAFFUE, J

HEARD ON:

3 FEBRUARY 2014

DELIVERED ON:

27 FEBRUARY 2014

INTRODUCTION

- [1] This is an appeal against the judgment of the Regional Court, Bethlehem (the court *a quo*) dismissing an application for rescission of judgment.

THE PARTIES

- [2] Appellant is Main Street 421 (Pty) Ltd, the owner of the Vrede Hotel in the town of Vrede, Free State Province. It, being the defendant in the court *a quo*, unsuccessfully applied for rescission of a judgment by default obtained against it.
- [3] Respondent is Goldfields Development (Pty) Ltd. It instituted action as plaintiff against appellant for payment of the amount of R250 000.00 together with interest and costs and obtained judgment by default as indicated above.

- [4] The parties shall be referred to in this judgment as appellant and respondent respectively.

FACTUAL BACKGROUND

- [5] The parties entered into a JBCC series 2000 building contract in terms whereof respondent undertook to do certain construction work at the Vrede Hotel for and on behalf of appellant.
- [6] Appellant appointed CSKO Architects as principal agent.
- [7] The principal agent issued several payment certificates as the construction work progressed and in this regard a total amount of R7 503 899.92 have been paid in respect of the first eight payment certificates. Payment certificate number 9 dated 19 May 2011 for the amount of R732 720.15 was not paid within the stipulated period. This certificate plays a role in the dispute between the parties. Appellant sought and obtained an extension of payment on the basis that the amount together with interest as agreed, totalling R750 000.00, be paid in three instalments of R250 000.00 each, payable at the end of July, August and September respectively.
- [8] The principal agent through its representative, Mr Johan Coetzee, confirmed appellant's undertaking under his signature in a letter dated 4 July 2011 addressed to respondent. He also confirmed on behalf of his client that final completion of the project would only be undertaken once the final instalment of R250 000.00 is made. Also on 4 July 2011 a certificate of practical completion was issued by the principal agent.
- [9] Having made the first two instalments, appellant neglected to settle the final instalment and consequently respondent caused summons to be issued out of the Regional Court, Bethlehem.
- [10] On receipt of the summons Ms FJ Nell of appellant contacted Ms Belinda Nel, a senior typist in the employ of respondent's Bethlehem attorneys telephonically, complaining about alleged defects in the construction work executed by respondent. She was requested to forward a written complaint to

the attorneys which she did in an e mail. The two ladies are in dispute as to what the arrangement was in this regard. Ms Belinda Nel stated under oath that she did not give any undertaking to hold further action in abeyance, but fact of the matter is that she invited appellant's representative to forward the complaints in writing whereupon same would be sent to respondent's Welkom attorneys for their instructions. Surely any client in the shoes of Ms FJ Nell would have taken it for granted that her complaints would be considered, that she would be informed of the outcome and pending this, that no further steps would be taken. We know now that she was not shown the courtesy of a response and that respondent's attorneys proceeded to apply for judgment by default. This telephonic conversation and appellant's written response thereafter are relevant merely to establish whether appellant gave a sufficient explanation for the failure to defend the action which resulted in judgment by default being granted. The court *a quo* correctly found in appellant's favour and it is not necessary to deal in any further detail with this aspect.

- [11] On all probabilities as a result of the aforesaid communication appellant failed to deliver a notice of intention to defend. On or about 2 July 2012 respondent's attorneys presented to the office of the registrar of the court *a quo* a request for default judgment in the prescribed form and a warrant of execution.

- [12] Whoever inspected the request for default judgment was apparently satisfied as to the correctness of each and every item contained in the document as these were ticked off, particularly the judgment costs. However this person neither affixed his/her signature on the document, nor recorded in writing that he/she had in fact granted judgment and if so, when and in what terms.

- [13] As mentioned, the request for default judgment does not contain any indication that judgment has been granted, and furthermore, there is also no indication on the court file to that effect. The only indication that judgment was apparently granted, appears from the warrant of execution which contains the signature of the assistant registrar as well as the official stamp and the judgment date inserted in handwriting. The relevant part of the warrant of execution reads as follows:

“Whereas in this action the said Plaintiff obtained judgment in the above mentioned court against the said Main Street 421 (Pty) Ltd of Vrede Hotel, 53 Church Street, Vrede, Free State on 02.07.12 for the several sums set out in the margin hereof amounting in all to the sum of R251 165.08 (excluding interest still to be added to the Capital Amount) of which Nil has since been paid...” (emphasis added – the date is inserted in pen).

Respondent obtained an affidavit from the assistant registrar in support of its opposition of the application for rescission of judgment and I quote the following from paragraphs 4 and 5 thereof:

“4.

I duly checked each and every item on the Judgment including the costs claimed by the Plaintiff and I, as is the practice, ticked each relevant item as correct. I there upon issued the Writ of Execution and I filled in on that Writ the date of Judgment when I granted it namely 2nd July 2012.

5.

It has now been brought to my attention that the Judgment which I granted was not actually signed by me and I confirm that the Judgment was in fact in my own mind granted and I somehow merely neglected or forgot to sign the actual document to confirm the granting but I would not have issued the Writ of Execution without the Judgment having been granted by me.”

[14] Some two months later, in September 2012, the sheriff served the warrant of execution and attached certain movable assets. This triggered appellant’s application for rescission of judgment.

[15] Appellant dealt with the reasons for the delay and its defence on the merits in detail in the founding affidavit in support of the application for rescission of judgment, but did not at that stage deal with any possible deficiency pertaining

to the procedural aspect of the judgment by default allegedly granted. *Ex facie* the application papers appellant's attorney inspected the court file after filing of the application and found that, although the warrant of execution had been issued, it was not recorded that judgment had been granted. Correspondence in this regard led to reaction from respondent's attorneys and the decision to obtain an affidavit from the assistant registrar which was filed in support of the opposition to appellant's application.

[16] In reply appellant relied on the information obtained by its attorneys when perusing the court file and made it clear that it was going to take the point that judgment by default was not granted as there was no compliance with rule 12(9) of the Magistrates' Court Rules.

[17] The matter was eventually argued. The court *a quo* not only dismissed the point of law taken on behalf of appellant to the effect that judgment by default was not granted in accordance with the aforesaid rule, but appellant's application was dismissed as well. The court *a quo* remarked as follows in its judgment in this regard:

“Die aansoek is volgens die betrokke dokument op 02/07/2012 deur die Assistent Griffier ontvang en gestempel. Op dieselfde dag het die Assistent Griffier ‘n Lasbrief vir Eksekusie uitgereik. Op die Lasbrief vir Eksekusie dui die Griffier spesifiek aan dat vonnis gegee is op dieselfde dag, naamlik 02/07/2012. Die Griffier het egter hierbenewens nie op die kantoorlêer aangeteken dat vonnis wel verleen is nie. Tydens die geopponeerde aansoek om tersydestelling van vonnis het die Verweerder/Applikant dit as ‘n punt *in limine* geopper dat daar in werklikheid geen vonnis was nie, aangesien die Assistent Griffier dit nooit op die lêer aangeteken het nie. Hierdie punt *in limine* is na aanhoor van argumente afgewys.”

NOTICE OF APPEAL

[18] Appellant filed a notice of appeal, alleging that the court *a quo* mistakenly dismissed the point *in limine* in that it is clear from the record that the assistant registrar did not record in accordance with rule 12(9) that judgment had been

granted. Several further grounds of appeal have been raised pertaining to the merits of the application for rescission of judgment, but in view of the conclusion to which I arrive herein, it is not necessary to deal with those, save to say that I am *prima facie* of the view that these grounds are without any substance.

THE APPLICABLE RULE AND RELEVANT LEGAL PRINCIPLES

[19] Rule 12 of the Magistrates' Court Rules deals with judgment by default. If a defendant fails to deliver a notice of intention to defend within the time stated in the summons, the plaintiff may lodge with the clerk of the Magistrates' Court /registrar of the Regional Court, (depending in which court action has been instituted), a request in writing similar to form 5 of annexure 1 to the Rules in duplicate for judgment against the defendant for any sum not exceeding the sum claimed in the summons, or the other relief so claimed, together with costs and interest, together with the original summons and the return of service,. See rule 12(1)(a).

[20] The clerk / registrar shall process the request in terms of the provisions of the relevant sub-rules of rule 12 "and notify the plaintiff of the outcome of the request by returning the duplicate copy duly endorsed as to the result and the date thereof." (emphasis added) See Rule 12(1)(c).

[21] Rule 12(9) reads as follows:

"Judgment shall be entered by making a minute of record thereof."

[22] The only reported judgment on the point in issue is **Civil and General Contractors CC v Civil Magistrate for the District for Albany** [2000] 3 ALL SA 9 (E) at 14c – f, referred to with approval by Van Loggerenberg, **Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa**, loose leaf edition, vol 2 at 12-17. The particular magistrate merely informally indicated to the plaintiff's attorney that she "will not grant" or "had refused" the request for default judgment. The court found in that instance that an order dismissing a request for default judgment is just as much a judgment as is an order granting the request and consequently a minute of

record thereof must be made. The record of proceedings in the Magistrates' Court has been furnished to the High Court, but no record therein could be found of any judgment or order having been made. However the court did not explain in precisely which form the dismissal should be minuted and/or recorded.

- [23] In terms of section 58A of the Magistrates' Court Act, 32 of 1944, any judgment by default entered in terms of that Act by the clerk (or registrar) of the court shall be deemed to be a judgment of the court. Although not directly in point, the following judgments are instructive insofar as they are authority that a writ of execution may be set aside on application as incompetent if the judgment was not definite and certain.

See: **De Crespigny v De Crespigny** 1959 (1) SA 149 (NPD) at 152 A – B;

Le Roux v Yskor Landgoed (Edms) Bpk 1984 (4) SA 252 (TPD) at 257F – G;

Du Preez v Du Preez 1977 (2) SA 400 (CPD) at 402 G – 403 C;

Van Dyk v Du Toit 1993 (2) SA 781 (OPD) at 783 C - D.

- [24] A judgment or order (except in the case of orders by agreement between the parties) of the court must be delivered in open court although not necessarily by the judge or magistrate who prepared it.

See: Section 16 of the Supreme Court Act, 59 of 1959 and section 5 of the Magistrates Court Act and **Lawsa**, vol 3, part 1, para 323. Also in the Supreme Court of Appeal and the Constitutional Court orders are handed down in open court and only after the legal representatives of the parties have been informed of the date and time to allow them to note judgment.

- [25] There might be uncertainty as to exactly what is meant by the sentence “(J)udgment shall be entered by making a minute of record thereof” contained

in rule 12(9). Isabel Ellis is of the view that rule 12(9) stipulates that judgment by default is entered by its written recordal.

See: **Lawsa**, vol 3, part 2, para 146. She does not indicate the format of such recordal. In terms of High Court Rule 31(5)(c) the registrar shall record any judgment granted or direction given by him. How this should take place is not mentioned.

- [26] When interpreting any legislation every court must promote the spirit, purport and objects of the Bill of Rights.

See: Section 39(2) of the Constitution.

Section 34 of the Constitution stipulates that everyone has the 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 tribunal or forum. It is also trite that the courts of law in this country are courts of record.

- [27] It may be instructive to refer to the analogy of High Court Rule 48 pertaining to the *allocatur* of the taxing master. It is vested law that no ruling of the taxing master in respect of any bill of costs or any item thereof can be reviewed by the court unless the taxing master has affixed his *allocator* to the bill.

See: **Pretorius v Cohen** 1953 (3) SA 639 (OPD).

The mere fact that the taxing master indicated his satisfaction in respect of each and every item on the bill of costs by ticking off every item is not sufficient.

ARGUMENTS OF THE PARTIES AND EVALUATION THEREOF

- [28] Mr Pienaar, on behalf of appellant, strenuously argued that the failure of the assistant registrar to sign on the request for judgment by default and/or to record in writing that judgment has been granted, was fatal, but even more so, his affidavit in support of respondent's case was not helpful insofar as the

court *a quo* could not consider what he had in mind when he perused the documents and issued the warrant of execution. Mr Els, on behalf of respondent, argued that the matter should be seen in proper perspective and all relevant documents and facts should be considered in order to ascertain whether judgment by default was granted or not. He argued that the court *a quo* was entitled to consider the contents of the warrant of execution and the fact that the assistant registrar indicated thereon that he granted judgment by default on the 2nd July 2011.

[29] It must be remembered that the warrant of execution, once issued, is lifted by the execution creditor's attorney and sent off to the sheriff with instructions to attach the debtor's property. It does not remain in the court file all the time. When appellant's attorney approached the registrar and perused the court file, (at the stage when the warrant was with the sheriff), no indication could be found that judgment by default had been granted. It is common cause that it was not recorded on the court file, or minuted or otherwise recorded on the request for default judgment or any other document kept in the file that judgment had been granted.

[30] I always try to avoid adjudicating disputes on technicalities as I believe that parties are entitled to their disputes being adjudicated upon the merits. However it cannot be disregarded that judgments and orders are meant to create certainty and therefore strict compliance with the rules of court should be adhered to.

[31] In its founding affidavit appellant did not allege any facts in support of the legal point relied upon for the first time in the replying affidavit and thereafter during argument in the court *a quo*. It is trite law that a court may in particular circumstances *mero motu* take cognisance of legal points. I refer in this regard to the often quoted judgment of **Paddock Motors (Pty) Ltd v Igesund** 1976 (3) SA 16 AD at 23 D - F where the court found as follows:

“It is clear that ‘the duty of an appellate tribunal is to ascertain whether the court below came to a correct conclusion on the case submitted to

it.” (per Innes J, in **Cole v Government of the Union of South Africa** 1910, AD 263 at p 272). For this reason the raising of a new point of law on appeal is not precluded, provided certain requirements are met:

‘If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.’ (per Innes J in **Cole’s** case *supra* at pp 272 – 273.) That it would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part, has also been accepted by this Court in **Van Rensburg v Van Rensburg en Andere**, 1963 (1) SA 505 (AD) at p 510 (A).”

In *casu* the legal point was not raised on appeal for the first time. It was clearly raised in appellant’s papers and also argued before the court *a quo*. When I initially prepared for the hearing of the appeal my immediate reaction was that the legal point taken by appellant was nothing but a mere technicality that had been dismissed correctly by the court *a quo*. I say this on the basis that, in principle, technical defences should not be adhered to as the parties are entitled to adjudication of their dispute on its merits. Although stated in a different context, I fully endorse the following *dictum* by Froneman J in **KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others** 2013 (4) SA 262 (CC) at par [80], relying on comments by Prof Cora Hoexter:

“Formalism has many meanings, but Professor Cora Hoexter helpfully describes one of its meanings as ‘a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense’.

Hoexter is further quoted in the judgment as follows:

‘In cases displaying formalistic legal reasoning the merits often seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson.’”

[32] Having said this, it is necessary to consider the approach adopted in our courts. If a High Court judge grants judgment (by default or otherwise), the order is recorded mechanically, but furthermore, the judge’s registrar records it on the court file and the judge minutes it in his/her bench book. Thereafter the order is typed, captured on a computer system and signed by or on behalf of the registrar. The position should be the same in the magistrates’ and regional courts although it is accepted that these presiding officers may not have their own personal registrars.

[33] There is no reason why standard norms should not be adopted by magistrate court clerks and registrars in the regional and high courts when applications for default judgments are considered and eventually granted as this will create certainty. I have reason to believe that most clerks / registrars in courts across the country act in accordance with the following norms which I suggest should be applied:

1. It shall clearly be stipulated in writing on the request for judgment by default whether judgment has been granted, and if so, in respect of which prayers or paragraphs of the request, alternatively the judgment debt with reference to the capital amount of the claim, the interest to be charged as well as the costs, either in a specific amount as in the magistrates’ and

regional courts, or to be taxed depending on the circumstances, should be noted.

2. The official stamp with an indication of the date on which judgment is granted shall be affixed on the request for default judgment together with the signature of the person who granted judgment.
3. Thereafter the duplicate copy of the request for judgment by default shall then be sent back to the plaintiff's attorney whilst the original with the above recordings thereon shall remain in the court file.
4. It shall be recorded in writing on the court file when and in what terms judgment has been granted and the particular official shall preferably affix his/her signature next to this inscription as well.

[34] These proposals might be regarded as too burdensome, but are in my view in conformity with the general practice in the Magistrates' and High Courts.

[35] "Minute" is defined in the New Shorter Oxford English Dictionary as *inter alia* an official memorandum authorising or recommending a course of action; or a memorandum relating to matters of procedure or evidence presented in a court by a party to a suit.

"Record" is *inter alia* defined in the same dictionary as the fact or condition of being or having been written down as evidence of a legal matter; the proceedings or verdict of a court of law; evidence recorded in this way; an authentic or official report entered on the rolls of the proceedings, including the judgment in any case coming before a court of record.

Bearing in mind these definitions and others similar to these, together with the aforesaid rules of court and general principles, there can be no doubt that the assistant registrar of the court *a quo* failed to endorse the request for default judgment as to the result and the date thereof as he was required to do in terms of rule 12(1)(c) and furthermore failed to enter the judgment by making a minute of record thereof as stipulated in rule 12(9). This is common cause and the mere fact that the warrant of execution which was handed to the sheriff to attach appellant's property indicated that judgment by default was allegedly granted is insufficient and cannot be regarded as compliance with rule 12.

- [36] The legal point taken on behalf of appellant in the court *a quo* is good and should have been upheld by that court. Consequently it is unnecessary to consider the other grounds of appeal and the arguments pertaining to the merits of the application for rescission of judgment. There was no judgment that could be rescinded.

RELIEF

- [37] Mr Pienaar, who also argued the matter in the court *a quo* on behalf of appellant, submitted that the appeal should succeed and if it is found that the legal point is good, the judgment of the court *a quo* should be set aside and orders made in terms of prayers 2, 3 and 4 of the Notice of Motion, costs to include a higher fee for counsel than provided for in part IV of annexure 2 of the Magistrates' Court rules. The proceedings in the court *a quo* were application proceedings to which item 21 of part IV of annexure 2 applies and therefore counsel was not entitled to a higher fee which could only be allowed if the parties went on trial. I refer to the note to items 22, 24, 25 and 26 (relating to trials). I am not prepared to find that respondent's opposition in the court *a quo* was unreasonable and therefore it should not be burdened with costs in that court. A novel point was raised by appellant and bearing in mind my *prima facie* view about appellant's defence in respect of the merits, I deem it fair and reasonable that each party shall bear its own costs in the court *a quo*. Prayer 1 of the notice of motion, being the prayer for rescission of the default judgment is irrelevant in the circumstances.

ORDER

- [38] Consequently the following orders are made:
1. The appeal is upheld with costs.
 2. The order of the court *a quo* is set aside and substituted with the following orders:
 - 2.1 The purported default judgment granted by the assistant registrar on 2 July 2012 is null and void for non-compliance with the provisions of sub-rules 12(1)(c) and 12(9) of the Magistrates' Court rules.

- 2.2 The warrant of execution issued on 2 July 2012 and all attachments made in accordance therewith are set aside as null and void.
- 2.3 Leave is granted to defendant to defend the action instituted against it under case number 241/2012 and to file its notice of intention to defend within 10 days from date of this order.
- 2.4 Each party shall be liable for payment of its own costs.

J. P. DAFFUE, J

I concur.

S. E. MOTLOUNG, AJ

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