

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: CA&R 3/2023
 Heard: 18 March 2024
 Delivered: 21 June 2024

In the matter between:

MINISTER OF POLICE

APPELLANT

and

PATRICK MKUSELI MVELO

RESPONDENT

In re:

PATRICK MKUSELI MVELO

APPLICANT

and

MINISTER OF POLICE

RESPONDENT

Coram: Stanton J & Tyuthuza AJ

JUDGMENT

Per Tyuthuza AJ

INTRODUCTION

1. The appellant herein lodged an appeal against the whole judgment and order granted by the Learned Magistrate for the District of Frances Baard, Kimberley, in which the Court dismissed an application for the rescission of a judgment brought in terms of section 36(1) of the Magistrates' Courts Act 32 of 1944 ("the Act").

2. Section 36(1) of the Act reads as follows:

"The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-

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

3. Rescissions in the Magistrates Court are governed by Rule 49 (1) of the Rules of the Magistrates Court, which states as follows: *"A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days'*

period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A)."

4. It is trite law that, to succeed in an application for rescission of a judgment, an applicant must show 'good cause', this would entail the following:

"(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325)¹.

5. Good cause includes, but is not limited to the existence of a substantial defence.² It is therefore necessary to determine whether there is a satisfactory explanation of the default, and whether the appellant raised a bona fide and reasonable defence.

BACKGROUND

6. On 4 May 2021, the respondent issued summons against the appellant, wherein the respondent claimed an amount of R200 000.00 for the unlawful arrest and detention of the respondent. According to the particulars of claim,

¹ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476–7

² *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G

the respondent alleges that he was arrested on 31 August 2019 in Kimberley, without a warrant of arrest or any reasonable grounds on a charge of theft. He avers that the arresting officer was on duty and was acting within the scope of his employment, and further that, as a result of the arrest, he was unlawfully detained until 7 September 2019. It is the respondent's case that the arrest was unlawful on one or more grounds, namely: the arresting officer did not have reasonable suspicion that the crime was committed and abused his powers by arresting him and that he was arbitrarily and without good cause deprived of his freedom.

7. Upon service of the summons, the appellant filed its notice to defend and subsequently filed its plea to the summons. The respondent filed its discovery affidavit and on 25 June 2021, issued a notice in terms of rule 23 wherein it sought the appellant to make discovery within twenty days. Due to the appellant's failure to discover, on 16 November 2021, the court a quo granted an order which compelled the appellant to file its discovery affidavit within five days. It is common cause that the appellant filed its discovery affidavit on 9 December 2021. On 7 December 2021, prior to the appellant having filed the discovery affidavit, the respondent launched an application to dismiss the appellant's plea and requesting that judgment on the merits be granted in favour of the respondent, on the basis that the appellant failed to comply with the order granted on 16 November 2021. The application was served on the office of the state attorney on 9 December 2021.
8. On 11 January 2022, an order was granted in favour of the respondent, dismissing the appellant's plea and defence, merits were granted in favour of

the respondent and the issue of quantum was postponed to 22 January 2022. On 17 March 2022, a default judgment was granted in favour of the respondent, wherein the appellant was ordered to pay the respondent an amount of R200 000.00 including interest at a rate of 7% from date of service of summons until date of final payment including the plaintiff's wasted costs on a party and party scale. This default judgment was the subject of the application for rescission in the court *a quo*.

9. The appellant launched the application for rescission on 29 July 2022, wherein it sought the rescission of the order granted on 17 March 2022, dismissing the appellant's plea. The appellant alleges that it became aware of the judgment on 11 July 2022, upon being served with a writ of execution. On 14 September 2021, the appellant was served with a notice of substitution of the respondent's attorney, the appellant's discovery affidavit was served on the erstwhile attorneys on 9 December 2021. The appellant alleges that the employee responsible for its files at the Office of the State Attorney Mr Visagie did not receive the notice of substitution and thus filed the discovery affidavit on the respondent's erstwhile attorneys and not his current attorneys of record. He submits that he made a *bona fide* mistake by serving the discovery affidavit on the previous attorneys of record and that the appellant would have opposed the application to dismiss the plea and defence, on the basis that the discovery affidavit was filed on 9 December 2021. The appellant further avers that the application was not brought to the attention of the appellant as Mr Visagie was conducting trials and on leave from 15 December 2021 to 10 January 2022, thus Mr Visagie only became aware of the judgment on 18 July 2022 when he uplifted the court file.

GROUND OF APPEAL

10. The appellant raised various grounds of appeal against the decision of the magistrate. However, the thrust of the appellant's argument is that the magistrate heard and decided the matter on the merits and failed to apply the reasonable prospects of success test. The appellant further avers that there was a reasonable explanation for the late filing of the discovery affidavit and that the late filing of the discovery affidavit was not malicious. The appellant submits that the arresting officer had a reasonable suspicion upon arresting the respondent and did not need to conduct any further investigations.
11. The respondent submits that the appellant did not place a *bona fide* defence to justify the arrest of the respondent as required in terms of section 40(1)(b) of the Criminal Procedure Act³. The respondent submits that the affidavit of the arresting officer is not commissioned and further does not refer to any investigations done prior to the arrest. The respondent further avers that the affidavit of Mr Basson, the deponent to the appellant's affidavit in the court *a quo*, constitutes hearsay evidence in that he was not there when the arrest was effected. The respondent further submits that the appellant failed to attach the confirmatory affidavits of the clerks in the office of the state attorney to attest to the version of Mr Basson, as a result the evidence in relation to the administration in the office of the state attorney is hearsay evidence.

³ 51 of 1977

12. Section 40(1) (b) of the Criminal Procedure Act prescribes arrest without a warrant as follows: *“A peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody.”*
13. In the matter *Biyela v Minister of Police*⁴ the court held as follows in regard to a reasonable suspicion:
- “[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.*
- [35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.*
- [36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.”*
14. What the court *a quo* fails to appreciate is that the arresting officer did not need to conduct an investigation or enquiries prior to the arrest, the arresting officer needs only to form a reasonable suspicion that a Schedule 1 offence

⁴ 2023 (1) SACR 235 (SCA).

has been committed based on credible and trustworthy information. Whether the information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence. The respondent in his papers concedes that the arrest that took place on 30 August 2019 was conducted by a police officer, who was acting in the scope of his employment and further that the arrest was as a result of the complainant pointing out the respondent.

15. The respondent seeks to argue that the arresting officer arrested him without obtaining evidence, and draws into question the reliability of the information received from the complainant. I am persuaded that the arresting officer has a reasonable suspicion and that in order to establish whether the respondent committed the offence, it is not required of the arresting officer to investigate the matter first before arresting the respondent. The Supreme Court of Appeal in *Biyela* confirmed and ruled that the evidence or suspicion considered by the arresting officer need *not* be based on information that would subsequently be admissible in a court of law.⁵ Information regarded by the arresting officer may be hearsay evidence. However, I am of the considered view that the arresting officer had reasonable grounds to effect the warrantless arrest, and thus the arrest was not unlawful.

⁵ *Biyela v Minister of Police (supra)* at para 33 and 35.

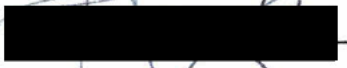
16. At the hearing of the matter the respondent raised certain objections citing them as material defects in the appellant's case, these issues were canvassed with the appellant in the hope that the appellant would withdraw its appeal. Firstly, the respondent submits that the appellant had failed to comply with Rule 51(4) of the Magistrates Court Rules, in that it had failed to provide security of costs; thus the appeal was not properly prosecuted. Secondly, the respondent submits that the noting of the appeal was not in compliance with Rule 50(1) of the Uniform Rules of Court, in that the notice has lapsed. Thirdly, the respondent submits that the appellant's application for rescission was brought on a premature basis. The respondent submits that the order was granted on 11 January 2022 and the appellant failed to comply with the order, and were thus in contempt. The appellant only served the discovery affidavit on 9 December 2021, but failed to seek condonation for the late filing thereof. The respondent submitted that a party seeking indulgence from the court must approach the court with clean hands.
17. These objections were not raised in the papers but were raised for the first time at the hearings and were only informally discussed with the appellant's representatives. These points ought to have been raised in the papers and prior to the date of hearing, in my view, entertaining them in this manner would have caused serious prejudice to the appellant.

COSTS

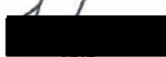
18. The normal rule is that costs follow the result, but in light of the objections raised by the respondent and the failures of the appellant in having launched this appeal, I am of the view that the respondent should not be ordered to pay the cost of the appeal and each party pay their own cost.

The following order is made:

1. Leave to appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following order:
 - 1. Rescission of the judgment by default granted on 17 March 2022 is granted; and*
 - 2. The Respondent is ordered to pay the costs of this application."*
3. Each party is to pay their own costs.


T TYUTHUZA

ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION


A STANTON

JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Appellant:
On the instruction of:

Ms N. Panduva
Office of the State Attorney

On behalf of the Respondent:
On the instruction of:

Adv H. Du Plessis
PGMO Attorneys Kimberley