

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

22 October 2024

DATE

SIGNATURE

APPEAL CASE NUMBER: A2023-076388
CASE NUMBER A QUO: GP/GRM/CRC328/2020

In the matter between:-

TRANSNET SOC LIMITED

Appellant

and

OLIVIER SURVEY GROUP (PTY) LTD

Respondent

JUDGMENT

MOSTERT AJ

INTRODUCTION

1. The respondent instituted action against the appellant on 2 September 2020 in the Regional Court for the Regional Division of Gauteng, held at Germiston.

The respondent claimed amounts totalling R255,574.46 flowing from services it allegedly rendered to the appellant in terms of a series of oral agreements.

2. The appellant failed to timeously enter an appearance to defend, and default judgment was granted in favour of the respondent against the appellant on 7 July 2021.
3. The appellant alleges to have gained knowledge of the default judgment when confronted by the sheriff with a writ of execution on 31 August 2022. Although the respondent avers that the appellant should have been aware of the judgment sooner than this date, this date is accepted on the papers as the date on which the appellant gained knowledge of the default judgment, and the date on which the *dies* for the delivery of a rescission application commenced running.
4. Pursuant to gaining knowledge of the default judgment the appellant brought a rescission application on 30 September 2022.
5. The respondent opposed the rescission application and raised certain points *in limine*.
6. The Learned Magistrate that dealt with the rescission application upheld the following three points *in limine*, and dismissed the rescission application without dealing with the merits:

- 6.1. First point *in limine*: two confirmatory affidavits were not attached to the founding affidavit in the rescission application, in contravention of Magistrates' Court Rule 55(1)(d)(ii). The appellant conceded that these confirmatory affidavits were obtained only after the founding affidavit was deposed to and the application was served.
- 6.2. Second point *in limine*: the appellant ostensibly sought rescission of a default judgment dated 6 October 2020, whereas in fact the date of the default judgment was 7 July 2021.
- 6.3. The third point *in limine*: the rescission application was delivered late – it was supposed to be delivered on 29 September 2022, but was only delivered on 30 September 2022.

The first point *in limine*

7. The respondent's contention, that the failure to attach the two confirmatory affidavits constituted non-compliance with Magistrate's Court Rule 55(1)(d)(ii), is correct.
8. This point *in limine* is however not an issue that, in my view, could have been raised up front as a ground upon which the rescission application could have been dismissed, without delving into the merits.

9. At best for the respondent, the failure to attach the confirmatory affidavits to the founding affidavit would render these affidavits inadmissible, in turn probably rendering portions of the founding affidavit inadmissible due to these portions constituting hearsay evidence.
10. The Learned Magistrate could, therefore, not dismiss the entire application based on the failure to attach the two confirmatory affidavits, and erred in doing so.

The second point *in limine*

11. The appellant's founding affidavit in the rescission application repeatedly referred to default judgment having been granted on 6 October 2020. It is however common cause that the default judgment was in fact granted on 7 July 2021.
12. It is evident where the confusion crept in – the application for default judgment was lodged on 6 October 2020. The judgment was not granted on this date.
13. This is quite clearly an instance of careless drafting, but could in my view not have been dispositive of the rescission application. Especially not as a point *in limine*.

14. It is common cause on the papers that only one default judgment was granted in the court *a quo*, under that specific case number.
15. The notice of motion in the rescission application did not even refer to the erroneous date. It framed its rescission relief in the following terms:

“The default judgement obtained by the Respondent under case no: GP/GRM/GRC 328/2020 be rescinded;”
16. There could therefore have been no scope for confusion on the part of either the respondent when opposing the rescission application, or on the part of the Learned Magistrate in adjudicating the rescission application.
17. There is no basis to contend that the erroneous date referred to in the founding affidavit somehow caused prejudice on the respondent’s part or confusion on the part of the court *a quo*.
18. The Learned Magistrate therefore also erred in upholding this point *in limine*.

The third point *in limine*

19. The third point *in limine* is the only point truly worth considering.
20. The appellant admitted in its founding affidavit that the rescission application should have been delivered by 29 September 2022, and that the application was delivered a day late.

21. The notice of motion in the rescission application did not contain a prayer for condonation, but the founding affidavit had a section devoted to dealing with the condonation aspect. The allegations in support of condonation were therefore on oath, the respondent had the opportunity of dealing therewith, and the court *a quo* had the opportunity of considering it.
22. The respondent argued *a quo* that the appellant was, in terms of Magistrates' Court Rule 60(5)(a), precluded from applying to court for condonation given that it had not first requested the written consent of the respondent to extend the time period in question.
23. This argument apparently found favour with the Learned Magistrate.
24. The learned authors in Jones and Buckle: Civil Practice of the Magistrates' Court in South Africa, explains with reference to the judgment in **Premier Music Saloon & Another v Loggie Bros** 1948 (2) SA 421 (N) at 425, that:

“The fact that a party has failed to ask the opponent for his written consent first does not preclude the court from giving that party the opportunity of doing so: the court can of its own motion adjourn the application for extension, in terms of Rule 33(1), to give the party the opportunity of asking his opponent for consent under sub-rule (5)(a); and thereafter, if consent is refused he can hear the application for extension under sub-rule (5)(b).”¹

¹ Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa, Vol 1, RS 35, 2024 Rule-p60-5

25. I am therefore of the view that the Learned Magistrate erred by following an over-technical approach in dismissing the application based on the third point *in limine*. A more prudent approach would have been to adopt the course of action referred to in paragraph 24 above, and to adjourn the matter and afford the appellant an opportunity of first exhausting the provisions of Rule 60(5)(a).
26. In any event, Magistrates' Court Rule 60(9) provides that the Magistrates' Court may, on good cause shown, condone non-compliance with the rules. The subrule should be read in conjunction with subrules (1) and (2) of Magistrates' Court Rule 1, which respectively provide that the purpose of the rules is to promote access to the courts and that the rules are to be applied so as to facilitate the expeditious handling of disputes and the minimization of costs involved. The appellant's founding affidavit *a quo* set out the grounds upon which the appellant contended that good cause had been established, and in my view adequately explained the appellant's minimal delay in bringing the application. The Learned Magistrate therefore erred in not granting condonation, and in not hearing the rescission application on the merits.

Costs

27. Even though I am of the view that the Magistrate erred in upholding the points *in limine* as raised by the respondent, the appellant's non-compliance with the Rules of the Magistrates' Court stands uncontested. I am of the view that the non-compliance did not justify a dismissal of the rescission application without

delving into the merits, it is however largely as a result of the appellant's cavalier approach to the litigation that this appeal came before the High Court.

28. The appellant, even before this court, persisted with the argument that the respondent was precluded from raising the defects in the appellant's rescission application, because the respondent did not first notify the appellant of its failure to comply with the rules, as contemplated in Rule 60(2). This subrule reads as follows:

“Where a party fails to comply with any provision of these rules or with a request made or notice given pursuant thereto or with an order or direction made by a court or at a judicial case management process or a pre-trial conference convened in terms of section 54 of the Act, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.”

29. I disagree with the appellant's argument. Rule 60(2) cannot be construed as having placed an obligation on the respondent to “spoon feed” the appellant, and to have to explain step by step to the appellant how it should have brought its application. It can also not be construed so as to place an obligation on a respondent to bring an application forcing an applicant to fix up its application, or to place the onus on a respondent to demonstrate that a non-compliant application falls to be struck out.

30. I am therefore reluctant to order the respondent to pay the appellant's costs of the appeal, even though the appeal should be upheld.

31. In the circumstances it is ordered that:-

31.1. The judgment and the order of the court *a quo* given on 6 June 2023, is set aside.

31.2. The matter is referred back to the Regional Court for a determination of the rescission application on the merits.

31.3. Each party shall be liable for its own costs of the appeal.



B Mostert AJ

Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I concur:



S Potterill J

Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

Date of hearing: 17 October 2024

Date of judgment: 22 October 2024

Counsel for Appellant: A Nase

Instructed by: Majang Inc Attorneys

Counsel for Respondent: A Scott

Instructed by: Wanda Stander Attorneys