



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Appeal Case no: A85/2025

Magistrate's Court no: 276/2020

In the matter between:

**JASPER JOHANNES JACOBUS SWART
TRADING AS GROENBERG BOERDERY**

APPELLANT

and

KAROO WILDDIENSTE (EDMS) BPK

RESPONDENT

Neutral citation: *Jasper Johannes Jacobus Swart t/a Groenberg Boerdery v
Karoo Wilddienste (Edms) Bpk* (Appeal Case no 1234/19)
[2020] ZAWCHC ... (140825)

Coram: **SLINGERS J, AND MTHIMUNYE AJ**

Heard: 08 August 2025

Delivered: 01 September 2025

Summary: Appeal against the dismissal of a rescission of judgment

ORDER

1 The appeal is dismissed with costs on scale B.

JUDGMENT

Mthimunye AJ (Slingers J concurring):

Introduction

[1] During April 2022, the applicant instituted an application in terms of section 36(1)(a) of the Magistrate's Court Act, Act 32 of 1944 read together with Magistrate's Court Rule 49 to rescind the default judgment granted against him on 25 March 2021. Furthermore, the applicant sought to rescind a Writ of Execution which was granted against him.

[2] It is common cause that applicant sought condonation for the late bringing of the rescission application.

[3] On 3 December 2024, the court *a quo* dismissed the rescission application after condoning the late bringing thereof. The appellant appeals against this dismissal.

[4] For the sake of convenience, I will refer to the parties as they appear in the leave to appeal, with the applicant in the rescission application being referred to as the appellant.

Litigation history

[5] The factual background is mostly common cause between the parties and can be succinctly set out as follows: On 10 February 2020 the respondent issued summons against the appellant, claiming R131 100.00, together with interest of 10.25% per annum from date of demand to date of payment. The respondent claimed damages arising from a breach of contract in that after it delivered wildlife animals to the appellant on 28 March 2019, the appellant failed and or refused to make payment on 24 August 2019 as per their written and or oral agreement.

[6] The appellant opposed the action, and his erstwhile attorneys Jordan Louw and partners filed his special pleas, plea and counterclaim. Respondent subsequently filed a plea to appellants counter claim and a replication to the appellants plea.

[7] On or about 17 December 2020 the appellant's erstwhile attorneys filed a notice of withdrawal as attorneys for the appellant. In the notice of withdrawal, the attorneys stated the appellant's last known service address as 2[...] K[...] Street, Oudtshoorn and the email address as j[...].

[8] On 16 February 2021 the respondent sent a notice of removal and re-enrolment of the trial to the appellant via registered post at Groenberg Boerdery P.O Box 3[...], Kleinbrak Rivier, 6503, as well as via email j[...].

[9] Consequently, the matter was placed on the roll on 25 March 2021 for trial.

[10] On 25 March 2021 judgment by default was granted in favour of the respondent in the capital amount of R83 100.00 together with interest and costs to be taxed on a party and party scale.

[11] On 19 January 2022 a warrant of execution was personally served on the appellant at Groenberg Boerdery District, Volmoed.

[12] On 11 April 2022 the appellant brought an application for the condonation and rescission of the default judgment granted on 25 March 2021, which was opposed by the respondent.

[13] On 19 August 2022, the application for rescission of judgment was postponed sine die, in order for the parties to file further affidavits.

[14] Subsequently the respondent served its answering affidavit on the appellant's former attorneys, Johan Sloet & Burger Inc on 2 September 2022. No replying affidavit was filed by the appellant. The appellant also did nothing further to place matter on the roll to be finalised. Consequently, on 23 October 2024 the respondent applied for a date for the rescission application to be heard. The notice of set down of the rescission application hearing on 3 December 2024 was duly filed and served per registered mail to address 2[...] K[...] Street, Oudtshoorn and to the personal email address of the appellant, j[...].

[15] On 3 December 2024 the appellant's correspondent attorney made an appearance informing the court that he had no instructions to proceed with the application. There was no appearance by the appellant. The correspondent could not explain the appellant's absence nor that of his instructing attorney.

[16] On 3 December 2024, the Magistrate after hearing the submissions by the respondent and after consideration of the papers, condoned the late bringing of the rescission application but dismissed same with costs on an attorney and client scale. Written reasons for these orders were provided on 5 February 2025.

[17] The reason by the appellant for his default, that he were never served with a notice of set down for the trial date as he never resided at 2[...] K[...] Street, Oudtshoorn was rejected by the Magistrate on the basis that the papers revealed that the notices were not served at 2[...] K[...] Street, Oudtshoorn as alleged by the appellant but rather via registered post at Groenberg Boerdery P.O Box 3[...], Kleinbrak Rivier Distrik, Volmoed as well as at the email address j[...]. The Magistrate further found that the appellant admitted in his particulars of claim that his address was Groenberg Boerdery, Groenberg, Distrik Volmoed which is the same address on which the Warrant of Execution was served. Further that the respondent pleaded in their papers that the email address of j[...] had always been the mode of communication with appellant and his attorneys, in previous cases and even though

he was represented at that stage. The Magistrate found that on a balance of probabilities the mere 'say so' by the appellant that the email address was not in use as alleged by the appellant in his papers cannot be accepted without evidence to that effect and found that the appellant failed to give a sufficiently full explanation for his default.

[18] The Magistrate further found that the conduct of the appellant in delaying the finalisation of the application for rescission of the judgment for nearly 2 years after filing and serving the application on the respondent was a delaying tactic to prevent the respondent from pursuing its claim. Further that the conduct of the appellant was indicative of the appellant having no bona fide defence against the respondent's claim.

[19] It is against this backdrop of these facts that the appellant's rescission application and application for leave to appeal is to be viewed.

Applicable Law and Discussion

[20] Section 36 of the Magistrate's Court Act deals with rescission of judgments in the Magistrate's Courts. In terms of section 36 the court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *mero motu*:

- (a) rescind or vary any judgment granted by 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 initio* 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; and
- (d) rescind or vary any judgment in respect of which no appeal lies.

[21] An application for rescission of a judgement granted by default is brought in terms of section 49(1) of the Magistrates Court Act. This application must be brought within 20 court days from the date on which the judgment came to the knowledge of the applicant. Notice has to be given to all the parties to the proceedings. The applicant further has to show good cause why the judgment should be rescinded, or alternatively the court must be satisfied that there is good reason to do so.

[22] Rule 49(1) of the Magistrates' Court Rules read as follows:

“(1) 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).

[23] The rule is clear that an applicant applying for a rescission of judgment must give a reasonable explanation for 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. Secondly the application must be bona fide and not merely made with the intention to delay the plaintiff's claim. Lastly the applicant must show that he has a bona fide defence to the plaintiff's claim.

[24] When considering whether to rescind any judgment, the court in exercising its discretion must exercise it judicially. In *Van Heerden v Bronkhorst* (846/19) [2020] ZASCA 147 (13 November 2020), Molemela JA (as she then was), in her dissenting judgment emphasised that “[50] *It must be borne in mind that a court's discretion whether or not to grant rescission of judgment must be influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case*”.

[25] Compliance with the Rules of Court is vital for a fair and just legal process. Gleaning from the record it is apparent that in this matter the appellant has a disregard for the rules of process. After the appellant served his application for rescission of judgment on the respondent on 11 April 2022 he did nothing further to bring the matter to finalisation. The respondent wanting finalisation to their claim enrolled the matter for hearing in the court *a quo* two years after being served with the rescission application.

[26] During the proceedings before us Counsel for the appellant conceded that there was a delay in the appellant bringing the rescission application before the court *a quo* and blamed it on the unavailability of the appellants erstwhile attorneys. Counsel further submitted that the mere fact that the Magistrate granted condonation for the late filing of the rescission application, indicated that the Magistrate found that there were no mala fides on the part of the appellant in bringing the rescission application late. Counsel on behalf of the appellant further conceded that the appellant delayed in proceeding with the rescission application for nearly two years as they thought the matter will go away.

[27] I am inclined to agree with the court *a quo* that there was no reasonable explanation granted for the default on 25 March 2021 as well as 3 December 2024 when the rescission application was dismissed. The Magistrate in his judgment succinctly dealt with the service of the notice of set down for trial and was satisfied that there was effective service, by finding that the address as mentioned in the appellant's papers is not the address the appellant alleged the notice was served at. From the papers it is clear that the notice was sent via registered mail to Groenberg Boerdery P.O Box 3[...] Kleinbrak Rivier Distrik Volmoed. In addition, the appellant never indicated that he had never received the email sent to him, he merely states that the email address was not in effect. He does not explain when the email address became ineffective but rather leaves it up to the court to speculate. During the hearing of the appeal, the appellant's counsel conceded that it could be accepted that the email address reflected on the notice of withdrawal of attorneys and which was used by the respondent to communicate with the appellant (j[...].) was, at some stage, the email of the appellant.

[28] The secondary enquiry whether the appellant raised a bona fide defence to the respondent's claim against it, the court *a quo* found that the delays caused by the appellant was merely to prevent the respondent from pursuing its claim, accordingly that the appellant had no bona fide defence to the respondents claim.

[29] In the matter before us, there is no doubt that the appellant has not sufficiently explained its failure to defend the action, particularly that he was served on both his P.O Box address by registered mail and by email which the respondent The appellant's version without a reasonable explanation for not receiving the notice of set-down therefore stands to be rejected.

[30] The delay in bringing this matter to finality is clearly indicative of the appellants conduct as another delaying tactic preventing the respondent pursuing its claim.

Test on Appeal

[31] *In Ferris and Another v Firstrand Bank Limited and Another* (CCT 52/13) [2013] ZACC 46; 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC) (12 December 2013), the Constitutional held that the test on appeal is that an appellate court will only interfere with the exercise of the discretion in an application for rescission if *"the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons"*

[32] In his judgment dismissing the rescission application, the magistrate addressed the issue of good cause and the appellant's delay in bringing the application and the inadequacy of his explanation for his default on 25 March 2020. When he turned to deal with the bona fide defence of the appellant, the Magistrate correctly find that the appellant had no bona fide defence to the respondent's claim but that he merely brought the application as a tactic to delay the claim of the respondent.

[33] On a proper application of the law the Magistrate correctly concluded that that the appellant failed to show good cause, by failing to give a reasonable explanation for his failure to apply on 25 March 2021.

[34] The appellant failed to give a reasonable explanation for the delay and his conduct giving rise to the delay. He failed to advance reasons why after two years of serving the application to rescind the judgment, he did nothing to bring the matter to finality and why the respondent seeking payment and finality to their claim, had to place the matter on the roll to be heard. The court *a quo*'s primary goal in ensuring fairness and justice between the parties correctly in judicially exercising its discretion dealt with the rescission application. The appellant knew that he had a pending rescission application that still had to be enrolled for hearing but decided to ignore it. In failing to give a reasonable explanation for his delay in finalising the rescission application, I am of the opinion that the appellant was in wilful default, in failing to show any good cause.

[35] In the founding affidavit deposed to in support of the rescission application, the appellant failed and/or elected not to address the issue of '*good cause*', which is pre-requisite for the granting of rescission.

Conclusion and Costs

[35] There was no error in the order granted on 3 December 2024 by the Magistrate in refusing to rescind this judgment. The appellant's explanation for his delay in prosecuting the rescission application leaves much to be desired and goes to the heart of whether he has shown good cause for the application to be heard and his flagrant disregard for the Rules of Court. We find that that the judgment of the court *a quo* when exercising its discretion whether or not to grant rescission of judgment had been influenced by considerations of justice and fairness by having had regard to all the facts and circumstances.. In the circumstances we are not persuaded that the Magistrate misdirected himself by applying the wrong principles of law or had an incorrect appreciation of the facts before him warranting this courts interference in setting aside the order granted on 3 December 2024. On this end the appeal must fail.

[30] The conduct of the appellant during the course of the litigation was grossly dilatory. There is no need why costs should not follow the result.

[31] Therefore, I would make the following order:

1. The appeal is dismissed.
2. The appellant is ordered to pay the respondents costs on a party and party scale B.

S MTHIMUNYE
ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.

H SLINGERS
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of appellant: Adv L J Joubert

Attorneys on behalf of appellant: JDC Attorneys

Counsel on behalf of respondent: Adv Potgieter

Attorneys on behalf of respondent: Coetzee & Van Der Berg