IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. CA&R 40/2013

Heard on: 30 October 2015

Delivered on 03 November 2015

In the matter between:

PATIENCE NONDZONDELELO MABUSELA Appellant

and

EASTERN CAPE DEVELOPMENT CORPORATION Respondent

JUDGMENT

BROOKS AJ:

[1] On 14 May 2012 the appellant launched an application for the rescission of a judgment which had been granted by default in favour of the respondent on 8 May 2012 by the magistrate in the Magistrate's Court for the District of Butterworth. The application for rescission was opposed by the respondent and a full exchange of affidavits occurred between the parties.

[2] On 13 August 2012 the magistrate dismissed the application for rescission and directed the appellant to pay the costs of the application on the scale as between attorney and client. The present appeal is directed against the correctness of that decision.

[3] The appeal was initially argued in this court on 14 February 2014, before BESHE J the late DUKADA J. At the commencement of the appeal hearing the court granted an application for condonation which had been introduced by the appellant to explain a delay in the prosecution of the appeal. After hearing argument the court reserved judgment on the appeal. Prior to the delivery of that judgment the late DUKADA J passed away. In the circumstances, on 6 May 2015 the Acting Deputy Judge President directed that the appeal be argued afresh. However, the order granting the appellant condonation remains unaffected by the subsequent developments in the matter.

[4] Section 36 (1) of the Magistrates' Courts Act 32 of 1944 empowers a court:

(a) to rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;

(b) to rescind or vary any judgment granted by it which was void *ab origine*, or which was obtained by fraud or by mistake common to the parties;

(c) to correct patent errors in any judgment in respect of which no appeal is pending; and

(d) to rescind or vary any judgment in respect of which no appeal lies.

[5] Rule 49 of the Magistrates' Court Rules of Court deals with the subject more fully, prescribing the procedure to be followed and the content of the affidavits which must be filed in support of the application for rescission. Sub-rules 1 to 6 deal with the rescission or variation of "default judgments"; sub-rules 7 and 8 deal with the rescission or variation of judgments other than "default judgments" and sub-rule 9 deals with the correction by a magistrate of his or her own accord of errors in a judgment. Sub-rules 1 to 3 cater for a defendant wishing to defend the action in which judgment has been granted by default against him or her.[1]

[6] It has been held[2] that:

"An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and the accompanying conduct by the defaulters, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in GRANT v PLUMBERS

[1] THE CIVIL PRACTICE OF THE MAGISTRATES' COURT IN SOUTH AFRICA VOLUME II,
Jones and Buckle, Tenth Edition 2012, Juta and Company (Pty) Ltd, Rule 49-2.
[2] DE WITTS AUTO BODY REPAIRS (PTY) LTD v FEDGEN INSURANCE CO LTD 1994 (4) SA 705 (E) 711E-G

(PTY) LTD[3] and HDS CONSTRUCTION v WAIT[4] and also any prejudice that might be occasioned by the outcome of the application."

[7] It is apparent from the application for rescission that the appellant contended that the judgment granted by default was void *ab origine.* It has been held[5] that in an application for rescission of a default judgment which is brought on the grounds that the default judgment is void *ab origine,* the applicant must set out his or her defence to enable the court to decide whether or not there is a valid and *bona fide* defence.

[8] It is also well established that the defendant must at least furnish an explanation of his or her default sufficiently full to enable the court to understand how it really came about, and to assess his or her conduct and motives.[6]

[9] In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits filed in the application for rescission, it is necessary to consider the nature of the relief sought. The effect of rescission would be to render the order a nullity. Neither advantage or disadvantage can flow therefrom. The

[3] 1949 (2) SA 470 (O)
[4] 1979 (2) SA 298 (E)
[5] LEO MANUFACTURING CC v ROBOR INDUSTRIAL (PTY) LTD t/a ROBOR STEWARTS & LLOYDS 2007 (2) SA 1 (SCA).
[6] SILBER v OZEN WHOLESALERS (PTY) LTD 1954 (2) SA 345 (A) 352G.

applicant is entitled to claim that the *status quo ante* be restored.[7] In my view, the grant of rescission can be likened to the grant of interim relief and the proper approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to determine whether, on those facts, the applicant is entitled to relief.[8]

[10] Upon a consideration of the content of the affidavits filed in the application for rescission against the background of the legal principles set out above, it is immediately apparent that the appellant has failed to address any of the allegations made in the summons in any manner which might be construed as setting out a clear and *bona fide* defence sought to be relied upon by the appellant.

[11] As the basis for the assertion that the default judgment was void *ab orgine* the appellant relies upon two points:

(a) in the absence of any plea having been filed by the appellant, the respondent issued a series of notices of bar issued in accordance with the provisions of Rule 12 (1) (b) of the Magistrates' Court Rules of Court. Those notices were served upon the appellant's correspondent attorneys. The appellant claims that the notices were fatally defective and contrary to the provisions of Rule 3 (3) as read with Rule 6 (2) of the Magistrates' Court Rules of Court. The

[7] SECURIFORCE CC v RUITERS 2012 (4) SA 252 (NCK) 261 D-E.
[8] SPUR STEAK RACHES LTD AND OTHERS v SADDLES STEAK RANCH, CLAREMONT, AND ANOTHER 1996 (3) SA 706 (6) 714 E.

complaint is that the wrong case number appears on the notices issued by the respondent;

(b) secondly, the appellant asserts the view that the respondent's summons was fatally defective in that it failed to annex a copy of the written agreement referred to in the body of the summons. This amounts to non compliance with the provisions of Rule 6 (6) of the Magistrates' Court Rules of Court and, so the argument proceeds, renders the summons fatally defective.

[12] Closer examination reveals the poverty of the appellant's complaint relating to the notices of bar. The description of both parties set out in the heading of the notices is accurate. The only error is the reflection of the case number as "1089/2011" whereas the correct case number is "1098/2011". In my view, the error is clearly a simple typographical error and was insufficient to warrant the notices being ignored as appears to have been the case. In the absence of evidence to the effect that the attorney concerned was dealing with a number of cases between the identical parties, or that some other factor lead to the notices being ascribed to an incorrect file, in my view it is perfectly reasonable to expect an attorney to reconcile the notices with the matter placed under his or her professional control and to have responded to the notices accordingly. In the event that the attorney was of the view that the appellant was prejudiced by the simple typographical error, he or she could have proceeded with an application in terms of Rule 60 (A) of the Magistrates' Court Rules of Court to have the notices set aside as irregular.

[13] Similar criticism arises in respect of the attitude adopted towards the respondent's summons. Remedies are available to a party who is faced by a summons which is deficient for want of an annexure. Those remedies include an application in terms of Rule 60 (A) of the Magistrates' Court Rules of Court, if prejudice is demonstrable.

[14] It is noteworthy that the summons was served personally upon the appellant on 30 November 2011. Notice of intention to defend the action was only given by the appellant on 19 March 2012, three and a half months later. No plea was forthcoming and the first of the notices of bar issued in terms of Rule 12 (1) (b) of the Magistrates' Court Rules of Court, to which reference has been made, was served on 24 April 2012, five weeks after the appellant had given notice to defend the action. These lengthy time periods are not dealt with at all in the application for rescission of judgment. Nor is there any indication in the affidavit deposed to therein by the appellant of any steps taken or even being contemplated to invoke any of the remedies available to the appellant to address the deficiencies in the proceedings of which complaint is raised in the application for rescission.

[15] The remedies available to a defendant who is served with a summons which lacks an annexure or notices of bar issued in terms of Rule 12 (1)(b) of the Magistrates' Court Rules of Court which contain typographical errors do not include adopting a supine attitude and ignoring the process on the basis that it is fatally defective. In my view,

this attitude on the part of the appellant gives rise inevitably to the inference that the appellant is not *bona fide* in her attempt to raise the complaints in motivation of an application for rescission of judgment, whether that application purports to demonstrate "good cause" for the setting aside of the judgment as being void *ab orgine* or purports to demonstrate reliance upon formal defences. The same, perhaps, could not have been said of the appellant if there were some indication in her affidavit filed in support of the application for rescission of activity aimed at invoking one of the remedies which were available to her in the Magistrates' Court Rules of Court during the lengthy periods of time to which reference has been made.

[16] It follows that I am of the view that the appellant has failed to provide an adequate reason for the default which led to the judgment being granted against her.

[17] In argument, MR NKUBUNGU, who appeared on behalf of the appellant, submitted that it was sufficient for the appellant to refer to the two formal defences available to her in her affidavit filed in support of the application for rescission, and that it was not necessary for her to address any substantive defence therein which she would set out in her plea. In my view, the submission is without substance. It is dealt a fatal blow by the *dicta* of ZULMAN JA[9]:

"Put differently, the provisions of Rule 49 (3) are peremptory when a court considers an application to rescind a default judgment. More particularly, the wording of the

[9] NOTE 5 (supra) para [6]

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 origne,* compliance with Rule 49 (3) nevertheless involves further proof of the existence of a valid *bona fide* defence to the claim." (Emphasis added).

[18] In my view, the complete failure on the part of the appellant to set out the grounds upon which a substantive defence is to be raised *bona fide* on the merits of the action is fatally defective within the context of the application for rescission.

[19] It follows that the magistrate cannot be criticised in the manner in which the matter proceeded and no basis has been laid for any interference with the order granted on the application for rescission.

[16] The following order will issue:

"The appeal is dismissed with costs."

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RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

I agree

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FY RENQE

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the appellant: MR MH NKUBUNGU of

B. MAKADE INCORPORATED, MTHATHA

For the respondent: ADV JL HOBBS instructed by

ROSS GM SOGONI & CO, MTHATHA