**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE, GRAHAMSTOWN)**

**CASE NO: CA 04/2012**
Date Heard: 15 June 2012
Date Delivered: 18 October 2012
**REPORTABLE**

In the matter between:

**MATTHEWS MTHIMKULU MHLOKONYA** Appellant

and

**COMPANY UNIQUE FINANCE (PTY) LIMITED** Respondent

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**JUDGMENT**

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**GOOSEN, J:**

[1] This is an appeal against the refusal of a magistrate to grant rescission of a judgment entered against the appellant by default. The matter has a long and sorry history which it is necessary to set out in some detail. The history of this matter is essentially common cause and is set out in an affidavit filed in support of an application filed for condonation of the late noting of an appeal against an earlier order also dismissing an application for rescission of the default judgment.

[2] The appellant was sued during 2010 by the respondent in respect of a debt secured by a mortgage bond registered against certain immovable property in 1993. Summons was served on the appellant on 12 February 2010. On 11 March 2010 the appellant's attorneys, Shaw Attorneys, filed a notice of intention to defend the action

on behalf of the appellant. A copy of this notice of intention to defend was served on the respondent's attorneys on that date. It appears from the record however that an application for default judgment, dated 3 March 2010, was filed although it is not stated when it was filed. A date stamp on the application indicates that it was filed on 18 March 2010 and that it was served before the magistrate on 19 April 2010. On that date the magistrate refused the request for judgment indicating in a handwritten note that the application was defective inasmuch as it was not accompanied by a cession agreement and a certificate in terms of section 40 of the National Credit Act[1].

[3] On 5 May 2010 the respondent's attorneys submitted to the clerk of the court, undercover of a letter, the certificate of approval for the transfer of assets and liabilities from African Bank Limited to the respondent issued in terms of section 54 (1) of the Banks Act, 1990 and the certificate of proof of registration of the respondent as a credit provider in terms of the National Credit Act. In this letter the respondent's attorneys renewed the request for default judgment. The matter thereafter came before the magistrate on 14 May 2010 when default judgment was granted.

[4] According to the appellant he first became aware of the fact that judgment had been granted against him on 17 September 2010 when a warrant of execution was served upon the appellant's son at the appellant's home. In response hereto the appellant, aggrieved that judgment had been obtained against him notwithstanding his instructions to his attorneys, terminated the mandate of Shaw Attorneys and

[1]Act 34 of 2005. It appears that the cession agreement relates to a requirement of the Banks Act, 1990 relating to the transfer of assets between African Bank Limited, the erstwhile bond holder, and the respondent as its successor in title.

instructed Fololo Fatyela Attorneys to act on his behalf and to apply for rescission of the judgment.

[5] An application for rescission of judgment was duly lodged. The application was supported by an affidavit deposed to by the appellant although he states that he did not properly consider the content of the affidavit before signing it. The application was opposed and was set down for hearing on 18 November 2010.

[6] In the founding affidavit filed in support of the rescission application it is alleged that service of the summons was not effected on the appellant. It is further alleged that insofar as the return of service indicates that service was effected, service must have been effected on someone who "pretended to be me". It is further alleged that the appellant had instructed Bowes McDougall Incorporated as his attorneys to act on his behalf and that he had heard nothing from said attorneys. He could accordingly not be in wilful default. As is apparent from the background set out above and the objective facts, these allegations manifestly bear no relation to what in fact occurred and lend credence to the allegation made by the appellant that this founding affidavit was drafted without reference to him and without having regard to his instructions.

[7] As indicated the application was opposed and an opposing affidavit was filed on behalf of the respondent in which the allegations upon which the rescission application was based were challenged. It appears from the record that this affidavit was filed on 17 November 2010. The appellant consulted his attorneys and, in the light of the content of the affidavit filed in the rescission application, also consulted

Sondlo Attorneys. Based on the advice received from Sondlo Attorneys the appellant decided to withdraw the application for rescission and to institute a fresh application for rescission.

[8] On 18 November 2010 the appellant's then attorneys Fololo Fatyela Attorneys filed a notice of withdrawal of the application for rescission and simultaneously withdrew as attorneys of record. These notices were served on the respondent's attorneys at their offices shortly after 8 am on the morning of 18 November 2010. The attorneys did not attend at court to deal with the matter or with their withdrawal on that date.

[9] On 18 November 2010, unknown to the appellant, the magistrate considered the appellant's application for rescission, notwithstanding the notice of withdrawal, and dismissed it. On the same date the appellant instructed Sondlo Attorneys to act on his behalf and to file a new application for rescission of the judgment granted on 14 May 2010 in which the correct factual averments are set out regarding the appellant's default. This application was indeed filed on 18 November 2010.

[10] This second application for rescission was also opposed by the respondent who filed its opposing affidavit on 21 January 2012. Upon receipt of this affidavit the appellant became aware that the first rescission application had been dismissed. The second application was heard on or about 22 March 2011 and judgment was reserved. It appears that the magistrate had become ill and for this reason judgment was only delivered on 6 October 2011. The magistrate dismissed the application. The appellant requested reasons for the judgment and filed a notice of appeal

against the said judgment. Regrettably the magistrate passed away without delivering further reasons for the judgment and accordingly the appeal was prosecuted in the absence of those reasons and based solely upon the content of the short written judgment delivered on 6 October 2011.

[11] During the course of consultations relating to the prosecution of the appeal the appellant was advised by counsel of the necessity to also appeal against the first order dismissing the application for rescission of judgment and it is in relation to this aspect that the appellant now seeks condonation for the late noting of an appeal.

[12] The history of this matter undoubtedly reflects a sorry state of affairs in which the interests of the appellant appear to have been poorly served. It was argued by Mr *de la Harpe*, on behalf of the appellant, that the appellant had been the victim of a travesty of justice. I agree. Ms *Watt*, who appeared for the respondent, fairly conceded that the circumstances are indeed extraordinary and that the appellant was undoubtedly poorly served in this matter, although the respondent was not responsible therefore. In my view the particular circumstances of this matter warrant the granting of condonation to the appellant for the late noting of an appeal against the order made on 18 November 2010 dismissing the appellant's application for rescission of default judgment. No prejudice can attach thereto and in any event this court is duty bound to exercise its discretion in the interests of justice.

[13] This appeal accordingly concerns two orders made by the magistrate, namely the order granted on 18 November 2010 in which the magistrate dismissed the appellant's application for rescission of judgment and the order granted on 6 October

2011 in which the magistrate dismissed a second application for rescission of default judgment.

[14] In terms of section 22 (b) of the Supreme Court Act an appeal court has the power "... to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require." In deciding whether or not to exercise such power an appeal court is concerned with whether the judgment or order appealed against is correct in the sense that it is one which is competent having regard to the facts before the court and the application to those facts of the relevant legal principles.

[15] In respect of the first order the question is whether, in the face of the notice of withdrawal of the application, an order could properly have been made dismissing the application. It is common cause that the appellant's erstwhile attorneys served a notice of withdrawal of the application for rescission of judgment on the respondent's attorneys at 08h07 on the morning of 18 November 2010 prior to the hearing of the matter. The notice included in the record bears the stamp of the clerk of the court and is dated 17 November 2010. This it appears is an error and it is accepted by the parties that this should read 18 November 2010. The clerk's stamp does not indicate the time when it was filed on that date. It must however be accepted, on the probabilities, that it would have been filed at or about the same time that it was served on the attorney.

[16] The respondent's attorney stated in an affidavit filed in opposition to the second rescission application that he only became aware that the application had

been withdrawn after the matter had been called and had been dismissed by the magistrate. It appears from the affidavit that he appeared on the 18th of November and in the absence of any appearance by and on behalf of the appellant he requested that the application be dismissed with costs.

[17] Rule 27 (2) of the Magistrate's Court Rules provides that:

> "(2) Save as provided by sub-rule (1), a plaintiff or applicant desiring to withdraw an action or application against all or any of the parties thereto shall deliver a notice of withdrawal similar to form 6 of annexure 1."

[18] Although the rule does not specifically require either delivery of a notice to the clerk of the court or that, in certain specified instances, the consent of the court be obtained, as is the case in the High Court, our courts have long held that a plaintiff or applicant does not have an absolute right to withdraw an action or application and that the court hearing the matter has a discretion whether or not to accept such withdrawal. See *Wilson Bros. Garage v Texas Co (SA) Ltd* 1936 NPD 386 at 396 – 397; *Cassimjee v Vather Brothers* 1958 (2) SA 310 (N) at 313A – 314A; and *Karroo Meat Exchange Limited v Mtwazi* 1967 (3) SA 356 (C) at 359 F – G. The exercise of the discretion to proceed with a trial or application which the plaintiff or applicant desires to withdraw must however be exercised judicially. The question arises whether it is necessary that the party desiring to withdraw an action or application need be informed that a judgment other than that in respect of costs would be sought against him or her in the matter. In *Abramacos v Abramacos* 1953 (4) SA 474 (SR) the court found that the rules of that court (the then Southern Rhodesia) were to the effect that a notice of withdrawal does not automatically end the litigation. The view was expressed, in the context of a party seeking to proceed with a counterclaim, that

notice ought to be given if a party intends nevertheless to seek judgment. There is much to be said for holding that in the event that a defendant / respondent wishes to seek judgment on the merits of an action or application which the plaintiff / application has withdrawn, then the withdrawing party is entitled to notice. I need not however decide the issue. It is sufficient for present purposes to find that the discretion to continue a matter which has been withdrawn after set down must be exercised with circumspection fully cognisant that the party against whom an adverse judgment, other than on the question of costs is sought, does not desire to proceed with the matter.

[19] In this instance the appellant's erstwhile attorneys complied with the provisions of the rule by delivering a notice of withdrawal and serving same on the respondent's attorneys. It must be accepted that immediately upon service of the notice of withdrawal of the application upon the respondent's attorneys, prior to the application being heard, that the respondent must be deemed to have knowledge that the application has been withdrawn (or that the appellant desires to withdraw the application). To hold otherwise would make a mockery of the process of service of documents at the office of a party's attorney of record. That being so the respondent's attorneys were obliged to draw the notice to the attention of the court when the matter was called. Even if it is accepted that the respondent's attorneys may not have had actual knowledge of the notice because it was delivered shortly before the matter was to proceed it is nevertheless a matter of concern that the matter was dealt with without any apparent attempt to ascertain why it was that the appellant, who was after all *dominus litis* in the matter, made no appearance. One can only presume that the respondent's attorneys and indeed the court proceeded

simply on the basis that the appellant was in default, as is provided by rule 32 (1). The simple expedient of an enquiry directed to the appellant's representatives would have alerted the respondent to the fact that the appellant's attorneys had served a notice of withdrawal and had withdrawn as attorneys of record. The establishment of that fact would have alerted the magistrate to the necessity of dealing with the matter on a different basis. In my view it is not an answer to shield behind the perhaps less than dutiful conduct of the appellant's attorney nor even the permissive language of rule 32 (1). It is a salutary practice when a matter falls to be dealt with in the absence of a party that the court should satisfy itself that the matter can properly proceed on that basis. In so doing the other party's representatives are obliged, as a matter of simple professional courtesy and good practice, to provide assistance to the court and if necessary to make appropriate enquiries.

[20] It must equally be said that the conduct of the appellant's erstwhile attorney leaves a great deal to be desired. The attorney was undoubtedly under a duty to ensure that the application was properly withdrawn and that the court and the other side were informed of this fact. He was also under a duty to bring to the notice of the court and the respondent's representatives that he was withdrawing as attorney of record and that his withdrawal as an attorney of record did not occasion any prejudice to the appellant. This he failed to do. The consequence of the failure was that the magistrate proceeded to deal with the application on the basis of the non-appearance of the appellant's representatives rather than on the basis of a withdrawal of the application. Had the magistrate been alerted to the existence of the notice of withdrawal and the withdrawal of the attorney he would undoubtedly have dealt with the matter mindful of the necessity of ensuring that the appellant was

afforded an appropriate opportunity to deal with the matter in the event that he exercised his discretion to continue with the application notwithstanding the withdrawal. In the light of this I consider that the order dismissing the application cannot be said to have been correctly or properly made by the magistrate. It accordingly stands to be set aside.

[21] In regard to the second order dismissing the application for default judgment the magistrate, in my view, failed to have proper regard to the evidence placed before him and failed to consider the basis upon which an order rescinding a judgment may properly be given.

[22] The second application for rescission makes it abundantly clear that the appellant had, prior to the granting of the default judgment, filed a notice of intention to defend the action and that this had been served on the respondent's attorneys as early as 11 March 2010. In opposing the application the respondent relies upon the fact that the application for default judgment was filed prior to the receipt of the notice of intention to defend the action but does not address the fact that the application was initially not granted because of certain deficiencies and that it was renewed on 5 May 2010 at a stage when a notice of intention to defend had been served and filed. These critical facts are not addressed in the judgment delivered by the magistrate on 6 October 2011.

[23] It was suggested in argument that the magistrate dismissed the second rescission application on 6 October 2011 because he found that he was *functus officio* and that the matter was *res judicata*. I disagree. A careful reading of the

judgment delivered by the magistrate indicates that he did not dismiss the application on that basis. The magistrate's judgment nowhere refers to the fact that a prior application for rescission of judgment had been made by the appellant nor does he mention that such application had been dismissed and that such dismissal was founded upon a consideration of the merits of the application. The judgment commences by recording certain facts relevant to the matter and then proceeds as follows:

> "The general principle in our law is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it.
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> The reason is that it thereupon becomes *fuctus offician* (*sic*), its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased (see *West Rand Estates Limited v New Zealand Insurance Company Limited* 1926 AD 173 at 176, 186, 187 and at 192; *MEC, Traditional Affairs and Local Government* 2006 (3) SA 1 (CC) at 12 f – g). There are other judicial decisions which also confirm this position.
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> Section 36 is an exception as it is submitted that a magistrate's court may correct or vary a judgment only on those cases in which are covered by the section. (*sic*)
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> The application is dismissed with costs."

[24] It is clear that the magistrate recognised that section 36 of the Magistrate's Court Act confers upon a magistrate's court the power to vary, amend or rescind a judgment in accordance with that section notwithstanding that the judgment sought to be varied, amended or rescinded is otherwise a final judgment of the court. Having accepted that he was at large to consider whether any of the provisions of section 36 find application in the application that was before him, the magistrate failed to do so and simply dismissed the application without providing any reasons whatsoever for coming to that conclusion.

[25] As mentioned above, no mention is made in the judgment of the first application for rescission despite the fact that the respondent's opposing affidavit made much of the fact that such an application had been made and that the application ought to be dismissed on that basis alone. Had the magistrate intended to dismiss the application on that basis he would undoubtedly have said so. I therefore accept that he did not and that, despite the argument to the contrary, he considered that he was entitled to deal with the second application before him on the merits of that application. Regrettably the magistrate failed to deliver a reasoned judgment setting out his reasons for dismissing the application. It cannot therefore be said that he properly applied his mind to the evidence placed before him and the legal principles applicable thereto. In *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) Navsa JA set out the rationale for requiring courts to furnish reasoned judgments in the following terms:

> "As a general rule a court which delivers a final judgment is obliged to give reasons for its decision. In an article in (1998) 115 South African Law Journal at 116 – 128 entitled 'Writing a Judgment' the former chief justice, MM Corbett, pointed out that this general rule applies to both civil and criminal cases. In civil cases this is not a statutory rule but one of practice. The learned author referred to *Botes & Another v Nedbank Limited* 1983 (3) SA 27 (A) where this court held that in an oppose matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's decision. It was pointed out that a reasoned judgment may well discourage an appeal by the loser and that the failure to supply reasons may have the opposite effect, that is, to encourage an ill-founded appeal. The learned author stated the following at 117:
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> 'In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public of confidence in the administration of justice.'"

[26] The magistrate was not precluded from dealing with the application for rescission of judgment by virtue of the fact that there had been a prior application for rescission of judgment since in the prior application it appears that the matter was disposed of on the basis of the appellant's default of appearance and, although the application was dismissed, no reasoned judgment on the merits was given. In these circumstances the dismissal of the application for rescission of judgment did not have the effect of rendering the default judgment a final judgment as far as the magistrate was concerned and therefore one precluding any consideration in terms of section 36 of the Magistrate's Court Act. (See in this regard *Ottens v Korf* 1937 (TPD) 58; *Vleissentraal v Dittmar* 1980 (1) SA 918 (O) at 921; *Venmei Beleggings (Edms) Beperk v Bue* 1980 (3) SA 372 (T) at 377).

[27] This court is accordingly at large to consider the merits of the application which served before the magistrate. In this regard it is common cause that the appellant filed a notice of intention to defend the action instituted by the respondent. The notice was served on the 11th of March 2010. On 19 April 2010 the request for default judgment was refused because the application was defective in certain respects. The request was renewed after the defects were corrected on 4 May 2010 and almost two months after the respondent's attorneys had received the notice of the appellant's intention to defend the action. It is lamentable that the respondent's attorneys considered that they could, despite knowledge of the notice of intention to defend, shield behind the fact that the notice to defend had only been filed after the request for default judgment was lodged. This is unconscionable. Had the fact that a notice to defend had been filed been drawn to the attention of the magistrate he would not have entered judgment by default.

[28] In argument it was sought to be suggested that the filing of the notice of intention to defend was in any event out of time since the application for default judgment had already been lodged. In this regard reliance was placed on the fact that the request for default judgment was dated 3 March 2010 and that the notice of intention to defend was only filed on the 11th of March 2010. It is doubtful having regard to the date stamp of the clerk of the court which reflects the 18th of March 2010 that the request for default judgment was in fact filed on 3 March 2010. In my view all of the probabilities point to the fact that the request for default judgment was only filed and officially received by the clerk of the court on 18 March 2010 i.e. after the notice of intention to defend had been filed. Even if it is to be accepted that the request for default judgment was presented to the clerk of the court on or about the 3rd of March 2010 but that for some administrative reasons it was only processed and receipted on the 18th of March 2010, that cannot avail the respondent. In any event it is clear that on the 19th of April 2010 the magistrate "refused" the request for default judgment because there were certain deficiencies in the application. Thereafter once those deficiencies had been rectified by the respondent's attorneys the respondent's attorneys re-submitted or renewed the request for default judgment on 5 May 2010, at a stage when they well knew that the appellant had signified his intention to defend the action. Default judgment was only thereafter granted on 14 May 2010.

[29] Default judgment cannot competently be given in circumstances where the defendant has given due and proper notice of his intention to defend the action (see *Mthanthi v Pepler* 1993 (4) SA 368 (D&CLD) at 371 – 372). In the light of this the

default judgment entered against the appellant on 14 May 2010 ought properly to have been rescinded by the magistrate when he considered the application for rescission of judgment. It is in these circumstances unnecessary to consider the merits of the appellant's defence or whether he has reasonably explained his default since he was not as a matter of fact in default.

[30] In the circumstances the appropriate order to make pursuant to section 22 (b) of the Supreme Court Act is to set aside the order of the magistrate on 6 October 2011 and to replace it with an order rescinding the judgment of 14 May 2010.

[31] In respect of costs there is no reason why the appellant should not be awarded the costs of the appeal. In relation however to the first application for rescission of judgment which the appellant sought to withdraw, the appellant tendered the wasted costs associated therewith. In my view it would be both fair and equitable if the appellant is ordered to pay the costs of that application. In respect of the second application for rescission the appellant has succeeded on appeal and ought therefore to be awarded those costs. Finally there is the question of the costs associated with the application for condonation for the late noting of an appeal against the first rescission judgment. In my view the costs associated with that application ought to be paid by the appellant.

[32] I would accordingly make the following order:

1. The appellant's appeal is upheld.

2. The magistrate's court order of 18 November 2010 dismissing the appellant's application for rescission of judgment is set aside.

3. The appellant is ordered to pay the respondent's costs of opposition to the aforementioned application up to and including 18 November 2010.

4. The magistrate's court order of 6 October 2011 dismissing the appellant's application for rescission of the default judgment granted on 14 May 2010 is hereby set aside and replaced with the following order:

   "a) The order made by this court on 14 May 2010 is hereby rescinded and set aside.

   b) The respondent is ordered to pay the applicant's costs of the application."

5. The respondent is ordered to pay the appellant's costs on appeal save that the costs incidental to the appellant's application for condonation of the late noting of an appeal against the order of 18 November 2010 shall be paid by the appellant.

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**GG GOOSEN**
**JUDGE OF THE HIGH COURT**

SANDI, J:

I concur.

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**B SANDI**
**JUDGE OF THE HIGH COURT**

APPEARANCES:

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|---|---|
| FOR THE APPELLANT: | Mr D de la Harpe, instructed by Wheeldon Rushmere & Cole |
| FOR THE RESPONDENT: | Ms K Watt, instructed by Netteltons Attorneys |