

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]**

CASE NO: CA 184/2021

Heard: 07 October 2022

Delivered: 18 October 2022

In the matter between:-

SOUTH AFRICAN SOCIAL SECURITY AGENCY

Appellant

and

**GROW WITH ME PROJECTS PRIMARY
CO-OPERATIVE LIMITED**

First Respondent

JUDGMENT

Matebese AJ:

[1] On 8 July 2021 the Regional Magistrates Court, East London (the court *a quo*) in an application for rescission brought by the appellant delivered judgement and granted an order dismissing the application for rescission and directing the appellant to pay the costs of the application on a party and party scale. The appellant appeals the judgement and order of the court *a quo*.

[2] The court *a quo* in arriving at the above order reasoned as follows:

“[29] Considering the facts, submissions of the parties and the law I am of the view that there is no bona fide defence established by the applicant. This court is inclined to exercise its discretion in favour of the respondent.”¹

[3] From a reading of the judgement it appears that the court *a quo* never considered whether the appellant had furnished a reasonable and acceptable explanation for its default. This is despite the court *a quo* having identified this as one of the requirements or elements of sufficient cause for the rescission of default judgement.² Nothing is said by the court *a quo* in this regard.

[4] Before dealing with the issues that arise in this appeal I deem it appropriate that I deal with the following background facts which I consider relevant to the order granted herein below.

Factual background

¹ Quoted from the judgement of the court *a quo*.

² See para.13 of the judgement of the court *a quo*.

- [5] On or about 2 December 2019 the appellant issued the respondent with Purchase Order Number A1-11885 for the supply and delivery of school uniform in Mdantsane and/or Idutywa.
- [6] The respondent contends, in its answering affidavit in the court *a quo*, that it delivered in terms of the Purchase Order and issued the appellant with an invoice for the payment of the sum of R86 450.00 in respect of the goods so delivered.
- [7] The appellant on the other hand contends, in its founding affidavit in the court *a quo*, that the respondent failed to deliver as per the agreement and that the appellant, as a result of such failure, cancelled the agreement.
- [8] For the reasons that appear later in this judgement it is not my intention to deal with the issue whether there was delivery by the respondent or whether the agreement was cancelled by the appellant. Suffice only to mention that the dispute about the appellants refusal and/or failure to pay the amount allegedly due to the respondent, led the respondent to institute action proceedings in the court *a quo*.
- [9] On 16 November 2020 the respondent issued summons against the appellant claiming the total amount of R78 500.00 (Seventy Eight

Thousand Five Hundred Rand Only) plus costs and interest on both the capital amount and costs.

[10] The summons were served upon the appellant on 10 December 2020. This appears from the Sheriff's Return of Service dated 14 December 2020.

[11] In the summons the appellant was given ten (10) days to file a notice of intention to defend the action and a further twenty (20) days thereafter to deliver its plea.

[12] The appellant, therefore, had until 26 January 2021 to file a notice of intention to defend the proceedings. This is so because the period between the 16 December and 15 January is a *dies non* for purposes of filing a notice of intention to defend.³

[13] On 11 January 2021 the respondent sought and obtained default judgement against the appellant in the sum of R 78500.00 (Seventy Eight Thousand Five Hundred Rand Only) plus interest in the at the rate of 10.5 % per annum from 10 December 2020 and costs. The default judgement was granted on 21 January 2021 by the court.

³ See rule 13 of the Rules for the Conduct of Proceedings in the Magistrates Court.

[14] On 22 January 2021 the appellant delivered its notice of intention to defend the proceedings. The notice of intention to defend was served upon the respondent's attorneys on 21 January 2021 at 11H49.⁴

[15] It is therefore clear from the above that the default judgement was sought and granted before the period for the filing of the notice of intention to defend expired. However, this was not raised in the appellant's rescission application in the court *a quo* and the court *a quo* was apparently unaware or failed to take notice of this irregularity or error.

[16] The appellant, in its heads of argument in this court took this point. Even though this point was not raised in the court *a quo*, it is in my view a legal point that is apparent from the record, it does not raise new factual issues and its consideration does not cause any unfairness and prejudice to the respondent. This court can therefore entertain it and decide the matter on the basis thereof.⁵ Above all, it is in the interests of justice that it be considered by this court.

Legal principles

[17] Section 36 of the Magistrates Court Act 32 of 1944 ("the Act") grants the Magistrates Court the power to rescind certain judgements. It provides, in

⁴ See record p.22 to 23

⁵ *Nwafor v Minister of Home Affairs and Others* [2021] ZASCA 58 para.29

part, that the court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*- rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted.⁶

[18] Rule 49 of the Rules for the Conduct of Proceedings in the Magistrates Courts (“the rules”) provides for the procedure for making applications for rescission and as well as the grounds upon which a court may rescind a judgement. It provides, in the relevant part:

“49 Rescission and variation of judgments

(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 subrule (5) or (5A).

⁶ Section 36(1)(a) of the Magistrates Courts Act 32 of 1944 as amended.

- (2) *It will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.*
- (3) *Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim...."*

The rescission.

- [19] The reasoning of the court *a quo*, quoted above, shows that the court *a quo* only considered whether the appellant had a bona fide defence. This is only one element of the enquiry on good cause.
- [20] The court *a quo* also failed to consider whether there was good reason to rescind the judgement as required by rule 49 of the rules. The rule clearly states that a default judgement may be rescinded upon good cause shown or if the court is satisfied that there is a good reason to rescind the judgement.

[21] The existence of a good reason to rescind the judgement is, in terms of the rule, an independent and separate ground for rescission of default judgement from good cause. This is clear from the use of the word “or” in the rule.

[22] In this case there was clearly a good reason to rescind the default judgement. The reason is that the default judgement was prematurely sought and granted by the court.

[23] For this reason alone the appeal must succeed. Having said that I consider it unnecessary to deal with the other grounds of appeal raised by the appellant

[24] I am left to deal with the issue of costs, with which I deal hereunder.

Costs

[25] The respondent, once the above issue was raised by the appellant, decided to file a notice to abide in which it sought to avoid liability for costs on the basis that if the point was raised earlier the issue of costs would have been mitigated. The notice to abide was filed on 5 October 2022, two days before the hearing of the appeal.

[26] In my view the respondent cannot avoid liability for costs in this matter. First, it is the respondent that prematurely approached the court and applied for default judgement. Second, when the appellant filed its notice of intention to defend, the respondent had an option to withdraw the application for default judgement, if the judgement had not yet been granted or, if already granted, to abandon same. Third, the respondent could also have consented to the rescission of the default judgement, especially regard being had to the fact that a notice of intention to defend was filed on the day the judgement was granted, clearly signifying an intention by the appellant to defend the matter. Instead, it opposed the rescission. Fourth, the respondent only waited until the 5th October 2022 to file its Notice to abide, a mere two days before the hearing of the appeal.

[27] Accordingly, I do not believe that the respondent is genuine or bona fide when saying the notice to abide is filed in order to avoid unnecessary legal expenses.

[28] The respondent must therefore bear the costs of this appeal and the costs of the rescission application in the court *a quo*.

[29] Accordingly, I make the following order:

- 1. The appellant's appeal is upheld with costs.**

2. The judgement and order of the court a quo is set aside and replaced with the following order:

- (a) The default judgement granted against the applicant on 21 January 2021 is rescinded and set aside;*
- (b) The applicant is granted leave to file its plea to the respondent's summons and particulars of claim within twenty (20) days from the date of this order*
- (c) The respondent shall pay the costs of this application.*

Z.Z Matebese
Acting Judge of the High Court

I agree

M. Lowe
Judge of the High Court

Appearances:

For the appellant : **Adv X. Nyangiwe (with Adv M. Sotenjwa)**
Instructed by State Attorney
East London

For the Respondent : **No Appearance**