IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Not Reportable
Case no.: FS/BHM/RC/60/2021
High Court Appeal no.: A60/2023

In the matter between:

THE MINISTER OF POLICE	First Appellant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Appellant

and

TEBOHO CONSOLATION MOKOENA	Respondent

CORAM: Loubser, J *et* Opperman, J

HEARD ON: 2 October 2023

DELIVERED ON: 9 October 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 9 October 2023. The date and time of hand-down is deemed to be 15h00 on 9 October 2023

JUDGMENT BY: Opperman, J

SUMMARY: Late filing of application for rescission – substantive application for condonation in the regional court

JUDGMENT

[1] Compliance with the Rules of Court is vital in all litigation. This is more conspicuous in the lower courts that are so - called “creatures of statute”. The case that lies before this court on appeal was tainted with a tendency by the appellants to disregard the rules of process. It caused, among others, an order[1] that was granted by default against them in the regional court.

[2] On 5 April 2022 the appellants served an application for rescission of the default judgment on the respondent. The application was mainly attacked by the respondent due to its lateness and that the affidavits used to promote the case for the appellants, were not proper in law.

[3] On 2 March 2023 the application was brought before the court below and without a substantive application for the lateness of the application; the court admitted the matter onto the roll. On the main application, as can be gleaned from the transcribed record,[2] the magistrate ordered as follows:

> The main application, therefore, it is difficult to deal with it without going into the details of the application for rescission but based on the submissions that had been brought before me, it is DISMISSED.

[4] In his written reasons for the judgment dated 23 March 2023, there was no order on the main application. The magistrate made the following order:

> [8] The following order is made:
>
> The first, second and forth in lime (sic) are dismissed.
>
> The third point in limine is upheld.

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[1] At page 50 of the record.
“IT IS ORDERED THAT
The request for judgment by default against the Defendant is granted as follows:
1.Payment of the Capital amount claimed in respect of claim A in the sum of R 250 00.00.
2. Payment of the Capital amount claimed in respect of claim B in the sum of R150 000.00.
3. Costs on an attorney and client basis to be taxed.
4. Interest on the amounts claimed at the rate of 7% per annum from 23 March 2021 until date of final payment.”

[2] Page 38/234 at lines 18 to 21.

[5] It seems that the application for rescission was dismissed based on the third point *in limine* that was upheld. The third point *in limine* is described by the court *a quo* to be that: "The documents purporting to be the founding affidavit and confirmatory affidavits were attacked. The basis was that they were not properly commissioned."[3]

[6] Reading of the record however shows that the beginning and the end; the core of this appeal, lies in the first point *in limine* that was taken by the respondent *a quo.* This issue now also became the first ground of appeal in the cross appeal by the respondent; it is the lateness of the application for rescission, the lack of a substantive application for condonation and the alleged illegal admission of the matter onto the roll *a quo*. The matter should not have been on the roll and the rest of the case could not have been, lawfully so, adjudicated.

[7] I pause for a moment to depict more of the background of the case.

1. The respondent instituted action against the appellants for damages in the amount of R400 000.00 based on unlawful arrest, detention and on malicious prosecution.

2. The respondent was charged with the rape of a minor child, aged 14 years at the time of the alleged incident.
3. The appellants did serve their notice of intention to defend the main action. A notice of bar subsequently followed. The appellants' plea was due on 21 September 2021. The respondents hereafter informed the appellants that no plea has been received and that an application for default judgment will follow.
4. The notice of set down for the application for default was served on 1 December 2021. On 9 December 2021 default judgment was granted against the appellants.
5. Apparently, the appellants did not receive the requisite knowledge that the respondent intended to proceed to seek default judgment. There was an alleged agreement between the parties that the bar would be uplifted in exchange for consent to condone the non-compliance with Act 40 of 2002.

[3] Page 5/172 at [6].

6. The appellants only became aware of the default judgment on 5 March 2022 when the attorney acting on behalf of the appellants received the email with the attached order and warrant of execution.

7. The default judgment order was only served on the offices of the first appellant and not the attorneys for the appellants nor the second appellant. Counsel for the respondent could not explain their questionable conduct on this issue when they addressed us during the appeal. Notwithstanding, they obtained a warrant of execution.

8. The appellant went on to endeavour, by way of their application for rescission on sworn affidavit, to show good and sufficient cause as to why the default judgment should be set aside and explain the reasons for the default.

9. The respondent denied the allegations made by the appellants in their recission application and based their opposition of the application by denying good cause and raising four points *in limine*:

    1. Failure to request an extension of time as provided for in rule 60(5)(a) of the Magistrates’ Court Rules;
    2. lack of *locus standi* on behalf of the second applicant (appellant);
    3. the founding affidavit and the confirmatory affidavits failed to meet the requirements of an affidavit therefore, the rescission application is not supported by an affidavit and the application stood to be dismissed; and
    4. the appellants had not disclosed a *bona fide* defence, essentially that no good cause has been shown by the appellants to justify the rescission of the default judgment.
    5. In addition, the respondent contended that no case had been made out for reliance on section 36 of the Magistrates' Court Act for the rescission of the judgment.

10. The appellants filed a replying affidavit dealing, in particular with the points *in limine.*

11. Only the points *in limine* were argued on 2 March 2023 and a determination on the matter was made without the merits having been argued.

12. The ground for appeal by the appellants is now that the magistrate erred in upholding the third point *in limine* that the founding and confirmatory affidavits fail to meet the requirements of an affidavit. The Magistrate, according to the appellants, misapplied the principle articulated and applied in *Absa Bank Limited v Botha NO and Others* 2013 (5) SA 563 (GNP) and made erroneous statements and inferences.
13. The cross appeal is that the court below erred in dismissing the first, second and fourth points *in limine* as contained in the respondent's opposing affidavit and they take the matter further to now demand that the order as to costs on a party and party scale, had to include costs of counsel in terms of rule 33(8) of the Magistrates' Court Rules including the costs accompanied with the preparation and drafting of the heads of argument that was submitted during the hearing.

[8] It is accepted as proven and trite that the order granted in default came to the knowledge of the legal representative of the appellants on 5 March 2022. They then proceeded to serve, *via* email,[4] a notice of motion in application for the rescission of the default judgment on the legal representative of the respondent. This was on 5 April 2022; <u>21 days</u> after they learned of the existence of the default judgment.

[9] A confirmatory affidavit by one W Sangweni attached to the application was not signed nor commissioned. An attempt was made to rectify the mistake when the same affidavit signed and commissioned on 11 April 2022, was send to the respondent's attorney.

[10] Essential is that it is not known to this court when the application for rescission was served and filed on the regional court itself; if ever. The notice of motion that is at pages 51 to 53 of the Appeal Bundle before this court, does not show any official stamp or indication that it was indeed filed and served on the Clerk of the Court: Bethlehem.

[4] At page 93 of the record.

[11] Rule 49 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa that was promulgated in 2018, dictates that:

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). (Accentuation added)

(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.

(4) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who does not wish to defend the proceedings, the applicant must satisfy the court that he or she was not in willful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his or her knowledge.

(5) *(a)* Where a plaintiff in whose favor a default judgment was granted has consented in writing that the judgment be rescinded or varied, either the plaintiff or the defendant against whom the judgment was granted, or any other person affected by such judgment, may, by notice to all parties to the proceedings, apply to the court for the rescission or variation of the default judgment, which application shall be accompanied by written proof of the plaintiff's consent to the rescission or variation.

(b) An application referred to in paragraph *(a)* may be made at any time after the plaintiff has consented in writing to the rescission or variation of the judgment.

(5A) *(a)* Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid in full, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment.

(b) The application contemplated in paragraph *(a)* —

(i) must be made on a form corresponding substantially with Form 5C of Annexure 1;

(ii) must be accompanied by an affidavit with annexures providing reasonable proof that the judgment debt, the interest and the costs have been paid; and

(iii) must be served on the judgment creditor not less than 10 days prior to the hearing of the application.

(6) Where an application for rescission or variation of a default judgment is made by any person other than an applicant referred to in subrule (3), (4) or (5), the application must be supported by an affidavit setting out the reasons why the applicant seeks rescission or variation of the judgment.

(7) All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.

(8) Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.

(9) A magistrate who of his or her own accord corrects errors in a judgment in terms of section 36(1) *(c)* of the Act shall, in writing, advise the parties of the correction.

[Rule 49 substituted by GN R632 of 22 June 2018 with effect from 1 August 2018.]

[12] Section 36(1) of the Magistrate's Court Act 32 of 1944 empowers the 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 from the beginning (*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. If a plaintiff in whose favor a default judgment has been granted has consented in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.

[13] It is peremptory to:

1. Apply for rescission within 20 days after the default judgment came to the relevant parties' knowledge.
2. Until an extension of time has been granted (under rule 60(5)(a)) the court may not entertain a late application for rescission.

3. The computation of the time is in terms of rule 2(2): "A Saturday, Sunday or public holiday shall not, unless the contrary appears, be reckoned as part of any period calculated in terms of these rules."

4. The application must be served and filed to the court; not just served *via* email on the respondent; served and filed at the court with notice to all parties to the proceedings within 20 days of knowledge. The subrule now explicitly provides that the applicant must "serve and file" his application within the prescribed period. It does not mean that the application must come before the court during the period.

[14] Rule 60(5)(a), that is also peremptory, states that:

> Any time limit prescribed by these rules, except the period prescribed in rule 51(3) and (6), may at any time, whether before or after the expiry of the period limited, be extended —
>
> (i) by the written consent of the opposite party; and
>
> (ii) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as it may deem fit. (Accentuation added)

[15] Jones and Buckle with reference to case law[5] had the following to say about the application:

1. If a litigant is out of time and his opponent refuses to grant him an extension in writing, he must make a substantive application to court for an extension.

2. Without such substantive application before it, the court is debarred from entertaining any application for rescission or reopening which is out of time.

3. A litigant who asks for an indulgence should also act with reasonable promptitude, be scrupulously accurate in his statement to the court, and other neglectful acts in the history of the case are relevant to show his attitude and motives.

[5] *The Civil Practice of the Magistrates' Courts in South Africa* (Volume I and II), 55 Applications, RS 28, 2021 Rule-p55-1 to RS 33, 2023 Rule-p55-38, Juta, Jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu on 5 October 2023. (In Volume II the cut-off date for reported cases is 30 April 2023. This service includes the amendments to the rules under GN R3371 of 5 May 2023 with effect from 9 June 2023 and GN R3399 of 12 May 2023 with effect from 19 June 2023.).

[16] Rule 55(4)(a)(i) provides that interlocutory and other applications incidental to pending proceedings must be brought on notice corresponding substantially with Form 1C of Annexure 1, indicating a date assigned by a registrar or clerk of the court or as directed by a magistrate before whom the matter is to be heard. The notice must be supported by affidavits if facts need to be placed before the court. Copies of the notice and all annexures thereto must be served upon every party to whom notice is to be given.

[17] The appellant denied being out of time and dismissed any non-compliance with the rules on the issue. It is a trite fact that they sent the notice of motion for the rescission application on the 21st day after they obtained knowledge of the default judgment *via* email to the respondent. If, for a moment, it is accepted that they are right, and they were not late; they did not serve and file with the court. The appellants are then still in the wrong and continued their defiance of the rules of court. To add insult to injury, one of the affidavits attached to the application was not signed and commissioned.

[18] The appellants were late when they served their application on the respondent; they did not file an application in terms of rule 60(5). The court *a quo*, as bound by the rules promulgated in terms of statute, did not have a discretion to allow the matter onto the roll without a substantive application; it is debarred from doing so. The impression of the court *a quo* where he deemed himself to have complied with the rules by noting that: "As indicated, both parties were given an opportunity to address the Court and they did so at length.", is patently wrong and not in accordance with the law. This was not an application in terms of the law.

[19] The application for rescission was unlawfully allowed onto the roll of the court and unlawfully adjudicated upon. The obvious consequence that must be regarded is the effect of this error on the adjudication of the other points *in limine*. Whether the founding and confirmatory affidavits were legally competent or not becomes irrelevant and the issues were illegally adjudicated. The costs order that serves on cross appeal, also so. These orders must however, for the sake of legal certainty, be set aside.

[20] The result is that all the orders of the court *a quo* must be set aside. Costs must follow the cause. The respondent was successful on the unlawful admission of the application onto the roll.

[21] ORDER

1. The appeal succeeds with costs on the basis that the court *a quo* failed to apply rule 49(1) read with rule 60(5)(a)(ii) of the Magistrates' Court Rules as promulgated in terms of the Magistrate's Court Act 32 of 1944 and that the application for rescission was unlawfully allowed onto the roll and subsequently entertained and adjudicated.
2. The orders of the court *a quo* that the main application is dismissed, that the first, second and fourth points *in limine* are dismissed and the third point *in limine* is upheld; are set aside.
3. The third ground of appeal within the cross appeal on the issue of costs is dismissed.

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M OPPERMAN, J

I concur

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P LOUBSER, J

APPEARANCES:

Appellants: **I MACAKATI**
Instructed by: State Attorneys, Bloemfontein

Respondent: **LA VISSER**
Instructed by: Loubser Van Wyk Inc
Lynnwood
Pretoria
c/o Jacobs Fourie Inc.
Bloemfontein