IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG2

CASE NO: A02030- 2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between –

MBATHA, NKOSINATHI SBONELO APPELLANT

AND

VERMAAK, CELESTE RESPONDENT

Neutral Citation: *Mbatha v Vermaak* (Case No. A02030-2020) [2023] ZAGPJHC 399 (4 May 2023)

JUDGMENT

MOORCROFT AJ [DLAMINI J CONCURRING]:

Summary

Rescission of judgment – good cause – encompasses reasonable explanation for default and a bona fide defence

Order

[1] I make the following order:

1. The appeal is upheld;

2. The following order is substituted for the order of the Magistrates' Court for the District of Ekurhuleni East held at Springs under case number 578/19 and granted on 20 July 2022:

2.1. The late filing of the condonation application brought by the applicant is condoned;

2.2. The default judgement granted on 9 October 2019 is rescinded;

2.3. The applicant is ordered to file a plea within ten days of the date of this order;

2.4. The costs of the rescission application shall be costs in the cause of the action.

3. The costs of the appeal shall be paid by the respondent in the appeal.

[2] The reasons for the order follow below.

Introduction

[3] This is an appeal[1] against a judgment by the Learned Additional Magistrate for the District of Ekurhuleni East handed down on 20 July 2022, in which the Court dismissed an application for the rescission of a default judgment brought in terms of Rule 49(1) of the Rules of the Magistrates' Court.

[4] The Rule[2] reads 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).* [emphasis added]

[5] The concept of 'good cause' or 'sufficient cause' has received the attention of the Courts over many years. In *Grant v Plumbers (Pty) Ltd*[3] Brink J was dealing with the equivalent Rule[4] in the Free State Division of the High Court. He said:

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1 In terms of section 83 of the Magistrates' Court Act, 32 of 1944. See Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10th. Ed, 2022, RS 26, 2022 Act-p583.

2 Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10th. Ed, 2022, RS 18, 2018 Rule-p49-1.

3 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476–7.

4 Rule 43 (O.F.S.).

> *"Having regard to the decisions above referred to,*[5] *I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:*
>
> *(a) He must give a reasonable explanation of 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.*
>
> *(b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.*
>
> *(c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325)."* [emphasis added]

[6] One of the cases referred to by Brink J is *Cairns' Executors v Gaarn*[6] where Innes JA (as he then was) said:

> *"It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of COTTON, L.J. (In re Manchester Economic Building Society (24 Ch. D. at p. 491)) 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application."* [emphasis added]

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5 The Judge referred to *Joosub v Natal Bank* 1908 TS 375, *Cairns' Executors v Gaarn* 1912 AD 181, *Abdool Latieb & Co v Jones* 1918 TPD 215, *Thlobelo v Kehiloe* (2) 1932 OPD 24, *Scott v Trustee, Insolvent Estate Comerma* 1938 WLD 129, and *Schabort v Pocock* 1946 CPD 363.

6 *Cairns' Executors v Gaarn* 1912 AD 181 at 186.

[7] Good cause includes, but is not limited to the existence of a substantial defence.[7] It is therefore necessary to determine whether there is a satisfactory explanation of the delay, and whether the appellant raised a bona fide and reasonable defence.

[8] The application for rescission was brought after the expiry of the 20—day period in Rule 49 and the appellant also applied for condonation. The applicant must show sufficient cause and it has been held that in that in this context condonation requires a reasonable explanation for the delay[8] and that a good defence need not be shown in the context of Rule 60.[9]

[9] The application for condonation and rescission was successfully opposed but the respondent chose not to oppose the appeal.

The facts

[10] On 11 January 2019 the appellant and the respondent were involved in a road accident in Springs. An accident report was compiled reflecting details of both parties and the appellant's address was reflected as No. 114, 3rd Street, Geduld, Springs.

[11] On 27 March 2019 the respondent caused a summons to be served on No. 14, 3rd Avenue, Welgedacht, Springs, the address alleged to be the address of the appellant in paragraph 2 of the particulars of claim.[10]

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7 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G.

8 *Athlone Agencies v Strauss* 1962 (4) SA 624 (D) 628; *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T); *Duncan t/a San Sales v Herbor Investments (Pty) Ltd* 1974 (2) SA 214 (T). But see *Iveta Farms (Pty) Ltd v Murray* 1976 (1) SA 939 (T) 941.

9 See Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* 10th. Ed, RS 28, 2021 Rule-p60.

10 Particulars of claim, CaseLines 03-113 and return of service, CaseLines 03-128.

[12] In the particulars of claim the respondent alleged that the appellant's negligent conduct was the sole cause of the collision and she claimed damages in the amount of R56 000 from him.

[13] The summons was served on a man whose identity was not known to the Sheriff and who refused to identify himself. The respondent assumed that the unidentified man must have been the appellant and sought default judgment when no intention to defend was received. The averment that the unidentified man was in fact the appellant also found its way into the respondent's subsequent affidavit resisting an application to rescind the default judgment, but there is no basis for the assumption on the evidence.

[14] The appellant states under oath that he had never lived at the Welgedacht address and this evidence is uncontroverted save for the bald averment that he must have been the person upon whom the summons was served in Welgedacht.

[15] Default judgment was granted in the magistrates' court on 9 October 2019. The judgment only came to the notice of the appellant on 18 February 2022 when an application in terms of section 65J of the Magistrates' Court Act, 32 of 1944 was served at his place of work. He attended at court on 25 February 2022 and the matter was postponed to 22 April 2022. On that date the application was postponed to 13 May 2022 to allow the appellant to appoint an attorney, an approach to the Legal Aid Board having been unsuccessful. On 13 May 2022 the appellant brought a self-penned and abortive rescission application and the Court advised him to obtain the services of an attorney. A proper application was then brought, out of time by 72 days on the respondent's calculations.

<u>A reasonable explanation for the default in respect of the condonation application and the rescission application.</u>

[16] This is not a matter where the appellant did nothing to for a long period of time. He immediately reacted to the section 65J application and attended at Court. He applied for Legal Aid, attempted his own application that was an abortive one, and finally appointed an attorney to bring an application for rescission in terms of the Rules of Court. The explanation is a reasonable one.

[17] The appellant has shown good reason for not defending the action in 2019 – he simply did not know of the summons and it was never served on him – and he has given an adequate explanation for the delay between the day on which he became aware of the action and the launch of the application for rescission.

[18] The appellant has therefore given a reasonable explanation both for his delay in bringing the rescission application, and his failure to oppose the claim after service of the summons.

Bona fide defence

[19] In his affidavit in the rescission application the appellant deals rather cursorily with the defence to the claim. He alleges that he was not negligent but that it was the respondent who was negligent on a number of grounds briefly stated in his affidavit. The respondent failed to seize the opportunity to deal in detail with the accident and merely denies the appellant's averments. The only version before the Court, sparse though it is, is that of the appellant.

[20] The appellant has set out averments which if established at the trial would constitute a defence, and is entitled to an order that the appeal be upheld. The appellant is entitled also to his costs as the appellant had no option but to appeal after the rescission application was opposed and dismissed.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I agree and it is so ordered

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J E DLAMINI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **4 MAY 2023**.

APPEARANCE FOR THE APPELLANT:	K J SELALA
INSTRUCTED BY:	K J SELALA ATTORNEYS
COUNSEL FOR THE RESPONDENT:	NO APPEARANCE
INSTRUCTED BY:	-

DATE OF THE HEARING:	25 APRIL 2023
DATE OF JUDGMENT:	3 MAY 2023