

Reportable: YES / **NO**  
Circulate to Judges: YES / **NO**  
Circulate to Magistrates: **YES** / NO  
Circulate to Regional Magistrates: **YES** / NO



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

**CASE NO: 1052/2024**

**REGIONAL CASE NO: NW/ODI/RC464/2022**

**In the matter between: -**

**KOKETSO OLEBOGENG CLOUDETH NYEUFANE                      Plaintiff**

**And**

**MINISTER OF POLICE    Defendant**

**Handed down: 14 MARCH 2024**

**Coram:     HENDRICKS JP, SCHOLTZ AJ**

**ORDER**

The following order is made:

- (i) The special review is removed from the roll.
- (ii) The matter is referred back to the Ga-Rankuwa Regional Court to deal with the case in accordance with paragraph [13] and [14] of this judgment.



## SPECIAL REVIEW JUDGMENT

### SCHOLTZ AJ

- [1] This matter came before me in terms of a Special Review from the **REGIONAL COURT, GA-RANKUWA**, upon request of Regional Magistrate **MALETE**.
- [2] The issues which this Court is called upon to rule on, per the request referred to in paragraph [1] above, are two-fold namely:
- (a) *Firstly, "to determine whether default judgment in the action was granted in accordance with justice."*
  - (b) *Secondly, "to provide directions regarding the procedural aspect of the matter."*
- [3] In respect of paragraph (b) *supra*, and for the purpose of this judgment, it is assumed that the Magistrate seeks a direction from this Court relating to what should happen with the pending action, as a result of various procedural irregularities which occurred. I will refer to those irregularities hereunder.

### THE FACTS AND CIVIL PROCEEDINGS PRECEEDING THIS REQUEST FOR SPECIAL REVIEW

- [4] On **9 DECEMBER 2022** Magistrate **MALETE** granted default judgment on the merits (against the Defendant) in the Defendant's absence. The quantum was postponed *sine die*. The Magistrate so postponed the quantum trial, as he was of the view that he need to hear *viva voce* evidence by the Plaintiff, to enable him to arrive at a proper damages amount. Upon granting of default judgment, it

was unbeknown to the Magistrate that the Defendant in fact filed a notice of intention to defend the action. This notice was for some reason not in the Regional Court file, neither was this Court furnished with a copy of same. I can therefore not make a finding regarding whether a proper notice of intention to defend indeed existed at the time that default judgment had been granted.

[5] On **4 AUGUST 2023**, the quantum trial came before Regional Magistrate **WESSELS** [being a colleague of Magistrate **MALETE**]. On this occasion, through the office of the State Attorney, the Defendant was legally represented, and applied for a postponement. From the notes of the aforesaid Magistrate it appears that an application for rescission of the judgment was apparently drafted on behalf of the Defendant, but it was not issued by the Registrar of that Court. I deliberately refer to "*apparent application for rescission of Default Judgment*", as such application is not forming part of the record before me. After a postponement had been argued the Magistrate refused same, and the trial ought to have proceeded immediately. Unfortunately, due to loadshedding, the matter could not go ahead, despite the refusal of a postponement.

[6] On **4 OCTOBER 2023** the quantum trial came back to Magistrate **MALETE** who heard *viva voce* evidence by the Plaintiff. The Defendant was represented by the office of the State Attorney during this appearance, and the Defendant's legal representative requested to cross-examine the Plaintiff. The aforesaid Magistrate granted the Defendant's attorney this opportunity, despite the Plaintiff's objection to it, namely that the Defendant was under *ipso*

*facto* bar to file its plea and could therefore not participate in the trial.

## **SEQUENCE OF PLEADINGS AND NOTICES**

- [7] The summons was issued on **19 SEPTEMBER 2022**. The notice of intention to defend was apparently filed, as already mentioned, on an unknown date. On **18 JUNE 2023**, a notice of bar was filed by the Plaintiff calling upon the Defendant to deliver its plea within **5 (FIVE) days**, failing which, it will be *ipso facto* barred to do so. This came despite the fact that default judgment had been granted more than 9 months prior to it.
- [8] It seems like the application for rescission of judgment referred to above, was not persisted with, and as mentioned above do not form part of the record before me. It rather appears like the defendant decided to participate in the quantum trial by cross-examining the Plaintiff. This added insult to injury in respect of the procedural comedy of errors which occurred in this action.
- [9] Be it as it may, the trial on quantum was completed after *viva voce* evidence was heard, and I assume Magistrate **MALETE** reserved judgment, as per the transcribed record, Heads of Argument were to be submitted on certain dates.

## **APPLICABLE LAW**

- [10] **SECTION 36 OF THE MAGISTRATE'S COURT ACT** reads as follows:

“36.(1) The Court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu* -

(a) *Rescind or vary any judgment was granted by it in the absence of the person against whom that judgment was granted.*

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

(c) *Correct patent errors in any judgment in respect of which no appeal is pending.*

(d) *Rescind or vary any judgment in respect of which no appeal lies.*

(2) *If a Plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affect by it.”*

[11] From this Section, it is clear that a Magistrate can only upon application by any affected person rescind or vary a judgment, which was granted in the absence of the person affected thereby. The same principle apply to rescind a judgment which is *void ab origine*. If default judgment had been granted, whilst there was indeed a proper notice of intention to defend, such judgment will be void in terms of section 36 (1) (c) of the Magistrates Court Act. Despite the judgment being void a Magistrate cannot *mero moto* rescind or set aside such judgment, as it must be upon application by an affected person. Should no affected party apply to rescind or review a void judgment, such judgment will stand.

[12] In **MOKOTLHA v LEOHO and ANOTHER (NORTH WEST HIGH COURT MAHIKENG, CASE NUMBER 02/2022) PETERSEN J** (with **DJAJE DJP** concurring) found:

“[3] *The succinct issue in this matter is whether a Magistrate in a civil matter in the Magistrate’s Court may summarily send a matter on special review and whether the **SUPERIOR COURTS ACT 10 OF 2013** sanctions such a procedure or alternatively provides a remedy to any party affected by the decision of the Magistrate.*”

“[5] *The only provision in the **SUPERIOR COURTS ACT** which deals with the review of proceedings of a Magistrate’s Court is **SECTION 12**, which provides that:*

**“Grounds for review of proceedings of Magistrate’s Court**

(1) *The grounds upon which the proceedings of any Magistrate’s Court may be brought under review before a Court of a Division are –*

- (a) *Absence of jurisdiction on the part of the Court;*
- (b) *Interest in the cause, bias, malice or corruption on the part of the Presiding Judicial Officer.*
- (c) *Gross irregularity in the proceedings, and;*
- (d) *The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

(2) *This Section does not affect the provisions of any other law relating to the review of proceedings in Magistrate’s Courts”.*

[6] *In terms of **SECTION 22 (1)(c) OF THE SUPERIOR COURTS ACT 10 OF 2013**, proceedings of any Magistrate Court may be brought under review before a High Court on the ground of gross irregularity in the proceedings. This provision is relevant to the issue before me in this*

*matter where an incompetent judgment from the Magistrate's Court is sought to be reviewed and set aside by this Court."*

"[7] The **MAKALAPETLO** decision gives clear direction how Magistrates should deal with reviews of this nature. This salutary approach is enunciated as follows:

"[20] The guidance this Court can give to the Magistrate faced with irregular judgment like in the present case is that the irregularity should be pointed out to the interest or affected parties (Plaintiff or Defendant, Judgment Creditor or Judgment Debtor), and advise them that the matter is reviewable by the High Court under Rule 53.

**There is no room for the Magistrate to simply submit the case to the High Court for Review**

"[21] The alternative procedure whereby a judgment which is void ab origine can be set aside is an application for rescission of judgment in terms of **SECTION 36(1)(b) OF THE MAGISTRATE'S COURT ACT, 1944** read with Rule 49 of the Magistrate's Court Rules. This application is brought in the Magistrate Court by any of the interested parties except the Magistrate. I need not go further into the aspect of rescission of judgment assuming that all Magistrates are conversant with the procedure". (my emphasis)

"[8] For the reasons stated above, the incompetent judgment of the Magistrate cannot be reviewed in the manner in which the special review was submitted to this Court."

[13] I agree with the *dictum* in that case. Magistrate **MALETE** should have not referred this matter to the High Court, as this matter does

not fall within the ambit of Section 12 of the Superior Courts Act. The procedural irregularities should have rather been pointed out to the affected parties [being both the Plaintiff and Defendant] by the presiding magistrate. The litigants must be informed and enlightened that the default judgment can be rescinded in terms of **section 36 of the Magistrate Court Act**, alternatively that it is reviewable by the High Court in terms of the **PROVISIONS OF UNIFORM RULE 53**.

[14] In my view, the Magistrate must issue a written directive to the parties inviting their attention to the legal position, as contained in paragraph [13] above. This directive should contain reasonable time frames for the litigants to act in accordance with the legal remedies referred to. Should the affected litigants omit to act accordingly, a judgment should be given on the quantum by the Regional Court.

### **Order**

[15] In the premises, the following order is made:

- (i) The Special Review is removed from the roll.
- (ii) The matter is referred back to the Ga-Rankuwa Regional Court to deal with the case in accordance with paragraph [13] and [14] of this judgment.

---

**H J SCHOLTZ**



**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**I agree**

---

**R D HENDRICKS  
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

