Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A 252/2022Lower

Court Case No. 3017/2018

Before: The Hon. Mr Justice Henney

and Ms Acting Justice Hofmeyr

Date of hearing: 28 July 2023
Date of judgment: 3 August 2023

In the matter between:

PAM AYANDA MDANJELWA Appellant

and

SOCIO ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA Respondent

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released to SAFLII

HOFMEYR AJ:

1 This is an appeal from the Magistrates' Court against the dismissal of the appellant's rescission application.

2 The appellant is a practicing attorney.

3 The respondent is the Socio Economic Rights Institute of South Africa ("SERI").

4 The appellant brought an application for rescission in the Magistrates' Court after default judgment was granted against her for the payment of R126,000 to SERI.

5 Default judgment was awarded to SERI in respect of a claim that it instituted in 2018 against the appellant and her erstwhile firm of attorneys, Mate Attorneys Incorporated.

6 The claim that SERI brought against the appellant, in respect of which it secured default judgment, was a claim based in the law of contract.

7 According to SERI's particulars of claim, it had entered into a verbal contract with Mate Attorneys in terms of which SERI would advance monies to Mate Attorneys. Mate Attorneys would then use the monies to secure the release on bail of a number of students who had been involved in the Fees Must Fall protests. The contract required Mate Attorneys to keep the monies, use them to bail out SERI's clients and then, as soon as the criminal matters had been finalised, to collect the bail money from the clerk of the court and immediately pay them back to SERI.

8 SERI further alleged that on 24 November 2015, it advanced R126,000 to Mate Attorneys in accordance with their contract. It then alleged that by September 2016, the

criminal matters had all been finalised so repayment of the amount of R126,000 became due and owing to SERI.

9 SERI then claimed that, despite the fact that the monies were now due and owing for repayment, Mate Attorneys, alternatively the appellant, alternatively both of them, failed to repay SERI.

10 SERI alleged that this was either a material breach of the contract or a repudiation of it and, as a result, it cancelled the contract and claimed R126,000 in damages from Mate Attorneys and the appellant .

11 SERI's pleaded case for recovery of its R126,000 was therefore based on a verbal contract that, it claimed, was entered into with Mate Attorneys. Significantly, the particulars of claim did not allege that there was a contract between SERI and the appellant. In SERI's own pleadings, the appellant's role was limited to representing Mate Attorneys, receiving the monies on behalf of Mate Attorneys and, together with Mate Attorneys, breaching the contract. But the contract, as pleaded, was one between SERI and Mate Attorneys.

12 The appellant failed to file a plea and was placed under bar in early December 2018. Later in December 2018, the Magistrate raised a query in relation to SERI's claim. The Magistrate asked on what basis SERI claimed that the appellant was personally liable to it. Seven months later, in July 2019, the Magistrate raised another query. The query referred to a response that had been received from SERI in which SERI appeared to contend that the claim against the appellant was a delictual one. The Magistrate pointed

out, however, that the claim, as pleaded in SERI's particulars of claim, was based on a contract with Mate Attorneys and not on any delictual cause of action.

13 In October 2019, SERI gave notice that it intended to amend its claim to remove references to Mate Attorneys in its particulars of claim and to make further changes to the pleadings to base its claim on a contract which, it now intended to plead, was entered into between SERI and the appellant herself. This amendment, if it had been effected, would have provided the legal basis for a claim against the appellant personally – the claim would now be based on the allegation that the contract had, in fact, been entered into between SERI and the appellant, herself.

14 However, the amendment was never effected. So, when SERI sought default judgment against the appellant, it did so on the basis of the unamended pleadings. Those pleadings alleged a contract between SERI and Mate Attorneys and not a contract with the appellant herself.

15 It is against the backdrop of these facts of how the litigation between the parties unfolded that the appellant's rescission application is to be viewed.

16 The question before this court on appeal is whether the rescission application was correctly dismissed.

Rescissions

17 A party seeking to rescind a judgment taken in default must generally satisfy two requirements: the applicant must provide a reasonable and acceptable explanation for the default and show that it has a bona fide defence on the merits that carries some prospects of success.[1]

18 The appellant's application for rescission is not a model of clarity. She does, however, deal both with the reason for her default and a bona fide defence to the claim.

Explanation for default

19 In so far as the explanation of the appellant's default is concerned, the gist of her explanation appears to be based on the fact that she had taken the view, when she received SERI's notice of intention to amend its particulars of claim, that the bar on pleading had been lifted and she would only be required to plead to the claim once SERI had effected its amendment. Because that amendment was not forthcoming, she did not take steps to plead to the claim.

20 The appellant's explanation of her conduct since receiving notice of the default judgment application is less clear but seems to have been substantially informed by the view that she took regarding the notice of intention to amend and its consequences for her next steps in the case. The appellant explains that when the default judgment application was served on her in December 2020, it made no sense to her because all that was attached to the application for default judgment were the original (unamended) summons, her

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[1] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-E

notice of intention to defend and the notice of bar. The application for default judgment did not include the notice of intention to amend.

21 She then wrote to SERI in January 2021 and set out these concerns. She claimed that the default judgment application did not include all the relevant documents because SERI's notice of intention to amend had not been included in the application. She reiterated her understanding that, until the amendment had been effected, she was not required to plead to the claim. SERI responded to this letter on the basis that it would not engage in litigation by correspondence.

22 SERI then proceeded to obtain default judgment in March 2021. It was served on the appellant on 19 March 2021. The appellant instituted the application for rescission more than a year later, in May 2022. The explanation for this delay is very poor. The appellant says that Mate Attorneys stopped operating as a firm of attorneys after the criminal matters were concluded. She had therefore been trying to obtain information about the cases and had been busy trying to "reconstruct the file". She also explains that she had difficulty finding a legal representative to handle her case. This is the sum total of her explanation of her delay. It is weak. It does not explain why reconstructing a file was necessary in circumstances where the appellant's main defence to the claim was that it there was no cause of action properly made out against her.

23 However, our courts have recognised that "an unsatisfactory explanation furnished by an applicant for rescission may well be compensated for by good prospects of success on

the merits."[2] In *Melane*, the Appellate Division (as it then was) referred to "strong prospects" of success in the defence as counterbalancing a lengthy delay.[3]

Bona fide defence

24 At the hearing of the appeal, counsel for the appellant, Mr Twalo, had some difficulty identifying what the appellant's bona fide defence to the action was. He began his argument by asserting that the defence was that, after the students had been released on bail, they had informed the appellant that SERI had made a donation of the R126,000 so that the appellant could use them for the students' future litigation endeavours. However, Mr Twalo was then taken by the court to the way in which the appellant, herself, described her bona fide defence in her rescission application.

25 In her rescission application, the appellant's bona fide focussed on a different aspect. The appellant explained that when she initially received the summons, she was "perplexed" by the fact that SERI had sued her because she was only ever an employee of Mate Attorneys and acting on their instructions. She said that she took the view that SERI was suing the wrong party because the particulars of claim did not set out a cause of action against her in her personal capacity.

26 As set out at the beginning of this judgment, SERI's original particulars of claim advanced a cause of action based on a contract between it and Mate Attorneys. It did not allege that there was any contract between it and the appellant. Shortly after it launched

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2 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) para 89. See further, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 12; *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B-C and *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838D - E

3 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532E

proceedings, however, the first Magistrate who dealt with the matter sent a query to the parties to ask on what basis SERI was advancing a claim against the appellant in her personal capacity. The same Magistrate later drew attention to the fact that SERI's claim against the appellant may lie in delict because the essence of the claim against the appellant was that she had stolen the monies they had deposited with Mate Attorneys.

27 Despite being alerted to these issues with its claim as pleaded, SERI did not effect any amendment to its pleadings. Instead, it proceeded to abandoned its proposed amendment that would, at least, have resulted in a claim being pleaded in contract against the appellant. It moved to obtain default judgment against the appellant based on particulars of claim that did not set out a cause of action against the appellant personally.

28 Despite these deficiencies in SERI's claim, the Magistrate refused the appellant's rescission application. It is against the refusal that this appeal lies.

The test on appeal

29 In *Ferris*, the Constitutional Court held that an appellate court will only interfere with the exercise of discretion in an application for rescission if "the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons".[4]

30 In her judgment dismissing the rescission application, the Magistrate focussed mainly on the issue of the appellant's delay in bringing the application and the inadequacy of her

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4 *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) para 28

explanation. When she turned to deal with the bona fide defence of the appellant, the Magistrate correctly identified that the essence of the appellant's defence was that SERI had not formulated a claim against her in her personally capacity. However, the Magistrate discounted this as a valid defence because she found that the appellant had acknowledged that SERI paid the monies into her account and the Magistrate found the appellant's explanation of SERI's alleged "donation" of the funds unconvincing.

31 In her treatment of the bona fide defence, the Magistrate made a fundamental error. She found that the fact that the monies had been paid into the bank account of the appellant was sufficient to found a claim against her personally. But this overlooks the fact that the claim, as pleaded by SERI, did not allege any contract with the appellant for which she could be sued in the event of its breach. The claim, as originally pleaded, was that the contract was with Mate Attorneys. The fact that the appellant's bank account was nominated to receive the funds does not make her a party to that contract and does not found a cause of action against her in contract. The court queried with Mr Nkosi, who appeared for SERI, whether there was any legal basis on which the appellant could be found personally liable for a breach of contract on the basis of SERI's particulars of claim as originally formulated. Mr Nkosi fairly conceded that there was none.

32 In the absence of a cause of action properly pleaded against the appellant in the original particulars of claim, the Magistrate erred in concluding that the appellant had no prospects of success in defending the claim. The error was based on a fundamental misunderstanding of the law – namely, that the fact that monies were paid into the appellant's bank account was sufficient to make her liable to SERI for damages *for breach of contract*. That the monies were paid into the appellant's bank account and then not returned may, as was highlighted in the initial queries, have meant that SERI had a

claim in delict against the appellant.[5] But despite this being drawn to SERI's attention, it did not take steps to amend its pleadings to pursue a claim in delict against the appellant.

33 The Magistrate applied a wrong principle of law to conclude that the appellant had no bona fide defence to the claim. She approached the pleadings on the basis that the mere averment that the monies were paid into the appellant's bank account could found a cause of action against her in contract but that is not correct.

34 On a proper application of the law, the Magistrate ought to have concluded that the appellant's defence held strong prospects of success. It was a case in which the strength of the appellant's bona fide defence could not but counterbalance the inadequacies of the appellant's explanation for her delay and default.

Remaining grounds of opposition

35 In its first set of heads of argument, SERI took the point that Rule 51(1) of the Magistrates' Courts Rules entitles an appellant to request a judgment in writing from the Magistrate that will show the facts found by the Magistrate and the reasons for her judgment. SERI contends that the appellant did not request such written reasons from the Magistrate. But the appeal record includes a fully reasoned judgment from the Magistrate dated 7 October 2022 so there is no merit in this point.

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[5] *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA) para 11

36 SERI also complained about the state of the record on appeal. It appears, however, that SERI has been working off the incorrect version of the appeal record because, for example, one of the complaints is that the record was filed without an index. However, the appeal record before the court is fully paginated and includes an index. This ground of opposition therefore also falls to be dismissed.

37 On the eve of the hearing, SERI filed supplementary heads of argument in which it raised the point that, in February this year, the appellant's appeal had been struck from the roll. However, instead of bringing the necessary condonation application to have it re-enrolled, the appellant merely set the matter down again for hearing. SERI contended that this meant that the appeal had lapsed and was not properly before the court.

38 At the commencement of the hearing, the court addressed the issue with the parties and sought an indication from SERI whether it wished to persist with the point because it caried the risk of being only a dilatory defence. In other words, if the matter were to be struck again from the roll, that would still leave open the possibility of a condonation application being made by the appellant and a further court having to deal with the condonation application and the appeal, if condonation was granted.

39 SERI indicated that it wished for the appeal to be determined on the merits. So the argument at the hearing then proceeded to the merits of the rescission application. That the court was willing to entertain argument on the merits of the rescission application should not, however, be understood to detract from the importance of parties following the Rules of Court and reacting swiftly to seek condonation when it is required. The appellant's conduct throughout this matter has been dilatory in the extreme. Her own

understanding of what is required of an officer of the court is severely lacking. This type of conduct can, and in this case should, have a bearing on costs.

Conclusion and costs

40 Although the appellant's explanation for her default left much to be desired and her delay in bringing the rescission application was lengthy, this is one of those cases in which the appellant's prospects of success in defending the claim are so strong that the interests of justice require the appeal to be upheld and the recission application to be granted. Unless rescission is granted in this matter, a plaintiff would have obtained default judgment against a defendant when there was no pleaded cause of action against the defendant. Such a result is antithetical to the rule of law because accurate pleadings are necessary for legal certainty.[6]

41 On the issue of costs, despite the fact that the appellant has been successful in this appeal, her conduct over the course of this litigation has been grossly dilatory and the explanations of her delay have been unsatisfactory. There is also the fact that she did not take the steps formally required of her to re-enroll the appeal, after it was struck, with an appropriate condonation application.

42 In further submissions on the issue of costs that were provided to the court, SERI submitted that the appellant's conduct is this matter has been so egregious that it would warrant a costs order against her even if she was successful in the appeal. There is force

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6 *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) paras 113 – 114 – per Jafta J, which was then endorsed by the majority of the Constitutional Court in *Public Servants Association obo Ubongo v Head, Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) paras 50 to 57

in the submission. The appellant's conduct merits appropriate censure. It is not conduct befitting of a litigant who is also an officer of the court. This is, therefore, a rare case in which the appellant is successful in the appeal but should be ordered to pay the respondent's costs.

43 The effect of success in the appeal is that the rescission application is granted and the default judgment against the appellant is set aside.

44 The parties are therefore left to pursue their rights as they see fit. No doubt, SERI will consider whether to amend its claim. However, I make no finding here about the availability of such an amendment given the time that has passed since summons was first served in the matter. If SERI does proceed to seek to amend its claim, any issues arising from an amendment will be dealt with by the Magistrates Court.

Order

45 In the light of what is set out above, I would make the following order:

45.1 The appeal is upheld and the appellant is directed to pay SERI's costs of appeal.

45.2 The order of the Magistrates Court dated 7 October 2022 is set aside and substituted with the following order:

45.2.1 The application for rescission is granted.

45.2.2 The default judgment granted on 8 March 2021 is set aside.

45.2.3 There is no order as to costs.

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K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

HENNEY J:

46 I agree and it is so ordered.

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RCA HENNEY

JUDGE OF THE HIGH COURT

APPEARANCES

Appellant’s counsel:	Adv T Twalo
Applicants' attorneys:	LS Twalo Attorneys
Respondent's counsel:	Adv T Nkosi
Respondent's attorneys:	SERI Law Clinic