IN THE HIGH COURT

(BISHO)

CASE NO.: 248/2001

DATE: 6 DECEMBER 2001

In the matter between:

PHILMARIE UYS & 5 OTHERS Applicants

versus

MEC DEPARTMENT OF EDUCATION & ANOTHER Respondents

EX TEMPORE JUDGMENT:

EBRAHIM J:

This is an application for the rescission of a default judgment granted on 13 December 2000 in this Court. The application relates to the default judgment granted in favour of third and 6th plaintiffs in the action proceedings under case no. 304/2000 being rescinded. For the sake of convenience I shall refer to the parties as cited in the action proceedings, namely as plaintiffs and defendants. Consequently the applicants in the rescission of judgment will be referred to as the defendants and the respondents referred to as the plaintiffs.

There is also an application for condonation for late application of the rescission of judgment. Initially when these applications were filed there was also an application to rescind an order made by this Court on 27 September 2001 as well as an application for consolidation of the applications under case no. 145/2001 and case no. 248/2001. Linked to this were contempt of Court proceedings initiated by the plaintiffs. Mr Notshe who represents the defendants informed the Court at the outset that the application to rescind the order made on 27 September 2001

was no longer being proceeded with, nor was the application for consolidation of the two applications as events have overtaken the issue of consolidation. At the direction of the Court the parties agreed that the contempt of Court proceedings would stand over until the application for rescission of judgment had been decided upon.

The facts surrounding the granting of default judgment are briefly as follows:

(a) The summons in case no. 304/2000 was duly served on both first and second defendants.

(b) First and second defendants via certain officials and in particular a certain individual Mrs Mbnenge, who are employed in the Department of Education, decided that the action instituted by the plaintiffs would not be defended. Although the summons was handed to the State Attorney the latter was not instructed to enter an appearance to defend the action.

(c) The decision of the Department of Education not to defend the action was because it required information from the districts where the plaintiffs were stationed. In this regard I refer to the affidavits filed in support of the application for rescission of judgment.

(d) The reason for not defending the action was not conveyed to the plaintiffs or their attorneys, nor was there any communication between the legal representatives of the defendants and the plaintiffs in regard to the summons.

(e) Since the action was not defended the plaintiffs proceeded to obtain default judgment in respect of the respective claims set out in the particulars of claim of the summons.

(f) At some stage subsequent thereto Mr Mbnenge became aware of

the default judgment. Armed with this knowledge she decided not to proceed with an application to have the judgment rescinded, but decided instead that she should endeavour to comply with the terms of the judgment.

(g) The individual claims were then investigated and payment was made of certain of the claims, namely the claim of first, second, fourth and fifth plaintiffs. The costs in respect of the action in regard to the aforesaid plaintiffs has to date not been paid.

(h) The claims of third and sixth plaintiffs were not settled as the defendants now contend that the amounts claimed are not due, but that there are lesser amounts which are due and payable.

As I have indicated the defendants now seek to have the default judgment granted in favour of third and sixth plaintiffs rescinded.

It is trite that in order to succeed with an application to have a judgment rescinded that the applicant is required to show the following:

(a) That the applicant has not been in wilful default in defending the action.

(b) That the application for rescission of the judgment is bone fide.

(c) That the applicant has a bone fide defence.

It is apparent that since the applicantion for rescission of judgment was not brought within a period of 20 days as prescribed in Rule 31(2)(b) of the High Court Rules, that the defendants must also obtain condonation for the lateness of their application. The facts upon which the defendants rely in regard to the application for condonation and he application for rescission of judgment are virtually in all respects the same. It is convenient therefore to deal with both the applications in one as the comments that are to be made in regard to the application for

condonation will in many respects overlap with those that are to be made in respect of the application for rescission of judgment. Indeed this was also the approach adopted by both counsel for the plaintiffs and defendants during the course of argument.

It is common cause that the defendants were fully aware of the action instituted under case no. 304/2000 by the plaintiffs. It is not disputed that the decision not to defend the action was a deliberate and conscious one on the part of the defendants via certain officials in the Department of Education. I should mention that the authority of the particular individuals to take such decision is not in issue and therefore I need not address whether they have exceeded the bounds of their authority. It is clear that the defendants have not placed this in issue and have accepted that the decisions are for all intents and purposes therefore the decisions of both first and second defendants.

The situation is virtually the same in respect of the application for rescission of judgment because it appears from the founding affidavit in the application for rescission of judgment and condonation that when Mrs Mbnenge became aware of the default judgment she consciously and deliberately took the decision not to apply for the judgment to be rescinded. There is no indication of the date that Mrs Mbnenge became aware of the default judgment but in this respect it is not contended by the defendants that such knowledge was acquired within a period of 20 days prior to the application for the rescission of judgment. This is obvious since there is also an application for condonation for the application for rescission of judgment being brought late.

Even during the course of argument Mr Notshe was not able to convey to the Court on what date Mrs Mbnenge became aware of the

default judgment. I should note in this regard that it is to some extent a peculiar omission since one would have expected that the date on which she acquired information of the default judgment would have been disclosed. The fact that this has not been disclosed does not in any way assist the defendants in regard to the application.

The parties are not ad idem that the default of the defendants was wilful, nor that the defendants are bone fide in their application for the rescission of the judgment, nor that the defendants have a bone fide defence.

It is clear from the supporting affidavit filed in the application for rescission of judgment that there was no impediment to the defendants defending the action in case no. 304/2000. This has not been the argument either of Mr Notshe that the defendants were in some way hindered or prohibited from entering an appearance to defend. The decision not to defend the action, as I have indicated earlier, was consciously and deliberately taken by the defendants via its officials.

It is also common cause that at no stage was there any communication between the defendants and the plaintiffs to inform them that the defendants were refraining from entering an appearance to defend as they required time to investigate certain issues and that until these investigations had been completed they were not in a position to either admit or deny the validity of the claims of the plaintiffs. Even at the stage when Mrs Mbnenge became aware of the default judgment there is no indication that any such communication took place between the defendants and the plaintiffs or by obvious corollary between their respective attorneys. It is clear also, as I have observed earlier, that the decision not to apply for a rescission of the judgment was a very

deliberate and conscious decision on the part of Mrs Mbnenge.

Faced with these facts I must agree with Mr Theron that the defendants have been in wilful default in failing to enter an appearance to defend and further have been in wilful default in failing to bring an application for the rescission of judgment timeously. I am at a loss to understand why the defendants, if at the stage when they received the summons and were uncertain about their liability for the amounts being claimed, could not have communicated with the plaintiffs to inform them of their difficulty in this regard and requested a reasonable extension of time for such investigations to take place. The inference is almost inescapable that the reason why the action was not defended was because at that stage there was no question of the defendants intending to defend the actions.

I have to take judicial cognizance of the fact that this is not the first time that the Department of Education has been involved in litigation. Purely from the cases that come before this Court it would be difficult for me to be able to quantify the number of cases that have been litigated in this Court in which the Department of Education has been the defendant or respondent. There can be no question therefore of the defendants claiming that they were not aware of the consequence of failing to enter an appearance to defend. Indeed in this regard I again take judicial cognizance of the fact that there have been numerous applications before this Court in the form of contempt of court proceedings because of the failure of the Department of Education to honour judgments of this Court. Those consequences could not have escaped Mrs Mbnenge and, as I have indicated a conclusion is virtually inescapable that the actions were not defended because the defendants

accepted that they were liable and that they were required to pay the amounts claimed by the plaintiffs.

Insofar as the question of bone fides is concerned there is, as I have observed already, no indication that when Mrs Mbnenge took the decision not to defend the actions that it was taken with the purpose that the investigations that were to be launched were intended to show that the amounts were disputed. The explanation which the defendants have furnished in regard to the investigations they wished to conduct is extremely vague. In my view it is deliberately so as both Mr Bokweni, who attested the supporting affidavit, and Mrs Mbnenge, in a further supporting affidavit, could probably in all honesty not state with any degree of certainty that the amounts were being disputed. I dare say that they were cognisant of the fact that to make that allegation may have laid them open to a possible accusation that they were inserting this knowledge on the basis of post-facto enquiries that were conducted. All the indications are that at the stage that the decision was taken not to defend the actions that it was simply a question of investigating certain issues in regard to the claims, but clearly there was no indication, at that stage, that the amounts were in dispute.

But, even if the defendants had in the recesses of their memory somewhere the idea that the amounts were in dispute, I have great difficulty with the fact that this was not brought to the attention of the plaintiffs at that stage, and that it is only some months later that it has come to the fore that the amounts are to be disputed. It is apparent from what I am saying that at the stage that the action was not defended there was no question of the defendants having any valid defence to the claims. I say this because it would have been a grave dereliction of duty

on the part of Mrs Mbnenge if she was aware that the claims were to be disputed and then decided not to defend the actions. This may very well be the case but, if that is so, then it is for the Department to resolve. But, it is not indicated on the papers in any way that this is the case and consequently it does not assist the defendants that this may be a possibility.

Mr Theron has referred to the case of **MORKEL v ABSA BANK BPK EN 'N ANDER** 1994 (1) SA 899 (C). The ratio as expressed in this case is that where a defendant becomes aware after default judgment has been taken that the defendant has a defence to the claim of the plaintiff the defendant does not acquire the right to then apply for rescission of judgment. In other words, if at any stage after default judgment a defence to the claims emerges the defendant is faced with the insurmountable problem that default judgment has been granted and it may now not obtain a rescission of that judgment in order to present its defence.

On the face of it this approach may seem to be somewhat harsh in regard to defendants. But, on the other hand, it is easy to understand that if such a door were permitted to be opened to defendants that it could lead to grave consequences in terms of the finality of judgments since in many cases it would be a relatively easy task to formulate a defence to a claim at a later stage. I am not called upon to determine whether that is just or not, but I find myself in favour with the ratio as expressed in the case of **MORKEL v ABSA BANK** (supra).

The consequence of such an approach is that where a defendant takes the decision not to defend an action in the knowledge that default

judgment will be granted against him he is then considered to be in wilful default in failing to enter the appearance to defend. It does not help the defendant to come forward at a later stage and then to say that I now have a defence and that I now seek to have the judgment rescinded. It is evident therefore that the defendants have not acted bone fide and I must support the contentions of Mr Theron in this regard.

I turn to the question of whether there is a bone fide defence. Mr Theron has attacked the defence as set out by the defendants in the supporting affidavit to the application for rescission of judgment. Mr Theron contends that the manner in which the defence has been set out is far from clear. There is ample authority that a defendant is not required to set out the defence in the precise detail that may be required when it comes to his plea, but the defence must nevertheless be set out with sufficient clarity in order to enable the Court to ascertain what the basis of the defence is and to enable the Court to determine whether there is a reasonable prospect that such defence may be of an arguable nature.

The reason for this is clear. It is not sufficient for a defendant simply to say to the Court, I don't owe the money or I have paid. These are really conclusions that are being expressed, but do not detail on what basis those conclusions are arrived at. By the same token for someone merely to say that I do not owe the money amounts to a bare denial. Even though in certain instances that may clearly be the case, a defendant is required to set out facts far more than that to enable the Court to determine whether in fact the denial that the amount is owed is one that may be reasonably sustainable on the basis of the facts as presented.

My reading of the affidavit, and on the basis of the argument presented by Mr Notshe on behalf of the defendants, does not enable me to conclude on what basis the defendants' claim that they are not liable for the amounts claimed by third and sixth defendants. It is so that they alleged that they paid a certain amount to the third defendant, and that is all that they owe, but that is as far as that defence goes. No other details have been provided to the Court to indicate why this is so.

Indeed, very specific allegations were made by the third defendant in regard to the amounts that had to be paid to her, but there has been a clear failure on the part of the defendants to deal with her allegations in this regard. It is apparent that she says that she rendered services at two different hostels and that the payment that she received was in respect of the services for one of the hostels. Faced with this information the defendants have refrained from dealing with these allegations.

In regard to the sixth respondent, whose claim relates to payments for leave that is due to him, the defendants have simply alleged that he is not entitled to 114 days leave but is only entitled to 3 days leave. Here again the defendants were in a position to inform the Court as to the basis for arriving at the conclusion that there were only 3 days leave due to him. Once again the defendants have refrained from doing so and it is simply a bald statement that he is only entitled to 3 days leave.

The Department's difficulty in this regard, i.e. in crystallising what its defence is, is highlighted by the argument presented by Mr Notshe. His argument was that it could very well be that the third and sixth plaintiffs were correct in respect of their allegations, but by the same token the defendants could also be correct in the assertions that they

were making. On that basis he argued that the Court should permit the defendants the opportunity to defend the action so that eventually it could be established exactly what the position is.

With due respect to Mr Notshe it appears that the Department or respondents are on a fishing expedition. They are not able at this stage to establish what the veracity is in respect of the averments they themselves make and are now seeking to defer finality in terms of the claims of the third and sixth plaintiffs so that they may have additional time to launch certain investigations and hopefully come up with some kind of defence. This is a situation which the Court clearly cannot permit. There is no reason why the Department could not have had this information at its fingertips. After all, it is in charge of the affairs of all the teachers and we live in a world that is so electronically advanced with computers and other technical equipment that I fail to understand why is it difficult for the respondents to be able to produce any tangible facts to confirm what the correct position is.

I agree with Mr Theron that it is an attempt or a manoeuvre to defer finality and that the Court should not permit this. Manifestly, therefore, at this stage the defendants are still unable to state with any degree of certainty what the correct position is. I am therefore not persuaded that there is a bone fide defence.

Insofar as the dispute in regard to costs is concerned it has been contended that the plaintiffs should not have brought their action in this Court but should have launched the action proceedings in the Magistrate's Court since the claims all fall within the jurisdiction of the Magistrate's Court. Mr Theron has contended that the attack on the Court's decision to grant costs on the High Court scale in the action

under case no. 304/2000 is not directed at the Court misdirecting itself nor at it not exercising its discretion properly. He is quite correct Mr Notshe has not in any way suggested this. The only contention in this regard is that since the claims fall within the jurisdiction of the Magistrate's Court the plaintiffs should be limited to costs on a Magistrate's Court scale and are not entitled to costs on a High Court scale. I do not find this persuasive.

There are cogent reasons why the plaintiffs sought to institute their action in the High Court. It is trite that should the respondents fail to pay or honour the judgment that the plaintiffs would then have to, as indeed they have, launch contempt of court proceedings. In my view such contempt of court proceedings can only flow from a judgment of this Court or an order of this Court. Had the plaintiffs instituted their action in the Magistrate's Court they would still have been compelled to come to this Court in order to compel the Department to pay. That much is clear since the Magistrate's Court has no jurisdiction to entertain contempt of court proceedings. That would still have resulted in the matter being before this Court and may in fact have resulted in greater costs being incurred. I do not find the attempt to justify the setting aside of the default judgment on this basis is in any way well founded. I find no basis for holding that this should be permitted and I am not persuaded that the Court in granting costs on the High Court scale misdirected itself or failed to exercise its discretion properly.

It follows from what I have said that I am not persuaded that the defendants have made out a proper case for condonation. Indeed they have failed to do so and condonation for the late application of the rescission of judgment is refused. Similarly the defendants have failed

to meet the requirements to justify that the judgments obtained by third and sixth plaintiffs on 13 December 2000 should be rescinded.

In the circumstances the order that I make is the following:

(a) The application for condonation of the late application for rescission of judgment is refused with costs.

(b) The application for rescission of judgment is dismissed and the first and second defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of both applications.

Y EBRAHIM : JUDGE BISHO HIGH COURT