IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

REPORTABLE

Case No.: CA85/2022

Date Heard: 14 February 2022

Date Delivered: 1 March 2022

In the matter between:

KHETHIWE DLODLO	First Appellant/Defendant
ADMIRE MOYO	Second Appellant/Defendant
BHC BUILT ENVIRONMENT PROFESSIONALS (PTY) LTD	Third Appellant/Defendant
and	
OMEGA CONSTRUCTION AND BUILDING (PTY) LTD	Respondent/Plaintiff

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JUDGMENT

EKSTEEN J:

[1] This matter concerns an appeal against a judgment granted by default in the High Court, Makhanda in favour of the respondent, Omega Construction and Building

(Pty) Limited (Omega) in the amount of R1 250 390,47, together with interest thereon. The appeal is with leave of the judge *a quo*.

[2] On 22 January 2020 Omega issued summons against the appellants for damages in the aforesaid amount. It alleged that it had concluded a Principal Building Agreement (the agreement) with the third appellant, BHC Built Environment Professionals (Pty) Limited (BHC), to undertake certain construction work (the works) at 27 Walton Road, Mill Park, Gqeberha (the property). The first appellant, Ms Dlodlo, a businesswoman in Gqeberha, is the sole director of BHC and she is married to the second appellant, Mr Moyo, who had previously been a co-director of BHC. Mr Moyo is qualified as a quantity surveyor and holds a LLB degree. He represented BHC in the conclusion of the agreement. Omega alleged that, at the time of the conclusion of the agreement, Mr Moyo had failed to disclose to it that the property did not belong to BHC, which was no more than an empty shell, owning no assets and having no income. In fact, the property was registered in the name of a family trust, of which Mr Moyo is a trustee, and it is reflected in the summons as the residential address of Ms Dlodlo and Mr Moyo.

[3] Omega alleged that it had completed the works and that BHC had failed to make certain progress payments due to it notwithstanding the issue of payment certificates, issued in terms of the agreement by BHC's principal agent. Disputes relating to the construction of the works followed and Omega was unable to obtain payment from BHC. This, in turn, prompted the issue of summons. It was Omega's case that Ms

Dlodlo and Mr Moyo had intentionally and fraudulently fabricated a series of events, and employed a strategy, designed to obtain the result that BHC would not make any further payment to Omega in respect of the building project, regardless of the fact that such amounts were and would be due, and regardless of its lawful obligation to do so. It contended that they had contrived a scheme to secure that they would obtain full use and enjoyment of the building project attended to by Omega, without it receiving payment in respect of the full contract value. It accordingly claimed damages in the amount which it contended that it would have been entitled to recover from BHC in terms of the contract, but for the fraudulent conduct of Ms Dlodlo and Mr Moyo.

[4] The summons was duly served on each of the appellants on 22 January 2020 and on 6 February 2020 a notice of intention to oppose was delivered by their nominated attorney. A deathly silence followed, until 4 March 2020, when Omega delivered a notice of bar calling upon the appellants to deliver a plea within 5 days, failing which they would be *ipso facto* barred.[1] The notice did not illicit a plea, however, the appellants filed a notice in terms of rule 23 of the Rules of Court (the rules) in which they raised a number of points that they alleged were vague and embarrassing. They afforded Omega 15 days to remove the cause of their complaint failing which an exception was threatened. Omega was apparently unmoved as it failed to seek any amendment to their particulars of claim. However, when the 15 days expired the appellants failed to pursue their exception.[2] Thus, the threatened exception lapsed,

[1] The notice of bar was delivered in terms of rule 26 of the Uniform Rules of Court

[2] In terms of rule 23(1) a party intending to take exception on the ground that a pleading is vague and embarrassing is required to file its exception within 10 days after the lapse of the 15 days afforded to remove the cause of complaint.

which led, in turn, to the delivery of a fresh notice of bar on 28 April 2020. Again the appellants were called upon to file their plea within 5 days, failing which they would be *ipso facto* barred. They failed to heed the notice and were accordingly barred. Ultimately, during October 2020 Omega filed an application for judgment by default, as the defendant's had failed to file their plea.[3] The application for default judgment was set down for hearing on 3 November 2020 and notice was accordingly given to the appellants on 13 October 2020.[4] On Friday, 30 October 2020 the appellants proceeded, without the consent of Omega or leave of the court, to file an "answering affidavit" attested to by Mr Moyo comprising more than 70 pages together with annexures running into more than 200 pages. On 2 November 2020, the day prior to the hearing, the appellants proceeded to file 140 pages of pleadings comprising special pleas and counter claims, in defiance of the notice of bar.

[5] Ms Dlodlo and Mr Moyo attended at court on the day of the hearing purporting to oppose the application for default judgment. The judge *a quo* afforded them an opportunity to address her before granting judgment. The material portion of her judgment was brief and it is instructive to set it out in full. The court *a quo* held:

> 'The defendants did not seek the lifting of the bar. They sought to persuade the court that they were not in wilful default of filing their plea. … Defendants apparently filed an "answering affidavit" comprising 70 odd pages, deposed to by the second defendant on the 30 October 2020, together with annexures thereto running into well over 200 unpaginated pages. On the day preceding the hearing of the default judgment application, two volumes each comprising 70 or so pages said to be

[3] In terms of rule 31(2)(a) and (4)
[4] In terms of rule 31(4)

> defendants' special pleas were filed. All of these are directed at assailing the allegations in the summons and at disclosing defences. The defendants have a right to raise special pleas, exceptions, put up defences – but to do so procedurally. As far as I could glean from the voluminous, out of time papers, there is no attempt to seek the lifting of the bar. …'

[6] The history, to the extent to which it relates to the process of court, is not in dispute. It is common cause that the appellants were procedurally barred in terms of rule 26 of the rules. The effect thereof is that the pleadings are deemed to be closed and the appellants were accordingly barred from filing a plea. The consequence of a bar is that a defendant is not entitled to appear either personally or by counsel (save in matrimonial disputes).[5] However, the court retains a discretion to permit a party to appear to make a statement.[6] A party that has been barred may apply to court for the upliftment of the bar on good cause shown[7] and the court retains an inherent jurisdiction to raise the bar.[8]

[7] Accordingly, the appellants were not entitled to file a plea or to appear at the hearing, subject to the discretion of the presiding judge. She permitted Ms Dlodlo and Mr Moyo to appear, albeit that they made no application for the upliftment of the bar. They sought to persuade her that their failure to file their plea timeously was not due to their wilful default. After hearing them she considered their argument and concluded:

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[5] *Luck v Owen* (1835) 3 Menz 456; *Leathern v Brodrick* (1879) Kotzé 143; and *Langley v Williams* 1907 TH 197
[6] *Tchela v Delema* 1907 EDC 293
[7] Rule 27
[8] *Nathan (Pty) Ltd v All Metals (Pty) Ltd* 1961 (1) SA 297 (D) at 300B-D

> "There is no evidence, none has been placed before me by way of affidavit/s why the defendants cannot be found to be in wilful default in filing a plea."

As appears from the passage quoted earlier from her judgment she refused to consider the extensive documentation which was unilaterally and improperly filed and she declined to admit their pleas or exceptions. Accordingly, she granted judgment by default.

[8] As I have said, leave to appeal was granted by the judge *a quo*. However, Mr Williams, who appeared on behalf of Omega, contended that the judgment is not appealable. In *Pitelli*[9] the Supreme Court of Appeal (SCA) reiterated that for an order to be appealable it must have as one of its features that the order is final in its effect, which means that it is not susceptible to being revisited by the court that granted it. It explained that an order is not final, for purposes of an appeal merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable. It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)(a), and if it is not covered by that rule it is in any event capable of being rescinded under rule 31 or the common law.[10]

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[9] *Pitelli v Everton Gardens Projects CC* [2010] 4 All SA 357 (SCA) at para [20]
[10] *Pitelli* para [27]

[9] We were advised from the bar, and it is not in dispute, that applications for rescission had been launched on behalf of the appellants. Whilst it is unclear what the outcome of these applications have been, at least one application for rescission is currently pending before the high court. As the SCA explained, the appealability of an order is dependent upon whether it is capable of being revisited and not upon whether such an application will succeed and it makes no difference if it has been dismissed.[11] If an application for rescission is dismissed that order may be appealed.

[10] Before us Mr *Beyleveld*, for the appellants, sought to distinguish the facts of the present matter from the findings in *Pitelli*. He argued that rescission of judgment could only be obtained where judgment had been granted in the absence of a defendant. Where, as in this case, Ms Dlodlo and Mr Moyo had participated in the proceedings and were heard, so the argument proceeded, it was not open to seek rescission of the judgment. Thus, he argued, the default judgment is final in this instance.

[11] Rule 31(2) provides for default judgment where a defendant had failed to file a plea. Rule 31(2)(b) stipulates that a defendant may, within 20 days after acquiring knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, do so on such terms as it deems fit. I shall accept, for purposes of the present judgment, that the rule envisages a judgment granted in the absence of a defendant. However, as Mr *Beyleveld* was constrained to acknowledge the rule does not envisage physical absence of a

[11] *Pitelli* para [34] and [36]

defendant. He contended, nevertheless, as adumbrated earlier, that where a party had been heard and had participated in the proceedings the rule could find no application.

[12] As I have said, where a party is under bar the court has a discretion to hear such a party and an inherent discretion to uplift the bar. The court *a quo* did hear the appellants and having considered their submissions held that no evidence had been placed before her on affidavit to justify the conclusion that they were not in wilful default. The effect thereof, as I understand her finding, was that she declined to exercise her discretion to uplift the bar and admit the appellants' plea. The matter was decided, as appears from the portion of her judgment which I have quoted earlier, on the basis that she refused to have regard to any of the considerable volume of papers filed in defiance of the notice of bar or to the appellants' submissions in respect thereof. She explicitly excluded the pleadings which had not been procedurally filed and decided the matter without any reference to the appellants' case. In that sense the judgment was granted in the absence of the appellants, their argument having been excluded from consideration. The judgment is therefore subject to rescission in terms of rule 42(1)(a), rule 31(2) or the common law, provided a proper case is made.

[13] In the circumstances the matter is not appealable. It falls to be struck from the roll with costs.

[14] There is, however, a further matter of concern which arises from the papers. As I have said the application for default judgment proceeded in terms of rule 31(2). In

terms of the rule, where a defendant is in default of the delivery of a plea, as in this case, a plaintiff is entitled to "set the action down" for default judgment. It does not postulate the filing of an application, as envisaged in rule 6, supported by affidavits. In the present matter the plaintiff brought its application for default judgment on notice of motion supported by a founding affidavit and annexures running to more than 40 pages. The approach reflects a tendency that appears to be gaining momentum in this court and that constitutes an abuse of the process of court. The proceedings had been commenced by way of action. Where there is no notice of intention to defend, or a plea, filed the factual averments contained in the particulars of claim are deemed to be admitted. However, where a claim is made for unliquidated damages, as in this case, the court is required to hear evidence in order to properly assess the issue and to make an appropriate order. In *Economic Freedom Fighters*[12] the SCA explained that application proceedings are inappropriate for this purpose. Generally, in action proceedings, evidence must be presented *viva voce.*[13] In exceptional cases evidence may, with the leave of the trial court, be received on affidavit. Thus, a plaintiff seeking default judgment in terms of rule 31 cannot seek to bolster his case by an extensive affidavit nor is it necessary to repeat the allegations made in the particulars of claim on affidavit. The present case provides an illustration of the consequences of such an abuse of the court process.

[15] As a result of the form of the application the appellants found it necessary to address all the averments made in the affidavit (which should never have been filed)

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[12] *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) at para [93]

[13] At para [100] to [104]

and I have referred earlier to the extent of the answering papers that followed. Thus, the record on appeal, in respect of a default judgment application, now amounts to 540 pages. To add insult to injury, a few days prior to the hearing of the appeal Omega's legal representatives found it necessary to deliver a "Supplementary Appeal Record" containing a further 270 pages of documentation relating to rescission applications filed by the appellants. All of this documentation relates to events which occurred after the judgment was delivered and is entirely irrelevant to the adjudication of the appeal.

[16] Had I sat as the judge of first instance I would have disallowed the costs occasioned by the preparation of the affidavits in support of the application for default judgment. In the appeal it is appropriate to disallow the costs occasioned by the preparation and filing of the supplementary appeal record.

[17] In the result, the appeal is struck off the roll with costs, such costs to exclude the costs of the supplementary appeal record delivered on 8 February 2022.

J W EKSTEEN

JUDGE OF THE HIGH COURT

DAWOOD J:

I agree.

F DAWOOD

JUDGE OF THE HIGH COURT

MATEBESE AJ:

I agree.

Z Z MATEBESE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellants:	Adv A Beyleveld SC instructed by R S Siyila Attorneys Inc c/o Wheeldon Rushmere & Cole Inc, Makhanda
For Respondents:	Adv K Williams instructed by Pagdens Attorneys c/o Cloete and Company, Makhanda