REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A1130/2005
DATE: 21 September 2007

In the matter between:

CHRIS VERSTER **APPELLANT**

And

MICOGER BK H\A TRUCK PART **RESPONDENT**

J U D G M E N T

MAKGOKA(AJ)

[1] The Respondent issued summons against the appellant in the Pretoria Magistrate Court for payment of R23 896.84, pursuant to certain repairs affected on Appellant's truck. The Appellant defended the matter. The Respondent applied for summary Judgment. The Appellant filed an affidavit resisting Summary Judgment, as a result of which leave to defend was granted. The Appellant filed a Plea and Counterclaim wherein he claimed the amounts of R1450.00, R22

262.30 and R24 000.00 respectively. Eventually the matter was set down for trial on 22 February 2005. Neither the Appellant nor his legal representatives attended the Trial. Accordingly, default judgment was granted against the Appellant in the amount of R23 896.64, with costs.

[2] On 12 May 2005 the Appellant brought an application to rescind the judgment granted on 22 February 2005. The application was opposed by the Respondent. Full sets of affidavits were filed by both parties. Having read the papers and heard arguments presented on behalf of both parties, the Magistrate dismissed the application for rescission. The appellant was further ordered to pay the costs of the application, including counsel's fee on a higher scale.

[3] The appellant thus approached this Court on appeal against the whole of the judgment and order of the Magistrate. The Appellant has also filed a substantive application for condonation relating to failure to apply for a date of hearing and the filling of the appeal record. This application is not opposed by the Respondent. A proper case has been made out and the necessary condonation is hereby granted.

[4] On 10 August 2007, the Appellant launched an urgent review application in this Court, to be heard simultaneously with the present appeal, wherein the appellant sought an order setting aside the

proceedings of 22 February and 12 May 2005, respectively including the judgments and orders made on those dates. The gravemen of the review application is that the advocate who appeared on behalf of the Respondent in both instances, had been struck off the roll of Advocates prior to those proceedings. The argument on behalf of the appellant was that because of this fact, the said proceedings were irregular and fell to be set aside. This application was opposed by the Respondent. The Magistrate who dismissed the application for rescission on 12 May 2005, filed a notice indicating that he abides the decision of this Court.

[5] That, in brief, is the background of the matter and the issues before us. I shall first deal with the application for review, and should it become necessary, the merits of the appeal would be dealt with later. As I indicated above, the Appellant's review application is based on the fact that the advocate who appeared on behalf of the Respondent in the application for default, judgment, as well as the application for rescission of judgment had been struck off the roll of Advocates prior to those proceedings. The fact is common cause between the parties.

[6] Rule 52 of the Magistrates Court Act, 32 of 1944 provides:

"52, Representation of Parties.

> *[1] [a] A party may institute or defend and may carry to completion any legal proceeding either in person or by a practitioner***".**

In Section 1 of the Act "practitioner" is defined as an Advocate, an attorney, a candidate attorney such as referred to in section 35 of the Attorneys Amendment Act 87 of 1989.

[7] It was argued by **Ms. Hartman**, on behalf of the appellant, that the fact that the Respondent's advocate appeared in court under the circumstances outlined above, in itself constitutes an irregularity which vitiates the proceedings in the Magistrate's Court. She referred us to ***S v Mkhise; S v Mosia; S v Jones; S v Roux 1988 [2] SA 868 [A]***. At 874 I-J, 875 A-G, Kumleben AJA [as he then was] said:

> *"An alternative argument or approach was raised and debated, namely, that the fact that counsel is or is not 'a fit and proper person' is a relevant factor to be taken into account in a particular case in deciding on the gravity of the irregularity. This argument, one infers, arose from an illustration given, and commented on, in the First Report of the Commission of Enquiry. The hypothetical case put forward was that of a person, of flawless character and vast experience in criminal matter, who return to the Bar and resumes practice but who inadvertently fails to have himself re-admitted as an advocate. The possibility of such a 'hard case' arising cannot be discounted*

but the chances would appear to be extremely remote. The present case appears to be first of its sort ever to have come before Court in the legal history of this country. But even if the likelihood were less remote, I do not consider this argument to be cogent for more than one reason. Firstly, though couched in another form, this contention in essence relies upon the absence of any prejudice in a case such as the one postulated: for that reason it is said that the irregularity should not necessarily vitiate the trial. However, as the Moodie case confirms and illustrates, the presence or absence of prejudice in a particular case is not a relevant consideration in deciding in the first place on the fundamental significance of the irregularity. Secondly, when considerations of public interest are paramount, hardship in a particular case, should it arise, is to be regretted but cannot be avoided. Thirdly, it would be wholly impracticable to attempt to determine ex post facto (that is, at some stage when the irregularity comes to light) whether counsel concerned was a fit and proper person in the sense that this term is applied and understood in the Act, ie whether he is generally a person of integrity and reliability. (Cf Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA 762 (T) at 782H-783H.) If, on the other hand, these words are taken to refer to his competence in the actual conduct of the case the difficulty is, if anything, compounded. It would be even more impracticable, if not impossible, for the court to attempt to determine, by applying some norm of competence (and by way of an enquiry into the merits of the case and counsel's conduct thereof) whether he in his defence of the accused has been proficient." In **Cooper v Findlay and Others (1) 1954 (4) SA 697 (N) at 700 A-B** Broome JP stated that:

> *"It is quite clear that the provision for the admission of advocates is part and parcel of the provision for the better and more effectual administration of justice. The Act is obviously conceived in the public interest."*
>
> In my view, having regard to all the relevant considerations discussed above, it is the public interest that the defence in the criminal trial be undertaken by a person who has been admitted to practice as an advocate in terms of the Act and the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceedings. (This, I should add, was the view taken in **S v Masithela 1986 (3) SA 402 (O) at 404H,** the facts being that a layman was permitted to represent the accused in a criminal trial in the Magistrate's court.)"

[8] This matter dealt with similar circumstances in various criminal cases. I must confess that, despite diligent search, I have not been able to find any decided cases pertinent to civil proceedings in similar circumstances. During argument, we debated with both counsel for the parties whether a distinction should not be drawn between civil and criminal proceedings. **Ms Hartman** persuasively argued that there should not, in principle, be such a distinction. Regard being had to the ***dicta*** in the above matter, I am of the view that it would be undesirable to state, as a matter of principle, that in civil cases an

enquiry be instituted on a case to case basis, to determine whether an irregularity had occurred in each instance. Legal representation, whether in criminal or civil proceedings is such a fundamental cornerstone of our jurisprudence and advocacy, that any deviation from that long standing tradition, should not be countenanced. I do not see reason why the *dicta* in Mkhise [***supra***], should not be applicable in civil matters.

[9] In the premises I find that the proceedings in the Magistrate's court, wherein judgment was obtained in default, as well as the application for rescission of the judgment, where irregular. Contemplative that I could be wrong on this aspect, I now turn to consider the merits of the appeal.

[10] Applications for rescission of judgment are governed by Section 36(1) of the Magistrates' Court Act, 32 of 1944. The procedure thereof is governed by Magistrates' Court Rule 49(1) which provides that:

> *"A party to proceedings in which a default judgment has been given, or any other 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 the 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 may deem fit."

Rule 49(3) reads as follows:

"Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."

[11] The general approach of the courts to applications for rescission was restated by Smallberger J [as he then was] in ***HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) at 300F-301C*** in the following terms:

*"In **Grant v Plumbers (Pty) Ltd 1949(2) SA 470(O)** Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause, an application should comply with the following requirements:*

a) he must give a reasonable explanation for his default;

b) His application must be bona fide;

c) He must show that he has a bona fide defence to the Plaintiff's claim."

[12] In an erudite exposition of the rule , Jones J , in ***De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994(4) SA 705(e) at 711E-I***, stated the following:

> *"An application for rescission of judgment is never simply an enquiry whether or not to penalize a party for his failure to follow the Rules and Procedures laid down for civil proceedings in our courts. The question is rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The Magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion, by balancing the interest of the parties, bearing in mind the considerations referred to* ***in Grant Plumbers (Pty)Ltd (supra)*** *and* ***HDS Construction (Pty) Ltd v Wait (supra)*** *and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the Courts which are properly taken in accordance with the accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment*

being executed where it should never have been taken in the first place, particularly where it is taken in the party's absence without evidence and without his defence been raised or heard."

[13] With the approach and general principles articulated above, I now turn to the facts of the present case. The Appellant's explanation for his and his attorney's non-appearance on the trial date, is briefly as follows: An advocate, one Zazerai had been briefed for the trial. On 21 February 2005, i.e., The day before the trial, Zazeria informed the Appellant's Attorneys that he could no longer handle the trial on 22 February 2005, the reason being that he, Zazeria, was in Cape Town on another matter which had rolled over. Appellant's attorney approached the Respondent's attorney for a possible postponement. His attorney was informed at approximately 17H30 that a postponement was refused and that the matter would proceed. The Appellant's attorney then undertook to instruct another counsel or his correspondent to argue a postponement.

[14] The Appellant's attorney, Mr Stephan Wolff Grobler, stated the following in his supporting affidavit for rescission of judgment:

"Aangesien ek self betrokke was by 'n ander aangeleentheid het ek instruksie gegee aan my kantoor om die nodige reëlings te tref en by opvolging daarvan om ongeveer 09H30 op 22

Februarie 2005 synde die dag van die verhoor het dit geblyk dat die instruksies nie betyds deurgegee is na ons korrespondente, Mnre Stegmanns Ingelyf te Pretoria, ten einde die aangeleentheid rondom die versoek tot uitstel te hanteer nie."

[15] Grobler does not explain the following:

[a] At what time his office was informed of Zazerai's sudden unavailability. It appears however, from the opposing affidavits of Mr Tintinger, the Respondent's attorney, that as early as 12H00 on 12 February 2005, a Mr du Plessis from Grobler's office informed him of the unavailability of Zarerai. No request for postponement was made at this stage.

[b] At what time , and to whom did he give instructions to contact the Pretoria correspondents to attend Court on 22 February 2005.

[c] Why the Pretoria correspondents were not alerted forthwith, upon learning of Zazerai unavailability, so as to alert them to a possible need to appear and request the postponement.

[15] Given the urgency of the matter, one would expect some level of prudence from Grobler. Having been informed the previous evening of the Respondent's attitude regarding postponement, he would have been expected, first thing the morning of trial, to personally speak to his correspondents and to give them pertinent instructions. He chose

to delegate this to an undisclosed person, and only followed it up at 9H30. This, is my view, constitutes negligence on the part of Grobler. The Magistrate's reasons correctly placed emphasis on the neglect of the Appellant's attorneys. She was, however, wrong in also apportioning blame to the Appellant.

[16] The next enquiry then is the Magistrate's approach in considering the matter. She proceeded from a premise that there was no proper explanation as to the absence of the Appellant and his attorney on the day of the trial and therefore, she was not enjoined to consider the Appellant's defence. In ***De Witt Auto Body Repairs(Pty) Ltd v Fedgen Insurance CO. Ltd*** (supra) Jones J , stated as follows:

> *"The correct approach is not to look at the adequacy or otherwise of the reasons for failure in isolation. Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an all important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way, the Magistrate place himself in an position to make a proper evaluation of the defendant's* ***bona fides*** *and thereby to decide whether or not, in all circumstances it is appropriate to make the client bear the consequences of the fault of its attorneys…"*

[17] In ***Zealand v Milborough 1991(4) SA 836 (SECLD) at 838 D***, Jones J remarked:

> *"A measure of flexibility is required in the exercise of the Court's discretion. An apparently good defence may compensate for a poor explanation..."*

[18] This case is one of those. Here regrettably, the fault lies completely with the Appellant's attorneys. The Magistrate in her judgment stated, that the Appellant did not allege that he had reason to believe that the case would be postponed by agreement. She further questioned why the Appellant did not state why he and his attorney were not at Court on the trial date. I am, however, unable to find any fault on the part of the Appellant. He is a lay litigant who had entrusted his matter to an attorney and a advocate. He could not suppose that his attorney would not be able to secure a postponement. He was informed of counsel's unavailability and that a postponement would be sought. Under the circumstances, it is not clear what more could have been expected of the Appellant. Accordingly, I am unable to accept that the Appellant was to any extent to blame for the events leading to the granting of default judgment.

[19] I now turn to consider whether the Appellant should be visited with the consequences of his legal representative's negligence. In ***Salojee Development 1965 (2) SA 135(A) at 140,*** Steyn CJ [as he then was], remarked:

> *"This Court has on a number of occasions demonstrated its reluctance to penalize a litigant on account of the conduct of his attorney. Two striking examples thereof is to be found in* ***R v Chetty 1943 AD 321****. In that case there was even a longer delay than here, and the excuses offered by the attorney concerned were clearly unsatisfactory, but the court nevertheless granted condonation."*

In my view, this is not a case where the Appellant could have done anything about the trial. Notice of his counsel's unavailability was received a day prior to the trial and he entrusted the conduct of the matter to his attorneys. Accordingly I find that the consequences of the legal representative's negligence should not be visited upon him.

[20] The Magistrate did not consider whether or not the Appellant disclosed *a bona fide* defence to the Respondent's claim. Her reasons for this was, that as he had found that the appellant was in wilful default, it was not necessary for her to deal with the merits of the Appellant's

defence. I have already indicated above that her approach in considering this aspect was out of context and wrong. As a result, it is necessary to deal with this issue.

[21] The Respondent's summons against the Appellant was for R 23 896.84 pursuant to certain repairs effected to the Appellant's truck, as well as the costs of certain parts fitted during the process of such repairs. The Appellant's defence was *inter alia*, that the repairs were not completed within the agreed time and that a "Dyna-Tune" certificate was not delivered at completion of the repair work. Significantly, he further alleged defective workmanship on the part of the Respondent, which defects the Respondent having failed to remedy despite three occasions on which the truck broke down after the repairs. As a result of the above, the Appellant was obliged to employ the services of another mechanic to identify and fix the defects. He incurred further expenses in this regard. These expenses are contained in his counterclaim, allocated as follows:

a)	Labour of new mechanic	R1450.00
b)	Parts bought, towing costs and repair	R22 262.30
c)	Loss of income resulting from truck not being delivered on agreed date	R24 000 .00

[22] The Respondent delivered his plea to the above claims wherein the allegations by the Appellant were denied. The above in my view, disclose a *prima facie* defence to the Respondent's claim. These are justiciable issues which only a trial court would be able to resolve. The other fact that should be given weight to when considering the Appellant's *bona fides*, is the prompt manner in which he responded once the default judgment came to his knowledge. He instructed his attorney to reply for the rescission of the said judgment. That demonstrated a willingness to persist with the defence raised in his plea. All these factors considered, in my view, establish the Appellants *bona fides*. If the application is bona fide, it must be granted. (***Mnandi Property Development CC v Benmore Development CC 1999 (4) SA 462 at 467H.)***

[23] I therefore make the following order:

[1] both the review application and appeal succeed;

[2] the order of the Magistrate granting default judgment is hereby set aside;

[3] the judgment and order of the Magistrate dismissing the application for rescission, is hereby set aside and substituted with the following:

[3.1] "The judgment granted in default against the Appellant on 22 February 2005 is rescinded.

[3.2] The Respondent is ordered to pay the costs incurred in the opposition of rescission application."

[4] The Respondent is ordered to pay the Appellant's costs of the review application as well as the costs of the appeal.

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T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT.

I AGREE

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CP RABIE
JUDGE OF THE HIGH COURT