IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A922/15
Date of hearing: 12 May 2016
Date of Judgment: 27 May 2016

In the matter between:

SOOMAIYA GANI Appellant

and

ESSA STEEL MANUFACTURERS CC

Respondent

MOTHLE J

JUDGEMENT

1. Central, Pretoria. The judgment, which was delivered on 21 October 2015, dismisses Appellant's application for rescission of a default judgment that was granted against her on 23 January 2015 as well as a condonation application for the late launching of the rescission application.

2. Essa Steel Manufacturers CC *(" the Respondenf')*, which obtained a default judgment against the Appellant, opposes this application.

BACKGROUND

3. On 27 May 2014, the Respondent issued summons as Plaintiff in the Magistrate's Court Pretoria, wherein it claimed an amount of R498,005.50 plus interest at the rate of 15.5% per annum as well as costs of suit against the Appellant who was cited as the Second Defendant. The First Defendant cited in those summons is Build Kwik Wholesalers (Pty) Ltd *("First Defendant").*

4. The cause of action in the summons is based on alleged goods sold and delivered by the Respondent to the First Defendant, with the appellant signing as surety and co-principal debtor *in solidum* with the First Defendant.

5. According to the two returns of service filed by the Sheriff, the combined summons were served on the First Defendant on 4 June 2014 at 14HOO, by affixing at the principal door of the address […] Church Street Pretoria West. The return states that *"After* a *diligent search and enquiry at the given address no other manner of service was possible."* On the same day, at the same address, at 14H01, the second return of service indicates

that a copy of the combined summons was served on the Appellant personally. The two returns of service became an issue before the Magistrate and also on appeal in this Court.

will revert to this aspect later in this judgment.

6. On 23 January 2015, the Respondent obtained judgment in default against the Appellant (Second Defendant) on the basis that the Appellant is alleged to have bound herself as surety and co-principal debtor with the First Defendant. This default judgment was granted almost seven months after the summons were issued.

7. On 25 February 2015, the Respondent issued a letter of demand to the First Defendant. On the same date, the bank informed the Appellant that there is a judgment that has been granted against the company and her. The events that unfolded from this point are central to the dispute that became a subject of debate in the subsequent applications for condonation and rescission of that default judgment, before the Magistrate. I will deal with these details in this judgment.

8. At this stage, it is apposite to record that on 3 June 2015, Appellant launched an application for rescission of the default judgment together with an application for condonation for the late filing of the application for rescission. The Respondent filed a notice to oppose these applications.

9. The applications were heard by the Magistrate in the opposed motion Court on 21 October 2015. In his judgment dated 28 October 2015, the Magistrate concluded that Appellant had failed to convince the Court that the application for condonation should be successful. Appellant then launched an appeal against the dismissal of its application which is now before this Court.

ISSUES IN THIS APPEAL

10. It is clear from the reading of the reasons for the decision provided by the Magistrate that he concentrated on the application for condonation and decided the fate of the whole application on that basis. In paragraph 6.10 of his reasons, the Magistrate states as follows:

> *" 6. 10 This Honourable Court being vested with* a *wide discretion to exercise when considering condonation applications, the court took into consideration the merits of the case as* a *whole, referred to the submissions made by the Respondent's attorneys of record, first and foremost the fact that the Second Applicant is not truthful with regards to the date upon which she obtained knowledge of the judgement and secondly the fact that the Second Applicant denies having received service of the processes in these proceedings. Although the latter becomes more relevant when dealing with the aspects of wilful default, its relevance will be shown hereunder."*

11. Again, in paragraph 6.14 of the reasons for the decision the Magistrate opined thus:" ... . *The Court, while considering the application for condonation, it assessed the merits of the application in its entirety, purely to accordingly establish the conduct and motive of the Second Applicant ..."*

12. The reasons for the decision point out that in dealing with the condonation application, the Magistrate ignored what was common cause between the two parties, namely, that the Appellant came to know about the judgment on 21 of April 2015.

13. In regard to the service of the summons, notwithstanding an affidavit by the Sheriff that service was effected personally on the Appellant, there are two problems which arise in this regard. The first is that the return of service in regard to Appellant and the company are one minute apart. However, the one for the Appellant indicates there was personal service while the other return of service for the First Defendant was by affixing the documents on the entrance of the premises as per the same address of *domiculum citandi et executandi.* This does not make sense as Appellant is a director of the First Defendant and if she was present and received service personally, nothing prevented her from doing so

on behalf of the First Defendant.This relationship is clear from the combined summons [1] . The First and second Defendants mentioned in the combined summons shared the same address. The affidavit of the Sheriff

does not clear this anomaly up.

14. Secondly, the evidence that Appellant was informed by the bank that there is a judgment against her and the company, does not clear up the question as to when Appellant first came to know about the judgment. The information from the bank as conveyed to the Appellant shortly after 25 February 2015, was such that it would not on its own, constitute knowledge of the judgment within the meaning of the rule. One cannot rely on such information to launch a rescission of judgment. At best, the information only serves to sensitise the party involved to investigate further or verify. The Magistrate erred in paying attention to any suggestion that verbal information from the bank constitutes sufficient notice as envisaged in the rule.

15. Appellant further raises two reasons why there was delay in launching the application for rescission of the judgment. First reason is that her legal attorneys struggled to obtain documents

[1] Paragraphs 2 and 3 of the particulars of claim, as well as on page 1 of the summons. The Appellant is described as an employee of the First Defendant, which description the Sheriff should have noted.

from the Court relating to the default judgment. This happens to be a common occurrence even in the High Court and is unfortunately part of the administration. There was no evidence to refute this allegation and the Magistrate strangely did not give reasons why he rejected it.

16. The second reason is that Appellant's attorney was on leave for approximately 11 days. I would agree with the Magistrate that this appears to be a flimsy reason. Any attorney, who understands that he/she is an officer of the Court, cannot afford to be tardy in dealing with time frames set by the rules in civil proceedings. A diligent attorney would have realised that once instructions from a client indicate that there is a possible or probable default judgment, the proverbial clock is ticking and the application has to be scrupulously dealt with.

17. Rule 49 of the Magistrate's Court Rules provides for rescission and variation of judgments. The genesis of the rule arise from the provisions of Section 36(1) of the Magistrate's Court's Act, 32 of 1944, which empowers the Court to rescind or vary any judgment granted by it, considered in the absence of the person against whom that judgment was granted. Rule 49 takes off from this provision by stating in detail the procedures relating to the variation or rescission of judgments in the Magistrate' s Court. Rule 49(1) provides thus:

> *"49.* ***Rescission and Variation of Judgments***
>
> ***(1)*** *A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment*

seNe and file an application to court, on notice to all 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 a good reason to do so, *rescind or vary the default judgment on such terms as it deems fit: provided that the 20 days period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5).*

(2) It will be presumed that the Applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the Applicant proves otherwise."

18. Sub-rule (5) dispenses with the 20 days period where a Plaintiff in whose favour the judgment was granted, has agreed in writing that the judgment be rescinded or varied. In the matter of **Phillips t/a Southern Cross Optical v S A Vision Care (Pty) Ltd**[2] **,** the Court emphasised that:

> *"Rule 49(1) provides that* a *Court may rescind or vary* a *default judgment on such terms as it may deem fit*
> *(a) upon good cause shown; or*
> *(b) if it is satisfied that there is good reason to do so."*

19. The Court found that the introduction of the concept *"good reason"* in Rule 49(1), intended to expand the discretion of the Magistrate's Court in rescission applications by introduction of less stringent criteria. The need to prove absence of wilful default is no longer a necessary requirement for rescission.

20. Considering that after she became aware of the default judgment on 21 April 2015, the application was launched on 3 June 2015, Appellant was a few days late with her application sine the 10-day period had expired sometime in May 2015.

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[2] 2000 (2) SA1007 CPD, page 1012.

21. Apart from stating that he has considered the merits of the main action between the parties, the Magistrate does not provide detail as to which aspect of the merits did he consider and what conclusions he reached.

22. It is indeed trite that a Court considering an application for rescission should also guard against any prejudice which might affect the interests of the parties. See in this regard **Grant v Plumbers (Pty) Ltd**[3] **as well as HOS Construction (Pty) Ltd v Wait**[4]**.** A measure of flexibility is necessary for the Court to exercise, especially in cases where a *bona fide* defence may compensate for a poor explanation.

23. Appellant, with reference to a number of invoices relating to the alleged goods sold and delivered to the First Defendant, demonstrates that she has a *bona fide* defence in that the invoices relate to another company. Appellant demonstrates with reference to specific invoices that purchases and deliveries were made by a company called *Build kwik* ***Trading*** *(Pty) Ltd*, which was liquidated in May 2014. According to Appellant, the Respondent claims payment from First Defendant which is *Build Kwik* ***Wholesalers*** *(Pty) Ltd* for these purchases. She attaches

[3] 1949 (2) SA 470 (0).
[4] 1979 (2) SA 298 (E).

a number of purchase orders made by Build kwik Trading. These claims are refuted by the Respondent. The Respondent admits that indeed there appears to have been two separate companies bearing similar names but sharing the same address. The one company had a director who was a previous director of the First Defendant.

24. On the face of it, it seems to me that this discrepancy needs to be adjudicated by the Court and cleared. Failure to do so may result in an injustice where the one party is settled with the debts of another entity that has been liquidated.

25. For these reasons, I am of the view that the Magistrate erred in refusing to grant condonation for the late filing of the application for rescission of judgment as well as the application for rescission itself.

26. It should have been apparent to the Magistrate when considering the merits of the application that there is a *bona fide* defence on the part of the Appellant in that some of the purchases which constitute the amount claimed relate to a different entity. To refuse a rescission of this judgment would result in prejudice and injustice to the Appellant. The Appellant

will be compelled to pay for goods that she or the First Defendant never purchased or even received delivery thereof.

27. Considering the conspectus of the evidence in this case, I am of the view that the applications for condonation and rescission of judgment should be granted and the Appellant should be allowed to file her plea. The matter should follow the normal course of civil proceedings in terms of the Rules.

28. In regard to the costs, the Respondent argued that it should be awarded the costs as a rescission is an indulgence granted to the Applicant. I do not agree. By electing to oppose this appeal, the Respondent incurred the risk of being mulcted with costs.

29. In the premises I make the following order:

1. The appeal succeeds.
2. Condonation for the late filing of the application for the rescission is hereby granted.
3. The decision by the Magistrate dismissing the application for both condonation and rescission of judgment dated 28 October 2015 is hereby set aside;
4. The default judgment granted against Appellant on 23 January 2015 is hereby rescinded;

5. The Appellant is granted leave to file her plea within 10 days from the date of this order;

6. The costs of the applications for condonation and rescission in the Magistrate's Court will be costs in the cause; and

7. Appellant is granted the costs of appeal in this Court.

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S P MOTHLE
Judge of the High Court
Gauteng DivisionPretoria

I concur:

H K KOOVERTJIE
Acting Judge of the High Court Gauteng Division
Pretoria

For the Appellant: **Adv. R J Groenewald**

Instructed by: **Lacante Henn Inc Attorneys Appellant:Ashley Gardens, Pretoria.**

For the Respondent: **Advocate A S L Van Wyk Instructed by:** **Pratt Luyt and De Lange Attorneys c/o Savage Jooste & Adams Inc Neuw Muckelneuk, Pretoria**