CASE NO.: CA 12/2007

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

J GRIESEL KONSTRUKSIE BK.

APPELLANT

AND

P. R. PRETORIUS **1ST RESPONDENT**

MRS PRETORIUS **2ND RESPONDENT**

CIVIL APPEAL

MAFIKENG

LEEUW J, LEVER AJ

DATE OF HEARING : 22 FEBRUARY 2008
DATE OF JUDGMENT : 03 APRIL 2008

COUNSEL FOR APPELLANT : ADV A. R. TRUSLER
COUNSEL FOR RESPONDENT : MR N. J. ESTERHUYSE

ATTORNEYS FOR APPELLANT : SMIT STANTON INC.
(Instructed by MOLOTO-WEISS INC.)
ATTORNEYS FOR RESPONDENTS : BOTHA COETZER SMITH
(Instructed by DU PLESSIS VAN DER WESTHUIZEN INC.)

JUDGMENT

LEVER AJ

INTRODUCTION:

[1] This matter is an appeal of a decision of the Magistrates Court for the District of Rustenburg refusing rescission of a default judgment granted against the Appellant by the said Court on the 17th May 2006.

[2] The application for rescission of this judgment was launched on the 11th July 2006. The rescission application appears to have been argued before the learned Magistrate on the 4th September 2006. The judgment dismissing the application for rescission, which bears the date stamp of the 28th March 2007, was subsequently made available to the parties.

[3] The Respondents in the heads of argument filed on their behalf on the 8th February 2008 raised two points **in limine**.

[4] The first point **in limine** raised by the Respondents is that the appeal was noted out of time. In response to this point **in limine** Mr Trusler, for the Appellant, informed the Court that he had only received the Respondents' heads of argument the previous day, being 21st February 2008. As a result of him becoming aware of the points **in limine** on such short notice he was not able to

prepare an affidavit dealing with the factual basis for his response to this point **in limine**. However, he informed the Court that his instructing attorney was present and would give evidence, if necessary, to the effect that:

- The said judgment was not handed down in open court;
- The said judgment was placed in the attorney's respective pigeon holes at the Magistrates Court;
- He received the judgment in his pigeon hole on the 26th April 2007;
- With reference to that date the application for reasons and the noting of the appeal were in fact timeous.

[5] Mr Esterhuyse, who appeared for the Respondents, was asked if he required the Appellant's attorney to give the tendered evidence to the Court under oath. He replied that it was not necessary and ultimately he properly conceded this point **in limine** and did not pursue it.

[6] The second point **in limine** was that the application for rescission of judgment in the Magistrates Court was filed out of time. On behalf of the Respondents Mr Esterhuyse argued that on the Appellant's version he became aware of the default judgment on the 10th June 2006 and that the 20 day period allowed by Rule 49(1) of the Magistrates Courts Rules of Court ["the Rules"]

expired on the 10th July 2006. The rescission application was served on the Respondents on the 10th July 2006 but the rescission application was only served and filed with the Clerk of the Civil Court on the 11th July 2006. When it was put to Mr Esterhuyse that this point **in limine** ought to have been raised in the Court **a quo**, he conceded that this point in **limine** was not raised in the court **a quo** and he submitted from the Bar that the Respondents, at the time the rescission application was argued in the Court **a quo**, were not aware that the application for rescission of the default judgment was filed one day out of time.

By virtue of the fact that Appellant could have applied for an extension of the relevant time limit in terms of Rule 60(5) had it been made aware of the fact that its application for rescission was one day out of time, the Appellant will be unduly prejudiced if we allowed the matter to be raised for the first time on appeal. Even if we are wrong in this conclusion, the allegation that Respondents were not aware of the application for rescission being one day out of time, at the time the rescission application was argued, ought to have been set out on affidavit in the appropriate manner so that the Appellant would be given a fair and reasonable chance to deal with such allegation. For the reasons already set out herein, the points **in limine** were dismissed.

[7] The grounds for appeal as set out in the notice of appeal may be summarised out as follows:

The magistrate erred in finding –

- In the circumstances, that the Appellant had failed to satisfy the court that good reason exists for the rescission to be granted;

- In the light of the Appellant's averment that it had not received the summons, that it had failed to give sufficient reasons for the Appellant's default to react to the summons; and

- That, in the light of the contents of the Appellant's founding and replying affidavits, the Appellant had failed to set out its defence with sufficient particularity.

[8] In the present circumstances Rule 49(1) as read with Rule 49(3) of the Rules are applicable. The aforesaid rules read as follows:

> "49(1) a party to proceedings in which default judgment has been given or any 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 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 reasons to do so, rescind or vary the default judgment on such terms as it may deem fit.
>
> . . .
>
> 49(3) 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."

[9] On a proper reading of Rule 49 it is clear that the Appellant has to establish two things. Firstly, it has to explain its default. Secondly, it has to show good cause to rescind the judgment, alternatively, it has to satisfy the court that there is good reason to rescind the judgment.

[10] Before considering whether the Appellant has sufficiently established the two requirements set out above, one must bear in mind the dicta of **Binns-Ward AJ**[1], which reads as follows:

> "[57] It is implicit in the dicta of **Schreiner JA** in Silber's case . . .,
>
> that the conduct and motives of the applicant for a rescission of judgment are relevant factors. The weight to be attached to them in the conspectus of other relevant material, such as the defence which the applicant alleges he or she has to the claim, is a matter for the court to determine in the exercise of its judicial discretion. It is in this context that it is generally accepted that a poor explanation may be compensated by a good defence and **vice versa**."

[11] In explaining the Appellant's default, Mr Griesel who deposed to the affidavit in support of its application for rescission stated in its founding affidavit that he is a member of the defendant and that the summons was not served on him at his residence and nor was the summons served on the Appellant's principal place of business. In the Respondents answering affidavit it is shown that

1Wright v Westelike Provinsie Kelders Bpk 2001 (4) SA 1165 (C) @ 1181 E-F

the summons was in fact served on the registered address of the defendant. In its replying affidavit Mr Griesel on behalf of the defendant explained that the address was indeed the registered address of the Appellant, but that an auditor Mr J J O'Nell had established the Appellant and that the auditor registered 8 Manitoka Ave, Rustenburg as the registered address of the Appellant without informing him (Mr Griesel) that he had done so. Mr Griesel also explained that the mandate of the auditor had been terminated some three years previously. Mr Griesel also explained that as a result of this the summons did not come to his attention.

The Respondents and the learned Magistrate criticised the Appellant for not setting these facts out in its founding affidavit. With respect on the facts of this case such criticism is not warranted. The deponent to the Appellant's founding affidavit set out the crux of his default, that is, that the summons did not came to his attention. The Respondents challenged this as they were entitled to in their answering affidavit and Appellant gave a sufficient and proper explanation in reply.

[12] In assessing the explanation for the Appellant's default it is important to bear in mind that corporate entities act through the intervention of natural persons. This is especially relevant in respect of small Close Corporations such as the Appellant. Such entities are usually the **alter ego** of one or two persons. These small corporations do not have a dedicated secretariat set up at the registered address such as one might expect from a large

corporate entity. The return of service itself also needs to be considered. The Sheriff simply states: “Dit dien om te sertifiseer dat bogemelde document (e) beteken is deur aanhegting van ’n afskrif van die betrokke document (e) aan die hoofdeur/hoof hek te MANIKOLAAN (**sic**) 8 RUSTENBURG te heg omdat geen ander manier van betokening moontlik was na sorgvuldige deursoeking nie.” In considering this return we must have regard to Rule 9(3)(c) which reads: “. . . in the case of a body corporate at its local office or principal place of business within the area of jurisdiction of the court concerned to a responsible employee thereof or in any other manner specifically provided by law.”

In this case the Sheriff purports to have acted in terms of Rule 9(5) and 9(6). Rule 9(5) appears not to be relevant. The Sheriff can rely on Rule 9(6) but the Sheriff does not say he attempted to find a responsible employee of the Appellant but failed. The Sheriff does not say whether the relevant address was a residential property, whether it was a business property or whether it was the address of an auditor. The Sheriff further fails to state whether he enquired whether the Appellant was known at that address. There are simply too many questions left open by the Sheriff’s return of service.

[13] It needs to be said that the Appellant is not free from criticism in the manner in which it explains its default. Clearly, the address of service was in fact the registered address of Appellant. However, on the probabilities we are satisfied that the natural person through whom the Appellant would ordinarily act did not have

knowledge of the service of the summons in this matter. When Mr Griesel received the Section 65A notification in this matter he took steps to have the default judgment set aside. There is no reason to question the motive of the Appellant in seeking to defend this action. Having regard to the fact that the Appellant raises a defence which is a triable issue, we come to the conclusion that despite the criticism that could be levelled at the Appellant's explanation of its default, such explanation should be accepted.

[14] The defence raised by the Appellant is that it built the house concerned according to the plans provided by the architect and the requirements of the NHBRC. The Appellant further alleges that there was no provision in the building plans to cater for storm water management. It is important to note that an affidavit of the architect Jackie Smit is provided by Respondent and that the said architect does not directly deny the allegation that the plans did not make provision for storm water management. The architect in his supporting affidavit merely states that after completion of the house he inspected it and found that the house was not completed in accordance with his plans. This general and broad allegation creates a dispute of fact but due to the fact that the architect has not provided any detail as to the manner in which the house was not built in accordance with the plans we are unable to assess the probabilities of the defence raised by the Appellant.

[15] The learned magistrate and the Respondents contended that the

defences raised by the Appellant were merely bare denials. We respectfully differ with this view taken by the learned magistrate. The issues raised by the Appellant if proved at trial would constitute a good and complete defence to the Respondents claims. In our view sufficient particularity is furnished to enable the Court and the Respondents to know what facts are placed in issue. There is sufficient particularity for us to conclude that the Appellant has raised this defence in a **bona fide** manner. Due to this conclusion it is not necessary to deal with the counter-claim raised by the Appellant.

[16] In the circumstances we are satisfied that there is good reason to rescind the default judgment granted against the Appellant on the 17th May 2006. In our opinion the learned Magistrate ought to have come to the same conclusion.

In the result, the order of the learned Magistrate dated 28th March 2007 is set aside and replaced with the following order:

a) The default judgment in case number 4968/1006 granted on the 17th May 2006 is hereby rescinded;

b) The Appellant is granted leave to defend the said action;

c) The Appellant shall enter an appearance to defence and all other process in the said action within the time periods prescribed by the Rules of the Magistrates Court and the **dies** in this respect will

begin to run from the date that this judgment is handed down.

d) The Respondents are to pay the costs of the rescission application in the Magistrates Court.

e) The Respondents are to pay the costs of this appeal.

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L. G. LEVER

ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered.

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M. M. LEEUW

JUDGE OF THE HIGH COURT