

SOUTH AFRICA / JUDGMENT

Eastern Cape Hub Development Service Network v Radio Graaf-Reinet (CA&R25/2014) [2017] ZAECMHC 19 (27 June 2017)

[2017] ZAECMHC 19

COURT

Eastern Cape High Court, Mthatha

BEFORE

SM Jolwana, B Majiki

CASE / FILE NUMBER

CA&R25/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. CA&R 25/2014

EASTERN CAPE HUB DEVELOPMENT

SERVICE NETWORK

Appellant

and

RADIO GRAAF - REINET

Respondent

APPEAL

JUDGMENT

JOLWANA AJ

[1] This is an appeal against the decision of the Magistrate's Court for the district of Cala in which he refused an application for a rescission of a default judgment. The respondent had issued a summons against the appellant for the sum of R62 784–00

and other ancillary relief and obtained judgment by default.

- [2] It is apparent from the return of service that the summons was served on one Vuyelwa Mdazana who is described therein as the Chairperson and is said to be working at the appellant's address.
- [3] On becoming aware of the judgment against it the appellant unsuccessfully applied for rescission of the default judgment.
- [4] Applications for rescission of the default judgment are provided for in Rule 49[1](the Rules) which provides as follows:

“(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 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 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 variation of judgment brought in terms of sub rule (5)”

- [5] Some of the reasons given by the appellant in not defending the action are that the summons was not effectively and sufficiently

served. The reason for this contention is that the appellant does not know Vuyelwa Mdazana on whom the summons was served, save for a Vuyelwa Mdazana who is the station manager at Forte FM. The appellant then alleges, without any form of confirmation from the said Vuyelwa Mdazana, that she emphatically denies having accepted service. Therefore the default was neither wilful nor contemptuous to the court a quo, so the appellant contends.

- [6] With regard to the bona fide defence appellant denies being indebted to the respondent for any amount, in that all monies due to the respondent were paid in full. The appellant then annexed proof of payments to the respondent in the sum of R112 091-00, almost double the amount claimed.
- [7] The respondent opposed the application for rescission on the basis that the summons was properly served in terms of Rule 9 (3) of the Magistrates' Court Rules. As I understand it, the contention of the respondent is that Mdazana was, five and a half months before the service of the summons upon her, a provincial chairperson of the appellant; that no replying affidavit was filed by the appellant to refute this allegation and that at all relevant times the appellant's deponent was himself a provincial coordinator of the appellant.
- [8] It is very unlikely that a provincial chairperson and a provincial coordinator of the same entity would not know each other. This would explain why Mdazana would have been at the appellant's place of business at the time of service of the summons and would have accepted service on behalf of the appellant. It is indeed true that service upon Mdazana was, in the circumstances of this case proper and in compliance with Rule 9 (3) (b). In this regard the appellant failed in my view, to explain satisfactorily why the matter was not defended. The appellant's deponent made a rather disingenuous choice of denying relevant knowledge of Mdazana in a desperate attempt to avoid the consequences of Mdazana's failure, who

evidently did nothing about the summons after receiving it.

- [9] This is where the magistrate started and ended his enquiry. In his reasons for judgment the magistrate made no attempt at all to deal with the matter beyond wilful default. Once he satisfied himself that Rule 9 was complied with, he did not evaluate whether the appellant had a bona fide defence and or there was good cause shown or whether there was good reason to rescind the default judgment. This was a serious

misdirection on the part of the magistrate and a failure to do a proper assessment of whether or not there was good reason to rescind

the default judgment as required by Rule 49.

- [10] In the case of *Wright v Westelike Provinsie Kelders BPK*[2], Binns-Ward AJ, as he then was interpreted the Rule 49 (1) requirements of “good cause shown or good reason to do so” as follows:

“In other words, the Court is empowered by the introduction of the phrase to grant a rescission application if the exigences of justice require it in an exceptional case, notwithstanding the existence of what would previously have been fatal deficiencies in the application

founding papers. It allows the Court to have regard mero motu to the justice of the case untrammelled by the incidence of onus”.

- [11] I am in respectful agreement with Binns-Ward AJ in this regard. I wish to expatiate further to what he had to say. It is always proper and sometimes necessary that our courts should exercise their unfettered discretion in dealing with the cases before them. It would lead to a miscarriage of justice if in an appropriate case a Court were to be constrained into looking only on whether there is sufficient explanation for the default. In other words having found there to be wilful default it must still rescind default judgment in the interests of justice and allow the matter to be defended on the merits, wilful default notwithstanding where there is good reason to do so.
- [12] Where summons has been properly served on a responsible employee at the place of business of the defendant but that employee fails to do something about the matter, as it happened in this case, should a case in which a bona fide defence is shown to exist be ignored solely on the basis that there was proper service of the summons? I do not think so. The Court should satisfy itself that there is no good reason to rescind default judgment despite lack of or unsatisfactory explanation for the default, on the part of the defendant. In a country like ours in which there are thousands of small businesses that could be liquidated for a debt of a few thousands of rands, it would not be in the interest of justice that a good defence to the claim is ignored simply because there was proper service of the summons. There is a very high level of illiteracy in South Africa, not to mention illiteracy on matters concerning law, this will always require the courts, in the interests of justice, to be freed to evaluate each case on its own merits and decide accordingly. This would not in my view, open the proverbial flood gates, of people failing to defend matters and then later on,

applying for rescission. It defies logic that a person would allow a risk of assets being attached and auctioned simply because there is a chance that if rescission is applied for, it will be granted. The Courts should be able to exercise an unfettered discretion and decide whether it is in the interest of justice to refuse an application for rescission despite the existence of a bona fide defence. In another case there may be wilful default and an absence of a bona fide defence. In that case the Court would be correct in the exercise of its discretion to dismiss the application for rescission.

- [13] This has been well stated in the commentary to the Uniform Rules[3], Erasmus Superior Court Practice where it is said that:

“Where the applicant has provided a power explanation for default, a good defence may compensate”.

In *Carolus and Another v Saambou Bank Limited, Smith v Saambou Bank Limited* a decision of this division Jones J dealt with a rescission application as follows:

“Both applications were out of time and, seeking condonation for the delay, the explanations offered for the delay were weak, as were the explanations of each applicant for allowing judgment to be taken against him or her in the first place, which affected the bona fides of the applications for rescission. In the circumstances, therefore, the strength of the applicants defence, on the merits

became crucial and condonation would only be granted if the applicants could satisfy the court that their defence has a reasonable prospect of success on trial”.

- [14] In this case there is a bona fide defence, in that the appellant not only denies being indebted to the respondent, but also goes further to annex in its founding affidavit, proof of payments that could even exceed the amount claimed. This therefore means that only a trial court would be in a position to hear and test evidence presented by both parties and decide the matter on its merits. On the face of it the appellant has provided proof of payments that even exceed the amount claimed. On what basis then should it be concluded that this is not a bona fide defence or that there is no good reason to rescind the judgment. One of the startling features of the respondent's case is that the schedule annexed to the particulars of claim is vastly different to the one annexed to the opposing affidavit. In addition to this the respondent did not annex the invoices in the particulars of claim and in the opposing affidavit. Instead thereof the respondent has introduced a new schedule with a total amount outstanding of R 66 044-00 as against the amount claimed in the summons in the sum of R 62 784-00.

- [15] In my view, the respondent is not very sure of its own case. This then makes it possible that at trial, evidence may very well be led which shows that they are not only mistaken in the amount owing but, as alleged by the appellant, they are not owed at all or are owed less than the amount claimed. On the other hand, the respondent may very well prove, through the discovery process and evidence being led in court that they are indeed owed. It is clear that the magistrate failed to look beyond wilful default and therefore exercised his discretion incorrectly by failing to consider whether or not there is good reason to rescind the default

judgment despite insufficient explanation for not defending the matter.

[15] I therefore make the following order:

1. The appeal is upheld with costs.
2. The order of the magistrate is hereby set aside and substituted as follows:
 - 2.1 Application for rescission is hereby granted with costs.

SM JOLWANA

JUDGE OF THE HIGH COURT (ACTING)

I agree:

B MAJIKI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant: Adv Bothma

Instructed by

J A Le Roux Attorneys

93 NELSON Mandela Drive

MTHATHA

Counsel for the Respondent: No appearance

Appeal heard on:

26 May 2017

Judgment

delivered on: 27 June 2017

[1] Rule 49 of the Magistrates' Court Rules of Court.

[2] 2001 (4) SA 1165 at 1181 H – 1182 A.

[3] 2002 (6) SA 346 at 349 B-D.

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