

SOUTH AFRICA / JUDGMENT

Kunene Motors Holdings Limited v Izicwe Mining Maintenance and Trading CC (A154/2018) [2019] ZAMPMHC 25 (21 June 2019) [2019] ZAMPMHC 25

COURT

Middelburg High Court, Mpumalanga

BEFORE

TV Ratshibvumo, MBG Langa

CASE / FILE NUMBER

A154/2018

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA MAIN SEAT

CASE

NO: A154 / 2018

In

the matter between:

KUNENE

MOTORS HOLDINGS LIMITED APPELLANT

and

IZICWE

MINING MAINTENANCE

&

TRADING

CC RESPONDENT

J U D G M E N T

RATSHIBVUMO AJ:

Civil

Procedure -

Rescission – of default judgment – Rule 49 requirements for rescission met – Reasonable explanation for not defending

the action – existence of a valid defence. Procedure to challenge the authority to act on behalf of the applicant

– no

company resolution attached mandating the deponent to act on behalf of the applicant – Respondent challenging

the authority as a

point in limine – Trial court upholding point in limine and dismissing the application.

Held

– on appeal – that

Rule 52 of the Magistrates Court Rules provides for procedure to be followed – Challenge to be raised

by way of notice to

applicant.

Held

further – that the trial

court should have afforded the deponent the opportunity to

prove his authorisation to act on behalf of the applicant.

1.

This is an appeal

against the order of the Regional Magistrate for the Regional Division of Mpumalanga sitting in Middleburg in

which he dismissed an

application for rescission of judgment. The learned magistrate dismissed the application for reasons that

the deponent to the

affidavits in support of the application (the appellant's

managing director) did not have the authority

to bring the

application on behalf of the appellant as no resolution to that effect was attached to his founding affidavit.

2.

Background: The

judgment sought to be rescinded was granted by default after the appellant failed to enter a notice to defend the

action. Summons in

the action had been served by the sheriff by affixing them to the door at the registered address of the appellant.

In its application

for rescission of judgment, the appellant averred that no summons was received by any of its employees and that

it could not have been

served at its registered address since the service was done during business hours and employees would have

been present at the said

address making it unnecessary to affix it to the door. The appellant only became aware of the default judgment when a warrant of execution was served on its managing director on 17 May 2018 and the rescission of judgment was launched thereafter only to be heard and dismissed on 19 July 2018. In an affidavit filed for the appellant, detailed reasons are advanced as a defence to the action by the respondent.

3.

It is trite that a rescission of judgment granted by default is granted on satisfaction of two requirements, to wit, a satisfactory explanation by the applicant on why he or she did not defend the action and existence of a valid defence to the action itself.

Rule 49 of the Magistrates

Court Rules provides,

(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 request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A).

(2) ...

(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."

[Own emphasis].

4.

In respect of the above, the court below remarked that the reasons advanced for the rescission are reasonable and understandable.

It however proceeded to dismiss the application for reason that failure to attach a company resolution mandating the managing director was fatal to the application. It appears the court did not go further to entertain the aspect of the managing director of the appellant who deposed to the

affidavit as being a person affected by the default judgment.

5.

The fact that the managing director of the appellant failed to attach a company resolution mandating him to act on its behalf to his affidavit was raised for the first time by the respondent on the date of the hearing as a point in limine, and this was only after the appellant had addressed the court on why a rescission application should be granted. It is evident that the respondent was well prepared in this argument as he referred to no less than three authorities in support of his argument. Whereas the appellant had indeed not attached a company resolution as contended, he had alleged in his affidavit that he was a managing director of the appellant and that he was “duly authorised to launch this application and depose to the founding affidavit on behalf of the applicant and generally represent the applicant in these proceeding by virtue of my appointment and employment.”

6.

Relevant parts of Rule 52 of the Magistrates Court Rules which deals with representation and substitution of the parties provides,

(1) (a) A party may institute or defend and may carry to completion any legal proceedings either in person or by a practitioner.

(b) A local authority, company or other incorporated entity in doing so may act through an officer thereof authorised by it for that purpose.

(c) ... (d)

...

(2) (a) It shall not be necessary for any person to file a power of attorney to act, but the authority of any person acting for a party may be challenged on notice by the other party within 10 days of such party becoming aware that such person is so acting or with the leave of the court on good cause shown at any time before judgment.

(b) If a person's authority to act for a party is challenged, he or she may not, without the leave of the court, so act further until the court is satisfied that he or she has authority so to act, and the court may adjourn the hearing of the proceedings to enable him or her to do so.

[Own emphasis]

7.

It seems as if in the quest to win the battle, the purpose of this rule was lost. The existence of this rule is not to help any party to the proceedings to win or lose the case through technicalities, but to prevent any person whose name is cited in the process from thereafter repudiating the process and denying his authority for the issue of the process, and also to prevent persons from bringing an action in the name of a person who never authorized it.[1] It is for this reason that this rule is not punitive in its wording, but gives allowance for the party whose authority is challenged, to avail the necessary authorisation before judgment can be handed down.

8.

A party that uses the rules as his ammunition should also make sure that he or she uses the same rules as his shield. Had the respondent been mindful of this principle, this matter would not have dragged to where it is today. The respondent was well within its rights to challenge the authority of the deponent to the affidavit attached in support of the appellant's application, but this should have been guided by Rule 52 of the Magistrates Court Rules[2]. In terms of Rule 52 (2) (a), any challenge to the authority of the managing director should have been brought within 10 days after the respondent became aware that he was acting on behalf of the appellant. This action can only be brought by way of notice to the other party. The respondent points in limine were raised only of the date of hearing, more than 10 days after it became aware of the application and this was done without any notice to the appellant.

9.

In Eskom v Soweto City Council[3] Flemming DJP held "The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid

undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney... If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.”

10.

In Circle

Construction (Pty) Ltd v Smithfield Construction[4]

the court of appeal

had to consider a ruling by the magistrate based on apparent lack of authorisation by the litigant. After the close of plaintiff's case,

the defendant applied for, and was granted, absolution from the instance. The reason was that, inasmuch

as neither of the witnesses

called were employed by plaintiff company in a representative capacity (one being a salesman in the

employ of the company, and the

other having no relationship with the company), and inasmuch as there was no evidence on record

of any meetings of the company

regarding the case and no resolution empowering the salesman to represent the company, the plaintiff

company could not be said to be

before the court. This point had not been canvassed in the pleadings and was raised for the first

time at the time of the application for

absolution. On appeal, the court set aside the absolution granted by the magistrate and

remitted the matter back the trial to continue.

11.

Brand JA held in

Unlawful Occupiers,

School Site v City of Johannesburg,[5]

“now that the new Rule 7(1)

remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure

followed by the

appellants in this matter, i.e. by way of argument based on no more than a textual analysis of the words used by

a deponent in an attempt

to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation,

which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, be answered only in the negative.”[6]

12.

When the court a quo allowed this challenge to be raised in a manner that can only be described as irregular, and did not extend the opportunity to allow the appellant to prove the authorisation through postponing the matter, as envisaged by Rule 52,[7] it deprived itself of the opportunity to have insight of the company resolution that apparently already existed at the time of the hearing, the same resolution that the managing director was referring to when he alleged in his affidavit in support of the application that he was “duly authorised to launch this application and depose to the founding affidavit on behalf of the applicant...”

The said resolution was made available to us as the appellant proved its argument that had the court below allowed a postponement, a resolution would have been made available. The said resolution was dated 17 May 2018, some two months before the date of the hearing.

13.

For the reason that this matter can be decided without deciding on the validity of the second affidavit filed for the appellant by the managing director, we do not deem it necessary to make a pronouncement on whether it was a properly sworn statement. We also note that the contents thereof do not allege anything substantially new or different to what already existed in the first affidavit in support of the rescission

application.

14.

It is very clear that

when the ruling was made by the court below, it was after it was fully addressed on the merits of the application.

The presiding

officer also expressed a view on the reasonableness of the application or the prospects of success but chose to dismiss the

application for reasons above. I do not deem it necessary to revert the matter back just for the court below to now express a ruling in

line with what it already expressed. Reverting the matter just for that exercise as requested by the respondent, who continues to enjoy

the existence of a default judgment in his favour, would in my view be an unnecessary judicial yoyo at the expense of the litigants and

is not be in the interests of justice.

15.

Consequently, the

following order is made:

1.1

Appeal is upheld with costs.

1.2

The order of the court

below is set aside and replaced with the following order:

“Application for the rescission of judgement granted against the applicant in favour of the respondent under case no. MRCC 151/16 on 14 September 2018⁷ is allowed with costs.”

TV RATSHIBVUMO

ACTING

JUDGE OF THE HIGH COURT

I

agree.

MBG LANGA

ACTING JUDGE OF THE HIGH COURT

FOR

THE APPELLANT: ADV AD THEART

INSTRUCTED

BY: PRINSLOO-VAN DER LINDE ATTORNEYS

Care

of JOHAN ALBERTS ATTORNEYS

MIDDLEBURG

FOR

THE RESPONDENT: ADV WR DU PREEZ

INTRUSCTED

BY: POTGIETER & BEEKEN ATTORNEYS

Care
of VAN DEN BERG & KOEKEMOER
DATE
HEARD: 07 JUNE 2019

JUDGMENT

DELIVERED: 21 JUNE 2019

- [1] See *Texeira v Industrial and Mercantile Corporation* 1979
- (4) SA 532 (O) at 539C–D.
- [2] Similar provisions in Superior Court Rules are contained in Rule 7.
- [3] 1992 (2) SA 703 (W) at 705 D-E and 706 B-D.
- [4] 1982
- (4) SA 726 (N).
- [5] 2005
- (4) SA 199 (SCA) paragraphs 14-16
- [6] See also *ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31 (KZP)
- [7] This has been referred to as Rule 7 of the Superior Court Rules – see footnote 2 above.

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