

SOUTH AFRICA / JUDGMENT

Masipa v Mahlathi and Another (A264/18) [2020] ZAGPPHC 203 (4 June 2020)

[2020] ZAGPPHC 203

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa, F. Botes

CASE / FILE NUMBER

A264/18

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: A264/18

In

the matter between:

TEBOGO

ROBERT MASIPA

Appellant

and

MAMPE

AGNES MAHLATHI

First

Respondent

MZIMKULU

LEONARD MAHLATHI

Second Respondent

JUDGMENT

BAQWA J AND BOTES AJ concurring

INTRODUCTION

1 In a rather unusual manner this case is both an appeal against the refusal of a rescission of judgment in terms of Section 36 of the Magistrate's Court Act 32 of 1944 read with Rule 49 of the Magistrate's Court Rules and a review application of a judgment granted on 4 April 2018 (the default judgment). The Appellant seeks that we deal with both applications alternatively.

CONDONATION

2 Both the Appellant and Respondents have also brought separate applications for condonation for non-compliance with Rule 50(9) of the Uniform Rules of Court. I do not find it necessary to deal with those applications for condonation as both applications are not opposed and for that reason the proper order should be that they are granted with no order as to costs.

APPEAL v REVIEW

3 In this judgment I have dealt with the matter as an appeal. Dealing with the matter as an appeal is dispositive of both the appeal and review issues. If the appeal succeeds that would enable the Appellant to defend the action against him, thus disposing of the need to review the judgment of 4 April 2018.

4 Another reason for dealing with this matter as an appeal is that I am not convinced that the matter ought to be dealt with in terms of the review procedure due to the fact that in the judgment of 4 April, the Magistrate was quite explicit in his judgment when he stated that he was granting the judgment by default due to the failure of the Defendant to enter appearance to defend. The physical presence of the Appellant at that hearing did not, therefore, preclude the Magistrate from continuing to grant judgment by default.

5 The appropriate step to take for the Appellant to take as advised by the Magistrate on 4 April 2018 was to apply for rescission of judgment which resulted in the judgment of 4 June 2018 which is the subject of this appeal.

BACKGROUND

6 The Respondents occupied Erf 6370 Soshanguve South, Pretoria, which is their erstwhile residence. The said property had been mortgaged as security for a bank loan which the Respondents failed to pay. The Appellant purchased the said property when it was auctioned by the bank. The Respondents allege that they were unlawfully evicted by the Appellant from the property.

7 The Respondents further allege that the Appellant, in the course of removing their movable from the premises, damaged some of the movable such as furniture and household contents. They aver that the Appellant removed the said the said movables and transported them to an unknown location.

8 The Respondents instituted an action at the Pretoria North Magistrates Court against the Appellant in which they claimed payment in the sum of R195000.00 as damages arising out of the removal and/or damage to their movable property.

9 According to the Sheriff's return of service, the summons was served at a tavern owned by the Appellant on one David Maisela, a tenant.

10 According to the Appellant he did not receive the summons and only became aware of the action against him when he was personally served with a Notice of Set Down of default judgment on 7 March 2018, which notified him that the matter was enrolled for hearing on 4 April 2018.

11 The Appellant attended in Court on said date to defend the case but the Presiding Magistrate at the Court a quo denied him the opportunity to do so because he had not entered appearance to defend as required by the Magistrate's Court Rules.

12 The First Respondent who was also present in Court proceeded testify that she had lost household goods at the instance of the Appellant. She also stated that she could only estimate what the value of the goods were, the Court a quo received the evidence and estimates and granted judgment in the sum of R80000.00 without explaining how it had reached the said amount. He also awarded the Respondents interest and costs on a party and party scale.

13 The Appellant applied for rescission of judgment mainly based on two reasons. He averred that he was not in wilful default as he was not served with the summons. The only document he had received was the Notice of Set Down. Secondly, he had a bona fide defence in that he had entered into an agreement with the Second Respondent in terms of which the Second Respondent would vacate the property with the assistance of the Appellant. The Appellant did indeed assist the Respondents and stored the Respondents' property in his garage for three months. At the end of that period the First Respondent accompanied by two unknown men cause to collect the aforesaid movables.

THE LAW

14 Section 36 (1) (a) of the Magistrate's Court Act 33 of 1944 provides as follows:

"36 What judgments may be rescinded

- (1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-
 - (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted."

It will therefore be necessary to consider whether the judgment against the Appellant was granted “in the absence of the person”.

15 Regarding the issue of “good and sufficient cause shown” in an application for rescission the dictum in the matter of Chetty v Law Society, Transvaal 1985

(2) SA 756 (A) 1985 (2) SA 746J to 765 C is apposite:

“The Appellant’s claim for rescission of judgment confirming the rule nisi cannot be brought under Rule 31 (2) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown. (See De Wet and Others v Western Bank 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank SA Ltd 1924 OPD 163.)

The term “sufficient cause” (or good cause”) defies precise or comprehensive definition, for many and various factors required to be considered. (See Cairn’s Executors v Gaarn 1912 AD 181 at 186 per INNES JA.) but it is clear that in principle and in the long-standing practice of our courts two essential elements “sufficient cause” “for rescission of a judgment by default” are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
 - (ii) that on the merits such party has a bonafide defence which, prima facie, carries some prospect of success (De Wet’s case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980
- (4) SA 799 (A); Smith No. v Brummer N.O and Another; Smith N.O v Brummer 1954 (3) SA 352 (O) at 357-8).”

REASONS

FOR JUDGMENT

16 The reasons for judgment appealed against were furnished by the Presiding Magistrate as follows:

“For the record, the application for rescission was dismissed with costs. It was based on the premise that there had been no proper notification to the Applicant, and as result his failure to challenge the case as a Defendant was not due to any wilful default on his part.

Applicant had argued that he was not aware of the proceedings, as the summons was served on another person who did not pass it onto him. This resulted in his failure to enter a defence and thus the judgment in default.

The Court, finding that he was actually present in Court on that day of judgment and also that the service on him complied with the provisions of Rule 9, held that there was no merit to his submissions and dismissed the application with costs.

The application was thus dismissed.”

WILFUL DEFAULT AND SUFFICIENT CAUSE

17 The reasons given by the presiding Magistrate Chokoe demonstrate that there was a total misdirection regarding what had taken place on the 4th of April when the judgment by default was granted. The Magistrate Ramahanelo never stated that there was no merit in the submissions by the Appellant. The Appellant was simply denied a right to be heard because he had not entered an appearance to defend.

18 On the 4th of April the Magistrate simply proceeded without taking cognisance of the Appellant in that Appellant never participated in the default judgment proceedings which were conducted by the Magistrate together with the First Respondent and her legal representative until the judgment was delivered. De Jure, therefore the judgment was granted “in the absence” of the Appellant thus bringing him within the ambit of the provisions of Section 36 referred to above.

19 What this implies is that the fact that he never received the summons, which appears from the return of service by the Sheriff was never disputed. Put differently, the absence of wilful default on the part of the Appellant was never put in issue. On the contrary, his admission that he was served personally with the notice set down of the default judgment and his subsequent attendance in Court in response thereto is confirmation that he had every intention to defend the case against him.

20 In the matter of *Harris v ABSA Bank Ltd Volkskas* 2006 (4) SA 527 (T) in a Full Court decision Moseneke J (as he then was) said the following:

“8. Before an applicant in a rescission of judgment application can be said to be in “wilful default” he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to reform from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause.”

21 It is quite apparent from the facts of this case that the Appellant did not receive the summons personally and there has been no evidence to suggest otherwise. It was therefore a misdirection for the Court a quo to cling to the provisions of 9 regarding service of process in the Magistrates Court and to ignore the requirements for rescission of judgment which are also set out in the Harrison decision (*supra*). The Court a quo seems to have followed the route of penalising the Appellant for not following the rules and procedures and disregarding the circumstances which were beyond his control.

22 In the circumstances it has not been suggested, nor can I find that the Appellant was wilful and/or negligent in not entering an appearance to defend.

BONA FIDE DEFENCE

23 The second stage of the inquiry is whether the Appellant has raised a bona fide defence to the action against him.

24 In paragraph 10 of the Harris decision, Moseneke J stated thus:

"10. A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or 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 important consideration, and in the light of all the facts and circumstances of the case as a whole.'

De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd (supra) at 711D."

25 As alluded to above, the Appellant's version is that he did not receive the summons and this version is corroborated by the Sheriff's return of service, which indicates that the summons was served on Maisela, a tenant. It is reasonably possibly true that Maisela did not bring the summons to Appellant's attention. Moreover, his actions after receiving the notice of setdown which was served on him personally by attending Court on 4 April 2018 are a clear indicator of his intention to defend the action. At that time, the Appellant was not aware that he ought to have entered an appearance to defend, as the notice of setdown did not contain such information.

26 It is quite apparent that the Court a quo on 4 June 2018 did not even give consideration to the defence raised by the Appellant. This was a further misdirection by the Court a quo.

27 The Appellant's defence is that he entered into an agreement with the Second Respondent in terms of which the Respondent agreed to vacate the property in question whereupon the Appellant assisted the Respondents with the relocation by removing their movables with Second Respondent's consent and storing same at his garage for a period of three months.

28 After the said period, the First Respondent, accompanied by two males arrived at the Appellant's property and removed the aforesaid movable property.

29 It is trite that an Applicant for rescission must demonstrate an existence of a substantial defence and not necessarily a probability of success. It is sufficient that in his evidence he shows a prima facie case which raises triable issues. The issues which the Appellant raised suggested disputes of fact which ought to have persuaded the Court a quo to allow the said issues to be ventilated in Court by granting the rescission application.

CONCLUSION

30 In the circumstances I find that the Court a quo erred in its dismissal of the Appellant's application for rescission.

31 The Court a quo ought to have found the existence of both the absence of wilful default and the presence of bona fide defence.

THE ORDER

32 In the result, I propose that the following order be made:

32.1 The appeal is upheld with costs.

32.2 The application for condonation by both parties is granted with no order as to costs.

32.3 The judgment and order of the Court a quo dated 4 June 2018 is set aside and substituted with the following:

32.3.1 The application for rescission of judgment is granted;

32.3.2 The Applicant is granted leave to file his appearance and plea within 20 (twenty) days from date of this order; and

32.3.3 The Respondents are ordered to pay the Applicant's costs, jointly and severally, the one to pay, the other to be absolved.

I agree

F. BOTES

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

It is so ordered

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on

: 4 June 2020

Judgment

delivered : 4 June 2020

Appearances:

For the Appellant

: Adv. S.L Cliff

Instructed by

: Andre Grobler Attorneys

For the Respondents : Mr L.P Tawana

Instructed by

: Makapan Attorneys

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