

SOUTH AFRICA / JUDGMENT

Pico v Malgas (A3114/2018) [2019] ZAGPJHC 214 (31 May 2019)

[2019] ZAGPJHC 214

COURT

South Gauteng High Court, Johannesburg

BEFORE

M B Mahalelo, H Ngomane

CASE / FILE NUMBER

A3114/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3114/2018

In the matter between:

PICO OGOPOLENG CATHRINE Appellant

and

MALGAS MOLEBOGENG LETITIA Respondent

J U D G M E N T

MAHALELO, J:

- [1] On 13 February 2018 the appellant launched an application for rescission of a judgment which had been granted by default in favour of the respondent on 15 June 2009 by the clerk of the Magistrate's Court in Fochville. The application for rescission was opposed by the respondent.
- [2] On 27 March 2018 the magistrate dismissed the application for rescission of the judgment. The magistrate furnished her reasons for the dismissal on 16 May
2018. The present appeal is directed against the judgment and order of the magistrate dismissing the application for rescission.
- [3] Section 36(1) of the Magistrate's Court Act 32 of 1944 empowers a court:

- (a) to rescind or vary any judgment granted by it in the absence of a person against whom that judgment was granted;
- (b) to rescind or vary any judgment granted by it which was void ab origine, or which was obtained by fraud or by mistake common to the parties;
- (c) to correct patent errors in any judgment in respect of which no appeal is pending; and
- (d) to rescind or vary any judgment in respect of which no appeal lies.

[4] The following facts emerge from a reading of the affidavits filed in the application for rescission:

- (a) The appellant was served with the summons in May 2009.
- (b) She approached her Attorneys Cass Pieterse Inc to defend the matter.
- (c) She was advised to relax and that she will hear from them.
- (d) She called and visited their offices often and was informed that they will call her if there was a need.
- (e) No plea was filed by her Attorneys.
- (f) On 09 June 2009 the respondent filed a request for default judgment with the clerk of the court.
- (g) Notwithstanding that the claim expressed in the summons was for payment of unliquidated damages in the amount of R100 000 no oral evidence or affidavit was placed before the clerk of the court in support of the application for default judgment.
- (h) On 15 June 2009 the clerk of the court granted judgment by default in favour of the respondent in the amount of R100 000 together with interest and costs.
- (i) On 11 July 2009 a warrant of execution was issued against the appellant and served on her on 13 July 2009. Pursuant thereto her movable assets were attached. On 16 July 2009, her husband, to whom she is married in community of property laid a claim to the items and they were released from attachment.
- (j) In a bid to recoup the unsatisfied debt, the respondent in November 2017 lodged a section 65 A (1) application in the Magistrate's Court. The appellant appeared in court on 5 December 2017 and the matter was postponed to 12 December 2017 for a financial enquiry. The appellant failed to appear in court on that day and a warrant for her arrest was authorised which was subsequently cancelled on 12 December 2017. On 29 January 2018 the appellant was served with the second warrant of execution.
- (k) The application for rescission of the default judgment was launched on 13 February 2018.

(l) The appellant approached her attorneys from the time she received the summons and instructed them to file a plea in order to defend the action.

(m) The appellant all along demonstrated her wish to defend the action.

[5] In consideration of all the facts placed before court in this appeal, I have reservations about accepting that the appellant's explanation of the default is satisfactory. I have no doubt that she wanted to defend the action throughout and that it was not her fault that default judgment was granted against her. Obviously she became aware of the judgment that was granted against her in her absence when she was served with warrants of execution but the reason why she did not act on them then is not explained at all. Whatever explanation she is trying to give for her failure to act upon the two warrants of execution cannot be regarded as reasonable at all. The inadequacy of the appellant's explanation in this regard may well justify a refusal of rescission on that account unless the weak explanation is cancelled out by the appellant being able to put up a bona fide defence which has good prospects of success.

[6] The appellant has not merely a good prospect of success but an answerable case at the procedural level because the default judgment of an unliquidated amount of money should have been referred to the magistrate by the clerk of the court.

[7] In terms of Rule 12(4) of the Magistrates' Court Rules of Court, the clerk of the court shall refer to the court any request for judgment for unliquidated amount and the plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the claim whereupon the court shall assess the amount recoverable by the plaintiff and shall give an appropriate

judgment.

[8] Normally the quantum of damages should be established by oral evidence, but in special circumstances the court may accept evidence on affidavit. See *New Zealand Insurance Co Ltd v Du Toit* 1965

(4) SA 136 (T). In the present matter there was no oral evidence led and no damages affidavit presented by the plaintiff. Given that

there was no evidence on quantum; the default judgment ought not to have been granted.

[9] It follows that upon a consideration of all the relevant factors before her, the magistrate ought to have granted the application for rescission of judgment. In the circumstances the appeal must succeed and the magistrate's order issued on 27 March 2018 must be set aside.

[10] The appeal is not opposed, there is no reason why I should order costs against the respondents.

[11] In the result the following order is made:

1. The appeal is upheld.

2. The order of the magistrate issued on 27 March 2017 is hereby set aside and replaced with the following order:
 - (a) Judgment granted by default on 15 June 2009 is hereby rescinded and set aside.
3. No order as to costs.

M B MAHALELO

JUDGE OF THE HIGH COURT

I agree

H NGOMANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT: ADV PRETORIUS

INSTRUCTED BY: YAMKELA BUNGANE ATTORNEYS

FOR THE RESPONDENTS: NO APPEARANCES

DATE OF HEARING: 06 MAY 2019

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