

SOUTH AFRICA / JUDGMENT

Jomane Eiendomme (Pty) Ltd v Van Zyl N.O and Another (M348/2020) [2023] ZANWHC 92 (22 June 2023) [2023] ZANWHC 92

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid, A Reddy

CASE / FILE NUMBER

M348/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: M348/2020

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional

Magistrates: YES/NO

In the matter between:-

JOMANE

EIENDOMME (PTY) LTD

(Registration

Number: 1[...])

Applicant

and

MAGISTRATE

EM VAN ZYL N.O.

First

Respondent

JAN
LODEWYK VOSLOO
Second
Respondent
ORDER
QUORAM: REID J et
REDDY AJ
The following order is

made:

i)
The application to review and set aside the order of the Magistrate dated 27 November 2019 is dismissed.

ii)
The Second Respondent's declaration is to stand as the particulars of claim in the Magistrates Court, Rustenburg under case number 5508/17.

iii)
Further process and/or pleadings are to be filed in terms of the Rules of the Magistrates Court.

iv)
The cost of this application is cost in the cause.

JUDGMENT

FMM REID J:

Introduction

- [1] This is an application in terms of Rule 53 of the Uniform Rules of the High Court to review and set aside the order dated 27 November 2019 made by the Acting Magistrate EM van Zyl in the Magistrates Court, Rustenburg under case number 5508/17.
- [2] The order sought to be set aside directs the second respondent to file a declaration in action proceedings in the court a quo.
- [3] The aforesaid order was made in terms of the Magistrates Court Act 32 of 1944 (the Magistrates Court Act) and in terms of the order, the applicant (Jomane Eiendomme) was ordered to file a declaration within ten (10) days from 27 November 2019. I will refer to this order as the "declaration order" or the "order under review". Jomane Eiendomme indeed filed a declaration as ordered.
- [4] Jomane Eiendomme is represented by Adv HP Wessels whilst Vosloo is represented by Mr HWN Keeny.

Application for condonation

- [5] The applicant requests condonation for the late institution of the review application, and the respondent objects to the granting of condonation. In a nutshell, the case of the applicant in relation to the application for condonation is that the judgment came to the attention of their legal team at a late stage, and the lockdown in Covid 19 overpassed the events.
- [6] The respondents contend that the applicants' representative was in Court when the rescission order was handed down and had become aware of the content thereof during 2019.
- [7] There is a factual dispute about the date when the declaration order came to the attention of the applicant. Despite the factual dispute, it is necessary to have regard to the other factors relevant in whether condonation should be granted or not. These factors include a prospect of success and whether there is any reason in the promotion of justice to allow the dispute to proceed.
- [8] Counsel of both parties agree that there is no case-law, Court Rules or procedures in place which deals with the issue at hand, namely the status of a rescission order after a consent order was made. I have also not come across any such case-law.
- [9] It is in the interest of justice that condonation be granted to establish and/or confirm the procedural aspect after a rescission order has been successfully granted against a judgment which was obtained by consent and agreement between the parties.
- [10] Condonation for the late filing of the review application is consequently granted.

The factual background

- [11] In order to just and fairly determine the way forward, it is necessary to set out the factual background against which the judgment by agreement was successfully rescinded.
- [12] Vosloo was the plaintiff in the Court a quo and instituted proceedings against Jomane Eiendomme (Pty) Ltd which was cited as the first defendant. The proceedings were instituted on the basis of a written acknowledgement of debt in terms of Section 58 of the Magistrates Court Act. The acknowledgement of debt was signed by Cornelius Alwyn Botha with identity number 5[...] (Botha Senior) on 14 July 2016, who was the sole director of Jomane Eiendomme (Pty) Ltd at that stage.
- [13] On 25 July 2017 Vosloo applied to the Magistrates Court requesting a judgment in terms of Section 58 of the Magistrates Court Act on the terms as agreed to by Botha Snr. In the request for judgment in terms of Section 58 of the Magistrate's Court Act, Vosloo cited "Jomane Properties (Reg No 1[...])" as the 1st (first) defendant and Botha Snr as the 2nd (second) defendant.
- [14] This judgment was granted in terms of Section 58 of the Magistrates' Court Act on the basis that the defendants have given written consent to the judgment. Section 58 of the Magistrates' Court Act reads as follows:

“58 Consent to judgment or to judgment and an order for payment of judgment debt in instalments

- (1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him or her of a summons demanding payment of debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the court may, on the written request of the plaintiff or his or her attorney and subject to subsection (1B)-
- (a) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and
- (b) if it appears from the defendant's written consent to judgment that he or she has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he or she has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1).”

(own emphasis)

- [15] The defendants did not receive any notice of set down of the application for the order by agreement, on the basis that service on the plaintiff is not required to notify the defendant in terms of Section 58 of the Magistrates’ Court Act. Judgment was consequently duly granted in the absence of the defendants on 25 July 2017.
- [16] This judgment was granted in the amount of R273,764.41 and is calculated as follows:
- 16.1. The outstanding balance of the debt in the amount of R288,947.63;
- 16.2. Legal cost on a scale of attorney and own client (to be taxed) in the amount of R8,873.95;
- 16.3. Interest at 10.25% from 26 March 2015 to 29 June 2017 in the amount of R66,942.83;
- 16.4. Minus payments made by the debtor in the amount of R91,000.00.
- [17] It was further ordered (as agreed) that the defendants are to pay the judgment debt and costs in monthly instalments of R13,000.00 with effect from 7 August 2016 and after that, on the 7th of every succeeding month in accordance with the written offer of payment until the outstanding balance of debt and costs has been paid in full. This was in accordance with the terms set out in the agreement to the judgment.
- [18] In the affidavit filed in support of the Section 58 judgment, the deponent (who is the attorney of record for Vosloo) states that the debt originated from a loan incurred by the son of Botha Snr, namely Botha Jnr who is an employee of Jomane Properties. The underlying cause of the debt was an Incidental Credit Agreement as defined in the National Credit Act 34 of 2005 (NCA). The deponent declares that it was not necessary for Vorster to register as a credit provider in terms of section 40(1) of the NCA as the debt was less than R500,000.00 (Five

Hundred Thousand Rand). It is also stated that the asset value or annual turnover of Jomane Eiendomme exceeds R1,000,000.00 (One Million Rand) and that the NCA is not applicable to the loan. It was further certified that Vorster adhered to the provisions of Sections 129(1) and 130 of the NCA and Section 57(1) of the Magistrates Court Act with reference to a letter of demand served per hand on 12 July 2016.

- [19] The correspondence between the parties reflect that on 15 July 2019 the attorneys for Jomane Eiendomme and Botha requested the attorneys of record for Vosloo to abandon the Section 58 judgment against Jomane Eiendomme on the basis that the loan agreement was entered into between Vosloo and Botha Junior and the acknowledgement of debt was entered into between Vosloo and Botha Senior. On this basis, so the attorney of record for Botha submitted, there is no nexus between Vosloo and Jomane Eiendomme in relation to the debt. The attorneys of record for Vosloo submitted that both Botha Senior and Botha Junior signed the acknowledgement of debt and both Jomane Eiendomme as well as Botha Senior bound themselves as sureties in the acknowledgment of debt.
- [20] In the Resolution of Jomane Eiendomme, as passed by Botha Snr as the sole director of Jomane Eiendomme, it was recorded that Botha Snr was diagnosed with Alzheimer's Disease and Dementia during March
2015. He was the sole director of Jomane Eiendomme. Mrs Botha took over the management of the affairs of the Company from approximately 8 April 2015 and was mandated to take over the full management and responsibilities of the Companies' affairs. During 8 July 2019 Jomane Eiendomme became aware of the Section 58 judgment in favour of Vosloo.
- [21] Jomane Eiendomme proceeded to apply for the rescission of the Section 58 judgment in terms of Rule 49(1) and 49(8) of the Magistrate's Court Act. In the order of the Court a quo granting a rescission of the Section 58 judgment as quoted above, the Court found that Jomane Eiendomme did not act wilful / negligent when the judgment was granted and that there is a reasonable prospect of successfully defending the claim.
- [22] In the application for rescission, in addition to submitting that the Section 58 judgment was void ab initio or alternatively granted in error, it is stated that Botha Jnr entered into the loan agreement in his personal capacity. The deponent, Mrs Botha declared that Botha Snr "stepped in" and signed the Acknowledgement of Debt in his personal capacity to repay the debt. The identity of the debtor is thus disputed.

The acknowledgement of debt

- [23] The acknowledgment of debt is contained in a document titled "Acknowledgment of Debt and Undertaking to pay debt" by Cornelius Alwyn Botha with identity number 5[...] in which he acknowledges as follows:

"I acknowledge that I am indebted to the Plaintiff in the sum of R288,947.63 (Capital excluding costs and interest) and undertake to pay:

1. The outstanding balance in MONTHLY INSTALMENTS / OUTSTANDING BALANCE of R13,000 per month from 07/08/2016.”

[24] In the application for rescission, the cause of action in the main dispute, is illustrated as being two-pronged:

24.1. Vosloo in his personal capacity lent an amount of R300,000.00 (Three Hundred Thousand Rand) plus interest at the rate of 10.25% per annum

of R32,263.54 (Thirty-Two Thousand Two Hundred and Sixty-Three Rand Fifty-Four Cents) to Botha Junior on 11 June 2016; and

24.2. Botha Senior signed an Acknowledgement of Debt and Undertaking to Pay Debt in terms of a Consent to Judgment in terms of Section 58 of the Magistrates' Court Act. In this Acknowledgment Of Debt the defendant is cited as Jomane Eiendomme with no reference to the type of entity (eg private company or close corporation).

[25] In terms of the Acknowledgement of Debt it is specifically stated in paragraph 9 that “Should I fail to honour my undertaking in terms of this document, I consent to judgment in terms of Section 58 of Act 32 of 1944 for the outstanding debt plus costs”.

[26] Of further significance, in bold, the following is stated:

“Should this acknowledgment of debt be signed by a representative on behalf of a Close Corporation, a company or trust as Defendant, the representative hereby binds himself as surety and co-principal debtor on behalf of the Defendant in favour of the Plaintiff for all obligations of the Defendant in terms of the Acknowledgement of Debt.”

[27] In the replying affidavit to the rescission application in the Court a quo Mrs Botha avers that her husband Botha Snr did not have the authority to bind the Company Jomane Eiendomme. She states that the registration number of Jomane Eiendomme has not been cited in the proceedings, and that the document reflected that Botha Snr

bound himself personally to the debt. In support hereof she refers to the wording of the Acknowledgement of Debt which refers to Botha Snr in the first person.

[28] In the ruling on the rescission application, the Court a quo found as follows:

“The Applicant indicate that the 2nd defendant (Jomane Eiendomme) in the main action intended to sign an acknowledgement of debt to pay monies owed by his son, he had no authority and at no stage indeed intended to bind the Company to such agreement and was at all times under the impression that the acknowledgement of debt he signed was to pay monies back on behalf of his son, who signed a loan agreement with the Respondent herein (Vosloo).”

- [29] In the rescission application the respondent (Vosloo) averred that the caveat scriptor rule should be applied in relation to the Acknowledgment of Debt. The Court a quo found that Jomane Eiendomme has set out a bona fide defence which might prove to be a successful defence to the claim during trial. The Magistrate then rescinded the Section 58 judgment to allow the dispute between the parties to proceed on trial.
- [30] Since summons was not issued and the Section 58 judgment obtained against Jomane Eiendomme and Botha Snr was granted on an ex parte basis, the parties were left with no pleadings to proceed to trial.
- [31] The Magistrate then, in writing, and with no application made by either party, mero motu ordered Vosloo to file a declaration in ten (10) days of the rescission order dated 27 November 2019. It is this order that Johmane Eiendomme seeks to set aside in review in these proceedings.

Proceedings in the Court a quo

- [32] A brief history of the proceedings in the Court a quo can be summarised as follows.
- [33] On 25 July 2017 Vosloo obtained a judgment against Jomane Eiendomme by consent and agreement between the parties in terms of Section 58 of the Magistrates' Court Act. I will refer to this judgment as the "judgment by agreement" or "Section 58 judgment" interchangeably.
- [34] The judgment by agreement dated 25 July 2017 was rescinded on application by Jomane Eiendomme (the rescission order). The rescission order was typed and signed by the Magistrate on 25 November 2019. The rescission order is not under review and reads as follows:
- "The Court after taking into account both applicant's and respondent's arguments on paper as well as orally, hereby grants the application for rescission of judgment as prayed for by the applicant as it is clear from the above evidence that there was no wilful default on the side of the applicant and that the applicant would have a bona fide defence should same be proved during trial. Cost is awarded to the applicant herein on a party and party scale."*
- [35] The Magistrate thereafter^[1] issued an order that Vosloo should file a declaration within 10 days (the declaration order). The declaration order was handwritten by the Magistrate and signed on 27 November 2017 and is the subject under review.
- [36] On 10 December 2019 Vosloo's attorneys served a declaration on the attorneys of Jomane Eiendomme, as ordered by the Magistrate. Jomane Eiendomme did not file a plea to the declaration, which lead to Vosloo causing a notice of bar dated 17 January 2020 to be served.

[37] On 21 January 2020 Jomane Eiendomme's attorneys served a notice in terms of Rule 60A(2) (b) of the Magistrates' Court Rules on Vosloo with an opportunity to remove two (2) irregular steps within 10 days of delivery of the notice. In the notice these two irregular steps are identified as:

37.1.1.

The declaration; and

37.1.2.

A notice of bar to deliver a plea which was served on 17 January 2020.

[38] The crux of this review application is to determine what the correct procedural step is after one party has obtained an order with the other parties' ostensible consent/agreement to a judgment in terms of Section 58 of the Magistrates Court Act, and that order by consent has successfully been rescinded.

[39] This review application will turn on two legal questions:

39.1. Whether the rescission order is dispositive of the dispute between the parties, and

39.2. Whether the Magistrate is procedurally correct in ordering that a declaration be filed (which in this instance triggered the filing of a plea on behalf of the defendant) and for litigation to proceed.

Grounds for review

[40] The grounds for review against the declaration order is that the declaration order is granted ultra vires and/or unlawful and/or constitutes a gross irregularity entailing an error of law by the Magistrate. It is argued on behalf of the Jomane Eiendomme by Adv HP Wessels that the aforementioned grounds cause the declaration order to be reviewed and set aside in terms of the provisions of Section 22 of the Superior Courts Act 10 of 2013 (SCA Act).

[41] Both parties' counsel agreed that the successful rescission of the order granted in terms of Section 58 of the Magistrates Court Act left the parties at an impasse on the basis that no summons was issued and no pleadings are before Court to air the disputes between the parties. Counsel for both parties agreed

that the Magistrates Court Act and the Magistrates Court Rules do not provide for a process on which the parties can proceed to further ventilate the litigation, or whether the rescission order brings the proceedings to an end. In summation:

41.1. The counsel of Jomane Eiendomme submits that the respondent is to issue summons afresh; and

41.2. Vosloo's counsel submits that the applicant (as defendant in the Court a quo) should proceed in filing a plea to the declaration filed by the Vosloo (as plaintiff in the Court a quo) as a consequence of the declaration order under review.

[42] This judgment subsequently regulates the process to be followed in this matter after the Section 58 judgment by agreement has been rescinded.

The legal position

- [43] The well-established common-law rule is that once a Court has duly pronounced a final judgment and order, it has itself no authority to set the judgment and order aside or to correct, alter or supplement it. The Court becomes *functus officio* and its authority over the subject-matter ceases. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Thobejane v Premier of Limpopo Province* (unreported, SCA case no 1108/2019 dated 18 December 2020 at paragraph [6].
- [44] The second reason why a Court which has duly pronounced a final judgment and order has no authority to set it aside or to correct, alter or supplement it, lies in the principle of finality of litigation which is expressed in the maxim *interest rei publicae ut sit finis litium*. See *Freedom Stationary (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A-B.
- [45] On the basis of the *functus officio* rule, Adv Wessels argues on behalf of Jomane Eiendomme that the rescission order has final and definitive effect and that the Section 58 judgment has been rescinded "once and for all", resulting in the issue between the parties to be *res judicata*. The argument is further that the Magistrate acted *ultra vires* in making the order that a declaration should be filed.
- [46] It is trite law that Magistrates' Courts Rules are subordinate legislation and cannot alter the common law. See *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 492 E-G and *Computer Brilliance CC v Swanepoel* 2005 (4) SA 433 (T) at 442C. On the basis it is argued by Adv Wessels that the Court a quo erred in granting the order under review.
- [47] It is further argued on behalf of Jomane Eiendomme that the order to file a declaration, constitutes a gross irregularity and stand to be reviewed and set aside in terms of the provisions of Section 22(1)(a) and (c) of the Superior Courts Act. It is argued that the correct procedure would be for Jomane Eiendomme to issue a simple summons afresh, on which Vosloo must file a notice of intention to defend and Jomane Eiendomme can then file a declaration within 15 days as per Rule 15(1) of the Magistrates' Court Rules.
- [48] To the contrary, it is argued by Mr Keeny on behalf of Vosloo that Rule 49(1) of the Magistrates Court Rules allows specifically that the Magistrate may rescind a judgment "on such terms as it deems fit". He argues that the Magistrate saw it fit to regulate the proceedings further in issuing the declaration order and that the Magistrate acted within the scope of Rule 49(1) of the Magistrates' Court Rules.

- [49] It is further argued on behalf of Vosloo that, for the application for rescission to succeed, Jomane Eiendomme need not only prove that there was a gross irregularity conducted by the Magistrate, but also that the gross irregularity led to Jomane Eiendomme suffering prejudice. See *Stemmer v Sabina & Sub-commissioner for Natives Johannesburg* 1910 TPD 479. The argument is that the Magistrate had the intention for the dispute to proceed to trial since the rescission of the judgment did not bring the matter to finality. In ordering that a declaration be filed, the Magistrate intended that the disputes between the parties be ventilated and advance to trial.
- [50] It is also argued by Mr Keeny on behalf of Vosloo that the object of rescinding a judgment is to restore an opportunity to the parties to air a real dispute. On this basis, it is argued with reference to *Securiforce CC v Ruiters* 2012 (4) TPD 320 at 328 that our Courts have remarked that a rescinded judgment is a nullity and neither advantage nor disadvantage can flow therefrom. It is argued that the rescission order is not a final order, and after the plaintiff has filed a declaration, the defendant is to file a plea to the declaration.
- [51] In addition to the argument that a rescission judgment is not a final judgment, it is argued by Mr Keeny that the plaintiff cannot issue a fresh summons, as it interruption of prescription under Section 15(1) of the Prescription Act 68 of 1969 would have caused the cause of action to lapse. He argues that the opportunity for Vosloo to issue summons have lapsed and the claim has become prescribed and this fact should favour the argument that the rescission judgment is not final, but with the purpose of airing the dispute between the parties.
- [52] In a judgment of this Court under case number CIV APP MG/17/2016 dated 9 November 2018 in the matter of *Gert Frederik Blom v Frederick Laker Geldenhuys* this Court dealt with a rescission application of a judgment that was acquired by consent between the parties in terms of Section 58 of Magistrates' Court Act. This Court placed emphasis on the fact that without derogating from the usual nature of a rescission application, the Court must also bear in mind any prejudice that might be occasioned by the outcome of a rescission application.
- [53] It is argued by Mr Keeny on behalf of Vosloo that the Magistrate has not become functus officio or acted ultra vires and that the order to issue a declaration was in fact a directive provided by the Magistrate to manage the process and proceedings in the matter going forward. In *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T) at 780H – 781A the Court held that the High Court has inherent powers to regulate its process as follows:

“A Court obviously has inherent power to control the procedure and proceedings in its Court. This is done to facilitate the work of the Court and enable litigants to resolve their differences in as speedy and inexpensive manner as possible. This has been recognised in many decided cases.”

Applying the legal principles

- [54] Section 34 of the Constitution of South Africa ensures that everyone has the right to litigation which includes the right to a procedural and substantively fair trial.

- [55] When a person obtains a judgment by agreement it follows logically that there is no need to issue a summons as it would be contra-productive since the parties agreed to the granting of a judgment. The agreement or consent is given that judgment may be taken against an entity or individual and the legal procedure makes provision for that in Section 58 of the Magistrates' Court Act. It is not expected, and cannot be reasonably expected, that the person who grants the consent will turn around and dispute the content of the consent to the judgment. What is even more unexpected, would be a situation where the judgment by consent has been rescinded and both parties are now left with a dispute but no legal mechanism to proceed the enforcement of the claim. This is what happened in this instance.
- [56] Should the agreement to a judgment be disputed after such judgment in terms of Section 58 has been obtained, the plaintiff will by necessity forfeit the date that the claim becomes enforceable and a valid defence of prescription might be raised to the institution of fresh simple summons proceedings. The prejudice to be suffered by Vosloo is thus tangible as his claim against Jomane Eiendomme would have become prescribed.

Is a rescission order final in nature?

- [57] The decision of whether an order rescinding a judgment is final or not, is the starting point in determining whether the Magistrate acted ultra vires and functus officio. Each case has to be determined on its own individual merits, having regard to the principles of fairness and justice.
- [58] If it is found that the rescission order is final, it follows that the Magistrate acted ultra vires and functus officio and the order has to be set aside.
- [59] Section 83(b) of the Magistrates' Court Act provides that a party may file an appeal against any order which has the effect of a final judgment. A final judgment grants finality in the dispute between the parties. A final judgment is the proverbial end of the road. It disposes of the disputes between the parties. This would be the case in instances where a rescission application is dismissed. The dismissal of the rescission order will stand and may be appealed against. See *Pitelli v Everton Gardens Projects* CC 2010 (5) SA 171 (SCA) at 176E. It may also, in certain circumstances, be that an order is rescinded and set aside.
- [60] In *Provincial Government North West and Another v Tsoga Developers CC and Others* 2016 (5) BCLR 687 (CC) ([2016] ZACC 9) the Constitutional Court, after referring to s 165(5) of the Constitution and the need to give effect to Court orders, held:
- "(O)nce the order has been made, it is an order like any other. That means it can only be set aside by means of a legally cognisable process like, for example, rescission."*
- [61] The legislature provides for the continuation of legal proceedings in Rule 49(1) of the Magistrates Court Rules, in specifying that an order may be reviewed, rescinded or set "on such terms as it deems fit".

- [62] The situation as it was prior to the rescinded judgment will in such a case resume. As such, a rescission of a judgment does not finally dispose of the matter between the parties and such an order cannot be final. See Jones and Buckle *The Civil Practice of the Magistrates Courts in South Africa*, Volume 1 at pages 589 and 591.
- [63] Having regard to the facts of the matter I hold the view that the rescission order did not bring the matter to finality. Instead, the rescission order allowed parties to proceed in ventilating the disputes and the wording of the rescission order clearly refers to a possible defence to the claim. In the instances where procedure has not been set out, and in the absence of a procedure, one cannot argue that the dispute itself is also absent.
- [64] Since the rescission order is not final, it follows that the Magistrate did not act ultra vires or functus officio.
- [65] On the basis that the dispute between the parties remain alive, it makes sense to me that the next step for Jomane Eiendomme is to file a plea (or any other consequential process) to the declaration, which would have been the legal position if a simple summons has been issued and a notice of intention to defend has been filed. This would provide a mechanism to air the disputes between the parties.
- [66] I cannot find that Section 58 of the Magistrates' Court Act is unconstitutional, as requested on behalf of Jomane Eiendomme.
- [67] The order of the Magistrate that a declaration be filed, is in accordance with the application of the legal principles of a fair and speedy trial, which includes cost effectiveness.
- [68] The plaintiff in the Court a quo has complied with the Court order a quo and filed a declaration in the periods allowed in terms of the Magistrates' Rules of Court. The defendant a quo should proceed with the furtherance of the dispute in filing a plea or other process within the period allowed in terms of the Magistrates' Rules of Court.

Cost

- [69] The application ventures in the fairly uncharted legal sphere where a judgment granted by consent, is rescinded. I cannot find that the applicant was incorrect in seeking legal clarity on the process, and in a similar vein cannot find any fault with the opposition of the application.
- [70] The normal cost order is that the successful party would be entitled to its cost. In this instance, I view the uncertainty in the legal position after a Section 58 judgment has been obtained and is now sought to be rescinded, and the uniqueness of this position, sufficient to deviate from the normal cost order.
- [71] The cost of this application should be cost in the cause as it would be the most fair to find that the party who, at the end of the day, is successful in either bringing the claim or defending the claim, should pay the costs of this application.

[72] I therefore find that cost should be cost in the cause.

Order:

[73] In the premises I make the following order:

ii) The Second Respondent's declaration is to stand as the particulars of claim in the Magistrates Court, Rustenburg under case number 5508/17.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree

A REDDY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING: 02 MARCH 2023 DATE OF JUDGMENT: 22 JUNE 2023 COUNSEL FOR APPLICANT: ADV H WESSELS COUSEL FOR RESPONDENT: ADV KEENY ATTORNEYS FOR APPLICANT: VAN ROOYEN TLHAPI WESSELS INC 9 PROCTOR AVENUE MAHIKENG, 2745 REF: VDT1/0030/CS INSTRUCTED BY: VDT ATTORNEYS ATTORNEY FOR RESPONDENT: MAREE & MAREE ATTORNEYS FOR ATTORNEYS 2nd RESPONDENT 11 AGATE STREET RIVIERA PARK MAHIKENG, 2745 REF: GJ MAREE/AA8741 INSTRUCTED BY: VAN VELDEN – DUFFEY INC.

[1] The record of the proceedings a quo is confusing. It seems that the magistrate a quo handed down a typed order (which, in the document, is referred to as a “verdict”) on 25 November 2019. The magistrate then provided handwritten notes dated 27 November 2019 indicating “Judgment read into record (signed by the magistrate) and under that, “Plaintiff ordered to file declaration within 10 days” with a second signature of the Magistrate.

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