IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO **REPORTABLE**

Case No. CA 31/13

In the matter between:

THE MINISTER OF POLICE **First Appellant**

BAYANDA MTSHULANE **Second Appellant**

MASIBULELE MKHUZO **Third Appellant**

and

LAZOLA GCELUSHE **Respondent**

APPEAL JUDGMENT

STRETCH J:

[1] This matter which was argued before us on 28 February 2014, purports to be an appeal against the whole judgment of Magistrate Z. Xaso delivered on 22 November 2012 in the magistrates' court for the district of Victoria East sitting at Alice.

[2] The appeal record consists of the following documents:

2.1 The notice of motion in a rescission application

2.2 The founding affidavit in the rescission application

2.3 Annexure A to the founding affidavit (a summons)

2.4 Annexure A's particulars of claim

2.5 Annexure B (a damages affidavit)

2.6 Comparative cases

2.7 Annexure C (a medical report)

2.8 Annexure D (request for default judgment)

2.9 The opposing affidavit in the rescission application

2.10 The applicants' heads of argument in a rescission application

2.11 The respondent's heads of argument in a rescission application

2.12 A judgment delivered on 22 November 2012 by additional magistrate Z. Xaso

2.13 A notice of appeal against the whole of the above judgment

2.14 A statement in terms of rule 51(8) from the magistrate stating that he had nothing further to add to the aforesaid judgment

2.15 A transcriber's certificate

[3] The grounds of the appeal, as set forth in the notice, are the following:

3.1 that the magistrate had erred in finding that the appellant did not have a bona fide defence;

3.2 that the magistrate had erred in failing to give due regard to the principles of law that default judgments are by their nature inherently unconstitutional and that, for that reason, a court should not scrutinise too closely to ascertain whether the defence is well-founded;

3.3 that the magistrate erred in finding that the default judgment was not granted as a matter of mistake common to the parties and that there was a causative link between the mistake and the granting of the order;

3.4 that the magistrate had erred in finding that "judgment was not granted on the strength of the fact the plaintiff was arrested on 22 February 2010 or on 19 February 2010, but that the plaintiff was arrested, detained and assaulted …";

3.5 that the magistrate erred in that he failed to consider the fact that there is a discrepancy between the plaintiff's particulars of claim and the damages affidavit;

3.6 that the magistrate erred in failing to consider that the default judgment was granted in the absence of a medical report illustrating the nature, severity and the extent of the injuries.

[4] On 13 February 2014 the respondent's attorneys wrote a letter to the appellants' attorneys which reads as follows:

"We note that in your appeal against the whole judgment of Magistrate Z. Xaso handed down on 22 November 2012 you have neglected to disclose on record, for the courts consideration in relation to the same matter, the previous two judgments of Magistrate Manjezi and that of Magistrate Njokweni.

We fail to comprehend how you omitted to include these prior judgments in relation to the same matter in order for the court of appeal to consider all the relevant documents and we shall be raising the same in argument of this matter.

Kindly advise how you propose to proceed with this matter in light of the above."

[5] On 19 February 2014 the appellants' attorneys responded to this letter as follows:

"We once more reiterate our clients' stance, as we have advised your Mr Mavuso, that they are not appealing against the judgment of Magistrate Manjezi the reason being that after having perused his judgment, our clients regroup and launched the second application which Magistrate Xaso entertained and delivered his judgment and that is the only judgment our clients are appealing against.

We regret to advise that we are not aware of the judgment delivered by Magistrate Majokweni. Even if there is any, our clients are not appealing against that judgment.

In a nutshell we hold the view that there will be no point of burdening the appeal record with information which is not relevant to our clients' appeal."

[6] It is trite that on appeal the appellant is bound by the four corners of the appeal record and must confine himself to the facts and argue thereon (*Dhlamini v Mayne* (1916) 37 NLR 173).

[7] The only judgment which the appellants have included in the 72-page appeal record is that of Xaso Esq. delivered on 22 November 2012.

[8] The heads of argument which were submitted before that magistrate gave judgment, and which have also been included in the appeal record, make it clear that the relief which the appellants sought from that magistrate was the following:

8.1 Rescission of a default judgment granted on 23 May 2011.

8.2 Uplifting of a bar preventing the appellants from pleading.

[9] Those heads of argument set out the history of the matter as follows:

9.1 The respondent issued summons during October 2010, suing the appellants for damages arising from assault and unlawful arrest and detention.

9.2 During March 2011 the appellants gave notice of their intention to defend.

9.3 During the same month the respondent delivered a notice of bar, to which the appellants did not respond, resulting in them being *ipso facto* barred from pleading.

9.4 During May 2011 the respondent delivered an application for default judgment to which was attached a medical certificate and a damages affidavit, and default judgment was duly granted in the sum of R100 000,00.

9.5 During August 2011 the appellants applied for rescission of this default judgment ("the first rescission application").

9.6 The application was dismissed. According to the aforesaid heads of argument (this Court not having been favoured with the judgment in the first rescission application), the application was dismissed because the default judgment "was not void *ab origine* and not invalid".

9.7 In the aforesaid heads of argument, the appellants submit that this judgment, dismissing the application for rescission in August 2011, is "appropriate, given the circumstances under which it was given and the information before the Court at that stage".

9.8 The heads of argument then reflect a heading referred to as "the second rescission application".

9.9 Under this heading, the appellants contend that the second rescission application is premised on new grounds which are then listed under the heading "second rescission application" as being the following:

(a) That it is not clear how the damages are quantified;

(b) That there is a difference between the particulars of claim and the damages affidavit;

(c) That the J88 did not reflect sufficient information upon which the magistrate could have made an informed decision;

(d) And most significantly, that this second rescission application was brought about "in the light of new facts and circumstances that were

not placed before the court at the time the first rescission application was considered" which new facts and circumstances are the following:

- The correct date of arrest.
- The date of the respondent's release from custody.
- The date of his hospital consultation.

(e) That the decision of the court in granting default judgment *was* (my emphasis) accordingly void *ab origine* by reason of mistake common to the parties regarding the dates on which certain events transpired.

(f) The appellants further contend in these heads of argument that the second rescission application shows that there was a reasonable explanation for their default, that the second application is bona fides and not an attempt to waste the court's time, and that they have a bona fide defence to the respondent's claim in the main case which defence, prima facie, has prospects of success.

(g) The appellants further contend, in these heads of argument supporting a second rescission application, that the court entertaining this second application, should also make an order uplifting the bar, so that they can plead to the summons.

[10] According to the respondent's heads of argument, the second rescission application was opposed on the following grounds:

10.1 That the first rescission application was premised on the argument that default judgment had been granted in error by the clerk of the court and not by the magistrate, and that the first rescission application was not based on an argument that it had been erroneously granted due to the magistrate's unawareness of the extent of the injuries sustained.

10.2 That at the first rescission application the appellants had raised a defence that there was never an arrest, whereas in the second rescission application they allege that there was an arrest but no assault.

10.3 That the argument that the default judgment was void *ab origine* or that it was granted as a result of mistake common to the parties which was raised for the first time in argument at the first rescission application, was

considered by Manjezi Esq. and was properly dismissed, as was the issue of a bona fide defence.

10.4 That (and this is a significant point) the second rescission application "is a desperate attempt by the applicants to cure the defects in the initial application as they know that they stand no chance on appeal with the initial application as it stands" and "furthermore, the applicants are estopped from bringing this new application or from raising issues they omitted to raise at the initial application by the *exceptio res judicatae* or 'the once and for all rule'".

[11] I agree with the aforementioned contentions raised by the respondent at that stage. Nothing, in my view, has changed. In his judgment in the second rescission application Xaso Esq. mentioned at the very outset, that he was dealing with a second rescission application, the first one having been dismissed by Manjezi Esq. on 20 October 2011 on the legal point raised *in limine* (that the default judgment was void *ab origine* or invalid), and again on the merits on 30 November 2011.

[12] Furthermore, in his judgment in the second rescission application, magistrate Xaso mentions that he invited the parties *in limine* to address him on the question of whether the launching of this second rescission application was the proper course to take. Subsequent to analysing the various contentions with respect to this point, the magistrate found (correctly in my view) that that court is *functus officio* (see *Old Mutual Life Assurance Co. (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C-D), but then for some reason qualifies this finding with exceptions which he says are set forth in section 36(1) of the Magistrates' Court Act 32 of 1944. In this respect it seems as if the magistrate then confused the position of *functus officio* in the first rescission application with the launching of successive rescission applications on purportedly different grounds. I say so because section 36 makes it clear that a bona fide applicant, dissatisfied with default judgment granted against him can, in the instances set forth in section 36 of the Act, prevail upon the same court which granted default judgment to reconsider its decision instead of taking the default judgment itself on appeal to a higher court.

[13] It seems to me that this is exactly what the appellants purported to do when they launched the first rescission application which was dismissed (and correctly so in my view).

[14] From then on the issue was quite simple and the magistrate ought not to have entertained the second rescission application at all, not even on the basis that the grounds were different, or that information not previously available was now at hand. Indeed, it is this very question that was raised at the first rescission application, which argument was correctly dismissed on that occasion. In entertaining the rescission application for the second time, Xaso Esq. effectively sat as a court of appeal which that court is not empowered to do.

[15] This matter is now before us on appeal, the lower court effectively having entertained and refused an application for the rescission of a default judgment on three occasions.

[16] For the sake of completeness, and because the series of events which we are now seized with are so curious and peculiar that it would be a shame not to tie up the few remaining loose ends, I shall briefly deal with what has been submitted as the appellants' heads of argument in support of the grounds which I mentioned at the commencement of this judgment. These heads of argument read as follows:

> "1. The Appellant humbly requests to incorporate its Heads of Argument (pages 37-49 record) into these Heads of Argument.
> 2. The court a quo erred in its finding that the incorrect date stated in Plaintiff's Particulars of Claim "could not have prevented the Defendant from coming with a defense" (page 65 record, line 18 and 19). The Plaintiff furnished an incorrect date and the Defendants acted on that incorrect date.
> 3. The court a quo erred in finding that the Defendants failed to show that they had a valid defense. The learned Magistrate's reliance on the case quoted (page 6 record, line 5 and 6) is misguided."

[17] The respondent's reply to these succinct heads of argument, is, not surprisingly, the following:

"1. The Respondent humbly requests the above Honourable Court to incorporate his heads of argument which are part of the appeal record (pages 50-57) into these heads of argument.

2. The court a quo was correct in finding that the appellants have failed to show that they have a valid defence to the respondent's claim as the founding affidavit of the appellants' attorneys in this regard was merely hearsay evidence.

3. The court a quo when dismissing the first rescission application and on paragraph 12 of Mr Manjezi's judgment, which is dated 30 November 2011 highlighted the absence of affidavits of the second and third appellants who were the police officers involved in this matter but the appellants failed to cure that defect even on the second rescission application.

4. The court a quo was correct in finding that there was no causal link between the mistake and the granting of the default judgment (record page 65 line 25 and 26). It would in any event appear that if there was any such mistake, it was not common to the parties as envisaged by the Act (section 36(1)(b) of Act 32 of 1944) but was only made by the respondent in respect of his actual date of arrest.

5. The court a quo in the second rescission application was correct in finding that the issue of the alleged discrepancy between the particulars of claim and the damages affidavit of the respondent together with the allegation that the medical report was not fully illustrating the nature, severity and extent of the injuries, both those issues were dealt with by the court a quo in the first application and it cannot again adjudicate upon such issues (record page 66 lines 13-15).

6. In conclusion, it is my submission *that the court a quo could have dismissed the second rescission application which is the subject of appeal herein based on the exceptio rei judicatae or the 'once and for all' rule* (emphasis added)."

[18] Once again, I am constrained to agree with these submissions. The *exceptio rei judicatae* covers estoppel by judgment and estoppel by representation. Estoppel is a term of English law, used to describe a group of rules of which the common feature is that they preclude a party from asserting or denying a particular fact. Coke, who spoke affectionately of estoppel as "an excellent and curious kindle of learning" explained it as follows (*Institutes* Vol 1 Bk 3 s 667):

" 'Estoppe' commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth."

[19] In English law, it was once possible to distinguish amongst three kinds of estoppel: by record, by deed and by conduct. Estoppel by record means, for all practical purposes, estoppel by the judgment of a competent court (in this case the default judgment which is a final judgment, or in these circumstances, the first rescission application, as there can be no such thing as a second rescission application for this very reason). Its effect is to prevent a party from re-litigating questions which have already been finally determined. With respect to estoppel by judgment, the expression *res judicata* signifies that a matter has been adjudicated, in other words, that proceedings have been terminated by a judicial decision (Hoffmann & Zeffertt *The South African Law of Evidence* Butterworths 1988 4ed 332, 335). It is trite that the purpose of using *res judicata* as an estoppel tool, is to ensure some type of finality in litigation.

[20] What has effectively happened here is that the appellants had four bites at the cherry in the magistrates' court (instead of a maximum of two), and in attempting a fifth bite in this court, they would have this court simply ignore not only the contents of the default judgment itself, but the contents of the two very important judgments of Manjezi Esq. dismissing at first instance (and the only instance which ought to have been permitted) the rescission application of this very default judgment not only on a point raised in limine, but on all the other points raised as well. These two judgments, which ought to have formed the basis of any hopeful appeal, do not form part of the record before us, despite the respondent's attorneys having pointed this problem out to the appellants well before this matter was due to be heard. Indeed, the response to the respondent's attorneys when they pointed out this very real problem is cause for concern. The appellants' attorneys therein appear to have quite openly conceded that because they were dissatisfied with the two judgments of Manjezi Esq., both refusing the rescission application, they simply decided to "regroup", instead of following the proper procedures, and to continue knocking their heads even harder against a very sturdy brick wall which by all accounts, was not going to collapse easily. It would indeed have been interesting had the second rescission application ended up before the same magistrate who refused rescission in the first place. Would he have been asked to recuse

himself, or would he have been expected to overturn his own judgment? This flawed conduct begs yet another question: What prompted the appellants to redirect their self-plotted voyages of discovery in the direction of the High Court as a court of appeal for the fourth bite at this variably consumed cherry? Why did they not simply approach another additional magistrate for a fourth opinion?

[21] I raise these questions not for want of anything else to say, but to illustrate this court's genuine concern at the lack of conception of what to me seems to be fundamental principles of civil procedure.

[22] It goes without saying that this court was at liberty, already at the outset of this matter, to strike this appeal from the roll with an appropriate costs order on the basis alone that a full record of what transpired in the court below was deliberately not placed before us, despite the appellants having been afforded the opportunity to do so. My brother was however, furnished by the clerk of the court below with that court's original file containing Manjezi Esq.'s two judgments, but not, as a matter of further concern, the default judgment which, after all, is the *fons et origo* of this application, non-suited as it may be. It is of particular concern to us that the appellants' attorneys have indicated, in writing, that they are not aware of this judgment and that even if such a judgment was delivered, they are not appealing it. Of even more concern is the fact that the senior assistant state attorney who deposed to the affidavit in support of the "second rescission application" stated under oath that default judgment was granted by the clerk of the court, and that it was this irregularity which the appellants sought to have set aside, when it subsequently transpired that the default judgment had in fact been granted by a magistrate. Even more strangely, this incorrectly stated proposition was admitted by the respondent in his answering affidavit, which resulted in this court, before the matter was argued, naturally applying its mind to magistrates' court rule 12(4) which refers to the mandatory referral to open court of default judgment applications for unliquidated damages such as in this case.

[23] It was only on the day that this matter was argued that it was brought to our attention via avenues other than submissions made in this case, that the procedure which had been followed in the magistrates' court when default judgment was granted was indeed beyond criticism. Of course, had the appellants' present legal representatives taken the advice of the respondent's legal representatives and made the effort to find out what the judgment of Magistrate Mjokweni was all about, they would have discovered that it happened to be the very default judgment that they thrice sought to have rescinded in the court below.

[24] Enough said of the history of this matter which in my view is not only embarrassing and shameful but nothing more than a waste of time and expense.

[25] One further aspect deserves mention. When this application was argued before us, counsel were asked to address the issue of whether this matter could in any event have been taken further, in the light of the fact that the appellants had been barred from pleading during early April 2011, that this bar has not been uplifted and that there is no application before us for upliftment of the bar.

[26] I have given further consideration to this aspect and am of the view, insofar as it may have been relevant to this application had the proper procedure been adopted in the first place, that a litigant who has been barred from pleading is not automatically barred from taking any other legal steps. On the contrary it seems to me to be logical, as was contended by the appellants' counsel, that the proper sequence of events would be to apply for the setting aside of the default judgment first, and then, if such application is successful, to apply for the upliftment of the bar, using prospects of success in the main action (which more often than not is one of the persuasive grounds for the setting aside of a default judgment) as a lever to move also for the upliftment of the bar. It is in any event so that once a judgment has been rescinded, and only then, can the prospective pleader apply for other obstacles to be set aside, such as for

upliftment of the bar (see *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 221G-H). To apply for upliftment of the bar (the only purpose of which would be to enable the appellants as defendants in the main action to plead), when default judgment has already been granted against them would be, it seems, an exercise in futility and any presiding officer faced with such an application would undoubtedly see it that way.

[27] That aspect out of the way, the appellants are still faced with the situation that what they have brought before this court is an application to have a judgment rescinded which judgment is effectively, or should be, the refusal to rescind a judgment. As nonsensical as that may sound, that is exactly what it is: a nonsensical application. In the circumstances I am not in the least surprised that there seems to be no case law directly in point.

[28] What the appellants ought to have done, is to have appealed either the default judgment, or (as these circumstances seem to dictate) one or both of the judgments of Manjezi Esq. To argue that a second application for rescission was brought because information became available to the appellants which was not available at the time that the first application was brought, does not assist the appellants and is not a ground for launching a second rescission application.

[29] The proper approach is to appeal, and to simultaneously seek leave from this court as a court of appeal, to allow the introduction of new evidence, provided it can be shown that such evidence was genuinely not available at the time, and that the present availability thereof will assist the applicant in making out a substantial defence. But that is a different matter altogether. It is in any event trite that such applications are not easily granted.

[30] To make matters worse, it is not clear at all what the appellants are appealing against. They do not seem to know either, which problem they would not have encountered had they followed the proper procedure which I have already

referred to. In their correspondence with the respondent's attorney however, they make it clear that they are not appealing those judgments, nor are they dissatisfied with the default judgment of Magistrate Majokweni. This being the case, what is presently before us is an exercise in futility. In any event, even if we were to set aside the fourth judgment in the magistrates' court (that of Xaso Esq.) the appellants would be no closer to a solution of their problem, which, I would imagine, should be a bona fide and genuine desire to air their defence. This is so because the judgments pertaining to the properly formulated rescission applications before Manjezi Esq. still stand as valid judgments, and have not been set aside.

[31] In the premises this appeal is ill-founded and fatally flawed. I propose the following order:

ORDER:

The appeal is dismissed with costs.

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I.T STRETCH **19 June 2014**
JUDGE OF THE HIGH COURT

I agree, and it is so ordered:

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B. SANDI
JUDGE OF THE HIGH COURT

Matter heard on: 28 February 2014

APPEARANCES:

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