IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT : MTHATHA) **CASE NO:** A17/09

DELIVERED ON : 12 NOVEMBER 2009

In the matter between :

BHEKANI E. KUBONE **Appellant**

And

NOMZAMO NGQONGISA **Respondent**

JUDGMENT

NHLANGULELA J

[1] This is an appeal arising from the judgment of the magistrate of Ngcobo refusing the appellant's application for rescission of a default costs order. This costs order was made after the Sheriff issued an interpleader summons.

[2] Prior to the hearing in the court *a quo* the parties agreed that two points in *limine* be decided. They were the following :

(a) The answering affidavit which was deposed to by *Mr Litha Madikizela*, the attorney of record for the respondent, on behalf of the respondent should be disregarded because *Mr Madikizela* was not a party in the litigation.

(b) The magistrate should dismiss the application for rescission due to failure by the appellant to comply with the provisions of Rule 49 (1) and Rule 60 (5).

The magistrate decided in favour of the respondent that the appellant did not comply with Rule 49 (1) in that the application was not brought within 20 days.

[3] In my view, the ground of appeal that the magistrate *erred* in holding that the application for rescission did not comply with the provisions of Rule 49 (1) of the rules of the magistrates' courts is the main issue for decision on appeal. It will therefore help to quote the provisions of Rule 49 (1) which read as follows :

> " 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, or 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 may deem fit."

[4] The antecedent facts, which are not in dispute, which led to the dismissal of the application for rescission of default judgment are the following : During August 2008 a motor vehicle of the appellant was attached and seized by the Sheriff of Ngcobo pursuant to a Writ that had been issued under Ngcobo Case Number 532/05 involving the respondent, as the judgment creditor, and Nosakhele Ngqongisa and Nosiviwe Ngqongisa, as the judgment debtors. The motor vehicle aforementioned is described as a 2000 Model Nissan Hard Body, SWB, S/CAB, 4 x 2 with registration FWD 133 NW. The appellant raised a complaint with the Sheriff that he was not a party in the proceedings under Case No. 532/05. As a result, the Sheriff issued an interpleader summons on 25 August 2008 and set the matter down for hearing before the magistrate on 29 August 2008

at 14h00. What had to be decided by the magistrate was the issue whether the motor vehicle was an item that was liable for judicial execution in terms of the Writ. However, on 25 August 2008 the Sheriff returned the motor vehicle to the appellant upon having been satisfied that it was the property of the appellant who had nothing to do with the matter under 532/05. In the meantime the interpleader summons had not yet been served upon the respondent. It was served on 28 August 2008.

[5] On 29 August 2008 the respondent attended court and, in the absence of both the appellant and his legal representatives, obtained an order that the appellant should pay the costs of the interpleader action. Pursuant thereto the respondent placed a bill of costs before the clerk of the court of Ngcobo for taxation on 03 October 2008. This she did upon notice to Songo Attorneys, the local correspondent attorneys of the appellant, on 17 September 2008. *N.S. Nombambela Incorporated*, the attorneys for the appellant on appeal who are based in Mthatha, were the instructing attorneys. The bill was taxed in the absence of the appellant and his attorneys on 03 October 2008 at R2 721,64. The respondent then caused a Writ to be issued on the taxed costs and then instructed the Sheriff to again attach and remove the same motor vehicle of the appellant on 20 October

2008. The motor vehicle was removed from the possession of the driver of the appellant. It was this removal of the motor vehicle of the appellant which prompted him to apply for a rescission of the order of costs on 30 October 2008. The appellant stated that this was the first time that he became aware of the costs order that was granted against him. In that application he cited the respondent and the Sheriff as the first and second respondents respectively. In refusing that application the magistrate stated the following and made the following orders on 17 December 2008 :

> " 1. Notwithstanding the fact that the opposing affidavit is by 1st respondent attorney's hand and that it was purportedly made on behalf of and on the instruction of 1st respondent the court is, after taking all the relevant circumstances into account, prepared to accept that this was a genuine mistake on the part of 1st respondent's attorney for he believed that he had the right to depose to the facts which, according to him, were personally conveyed to him by 1st respondent.
>
> 2. Points in *limine* raised by 1st respondent's attorneys are upheld.
>
> 3. Rules 46 (*sic)* and 60 of the Rules of Court have not been complied with.

4. Application for rescission of judgment is dismissed with costs."

[6] Upon receipt of a notice in terms of Rule 51 (1) of the rules of the magistrates' courts requesting the magistrate to supply a written judgment showing the facts he found proved and written reasons for judgment the magistrate complied accordingly. For the sake of brevity I will paraphrase his response in the following terms :

(a) The appellant became aware of the default judgment on 17 September 2008 but brought the application for rescission outside the period of 20 days as envisaged in Rule 49 (1).

(b) Notwithstanding that 20 days had lapsed, the appellant failed to bring an application for an extension of time within which to bring the application for rescission as contemplated in Rule 60 (5) of the rules.

(c) Furthermore, the appellant failed to show on affidavit that he was not in wilful default of attending court on 29 August 2008.

[7] The response of the magistrate as stated in the preceding paragraph form the cornerstone of the grounds upon which the appeal is based.

During argument it was submitted by *Mr Nombambela*, an attorney who appeared on behalf of the appellant, that the magistrate *erred* in going beyond the determination of the points in *limine* which were raised by both parties in their respective affidavits.

[8] The record indeed shows that the parties had asked the magistrate to determine the aforementioned points in *limine* only. In the circumstances, I cannot find otherwise than that the magistrate *erred* in dealing with the merits of the applications against the expressed wishes of the parties who appeared before him. However, that is not the end of the matter as this Court must still determine the legal issues based on Rule 49 (1) and Rule 60 (5).

[9] For the purposes of convenience, I interpose here to say something about the correctness of the filing by *Mr Madikizela* of an opposing affidavit without the same having been confirmed by the respondent. The reason advanced by the magistrate for accepting such an affidavit is far from satisfactorily in my view. The genuineness of the mistake on the part of *Mr Madikizela* to file the opposing affidavit without a confirmatory affidavit of the respondent is not a criterion for admissibility thereof. Generally, the rule

of practise has always been that for the contents of the affidavit to be admissible as evidence a deponent may only set out facts which are perculiarly known to him/her. If not, the contents of an affidavit becomes inadmissible hearsay unless the court is persuaded to admit the contents in terms of s 3 of The Law of Evidence Act No. 45 of 1988. Therefore, I would accept the affidavit of *Mr Madikizela* on the basis that he did make an allegation in the answering affidavit that the facts stated by him therein were within his personal knowledge and that he had been duly authorised by the respondent to make the affidavit. There is nothing stated in the answering affidavit which required confirmation by the respondent. In the commentary by *Jones* and *Buckle* in: "*The Civil Practise of the Magistrates' Courts"* 9th Edition, Vol. II, The Rules at Chapter 49-6A it is stated that a legal representative of an applicant for rescission of a default judgment in terms of Rule 49 can depose to a founding affidavit. Based on the statement of the learned authors, which is correct, I see no reason why a legal representative for the respondent should be prevented from deposing to an answering affidavit. That having been said the parties should be mindful of the fact that even if no answering affidavit had been filed or disregarded by the magistrate the *onus* would still rest upon the appellant to rebut the presumption in terms of Rule 49 (2) that he was presumed to have

knowledge of the default judgment within 10 days after the date on which it was granted and further, to show in terms of Rule 49 (3) that the explanation for default was reasonable and his defence *bona fide*. See: *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O); *Silber v Ozen Wholsealers (Pty) Ltd* 1954 (2) SA 345 (A); *De Wits Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd* 1944 (4) SA 705 (E). Therefore, a consideration of the founding, answering and replying affidavits filed was necessary.

[10] This Court should also not be detained much with the issue of non-compliance by the appellant with the provisions of Rule 60 (5) because a decision of the appeal on the basis of this subrule depends on the resolution of the question whether the appellant did comply with the provisions of Rule 49 (1). I deal with this question in the paragraphs that follow.

[11] In my view the determination of the issue of compliance with Rule 49 (1) is one of fact. It is plain from the reading of the reasons for judgment that the magistrate decided the issue on the basis of paragraph 15 of the appellant's founding affidavit. The paragraph in question reads as follows :

> " On 17th September 2008 the Execution Creditor's Attorneys filed a Notice of Set down for Taxation with correspondent Attorneys appointed by my Attorneys of record and was faxed through to my Attorneys of record on the very same day setting down taxation for 03rd October 2008."

The magistrate stated in the reasons for judgment that the appellant's contention that he only became aware of the judgment against him on 20 October 2008 cannot be correct because according to paragraph 15 he became aware of the judgment on 17 September 2008. It was argued strenouosly by *Mr Nombambela* that at all material times relevant to this matter the appellant was residing at his place of employment in West Deep Level, Room 489, Carletonville, Gauteng. It was only his instructing and correspondent attorneys who received the notice of set down for taxation of a bill of costs on 03 October 2008 and his attorneys did not consult the appellant about such notification which, incidentally, revealed that the respondent had obtained a default judgment against the appellant on 29 August 2008. According to *Mr Nombambela* the appellant knew of the existence of the default judgment for the first time on 20 October 2008 when the Sheriff seized his motor vehicle for the second time.

[12] In my opinion the magistrate *erred* in holding that the appellant knew about the existence of the judgment on 17 September 2008. I find that the main reason for his error was that he paid undue attention to paragraph 15 and omitted other paragraphs with the result that the reading of the contents of the founding affidavit became strained. He overlooked the evidence in the founding affidavit; namely that :

(a) The Sheriff did not take further steps after serving the parties with the interpleader summons as he had returned the motor vehicle to the appellant;

(b) The respondent did not serve the appellant with a notice indicating opposition to the interpleader summons;

(c) The attorneys addressed a letter to Mr Madikizela on 30 September 2008 stating that the taxation of the bill of costs had no legal basis and if enforced an application for rescission would be brought;

(d) The appellant had entrusted his motor vehicle into the custody of his driver; and

(e) That the appellant was not aware that a judgment existed until on 20 October 2008 when he learnt that his motor vehicle was seized by the Sheriff.

The above evidence was not gainsaid by the respondent. In the event the material facts stated in the founding affidavit ought to have been accepted by the magistrate as correct. See : *Moosa v Knox* 1949 (3) SA 372 (N); *United Methodist Church of South Africa v Sokufudumala* 1989 (4) SA 1055 (O) at 1059A; *Ebrahim v Georgoulus* 1992 (2) SA 151 (B) at 153D. In my judgment, the facts stated on the founding affidavit proved on a balance of probabilities that the appellant knew of the judgment only on 20 October 2008. Further, the appellant had also succeeded in rebutting the presumption in Rule 49 (2) because the evidence showed that he did not gain knowledge of the judgment within 10 days after 29 August 2008. My judgment on the issue of compliance with Rule 49 (1) puts paid to the issue regarding the decision of the magistrate that the appellant did not comply with the provisions of Rule 60 (5) because there was no need for the appellant to apply for extension of time within which to bring an application for rescission of judgment. In all the circumstances of this matter the appeal must succeed.

[13] I now deal with the issue of costs. There is no reason to deprive the appellant of the costs of this appeal because the magistrate clearly misdirected himself on the facts which were placed before him and the

respondent as early as on 30 October 2008 when the application for rescission was brought. The respondent was well advised not to oppose the appeal otherwise he would have exposed himself to the costs of his legal representatives as well.

[14] Since the effect of the outcome of the appeal has a bearing on the hearing on the special pleas that was concluded on 17 December 2008 the costs thereof ought to be paid by the respondent.

[15] In so far as it will be necessary for the merits of the application for rescission of default judgment to be decided by the magistrate it is hoped that the parties will seize the opportunity to set the matter down for hearing so that it may be finalised. Such opportunity will be available once the judgment on appeal has been delivered.

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

1. The appeal succeeds with costs.
2. The judgment of the magistrate dismissing the application for rescission is set aside and replaced with the following order :

" (a) The respondent's application on the points in *limine* is dismissed with costs.

(b) The application for rescission of the default judgment dated 29 August 2008 be and is hereby re-opened for hearing on the merits."

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Z. M. NHLANGULELA

JUDGE OF THE HIGH COURT

I agree : SCHOEMAN J

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I. SCHOEMAN

JUDGE OF THE HIGH COURT

Attorneys for the appellant	:	N.S. Nombambela No. 7 Craister Street MTHATHA
Attorneys for the respondent	:	Litha Madikizela & Co 204 High Street ENGCOBO