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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case no. 170/2023

In the matter between:

EFB FARM (PTY) LTD

Appellant

and

RV SMITH CC

Respondent

EX TEMPORE JUDGMENT

LAING J

[1] This is an appeal against a judgment delivered in the Gqeberha District Court, dismissing the appellant's application for rescission.

[2] The parties previously concluded a contract for the provision of, *inter alia*, roofing repairs and related services at Glen Boyd Farm Dam, situated in Makhanda. A dispute arose between the parties and the respondent instituted action for payment of R 211,558.

[3] The sheriff attended to service of the combined summons and particulars of claim on 13 April 2021. More will be said about this later. The appellant failed to deliver a

notice of intention to defend, and the respondent obtained judgment by default on 24 May 2021.

[4] The first time that the appellant became aware of the matter, alleges its financial manager, Ms Michelle van Jaarsveld, was on 6 May 2022, when the sheriff contacted her about the appellant's address for purposes of serving a warrant of execution. This prompted Ms van Jaarsveld to instruct the appellant's attorneys to launch a rescission application, which the respondent opposed.

[5] The district court dismissed the application. In his judgment, the magistrate held that the respondent was within its right to direct service of the summons at the appellant's registered address, viz. 1[...] C[...] Road, M[...] C[...], Gqeberha, notwithstanding that the appellant no longer operated therefrom. The magistrate pointed out that the appellant never explained why it failed to comply with section 23 of the Companies Act 71 of 2008, requiring notification of any change in address to be given to the Companies and Intellectual Property Commission ('CIPC'). Consequently, there had been proper service of the summons. The magistrate also held that the appellant failed to make out a *bona fide* defence, as required by the Magistrates' Court rules. It was unclear from Ms van Jaarsveld's affidavit what such defence comprised.

[6] The grounds of the appeal are based primarily on those two findings. The appeal is not opposed.

[7] In terms of section 36(1)(a) of the Magistrates' Court Act 32 of 1944, a court may rescind or vary any judgment granted in the absence of a person. The procedure in that regard is contained in rule 49 of the Magistrates' Court rules. To that effect, sub-rule (1) permits a court to rescind a default judgment upon good cause shown or if there is good reason to do so, while sub-rule (3) stipulates that an applicant who wishes to defend the proceedings must set out the reasons for his or her absence or default, as well as the grounds of his or her defence.

[8] In the present matter, the appellant explained that it was simply unaware of the summons, notwithstanding service at its registered address. The company no longer operated from 1[...] C[...] Road; it traded as Glen Boyd Farm Dam and was based in Makhanda. Importantly, averred the appellant, the respondent was aware of this because it carried out work at the Makhanda address and later instructed the sheriff to serve the warrant of execution thereat. The respondent did not dispute this.

[9] The district court agreed with the respondent, however, that notwithstanding the appellant's lack of knowledge of the proceedings, there was indeed proper service of the summons. In this regard, rule 9(3)(e) stipulates that process shall be served on a corporation or a company as follows:

'by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.'

[10] An elementary principle of South African law is that a litigant has a right to be informed of any proceedings instituted against him or her. In the case where a litigant is a company, then rule 9(3)(e) allows service on a responsible employee thereof, failing which the sheriff may attach a copy of the process to the main door of the registered office or principal place of business. In *Magricor (Pty) Ltd v Border Seed Distributors CC* 2021 JDR 0104 (ECG), to which the appellant referred, the court observed that the purpose of the corresponding rule in the High Court is to ensure that the process comes to the attention of the juristic entity. The court went on to hold that proper service occurs when: (a) the process is served on a company's employee; or (b), when the employee is unwilling to accept service, by affixing a copy of the process to the main door of the registered office.

[11] The facts in this matter are somewhat distinguishable from those in *Magricor* and the decisions to which the court referred, i.e. *Arendsnies Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) and earlier cases. This is because there was no evidence of an

employee or anyone else having been available to accept service. The contents of the sheriff's return of service stated as follows:

'On this 13th day of April 2021 at 14h07, I served this combined summons with particulars of claim upon EFB Farm (Pty) Ltd at the registered address at 1[...] C[...] Road, M[...] C[...], Port Elizabeth, by affixing a copy to the principal door as I found the premises locked. No other service was possible after performing a diligent search.'

[12] In the circumstances, the sheriff was unable to serve the summons upon any employee of the appellant and attached it to the 'principal door', as permitted under rule 9(3)(e). What is concerning, however, is what followed in the rest of the return of service. The relevant portion read, in capitalised text:

'THERE IS [a] BANK, CLINIC & DEVELOPMENT HUB AT THE GIVEN ADDRESS.'

[13] There is no mention of the appellant. There is no indication, at all, that the sheriff attached the summons to the main door of the appellant's registered office or place of business. This stands to reason considering Ms van Jaarsveld's assertion that the appellant no longer operates from 1[...] C[...] Road. In the absence of any evidence to the contrary, such as an affidavit from the sheriff, the return of service must be understood as indicating service by attaching the summons to the 'principal door' of the bank, the clinic, or the development hub. It cannot in any way be contended that the requirements of rule 9(3)(e) were met. The service of the summons was bad, the appellant was never informed of the proceedings.

[14] That the respondent was aware of the appellant's current address aggravates the irregularity. No explanation is apparent from the record why the respondent did not or could not instruct the sheriff to serve the summons at Glen Boyd Farm Dam, in Makhanda, where Ms van Jaarsveld resided and at which the respondent carried out the work that gave rise to the dispute. The use of a disused registered address suggests, at the least, a measure of cynicism on the respondent's part.

[15] Turning to the grounds of the appellant's defence, Ms van Jaarsveld alleged in her founding affidavit to the rescission application that the respondent breached the contract through defective workmanship or malperformance, as she called it. She amplified her allegation by referring to correspondence between the parties, from which it is evident that there were problems with the supply of wooden fascia boards, the installation of aluminium gutters, the construction of dry-walling, and the repair of the pressed ceilings. The most recent correspondence indicated that that the roof was still leaking. Ms van Jaarsveld also referred to a report prepared by an independent roofing and waterproofing business, Imcor CC, in terms of which it was averred that the gables had not been properly repaired, and that the verandah sheeting, aluminium gutters, and downpipes had not been properly installed.

[16] Although the appellant did not set out the precise details of its defence, it did so with sufficient detail and clarity to make it obvious that it was relying on an alleged breach of contract. The decision of the full court in *Hlophe v Freedom Under Law* 2022 (2) SA 523 (GJ) is authority to the effect that the rules relating to pleadings, as contained in rule 18 of the Uniform Rules of Court and rule 6 of the Magistrates' Court rules, do not apply to affidavits.

[17] It cannot be said, in the present matter, that the appellant failed to comply substantially with the provisions of rule 49(3). The appellant satisfactorily set out the reasons for its absence or default, as well as the grounds of its defence. Consequently, I am persuaded that there was indeed good cause for the default judgment to have been rescinded and that the district court misdirected itself in not doing so. It would also follow that there was no basis for the respondent's warrant of execution.

[18] Regarding costs, the appellant has been put to the unnecessary expense of having to pursue an appeal. There is no reason why it should not be entitled to recover the costs thereof. It never sought the costs of its rescission application, however, as counsel conceded.

[19] Consequently, the following order is made.

(a) The appeal succeeds and the judgment of the district court, dated 15 August 2023, is set aside, and replaced with the following:

‘1. The default judgment granted against the applicant on 24 May 2021, under case number 2544/2021, in the Magistrates’ Court for the District of Gqeberha (Port Elizabeth), is rescinded.

2. The applicant is granted leave to deliver its plea within 15 court days of the date of this order.’

(b) The respondent shall pay the costs of the appeal.

JGA LAING
JUDGE OF THE HIGH COURT

I concur.

GH BLOEM
JUDGE OF THE HIGH COURT

Date heard: 24 May 2024

Date delivered: 24 May 2024

Appearances:

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