REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **A3073/2016**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between

Banda, Flyson Joseph Appellant

and

Banda, Constance Mpho Respondent

Judgment

Van der Linde, J:

Introduction and background

[1] This is an appeal by an ex-husband against an order by a magistrates' court dismissing an application that he had brought for the rescission of a default judgment. The judgment that had been given against him by default was by the magistrates' court, sitting as a family court,[1] on 6 March 2015, although there is also a stamp dated 13 March 2015 on the order.

[2] The order directed Old Mutual to pay out of the appellant's then pension benefit into the Guardian's Fund an amount of R400 000 (not R450 000 as the reasons for the judgment suggest) into an account in the appellant's name; directed the Master to pay from that account R5000 per month from 1 January 2016 in favour of the appellant's two dependent minor children, being L B ([…]1993) and B B ([…]2005); directed that these funds be paid until the children were self-supporting or a high court or maintenance court otherwise directed; and directed Old Mutual to pay an amount of R50 000 to the appellant's ex-wife, the first respondent, Constance Mpho Banda (…), into her bank account with Nedbank, account number […]. No costs order was made.

[3] The rescission was refused on the basis that the court found that the appellant's default was wilful. This was based on the inference that the notice of motion, which was served on the appellant's sister at the appellant's last known address, actually came to his knowledge. The court also held that no good prospects of success on the merits had been illustrated.

[4] Before us appellant's counsel stressed that the appellant felt aggrieved that he had not had an opportunity to be heard before the order which he sought to have rescinded, was granted. Counsel explained that in fact the parties have since been divorced, and that a settlement agreement that they had concluded, was in fact made an order of court. That settlement agreement is not before us, and we do not know whether it in fact deals with the question and rate of maintenance for the dependent children, in which event this appeal will be entirely academic.

[1] The court order at p24 so describes the court that made the order.

The legal requirements restated

[5] The statutory framework within which the rescission application had to be decided, is made up of Magistrates' Court Rules 49(1) and (3), and s.36(1)(a) of the Magistrates' Court Act 32 of 1944. These provide as follows (emphasis supplied).

"Rescission and variation of judgments

49. *(1) 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, on 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 deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5).*

(2) …

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."

"36 What judgments may be rescinded

(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-

(a) rescind or vary any judgment granted by it in the absence of the person against who that judgment was granted;…".

[6] These provisions, and their similar forebears, have through the years been applied to mean that a successful applicant for rescission will have given a reasonable explanation for her default; her application will have been bona fide; and she will have shown a bona fide defence to the plaintiff's claim.[2]

The procedural facts

[7] In this matter the original case against the appellant by the respondent was an urgent application to secure R400 000 of the appellant's full pension benefit for the future maintenance of their two dependent children (there were three children born of the marriage). The concept was that the capital amount was to be paid into the Guardian's Fund, whence it was to be paid to the children at the rate of R5000 per month, until amended by a subsequent appropriate court order; the balance remaining after the children will have become self-supporting would then be paid to the appellant.

[8] The founding affidavit was in the standard form that no doubt is used regularly when a spouse seeks to attach the proceeds of "an annuity/pension fund/insurance company" with an employer of the maintenance obliged other spouse. The relevance of this observation is that the affidavit is sparse and generalised.

[9] At all events, when the matter was heard the appellant was in default, the return of service reflecting that service on his sister had been effected, since the appellant "could not be found". The return describes the address as "the respondent's place", although the address itself is not identified. The form of the order that was then granted is reflected at the outset of this judgment.

[10] Even though counsel for the appellant did not refer to this in his address to us, there clearly is some confusion concerning the dates. The respondent's initial application gave notice that

[2] Some of the leading cases are Grant v Plumbers (Pty) Ltd, 1949 (2) SA 470 (O); Silber v Ozen Wholesalers (Pty) Ltd, 1954 (2) SA 345 (A); HDS Construction (Pty) Ltd v Walt, 1979 (2) SA 298 (E); and De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd, 1994 (4) SA 705 (E).

it would be brought on 6 February 2015. Since the notice of motion was signed on 26 February 2015, that was impossible. The reference must therefore have been to 6 March 2015, for a reason to which I refer below. The return of service states that service on the appellant's sister took place on 2 February 2015, but as indicated, the notice of motion and founding affidavit were then not yet in existence. The founding affidavit bears the date stamp of the South African Police at Kagiso (the Commissioner of Oaths), as being 25 February 2015. This date likely bears some credibility.

[11] The service on the appellant's sister thus likely took place either on 26 February 2015 or 2 March 2015. On either date, the appellant – assuming that the papers got to his attention on the day of service – would have appreciated that the hearing could not have been intended for 6 February 2015, and there was then still some time to make enquiries as to the correct date of the hearing. I revert to this issue below.

[12] Although the court order bears a date stamp of 13 March 2015, the Magistrate appears to have signed the court order on 6 March 2015, which would support the inference that the notice of motion intended to convey that the hearing would be on 6 March 2015.

The substantive facts, applied to the legal requirements

[13] I turn now to the questions whether the appellant's affidavit set out *"the reasons for the defendant's absence or default and the grounds of the defendant's* (the appellant's) *defence to the claim"* and, if so, whether either *"good cause"* was shown, or the court ought to have been satisfied that there was *"good reason"* to rescind the judgment.

Reasons for default

[14] Taking these one by one, and starting with the reasons for the default, the appellant's affidavit makes two points: that the person who served the papers did not specify the address at which he served them, and also did not furnish the name of the appellant's sister. These assertions do not take the court into the appellant's confidence. The appellant could

easily have disclosed his address, and could easily have disclosed the name of his sister. She could easily have explained in a supporting affidavit whether she had received the notice of motion, and if she did, what she then did with it.

[15]Without the appellant saying why he was choosing not to disclose this information, the inference is warranted that he did not want the court to infer that in fact the summons had come to his attention much earlier than when, as he says, his attorneys only told him on 15 May 2016 that an order had been obtained against him by default. It follows that the reason for the default has not been explained satisfactorily.

Grounds of defence

[16]As to the disclosure of the grounds of his defence, the appellant says in his affidavit that at the beginning of 2015 he and the respondent were in the throes of a divorce settlement. At a meeting between the two sides (described in the popular jargon as a "round table" – "I attended a round table at the premises of the first respondent's attorneys") on 16 January 2016 the parties agreed maintenance for the two dependent children at the rate of R3500 per month. On 20 February 2015 he signed a settlement agreement which reflected the maintenance in that amount. That is as far as the assertions go.

[17] There is no assertion that the settlement agreement was actually accepted and signed by the respondent nor, more importantly, that the amount of R3500 per month was a reasonable amount in respect of the maintenance of the two dependent children. Nor is anything said about any resistance to the payment of R400 000 to the Guardian Fund. In these circumstances the setting out of the grounds of the appellant's defence also falls short of what is required.

Good cause? Good reason?

[18]The more important consideration is whether good cause has been shown or whether the court ought to have been satisfied that there was good reason to set aside the judgment. In considering these questions, the court a quo was obliged to have considered the total

picture.[3] Not doing so, would constitute a misdirection that would entitle a court of appeal to inference in the exercise by the court a quo of its discretion.

[19]What confronted the court a quo? These were the facts. The parties were involved in settlement negotiations as a precursor to a divorce. The appellant had accepted that he was obliged to maintain the two dependent minor children. The appellant says that the respondent had in fact accepted the R3500 per month that the appellant was prepared to pay. But if that were correct, then surely the respondent would certainly simply have signed the written settlement agreement in the form presented.

[20]Continuing with the facts. The interests of minor children were involved, and the law regards these as paramount. The explanation which the appellant gave for his non-receipt of the notice of motion was, at least, suspect. The appellant's affidavit is silent concerning the question of the pension benefit; why was nothing said about any grounds of resistance to the orders granted in respect of this issue?

[21]And finally, if the rescission were granted, the matter would have to be enrolled for a determination by the court a quo as to the appropriate rate of an admitted maintenance obligation, while there would in the meantime be no judicial clamp on the payment out by Old Mutual to the appellant of all of his pension benefit, only some 22,6% of which served in terms of the court order as security for payment of the maintenance obligation.

[22]Weigh against this scenario the prejudice potentially suffered by the appellant if rescission were not granted: the current court order applied only until it was varied by an appropriate court. If, as the appellant was contending, the parties had in truth settled the maintenance obligation, then the parties would presumably both sign the written divorce settlement agreement straight away, and the court order that the appellant was seeking to challenge would simply, in terms, implode. Or the appellant was free to go to the maintenance court and there argue for a reduction of the maintenance payable.

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[3] Compare De Witts Auto Body Repairs supra at p709 in fin.

[23]Weighing these contending considerations, I am not persuaded this court, even if it were free to exercise a discretion afresh, would have come to a conclusion different to that of the court a quo.

[24]In the result I propose the following order:

(a) The appeal is dismissed.

WHG van der Linde
Judge, High Court
Johannesburg

I agree, and it is so ordered.

BM Vally
Judge, High Court
Johannesburg

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