IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***8th MARCH 2018*** Signature: _____

APPEAL CASE NO: A3108/2017

COURT *A QUO* CASE NO: 2017/9958

DATE: 8th MARCH 2018

In the matter between:

ROELITTA CC t/a RVR CONSULTING	First Appellant
DELL, RALPH DENIS	Second Appellant
and	
NATIONAL YOUTH DEVELOPMENT AGENCY	First Respondent
RAMAKUMBA, KHATHUSHELO	Second Respondent
MAJOLA, REBONE	Third Respondent

JUDGMENT

ADAMS J:

[1]. This is an appeal against the judgment and the order handed down on the 31st of August 2017 by the Randburg Magistrates Court (Magistrate H Banks). In terms of the said order, a default judgment granted against the respondents in favour of the appellants on the 20th July 2017 was rescinded and set aside.

[2]. On the 20th of July 2017 the court *a quo* had granted a judgment by default for the appellants against the respondents for payment of R14 250 plus interest thereon and cost. The judgment, I understand, was based on a claim by the appellants for fees in respect of services rendered at the special instance and request of the respondents. The default judgment was by definition granted in the absence of a notice of appearance to defend by the respondents.

[3]. On the 21st of July 2017, that is one day after the granting of the default judgment, the respondents became aware of same. On the 2nd of August 2017 the respondents caused to be issued an application for the rescission of the default judgment. The application was served on the appellants, who opposed same and delivered their answering affidavit on or about the 7th August 2017. The opposed application for rescission was heard by the Randburg Magistrates Court on the 31st August 2017. After the arguments were completed the court *a quo*, seemingly in a summary manner, granted the application for rescission on the basis that the default judgment was erroneously granted because the respondents had delivered a notice of appearance to defend on the 17th July 2017, that is prior to the granting of the default judgment on the 20th July 2017. Therefore, so the Learned Magistrate found, the respondents were not in default and they were entitled to a rescission.

[4]. This appeal is on the basis that the court *a quo* erred in its findings relating to these issues, and it is submitted, on behalf of the appellants, that the

Magistrate Court should not have granted the rescission of the judgment by default.

[5]. Rule 49(1) of the Magistrates' Court Rules provides that a party to proceedings in which a default judgment has been given may serve and file an application to court, on notice to all parties to the proceedings, for a rescission 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 the default judgment on such terms as it deems fit. (My emphasis).

[6]. The salient fact in this matter is that the respondents were not in default when judgment was granted. They had entered an appearance to defend the action two days prior to the granting of the judgment. The Magistrates Court found that this fact is sufficient for the respondents to be granted a rescission of the judgment.

[7]. The question on appeal is whether the Magistrate was correct in her finding that the respondents are entitled to a rescission of the judgment.

The Appealability of the Order of the Court *A Quo*

[8]. A preliminary issue raised by the respondents is whether the order granted by the Magistrates Court is appealable.

[9]. The appeal, so it was submitted on behalf of the respondents, is directed at the granting of an interlocutory order, pursuant to an interlocutory application. Interlocutory orders, so it was submitted on behalf of the respondents, are those which pronounce upon matters which are incidental to the main dispute or are preparatory to or during the course of the litigation. Such orders can be divided

into those which have a final and definitive effect on the main action and those which are considered simple (or purely) interlocutory orders. The respondents submitted that the order of the Magistrate fell into the latter category.

[10]. The respondents were therefore of the view that the rescission order of the Learned Magistrate is not appealable on the basis that it was not final in effect or definitive of the rights of the parties or that it disposes of any portion of the relief claimed. If the respondents are right about this point, then as per the many instances in both the SCA and in this division in which the appeal court ruled, on hearing the appeal that the judgment or order of the Court *a quo* was not appealable, struck the appeals from the roll. See for example: *Carter v Haworth,* 2009(5) SA 446 (SCA); *Pitelli v Everton Gardens Projects CC,* 2010(5) SA 171 (SCA); and *Bookworms (Pty) Ltd v Greater Jhb TMC,* 1999(4) SA 799 (W).

[11]. I now turn my attentions to whether the order of the Court below is appealable.

[12]. The answer to this question depends on whether the judgment was a final and definitive one. In deciding this point the test traditionally has been to determine whether an order is a simple interlocutory order (as opposed to a final and definitive order) and therefore not appealable (as the legislation then stood) save with leave. One of the decisions which applied this historical criterion was *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*, 1948 (1) SA 839 (A). According to this case, the enquiry then was whether the court below had intended to express a final opinion upon the points in issue.

[13]. Where to draw the line between decisions which are *'interlocutory'* and as such have to await their decision on appeal until the proceedings in the court of first instance have been concluded, and those which are *'final'*, deserving to

be appealable before the main suit is, is a question that has vexed the minds of eminent lawyers for many centuries, and the answer has not always been the same. The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results.

[14]. As per the dictum in *Zweni v Minister of Law and Order,* 1993(1) SA 523 (A), it is trite that, generally speaking, a judgment or order is susceptible to appeal if it has three attributes, namely:

> *'[T]he decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'*

[15]. In *FirstRand Bank Limited t/a First National Bank v Makaleng*, [2016] ZASCA 169 para 15, it was emphasised that these three attributes are not necessarily exhaustive. Even where a decision does not bear all the attributes of a final order it may nevertheless be appealable if some other worthy considerations are evident, including that the appeal would lead to a just and reasonable prompt solution of the real issues between the parties. Furthermore, the interests of justice may be a paramount consideration in deciding whether a judgment is appealable.

[16]. Applying these principles *in casu*, we are of the view that the order of the court *a quo* was interim in effect. What the order in effect did was to allow the litigation process in the matter to revert back to the stage at which the respondents had entered appearance to defend. This means that the final word on the matter, that being the respondents' liability towards the appellants, has not yet been spoken. The order is not final in effect in that the appellants will have another opportunity at the trial to have the issues ventilated and to have the rights of the respective parties defined. It is not final in effect, as the final

word as to the relief to which the appellants may be entitled, has not been spoken – that is does the respondents owe the appellants the amount claimed or not. Furthermore, the judgment / order and its effect are clearly susceptible to alteration by the court below, which will happen when the matter goes on trial.

[17]. Therefore, the order is not appealable.

[18]. Closely linked to the aforegoing is the fact that the order of the Magistrate is also not definitive of the rights of the parties. It does not grant conclusive and distinct relief, and, apart from this, the order does not finally dispose of the relief claimed by the appellants, who would have another bite at the cherry when the matter goes on trial.

[19]. Lastly, and applying the dictum in the *Makaleng* matter (supra), we are of the view that there are no worthy considerations present in this matter, which would make the order appealable. A further consideration to be borne in mind is that the main action in the court below is still pending. In fact, we were informed from the bar that the appellants are pursuing that action and have placed the respondents on terms to deliver their plea. The actions of the appellants in that regard confirm the view that the order is not appealable.

[20]. In these circumstances, the order of the court *a quo* has the attributes of an order which is not appealable.

The rescission of the default judgment

[21]. In their notice of appeal the appellants contend that the Magistrate wrongly granted a rescission of the default judgment. An issue which would have required consideration by the appeal court is whether the respondents had

demonstrated 'good cause' entitling them to a rescission of the default judgment especially if regard is had to the fact that the respondents failed to in any way touch on the requirement relating to their *bona fide* defence to the appellants' claim which gave rise to the judgment.

[22]. In view of our finding relating to the appealability of the court *a quo's* order it is not necessary for us to deal with the merits of the appeal, which stands to be struck from the roll.

Conclusion and Cost

[23]. The parties are in agreement that the correct cost order which should have been granted by the Magistrate is one of no order as to costs. I understood that to have been the cost order granted by the Magistrate when she first dealt with the application for rescission. This is however not reflected in her reasons for judgment in terms of Rule 51, which records that the cost of the application for rescission shall follow the result of the application, which, in turn, implies that the appellants are to pay the cost of the opposed application for rescission.

[24]. As I indicated, the parties are in agreement that there should have been no order in relation to the application for rescission. This is noted. It is not necessary for us to make an order in that regard.

[25]. As far as the cost of this appeal is concerned, the general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[26]. As indicated, the appeal stands to be struck off the roll, which means that the respondents are successful on appeal. This means that, applying the general rule, the respondents should be awarded the cost of the appeal. The appellants, who were unrepresented both in the court *a quo* as well as in the appeal court, on the other hand were justified, in our view, in launching this appeal. After all, the rescission of judgment had been granted in circumstances in which the respondents had not demonstrated that they have a *bona fide* defence to appellants' claim.

[27]. In the exercise of its discretion as to costs the court may also attach weight to the moral as opposed to the legal obligations of the parties. In their dealings with the appellants, the respondents, who are part of a public body, have been less than courteous or cordial with the appellants, who rendered a service to them. For no apparent reason the respondents refuse to pay to the appellants their fees due for the services rendered. Although they may very well be acting within their legal rights to defend the action, my view is that, in the absence of a *bona fide* defence, the conduct of the respondents is inconsiderate.

[28]. Accordingly, in the circumstances of this matter, we are satisfied that, in the exercise of our discretion in awarding costs, there should be no order as to cost relative to the appeal. Such an order would, in our judgment, be fair, just, equitable and reasonable to all concerned.

Order

In the result, the following order is made:-

1. The appeal against the order of the court *a quo* is struck from the roll.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree,

J S NYATHI
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	6th March 2018
JUDGMENT DATE:	8th March 2018
FOR THE APPELLANTS:	In Person
INSTRUCTED BY:	In Person
FOR THE RESPONDENTS:	Adv Kutlwano Motla
INSTRUCTED BY:	Seanego Attorneys Inc