REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A2024-040877

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

In the matter between:

RAYMOND MACK DANIELS	Appellant
And	
SIMUL ENTERPRISES CC	First Respondent
THE SHERIFF, GERMISTON NORTH	Second Respondent

JUDGMENT

Noko J (**Ntlama Makhanya AJ** concurring).

Introduction

[1] This is an appeal against the whole judgment and order granted on 1 February 2024 by the Regional Magistrate TD Ntoko, sitting at Germiston Regional Court. The court *a quo* dismissed an application for rescission with costs on attorney and client scale. The second respondent is not opposing the appeal and reference to the respondent in this *lis* means the first respondent.

Parties

[2] The appellant is Mr Raymond Mack Daniels as the sole member of Alexjay Catering CC which is trading as Applebite Express CC (registration number 2008/167560/23) and carrying business at 2[…] C[…] Avenue, E[…], Edenvale.

[3] The first respondent is Simul Enterprises CC, a close corporation with its registered address at […] M[…] C[…] Drive, R[…] I[…] P, G[…] P[…], G[…], Johannesburg.

[4] The second respondent is Sheriff, Germiston North cited in his capacity as the Sheriff of the high Court carrying his business at 2[…] S[…] Street, cnr V[…] Avenue, E[…], Johannesburg.

Background

[5] The respondent sued out summons with rent interdict on 18 September 2020 against the appellant for the arrear rental in the sum of R211 880.00. The sheriff simultaneously with service of summons attached assets of the appellant's business to the value of R221 888.00. The appellant entered appearance to defend on 6 October 2021 and was served with notice of bar on 22 November 2021 after failing to serve the plea on time. The respondent subsequently served a notice on intention to amend on 28 April 2023 which was objected to by the appellant by the appellant on 14 May 2023.

[6] The respondent waited for the notice to amend[1] to lapse and proceeded to serve another notice of intention to amend on 7 August 2023 which was followed by filing amended pages on 24 August 2023 since the appellant did not object thereto. The respondent then served notice of bar on 22 September 2023 on the appellant and his attorney. The notice of bar did not elicit any reaction from the appellant and respondent applied for default judgment on 23 October 2023 which was granted. A warrant of attachment was issued, and sheriff attached the appellant's assets on 3 November 2023 to the value of R211 888.00[2].

[7] The appellant instituted application for the rescission of the judgment on 25 January 2024 under two parts. Part A being an application to stay the execution of the warrant pending Part B which was the application for rescission of judgment.

Before court a quo

[8] The appellant instituted application for orders under two parts. Part A being an application to stay the execution of the warrant pending Part B which was the application for rescission. The parties agreed to the stay of the warrant of execution which was made an order of court. In the application for rescission the appellant contended that the judgment was granted erroneously on a number of grounds.

[9] The court *a quo* found that the application falls within the purview of the provisions of rule 49[3] which provides for the rescission of a judgment at the instance of a party against whom a judgment was granted in his absence. Such a judgment may be rescinded if the party was not in wilful default and good cause is found exist.

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[1] Amending the claimed amount from R239 000.00 to R425 519.45.
[2] The appellant's counsel indicated in the Heads of Argument at para 28 (CL 03-10) that the value of the attached goods is R221 888.00 but at para 31 (CL 03-11) stated the amount to be R211 888.00.
[3] Magistrate's Court Rules.

[10] The appellant contended that the judgment was granted erroneously on the basis that, first, the appellant's plea dated 15 March 2021was delivered timeously after receipt of the first notice of bar and as such the request and the granting of the default judgment was incompetent. Secondly, that the judgment amount of R425 519,45 was granted in error since the value of the attached assets in the sum of R221 880.00 should have been deducted from the total amount claimed. Thirdly, that the lease agreement was amended and the rental amount was reduced and the amount sued for was incorrect; fourthly, that the respondent failed to serve an application for default judgement on the appellant before lodging same with the court *a quo*. Lastly, that the judgment amount granted was in excess of the jurisdiction of the Regional Magistrate Court.

[11] The court *a quo* found that the appellant failed to prove that a plea was served to the respondent and/or filed at the court. Further, that the contention that the value of the attached goods should have been deducted has no basis in fact and law. That there are no merits in arguing that the rental amount has changed as the agreement contained an entrenchment clause in terms of which any amendment cannot be effected unless reduced into writing and signed by both parties. The requirement for service of the application for default judgment applies only in the high court and not in the magistrate court. Lastly, that the agreement between the parties provides for consent to jurisdiction in terms of section 45 of the Magistrates' Court Act.[4] In conclusion, the court *a quo* held that there was no good cause shown by the appellant and dismissed the application for the rescission, with costs, on a scale between attorneys and client. In addition, the court *a quo* found that the admission by the appellant that there is money owing to the respondent is sufficient to conclude that there is *no bona fide* defence.

On appeal

[4] Act 32 of 1944 (as amended).

[12] The appellant disavowed the argument that the amount claimed was above the reach of the magistrate.

[13] The appellant raised several contentions in support of the appeal. First, the appellant contended that the default judgment was obtained erroneously as the applicant although stated that all documents were filed but there was an affidavit by a candidate attorney who stated that the original documents could not be traced. In retort, the respondent submitted, correctly, that it is not unusual that when a party is unable to produce the original documents filed with the court that an affidavit be submitted with the application for default judgment. This contention is unsustainable.

[14] Secondly, the appellant contended that the value of the goods attached through the hypothec was R221 880.00 which amount would have settled the amount claimed by the respondent. In the premises, argument continued, it was improper for the respondent to obtain judgment for any higher amount. In retort, the respondent submitted that this argument is flawed. The fact that there is attachment of goods does not imply that the estimate value thereof is cash in the respondent's hands. The attachment is just security and would bar any other creditor to execute the said property. Further, that the respondent has an option after obtaining judgment either to proceed and sell the attached goods or execute any other way possible including the attachment of the members' interest in the CC. This understanding is subject to the proviso that the debtor shall be notified so that the assets should be freed from the hypothec. In any event, so argument went, the argument that the value of the attached assets should have been deducted was not raised, initially, by the appellant.

[15] Thirdly, the appellant further contended that the plea was served after the receipt of the notice of bar. As such, it was improper for the respondent to obtain judgment by default. The appellant's attorneys are, however, unable to provide

any evidence that the said plea was served as they have not been able to access the attorney's server.

[16] The argument advanced by the appellant that the plea was delivered was aimed at defeating the contention that there was wilful default on the appellant's part. The respondent denies that appellant has served a plea at their offices and same was also not found in the court file.

[17] In addition, as was set forth in *State Capture Commission*,[5] the Constitutional Court found that "absence" for the purposes of the rule means being "precluded from participating" in the proceedings.[6] Accordingly, if a person positively elects not to attend, then such a person is not "absent" for the purposes of the rule. The appellant was served with notice of bar and chose not to participate in the proceedings, the respondent argued.

[18] Fourthly, that the lease agreement was amended by the parties during Covid-19 and the court *a quo* should not have granted the judgment which did not take into consideration that the agreement was varied. This contention could not be sustained as it was demonstrated that the agreement has a non-variation clause. In this regard I find that this argument is unsustainable.

[19] The appellant further sought to dispute the amounts which were due to the municipality which challenge was never raised in the initial application before the magistrate court. This was not properly introduced and cannot be entertained on appeal.[7]

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[5] *Zuma v State Capture Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC).
[6] *Id* at paras [60] to [64].
[7] See *Seedat v S* 2017 (1) SACR 141 SCA at para [21], where the court held that: "There should be a reasonable sufficient explanation, based on allegations which may be true, while the evidence which it is sought to lead was not let at the trial. There should be a prima facie likelihood to the truth of the evidence. The evidence should be materially relevant to the outcome of the trial." This was a criminal case and was referred as on the basis of parity of reasoning and also that proper motivation should be advanced if a party seek to introduce new evidence.

[20] The respondent, on the other hand, contended that the application for rescission of judgment required a party to show that he had a good cause. The good cause requires a clear explanation that the party did not wilfully default and further, that such a party has a good defence. The appellant alleges that the plea was served but failed to provide proof that it was indeed delivered. The notice of bar was served on both the attorney and the appellant personally and both elected not to serve a consequential amendment to the plea if indeed the first plea was served after the first notice of bar.

[21] The respondent contended further that the appellant's contention that the respondent improperly obtained judgment as the original documents were not filed is also unsustainable as the respondent's attorneys filed an affidavit stating that the originals could not be found.

[22] The appellant further contended that the summons were stale and this could not be properly substantiated with the relevant applicable legal principles. The respondent stated that rule 10 of the Magistrate Court rules which provided for the lapsing of the summons after 12 months has been repealed and this contention remain unsustainable. In addition, the Magistrate Court rules unlike High Court rules do not enjoin a party to serve application for default judgment after notice of bar was served.

[23] The Court, respondent argued further, should also impose costs on attorneys and client scale in the appeal as there was no genuine dispute raised or even explanation for the default.

Issues

[24] The issue for determination is whether the appellant has presented a persuasive case to upset the judgment of the court *a quo*. That a good case was made out for the rescission of judgment in terms of rule 49.

Legal principles and analysis.

[25] It is trite that Rule 49[8] of the Magistrates Court Act enjoins an applicant for rescission to show good cause for the judgment to be rescinded. It was stated in *Chetty*[9] that: "the term good cause (or sufficient case) defies precise of comprehensive definition, … but it is clear that in principle and in the long-standing practice our courts two essential elements "sufficient cause" for rescission of a judgment by default are:

> (i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and
> (ii) that on the merits such party has a *bona fide* defence which, *prima facie,* carries some prospects of success.

[26] The above sentiments were echoed by the Constitutional Court in *Barnard*,[10] where it was stated that: "This Court recently repeated the well-known requirements: first, the applicant must give a reasonable and satisfactory explanation for its default; and second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success." As it would be shown below, the appellant appears to have failed from both fronts.

[27] With regard to the explanation for the default, the appellant's contention was that he did not default as a plea had been served but cannot provide any evidence to support as its IT system were inaccessible. The respondent or its attorneys or the court did not have a copy. The old Latin maxim "*actio incumbit*

[8] Rule 49(1) provides that "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 20 days' period shall not be applicable to a request for rescission or variation of judgement brought in terms of subrule (5) or (5A).
[9] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 757B – C.
[10] *Barnard Labuschagne Incorporated v Commissioner, South African Revenue Service and Another* 2022 (5) SA 1 (CC) at para [46]. See also *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) at para [71].

probatio" ("he who alleges must prove") finds application. Bar any evidence that there was no default or explanation for the default then *cadit questio*.

[28] The highwater mark of the appellant's defence is that the hypothec accords the respondent not only the security but also serve as proof that the estimate value of the attached goods is cash in the respondent's account. As such, the said value should have been deducted from the total sum claimed and judgment should have been ordered for the reduced amount. This argument reveals creativity and ingenuity on the part of the appellant but cannot be supported with the trite law or current jurisprudence. The authors of Wille's Principles of South African Law states that: "On attachment the land lord acquires a real right of security and is entitled to prevent removal of the goods from the premises and to claim their return if so removed".[11] The benefit of the attachment is only to have the assets as security and not for a party become the owner thereof or value in his pocket.

Conclusion

[29] On the basis of the aforesaid there is no basis to argue that the process to obtain judgment was irregular as the said amount was not deducted. Equally so, the argument of hypothec cannot be invoked to lay the basis for the argument that there is a *bona fide* defence. This would extend to the second requirement of the wilful default. The appellant's concessions that no processes were delivered, that nothing was done after the receipt of the second notice of bar and further an admission before the court *a quo* that rental applies is a fatal blow to his course.

[11] See Bradfield G, Du Bois F, *et seq* "*Willes's Principles of South Africa law*" 9th Ed, Juta, 2007, page 658-659. See also Kerr AJ *The Law of Sale and Lease* 2nd edition Lexis-Nexis-Butterworths, 1996, at 359 where it was stated that: "When a lessor issue summons in the Magistrate Court for the rent of any premises he may include in such summons a notice prohibiting any person from removing any of the furniture or other effects thereon which are subject to [his] hypothec for rent until another order relative thereto has been made by the court. If he asks for and obtains in the judgement confirmation of the interdict, it is extended until execution or further order of the court. An interdict does not in itself give the lessor any greater right over against other creditors than he had: it merely tends, by means of the threat of criminal proceedings for contempt of court, to prevent those who know of its existence from removing the property and thus diminishing the left lesser security." (Emphasis added).

[30] In the premises, I remain impervious that the court *a quo* has not misdirected itself or applied incorrect legal principles in the dismissal of the application for rescission of judgment. The appeal is therefore bound to fail.

Costs

[31] It is trite that the costs are ordinarily within the discretion of the court and further that they follow the result. These established principle brooks no further ventilation and any attempt to upset same in this *lis* would be unwarranted.

Order

[32] In the premises I order as follows:
The appeal is dismissed with costs including costs of counsel at scale B.

M V NOKO
Judge of the High Court
Gauteng Division, Johannesburg.

DISCLAMER: This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 12 May 2025, at 12:00

Dates:
Hearing: 28 January 2025.
Judgment: 12 May 2025

Appearances:

For the Appellant: A P Allison.

Instructed by:	Tshepo Mohapi attorneys
For the First Respondent:	N Lombard.
Instructed by:	TWB Attorneys