IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO: 2190/2012
DATE HEARD: 6/3/2014
DATE DELIVERED: 7/3/14
NOT REPORTABLE

In the matter between:

LESTER C DE KOCK t/a L C PALMS	**APPLICANT**
and	
PUMLA NDENZE	**FIRST RESPONDENT**
THE MAGISTRATE, EAST LONDON	**SECOND RESPONDENT**

JUDGMENT

PLASKET J

[1] This is an application to review and set aside a decision of the second respondent on 8 June 2012 in which she rescinded, at the instance of the first respondent, a default judgement in favour of the applicant and against the first respondent. The first respondent has not opposed the application and the second respondent abides the court's decision. The applicant does not seek a costs order against either.

[2] In 2006, the applicant, as plaintiff, sued the first respondent as defendant for payment of money that he claimed she had failed to pay him for certain landscaping, installation and repair work he had undertaken at her home. Eventually, on 16 March

2009, a default judgment was granted in his favour. By notice of motion dated 21 February 2012, the first respondent applied for orders (*inter alia*) condoning the late filing of the application 'in so far as it may be necessary to do so' and rescinding the default judgment granted against her on 16 March 2009.

[3] Section 36 of the Magistrates' Courts Act 32 of 1944 sets out the circumstances in which judgments may be rescinded. It provides:

'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 whom the judgment was granted;

(b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;

(c) correct patent errors in any judgment in respect of which no appeal is pending;

(d) rescind or vary any judgment in respect of which no appeal lies.'

[4] Rule 49 of the Magistrates' Courts Rules regulates the procedure governing applications for rescission of judgements. For present purposes it is only necessary to refer to two sub-sections of this rule. First rule 49(1) provides that a party to proceedings in which default judgment had been given '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'. Rule 49(8) provides for a different time period. It states:

'Where the rescission or variation of a judgment is sought on the ground that it is void *ab origine* or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.'

[5] Finally, rule 60 bears mentions. It provides for condonation for non-compliance with the rules. Rule 60 (5) provides:

'Any time limit prescribed by these rules, except the period prescribed in rule 51(3) and (6), may at any time, whether before or after the expiry of the period limited, be extended –

(a) by the written consent of the opposite party; and

(b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as it may deem fit.'

[6] In her founding affidavit, the first respondent claimed to have only acquired knowledge of the judgment granted against her on 2 September 2011. In the applicant's answering affidavit, however, his attorney stated that this is a 'clear fabrication' and that she, in fact, became aware of the default judgment on 1 October 2009 (at the latest) when she appeared at a section 65 inquiry and requested a postponement until 15 October 2009 to enable her to bring an application for the rescission of the default judgment.

[7] As the first respondent did not file a replying affidavit, this averment stands un-contradicted. In any event, in terms of the well known case of *Plascon-Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd*[1] it should have been accepted by the second respondent that the first respondent acquired knowledge of the default judgment on 1 October 2009 and so delayed over two years before bringing the application.

[8] When the rescission application was argued, the point was taken by the applicant's attorney that the first respondent had not sought the applicant's written consent for an extension of time for the filing of the application in terms of rule 60(5)(a). This was a necessary precondition for applying for condonation. In any event, she had given no explanation for her failure to comply with the time period prescribed by the rules and so her failure simply could not be condoned.

[9] In my view, the applicant's attorney was correct on both scores. In *Premier Music Saloon & another v Loggie Bros*[2] Broome J held that parties who were out of time had standing to apply to court for an extension of time but that before doing so 'they must approach the plaintiffs for their written consent to an extension of time, and only if that is refused can they apply to the magistrate'. Even if she had been able to apply for condonation, the first respondent could not have succeeded. In order to

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.

[2] *Premier Music Saloon & another v Loggie Bros* 1948 (2) SA 421 (N) at 424. See too Van Loggerenburg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (10 ed) (Vol II) at Rule 60-5.

traverse the first hurdle, she would have had to give an explanation of her delay. As she did not do this, the court simply could not condone her failure: it had no explanation before it to evaluate.[3]

[10] The second respondent was required to deal with the issue of condonation before she could deal with the merits. Her failure to do so was a gross irregularity justifying the setting aside of her order because she dealt with a matter when its merits were not properly before her

[11] But even on the merits, the second respondent committed more than one gross irregularity. She had regard to the entry in the court file when the magistrate had granted the default judgment in order to decide that the first respondent had not known about the trial date. There are two fundamental problems with this: she never gave the parties the opportunity to address her on this and to deal with it; and it is not evidence and cannot prove the facts alleged therein. Despite this she based her decision on it.

[12] According to the reasons she filed, she rescinded the judgment, not on the basis of anything put forward by the first respondent's attorney but on the basis of one of the grounds set out in s 36(1)(b) of the Act namely, a mistake common to the parties. She mentioned the section specifically when she said that the term 'mistake' in that section 'must relate to and be based to something in the procedure adopted, amongst other things' and that there 'must be a causative link between the mistake and the grant of the order or judgment, the latter must have been as a result of the mistake'.

[13] It is unfortunate that she never gave the parties an opportunity to address her on this ground because doing so may have saved her from erring. I do not know what mistake she had in mind and from the record, a mistake common to the parties – where 'both parties are of one mind and share the same mistake'[4] – does not arise. So, in this respect too, she committed a gross irregularity.

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[3] See generally on the requirements for condonation, *Darries v Sherrif, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at 40H-41E.

[4] *Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another* 1992 (4) SA 852 (A) at 863A-B.

[14] The applicant was granted a judgment in his favour in 2009. His litigation against the first respondent commenced in 2006. It appears that this is not the first time a default judgment was taken against the first respondent and then rescinded. It is clear, leaving aside that fact that the judgment stood for two years before being rescinded, that the applicant has been prejudiced by the decision to rescind the judgment.[5]

[15] In the result, the application must succeed. The following order is made.

The order of the second respondent rescinding the default judgment granted against the first respondent and in favour of the applicant in case no. 4033/06 in the Magistrate's Court for the district of East London on 8 June 2012 is reviewed and set aside.

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C. PLASKET
JUDGE OF THE HIGH COURT

I agree:

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J. J. NEPGEN
ACTING JUDGE PRESIDENT

Appearances:
For the applicant: J Koekemoer, instructed by Netteltons, Grahamstown
For the respondents: No appearances

[5] *Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg & another* 1978 (4) SA 790 (T) at 793A-C.