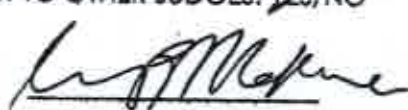


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3117/2016

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED
<u>5/5/17</u>	
Date:	WR MOKHARI

In the matter between:

HELENA E JANSEN VAN RENSBURG

Appellant (Defendant)

and

WILLOWLEIGH BODY CORPORATE

Respondent (Plaintiff)

JUDGMENT

CORAM: MOKHARI AJ

1. This appeal is concerned with the default judgment which was granted by the Magistrate in the Magistrate's Court for the District of Emfuleni held at Vereeniging. The appellant who was the defendant in the Magistrate's Court was sued by the respondent, who was the plaintiff in that Court for arrear levies

in the sum of R15 421.99 under case number 1396/15. Further summons was issued by the respondent through its attorneys against the appellant's father for arrear levies in the sum of R17 887.66 under case number 1397/15.

2. It is common cause that the appellant failed to file a plea and was placed under bar in terms of the notice of bar which was served and filed on 30 October 2015. The respondent proceeded to file with the Court a request for default judgment dated 17 November 2015 for payment of the sum of R15 421.99 with interest and costs. According to the Court stamp, the request for default judgment was received and acknowledged by the clerk of the Court on 19 November 2015. The Magistrate granted default judgment on 28 December 2015 by affixing a Magistrate's stamp on the face of the request and signed it, but granted default judgment in the sum of R17 887.66 instead of R15 421.99 which was requested in the request notice.
3. Upon gaining knowledge of the default judgment, the appellant delivered a Rule 16(5) application in the Magistrate's Court to uplift the bar and file a plea and for condonation for the filing of a counterclaim. This application was opposed by the respondent which filed a counter application for the default judgment to be properly endorsed and varied to reflect the correct judgment amount as R15 421.99 and asking for the appellant's application for condonation to be dismissed. The Magistrate granted the counter application in favour of the respondent and varied the amount of R17 887.66 which he had found to be a patent error by substituting same with the sum of R15 421.99 which was claimed by the respondent in the summons and the request for default

judgment. Aggrieved by the Magistrate's order, the appellant has appealed to this Court on grounds that there was no valid judgment granted and that the 'alleged recorded judgment' on the request for default judgment is null and void.

4. In support of these contentions, the appellant relied on Rule 12(7)(c) and Rule 12(9) of the Magistrate's Court rules as well as the unreported judgment of the Free State Division per Daffue J at et Motloun AJ in Main Street 421 (Pty) Ltd vs Goldfields Development (Pty) Ltd (A187/2013) (2014) ZAFSHC 21 (27 February 2014).
5. Reliance by the appellant on the above mentioned rule and case law is to support the appellant's contention that no default judgment was granted by the Magistrate and no file in respect of this matter was placed before the Magistrate. The appellant's contention is incorrect having regard to the request for default judgment which bears both the stamp of the Clerk of the Court signifying the date it was received and the Magistrate's stamp with the Magistrate's signature affixed thereto and the date on which the Magistrate granted default judgment. The case number under which the Magistrate was granting default judgment appears from the request notice and the default judgment he granted. As a result there has been compliance with Rule 12(7)(c) read with Rule 12(9) as the Magistrate recorded on the face of the request notice that he was granting default judgment and the date he did so and his signature thus making a minute of record thereof as required by the rule. Rule 12(7)(c) states that:

"The Registrar or Clerk of the Court may refer to the Court any request for judgment and the Court may there upon –

(c) give judgment in terms of the plaintiff's request or for so much of the claim as has been established to its satisfaction."

6. Rule 12(9) states that: *"judgment shall be entered by making a minute of record thereof."*
7. The appellant has without more concluded that the absence of the recordal on the file of the default judgment meant that no default judgment had been granted. By so concluding, the appellant suggested that the default judgment sought to be enforced by the respondent by way of a warrant of execution was a nullity. The appellant failed to appreciate a distinction between an irregular act and an act that is a nullity. In *Gibson and Jones (Pty) Ltd vs Smith* 1952 (4) SA 87 (T) at 89F, the Court stated with regard to irregular conduct: *"It is a wrong entry of appearance, but there it is..."*.
8. In *Chasen vs Ritter* 1992 (4) SA 323 (SE) at para 328 the Court stated as follows: *"One must recognise it for what it is: a defective or irregular proceeding. But it is not nothing and cannot be ignored."* In *Chasen supra*, the Court drew a distinction between irregularity and a nullity. It stated:

"If there is no act or objective manifestation of an intention, there is nothing to be condoned. In the context, a nullity is an objective manifestation of an intention or act which is devoid of legal effect, but it does not comply with the rules of Court. But it does not imply that something was done with the bona fide purpose or having the effect which it would have had if it had complied with the rules. Under these circumstances the distinction between an irregularity and a nullity is of little practical value. Both of these rules demonstrate the overriding

object of the legislature that the rules had as their object the creation of the framework for doing justice. If the requirements of the rules prevent that, it is proper to grant condonation."

9. The facts of this case are also distinguishable from the Mains Street case where there was no evidence at all that default judgment was granted. In paragraph 12 of that judgment, Daffue J stated:

"However this person neither affixed his/her signature on the document, nor recorded in writing that he/she had in fact granted judgment and if so, when and in what terms."

10. In this matter, the Magistrate granted default judgment and signed the request notice and also made a minute of the record thereof. In paragraph 7 of the Magistrate's reasons for judgment in granting the counter application, he stated:

"This Court granted the default judgment in the matter, it isn't correct for the respondent to assume (without proof thereof) that only one file was to be placed before the Magistrate and he granted two orders (for two different case numbers) in the same amount, the Court mention that it wouldn't do such a thing, it usually checks the case numbers and parties of each request correspond with the Court file and other documents filed. The Court also mentioned that it does happen that no judgment stamp is placed on the Court file but judgment is granted on the request for default judgment, in this scenario, the Clerk who usually stamp the Court file later and ask the Magistrate to sign the cover as well, the original request would be given to the applicant's attorneys and a copy would remain in the Court file as proof that such request was granted."

11. The Magistrate further stated in his reasons for judgment:


"The respondent's allegation that the request was granted illegally has no merit since the Court, the Clerk and the attorney for the applicant all acted in terms of Rule 12(1)(c). The Court found that it is well within its right to and in terms of section 36(1)(c), by correcting a patent error by entering a higher amount than what was requested. The Court explained that the only explanation from its side was that it signed the request for default judgment, by not checking correctly the amount that was written on the stamp as the amount to correspond with amount claimed, it was a bona fide mistake by the Court, nothing illegal about it. The Court could also vary the judgment in terms of section 36(1)(d) (supra) since no appeal was lodged in the matter. The Court therefore granted the variation application with costs."

12. The Magistrate's reasons cannot be faulted. The amount of R17 887.66 was a patent error which was neither asked for in the request for default judgment nor the summons. The Magistrate was entitled as he correctly found to vary the amount of the default judgment and record the correct amount that was claimed by the respondent in the summons and the request for default judgment. Besides, the respondent had an option of abandoning the difference and execute on the correct amount foreshadowed in the summons and the request for default judgment which in any event was lesser than the amount granted by the Magistrate in the default judgment.
13. There is therefore no merit in this appeal. It follows that the appeal should fail.
14. The following order is made:
 - 14.1 the appeal is dismissed with costs.


W R MOKHARI

ACTING JUDGE OF THE HIGH COURT

I agree:

PP 

W VAN DER LINDE

JUDGE OF THE HIGH COURT

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