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

CASE NO: 69094/2014

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

11 December 2017

(Signature)

FERREIRAS (PTY) LTD **Applicant**

and

NAIDOO, VISHNU KISTENSAMY **1st Respondent**

REGO, SAMUEL JORGE DA SILVA **2nd Respondent**

Heard on: 30 November 2017

Delivered on: 11 December 2017

JUDGMENT

DE VILLIERS AJ:

[1] This matter has been allocated to me for adjudication from the Pretoria High Court. Both parties requested me to hear the matter. I have a discretion to hear the matter (**Thembani Wholesalers (Pty) Ltd v September and Another** 2014 (5) SA 51 (ECG) at para 13). The Pretoria High Court and the Johannesburg High Court have concurrent jurisdiction (**Government Notice** 30 published in Government Gazette 39601 of 15 January 2016). I exercised my discretion and heard the matter.

[2] The applicant seeks to set aside the respondents' application for rescission of judgment as an irregular step in terms of Rule 30. This is the application before me. In addition there are/were three other applications, namely:

[2.1] The first application in the series is a main application for payment in which the applicant (also the applicant in this matter) claimed payment of about R1m from the respondents (also the respondents in this matter). The applicant issued the application for payment in September 2014;

[2.2] The respondents in the application for payment sought discovery in terms of Rule 35(12) and (14) in November 2014. This led to an application to compel discovery, which was heard in October 2015, the second application in the series. Msimeki J handed down judgment in September 2016, and dismissed the application for discovery;

[2.3] The third application in the series is a rescission application after judgment was granted in the application for payment. This came about as upon the dismissal of the application for discovery, the answering affidavit in the application for payment became due and then overdue. The applicant enrolled the application in the unopposed motion court for payment without an answering affidavit having been served, and did so on 7 November 2016. The answering affidavit in the application for payment was served on 30 November 2016, without an application for an extension of time and/or a condonation for the late service of the

affidavit. When the matter was called before Louw J on 2 December 2016, the respondents therein (and before me) sought a postponement to bring an application for condonation of the late delivery of the answering affidavit. This was a request made from the bar. Louw J decided that the answering affidavit was not before him, dealt with the matter on an unopposed matter and granted the application for payment. The respondents before me launched a rescission application on 4 January 2017 in which they claimed rescission of judgment in the payment application under the Common Law. They earlier launched an application for leave to appeal the judgment as well. I am informed that this step was taken out of caution.

[3] The applicant before me (also the applicant in the application for payment), instituted Rule 30 proceedings, rather than to answer the rescission application. As stated, this matter came before me more than three years after the application for payment was launched, as the fourth application in the series.

[4] The Rule 30 application dated 6 February 2017, is premised on an argument that the judgment before Louw J was not a default judgment as the respondents' counsel was present in court when the judgment was granted. The applicant's case is that a judgment by default requires to be one given in the physical absence of the respondents.

[5] It is common cause that Louw J had no regard to the answering affidavit that the respondents sought to place before the court. I may add that it is clear from the transcript that Louw J believed that he was granting a judgment by default, as he did not have opposing papers before him. He heard the matter as part of the unopposed motion roll and granted an order only (without giving a judgment), as one normally does in that court.

[6] Apart from relying on case dealing with a summary judgment application, I was referred to the following two cases dealing with the position in the Magistrates' Courts. These two cases reflect the main basis for the

applicant's argument that physical absence/presence of the respondents' counsel would determine if one has to deal with a rescission of a default judgment or an appeal:

[6.1] The first case is **De Allende v Baraldi t/a Embassy Drive Medical Centre** 2000 (1) SA 390 (T):

[6.1.1] In this case the court considered section 36(a) of the **Magistrates' Courts Act** 32 of 1933-

> '*The court may, upon application by any person affected thereby, or, in cases falling under para (c), suo motu - (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted';*

[6.1.2] The facts were that after the defendant failed to comply with a court order compelling further particulars-

> '. . . *the applicant launched an application in terms of Rule 60(3) for an order striking out the respondent's plea and granting judgment in favour of the appellant as claimed in the summons. The court heard the application on 23 April 1998. At the hearing respondent's attorney attempted to hand in an affidavit to support an application by the respondent for a postponement of the application but this was refused by the court. After argument the court granted judgment against the respondent in terms of Rule 60(3) together with costs, including the costs of the Rule 60(3) application. The respondent then launched an application to rescind the order . . .* '.

[6.1.3] The **De Allende** judgment was decided by an application of the Rules of the Magistrates' Courts that provide for representation of a defendant by an agent, namely a legal representative. Accordingly, so the court ruled, the defendant was present at the hearing as his attorney was present when he asked for a postponement;

[6.2] A similar case is **Du Plessis v Goldblatt's Wholesale (Pty) Ltd** 1953 (4) SA 112 (O):

[6.2.1] In that case the defendant did not appear when a trial had to commence, his attorney sought a postponement and the magistrate granted default judgment in the presence of the attorney (*'Die magistraat wat egter van mening was dat daar nie voldoende redes aangevoer is nie vir verweerder se afwesigheid, het die aansoek om uitstel geweier en sonder om die partye op die meriete te verneem, vonnis by verstek vir die bedrag van £146 10s. 10d. ten gunste van eiser toegestaan. Verweerder se prokureur was teenwoordig toe die vonnis gevel is.'*)

[6.2.2] Also in this case the court found that for the purposes of section 36 of the **Magistrates' Courts Act**, the judgment was not given in the absence of the defendant.

[7] The case I have to decide does not deal with a rescission of judgment obtained in the magistrates' court or the application of its rules. Not only are the decisions not in point, but the two judgments also did not consider the effect of the defendants' versions not having been placed before the courts when the magistrates made their decisions.

[8] As will appear below, this omission is important, as in the Common Law, our courts are not only concerned with physical presence of the parties.

Katritsis v De Macedo 1966 (1) SA 613 (A) dealt with the case where a judgment was taken against a defendant who absented himself mid-way through a trial. The court held that it is a judgment by default. In that case, the plaintiff's counsel had withdrawn and the plaintiff was refused a postponement. The plaintiff acting in person was unable to place his case before the court, and left. The trial proceeded in his absence and judgment was granted against him. The court held (618B) that the concept of default has three components (underlining added):

> '*It is clear from the authorities that the default in regard to a defendant is not confined to his failure to file the necessary documents required by the Rules in opposition to the claim against him, or to appear when the case is called, but comprises also failure to attend Court during the hearing of the matter. . .*'

[9] In the case before me, the first component is of importance, but also the fact that there was no appearance on the merits of the matter. In **Katritsis v De Macedo** the court also emphasised that a defendant who is present but does not make a defence, is deemed to be absent (618E-F, underlining added):

> '. . . ***Voet**, 2.11.11., makes it even moreclear. I quote from Gane's translation:*
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> > *'Moreover not only is he who does not attend at all on the day fixed to be accounted a dallier and defaulter, but also he who does indeed attend, but does not take in hand the business for the taking in hand of which the day had been appointed. For instance a plaintiff appears and makes no claim: or a defendant does not challenge the plaintiff's claim when he should do so. He who though present makes no defence is surely reckoned in the position of one who is not there; and he who when called upon does not plead is deemed to have been futile and is expressly classed as contumacious.*'

[10] In **Pitelli v Everton Gardens Projects CC** 2010 (5) SA 171 (SCA) the court dealt with a judgment obtained by default in motion proceedings where no answering affidavit was filed. As will appear below, instead of dealing with a

rescission application, the court dealt with an appeal. The brief background is that the respondent sought to hold the appellant liable for the debts of a company, and sought to do so in motion proceedings. Those proceedings followed after action proceedings against the company, where a judgment by default was obtained. The judgment in the motion proceedings was obtained when an application for postponement of the proceedings was refused, and the appellant's counsel withdrew before judgment was granted. The matter before the Supreme Court of Appeal was an appeal against the default judgment in the motion proceedings, leave being granted on petition. An application for rescission of judgment had been refused, but was not before the court hearing the appeal. The court stated that the issue for determination on appeal (para 22) as follows:

> '. . . *All the submissions that were presented in this case turned around the allegation that Mr Pitelli knew full well that the moneys had been overpaid. When asked whether we are to accept that as an established fact counsel for Mr Pitelli was constrained to concede, though he did so with considerable discomfort, that we must indeed accept that as an established fact because the allegation has not been answered. But of course the allegation has not been answered, in either direction, only because Mr Pitelli walked out of the case without filing answering affidavits. This raises the question why this court is hearing an appeal when the proceedings were abruptly ended before they had reached their ordinary conclusion.*'

[11] In the end the court in **Pitelli** found that (para 36)

> '*The orders that were made in this case were clearly susceptible to rescission. In those circumstances they are not appealable, . . .*'

[12] I am asked to make a distinction between this judgment and the one I have to decide because the advocate in the present case did not withdraw as counsel for the respondents before Louw J granted the judgment. That submission is contrary to the findings in **Katritsis v De Macedo** about an extended meaning to a judgment in default to include a litigant whose version is not before the court. It is not a true distinguishing factor to distinguish this case and **Pitelli**.

[13] Shortly before the hearing a decision by a full court was handed down in the Limpopo Division. The applicant contended that I should not follow it, as it is decision in another division that is clearly wrong.

[14] The case in issue is **Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm** (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017) a decision by Makgoba JP (Kganyago J and M S Sikhwari AJ concurring). The issue decided in part was almost identical (underlining added):

'*[2] The question to be decided is twofold, namely:*

2.1. Whether the Appellant was in default despite the attendance of its Counsel in Court when judgment was granted; and

2.2. Whether the Appellant whose application for rescission of judgment was dismissed by single Judge of this Division had made out a case for the relief sought.

[3] The judgment sought to be rescinded was granted on 2 August 2016 when M G Phatudi J refused an adjournment sought by the Appellant's Counsel and granted judgment in the absence of any answering affidavits by the Appellant and on the Respondent's version alone.

[4] . . .

[10] The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in

Court. See: ***Morris v Autoquip (Pty) Ltd*** *1985 (4) SA 398 (WLD);* ***First National Bank of SA Ltd v Myburgh and Another*** *2002 (4) SA 176 (CPD).*

[12] The question of what is meant by "default" was considered in ***Katritsis v De Macedo*** *1966 (1) SA 613 (A). In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party.*

[13] . . .'

[15] I intend to follow the Limpopo Division as I do not believe that it is clearly wrong. As result, in my view, the reliance by the applicant on an interpretation of the rules in the magistrates' courts, has been misplaced.

[16] As an aside, in my view, this country now has one High Court, and the artificial left over from a divided pre-1910 past about which full courts or full bench decisions a single judge must follow, should adapted. In my view, a single judge should be bound by a larger court, whether in her/his division or not, if that case is the only decision in point.

[17] It seems to me that a judgment could be given by default in the normal course in motion proceedings as a result of (a) default of opposition, (b) in default of an appearance at the hearing, or (c) in default of a party placing its version before the court. A judgment is necessary in none of these cases (unless the presiding judge decides that a judgment is required), an order suffices. These cases of default in the normal course in motion proceedings are:

[17.1] A party may elect not to oppose an application. The matter is placed on the unopposed motion roll and is dealt with on the applicant's papers only. It is on all versions a judgment by default (in all three meanings of the term, default of opposition,

default of an appearance, and in default of a party placing its version before the court);

[17.2] A party may elect to oppose an application, serve a notice of opposition, and may-

[17.2.1] Do nothing more (i.e. do not serve an answering affidavit or do not appear at the hearing). The matter is placed on the unopposed motion roll and is dealt with on the applicant's papers only. It is a judgment by default (in two meanings of the term, default of an appearance, and in default of a party placing its version before the court). This happens often;

[17.2.2] Serve a notice in terms of Rule 6(5)(d)(iii) to take a point of law, and do not appear at the hearing. The matter is placed on the opposed motion roll and is dealt with on the applicant's papers only. It is a judgment by default (in two meanings of the term, default of an appearance, and in default of a party placing its version before the court);

[17.2.3] Serve an answering affidavit timeously, and do not appear at the hearing. This happens often. In almost all of these cases, the respondents do not serve heads of argument. The matter is placed on the opposed motion roll and is dealt with on the applicant's papers only. It is a judgment by default. Although the default is only in respect of one meaning term, default of appearance, that fact means that the answering affidavit is not considered. The exception is the position in summary judgment proceedings where the court is obliged to consider an affidavit served due to the wording of the rule

32(3)(b).[1] See **Morris v Autoquip (Pty) Ltd** 1985 (4) SA 398 (W) at 400C-F. I respectfully disagree with the application of the position in summary judgment proceedings to normal opposed motions as set out in **Benson and Another v Standard Bank of SA Ltd and Others** (17143/2011) [2014] ZAGPJHC 428 (14 October 2014) para 9-12. In that case the court refused a rescission application in terms of Rule 42(1)(a)[2] in circumstances where an answering affidavit had been filed, but the respondent's counsel waited in the wrong court. Judgment was granted and an application for rescission of judgment under Rule 42 was brought. I agree that Rule 42 is not the appropriate procedure, but the court found that it was not a judgment by default in that an answering affidavit had been filed. Accordingly, the court found that an appeal was the appropriate procedure. In my view, with respect, a rescission application would have been the appropriate procedure;

[17.2.4] Prepare an answering affidavit late, and do not appear at the hearing. The matter is placed on the unopposed motion roll and is dealt with on the applicant's papers only. (See **Pitelli v Everton Gardens Projects CC** para 18.) It is a judgment by

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[1] '*Upon the hearing of an application for summary judgment the defendant may—*

(a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.'

[2] '*The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) . . .'

default (in two meanings of the term, default of an appearance, and in default of a party placing its version before the court);

[17.2.5] Prepare an answering affidavit late, and appear at the hearing seeking a postponement and/or leave to place the answering affidavit before the court. If such relief is refused, and judgment is granted on the applicant's papers only. It is still a judgment by default in at least one meaning of the term, default of a party placing its version before the court.

[18] Whether or not leave is even required to place the answering affidavit before the court is not without complexity. In my view, Louw J in law, with respect, was not obliged to treat the answering affidavit as pro non scripto. **Uniform Rule** 6(5)(d) does not state that an answering affidavit served late is pro no scripto without an application for an extension of time or for condonation. Furthermore, the effect of **IBR Fire Protection CC t/a IBR Fire v Minister of Labour and Others** (70285/13) [2015] ZAGPPHC 972 (7 August 2015) is that no application for an extension of time or for condonation is necessary if an answering affidavit is served before the hearing. See too **Pangbourne Properties Ltd v Pulse Moving CC and Another** 2013 (3) SA 140 (GSJ) para 14 and further that urges judges in these circumstances not to take a technical approach.

[19] In the end, the reason why the learned judge had no regard to the answering affidavit, does not matter. It was a judgment by default of him considering the respondents' defence that they had tried to place before him. Treating the matter as an appealable matter would result in the same conundrum as experienced in **Pitelli v Everton Gardens Projects CC**, in this instance averments in the answering affidavit that will stand uncontested.

[20] The formalistic approach of the applicant comes at a great cost to bringing the matter to finality. Many litigants would have had the matter removed

from the unopposed roll before Louw J at the respondents' cost, delivered a replying affidavit, and the matter would have been finalised by now. Many others would simply have answered the rescission application, and the matter would have been finalised by now. The formalistic approach of the applicant will continue to involve the parties in much expense. I were to decide the matter against the applicant (as I do), at least the rescission application would have to be answered, replied to, and argued (if my judgment is not appealed against). If the rescission application were to succeed (and no attempts were to made to seek leave to appeal that decision), the application for payment would have to be replied to, and argued.

[21] An applicant, prima facie desirous to be paid, has embarked on this technical, time-wasting route that may tie it and the respondents up in litigation for years to come, and tie it up in matters that take the matter potentially not one step closer to finality.

[22] The Rule 30 application had no merit. It should never have been brought. In the exercise of my discretion on costs, I grant the costs of two counsel. Although the law and the facts are not unduly complicated, the importance of the matter, and the conduct of the applicant in my view, justify such an order. Had the respondents persisted with a costs order on the attorney and client scale, I would have seriously considered it. It is a case where part of what is stated **In Re Alluvial Creek, Ltd.** 1929 CPD 532 at 535 applies:

> '*An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexations. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may he regarded as vexatious when they put the other side to unnecessary trouble*

and expense which the other side ought not to bear. That I think is the position in the present case.'

[23] I do not know if the applicant by taking a technical route ever entered into the litigation *"with the most upright purpose and a most firm belief in the justice of their cause"*, but in my view the respondents should not be out of pocket in having to deal with such litigation.

[24] I accordingly grant the following order:

1 The application is dismissed with costs, such costs to include the costs of two counsel

DP de Villiers AJ

On behalf of the Applicant:	Adv W Strobl
Instructed by:	Kyriacou Inc
On behalf of the Respondents:	Adv R Stockwell SC
	Adv H W S Martin
Instructed by:	Robyn Edmunds Attorneys