REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER 57925/10

DATE: 18 SEPTEMBER 2014

In the matter between:

KOBIE GUESS N.O. APPLICANT

and

PRETORIA MAGISTRATE 1ST RESPONDENT

WOOD PERFECTIONS CC 2ND RESPONDENT

JUDGMENT

MODIBA AJ:

1.

This is an application to review and set aside an order made in the Magistrates' Court Pretoria by the 1st respondent on 1 July 2010, under case number 114391/2007, dismissing an application for rescission of judgment.

2.

The 1st respondent presided over the proceedings in the Magistrate Court. He is not opposing this application. He filed a notice to abide. The application is only opposed by the 2nd respondent. The 2nd respondent was the respondent in the rescission application.

3.

The following facts are common cause between the parties. The 2nd respondent issued summons against the applicant in the Pretoria Magistrates' Court for payment of money due for services rendered. The applicant filed an appearance to defend, a plea and a counter claim. The matter was set down for trial on 6 April 2010. On the said date, there was no appearance on behalf of the applicant. The magistrate granted default judgement in favour of the 1st respondent. The applicant filed the rescission application on 12 May 2010. The applicant did not apply for condonation, either in writing, or was such an application brought orally from the bar.

4.

Counsel for the applicant submitted that during the application for rescission of judgment, two peculiar occurrences took place that prompted this review application. Firstly, the 1st respondent denied the applicant an opportunity to argue in reply. Secondly in his judgment, the 1st respondent expressed the view that the applicant brought the rescission application out of time. He then *mero muto*, considered an application for condonation for the late filing of the rescission application when he was not ceased with such an application. He found that the applicant failed to show good cause for failing to bring the rescission application timeously. He then dismissed the application for condonation. He also dismissed the rescission application without considering the merits of the application.

5.

The applicant brought this application in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), Section 33 of the Constitution and Rule 53 of the Uniform Rules of Court. At the hearing of this application, counsel for the applicant conceded a point raised in the 2nd respondent's heads of argument, that the 1st respondent's conduct of the rescission application is not reviewable under PAJA. He also abandoned his reliance on section 33 of the Constitution because that section merely sets out the right to just administrative action. He premised the application on rule 53. Counsel for the 2nd applicant submitted that Rule 53 was not in operation when the causa for this application arose. However, he conceded that the applicant may rely on section 24(1) (c) to bring this application.

6.

The jurisdiction of the high court to review lower court proceedings for a gross irregularity in the proceedings is founded in section 24(1) (c). Rule 53 merely sets out the procedure to be followed by the applicant when bringing a review application. I am therefore of the view that this application is properly before me in terms of section 24(1) (c). Applicant has also complied with the procedural requirements set out

in Rule 53.

7.

Gross irregularity in the proceedings is defined as an irregular act or omission by the presiding judicial officer in respect of the proceedings which is of such a gross nature that it was calculated to prejudice the aggrieved litigant. Once an applicant has proved that the presiding judicial officer committed a gross irregularity, the court hearing the review application ought to set the order aside unless it is satisfied that the applicant has in fact not suffered any prejudice.[1] The order would only be set aside if it is of such a nature that it was calculated to cause prejudice to a litigant.[2]

8.

The applicant based his application on two grounds. The first ground is that during the hearing of the rescission application, the 1st respondent violated the *audi alteram* rule by refusing to hear the applicant in reply. He averred that by uttering the following words which appear in the record: "*Thank you. No. I do not want to hear you anymore,"* the 1st respondent denied him the right to reply. The second ground is that the Magistrate refused the recession application on the basis that an application for condonation was dismissed when no application for condonation had been made by the applicant.

9.

In my view, prima facie, the first ground sought to be relied on by the applicant sets out an irregularity. The second ground does not set out an irregularity. Instead it requires a consideration of the merits of the recession application. A single judge may not consider a judgment handed down by a lower court. Only an appeal court has the jurisdiction to do so. For that reason, when adjudicating this matter, I will only confine myself to the first ground of review.

10.

Counsel for the 2nd respondent submitted that the applicant had an opportunity to address the Magistrate in argument. In reply, he would only have clarified aspects of his argument in response to argument by counsel for the 2nd respondent. During the hearing of the recession application, he neglected to object to the refusal by the Magistrate to argue in reply. Counsel for the 2nd respondent relied in this regard on Transvaal Industrial *Food Ltd v BMM Process (Pty) Ltd 1973 (1) 627 AD,* where the court held that if failure of a court to receive argument on behalf of a party was due to fault or supineness on that party or his legal representative, the omission might not constitute a fatal irregularity. This case is distinguishable from the

current case in that there the court dealt with an order by the presiding judicial officer to summit written argument. As a result, Counsel were deprived of an opportunity to utilize their persuasive skills in the interests of their clients.

11.

In this case, in my view, counsel was neither supine nor did he erroneously not argue in reply. What appears from the record is that when he attempted to argue in reply, the 1st respondent expressly informed him that he did not want to hear him. Therefore that the court did not receive argument in reply cannot be attributed to supineness or fault on his part. It is clearly due to an express refusal by the 1st respondent to hear him. In my view, there is nothing further that he ought to have done. This case is also distinguishable from other cases relied on by the 2nd respondent, in that in those cases the presiding officer omitted to invite the applicant to argue in reply and the applicant neglected to insist on its right to argue in reply.[3]

12.

Counsel for the 2nd respondent further argued that the applicant neglected to set out the issues that he would have raised in reply as well as to demonstrate that he has suffered prejudice as a result of failure by the magistrate to allow him to argue in reply. In response to this argument, counsel for the applicant pointed out that the 2nd respondent issued summons against the applicant for an amount of R 54,000.00. His cause of action arose out of services rendered. He alleges that the services were rendered poorly. The applicant filed a plea and a counter claim in an amount of R150,000. He made out a prima facie case in his counter claim which constitutes a defence to the second respondent's claim. Prior to the trial date of 6 April 2010, the applicant's attorneys wrote a letter to the 2nd respondent's attorneys informing them that they intend applying for a postponement. The applicant's attorneys travelled overseas shortly thereafter. Due to a miscommunication between the applicant's counsel and the applicant's attorney, there was no appearance on behalf of the appellant. The appellant only became aware that judgment was taken against him on the 14th of April 2014. He filed the recession application on 12 May 2010. These are the issues the applicant would have clarified in reply to persuade the Magistrate to grant the rescission application.

13.

Rules of natural justice are central to the South African procedural law. The right to be heard, encapsulated in the maxim *audi alteram*, forms part of the rules of natural justice. It requires that every litigant is given a fair opportunity to address the court. This principle is at the pinnacle of adversarial legal proceedings.[4] It

includes the right to argue on the facts.[5] In my view, this principle ought to be observed at all times unless a party expressly waives his right to be heard or negligently omits to do so. By refusing the applicant an opportunity to argue in reply, the 1st respondent violated this important principle. Given the factors set out in paragraph 12 above, which the applicant would have clarified in reply, I am satisfied that the applicant was prejudiced by the first respondent痴 refusal to hear him in reply. Therefore refusal by the 1st respondent to hear the applicant in reply constitutes a gross irregularity.

14.

Although courts have in exceptional cases substituted the decision of the lower court,[6] in my view, given the nature of the gross irregularity committed in this case, I am loath to consider substituting the 1st respondent 痴 decision, as doing so would require me to singlehandedly consider the merits of the rescission application. In my view, it is appropriate to remit the matter back to the 1st respondent to hear the applicant in reply.

15.

In the premises, I make the following order:

ORDER

1. The decision by the 1st respondent on 1 July 2010 dismissing the rescission application is set aside.

2. The rescission application is remitted back to the magistrate's court to afford the applicant an opportunity to argue in reply.

3. The respondents are ordered to pay the applicant's costs of this application jointly and severally.

L. T. Modiba

Acting Judge of the High Court Gauteng Division,

Pretoria

Counsel for the Applicant: Mr PI Oosthuizen

Instructed by: Barnard Incorporated

For the 2nd Respondent: Mr BC Stoop

Instructed by: Pierre Krynauw Attorneys

Date of hearing: 25 August 2014

Date of judgment: 18 September 2014

footnote1