IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

APPEAL CASE NO: A809/2015

COURT *A QUO* CASE NO: 1688/2015

In the matter between:

MABHENA: MARIA First Appellant

MABHENA: JOHANNES Second Appellant

And

GREAVES PROPERTIES CC Respondent

JUDGMENT

ADAMS AJ:

[1] . This is an appeal against the Judgment and the order of the Witbank Magistrates Court handed down on the 8th May 2015. In terms of the Judgment the application by the appellants for a rescission of the eviction order granted against them in favour of the respondent was dismissed with costs. The learned Magistrate also confirmed the order for the eviction of the appellants from the property known as Farm N…. 3…, Portion 1….., Witbank *('the property'*).

[2] . On the 8th of May 2015 the court a *quo* had granted an order by default against the *'illegal occupant* of the property, as the first respondent, and against *'all other occupiers'* thereof, as the second respondent. The first and the second appellants as well as their children are the occupiers of the property and have inhabited the buildings on the property at all material times. The order was granted by default under the circumstances set out hereafter.

[3] . On the 16th of February 2015 the respondent issued out of the court a *quo* a notice of motion in terms of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act, Act no 19 of 1998 *('the PIE Act').* The aforesaid notice of motion incorporated an *Ex Parte* application in terms of section 4(2) of the PIE Act, to be

heard on the 23rd March 2015. On the 23rd March 2015 the ex *parte* Order was in fact granted, and pursuant to the Order the application was served on the appellants. I interpose here to note that the procedures followed by the respondent in terms of the PIE Act, were completely defective and wholly non-compliant with the provisions of the said Act. In any event, this point was conceded during argument by Ms Gianni, who appeared on behalf of the respondent.

[4] . All the same, at some point subsequent to the 23rd of March 2015 service of the application came to the attention of the appellants and on the 15th April 2015 their attorney communicated with the attorneys for the respondent, and advised them that the appellants have instructed him to oppose the application for their eviction from the property. On or about this date a notice of intention to oppose the application was delivered on behalf of the appellants.

[5] . The attorney for the appellants also arranged with the respondent's attorneys that the application which, according to the notice of motion was on the motion court roll for the 24th April 2015, would be removed from the roll for the aforementioned date to enable him to file the answering affidavits of the appellants within 2 (two) weeks from the 15th April 2015. Respondent's attorneys thereupon attended court on the 24th April 2015 and postponed the matter to the 8th May 2015, as he understood the arrangement to have been that the appellants would file opposing papers within 2 weeks, failing which he (respondent's attorney) would apply for an order by default. Respondent's attorneys failed to advise the appellants' attorneys that the application had been postponed to the 8th of May 2015.

[6] . On the 8th May 2015 the eviction order was granted. The appellants and their legal representatives were however blissfully unaware of this as they laboured under the impression that the application would simply be removed from the motion court roll for 24th April 2015. They had no idea that the matter was on the roll for this date. On the 28th May 2015 the appellant's affidavit opposing the application for eviction was served and filed, albeit rather belatedly. At that point the respondent's attorneys advised the appellants' attorneys that an eviction order had been granted on the 8th May 2015. By all accounts, the appellants and their attorney were caught completely by surprise as they were totally unaware that the application was on the roll for the said date, and had

in fact already been dealt with.

[7] . On the 11th June 2015 the appellants launched the application for rescission of the judgment. On the 7th October 2015 the application was dismissed on the basis that the application was out of time and that the appellants ought to have filed an application for the late filing of the application. Also, the court was of the view that the appellants had not demonstrated a *bona fide* defence to the respondent's claim.

[8] . The Learned Magistrate found that the application for rescission was out of time and that the appellants ought to have applied for condonation for the late filing of the said application. For the reasons alluded to later on in this judgment, I am of the view that this finding by the Magistrate was incorrect. The Court also found that the appellants had not demonstrated a *'substantial defence'.* The court rejected the defence of the appellants to the effect that the respondent was not entitled to have them evicted because they were *labour tenants'* as defined in the Land Reform (Labour Tenants) Act no 3 of 1996 *('the Labour Tenants Act'),* which means that the Court a *quo* did not have jurisdiction to hear the matter.

[9] . This appeal is on the basis that the court a *quo* erred in its findings relating to these issues, and it is submitted, on behalf of the appellants, that the Magistrate should have granted the rescission of the default judgment.

THE LAW & ITS APPLICATION *IN CASU*

[10] . Section 36(1) of the Magistrates' Court Act, Act no 32 of 1944 (as amended), empowers the court to rescind any judgment granted by it in the absence of the person against whom that judgment was granted.

[11] . In terms of Rule 49(1) of the Magistrates' Court Rules a party to proceedings in which a default judgment has been given may within 20 (twenty) 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 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 the default judgment on such terms as it deems fit:

[12] . The undisputed and uncontested version of the appellants, as corroborated by their attorney, is that the first time that they became aware that an eviction order had been granted against them was on a date after the 28th of May 2015, that is the date on which their papers opposing the application for an eviction order was filed. On the 11th June 2015 the appellants' application for rescission was delivered. This means that at most the application was filed within 10 (ten) days from the date on which the appellants *obtained knowledge of the judgment*therefore well within the 20 day time period limited by Magistrates Court Rule 49(1). It is for this reason that I am of the view that Court a *quo* was incorrect in ruling that the application for rescission was out of time.

[13] . In terms of Rule 49(1) the court is not entitled to rescind or vary a judgment if the applicant fails to show *'good cause*' for relief or does not satisfy the court that there is good reason for the rescission or variation of the judgment. If the applicant succeeds in showing good cause, it is still in

the discretion of the court to grant or refuse relief. This discretion must be exercised judicially in the light of all the facts and circumstances of the case as a whole. The approach to be adopted by the court has been described by Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd,* 1994 (4) SA 705 (E), at 711E-G, as follows:

'An application for rescission is never simply an enquiry whether or not to penalize a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it willful or negligent or otherwise, gives rise to the probable inference that there is no bona fide *defence, and that the application for rescission is not* bona fide. *The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in* Grant v Plumbers (Pty) Ltd, *1949 (2) SA 470 (O), and* HDS Construction (Pty) Ltd v Wait, *1979 (2) SA 298 (E), and also any prejudice that might be occasioned by the outcome of the application. '*

[14] . In *Silber v Ozen Wholesalers (Pty) Ltd*, 1954 (2) SA 345 (A) at 352G, the Appellate Division held that*'good cause'* includes, but is not limited to, the existence of a substantial defence. The court declined to make the phrase the subject of further definition and found it sufficient for the purpose of the case before it to state at 353A that:

'the defendant must at feast furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, *and to assess his conduct and motives'.*

[15] . *In casu,* the appellants gave a perfectly plausible explanation for their default. They were not aware of the fact that the matter had remained on the motion court roll. According to them, their legal representatives, who had served notice of intention to oppose the main application for eviction, had arranged with the respondent's attorneys that the matter would be removed from the roll as same had by then become opposed. There is nothing inherently improbable about this version and it cannot

possibly be said that this explanation is far-fetched.

[16] . This court is therefore of the view that the appellants gave an explanation for their default which is sufficiently full and which ought to have enabled the court a *quo* to understand how the default judgment came about.

[17] . The sub rule also imposes on the appellants the burden of actually proving good cause for rescission. It has been held that the requirement of *'good cause'* cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a *bona fide* presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded. See: Ga/p *v Tansley NO,* 1966(4) SA 555 (C), at 560B. The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success: it suffices if he shows a *prima facie* case, or the existence of an issue which is fit for trial.

[18] . In this matter the main defence which the appellants intended raising against the application for their eviction was based on the provisions of Labour Tenants Act 3 of 1996. In terms of this Act the Magistrates Court does not have jurisdiction to adjudicate a matter relating to the eviction from premises of *'labour tenants'* as defined in the said Act 3 of 1996. Jurisdiction relative to such matters is the exclusive reserve of the Land Claims Court, and this is expressly provided for in the Act 3 of 1996, read with the Restitution of Land Right Act, Act no 22 of 1994.

[19] . The appellants alleged in their application for rescission in the Court a *quo* that they are *'labour tenants'* as defined. This was disputed by the respondent. However, the denial by the respondent that the appellants are *'labour tenants'* is immaterial. The mere fact that the appellants claim that they are [1]*labour tenants'* is sufficient to exclude the jurisdiction of the Magistrates Court. This, in our view, ought to have been regarded by the Magistrate as a *'substantial defence'* to the respondent's eviction application.

[20] . Accordingly, the court a quo erred in not granting the application for rescission. It ought to have ruled that it has no jurisdiction to adjudicate this issue. By finding, as it did, that the appellants are not *labour tenants*', the court a quo had misdirected itself. The misdirection lies therein that, having regard to the applicable legislative

framework, the Magistrates Court does not have jurisdiction to hear the matter. A further misdirection related to the actual finding on this point that the appellants were not *labour tenants'.* In our view, there appears to be no factual basis for this finding. On the contrary, the uncontested facts, notably that the mother of the appellants is buried on the property, which suggests that they have their roots firmly in the ground of the property, seemingly supports the version of the appellants on this point. We are however not required to decide this point and we do not intend doing so. The point is however that the court a *quo's* jurisdiction to hear this matter is excluded.

[21] . The appellants have also alluded to other aspects which, according to them, demonstrate that they have additional defences. These include the fact that there has not been proper compliance with the procedural requirements of the PIE Act. I agree with the submissions on behalf of the appellants in that regard. I have already indicated what the difficulties are which I have with the procedures followed by the respondent. Importantly, the *ex parte* application for directions on the service of the processes was part and parcel of the main application for the eviction of the appellants. This is unprocedural and defeats the purpose of the PIE Act.

[22] . For these reasons, I am of the view that the court a *quo* was incorrect in dismissing the application for rescission. Accordingly, the appeal stands to be upheld.

COST

[23] . Mr Mojapelo, who appeared on behalf of the appellants, submitted that cost of the appeal, as well of the cost of the application in the Court a *quo* for the rescission, should be awarded in favour of the appellants against the respondent. I agree with these submissions.

[24] . The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[25] . I can think of no reason why I should deviate from this general rule. If anything, the facts in this matter, notably that the respondent opposed the application for rescission in circumstances where the opposition was not warranted, mitigate in favour of the

application of the general rule.

ORDER

[26] . Accordingly, the order that I would make is the following

1. The appeal is upheld with costs.
2. The order of the Court a quo be and is hereby set aside and substituted with the following

The Order granted by this Court on the May 2015 be and is hereby rescinded and set aside; and the respondent is ordered to pay the cost of the applicants relating to the opposed aoDlicatiojrior rescission\

ADAMS AJ

Acting Judge of the High Court

Gauteng Division, *Pretoria*

I agree,

MPHAHLELE J

Judge of the High Court Gauteng Division, Pretoria
HEARD ON: 14th June 2016

JUDGMENT DATE: 15th June 2016 FOR THE PLAINTIFF: Adv M M Mojapelo

INSTRUCTED BY: Mketsu & Associates Inc

FOR THE DEFENDANT: Adv D S Gianni

INSTRUCTED BY: Harvey Nortje Wagner & Motimele