REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No. AR 462/09

In the matter between:

SURGEREN NAIDOO APPELLANT

and

RICKEY PANDARAM RESPONDENT

J U D G M E N T

RALL, AJ.

[1] The appellant appeals against the dismissal of his application for the rescission of a default judgment granted against him by the Chatsworth magistrates' court. Because of the brevity of the magistrate's reasons for judgment, it is necessary to set out the facts of the case in some detail.

[2] The respondent instituted action for, firstly, the reduction of the purchase price of a motor vehicle sold by the appellant to the respondent. This claim was based on the *actio quanti minoris*, it being alleged that the appellant made misrepresentations about whether or not the vehicle was a so-called built up one. Secondly, the respondent claimed damages for negligent misrepresentations made by the appellant about latent defects in the vehicle.

[3] The appellant defended the action on the following bases:

(a) he denied having made the misrepresentations

(b) he denied that the vehicle was a rebuilt one and that he had knowledge of that fact prior to the sale

(c) he denied the existence of the latent defects

(d) he averred that the vehicle had been sold voetstoots

(e) and finally, he denied any negligence on his part.

[4] The matter was set down for trial on 16 October 2008. However, shortly before the hearing the appellant decided to change attorneys and on 6 October 2008 instructed attorneys Nolan Naicker and Company to act for him. The appellant attempted to get the file transferred to his new attorneys, but his erstwhile attorneys stated that they would not hand over the file until they had been paid by a firm known as Legal Wise. Legal Wise had apparently undertaken to pay the applicant's legal costs. The file was eventually handed over on 15 October 2008, the day before the trial.

[5] In the meanwhile, the appellant had decided to go to Swaziland on a business trip, and as a result, was not present at the trial. He informed his new attorneys of this fact on 6 October 2008 and consequently, the respondent's attorneys were requested on the same day to consent to an adjournment of the trial. This was met with the response that the respondent would only consent to an adjournment if the appellant tendered certain wasted costs. There was no response to this proposal and no agreement on an adjournment was reached.

[6] On the day of the trial, the appellant's erstwhile attorneys formally withdrew and the attorney now representing the appellant attempted to place herself on record in order to request an adjournment. The adjournment was going to be requested on the grounds that the appellant was not available and that the attorney had had insufficient time to

prepare. The magistrate refused to allow the attorney to represent the appellant and judgment by default was granted against the appellant. The appeal record does not reveal whether any evidence was led, either orally or by way of affidavit, before judgment was granted, but it was common cause at the appeal that no evidence had in fact been led.

[7] A writ was issued on 27 October 2008 and on 12 November 2008 the application for rescission was brought. This was within the 20 day period prescribed by rule 49. (In this judgment all references to sections and rules will be to sections of and rules under the Magistrates' Court Act, unless otherwise stated).

[8] In his founding affidavit the appellant set out in more detail the events that I have already summarized. He further stated that he had a *bona fide* defence, based on the allegations in the summons. He concluded by stating that he was not in wilful default, and that the judgment was granted as a result of the delay in payment by Legal Wise and a mistake by the magistrate. The mistake was obviously the refusal to allow the appellant legal representation.

[9] The respondent's opposition to the application was based on both legs of the well-known enquiry in applications for rescission of default judgments. He questioned, but did not expressly dispute the appellant's assertion that he had gone to Swaziland, pointing out that the appellant had not put up documentary proof of this visit. He also alleged that the appellant was aware that the vehicle was built up at the time of the sale, by virtue of an affidavit which he had signed prior to the sale. In addition, the respondent challenged the appellant's *bona fides*, alleging that his request for an adjournment was yet another manifestation of his dilatoriness in dealing with this matter. Significantly, the

respondent did not deal with the magistrate's refusal to allow the appellant's attorney to represent her client.

[10] The arguments before the magistrate went much along the lines of those in the affidavits. On behalf of the respondent it was also argued that the appellant did not have a *bona fide* defence to the claim.

[11] In dismissing the application the magistrate gave no reasons. However, in response to a notice in terms of rule 51(1), the magistrate did provide reasons. These, as I have already mentioned, were very brief, namely:

(a) the magistrate found that the appellant had not given a satisfactory explanation for his default because he had not put up a copy of his passport to prove that he had been in Swaziland.

(b) secondly, it was found that the appellant had no *bona fide* defence because he was aware, prior to the sale, that the vehicle was a built up one.

(c) finally, it was found that the appellant had been dilatory, apparently because he had instructed his new attorneys very shortly before the trial in October 2008.

[12] At the commencement of the appeal we were informed that the respondent was taking the point that the appellant had failed to put up security for costs as required by magistrates' court rule 51. The appellant's counsel required a brief adjournment to take instructions on the matter and when the appeal hearing resumed we were informed that the appellant conceded that no security for costs had been put up. The appellant's counsel then applied from the bar for condonation giving as the only reason for this omission, an oversight on the part of the appellant's attorneys. We were informed that

the respondent's attorneys had called upon the appellant's attorneys about three months prior to the appeal hearing to put up security.

[13] It was decided that the merits of the appeal should be argued because if it was found that the appeal should succeed, the question of security for costs would fall away. We also felt that the security point had been taken very belatedly by the respondent, resulting in costs having been incurred and time and effort put into preparation of the appeal. Finally, we were of the view that the approach adopted in the case of Pilane v Northern Cape Tractors (Pty) Ltd 1971(3) SA 619 (NC) was the correct one, namely, that if a respondent wishes to rely on an appellant's failure to lodge security it should raise its objection timeously and by way of notice of motion.

[14] I am of the opinion that this case turns on an issue which was not dealt with by the magistrate, namely, the refusal to allow the appellant's attorney to represent him at the trial.

[15] The principles applicable to rescission applications are well established and need not be repeated by me. It is however necessary, for purposes of this appeal, to deal in some detail with the primary prerequisite for a rescission application such as the present one, namely, that the applicant must have been in default. The reason for having to consider this matter is that the section of the Act and the rule dealing with rescission of default judgments are slightly differently worded.

[16] Rule 49(1) gives the right to apply for rescission to, amongst others, "*a party to proceedings in which a default judgment has been given.*" Rule 2 defines "*default judgment"* as "*a judgment entered or given in the absence of the party against whom it is made*." The same rule provides that "*party*" includes the attorney or counsel appearing

for any such party. This means that a litigant who is legally represented is only in default for purposes of rule 49 if both the litigant and the legal representative of the litigant are absent. This has long been recognised by our courts, even under rule 49's predecessor under the 1917 Act (see Naidoo v Goodricke & Son 11 PH L23; Du Plessis v Goldblatt's Wholesale 1953 (4) SA 112 (O); De Allende v Baraldi 2000(1) SA 390 (T)).

[17] The section which deals with rescission is section 36 and the difference in the wording of that section and Rule 49 is that, whereas Rule 49(1) refers to "*a party*", section 36(1)(a) refers to judgments "*granted in the absence of the person against whom the judgment was granted.*" "*person*" is not defined in either the Act or the rules and the question is whether it has a different meaning to "*party*".

[18] Section 36's predecessor in the old act used the word *"party*". Ordinarily therefore one would think that the change in wording would mean a change in meaning. However, in the De Allende case (at 395) it was held that where a practitioner represents a natural or artificial person in court that person is not absent and so section 36(a) (now section 36(1)(a)) has no application.

[19] I am in respectful agreement with that decision, which was based on the reasoning that a legal representative is a litigant's agent and therefore that the litigant can be present in court through that agent. In coming to this conclusion, the court pointed out that rule 52(1)(a) entitles a party to conduct legal proceedings through a practitioner.I would add the following. As far as I am aware, the right to legal representation in the magistrates' courts, and indeed the high court, has always been recognised in our law. This means that generally speaking, a party does not have to be present in court when a case is being heard, and one knows that parties frequently leave

litigation to their legal representatives. (The exception to the rule is when the party is required to give evidence.) The purpose of the rescission procedure is to come to the assistance of a party who has not had an opportunity to put its case before the court. That is why the rescission applicant has a less onerous burden than an appellant or a review applicant. It would therefore be anomalous were a litigant who, although not present personally in court, was legally represented and therefore able to put his or her or its case before the court, to be entitled to challenge the judgment via the less onerous route of rescission.

[20] This means that in the present case the denial of the right of audience to the appellant's attorney is relevant. It resulted in the appellant being absent from court. If the law was that the appellant could only have been present in court for purposes of section 36(1)(a) by being present in person, then his attorney's presence would not have constituted presence for purposes of the section, and the attorney's absence would therefore have been irrelevant.

[21] A further consequence of the conclusion to which I have come is that when a litigant elects to be represented in court and not to appear in person, the litigant's absence is irrelevant for purposes of rescission of a default judgment. It is only the representative's absence which is relevant.

[22] This is precisely the situation in the present case. The appellant elected, as was his right, to absent himself from the trial and to rely on his attorney to represent him and therefore to ensure his presence in court. Accordingly, whether the appellant's reasons for not being at court were acceptable or not, is not relevant, and it was not incumbent on him to explain his absence.

[23] It follows therefore that if the reason for a magistrate refusing the appellant's attorney the right of audience was unacceptable, the appellant had an acceptable explanation for his absence.

[24] The reason given by the magistrate for not allowing the attorney to represent the appellant was that the appellant's attorneys had not placed a notice of appointment as attorneys of record before him. Nowhere in the act and rules is provision made for a so-called notice of appointment. A practice has merely developed in terms of which such a notice is delivered when an attorney comes on record for a party. In any event, even if such a notice was required, to use this to deny anybody the right to legal representation, would be to put form before substance and be completely unjustified. The magistrate was therefore not entitled to refuse the attorney the right to represent the appellant.

[25] As a result of the magistrates refusal to allow the attorney to represent the appellant, the appellant was denied the opportunity to make application for an adjournment. That decision also resulted directly in the appellant being in default and therefore in the default judgment being granted against him. I am therefore of the opinion that the appellant has given a satisfactory explanation for his attorney's absence from court when the judgment was granted.

[26] Because of this conclusion, it is not strictly necessary to deal with the appellant's explanation for his own absence from court. Suffice it to say however, I am of the opinion that although the appellant's explanation is open to some criticism, he did give a satisfactory explanation for his default.

[27] On the face of it the defences raised by the appellant, mentioned above, are valid. It was however argued on behalf of the respondent that the appellant had not

shown that he had a *bona fide* defence. The contention that appellant not shown he had a *bona fide* defence was based almost entirely on an affidavit which he had signed some time before the sale of the motor vehicle. The appellant admitted having signed the affidavit and stated that he did so in connection with registering the vehicle in his name. The printed heading of the affidavit, which appears to be an official South African government form reads "*affidavit iro built up motor vehicle (Road Traffic Act, 1989, Sec 14.)"* From the printed content of the affidavit it purports to explain that the deponent had built up an identified motor vehicle from the spares of other vehicles, and then goes on to leave spaces for inserting details of what spares were used and from whom they were obtained. However, in those spaces the words *"bought complete vehicle from KZN Transport*" have been inserted in manuscript.

[28] It was argued that this affidavit showed firstly that at the time of the sale, the appellant knew that the vehicle was a built up one and therefore that he had no defence to the claim. Secondly, it was argued that the affidavit showed that the appellant was being untruthful when he stated in his founding affidavit that he did not know that the vehicle was a built up one.

[29] The claim based on the misrepresentation that the vehicle was not built up, was an *actio quanti minoris*. An essential component of this cause of action is that a statement must have been made. The appellant denies having made such a statement so even if he knew that the vehicle was built up, he still has a valid defence.

[30] Furthermore, the affidavit does not show that the appellant is untruthful. Firstly, the body of the affidavit is inconsistent with the heading. Secondly, the appellant stated that he did not attend to the registration of the vehicle personally. He left that to his brother but at one stage, whilst obtaining a so-called clearance certificate from the

SAPS, he was asked whether he had built up the vehicle. He replied that he had not and was then required to sign the affidavit which he understood to confirm that *"I have purchased a complete vehicle and not a built up vehicle."* At this stage, it is not possible to find that this explanation is false. What would emerge after cross-examination at the trial one does not know.

[31] The respondent's second claim is for damages arising from negligent misrepresentations about latent defects in the vehicle, completely unrelated to the question of whether the vehicle was built up. The criticism of the appellant based on the affidavit mentioned above therefore has no bearing on his defence to this claim, save perhaps on the question of his *bona fides*, which I have already dealt with. Apart from the fact that the appellant denies having made the representations attributed to him, and has therefore established a valid defence, it is at best for the respondent doubtful whether, in the light of the voetstoots clause in the sale agreement, he has a valid claim for damages.

[32] I am therefore of the opinion that the appellant established that he had a *bona fide* defence to the respondent's claims. It follows therefore that the application for rescission ought to have been granted and that the appeal should succeed.

[33] As far as costs are concerned, counsel for both parties agreed that the costs of the appeal should follow the result and that if the appeal should succeed, the costs order in the magistrates' court should be that the respondent should pay the costs occasioned by his opposition to the application. In my opinion, this would be the fairest costs order because the respondent was entitled to insist that the appellant bring the rescission application but once the application was launched, the respondent had an election. He

could either consent to the application or oppose it at the risk of an adverse costs order in the event of the opposition being unsuccessful.

[34] In conclusion, I wish to point out an unsatisfactory aspect about the judgment granted against the appellant. The first claim is for the difference between the purchase price of the vehicle and the vehicle's true value. The value is unliquidated and so the claim is clearly unliquidated. The second claim is for the cost of repairing certain defects and is therefore also unliquidated.

[35] In the case of applications for default judgment where the defendant is in default of appearance to defend, the rules (rule 12(4)) expressly provide that the plaintiff must *"furnish to the court evidence either oral or by affidavit of the nature and extent of the claim."* If a defendant does not appear at the trial, rule 32(2) simply provides that a judgment may be given against him with costs. However, I see no distinction in principle between the two cases and am therefore in respectful of agreement with the opinion expressed in Jones and Buckle, The Civil Practice of the Magistrates' Courts in Southern Africa (ninth edition), volume II at 32-3 that a magistrate cannot exercise a proper discretion in the absence of evidence in regard to the quantum of the plaintiff's claim.

[36] When this problem was pointed out to counsel at the appeal hearing, counsel for the appellant argued this was a further ground for upholding the appeal. However, because this point was not taken before the magistrate and was not raised by the appellant in his grounds of appeal, is doubtful whether the appellant was entitled to raise this point. Because I have concluded that the appeal must succeed on other grounds, it is not necessary to decide these issues.

[37] I would therefore make the following order:

1. The appeal is upheld with costs

2. The order of the magistrate is set aside and replaced with the following order:

    1. The judgment granted against the defendant on 16 October 2008 is rescinded.

    2. The plaintiff is ordered to pay the costs of the application for rescission occasioned by his opposition to it.

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A.J. RALL, AJ

I agree and it is so ordered

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MNGUNI J

Date of Argument : 26 October 2009

Date of Judgment : 23 November 2009

Appearances

For Appellant : R. Singh
Instructed by Nolan Naicker & Co.

For Respondent : L. Olsen
Instructed by King-Essack and Associates