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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR580/2018

CASE NO: COURT A QUO 1929/16

In the matter between:

PROVINCIAL COMMISSIONER KWAZULU-NATAL Appellant

SOUTH AFRICAN POLICE SERVICES (Defendant in the Court *a quo*)

and

ACCLAM INVESTMENTS CC Respondent

(Plaintiff in the Court *a quo*)

Coram: Seegobin J et Khuzway AJ

ORDER

(a) The appeal is upheld with costs.

(b) The order of the court *a quo* is set aside and is replaced with the following:

‘(i) The default judgment granted against the applicant on 28 July 2017 is hereby rescinded.

(ii) The applicant/defendant is granted leave to defend the action.

(iii) The costs are reserved for decision by the trial court.'

JUDGMENT

SEEGOBIN J

[1] This is an appeal against the judgment and order of the Magistrates Court, Durban, delivered on 29 June 2018 refusing an application by the appellant for rescission of a default judgment granted against it on 28 July 2017.

[2] The relevant facts are the following:

2.1 On 6 March 2016 at approximately 16h20 a collision occurred at or near Hosking Street, Glencoe, KwaZulu-Natal, between the respondent's vehicle, a Toyota Corolla 1.4D and a motor vehicle bearing registration marks [….], being a police vehicle driven by one S A Zulu.

2.2 On the basis that the said S A Zulu was acting in the course and scope of his employment with the appellant *alternatively* as agent furthering the interest of the appellant, the respondent instituted action against the appellant out of the Magistrates Court, Durban, claiming damages in the sum of R54 050-30. The respondent alleged that the sole cause of the collision was the negligent driving of the said SA Zulu at the time.

2.3 The summons was served at the offices of the Provincial Commissioner of the South African Police Service on 19 July 2016.

2.4 No appearance to defend was filed and accordingly on 28 July 2017 default judgment was granted against the appellant for payment of the amount claimed together with interest and costs.

2.5 On becoming aware of the default judgment the appellant, through the Office of the State Attorney (KwaZulu-Natal), instituted its application for rescission on 28 September 2017 in terms of Rule 49 of the Magistrate's Court rules.

2.6 The founding affidavit in support of the application was deposed to Mr M Pillay, an attorney employed in the office of the State Attorney.

2.7 In the founding affidavit Mr Pillay records that the file in the matter was allocated to him on 27 September 2016. This presumably occurred as a result of a letter of demand that was served by the respondent's attorneys on the Office of the Provincial Commissioner of the South African Police Service in Durban at the time.

2.8 In his response to the letter of demand Mr Pillay informed the respondent's attorneys that since the versions of the two drivers were mutually destructive any action instituted will be defended.

2.9 Mr Pillay further records that the first time he had sight of the summons in the matter was when it was emailed to him on 15 September 2017. He immediately prepared an appearance to defend. On the same day, however, the respondent's attorneys served a notice in terms of the State Liability Act Amendment Act 14 of 2011 in terms of which the appellant was informed that default judgment had been taken against it on 28 July 2017 and that the judgment amount remained unpaid. This was the first time that Mr Pillay became aware that default judgment had been taken against the appellant.

2.10 Mr Pillay averred that the summons in the matter was never served on the 'Minister' (being the Minister of Police) in this instance.

2.11 In setting out the appellant's defence to the action Mr Pillay records that the appellant has a *bona fide* defence to the respondent's claim in that the sole cause of the collision was the negligent driving of the respondent who

was negligent in one or more of the respects set out in paragraph 10 of the affidavit. He further alleged that the appellant intended raising a special plea of jurisdiction against the respondent. He averred finally that the appellant had a valid counterclaim against the respondent as the appellant's vehicle was damaged in the accident.

2.12 In opposing the application the respondent averred that the appellant had failed (a) to furnish an explanation why it was not in wilful default; (b) to file a notice to defend and that default judgment was granted approximately seven (7) months later; (c) to explain what transpired after summons was served and that the allegations in paragraph 10 of the founding affidavit were hearsay and; (d) that, insofar as the issue of jurisdiction was concerned, it averred that the appellant's address falls within the jurisdiction of the Durban Magistrates Court.

[3] On the record the following facts are either common cause or not seriously disputed:

3.1 The collision in question occurred at Glencoe, KwaZulu-Natal.

3.2 The proceedings were instituted in the Magistrates Court, Durban.

3.3 The Office of the Provincial Commissioner of the South African Police Service was cited as the defendant.

3.4 The issue relating to the applicability of the relevant provisions of the State Liability Act 20 of 1957 ('the Act') was pertinently raised and argued before the court *a quo.*

3.5 The summons was never served on the Office of the State Attorney.

[4] Magistrates Court Rule 49(3) provides:

> 'Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out

> the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.'

[5] Placing strong reliance on the provisions of section 2 of the Act, Mr D D Naidoo on behalf of the appellant contended that the default judgment was, in any event, void *ab origine* in view of the fact the wrong party, namely, the Office of the Provincial Commissioner and not the Minister of Police was sued in the matter. I deal with this aspect first.

[6] Section 2 of the Act provides that:

> '2. **Proceedings to be taken against executive authority of department concerned**
>
> (1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.
> (2) The plaintiff or applicant as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.'

[7] In terms of section 2 of the Act it seems that in the case of a national or provincial department, the political head of the department is cited in a representative capacity. In the case of a national department the responsible Minister is cited in his/her representative capacity. In the present instance it would seem to me that the responsible Minister is the 'Minister of Police' and not the Provincial Commissioner as cited herein.[1] For this reason and the fact that the summons was never served on the office of the State Attorney, I will assume, without deciding the issue, that the default judgment was in any event void *ab origine*.. The judgment of the court *a quo* whilst accepting that the relevant provisions of the Act

[1] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and Another* (264/02) [2003] 2 All SA 223 (SCA) (31 March 2003) at paragraph 5 *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (AD) at 759 F-*G Mhlongo and Another NO v Minister of Police* 1977 (2) SA 800 (AD) at 803 D-E

were argued on behalf of the appellant, does not deal with this issue at all. At paragraph 22 of the judgment, however, the learned magistrate makes the following odd statement without really applying her mind to the argument advanced by the appellant on the relevance and applicability of the State Liability Act:

> 'In so far as the applicant has maintained that the incorrect entity has been sued, and that summons ought to have been served on the State Attorney, it remains for the respondent to decide on the way forward.'
>
> [my emphasis]

[8] Secondly, a preliminary defence concerning the issue of jurisdiction was never really considered by the court *a quo*. A simple analysis of the facts giving rise to this claim establishes that the claim falls outside the jurisdiction of the Durban Magistrates Court. The respondent herein seems to have relied on the provisions of s 2

8 (1) (a) of the Magistrates Court Act 32 of 1944 which provides as follows:

> '28. Jurisdiction in respect of persons
>
> (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:
> (a) any person who resides, carries on business or is employed within the district or regional division;
> (b) …. '

[9] It would seem to me that the respondent's reliance on s 28 (1) (a) flows from its incorrect assumption that it is the provincial commissioner who is legally liable for any of the respondent's damages. This is clearly wrong when one has regard to the relevant provisions of the Act as set out above. In my view, the special plea of jurisdiction would have reasonable prospects of success.

[10] As far as the appellant's defence is concerned, whilst the learned magistrate accepted that Mr Pillay was entitled to depose to the founding affidavit on behalf of his client, she nonetheless finds that the source of his information was not disclosed

and that such information is accordingly hearsay. I disagree entirely. In my view, once it is accepted that Mr Pillay was fully mandated to speak on behalf of his client, it must be accepted that he does so with all facts at his disposal. As I pointed out already, at the very outset when Mr Pillay responded to the letter of demand he made it very clear that the matter would be defended having regard to the mutually destructive versions presented by the respective drivers. Later in his affidavit, he went further and set out the specific grounds of negligence that would be relied upon. In my view these grounds evidence a *bona fide* and valid defence that can only be tested once all the evidence has been led.

[11] In all the circumstances I consider that the court *a quo* was clearly wrong in its overall finding that the appellant had failed to make out a proper case for rescission in terms of Rule 49 of the Magistrates Court Rules. A magistrate's discretion to rescind the judgment of his or her court is ordinarily designed to do justice between the parties. That discretion can only be exercised by balancing the interests of the parties and also any prejudice that might be occasioned by the outcome of the application.[2] In my view, a court is ordinarily duty bound to do its best to advance the administration of justice than to place unnecessary obstacles in its path. As pointed out by Jones J in *De Witts Auto Body Repairs*,

> 'in the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.'

Order

[12] In the result, the following order is made:

(a) The appeal is upheld with costs.

[2] *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 € at 711 E-G

(b) The order of the court *a quo* is set aside and is replaced with the following:

'(i) The default judgment granted against the applicant on 28 July 2017 is hereby rescinded.

(ii) The applicant/defendant is granted leave to defend the action.

(iii) The costs are reserved for decision by the trial court.'

_____

SEEGOBIN J

I agree

_____

KHUZWAYO AJ

APPEARANCES:

FOR THE APPELLANT:	D D Naidoo (instructed by State Attorney (KwaZulu-Natal, Durban)
FOR THE RESPONDENT:	Vaishna Singh (instructed by Chapman Dyer Incorporated)

DATE OF HEARING:	11 October 2019
DATE OF JUDGMENT:	22 November 2019