**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**REPORTABLE**

Case No: AR329/2021

In the matter between:

| | |
|---|---|
| **KWADUKUZA MUNICIPALITY** | Appellant |
| And | |
| **TIGER TALES (PTY) LTD** | First Respondent |
| **SIMSI CONSTRUCTION AND PROJECT MANAGEMENT CC** | Second Respondent |
| **SHERIFF FOR LOWER TUGELA, R. SINGH** | Third Respondent |

**ORDER**

The appeal is dismissed with costs.

## JUDGMENT

**Ploos Van Amstel J (Bedderson J concurring)**

[1] This is an appeal against the dismissal by a magistrate of an application to stay a sale in execution and rescind a default judgment. The appellant before us ('the municipality') was the applicant in both applications, although it was not a party to the litigation that resulted in the default judgment.

[2] The summons was issued by Tiger Tales (Pty) Ltd, trading as K9 Security Services. The defendant was Simsi Construction and Project Management CC. They are, respectively, the first and second respondents in this appeal. The sheriff for Lower Tugela is the third respondent, but took no part in the appeal.

[3] The claim in the summons was for payment for security services which had been rendered to the defendant. It did not defend the matter and default judgment was granted against it. A warrant of execution was issued and the sheriff attached various movables, which included tools, machinery and building material. He advertised his intention to sell the attached goods in satisfaction of the judgment, and the sale in execution was scheduled for 20 August 2020.

[4] On 19 August 2020 the municipality launched an urgent application for the stay of the warrant and the sale in execution, pending an application for the rescission of the default judgment. It is not clear from the record whether the sale was stayed by agreement or in terms of an interim order, but the application for a stay and the application for rescission were heard together on 29 April 2021. The basis of the municipality's application was that it was the owner of the goods that had been attached and that consequently it was a person affected by the judgment and entitled to apply for

a rescission of the judgment. Section 36(1)*(a)* of the Magistrates' Courts Act 32 of 1944 provides that the court may, upon application 'by any person affected thereby', rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted.

[5] The magistrate dismissed both applications, basically on the basis that she saw no point in rescinding the judgment if nobody was going to defend the action. She made the point that the municipality would not have been able to join the action as a defendant and that its real remedy with regard to the attachment of its property would have been interpleader proceedings.

[6] Counsel for the municipality referred to a number of cases in which it was held that a person whose property was attached pursuant to a default judgment granted against someone else was a person affected by the judgment and could apply for it to be rescinded.

[7] In *Gluckman v Wylde*[1] a default judgment was granted against the appellant's husband. Mrs Gluckman was not a party to the action. A writ of execution was issued and a number of movables attached. Mrs Gluckman claimed that the attached goods belonged to her, and brought an application to have the default judgment rescinded. It was not an issue in the case whether Mrs Gluckman was 'affected' by the default judgment, and Pittman AJP's statement that she was 'clearly affected thereby' was made *obiter*. The matter concerned the interpretation of a section in the Insolvency Act 32 of 1916 and Mrs Gluckman's locus standi to apply for the rescission of the default judgment was not challenged.

[8] *Gluckman* was referred to with approval in *Naidoo v Harper's Stores and Another.*[2] Lansdown J, with Hathorn J concurring, held that a garnishee was a person affected by a judgment obtained against his creditor within the meaning of Order XXIX, rule 4(1) of the Magistrates' Courts' rules, and in terms thereof entitled to apply to

[1] *Gluckman v Wylde* 1933 EDL 322.
[2] *Naidoo v Harper's Stores and Another* 1935 NPD 94.

review and rescind or vary the judgment. Harper's Stores had obtained a default judgment against one Kenyon, and thereafter a garnishee order requiring Naidoo, as garnishee, to make certain payments to the plaintiff out of debts owing by Naidoo to Kenyon. Naidoo applied for the default judgment to be rescinded. The plaintiff's attorney took the preliminary objection that the garnishee applicant was not a person affected by the default judgment and that consequently he was not a person entitled to remedy under the relevant rule. The magistrate upheld the point and dismissed the application for rescission. On appeal, Lansdown J said the words of the rule 'any person affected' by the judgment 'who was not a party to the action or matter' were very wide[3]. He found that the garnishee was a person affected by the judgment and entitled to apply for its rescission.

[9] I would hesitate to disagree with such eminent judges. I am however puzzled as to how such a matter would proceed after the default judgment had been rescinded. If Mrs Gluckman had succeeded in her rescission application the writ would have fallen away. But she had no basis for defending the action against her husband, nor did she have a sufficient interest to join the action as a defendant. That suggests to me that she was not 'affected' by the judgment against her husband - she was affected by the attachment of her property, the remedy for which is interpleader proceedings.

[10] Later cases appear to me to have approached the matter differently. *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*[4] concerned Uniform rule 42(1)(a), which then provided as follows:

> 'The Court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted without notice to any party affected thereby;…'

---

[3] Ibid 97

[4] *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C).*

[11] The matter of the applicants' locus standi was raised pertinently. Corbett J said that it was clear that it was only a limited class of persons who were entitled to bring an application for the rescission of an order. He added:

> 'The Rule of Court specifically speaks of the application being brought by "any party affected"; and it is manifest that the Court would not entertain an application under the common law at the instance of a disinterested third party… but what is not so clear is how that limited class of persons is to be defined'.[5]

He then concluded that:

> '…an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish *locus standi*, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted.'[6]

[12] The approach in *United Watch* solves the difficulty to which I have referred, of an applicant who succeeds in a rescission application but has no locus standi to defend the merits of the case. If a successful applicant has a sufficient interest to entitle him to intervene as a defendant, then it makes sense to allow him to apply for a rescission so that he can defend the action.

[13] *Union Watc*h was referred to with approval in *De Villiers and Others v GJN Trust and Others.*[7] Van der Merwe JA put it thus:

> 'Corbett J held that, in order to establish locus standi under rule 42(1)*(a)*, an applicant must show a direct and substantial interest in the judgment or order that the applicant wishes to have varied or rescinded. This means a legal

[5] Ibid at 414F-G.
[6] Ibid at 415A-B.
[7] *De Villiers and Others v GJN Trust and Others* 2019 (1) SA 120 (SCA).

interest in the subject-matter of the action or application which could be prejudicially affected by the order in that action or application.'[8]

He added the following:

'…rule 42 is for the most part a reinstatement of the common law and must be interpreted in the context of the common-law principles of finality of judgments in the interests of certainty. This leaves no room for rescission of a judgment at the instance of a person who was not a necessary party to the litigation concerned.'[9]

[14] The effect of *Union Watch* and *De Villiers* to my mind is that the words 'any person affected' are not as wide as previously thought, and as Corbett J put it in *Union Watch*, in fact refers to a limited class of persons. Mrs Gluckman did not have a legal interest in the action against her husband, and the municipality in this appeal had no legal interest in the first respondent's action against the second respondent for payment for services rendered. It therefore had no locus standi to apply for the rescission of the default judgment. This conclusion makes it unnecessary to consider the other points raised on the papers.

[15] The appeal is dismissed with costs.

**Ploos Van Amstel J**

**Bedderson J**

[8] Ibid para 22.
[9] Ibid para 27.

## CASE INFORMATION

| | | |
|---|---|---|
| **Date Judgment Reserved** | **:** | **9 September 2022** |
| **Date Judgement Delivered** | **:** | **14 September 2022** |

**This judgment has been handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 11h30 on 14 September 2022.**

Appearances:

| | | |
|---|---|---|
| For the Appellant | : | Mr A Stokes SC |
| Instructed by | : | **JAY PUNDIT AND COMPANY** |
| | | Suite 1, Prithvi Centre |
| | | 131 Mahatma Gandhi Street |
| | | Stanger Central |
| | | DURBAN |
| | : | Tel: (032) 551 1261/2 |
| | : | Email: nishana@jpundit.co.za |
| | : | (Ref: N PANDAY) |
| For the Respondent | : | Mr Kissoon-Singh SC |
| Instructed by | : | **KEVESH SINGH AND COMPANY** |
| | | 88 King Shaka Street |
| | | KWADUKUZA |
| | : | Tel: 032 – 552 2107 |
| | : | Email: kevesh.singh@gmail.com |
| | : | (Ref: MR K R SINGH/T003) |