REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION, POLOKWANE.

CASE NO: HCA 37/2022
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
Date:2023/06/15

In the matter between:

PULENG ALFRED THOKA **Appellant**

And

SYDNEY GERHARDUS RICKET **Respondent**

JUDGEMENT

MONENEAJ

1. This is an appeal against the judgement granted by the honourable Magistrate Netshiozwi TG out of the Polokwane Magistrate Court dated 26 April 2020 in which the Learned Magistrate dismissed a rescission of judgement application brought by the appellant in the wake of a judgement which was granted for the respondent in the absence of the appellant to the effect that the appellant pay an amount of R50 000.00 arising from a delictual claim premised primarily on an

assault visited upon the respondent by the appellant.

2. The nub of the appeal is whether the trial magistrate was correct to proceed with the trial in the absence of the appellant (the defendant in the court a quo) immediately after the appellant's attorneys of record had withdrawn from the record indicating that they could not locate him.

3. The appellant was sued for injuries sustained by the respondent arising from an assault with a towel he meted out on the respondent in an altercation at a gym.

4. When the matter served before the trial magistrate on 21 January 2020 after having been properly set down for trial the following transpired as per the trial record on page 65 at lines 1 to 12 of Volume 1:

> ***"MR GROBLER:*** *Thank you your Worship.*
>
> ***MISS MOTSWALOHOSI:*** *Your worship we do confirm that we have served a notice of withdrawal this morning Your Worship. We have been unable to locate the defendant Your Worship.*
>
> ***COURT:*** *Thank you.*
>
> ***MR GROBLER:*** *Your Worship the notice of set down* was *served and filed the 19 July 2019 for today* so *if my learned friend* has *now withdrawn off record, I would like to proceed with default judgement.*
>
> ***COURT:*** *Thank you.* "

5. That said the respondent who was the plaintiff in the court a *quo*

proceeded to be led in chief at the end of which, following brief submissions by his legal representative judgement was granted against the appellant in his absence.

6. Subsequent to the judgement, the appellant launched a rescission application attacking the judgement primarily on the premise that proceedings ought to have been held in abeyance until the appellant was made aware of the withdrawal of his attorneys. He alleged therein that he was not aware that the matter was before court on 21 January 2020 being the date the default judgement was granted.

7. His rescission application was dismissed by the trial court prompting him to bring this appeal.

8. The notice of appeal and the appellant's heads of argument, albeit both inelegantly drafted, craft the following as grounds upon which the appeal should attract our favour:

8.1 That the trial court proceeded with the proceedings in circumstances where generally it should not have because the appellant had only become aware of the judgement and by extension of reasoning aware of the proceedings which resulted in the judgement on 31 March 2021.

8.2 That when the trial court was appraised of this lack of awareness on the part of the appellant it ought to have granted the rescission application.

8.3 Although unclear to what effect the ground is raised, that the trial court failed to, upon request by the appellant provide its reasons for the judgement.

8.4 That in terms of rule 52A(1)(a) of the Magistrate Court Rules, upon the withdrawal of the appellant's attorneys of record they ought to have

notified him of their withdrawal at his last known address and since the withdrawing parties had not demonstrated compliance therewith then the court ought not to have proceeded with because the appellant was not in wilful default.

9. The respondent in this appeal did not file any Heads of Argument nor did they make an appearance when the appeal was argued before us.

10. I proceed then to briefly evaluate the grounds of appeal in the light of the record before us as the issue is crisp. If in proceeding in the appellant's absence the trial court fell foul of magistrate court rule 52A(1)(a) as alleged and/or acted irregularly in any manner, then the appeal must succeed. If however the flipside obtains then the appeal must fail.

11. When the matter came up for trial on 21 January 2020 it clearly had been set down more than six months earlier on 19 July 2019.

12. It is not in dispute that the attorneys who withdraw on the trial date were the appellant's duly instructed attorneys. No wonder they showed up on the day, knowing his matter to be on the roll.

13. The appellant's legal representative placed it on record that they were unable to locate the appellant. It is of course unclear when exactly they started failing to locate him, that is, whether it was before or after they were served with a set down. That, however, is in my view of no moment as it is trite that service of process on the legal representatives of a litigant is proper and valid service.

14. Married thereto is whether rule 52A(1)(a) of the magistrate court rules provides any refuge to the appellant in the circumstances listed above.

15. Rule 52A(1)(a) of the Magistrate Court rules reads as follows:

"52A(1)(a) -Where an attorney acting in any proceedings for a party ceases so to act, such attorney shall forthwith deliver notice thereof to -

(i) Such party st the party's last known address, which address sh/l be stated in the notice;

(ii) The registrar or clerk of the court; and

(iii) All other parties to the proceedings:

Provided that the notice to the party for whom such attorney acted shall be served in accordance with the provisions of rule 9(9)."

16. As I understand the rule it imposes an obligation on the attorneys intending to withdraw as a party's legal representatives to deliver a notice of such intention to the party at the party's last known address and notice the clerk of court and other parties involved in the litigation. It does not *per se* nor by implied meaning call upon court proceedings to be held ransom or perpetually detained by a truant or absentee litigant whose whereabouts are a mystery even to his own legal representatives. It is peremptory, as the appellant avers, but to the withdrawing and by no means to the court.

17. On record, as quoted above, it is clear that the legal representatives of the appellant said that they were unable to locate him. That would mean not finding him either telephonically and/or physically. Whether they actually went to his last known address is unclear but that is really an issue between the appellant and his erstwhile attorneys for which he may or may not have legal recourse if he alleges breach of their professional duties arising from their alleged non-

compliance with rule 52A(1)(a) of the Magistrate Court Rules.

18. I certainly do not understand the rule under which the appellant seeks refuge to be instructing the court not to proceed in circumstances where a litigant's whereabouts are unknown. Such a situation would be untenable for many reasons not least of which would be prejudice to the other parties in a matter and practical questions of who must then go look for the absent litigant or at least serve him in the light of the withdrawal of his attorneys. At any rate the same rule at subrule 3 provides in part that any service duly effected elsewhere before receipt of the rule 52A(1)(a) notice shall notwithstanding such change, for all purposes be valid, unless the court orders otherwise.

19. I find it unnecessary unhelpful to delve into the question of whether indeed the trial magistrate failed to give reasons for either his initial judgement or his dismissal of the rescission application. That is because it is not evident to me how the alleged failure finds relevance to the appeal as, before us, it was made abundantly clear by Mr Rangoanasha on behalf of the appellant that the judgement was not being attacked on the merits of the evidence led but rather only on whether the matter ought to have been proceeded with in the appellant's presence or not. A further reason is that I do not understand the appellant to be saying that because reasons were not given by the trial court then the appeal must succeed solely for that. Nor was it the appellant's contention that his appeal be not proceeded with pending his receipt of the magistrate's reasons for either of the judgements.

20. A further aspect which is relevant for this court to give a glance to is whether any grounds of recission available in law were articulated in the rescission application before the trial court. That is looked at *ex abudante cautela* as neither grounds of appeal nor the heads of argument nor the address by counsel took us there even though it was the rescission application judgement

which served before us as a court of appeal. Equally I find a need to reflect on whether the appellant had on his version a *bona fide* defence to the main action which militated for the granting of his rescission application.

21. Beyond merely alleging lack of awareness of the proceedings of 21 January 2020 which resulted in the judgement against him and seeking refuge in rule 52 A(1) (a) as alluded to *supra* the appellant did not in his rescission application refer to any grounds of rescission available in law.

22. Furthermore, what he alleged as a *bona fide* defence was no defence at all as he stated in both his plea and his rescission application affidavit that he assaulted the respondent because the respondent had insulted him. That was at best a counterclaim which at any rate had not been pleaded in his plea to the respondent's summons.

23. I am unable to find any semblance of a rescission ground either at common law or in terms of the rules of court which ought to have gained any traction before the trial court and which deserves our interference on appeal.

24. Similarly, I have no hesitation in finding that on the pleadings the appellant had no defence to the respondent's claim at all.

25. Rule 32(2) of the Magistrate Court Rules provides that if a defendant or respondent does not so appear, a judgement may be given against him or her with costs, after consideration of such evidence, either oral or by affidavit, as the court deems necessary.

26. In the unreported matter of **Alba Gas & Welding East Rand(PTY) LTD and Closwa Biltong(PTY)LTD Case Number A3O54/2015 [Gauteng Local Division] dated 21 October 2015,** a matter where a court of appeal was seized

with almost similar facts relating to a trial defendant who was in default of attendance, it was held at paragraph 7 that rule 32(2) provides a mechanism for a plaintiff to obtain relief at the trial stage of an action when the defendant is in default of appearance. It was held further therein at paragraph 16 that:

> *"One of the main purposes of a trial is to adjudicate over and finalize disputes between the parties. By being in default of this exercise, the defendant renounces his right to create a dispute. His pleaded dispute, accordingly, falls away and the plaintiff's claim becomes undisputed".*

27. I find that what transpired before the court a *quo* on 21 January 2020 is on all fours with the above-mentioned decision in **Alba Gas** and further that it was in exact compliance with rule 32(2) of the Magistrate Court rules and cannot be faulted.

28. In the light of all the afore going I am unable to fault the Learned Magistrate in any manner. The judgement granted where the appellant was in default of attendance on 21 January 2020 is unassailable. So too is the judgement dismissing the rescission application.

29. Accordingly, the following order is made:

29.1 The appeal is dismissed.

M S MONENE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

I **AGREE**

NAUDE-ODENDAAL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

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FOR THE RESPONDENT:	No appearance
DATE HEARD:	21 April 2023
JUDGEMENT DELIVERED ON:	15 June 2023