CASE NO. SA 17/2002

IN THE SUPREME COURT OF NAMIBIA

IN THE MATTER BETWEEN

WILLEM PETRUS SWART	APPELLANT
And	
KOOS BRAND	RESPONDENT

CORAM: MTAMBANENGWE, A.C.J, O'LINN, A.J.A. *et* CHOMBA, A.J.A.

HEARD ON: 08/04/2003

DELIVERED ON: 28/10/2003

APPEAL JUDGMENT

CHOMBA, A.J.A.

INTRODUCTION

This appeal is the culmination of the circumstances which will be summarized shortly. For now I shall merely introduce the parties hereto and give them a tag by which they will be referred to throughout the judgment. It is also necessary at this juncture to set out the parameters which the judgment will cover.

The appellant in this appeal Mr. Willem Petrus Swart, was the plaintiff in the court of first instance, namely the Magistrates Court at Gobabis (the Magistrates Court). The respondent, Mr. Koos Brand, was the defendant in the action. It will be more convenient for them respectively to be referred to, and I shall consequently refer to them, as the plaintiff and defendant respectively.

As to the parameters, I shall first summarise the facts of this case, review the arguments on both sides, deal with statute law which has been argued or fall for consideration by necessary implication.

THE FACTS

The plaintiff instituted an action in the Magistrates Court claiming damages for breach of contract. The particulars of claim which he filed in that court state that the parties agreed that the defendant would do certain building and/or general work for the plaintiff. It was alleged that the defendant did not perform his obligations under the contract satisfactorily and as a result the plaintiff suffered damage. In the fifth paragraph of the particulars of claim it was stated –

> **" The plaintiff is obliged to obtain the services of another building contractor to complete the outstanding work on behalf of the Defendant of which the fair and reasonable costs of repair amounts to N$ 8000."**

Consequently the plaintiff claimed a sum of N$ 8,000 plus interest a *tempore morae* and costs of the suit.

The founding summons was served on the defendant's wife. It is common cause that the defendant was not available at his residence at the time of service. In the result the defendant's daughter, a Mrs. Bussel, completed on her father's behalf the Notice to defend. This was on July 2, 1998. The daughter indicated her own postal address as the address of service. This prompted the plaintiff's lawyers to further serve a Notice to deliver in terms of rule 13 and in the body of this Notice it was stated that the defendant should deliver a proper notice of entry of appearance in due form. The rule 13 notice was addressed to the defendant's daughter's postal address, with the result that the defendant did not actually receive it.

Because of an apparent failure of the defendant to enter appearance in consequence of the rule 13 notice, the plaintiff filed a formal Request for Default Judgment. This was originally dated 6th July 1998, but was later altered to read 30th October 1998. Judgment was accordingly entered by date-stamping over the Request for Default Judgment. The date of entering the default judgment is shown as January 13, 1998. In consequence thereof execution was enforced upon which certain movable chattels of the defendant were seized together with goods which belonged to other persons. The defendant's goods were sold in due course in execution of the default judgment.

It was in the wake of the occurrence of the sale in execution that the defendant discovered that the entry of the default judgment was effected by the Clerk of the Court at the Magistrates Court and that the Request for Default Judgment was not verified by affidavit. In the circumstances the defendant in due course filed a Notice of Application for Rescission of the Default Judgment.

This is dated July 11, 2000 and the filing was done on July 12 as evidenced by the date stamp embossed on it. In a supporting affidavit the defendant deposed, inter alia, that he had been advised that the default judgment was irregular and illegal and consequently that the seizure and subsequent sale of his goods on the strength of the said judgment was equally irregular and illegal. He also stated that he had a bona fide defence to the plaintiff's claim. He specifically deposed that he denied that the plaintiff had suffered any damages, that he, the defendant had refused and/or neglected to complete any outstanding work for the plaintiff. In praying that the default judgment be rescinded the defendant averred that the default judgment was void *ab initio*.

In an opposing affidavit the plaintiff initially raised two points in *limine*. On the date of hearing the application for rescission the plaintiff's legal practitioner, Mr. B.N. Venter, withdrew the second point in *limine* and was left with the first one. In this he argued that the defendant's application for rescission ought not to have been set down for hearing unless and until he first complied with rule 49(3) of the Magistrates Court Rules. This requires the furnishing of security for costs prior to the hearing of an application to set aside. In response to that contention it was argued on defendant's behalf by Mr. Van de Heever, that since the judgment entered in default was void *ab initio* rule 49(3) did not apply.

EVALUATION OF THE LAW AND FACTS

It was evident at the time of arguments that it had become common cause that there was no supporting affidavit in as required by rule 12(4) of the Magistrates Courts Rules in the Magistrate's Court file. When he eventually

gave his extempore judgment the trial magistrate descended into the arena and interpolated that the default judgment had in fact been entered by himself and that at the time the matter was placed before him by the Clerk of the Court there had been a verifying affidavit although as of the time of the hearing the case file did not have the affidavit. He expressed his unhappiness at the frequent loss of documents from case records at his court, a phenomenon he attributed to incompetence on the part of inadequately experienced Clerks of Court. In conclusion he ruled that the default judgment was valid and not void *ab initio.* Therefore since the defendant had not complied with rule 49(3) aforesaid he struck off the action from the roll.

The defendant was aggrieved by the Magistrate's ruling and consequently appealed to the High Court. There the appeal was heard by Levy and Mainga, J.J. At the hearing of the appeal the plaintiff, who was then the respondent, raised yet another preliminary point *in limine*. This time the point raised was that the Magistrate's ruling was interlocutory and therefore unappealable. In a unanimous judgment delivered by Levy, J, it was held, upholding the appeal, that although in form the Magistrate's ruling appeared to be interlocutory, in reality it was a final judgment because, in the opinion of the judges, no action could be taken by the defendant to advance the case any further. The following appears on page six of the appeal judgment of the court a quo –

> **" In argument both written and oral, Mr. Schickerling conceded that the default judgment was invalid and should not have been granted, Mr. Schickerling pointed out that the so-called grounds of appeal were repetitive and introduced allegations which were unnecessary. The final ground, however, summed up the appellant's case, and more particularly the ground of appeal was :**

> **‘ The learned Magistrate erred in law and in fact in finding that the so-called default judgment was valid despite the various irregularities committed in this matter and accordingly that justice was not done.’**

> **The appeal therefore is not only against the scrapping of the application for rescission. No purpose will be achieved by setting aside such ruling and ordering the matter to be returned to the Magistrate. The Magistrate has already given a judgment on the very point that the application for rescission was made in the first place and his judgment is the motivation for his ruling. The judgment is wrong and cannot be allowed to stand. Consequently the ruling flowing therefrom cannot be allowed to stand.”**

In consequence the court a quo set aside the Magistrate’s ruling, thereby allowing the appeal.

Let me state straight away that I concur that the Magistrate’s ruling was wrong, but in my view it was wrong for a different reason. The Magistrate descended into the arena, so to speak, and purported to give evidence of what had transpired when the application for rescission was lodged at the Magistrates court. The following is a text from his ruling starting from just below the first half of page 104 of the record of appeal :

> “ In view of the fact that there are allegations by the Respondent that certain documentations were in fact on file. And it is clear today that no such documentation is on the court file. Mr. Venter proceeded to give an explanation thereto, and I have to confirm with a bit of shame, I must confess that we do have a problem here in Gobabis with documentations missing from the court files for various reasons. We have had it in the past, they were simply not filed, could not be found and were then indeed found at a later stage. I am not looking for any excuses, however it is so that we have had various Clerks of the Civil Court, acting in this office, people with little experience, people being trained and indeed this is not a singular incident. We had various of these incidents where various pieces of the court file were not there and then later ex post

> facto it was found, filed somewhere else or locked in a cupboard, whatever. So therefore Mr. Venter's allegations should deserve some consideration. What I can see is, if I have a look at the court file, is that indeed this court file, before the judgment was noted by the Clerk of the Court, on the 1999.01.13, this court file was submitted to the Court. The Court did look at the court file, and the Court did in fact grant a judgment of N$8 000, plus costs. And this was also signed by the Court on the 12th day of January 1999. So what is actually clear here, is that this file was referred by the Clerk of the Court to the Court, and that the Court signed a judgment on the cover of the file before the Clerk of the Court then stamp the judgment, and granted the judgment. The question I have to answer there is, when this judgment was given by the Court, was there evidence under oath, either viva voce or by means of an affidavit, supporting this claim, because *ex natura* the claim, it is a claim for damages. And the Court is well versed with the prerequisite that a judgment will not be granted for damages, without the existence of evidence, supporting the quantum of the damages. This is also quite clear from the file that no *viva voce* evidence was heard by the court. So the question remain, whether there was in fact an affidavit upon which the Court granted this judgment. Now the Court can say, and it is indeed the proceedings in this court, of which I was the only civil magistrate until recently, and definitely the only civil magistrate at the time that this request for default judgment was brought to the court, and also that I was the person who granted this default judgment, that under no circumstances this Court ever granted a default judgment for damages, without evidence to this regard. It has been the practice and there are several instances that I can recall where there were in face requests for default judgment brought before the Court, and the Court referred them back, and said that no default judgment will be granted in the absence of evidence regarding the quantum of the damages. So I have to find in this case, that in fact there was some kind of an affidavit at least supporting this request for default judgment. It is very unfortunate today, that those documents are missing from the court file. It is however, as I have already indicated, an instance that occurred in this office at more than one stage, and therefore I have to accept that there was indeed an affidavit."

There was no justification at all for the Magistrate to amplify and advance the case of one party, the plaintiff in this case. The parties fought this case on the strength of affidavits and if the magistrate deemed it fit to become a witness he should have recuse himself in which case it would have been up to the plaintiff's counsel to offer him, the Magistrate, as a deponent.

To illustrate the unfairness of the Magistrate's action in this case, the defendant, as applicant for rescission of the default judgment, deposed to an affidavit in support of his application. Similarly the plaintiff, in order to resist the application, swore an affidavit in opposition. Each of the two could have been called, if occasion had arisen, to submit themselves in person for cross-examination on the contents of their affidavits. But the Magistrate gave a statement without the sanction of an oath. This notwithstanding, he heavily relied on that statement in purported proof of a cardinal issue in the hearing, namely what had transpired on the day of lodgment of the application for default judgment. It was on the basis of the unsworn statement that he concluded that an affidavit in support of the request for default judgment was in fact filed. The Magistrate's behaviour was totally unacceptable in law. How could he dispense impartial justice when his statement favoured one side?

Unfortunately for the judges of the court *a quo*, it is my considered opinion, as I shall presently show, that the waywardness of the Magistrate's ruling does not redeem their judgment. The impression the judgment of the court a quo creates is that the finding by the Magistrate that the default judgment was valid spelt the finality of the plaintiff's action. In my respectful view it was flawed reasoning to state, as Levy, J, stated, that no purpose would be achieved **"** by setting aside such ruling and ordering the matter to be returned to Magistrate." There was a purpose to be served or achieved.

Rule 49 of the Magistrates Court Rules states as hereunder, quoting only those of its sub-rules which are pertinent at this stage :

> "(1) Any party to an action or proceedings in which a default judgment is given may apply to the court to rescind or vary such judgment provided that the application shall be set down for hearing on a date within six weeks after such judgment has come to his knowledge.
>
> (2) Every such application shall be on affidavit which shall set forth shortly the reasons for the applicant's absence or default of delivery of notice of intention to defend or of a plea and, if he be the defendant or respondent, the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment."

Moreover section 36 of the Magistrates Courts Act is quoted as follows by Jones and Buckle, the learned authors of "The Civil Practice of the Magistrates' Courts in South Africa" at page 134 :

> " The Court may, upon application by any person affected thereby, or in cases falling under paragraph (c), <u>*suo muto*</u> –
>
> (a) rescind or vary <u>any</u> judgment granted by it in the absence of the person against whom that judgment was granted;
>
> (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties
>
> (c) –
>
> (d) rescind or vary any judgment in respect of which no appeal lies." (underlining supplied)

The effect of both section 36 and rule 49(1) and (2) is clear. Any judgment, whether valid or void *ab origine*, can be made the subject of an application for rescission. It therefore stands to reason that if the applicant for rescission can satisfy the court that he has a good case to justify rescission, the court can rescind a valid default judgment. Rule 49(2) requires two preconditions to justify a rescission viz: acceptable reasons for the applicant's absence or

default of delivery of notice of intention to defend or plea, and the fact that the applicant has a good defence to the claim.

Indeed the Magistrate in the court of first instance did give the defendant an option to resuscitate the matter by resubmitting the rescission application. He stated –

> " Therefore the ruling that the court makes at this stage is that the judgment given on that day was not invalid *ab initio* but indeed a valid default judgment, and therefore, if the defendant, who is the Applicant today wishes to request a rescission of judgment, it should be done so properly and the necessary security should be given" (emphasis mine).

In the present case the defendant did attempt to satisfy both conditions required by rule 49(2). He stated that despite that he had indicated his correct address for service on the founding summons by crossing out his daughter's postal address in part 3 which is to be completed in order to give a notice of intention to defend, the plaintiff sent to his daughter's address the Rule 13 notice to deliver a proper entry of appearance/notice of intention to defend. By necessary implication the defendant's explanation is that although he did indicate his address for service when he completed the notice of intention to defend, subsequent process was misdirected to his daughter's postal address. His reference to completing the notice of intention to defend also implies that the request for default judgment ignored the fact of his having filed the notice of intention to defend. He then went further and deposed that he had a good defence on the merits. To this end he deposed that the plaintiff did not suffer the claimed damages in the sum of N$8,000; that he had not refused or neglected to complete any work as claimed in the founding summons; and that the plaintiff had never at any time demanded that the defendant should

complete any such outstanding work. Therefore *prima facie* he did make out a case to entitle him to a rescission of the default judgment.

Reverting to section 36 of the Magistrates Courts' Act, we have seen that at paragraph (b) it provides that even in respect of a default judgment which is void ab origine an aggrieved party is required to lodge an application for rescission. This statutory provision appears to run counter to Lord Dennings' *dictum* in MACFOY v. UNITED AFRICA CO. LTD (1961) 3 ALL E.R., to wit :

> **" If an act is void, then it is in law a nullity. It is not only bad, but is incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

Section 36 provides to the contrary: you need an application to set aside a default judgment which is void *ab origine*. That application, based as it is on the alleged void default judgment, is in principle a good application; that application is by law allowed to be safely perched on the void judgment and to stay there and not collapse. Therefore in the eyes of section 36 the alleged void default judgment is not per se incurably bad but in order to extinguish it you have to apply for its rescission. Furthermore Rule 49(3) of the Rules of the Magistrate's Court also applies in such a case as provided for in Rule 49(10). Rule 49(10) of the Rules of the Magistrate's Courts makes Rule 49(3) also applicable in such a case.

In the final analysis the Court *a quo* was wrong to hold that the ruling of the magistrate given on the application was final and appealable. In my view and on the legal position considered in the preceding paragraphs of this judgment, the magistrate's decision that the application be struck off the roll and the option left to the defendant to submit a fresh application for rescission in a proper manner, was the only valid and appropriate order that the Court could make in the light of the provisions of sub-rule (3) of Rule 49.

At first blush it appears that the finding on the application to declare the default judgment "*void ab origine*" in terms of section 36 of the Magistrate's Court Act, constitutes a final judgment or order and as such appealable without more. In view however, of Rule 49(3) which is made applicable by sub-rule (10) also on an application under section 36, the finding was premature and as a consequence it must be regarded as an *obiter dictum* which is not final and not appealable. This view is strengthened by the fact that in the final result the learned magistrate struck the application from the roll.

But even if the said finding under section 36 was intended by the learned magistrate as a final judgment on the issue, such judgment would in itself constitute a proceeding which is *"void ab origine"* because the application for rescission did not comply with the preconditions set by Rule 49(3) read with sub-rule (10).

Another magistrate presiding at the hearing of a fresh or supplemented application brought in accordance with Rule 49(3) read with Rule 49(10) will be free to decide *de novo* whether or not the default judgment was or was not "*void ab origine*".

It follows that the point *in limine* taken on behalf of plaintiff in the appeal before the Court *a quo*, should have been upheld. To avoid any further confusion I will continue to refer in the Court's order to the parties as in the Court of first instance.

In the result the order of this Court is as follows.

1. The appeal is upheld. The judgment of the Court *a quo* is set aside.

2. The following order is substituted for that of the Court *a quo*.

    2.1 The appeal from the judgment of the magistrate is struck from the roll.

    2.2 Should the defendant wish to reapply for a rescission of the default judgment against him, he may do so on the papers filed in the original application for rescission, alternatively submit a fresh application, provided that:

        (a) The defendant complies with the preconditions set by Rule 49(3) of the Rules of the Magistrate's Court relating to security unless he has successfully applied to be dealt with as a *pro deo* litigant as provided by Rule 49(3) itself; and

        (b) The defendant relaunches his application for rescission within 30 days of the date of this judgment.

3. Should defendant proceed with such application, it shall be heard by a different magistrate than the one who presided in the Court of first instance when defendant's application for rescission was first heard.

4. During such hearing before another magistrate it shall be open to the defendant to once again contend that the default judgment was "*void ab origine*".

5. Should defendant proceed with such application to its conclusion, costs of the appeal in the Court a quo as well as in this Court will be costs in the cause. If however, he does not proceed, he will be responsible for the costs of the appeal in the Court a quo as well as in this Court in addition to any legal costs which may be incurred subsequently in any reapplication proceedings.

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CHOMBA, A.J.A.

I agree

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MTAMBANENGWE, A.C.J.

I agree

_____
O’LINN, A.J.A.

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