THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO 608/2004

In the matter between

LEO MANUFACTURING CC Appellant

and

ROBOR INDUSTRIAL (PTY) LTD
t/a ROBOR STEWARTS & LLOYDS Respondent

Coram: Zulman, Van Heerden JJA and Cachalia AJA
Heard: 28 FEBRUARY 2006
Delivered: 20 MARCH 2006

Summary: Rule 49(3) of the Magistrates' Court Act, 32 of 1944 precludes a Magistrates' Court from rescinding a default judgment in the absence of the applicant for rescission setting out the grounds of the defendant's defence to the claim. This is so even if the proceedings in which the judgment was obtained are a nullity.

Neutral citation: This judgment may be referred to as *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds* [2006] SCA 19 (RSA)

JUDGMENT

ZULMAN JA

[1] The issue in this appeal is whether the provisions of Magistrates' courts rule 49(3) preclude a court from rescinding a default judgment granted in circumstances where the proceedings are a nullity, because the grounds of defence have not been set out in the application for rescission.

[2] The relevant history of the matter is as follows:

(a) The 'proceedings' in this matter commenced with the issue of a summons in the Durban Magistrates' Court on 25 September 2001 in which the respondent (plaintiff) claimed payment of R62 998,07 in respect of goods sold and delivered. The defendant was cited in the summons incorrectly as 'Leon Manufacturing CC t/a Manufacturing CC t/a Leon Manufacturing' as opposed to Leo Manufacturing CC t/a Leon Manufacturing. (My emphasis.)

(b) Unsuccessful attempts were made on 1 October and 30 November 2001 by the sheriff to serve the summons.

(c) On 21 February 2002 service of the summons was effected by affixing same to the main door of an allegedly chosen *domicilium citandi et executandi* in terms of rule 9(6). The sheriff's return of service describes the defendant as 'Leon Manufacturing CC t/a Leon Manufac.'

(d) The respondent then filed a request for default judgment with the clerk of the court citing Leon Manufacturing CC t/a Leon Manufacturing as the defendant. On 13 May the clerk of the court granted default judgment in the sum of R62 998,07 together with interest and costs in terms of the request made.

(e) A writ was issued by the respondent on 14 May 2002. After various attempts to serve the writ failed, it was reissued on 30 August 2002. In the writ as reissued, the name of the defendant was altered to read (correctly) Leo Manufacturing CC t/a Leon Manufacturing.

(f) On 1 November 2002 the sheriff attached a number of assets of the

appellant.

(g) This gave rise to an application launched by the appellant on 26 November 2002 for the setting aside of the attachment on the basis that the appellant was never served with the summons. The reason given was that the appellant had, prior to the date of service of the summons, changed the address of its registered office from the address where the summons was served. It appears from the relevant form annexed by the appellant to its replying affidavit in its subsequent application for rescission of the default judgment (form CK 2A) that this was indeed done with effect from 23 January 2001. It was therefore contended that no judgment had been granted in favour of the respondent and, consequently, that the writ was a nullity. The respondent brought a counter-application for the amendment of the citation of the appellant so as to cite the appellant by its correct name, 'Leo' instead of 'Leon' Manufacturing CC.

(h) In a judgment dated 4 April 2003, the Durban Magistrates' Court refused the application for setting aside the writ and granted the counter-application to amend the citation of the appellant.

(i) An application for rescission of the judgment was then launched by the appellant on 8 May 2003. In the founding affidavit in support of the application, the appellant alleged that there had not been proper service of the summons. Consequently, it was contended that the proceedings were a nullity, the judgment should not have been entered and the appellant was accordingly entitled to have the judgment set aside. No grounds were set out in the founding affidavit in respect of the appellant's defence to the respondent's claim in the initiating summons. The application was opposed by the respondent who filed an answering affidavit. The appellant then filed a replying affidavit which also failed to set out properly any defence on the merits to the claim.

(j) Judgment was delivered by another magistrate of the Durban Magistrates' Court on 15 July 2003 dismissing the appellant's rescission application with costs. The appellant thereupon appealed to the Full Court of the Natal Provincial Division. The appeal was dismissed with costs, as was an application for leave to appeal to this court. However pursuant to a petition such leave was granted by this court.

(k) The respondent has filed a notice intimating that it does not intend to oppose the appeal and that it abides the decision of this court.

[3] Magistrates' courts 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.'

[4] As previously stated the appellant at no time set out 'the grounds of its defence' to the respondent's claim as required by rule 49(3). It was upon this basis that the magistrate and the court *a quo* refused to rescind the default judgment. Reference was made to two cases, namely, *Cooper & Ferreira v Magistrate for the District of Humansdorp*[1] and *F & J Car Sales v Damane*.[2] In *Cooper & Ferreira* it was held, with reference to rule 49(2) (the predecessor to the present rule 49(3)), that it is clear that an application for rescission has to be supported by an affidavit setting out not only the reasons for the defendant's absence or default, but also the grounds of the defendant's defence to the action or proceedings in which the judgment was given.[3] In the *F & J* case, which dealt specifically with the present rule 49(3), the Full Court came to exactly the

[1] [1997] 1 All SA 420 (E).
[2] 2003 (3) SA 262 (W).
[3] Supra at 429 c-g.

same conclusion.

[5] I will assume, without deciding the matter, that the default judgment granted in this matter was void *ab origine* by reason of non-service of the initiating summons upon the appellant. However I am of the opinion that the second magistrate was correct when, after referring in his judgment to the cases of *Cooper & Ferreira*[4] and *Standard Bank of SA Ltd v El-Naddaf*[5], he stated that:

> 'Now following the rationale of those two decisions, it is totally unnecessary for the Court to rule whether the default judgment was void *ab origine* or not. The fact of the matter is, and this point has been taken by the Respondent, that there is absolutely no mention of a defence set out in the initial affidavit and there is the mere mention of a possible defence in the replying affidavit. It certainly does not comply with the requirements that it be set out with sufficient particularity so as to enable the Court to determine whether or not there is a valid and *bona fide* defence.'

[6] Put differently, the provisions of rule 49(3) are peremptory when a court considers an application to rescind a default judgment. More particularly the wording of the sub-rule makes it clear that the grounds of the defendant's defence to the claim must be set out. Where the objection is that the judgment was void *ab origine*, compliance with rule 49(3) nevertheless involves further proof of the existence of a valid and bona fide defence to the claim.[6]

[7] In so far as sub rule 49(8) may be relevant to the matter, in that it specifically refers to the rescission or variation of a judgment which is

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[4] Supra.
[5] 1999 (4) SA 779 (W).
[6] See HJ Erasmus and DE van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 9ed (1977, with loose-leaf updates) Volume II: The Rules p 49-8.

sought inter alia on the ground that it is void *ab origine* and requires the application to be served and filed within one year after the applicant first had knowledge of such voidness, this in no way overrides the provisions of rule 49(3). Rule 49(8) simply provides a different time period for the filing and service of an application for rescission of a judgment (not only a default judgment) on certain specified grounds. [7] In their comment upon rule 49(8), the learned authors Erasmus and Van Loggerenberg[8] make the point that an applicant seeking rescission of a default judgment on the grounds that the judgment in question is void *ab origine* must (in terms of rule 49(3)) set out a defence 'with sufficient particularity' so as to enable the court to decide whether or not there is a valid and bona fide defence.

[8] In the circumstances the appeal is dismissed with such costs as the respondent might have incurred.

R H ZULMAN
JUDGE OF APPEAL

CONCUR:) VAN HEERDEN JA
) CACHALIA AJA

[7] Where the alleged ground for rescission of a default judgment is not one of the grounds specified in rule 49(8), then the application for rescission must be served and filed 'within 20 days after obtaining knowledge of the judgment' (rule 49(1)).
[8] Op cit p 49-12.