

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0496/2021

**NETWORK OF EXCELLENCE
CONSORTIUM AGREEMENT (NECA)**

APPLICANT

AND

HLALEFANG KATA

RESPONDENT

Neutral Citation: Network of Excellence Consortium Agreement (NECA) v
Hlalefang Kata [2023] LSHC 148 Comm. (30 NOVEMBER 2023)

CORAM: MOKHESI J

HEARD: 28 AUGUST 2023

DELIVERED: 30 NOVEMBER 2023

SUMMARY

CIVIL PRACTICE: *Application for default judgment granted against the applicant who was barred from pleading in terms of Rule 26(3) of the High Court Rules 1980- Application specifically brought in terms of Rule 27 but the court decides the matter on the basis of Rule 45(1) (a) as it is clear that the defendant was not served with the notice of set down of default judgment - The order was sought and granted erroneously - The application succeeds with costs.*

ANNOTATIONS

LEGISLATION

High Court Rules No.9 1980

CASES

SOUTH AFRICA

Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd 1994 (4) SA 705

Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J, 765A - D

Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (TPD)

National Pride Trading 453 (Pty) Ltd v Media 24 2010 (6) SA 587 (ECP)

Mutebwa v Mutebwa 2001 (2) SA 193 (TK HC)

BOOKS

Theophilopoulos, Van Heerden and Borain, *Fundamental Principles of Civil Procedure 3ed (2015)*

Herbstein and Van Winsen, *The civil Practice of the High Courts of South Africa 5 ed. Vol. 1*

JUDGMENT

[1] Introduction

This is an application for rescission of default judgment granted against the applicant who was barred from delivering a pleading in terms of Rule 26(3) of the High Court Rules 1980. For the sake of convenience, I will refer to the parties as they are cited in the summons, so for present purposes, the applicant will be referred to as the defendant and *vice versa*.

[2] Background Facts

The plaintiff had issued out summons against the defendant for breach of contract and incidental reliefs. The defendant entered appearance to defend but did not file a plea as a result of which it was eventually barred from delivering it, in terms of the provisions of Rule 26 (3) of the High Court Rules

1980. The plaintiff made a request for default judgment. The notice of set down of the application for default judgment was not served upon the defendant in terms of Rule 27(3). The plaintiff was ultimately successful in obtaining default judgment.

[3] On being served with the Court Order, the defendant lodged the current application for rescission, while being barred from delivering its plea. This application was brought under Rule 27(6).

[4] **The Parties' Cases**

The defendant's case.

It is the defendant's case that it was not in wilful default of delivering plea as its erstwhile counsel Mr Sello passed on after he could not file plea due to the fact that he was preoccupied with burying his mother who had earlier passed on. The deponent to the founding affidavit avers that the founding affidavit avers that she got this information from Adv. Mantša who had always been working with Adv. Sello

before his death. The deponent avers that after the death of Mr Sello there was a lull of business at his chambers. It should be stated that apart from the well-known fact of the death of Mr Sello all the information which the deponent says got from Adv. Mantša is not supported by any confirmatory affidavit. In short it is all hearsay and therefore inadmissible. It is important to bear in mind the following salutary remarks by the learned authors **Theophilopoulos, Van Heerden and Borain** *Fundamental Principles of Civil Procedure 3ed (2015)* at 144:

“Where the applicant refers in the supporting [founding] affidavit to communications or actions by other persons, such references must be affirmed by obtaining affirming or confirmatory affidavits, from the said persons and attaching it to the supporting affidavit. The attachment of confirmatory affidavits is necessary in order to comply with the evidentiary rule against hearsay evidence. Only admissible evidence should be contained in the affidavit.”

[5] However, be that as it may, the defendant further contends that it was not served with the “notice of application for default judgment” and that no evidence was led to prove the claims. It avers that it has prospects of success in the main action as the plaintiff withheld from the court that his membership was terminated on account of failure to comply with conditions of membership. As to what the parties’ arrangement entails is not important for purposes of this judgment, and will therefore, not be traversed.

[6] **The plaintiff’s case**

The plaintiff (respondent) in his answering affidavit raised a point in *limine* that the procedure adopted by the defendant in lodging rescission application while under bar, is irregular. The plaintiff contends that the defendant cannot approach the court in this manner before first applying to uplift the bar. The plaintiff further contends that the defendant should not use its lawyer’s negligence or reckless as a ground for rescinding the order of this court.

[7] **Issues for determination**

- (i) Point in *limine* raised.
- (ii) The merits

[8] **Irregular Court Procedure**

Before I deal with this point it is important that I re-state the legal effects of being barred from filing pleadings. When the defendant was barred from filing its plea, the effect of that is that the pleadings are deemed to be closed. The defendant cannot file plea without uplifting the bar. Being barred from filing plea, means that the defendant or his counsel may not appear before court. This has been stated authoritatively by the learned authors **Herbstein and Van Winsen**, *The Civil Practice of the High Courts of South Africa 5 ed. Vol. 1* at 728:

“A further result of a defendant being barred from filing a plea is that he may not appear at the trial either personally or by counsel. The court has, however, by its indulgence allowed a party who has been barred to cross-examine witness and make statement, and in matrimonial disputes it is the usual practice to allow the party barred to appear if he wishes to do so....”

[9] The above notwithstanding, Rule 27(3) provides that where the defendant has been barred from filing plea, the application for default judgment should be set down on less than three days' notice to him or it. It is common cause that the defendant was served with the application for default judgment. Crucially, the same Rule and in particular subrule 6 gives the defendant a right to rescind a judgment which has been granted by default in terms of Rule 27. It provides that:

“(6)(a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty-one days after he has knowledge of such judgment apply to court on notice to the other party, to set aside such judgment.

(b) The party so applying must furnish security to the satisfaction of the Registrar for the payment to the other party of the costs of the default judgment and of the application for rescission of such judgment.

(c) At the hearing of the application the Court may on good cause shown set it aside on such terms including any order as to costs as it thinks fit."

What the defendant did in these proceedings is therefore sanctioned by Rule 27. It follows that the point in *limine* raised has no merit and should be dismissed.

[10] What remains, therefore, is to determine whether the requirements of rescission in terms of this rule have been satisfied by the defendant. In order to establish a "good cause" for default the defendant has to:

- (i) Give a reasonable and acceptable explanation for its default and
- (ii) Must show that he has a bona fide defence to the plaintiff's claim, which means that it must have some prospects of success (**Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J, 765A - D**).

[11] In **Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (TPD)** at para. [6], it was stated that an enquiry into whether a good or sufficient cause has been established is

intertwined with the determination of the issue whether the defaulter acted wilfully in disregarding court process and rules. The court was, however, careful to caution that even if wilfulness is established that should not be the basis upon which rescission application is refused absent the determination of good cause for default. Importantly, the court at para.[8] said:

“Before an applicant is a rescission of judgment application can be said to be in ‘wilful default’ he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.”

[12] In The present matter, the defendant was not served with the notice of set down of hearing of the application for default judgment. This is a good explanation by the defendant for its default. However, in applications for rescission of judgment the soundness of the explanation alone is not the determining factor, it must be considered in view of the existence of a *bona fide* because:

“...The question whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide” **(Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd 1994 (4) SA 705 € at 711 F - I).**

[13] The defendant’s explanation for default

The plaintiff instituted summons against the defendant, which is an association duly registered in terms of the law, claiming for breach of contract and cancellation of the contract between the parties and the return of all the money which he paid into the accounts of the defendant totalling M36,280.00, interest and costs of suit. It must be said that the nature of the arrangement between the parties’ smacks of a Ponzi scheme given the promise of fantastic returns within a short space of time. The participants in this arrangement were to receive 100% interest on the money deposited. The plaintiff deposited various amounts into different bank accounts held with different banks.

[14] When the summons was issued, the defendant's erstwhile counsel was the late Mr. Sello. This was in October 2022. It is common cause that the summons was served upon Mr Sello's chambers. The defendant avers that it did not know what transpired from then on until 26 April 2023 when an order of this court which was granted by default was served upon it. The defendant says Mr Sello passed away in February 2022. This information is from Adv. Mantša who had always been working in the same Chambers. The Notice of appearance to defend was filed and served upon the plaintiff's counsel. No plea was ever filed on account of Mr Sello's ill-health. Notice to file plea was filed and served but no response came from the defendant thereby with the lapse of time it was automatically barred from filing its plea. At para. [4.4.1] of the Founding Affidavit to the rescission application, the defendant says:

"4.4.1 ... Respondent then issued out a notice to file plea to which we are informed that Mr Sello who was at that time bereaved and preparing for burial of his mother, sought and got an indulgence with the respondent's counsel to let him file the plea as soon as the burial of

his mother was done. Unfortunately, Mr Sello passed on as soon as his mother was buried.

4.5 We were informed upon inquiry that there was some pause of all business at Mr Sello's office following his demise and it was only upon the redemption of office business and after we had been served with the court order alluded to in paragraph 4.3 that we consulted with Adv. Mantša and gave her instruction to attend to this matter, hence the present application. "

[15] This explanation is hardly reasonable because it is based on hearsay evidence, in the absence of a confirmatory affidavit of Adv. Mant'sa as to what exactly happened. However, the fact that the defendant's explanation does not pass its first hurdle does not spell the end to its application. The application for default judgment was heard without the defendant being served with its notice of set down. In as much as the application was brought ostensibly in terms of Rule 27(6), I am inclined to rescind the default judgment in terms of Rule 45(1)(a) as the defendant was not served with the Notice of set down. I am fortified in this approach by the decision of **Mutebwa v Mutebwa 2001 (2) SA 193 (TK HC)** at para.[12] - which I agree with- where the court said:

“On the basis of these two authorities the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or under common law provided the requirements thereof are met. Under common law as well, the applicant must show good cause before a judgment can be rescinded.”

[16] Under Rule 45 the defendant needs only establish that that the judgment or order was erroneously sought or granted in its absence. In the present matter the order was erroneously sought and granted in the absence of the defendant.

[17] The fact that the defendant was barred from pleading does not take the matter any further because the purpose of Rule 27 (3) in requiring the plaintiff to serve a barred defendant with the notice of set down of application for default of judgment in not less than three days is to afford him or her an opportunity to exercise her right to have the bar uplifted and to decide whether he/she intends to oppose the application for default. In the absence of notice of set down the order cannot stand because *“[a]ny order or judgment*

make against a party in his absence due to an error not attributable to him, is such a profound intervention in his right to a fair trial and right to be heard, that, for this reason alone, the judgment or order should be set aside without further ado.” **National Pride Trading 453 (Pty) Ltd v Media 24 2010 (6) SA 587 (ECP)** at para. 56. I agree with this view.

[18] In the result, therefore:

- (i) The Application succeeds with costs.

MOKHESI J

For the Plaintiff: No Appearance

**For the Defendant: Adv. M. J Maleke instructed
by K.M Thabane & Co Attorneys**

