

SOUTH AFRICA / JUDGMENT

Bayport Securitisation RF Ltd v Sinandile (352/16) [2019] ZAECHGHC 44 (22 March 2019) [2019] ZAECHGHC 44

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Rugunanan, R Griffiths

CASE / FILE NUMBER

352/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO. 352/16

Date heard: 22 March 2019

BAYPORT SECURITISATION RF LTD

Appellant

and

THANDO SINANDILE

Respondent

REASONS FOR ORDER

RUGUNANAN, AJ

[1] On 22 March 2019, this court granted an order in the following terms:

“1. The appeal is upheld with costs.

2. The order granted by the magistrate on 7 September 2016 is set aside and is replaced with the following:

‘The application is dismissed with costs’.

[2] We stated at the time the order was made that reasons would follow. These are the reasons.

- [3] The factual background to the matter is that on 18 July 2013 the clerk of the civil court at Mdantsane entered a judgment in favour of the appellant (as plaintiff) against the respondent (as defendant) in the capital amount of R4 885.07 plus costs in the amount of R419.98 together with interest at the rate of 32.10% per annum from date of judgment to date of final payment. The judgment was entered in terms of a Written Consent To Judgment (incorporating a consent to attachment of emoluments) under section 58 of the Magistrates' Courts Act[1] and was in respect of a credit advance to the respondent in terms of the National Credit Act[2] ("the NCA"). By notice dated 30 January 2016 the respondent applied to the Magistrates' Court in Mdantsane for an order rescinding the judgment. Such order was granted on 7 September 2016. On 3 October 2016, the appellant noted an appeal to this court. This appeal lies against the order granted by the magistrate in favour of the respondent in the rescission application. The respondent did not file a notice to oppose the appeal, nor was there an appearance on behalf of the respondent, or by the respondent in person on the day of the hearing of the appeal.
- [4] An applicant, in terms of rule 49(2), is presumed to have had knowledge of the judgment 10 days after the date on which it was granted, unless the applicant proves otherwise. The founding affidavit in the rescission application does not set out facts which explain: (i) why it is that the respondent had been making regular monthly payments in discharge of his loan obligation to the appellant in the months before the judgment was entered against him; (ii) why it is that he did not query the deduction of emoluments from his salary which commenced after judgment'; and (iii) why he only consulted his attorneys on 4 April 2015 which resulted in the launch of the rescission application on 30 January 2016.
- [5] Absent those facts, the respondent did not discharge the presumption in rule 49(2) which, as will be seen from what appears below, was also integral to the determination of good cause in the rescission application. In granting the application the learned magistrate found that the absence of proof of compliance with section 129 of the NCA meant that the clerk of the court had no jurisdiction to enter judgment against the respondent. Respectfully, the magistrate's

approach was based on an individual issue[3] rather than the broad picture intrinsic to the concept of good cause within the context of the rules discussed below.

- [6] The application for rescission was brought on the cumulative premises of rules 49(1), 49(3) and 49(8) of the Rules Regulating The Conduct Of The Proceedings Of the Magistrates' Court ("the rules").
- [7] In terms of rule 49(1) a party bringing an application for rescission must ordinarily do so within 20 days of obtaining knowledge of the judgment and the court may, on good cause shown, or if it is satisfied that there is good reason to do so, rescind the judgment. The court is not entitled to rescind or vary a judgment if the applicant fails to show good cause for the relief or does not satisfy the court that there is good reason for the rescission of the judgment.[4]

[8] Good cause must be proven and not merely alleged; and it is expected of an applicant for rescission to at least furnish an explanation for his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives.[5] Although courts have refrained from attempting to formulate a comprehensive definition of what constitutes good cause, it has been

held to include not only the existence of a substantial defence but, in addition, a bona fide desire on the part of an applicant to defend the case in the event that rescission is granted.[6]

[9] It will be noted that the rule also entitles a court to rescind a judgment if there is good reason to do so. Where the applicant is the defendant, good reason will be evident from the reasons for his absence or default, and in his grounds of defence.[7]

[10] Evident from the founding affidavit in the rescission application is that the respondent relied on conclusions of law without elucidating the factual matrix for sustaining them. No attempt was made to disclose a bona fide defence to the claim for payment, nor was any attempt made demonstrate that the respondent has any real or bona fide intention to oppose the appellant's claim. Given these limitations it is impossible to discern what benefit the respondent

could conceivably have derived from the rescission of the judgment. In the circumstances the founding affidavit signally failed to make out a case for rescission on the grounds of good cause or good reason.

[11] Rule 49(3) stipulates that where an application for rescission is made by a defendant 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. The rule requires explicitly that the affidavit must set out the grounds of the defendant's defence to the claim.[8] Although it is not necessary in an application for rescission to deal fully with the merits of the matter, an applicant for rescission must set out a defence with sufficient particularity to enable the court to decide whether or not there is a valid and bona fide defence.[9]

[12] Rule 49(8) permits a rescission of a judgment on the ground that it is void ab origine or was obtained by fraud or mistake in which event the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake. The founding affidavit in the rescission application does not disclose grounds based on fraud or mistake. The respondent states that the judgment is void. In an application for the rescission of a judgment on the ground that it is void ab origine, it is incumbent on an applicant to set out his defence with sufficient particularity to enable the court to decide whether or not there is a valid and bona fide defence.[10]

[13] It follows that the requirement that the founding affidavit discloses a defence with sufficient particularity to enable the court to decide whether or not there is a valid and bona fide defence is one that is common to both rule 49(3) and rule 49(8) particularly where, in the

latter instance, the application is brought on the ground that the judgment is void ab origine. The respondent's founding affidavit does not lay a sufficiently candid basis from which it can be determined exactly when, where, how or under what circumstances the respondent had learnt of the voidness of the judgment, nor does it disclose a valid and bona fide defence (an element of good cause).

[14] In all the circumstances rescission by the magistrate ought to have been refused.

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Griffiths J

I agree and it is so ordered.

R. GRIFFITHS

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv. C Van Der Merwe instructed by Carinus Jagga Incorporated, Grahamstown

For Respondent: No appearance

[1] No 32 of 1944, as amended

[2] No. 34 of 2005, as amended

[3] Mnandi Property Development CC v Benmore Development CC 1999 (4) SA 462 (WLD)

[4] Jones & Buckle, The Civil Practice of the Magistrates' Courts in South Africa, Tenth Edition, Volume II, The Rules, [Service 6, 2013] at 49-5

[5] Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (AD) at page 352 G and page 353 A-B

[6] Galp v Tansley NO and Another 1966 (4) SA 555 (E) at page 560 B

[7] Jones & Buckle op cit at 49-8

[8] Cooper & Ferreira v Magistrate for the District of Humansdorp and Another [1997] 1 All SA 420 (E); F & J Car Sales v Damane 2003 (3) SA 262 (W); and Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts and Lloyds 2007 (2) SA 1 (SCA)

[9] Leo Manufacturing CC supra at page 4G

[10] Jones & Buckle, op cit at 49-14

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2019/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bayport-securitisation-rf-ltd-v-sinandile-unknown-topic-aecghc-2019>

Prepared on 11 October 2026 · Esheria