

SOUTH AFRICA / JUDGMENT

Diniso v African Bank Limited (CA240/2016) [2017] ZAECHGHC 3 (24 January 2017) [2017] ZAECHGHC 3

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, M J Lowe

CASE / FILE NUMBER

CA240/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

No.: CA240/2016

Date

Heard: 2 December 2016

Date

Delivered: 24 January 2017

In

the matter between:

NONTANDA

DINISO

Appellant

and

AFRICAN

BANK

LIMITED

Respondent

JUDGMENT**EKSTEEN J:**

- [1] On 17 October 2014 the magistrate of King William's Town granted judgment against the appellant in accordance with a consent to judgment signed by the appellant in the sum of R34 045,57. In January 2016 the appellant launched an application in terms of rule 49(8) the Magistrates' Court Rules (the rules) for rescission of judgment. The magistrate had granted rescission and proceeded to grant leave to the respondent to file a further affidavit in respect of the quantum of the claim for reconsideration thereof. He declined to order the restoration of the status quo ante and held that the application was not bona fide. In these circumstances he ordered the appellant to pay the costs of the application on a scale as between attorney and client.
- [2] The appellant appeals both against the order made by the magistrate on the merits of the application and against the costs order.
- [3] The underlying debt which gave rise to the consent to judgment and the judgment arises from two separate credit agreements concluded in terms of the National Credit Act 34 of 2005 (NCA). Both were small agreements as defined in section 9, as read with section 7 of the NCA. The first agreement was concluded on 13 August 2008 with a principal debt in the amount of R10 500 which was repayable in 36 monthly instalments of R588,16 each. The total instalments, including interest, fees, and credit life insurance (excluding optional insurance) therefore amounted to R21 173,76. The interest was stipulated at 33,5% per annum.
- [4] The second agreement was concluded on 10 March 2009 with a principal debt of R13 000 repayable in 42 monthly instalments of R658,91. The total instalments, including interest, fees and credit life insurance (excluding optional insurance) therefore amounted to R27 674,22.
- [5] The appellant does not deny that she entered into these agreements nor that the principal debts reflected therein were in fact advanced to him. Copies of these agreements are included in the papers which were retrieved from the Magistrates' Court file at the time that the judgment was granted and the appellant does not dispute that these copies are true copies of the original agreements nor are any of the terms of the agreements in dispute. The appellant does not dispute that she was in default of his obligations under the agreements, her signature of the consent to judgment is not challenged nor is it in dispute that the appellant acquiesced in the judgment and gave effect to the judgment until such time as she was advised by her attorney of record on 16 October 2015 that the judgment was void ab initio.

The merits

[6] In respect of the merits the appellant's notice of appeal reflects:

"3. ... the Court a quo erred in granting an order permitting the respondents to prove the quantum of their claim with supporting documentation under the

auspices of the initial request for judgment in terms of section 58 of the Magistrates' Court Act, 1949 (Act 32 of 1944) ... in view of that-

3.1 the entire initial request for judgment was not in compliance with-

3.1.1 Rule 4(1)(b), more particularly that the letter of demand did not deal with the provisions of section 129 and 130 of the NCA;

3.1.2 Rule 4(2) in that the respondent had failed to direct a request for judgment by means of Form 5B duly supported by an affidavit containing such evidence as was necessary to establish that all the requirements in law, including the NCA, had been complied with;

3.1.3 Rule 12(6) in view thereof that the respondent had failed to file the original credit agreement (alternatively an affidavit setting out reasons why the original could not be filed) together with the request for default judgment; and

3.1.4 Rule 12(6A) because the respondent did not file any evidence showing its compliance with the provisions of the NCA when requesting default judgment; and

3.2 the Court a quo is a creature of statute and there is no provision for such an order in section 58 of the Magistrates Court Act."

[7] The challenge contained in para 3.1 is based exclusively on a procedural footing. The notice of appeal does not contain any suggestion that a breach of any of the provisions of the NCA are relied on in the appeal.

[8] I shall consider first the alleged failure to comply with the rules. It has been held that the object to the rules of court is "om ordelikheid in die gedingvoering te verkry en om die regte van die partye te beskerm. Nie nakoming kan lei tot vanorde en tot benadeling van een of beide van die partye". (See *Venter v Du Plessis* 1980

(3) SA 151 (T) at 152A.) The rules of court, however, are not an end in themselves: they are provided to secure the inexpensive and expeditious completion of litigation before the courts. For this reason the courts do not encourage formalism in the application of the rules (see *Federated Trust Limited v Botha* 1978 (3) SA 645 (A) at 645D-G).

[9] In respect of rule 4(1)(b), the letters of demand in respect of the two credit agreements are identical. It cannot be gainsaid that they do not deal with each one of the relevant provisions of section 129 and 130 of the NCA as is required by the rule. In each case the appellant was advised in the letter that she ought to have been provided with a notice in terms of section 129 of the NCA prior to receiving the letter of demand. In the application for rescission the appellant does not allege that she did not receive the initial notice in terms of section 129(1) of the NCA. The letter of demand was delivered to the appellant on 25 January 2014 and the

appellant signed for receipt thereof. In acknowledging receipt thereof the appellant further acknowledged and confirmed that she had previously received a notice in terms of section 129 of the NCA and that she was aware of her rights, including the right to consult with a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction should she find it difficult to meet her monthly obligations.

- [10] The letter recorded in each case that the appellant had been in default for at least twenty business days prior to the letter of demand, which accords with section 130(1) of the NCA. Although the letter makes no express reference to section 130(1)(a) it is apparent from the request for judgment which was filed on 29 August 2014, that the respondent did not approach the court prior to the lapse of ten business days after the delivery of the 129 notice.
- [11] The letter of demand did not make reference to the provisions of section 130(3), however, the consent to judgment which was signed by the appellant on the same day, 25 January 2014, records that “no matter that arose from the credit agreement is currently pending before the national consumer tribunal and I verify that I have not approached a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction, with regard to the credit agreement. I am however aware of the fact that I am in arrears with this credit agreement, and may consult with a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction should I find it difficult to meet my financial obligations. I have elected not to exercise my rights in this regard.”
- [12] In the circumstances, whilst the letter of demand clearly falls short of the requirements set in rule 4(1)(b) of the rules, there does not appear to have been any breach of the provisions of section 129 and 130 of the NCA. In view of the objective evidence before the magistrate and the acknowledgements by the appellant herself I do not think that any prejudice to the appellant resulted from the non-compliance with the rule.
- [13] Rule 4(2) of the rules provide:
- “A request in writing referred to in section 59 of the Act shall be directed to the registrar or clerk of the court by means of Form 5A or 5B, as the case may be, supported by an affidavit containing such evidence as is necessary to establish that all the requirements in law have been complied with.”*
- [14] The rule must be read in conjunction with the provisions of rule 12(6A) which provides:
- “If a claim is founded on any cause of action arising out of or regulated by legislation then the plaintiff shall together with the request for default judgment file evidence confirming compliance with the provisions of such legislation to the satisfaction of the court.”*
- [15] The request for judgment was submitted substantially in Form 5B. It was supported by an affidavit by one Chetna Nepal, the respondent’s

attorney of record at the time. In the affidavit she confirms that the respondent is a credit provider duly registered in

accordance with the provisions of section 40 of the NCA. She states that the appellant had failed to pay the account regularly and timeously and that the appellant was at the time in default with payment for at least twenty business days as contemplated in section 130(1) of the NCA. She confirmed that a letter of demand in terms of section 129 was forwarded to the defendant as contemplated in terms of section 65(2)(a)(i) of the NCA and that ten business days had lapsed since the appellant received the notice in terms of section 129. She recorded that to the best of her knowledge the matter was not pending before a tribunal, a debt counsellor, a consumer court or ombud with jurisdiction and that the appellant has complied with the requirements in law. Finally, she confirmed that the appellant had resolved not to respond to the section 129 notice in the manner provided for in the said section but had opted rather to sign a section 58 consent to judgment. As recorded earlier, the appellant did not dispute receipt of the said notice in terms of section 129(1) of the NCA.

[16] A further affidavit by one Adèle Fourie, an employee of the respondent, was contained in the court file. In this affidavit

she recorded that a written notice in terms of section 129 of the NCA was posted to the appellant on the date set out in the notice.

She records that to the best of her knowledge and belief the appellant was in possession of the said letter. She recorded

further that the appellant had subsequently acknowledged the existence of the credit agreement, receipt of the aforesaid section

129 notice and her indebtedness to the respondent by voluntarily signing the acknowledgment of debt. Notices in terms of the provisions of section 129 in respect of each of the credit agreements dated 8 December 2012 were also contained in the court file. Again the appellant does not deny receipt of the notice.

[17] It is true that the affidavits do not record that the section 129 notice was sent by registered post, however, at the time of the signature of the consent for judgment the appellant acknowledged that she had received the section 129 notice prior to her acknowledgment of receipt of the letter of demand. Where actual receipt of the notice is established it is irrelevant how it was dispatched (compare section 168 of the NCA).

[18] In the circumstances I do not consider that there is merit in the arguments raised in respect of rule 4(2) and rule 12(6A). The affidavits of Nepal and Fourie constitute substantial compliance with the said rules.

[19] There is equally no merit in the argument raised in respect of rule 12(6). It is common cause that the original credit agreement was not annexed to the request for judgment. Rule 12(6), however, provides that where the original document is not filed an affidavit should be filed setting out to the satisfaction of the court why such an original cannot or should not be filed. Such an affidavit was not located by the appellant's attorney in the court file when he investigated the matter in 2016. In the answering affidavit by one Louise Kelder, a manager

in the respondent's Outsourced Legal Collections Department she records however that such an affidavit was indeed filed and she has annexed a copy thereof attested to by the said Adèle Fourie on 7 August 2014. The affidavit explains that the credit agreements are governed by the NCA and that Chapter 7 of the regulations to the NCA allows a credit provider to keep records that are required to be maintained in terms of the NCA in electronic format. Section 15 of the Electronic Communications and Transactions Act, 25 of 2002 stipulates that information in the form of data messages must be given due evidential weight. Section 15(4) of the Electronic Communications and Transactions Act provides for data messages, or copies or printouts thereof or extracts from such data messages, duly certified to be correct by an officer to be admissible in evidence on its mere production in civil proceedings and constitutes rebuttable proof of the facts contained in such record, copy, printout or extract. She states that the respondent's retention policy and process of scanning and retaining agreements in the form of data messages complies with section 16 of the Electronic Communications and Transactions Act. In these circumstances she explained that due to the high cost of storage and lack of space the respondent has embarked upon a process of systematically recording and retaining its documentation in electronic format. In these circumstances it seems to me that there has been no contravention of rule 12(6) at all.

- [20] For purposes of the present appeal, however, I shall accept without making any finding in that regard, that by virtue of the non-compliance with the rules of court the judgment granted was void ab initio. I shall accept too that the Magistrates' Court Act does not empower a magistrate to set aside portion of a judgment and to refer the matter back to the Magistrates' Court for further consideration. Again I make no finding in this regard.
- [21] Rule 49 regulates applications for rescission of judgment. Sub-rule
- (3) stipulates that where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted and 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 an affidavit must set out the grounds of the defendant's defence to the claim (see also *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)).
- [22] Whilst 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 to the main action with sufficient particularity so as to enable the court to decide whether or not there is a valid and bona fide defence. (See *Leo Manufacturing CC* supra 4G.) The requirements of rule 49(3) find equal application where rescission is sought in terms of rule 49(8) on the basis that the judgment was void ab initio (see *Leo Manufacturing CC* supra at 4E-F). In the absence of a valid and bona fide defence to the claim rescission cannot be granted.

[23] Ms Makaula, who appeared on behalf of the appellant argues, however, that because the rules have not been complied with the order was void ab initio by virtue thereof that the magistrate had no jurisdiction to make the order. The defence, so it is argued, is therefore that the magistrate lacked jurisdiction. I do not consider that the lack of jurisdiction, in the context in which it is raised in this appeal, constitutes a defence to the claim. At best it may be a procedural shortcoming which prevented the magistrate from granting judgment by default or consent at the time, however, it is not a defence which could defeat the claim if it were to proceed to trial before the magistrate. It is not contended that the magistrate did not have the jurisdiction to entertain the action for judgment, but merely that he ought not to have granted judgment by virtue of the failure to comply with the rules. In *Leo Manufacturing CC*, supra, the proceedings before the magistrate had been a nullity as the process had not been served on the defendant at all. The

magistrate in that case therefore did not have the power to grant the order. This too strikes at the jurisdiction of the magistrate in the sense contended for by the appellant. The Supreme Court of Appeal, however, nevertheless ruled that the application for rescission could not succeed because no defence to the claim appeared from the papers. The position in the present matter appears to me to be no different. The magistrate ought not to have granted any rescission.

The costs order

[24] The appellant has, as set out earlier, further challenged the costs order made by the magistrate. Costs are generally in the discretion of the court of first instance. A court of appeal will interfere with the order as to costs only if it is satisfied that there has not been a judicial exercise of the lower court's discretion. The appellant was in fact successful in the magistrate's court, although she did not secure all the relief she sought. In *Merber v Merber* 1948 (1) SA 446 (A) at 453 the court held:

"[W]hen a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule, and if there are no such grounds, then ordinarily it will interfere."

But if there are grounds upon which a reasonable man could have come to the conclusion arrived at the appellate tribunal in its reluctance to interfere with the discretion of the trial Judge would not set aside the order as to costs given by him merely on the ground that it might have taken a different view of the sufficiency of such grounds."

[25] In respect of the costs order the magistrate recognised that the respondent had not fully complied with the rules of court. He reasoned:

"Regarding costs, the respondents have obtained a judgement without properly complying with the rules of court and on the other hand the applicant has brought an application for rescission, which for the reasons set out above, would not have succeeded in the normal course. Applicants should firstly exhaust all other means of ascertaining (that) the amount owing is incorrect, thus proving to the court that the judgment is for the incorrect amount, before burdening it with such applications. In an effort to dissuade the applicants from bringing vague and generalised applications where the bona fides

thereof may be in question I order that the applicant pay the costs of the application on and attorney and client scale.”

[26] As recorded earlier, I too consider that the magistrate ought not to have granted rescission at all. The quantum of the claim was, after all admitted in the consent to judgment. As recorded earlier the agreements are not in dispute nor was the appellant’s

default at the time of judgment. The appellant acquiesced fully in the execution of the judgment for an entire year before seeking rescission. I agree with the magistrate that the application raises serious questions relating to the bona fides of the application. In these circumstances I do not think that the magistrate exercised his discretion wrongly.

[27] In the result, the appeal is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

LOWE J:

I agree.

M J LOWE

Appearances:

For Appellant: Ms Makaula instructed by N J du Plessis & Associates Inc c/o Huxtable Attorneys, Grahamstown

For Respondent: Adv Dobie instructed by Oosthuizen Du Toit and Boon Attorneys c/o Borman and Botha Attorneys, Grahamstown

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