

SOUTH AFRICA / JUDGMENT

Halle v Downs and Another (AR111/23)
[2024] ZAKZPHC 128 (30 August 2024)
[2024] ZAKZPHC 128

COURT
Kwazulu-Natal High Court, Pietermaritzburg

BEFORE
Chithi, Sibiya

CASE / FILE NUMBER
AR111/23

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Source record

IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
CASE
NO: AR111/23
In

the matter between: FELICITY
 DELIA HALLE
 APPELLANT
 and
 ANITHA
 HILDA DOWNS
 FIRST RESPONDENT
 SHERIFF
 LADYSMITH
 SECOND
 RESPONDENT
 ORDER
On
 appeal from: Ladysmith Magistrate's Court (sitting as the

court of the first The
instance): appeal is dismissed with costs.

JUDGMENT

Chithi AJ (Sibiya J concurring):

Introduction

[1] This is an appeal against an order of the Ladysmith Magistrate's

Court dismissing an application for rescission of judgment against the appellant on 25 January 2023. A period of 17 years had elapsed between the time the judgment was granted on 9 April 2005 and the time the rescission application was instituted on 23 September

2022. The sheriff of Ladysmith, who is cited as the second respondent in these proceedings, was merely cited as an interested party, however, he never partook in the proceedings nor is he participating in this appeal.

Background

[2] This case has its origin from the damages action, which was instituted by the first respondent against the appellant in the Ladysmith Magistrate's Court on 9 November 2000. In the action, the first respondent claimed payment in the sum of R228 523.18, interest thereon at the rate of 16% per annum and costs of suit as between attorney and client. This action arose from the alleged breach of contract by the appellant in relation to the purchase and sale of a portion of the farm Danse Kraal in Ladysmith. On 6 December 2001 pursuant to the issue of liability having been set down for determination the court a quo found the appellant liable to the first respondent. The issue of quantum stood over to be determined at a later date.

[3] On 9 April 2002 the matter was set down on the issue of quantum. However, before the hearing the parties concluded a settlement agreement, settling the matter in its entirety, as follows:

'The parties agree to settle the matter on the following basis:

1. The defendant is to pay the plaintiff the amount of R35 000.00 together with plaintiff's attorney and client costs, such costs to be agreed or taxed.

2. The amount referred to in paragraph 1 above will be paid in the following manner:

- 2.1 R10 000.00 on or before 30 April 2002;

- 2.2 The balance to be paid by way of monthly installments of R500.00 per month, the first instalment being payable on or before 31 May 2002 and subsequent instalments on or before the last day of each succeeding month.

3. The amounts referred to in paras 2.1 and 2.2 will be subject to the payment of 10% collection commission.
 4. Interest will be payable on the outstanding balance from time to time at the rate of 15.5% per annum calculated from 1 May 2002.
 5. Should the defendant default in any of the aforesaid payments, the full outstanding amount will become payable forthwith.[1]
- [4] According to the appearance sheet on 9 April 2005 Mr Louw appeared for the first respondent, while Mr Combrink appeared for the appellant. The court a quo recorded that in terms of rule 27(8) of the Magistrates' Courts Rules (MC Rules) the action was settled, as set out in the deed of settlement attached to the appearance sheet.[2]
- [5] It is common cause that the appellant failed to maintain the payments in terms of the settlement agreement. The last payment which the appellant made was on 6 December 2004. As a result of the appellant's failure to maintain the payments on 26 April 2005 the first respondent instituted an application in terms of rule 27 of the MC Rules, which she set down for hearing on 25 May 2005. In the application the first respondent sought payment in the sum of R39 958.92, interest thereon at a rate of 15.5% per annum from 1 April 2005 to the date of payment and costs of the application.
- [6] On 25 May 2005 the appellant attended court in person. On this occasion, the case was postponed to 1 June 2005 to enable the appellant to inform the attorney, Mr Ramkhelawan of Ramkhelawan Incorporated, who was the appellant's attorney on record, either to withdraw as an attorney of record or to attend court. According to the court appearance sheet[3] on 1 June 2005 Mr Ramkhelawan appeared for the appellant while Mr Stemmet appeared for the first respondent. Mr Stemmet asked for

judgment

against the appellant as set out in the application papers. Mr Ramkhelawan on the other hand only remarked that he had received instructions the previous day and perused the papers. According to him there was no valid ground to defend the application. Judgment was thereafter accordingly granted in favour of the first respondent in terms of paragraphs 1 to 3 of the notice of application. According to the appellant she was informed by Mr Ramkhelawan of the outcome of the application on 1 June 2005, which was the very same day of the hearing. On 27 July 2005 the first respondent instituted proceedings in terms of s 65A(1)[4] of the Magistrates' Court Act 32 of 1944 (the Act). On 17 July 2006 an emolument attachment order was granted against the appellant.[5]

Appellant's founding affidavit

- [7] In the founding affidavit the appellant contends that during July 2022, while her husband was accompanying his business partner to the office of the appellant's current attorneys of record, Ms Parak of Thasneem Parak & Associates, in respect of a different matter, the appellant's husband mentioned this matter to Ms Parak. During the conversation between Ms Parak and the business partner a discussion in relation to the in duplum rule arose. The appellant's husband understood the in duplum rule to have the effect that interest on a debt would cease to run where the total amount of arrear interest has accrued to an amount equal to the outstanding principal debt. The appellant's husband then enquired from Ms Parak if it was possible that the appellant would still owe a sum of R31 632.34 if she had already paid over R100 000.00 in respect of a settlement amount of R35 000.00. In reaction to this enquiry Ms Parak requested the appellant's husband to make an appointment with her to assess the appellant's rights.
- [8] An appointment was then arranged for 5 July 2022, which the appellant and her husband attended. In this consultation, the appellant handed over to Ms Parak all the relevant documents including the settlement agreement, the application in terms of rule 27 of the MC Rules and the emolument attachment order. After considering the case, Ms Parak advised the appellant that it was impossible for a judgment to have been granted in terms of rule 27 of the MC Rules. On the appellant's instructions, Ms Parak did not only call Mr Ramkhelawan on 5 July 2022 but they also directed a letter to him enquiring as to the circumstances under which the judgment was obtained against the appellant. However, Mr Ramkhelawan did not have any independent recollection of the matter.
- [9] On 17 August 2022, Ms Parak, the appellant's attorney served upon the first respondent's attorneys a notice of appointment as attorneys of record and had the same filed at court. On 18 August 2022, the appellant's attorney directed a letter to the first respondent's attorneys in which they inter alia requested them to consent to the rescission of the judgment, which was granted on 1 June 2005. On 19 August 2022, the appellant's attorneys directed a reminder to the first respondent's attorneys. On 31 August 2022 the first respondent's attorneys declined to consent to the rescission of the judgment. The first respondent's attorneys contended that the settlement agreement was made an order of court on 1 June 2005 and the order was therefore valid for 30 years. In addition, the first respondent's attorneys denied that there were any irregularities in the application in terms of rule 27 of the MC Rules and that the appellant had paid the debt in full. The first respondent's attorneys attached to their response the court a quo's appearance sheet to which the handwritten settlement agreement was attached and the judgment against the appellant was inscribed.[6] The appellant claims she only found out for the first time that judgment was granted against her in terms of rule 27 of the MC Rules on 31 August 2022.
- [10] On 23 September 2022 the appellant instituted an application for the rescission of the judgment, granted against her on 1 June 2005, in terms of s 36(1)(a) and (b) of the Act, read with rule 49(7) and 49(8) of the MC Rules.

The grounds upon which the appellant sought to rescind the judgment

[11] The grounds upon which the appellant sought to rescind the judgment were as follows:

- (a) The judgment was void ab origine because when the judgment was granted the provisions of rule 27 of the MC Rules as it read in 2005 were not complied with in that:
 - (i) The settlement agreement itself did not make provision for it to be made an order of court as was required in terms of rule 27(9); and
 - (ii) The settlement agreement had to be recorded in terms of rule 27(6) -
- (8) before judgment could be granted in terms of rule 27(9).
- (b) The judgment was obtained by fraud in that when the first respondent's erstwhile attorneys deposed to the affidavit in support of the application in terms of rule 27 of the MC Rules, they fraudulently stated that the settlement agreement was handed up in court and noted by the court at the request of the parties. The appellant contended that this never happened as the settlement agreement was only concluded after lunch and only reduced into

writing by the first respondent's erstwhile attorneys after the appellant's counsel had already left.

- (c) The R35 000.00 provided in the settlement agreement was in full and final settlement of all legal matters. Interest and taxed costs would only have applied if the appellant breached the settlement agreement. The addition of extra costs and interest was never part of the agreement. She was tricked by the insertion of those clauses in the agreement.
- (d) The appellant contended that it was never her intention to pay anything additional to the R35 000.00, which was purely for the costs of the litigation in the matter. R15 000.00 of this amount was for the estimated costs under this case and R20 000.00 were costs that rounded off in respects of the appellant's parents in law, which they had incurred in an unrelated case.[7]

- (e) When she had paid R10 000.00 the settlement amount was immediately

reduced from R35 000.00 to R25 000.00. Thereafter she paid 31 instalments in the sum of R500.00 per month totalling to R15 500.00.

The lump sum payment of R10 000.00 plus R15 000.00 amounted to R25 500.00 which meant that the only outstanding balance in terms of the settlement agreement when she stopped paying was R9 500.00.

- (f) In February 2022 when the first respondent's attorneys demanded payment in the sum of R31 632.34 after she paid the debt for 20 years in terms of the emoluments attachment order she stopped paying as she believed the debt was finally extinguished.
- (g) The appellant contended that she had paid three times over the settlement amount.
- (h) The case number in the bill of costs annexed to the rule 27

application is not the case number in respect of this case. In the circumstances it should never have been considered as an amount to be included or added to the outstanding settlement amount as any court documents where the citation is incorrect is void ab origine.

- (i) Since the settlement agreement between the parties did not make provision for it to be made an order of court and was not recorded in terms of rule 27(6) – (8) of the MC Rules it therefore constituted a new cause of action. Upon the breach of the settlement agreement, the first respondent had to commence a new action based on the settlement agreement. The first respondent was therefore precluded from proceeding based on the settlement agreement to obtain judgment against the appellant. Since the appellant last made payment in terms of the settlement agreement on 6 December 2004, any claim against the appellant for the outstanding balance in terms of the settlement agreement had prescribed.
 - (j) At the time when the judgment was granted in terms of rule 27 of the MC Rules there was no longer any live issue between the parties in the main action. The court a quo as a creature of statute when it granted the judgment it acted outside the powers conferred upon it by the Act and the rules.
- [12] What was unusual about the appellant's rescission application is that the grounds upon which the appellant sought to have the judgment rescinded were couched in the form of points in limine.

The first respondent's opposing affidavit

- [13] The first respondent opposed the application for rescission of judgment and the grounds as set out in her answering affidavit were as follows:
- (a) The provisions of rule 27 of the MC Rules as it read in 2005 did not require that the settlement agreement in terms of which judgment is sought had to have been made an order of court prior to judgment being sought. What was required was only a breach of the settlement agreement.
 - (b) On 9 April 2002, in the presence of the legal representatives of both parties, the court a quo recorded that in terms of rule 27(8) of the MC Rules, the action was settled as set out in the deed of settlement, which was attached to the court record. Therefore, there was compliance with rule 27(7) and 27(8) of the MC Rules.
 - (c) The terms of the settlement agreement provided for the future fulfilment by the appellant of the stated conditions in that settlement agreement.
 - (d) On 6 December 2004 the appellant breached the settlement agreement as she fell into arrears in relation to the agreed payments.
 - (e) On 26 April 2005 within 12 months from the date of the appellant's default the first respondent instituted an application in terms of rule 27(9) of the MC Rules.

- (f) The application in terms of rule 27(9) was served on the appellant's husband on 4 May 2005. [8]
- (g) On 1 June 2005 the court a quo granted judgment against the appellant in terms of rule 27(10) (b) of the MC Rules and on the appellant's own version judgment was given in the presence of her attorney.
- (h) Once judgment was obtained, the judgment would only prescribe after 30 years.
- (i) In relation to the common law in duplum rule a cap is placed on interest charges only and not on the other costs. The interest that can be charged on the capital amount is not to exceed the capital amount. The interest as reflected in annexure "ADH3" was limited to the sum of R39 958.92, which is less than the capital amount, which includes R35 000.00, together with the taxed bill of costs in the sum of R20 654.64.
- (j) In terms of the settlement agreement the appellant was not only liable for the amount of R35 000.00 but also for costs, interest, and collection commission.
- (k) By the time that the emolument attachment was issued the capital amount outstanding including the attorney and client costs was R39 958.92, interest in the sum of R22 710.01 and collection commission in the sum of R7 442.96 had accrued of which R3 103.66 had already been paid and various costs were added to the amount bringing the total due to R75 724.11.
- (l) The appellant was informed of the outcome of the application in terms of rule 27 of the MC Rules on 1 June 2005, yet she did not take any steps for 17 years to rectify what she perceived to be a wrong committed against her.
- (m) Following the judgment, there was a s 65 enquiry[9] and when the appellant received notice of the s 65 enquiry, she never took any steps to have the judgment rescinded.
- (n) The amount of R35 000.00 specified in the settlement agreement was not in respect of any litigation costs but instead was in respect of the costs of the subdivision of the immovable property, the erection of game fencing around the portion of the property the appellant intended purchasing and registration of a water servitude in respect of a borehole.
- (o) While it was true that the case number in the bill of costs to the rule 27 application was incorrect there was absolutely no doubt that the bill related to the case if one had regard to items 110 - 112 for 9 April 2002, it was patently clear that they related to this case.
- (p) The discussion about the amount of money that the applicant still owed to the first respondent and the in duplum rule brought about the rescission application.

The appellant's replying affidavit

[14] In the replying affidavit, the appellant put the authenticity of the order of 9 April 2002 in dispute. The appellant denied that it existed in the court file up to and including 20 September 2022 the last date in which her attorneys inspected the court file and having done so at least four times before.

[15] The appellant contended that she was personally uncertain as to when she signed the settlement agreement. However, after being reminded by her husband that the settlement agreement was presented to her husband when her husband went to pay the R10 000.00 to the first respondent as per clause 2.1 of the settlement agreement,

the appellant suggested that it was possible that she did not sign the settlement agreement on 9 April 2002 but the settlement agreement was pre dated.

The judgment of the court a quo

[16] On 24 January 2023 the court a quo refused rescission of judgment and awarded costs against the appellant on a party and party scale. It is this judgment which the appellant seeks to assail.

[17] In dismissing the application, the court a quo held, as paraphrased by this court, that:

(a) An application in terms of s 36(1) of the Act had to be instituted

within one year after the party acquired knowledge that the judgment was void or obtained by fraud or mistake common to the parties. The period starts running when the party, and not his or her attorneys become aware of the judgment that was against him or her.

(b) The parole evidence rule prescribes that no extrinsic evidence is allowed in a dispute to interpret a written agreement between the parties.

(c) A court may on good cause shown or if it is satisfied that there is good reason to do so, rescind or vary a default judgment, on such terms as it may deem fit. Good cause will include the existence of a substantial defence. The requirement of good cause cannot be satisfied unless there is evidence not only of the existence of a substantial defence, but, in addition of the bona fide held desire on the part of the applicant for the relief, actually to raise the defence concerned in the event of the judgment being rescinded.

(d) An applicant should whenever he or she realizes that he or she has not complied with a rule of the court apply for condonation as soon as possible.

(e) The truth is that the applicant has failed to provide a plausible or acceptable explanation for her default.

(f) The reasons upon which the court arrived at this conclusion are that the applicant was throughout the proceedings aware of the judgment against her. In paragraph 41 of her founding affidavit the applicant stated that she paid the debt for 20 years as per the emolument attachment order. In the court a quo's view the application was brought about because of the applicant's belief that the debt was extinguished and the discussion about the

amount of money that the applicant still owed to the first respondent as well the in duplum rule.

- (g) On 9 April 2002 the court granted an order in terms of rule 27(8) of the MC Rules as it was empowered to do so.
- (h) There was compliance with the provisions of rule 27(9) and 27(10) and on 1 June 2005 the court granted judgment as a result of the breach of the agreement.

Grounds of appeal

[18] The appellant in her grounds of appeal alleges that the learned magistrate misdirected himself in respect of the following issues:

- (a) In refusing to rescind the judgment of 1 June 2005 when the settlement agreement was not made an order with judgment being granted as a result of a rule 27 application.
- (b) In holding that the amount for which judgment was granted was in accordance with the settlement agreement.
- (c) In refusing to rescind the judgment when the application in terms of rule 27 of the MC Rules included a taxed bill of costs under a different case number in an unrelated matter, which was instituted 1 year before the summons was issued in this case as part of the additional amount to the alleged outstanding balance in respect of the settlement agreement.
- (d) In holding that compliance with the provisions of rule 27(6) of the MC Rules was not a precondition before an application in terms of rule 27(9) could be made.
- (e) In refusing to rescind the judgment when the court a quo, in granting judgment on 1 June 2005, allowed interest at the rate of 15.5% over and above the interest on the capital sum, and allowing interest to be added on the interest accumulated and on the taxed bill of costs.
- (f) In refusing to rescind the judgment when the appellant's attorney was not afforded an opportunity to file any answering papers to the first respondent's application in terms of rule 27 of the MC Rules and granting judgment against the appellant merely upon the appellant's attorney's concession that there appeared to be no valid defence to the settlement agreement.
- (g) In refusing to rescind the judgment when the amount claimed in the application in terms of rule 27 of the MC Rules was in excess of the amount recorded in the settlement agreement.
- (h) In holding that the appellant was required to make a substantive application for leave to file the confirmatory affidavits which already formed part and parcel of the appellant's founding

affidavit.

- (i) In holding that the appellant was required to make an application for condonation in respect of his application for rescission of judgment when the appellant brought the application within 1 year after she learnt for the first time on 5 July 2022 that the judgment was granted in error.
- (j) In accepting what purported to be an order noting the settlement agreement in terms of rule 27(8) of the MC Rules on 9 April 2005 despite it not being stamped and its authenticity being put in dispute.
- (k) In awarding costs against the appellant in respect of the application for condonation for the late filing of the first respondent's answering affidavit while also awarding costs against the appellant in respect of the application for rescission of judgment.

Provisions of rule 27(6) - 27(10) of the MC Rules as they read in 2005

[19] In order to understand the full context of the thrust of the appellant's complaint it is convenient to consider the provisions of rule 27(6) to 27(10) of the MC Rules as they read in 2005, which I reproduce verbatim below:

‘(6) Application may be made to the court by any party at any time after entry of appearance and before judgment to record the terms of any settlement of an action without entry of judgment agreed to by the parties. If the terms of settlement so provide, the court may make such settlement an order of court.

- (7) Such application shall be on notice, except when the application is made in court during the hearing of any proceeding in the action at which the other party is represented or when a written waiver (which may be included in the statement of the terms of settlement) by such other party of notice of the application is produced to the court.
- (8) At the hearing of the application the applicant shall lodge with the court a statement of the terms of settlement signed by all parties to the action and, if no objection thereto be made by any other party, the court shall note that the action has been settled on the terms set out in the statement and thereupon all further proceedings in the action shall, save as hereinafter provided, be stayed.
- (9) When the terms of settlement provide for the future fulfilment by any party of stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time within 12 months after the first mentioned party has so failed to comply, apply for the entry of judgment in terms of the settlement. Such application shall be on notice to the party alleged to be in default, setting forth particulars of the breach by the respondent of the terms of settlement.
- (10) After hearing the parties the court may-
 - (a) dismiss the application;

- (b) give judgment for the applicant as specified in the terms of settlement;
- (c) set aside the settlement and give such directions for the further prosecution of the action as it may deem fit;
- (d) make such order as may be just as to the costs of the application.'

The party's submissions

[20] Mr Gevers who appeared for the appellant confirmed having approached Mr Combrink SC to establish the circumstances surrounding the conclusion of the settlement agreement on 9 April 2002. Consequently, he abandoned the appellant's contention that the judgment was obtained by fraud. However, he persisted with the remainder of the argument that the judgment was obtained by a mistake common to the parties. Mr Gevers argued that in terms of rule 49(8) of the MC Rules the knowledge must be of the fraud or mistake not of the judgment. He therefore

contended that the appellant only came to know of the judgment when she consulted with her attorney. According to the appellant, this was on 31 August 2022.[10] Mr Gevers further argued that even if Mr Ramkhelawan did not consent to the judgment his actions could reasonably be perceived as consenting when he was not authorised to do so by the appellant.

[21] Mr Gevers referred the court to the schedule attached to the rule 27 application, namely Annexure "ML2." He pointed out that the first respondent added interest at the rate of 15.5% to the capital amount. Relying on *Euro Blitz 21 v Secena Aircraft Investments CC*[11] and *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd*[12] he argued that the first respondent was precluded from claiming any compound interest when there was no provision in the settlement

agreement.

[22] He pointed out further that the amounts which the first respondent claimed in respect of collection commission were above the rate of 10% collection commission. As an example, he referred the court to the entry in respect of 28 June 2002 when the appellant had made payment in the sum of R500.00 and the first respondent claimed collection commission in the sum of R57.00 instead of R50.00.

[23] Additionally, Mr Gevers pointed out that the judgment, which was granted on 1 June 2005 in the amount of R39 958.92, included a taxed bill of costs covering the period August 1999 to April 2003 amounting to R15 169.76. However, thereafter the first respondent's attorneys still added the taxed bill of costs of R15 169.76 to the amount of R39 958.92, and they thereafter charged interest on the erroneous duplication. The first respondent's attorneys thereafter included an additional bill of costs for the period of April 2000 to November 2000 (which is a period covered by the previous bill of costs, already included twice) in the amount of

R20 654.64, and charged interest thereon.

[24] Mr Gevers further argued that before a settlement agreement could be made an order of court, rule 27 of the MC Rules, as it read in 2005, required the following:

- (a) that the settlement agreement itself should make provision for it to be made an order of court before it could be made an order of court in terms of rule 27(9) or
- (b) that the settlement agreement be recorded in terms of rule 27(6) -
- (8) before judgment could be granted in terms of rule 27(9).

The failure by the court a quo to comply with the provisions of rule 27 of the MC Rules therefore rendered the judgment void ab origine as the court acted outside its jurisdiction in granting the judgment. In conclusion, Mr Gevers argued that the settlement amount was paid off and that in fact it was paid at least three times over.

[25] Ms van Jaarsveld for the first respondent on the other hand argued that since the appellant had abandoned her contention that the judgment was obtained by fraud and did not persist with her contention that the first respondent's claim had prescribed the appellant's case was therefore watered down. The appellant's case therefore only revolved around the issue of compound interest and the authorities thereon which the appellant did not refer to in the papers or the appellant's heads of argument.

[26] Ms van Jaarsveld further argued that there was a logical reason for the distinction between rule 27(6) and rule 27(9). Rule 27(6) of the MC Rules contemplated two scenarios. The first scenario is the recordal of the settlement of the action without entry of judgment agreed to by the parties. The second scenario contemplated the court making such settlement agreement an order of court if the terms of the settlement agreement so provided. On 9 April 2002 the court a quo noted the settlement agreement as it was required in terms of rule 27(8) that the action was settled as set out in the deed of settlement. In doing this the court a quo recorded the terms

of the settlement agreement as provided for in rule 27(6), which is what is contemplated in the first scenario. The provisions of rule 27(9) of the MC Rules were only triggered once there was a breach of the conditions of the settlement agreement relating to the future obligations by the appellant. In the circumstances, the first respondent only made the application upon the appellant's

default after 6 December 2004.

[27] Ms van Jaarsveld furthermore argued that the appellant could not possibly have only come to know of the mistake in the judgment on 31 August 2022 for the following reasons:

- (a) On 25 May 2005 she attended court in person. At this stage all the facts must have been known to the appellant. The schedule, annexure "LM2", was already a part of the application papers.

- (b) On 1 June 2005 the appellant was informed by Mr Ramkhelawan of the outcome of the application.
 - (c) After the judgment was granted on 1 June 2005 the first respondent instituted proceedings in terms of s 65A of the Act, which resulted in an emolument attachment order being granted against the appellant in respect of which she made payment close to two decades.
- [28] Ms van Jaarsveld pointed out that even if the amounts, which are set out in annexure “FA12”, were incorrect, this annexure was not used and played no part in the application in terms of rule 27(9) of the MC Rules. In conclusion, Ms van Jaarsveld argued that the appellant had not made out any case that the settlement amount was paid off. The appellant failed to set out in her founding affidavit how payment was discharged.

The law

[29] To answer the question of whether there was any misdirection on the part of the court a quo, apart from the provisions of rule 27(6) to 27 (10) of the MC Rules, which I have referred to above, it is convenient to refer to the relevant provisions upon which the appellant’s application for rescission of judgment was founded, namely s 36

(1) of the Act, rules 49(5A)(a), 49(7) and 49(8) of the MC Rules.

[30] Section 36 of the Act provides:

‘(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-

- (a) rescind or vary any 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) correct patent errors in any judgment in respect of which no appeal is pending;
- (d) rescind or vary any judgment in respect of which no appeal lies.’

[31] Rule 49(5A) of the MC Rules provides:

‘(a) Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid in full, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment.

(b) The application contemplated in paragraph (a)-

- (i) must be made on a form corresponding substantially with Form 5C of Annexure 1;
- (ii) must be accompanied by an affidavit with annexures providing reasonable proof that the judgment debt, the interest and the costs have been paid; and

(iii) must be served on the judgment creditor not less than 10 days prior to the hearing of the application.’

[32] Rule 49(7) of the MC Rules provides:

‘All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.’

[33] Rule 49(8) of the MC Rules provides:

‘Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.’

Was the judgment void ab origine for want of compliance with rule 27(6)-(8)?

[34] The requirements of s 36(1)(a) and (b) are markedly distinct.[13] Section 36(1)(a) is intended ‘to be and is operative for the benefit solely of the litigant who was in default at the time of the granting of judgment’.[14] Section 36(1)(b) is intended to cover a scenario where judgment granted was void ab origine or was obtained by fraud or by mistake common to the parties. The two subsections permit a disjunctive interpretation and so too are the three distinct elements of sub-paragraph (b).

[35] The appellant abandoned her case in relation to the issue of the judgment having been obtained by fraud. The alleged fraud related to the first respondent’s attorney’s deposition that the settlement agreement was handed in court and noted by the court at the request of the parties. However, despite abandoning this issue, the appellant persisted with her argument that the court a quo was wrong in holding that compliance with the provisions of rule 27(6) of the MC Rules was not a pre-condition before an application in terms of rule 27(9) could be made.

[36] The appellant’s argument that the court a quo acted outside its jurisdiction in granting the judgment was founded on the allegations of fraud, particularly, that the settlement agreement was handed in court and noted by the court at the request of the parties. In my view, once the appellant abandoned her case in relation to issue of the judgment having been obtained by fraud, the appellant could no longer validly argue that the court a quo acted outside its jurisdiction in granting the judgment. The effect thereof being that the judgment was recorded in terms of rule 27(6) -

(8) of the MC Rules.

[37] Even if I am wrong in arriving at this conclusion when this court had an occasion to delve into the interpretation of the provisions of rule 27 in *Khwela and another v Dlamini*

[15] it held as follows:

[7] The significance of this assertion is stated by the respondents as follows. Because “the Applicant did not lodge a statement of the terms of settlement signed by all the parties to the action as envisaged in Rule 27(8)”, “the present application cannot succeed”. This point requires a brief overview of Rule 27 and a brief analysis of Rules 27(7), (8) and (9). The clear underlying rationale for Rule 27 is that where litigious matters are settled, a mechanism is provided for judgements to be granted in terms of the settlement without having to begin ab initio with an action based on the settlement agreement. If the rule was not in place, a matter which had been settled by way of a compromise, and where a party did not reserve the right to proceed on the original causes of action, would require the party concerned to commence a new action to sue on the settlement agreement. I will deal below with the requisites for a compromise. This is because the settlement agreement would constitute a fresh cause of action. The Rule provides a means to obtain an expeditious judgement where the terms of a settlement agreement have not been complied with. In the circumstances dealt with under the Rule, judgement can be granted on a settlement agreement which has compromised the original cause of action pursuant to the provisions of Rule 27(9) without a fresh action being instituted.

[8] I now turn to a brief analysis of Rule 27 (7), (8) and (9) . . .

Within the context of Rule 27 and the Rule 27(9) application, the following is the effect of these sub-rules. First, Rule 27(7) was complied with in the present case because the original application had been set down for hearing on the day the recordal was made. Rule 27(8) requires the lodging of a statement signed by all the parties at the hearing of an application in terms of Rule 27(6). The respondents say that no such statement was lodged. Within the context of the Rule 27(9) application, this was not contradicted by the applicant in reply. On the face of it, therefore, the recordal in terms of Rule 27(6) should not have been made for want of compliance with the provisions of Rule 27(8). However, Rule 27(9) does not itself require the settlement agreement to have been signed by the parties. It simply requires a prior recordal to have been made under Rule 27(6). That recordal was made on 26 September 2011.

[9] The only defence raised by the respondents is to the effect that the recordal under Rule 27(6) was not competent for want of compliance with Rule 27(8). This provides no defence to the Rule 27(9) application. This is because, in fact, the settlement agreement had been recorded under Rule 27(6), whether rightly or wrongly. That jurisdictional fact was all that was required to entitle the court to consider an application under Rule 27(9). The court hearing the Rule 27(9) application was not entitled to consider whether the recordal of the settlement agreement under Rule 27(6) had been properly made. Unless and until that recordal is set aside, it remains binding. This is so regardless of the nature of a recordal in terms of Rule 27(6). If the recordal is regarded as an administrative measure, it is valid until set aside according to the principles set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*. If it is regarded as a judgment, it is valid until set aside according to the principles set out in *Jacobs & others v Baumann NO & others*. For the purposes of this appeal it is not necessary to decide whether such a recordal amounts to an administrative act or a judgment

although I incline to the latter. The crucial fact is that the respondents have not even to date appealed or brought under review or in any other way set aside the recordal of the settlement agreement in terms of Rule 27(6). That recordal then stands as a jurisdictional

fact upon which the court was entitled to rely for the purposes of the Rule 27(9) application.

[10] It is therefore unnecessary to analyse in detail precisely what is required before the court is entitled to make a recordal in terms of Rule 27(6). It may be that the recordal would have been vulnerable to a challenge. I say may because it is not necessary to make a finding that such a challenge would have succeeded and I therefore do not do so. The issue of whether the parties did or did not sign the settlement agreement was therefore irrelevant to the Rule 27(9) application and did not constitute a defence to it.

[11] As mentioned, accordingly, Rule 27(9) requires only two jurisdictional facts before an application may be brought and an order can be granted. The first is the recordal of a settlement agreement in terms of Rule 27(6). The second is the failure of one of the parties to comply with the stated conditions in the settlement agreement. The first requirement is clearly satisfied by the recordal of the settlement agreement consented to by the parties on 26 September 2011. I turn, therefore, to consider whether the applicant made out a case that the respondents had failed to comply with one of the stated conditions of the settlement agreement.’ (references omitted)

[38] In view of my conclusion the only remaining aspect on the issue on whether the judgment was void ab origine is the second leg of s 36(1)(b) being whether the judgment was obtained by mistake common to the parties. This issue can be determined with reference to the following question.

Was the judgment obtained by mistake common to the parties?

[39] In *Tshivhase Royal Council v Tshivhase*[16] it was held:

‘In relation to subrule (c) thereof, two broad requirements must be satisfied. One is that there must have been a “mistake common to the parties”. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, *ad idem* . . . Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been “as the result of” the mistake.’

[40] There has not been any suggestion in the papers on the record that the judgment was obtained by mistake common to the parties. Mr Gevers also did not advance any argument to that effect. In my view the appellant did not make out a case that the judgment was granted based on a mistake common to the parties. Therefore, once the appellant abandoned her argument that the judgment was obtained

by fraud that was the end of the case in so far as appellant sought to rely on s 36(1)(a) and (b) of the Act. Consequently, I do not see any reason why this court should upset the court a quo's judgment based on this ground.

Was there any default on the part of the appellant?

[41] Default judgment in terms of MC rule 2 is defined as meaning 'a judgment entered or given in the absence of the party against whom it is made.' Furthermore, the words 'plaintiff', 'defendant', 'applicant', 'respondent'

and 'party' are defined to 'include the attorney or counsel appearing for any such party and the officer of any local authority nominated by it for the purpose.'

[42] At the time when the judgment was granted the appellant's attorney Mr. Ramkhelawan was present. In the circumstances, the judgment was not granted in the appellant's absence. Therefore, the provisions of s 36(1)(a) were inapplicable. Again, I do not see any reason why this court should upset the court a quo's judgment based on this ground.

Was the judgment obtained by consent?

[43] This court cannot agree with Mr. Gevers that the judgment was granted by consent in circumstances when Mr. Ramkhelawan was not authorised to consent to judgment. The appellant's contention to this end is not borne out by the record. The fact that Mr. Ramkhelawan could not distil any defence on the face of the settlement agreement does not mean that he consented to the judgment let alone without authority. The authorities upon which Mr. Gevers sought to place reliance, are not an authority for the proposition he sought to advance. In fact, they provide for the opposite.

While it might have been salutary if the court a quo had permitted the appellant to file opposing papers in the matter, however, the appellant neither filed a notice to oppose the

application nor did she request the court a quo for an opportunity to file opposing papers. Had the appellant requested an opportunity to file opposing papers it might have been a different thing altogether as a failure to give the appellant an opportunity to file opposing papers might have amounted to a denial of the appellant's right of access to court in terms of s 34 of the Constitution.[17] After all, it was the court a quo's duty to balance the competing interests of the parties to ensure that in the absence of a valid defence the appellant did not unnecessarily delay the first respondent in obtaining judgment. In the circumstances, this court cannot fault the court a quo for granting judgment against the appellant.

Was the debt paid in full?

- [44] It is trite that when a judgment debt, as well as the interest thereon at the rate granted in the judgment and the costs have been paid in full, then, irrespective of whether or not the judgment creditor consented to the rescission of the judgment, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment. [18]
- [45] For the appellant to succeed in the rescission application the appellant was required to have attached to her affidavit the requisite proof that the judgment debt, the interest, and costs had been paid. There was no such proof attached to the appellant's affidavit.
- [46] On the contrary, on the appellant's version after she made the lump sum payment of R10 000.00 and paid 31 instalments there was an outstanding balance of R9 500.00.[19] In any event, the appellant never raised the issue of the debt having been paid at the time she applied for rescission of

judgment.

Consequently, the appellant was not entitled to raise this issue for the first time on appeal. For these reasons, I cannot fault the court a quo in its refusal to grant the rescission of the default judgment.

Were the amounts claimed for collection commission above the permitted rate and was the first respondent entitled to claim compound

interest?

- [47] In terms of clause 3 of the settlement agreement the lump sum payment of R10 000.00 and the monthly instalments of R500.00 were subject to the payment of 10% collection commission. Collection commission is a fee charged by a collection agent, who if he is a registered VAT vendor, is entitled to charge VAT on the commission. There was therefore no irregularity in any of the amounts claimed in respect of collection commission being above the rate of 10% collection commission as such amounts included VAT which was calculated at the rate of 14% at the time.
- [48] In relation to the bill of costs which was attached to the application in terms of MC rule 27 bearing a different case number to the current case, the court a quo must have been satisfied by the first respondent's explanation if everything was considered it was patently clear that the bill of costs related to this case and the case number was merely a clerical error. For this reason, this court cannot interfere with the court a quo's judgment on this ground.
- [49] As far as interest is concerned, it is trite that compound interest may only be claimed if there is a provision in the agreement for such interest to be charged. There was no provision in the settlement agreement for the first respondent to claim compound interest. It appears that in annexure "LM2" the first respondent may have claimed compound interest when she was not entitled to. While the claim of compound interest by the first respondent might have

been irregular and could possibly constitute a ground of appeal, the claim for compound interest did not render the judgment void ab origine.[20] Although the claim of compound interest by the first respondent is an issue of law, in my view it is an arithmetical error which the court a quo could have corrected suo motu in terms of s 36(1)(c) of the Act had the appellant correctly identified the issue for

determination.

Could the judgment have been rescinded on the basis of rule 49(7)?

- [50] In order for the court a quo to have exercised its discretion in terms of rule 49(7) of the MC Rules the appellant had to satisfy the court a quo that there was good cause to do so. To show good cause the applicant is required (a) to give a 'reasonable explanation of his default'; (b) to show that his 'application is made bona fide'; and (c) to show that he has 'a bona fide defence to the plaintiff's claim, which prima facie has some prospect of success'.[21]
- [51] Although the appellant's application for rescission of judgment was founded on s 36(1)(a) and (b) of the Act read with rule 49(8) of the MC Rules, the appellant also relied on rule 49(7). To succeed with an application in terms of this rule the appellant was required to bring the application within 20 days from the date she became aware of the judgment and show good cause.
- [52] It is common cause that the appellant's application was filed hopelessly outside the 20-day period prescribed by rule 49(1) of the MC Rules and the appellant did not apply for condonation. The appellant in her application contented herself with the fact her application was based on s 36(1)(a) and (b) of the Act read with rule 49(8) of the MC Rules, which had to be launched within one year after the applicant first had knowledge of voidness, fraud, or mistake. The appellant did not apply for condonation in the alternative in the event the court a quo did not find the judgment void as contemplated in s 36(1)(a) and (b) of the Act. The appellant did not apply for condonation while she also relied on the provisions of rule 49(7) of the MC Rules in her application. The inevitable consequence of this stance, is that she had to stand and fall by the averments that the application fell with the ambit of s 36(1)(a) and (b) read with rule 49(8) of the MC Rules. For this reason, I cannot fault the court a quo for having held that the appellant was required to have applied for condonation to the extent that the appellant sought to rely on the provisions of rule 49(7) of the MC Rules.

Declaration of confirmatory affidavits pro non scripto

- [53] It is trite that a confirmatory affidavit is necessary where a deponent refers to crucial evidence originating from another person.[22] The appellant in support of her application for rescission of judgment attached to her founding affidavit confirmatory affidavits

of her current attorney of record and Mr. Ramkhelawan. However, the court a quo considered these confirmatory affidavits pro non scripto and held that the appellant was required to have brought a substantive application to file these affidavits.

[54] It seems that the court a quo in doing this was motivated by the fact that the confirmatory affidavits did not go far to specify the facts which they confirmed even though the appellant in her founding affidavit insinuated some impropriety on the part of the court a quo and the first respondent's attorneys. For example, the

affidavit of Mr Ramkhelawan merely stated 'I have read the founding affidavit of Felicity Delia Halle together with annexures

marked FA1 until FA15 and I confirm the contents in so far and whenever they make reference or apply to me.'

[55] This practice has long been discouraged and disapproved by our courts. A hearsay statement by a deponent merely supported by a confirmatory

affidavit such as the one of Mr. Ramkhelawan, on a crucial aspect of the case, has been held to lose cogency.[23] In other instances, an affidavit couched in that fashion would even be

considered pro non scripto[24] as the court a quo has done in this case. This court therefore cannot fault the court a quo in considering such confirmatory affidavits pro non scripto.

However, the court a quo was wrong though to hold that appellant required the leave of the court a quo to file the confirmatory affidavits which already accompanied the founding affidavit.

Nevertheless, such misdirection, does not go far enough to warrant an interference by this court of what is otherwise a judgment which is not impeachable.

Costs

[56] The appellant contends that the court a quo was wrong in awarding a cost order against her in respect of the first respondent's application for condonation for the late delivery of the first respondent's answering affidavit while also awarding a cost order against the appellant in respect of the dismissal of the appellant's rescission application.

[57] It is trite that the general rule is that costs follow the event and are pre-eminently in the discretion of the court which discretion the court must exercise judiciously. The court would therefore be entitled to depart from the general rule and exercise its discretion

and make any order as to costs as it deems fit including an order that there would be no order as to costs. A court of appeal will not readily interfere with the exercise of that discretion.[25] In any event the costs order against the appellant by the court a quo was general. The court a quo in its costs order against the appellant did not specify that the costs were awarded against the appellant in respect of any of the three applications, which were heard simultaneously by the court a quo. However, the court a quo remarked

that the outlandish and outrageous statements, which were made by the appellant, were a trigger that caused the first respondent's

attorneys to appoint counsel in the matter. In the circumstances, the court a quo was of the view that the appellant should pay costs of counsel. Consequently, this court cannot fault the court a quo's reasoning and interfere with the exercise of its discretion.

[58] For all these reasons this appeal must fail.

The appeal record

[59] The way the appeal record was prepared in this case merits some comment. Perhaps in doing so it is apposite to preface such comment by the remarks of the court a quo wherein the learned magistrate stated: 'Given the state of the record, it took this court an enormous amount of time to shift wheat from the chaff to dissect what the issues in dispute are.'

[60] The appeal record comprises 6 volumes totalling to 791 pages. Some of the pages are barely legible and illegible as some of those pages are, in addition, they were printed in portrait format. This made the reading of this part of the record difficult and straining to the court. This record, apart from comprising the parties' heads of argument in the rescission application, also comprised the oral submissions which the parties rendered during the hearing of the rescission application. In addition, the record also comprised the parties' heads of argument in the condonation application in respect of the late filing of the first respondent's answering affidavit as well as the oral submissions of the parties, which the parties rendered during the hearing of the condonation application. Moreover, the record also comprised the evidence, which was led during the determination of the issue of liability and the respective oral submissions of the parties. What was most puzzling is that in relation to the portions of the record this court was required to read it was requested by the appellant to read among others the heads of argument in the condonation application and the heads of argument in the rescission application and the transcript of the hearing. Almost half of what forms this appeal record was not essential to the determination of this appeal. The inclusion of what was not essential to the determination of this appeal equally made the reading of the appeal record difficult as the essential portions were in between what this court considers not to have been essential. This court had to shuffle between the essential and the non-essential portions.

[61] Uniform rule 50(7) provides that the record shall contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, together with an index thereof, and copies lodged with the registrar shall be certified as correct by the attorney or party lodging the same or the person who prepared the record. On the other hand, uniform rule 50(8), which I reproduce verbatim below:

‘(a) Save in so far as these affect the merits of an appeal, subpoenas, notices of trial, consents to postponements, schedules of documents, notices to produce or inspect, and other documents of a formal nature shall be omitted from the copies of the record prepared in terms of the foregoing subrule. A list thereof shall be included in the record.

(b)(i) With the written consent of the parties any exhibit or other portion of the record which has no bearing on the point in issue on appeal may be omitted from the record.

(ii) If a portion has been so omitted from the record, the written consent signed by or on behalf of the parties and noting the omission shall be filed, together with the incomplete record, with the Registrar.

(iii) Notwithstanding the provisions of subparagraphs (i) and (ii) the court hearing the appeal may at any time request the complete original record and take cognisance of everything appearing therein.

(c) When an appeal is to be decided exclusively on a point of law, the parties may agree to submit such appeal to the court in the form of a special case, as referred to in rule 33 of the Rules, in which event copies may be submitted to the court of such portions only of the record which in the opinion of the parties may be necessary for a proper decision of the appeal: Provided that the court hearing the appeal may request that the entire original record of the case be placed before the court.’

[62] In terms of Practice Directive 33.8.3.2 of the Practice Manual of the KwaZulu-Natal Division of the High Court the argument at the conclusion of the application or trial shall not form part of the record unless essential for the determination of the appeal, and the parties agree thereto in writing. In Uniform rule 50(7) and (8) there is no provision that the parties’ heads of argument should form part of the appeal record, let alone the parties’ argument during the hearing of the application or at the conclusion of the trial. To include the record of the previously concluded

proceedings as part of the appeal record in respect of the issue of liability only aggravated the view which this court took. As

much as KZN High Court Practice Directive 33.8.3.2. is applicable to full court appeals and not to full bench appeals I do not see why by parity of reasoning it should not be deemed to apply to full bench appeals as well. In my view the appeal record as was filed by appellant was filed in direct contravention of Uniform rule 50(7) and

(8) and by extension in contravention of KZN High Court Practice Directive 33.8.3.2. This court strongly discourages this practice.

Order

[63] In the result the appeal is dismissed with costs.

CHITHI AJ

APPEARANCES

Counsel for the Appellant: Mr. A. J. Gevers Instructed by: Thasneem Parak & Associates Counsel
for the First Respondent: Ms. M. E. Van Jaarsveld Instructed by: Maree & Pace, Mpulo Attorneys
Dated of hearing: 31 May 2024 Date delivered: 30 August 2024

[1] Record: Vol. 1: Page 44-45.

[2] Record: Vol. 4: Page 415

3 Record: Vol. 4: Page 430. Vol 1: Page 62.

[4] Record: Vol. 4: Pages 431-432.

[5] Record: Vol. 5: Page 52.

[6] Record: Vol. 1: Page 60 - 61.

[7] These costs were apparently in respect of the eviction proceedings which were brought before the Ladysmith Magistrates' Court under case no.:235/2000 against the appellant's parents in law. The appellant's parents in law were previously the owners of the farm before it was acquired by the first respondent. The appellant's parents in law were permitted to live on the portion of the farm in which they previously lived before the acquisition of the farm by the first respondent provided, they paid rent. When they failed to pay rent the eviction proceedings were instituted against them under case no.:235/2000. However, those proceedings were settled in terms whereof the appellant agreed to buy the portion of the farm where her parents in law resided. It is the sale of that portion of land which founded the damages action resulting in the judgement against the appellant on 9 April 2005 which is the subject of this appeal.

[8] Record: Vol. 4: Page 416.

[9] Section 65 of the Magistrates' Court Act 32 of 1944 (the Act).

[10] Record: Vol 1: Page 16: para 54 and Page 17: para 55.

[11] Euro Blitz 21 (Pty) Ltd and Another v Secena Aircraft Investments CC

[2015] ZASCA 21.

[12] Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd

[2008] ZASCA 40; 2008 (4) SA 325 (SCA); [2008] 3 All SA 395 (SCA).

[13] Moholeng v Bekana and another

[2021] ZAGPJHC 562 para 27.

[14] First Consolidated Leasing Corporation Ltd v McMullin 1975 (3) SA 606 (T) at 609A.

[15] Khwela and another v Dhlamini

[2013] ZAKZPHC 46.

[16] Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another [1992] ZASCA 185; 1992

(4) SA 852 (A) at 863A-C.

[17] Morudi and others v NC Housing Services and Development Co Limited and others

[2018] ZACC 32; 2019 (2) BCLR 261 (CC) para 33.

[18] Rule 49(5A)(a) of the Magistrates' Courts Rules (MC Rules).

[19] Record: Vol 1: Page 21: para 82 and Page 35: para 159.

[20] Minister of Police v Mnukwa and others

[2022] ZAECMHC 46 para18.

[21] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) para 11.

[22] Drift Supersand (Pty) Ltd v Mogale City Local Municipality and another [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31 (Drift Supersand).

[23] Drift Supersand.

[24] Elundini Local Municipality v UNCEDO Taxi Association and others [2021] ZAECGHC 86 para 12.

[25] Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and others

[2020] ZASCA 185; 2021 (3) SA 47 (SCA); [2021] 1 All SA 668 (SCA) paras 99 - 106.

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