

SOUTH AFRICA / JUDGMENT

Mjongile v Magistrate Zwelitsha and Others (406/16; 407/16) [2017] ZAECBHC 22 (23 February 2017) [2017] ZAECBHC 22

COURT

Eastern Cape High Court, Bhisho

BEFORE

I.T. Stretch, D. Van Zyl

CASE / FILE NUMBER

406/16; 407/16

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. 406/16

REPORTABLE

In the matters of:

THEMBA MJONGILE versus MAGISTRATE TWANI, ZWELITSHA 1st Respondent WILBERFORCE TRADING CC trading as BUNTU MXENGE 2nd Respondent THE CLERK OF THE CIVIL COURT, ZWELITSHA 3rd Respondent MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 4th Respondent And Case no. 407/16 THEMBA MJONGILE versus MAGISTRATE TWANI, ZWELITSHA 1ST Respondent WILBERFORCE TRADING CC t/a BUNTU MXENGE 2nd Respondent

REVIEW JUDGMENT

STRETCH J:

[1] Before us are two applications for the reviewing and the setting aside of judgments sounding in money granted against the same applicant purportedly in terms of section 58 of the Magistrates' Court Act 32 of 1944. The judgment under case no. 406/16 was granted by the clerk of the Zwelitsha civil court on 28 October 2013. The judgment under case no. 407/16 was granted by the Zwelitsha civil magistrate on 11 December 2014. The applications are not opposed.

[2] The factual matrix upon which the application is based is the following:

- (a) On 26 August 2013 the applicant entered into a written loan agreement with Wilberforce Trading CC trading as B Mxenge (the second respondent) who is a registered credit provider with the National Credit Regulator in terms of section 12 read with section 40 of the National Credit Act 34 of 2005 ("the NCA").
- (b) The material terms and conditions of the loan are that the second respondent would lend the applicant the sum of R17 436,00 for one month with interest calculated at 30 per cent per annum.
- (c) On the same day the applicant signed a consent to judgment for the aforesaid amount incorporating an undertaking to pay the debt in instalments of R1500,00 per month commencing on 16 September 2013, and consenting to the issuing of an emoluments attachment order to this effect against his salary.
- (d) On 3 September 2013 (more than three weeks before the debt became due and payable), the second respondent's attorneys forwarded (by way of registered mail) a notice to the applicant purportedly in terms of section 129(1) of the NCA. The notice informs the applicant that he has failed to pay the second respondent the money which it lent to him and demands payment of the full sum of R17 436,00 together with interest at the rate of 15,5 per cent per annum calculated from 2 September 2013 to date of payment, as well as the costs of the letter in the sum of R33,06. The notice thereafter complies after a fashion with the requirements of section 129(1)(a) of the NCA.
- (e) On 20 September 2013 (six days before the debt became due and payable), the second respondent's attorneys wrote a letter to the applicant demanding payment of the full sum lent as well as R33,06 in disbursements, to be paid (or suitable arrangements to be made for settlement) by 8 October 2013, failing which summons would be issued without further notice.
- (f) On 17 October 2013 the second respondent's attorneys filed a request for judgment against the applicant at the Zwelitsha magistrates' court. As I have said, the request purports to be in terms of section 58 of the NCA and claims a judgment debt of R17 436,00 and R496,90 in costs. Annexed thereto is a copy of the letter of demand and the consent which I have referred to.
- (g) On 28 October 2013 the clerk of the civil court granted judgment against the applicant in the amounts claimed, and directed him to settle the debt in instalments. The relevant extract from the order reads as follows:

'The Defendant is further ordered to pay the said judgment and costs in monthly/weekly instalments of R1500. The first instalment must be paid on or before 7/12/13 and thereafter on or before the 7th day of every succeeding month/week until the outstanding balance of the judgment debt and costs has been paid in full.'

I might mention that ex facie the order, the applicant can either pay these instalments monthly or weekly.

- [3] This application for review is brought under section 22 of the Superior Courts Act 10 of 2013. The applicant primarily relies on the contention that the proceedings were grossly irregular in support of his claim for the order to be set aside.
- [4] The applicant has raised a number of relevant issues in support of this application. Indeed, the irregularities are glaringly obvious from a mere reading of the facts which I have already outlined. I mention but a few of these:
- (a) Section 129 outlines the procedure to be followed before debt enforcement. Section 130 outlines the procedure to be followed in court. Section 129 makes it clear that a debt can only be enforced if the consumer is in default of a credit agreement. This goes without saying. The second respondent's non-compliance with section 129, by sending a notice purported to be in terms of this section as well as a letter of demand to the applicant before the debt was due and payable in terms of the credit agreement, constitutes a gross irregularity which, on its own, vitiates the judgment granted.
 - (b) The provisions of sections 57 and 58 of the Magistrates' Court Act 32 of 1944 ("the MCA") make it clear that a consent to judgment or an admission of liability and an undertaking to pay a debt in instalments cannot precede a letter of demand or a summons. This too, goes without saying. In the matter before us, the applicant signed a consent to judgment on the same day that he entered into the credit agreement, and at least one month before the credit provider would have been entitled to make demand and/or to issue summons.
 - (c) The letter of demand (which was attached to the request for judgment) is in any event misleading. It advises the applicant that, in the event of non compliance, summons would be issued (which needless to say, would have granted him an opportunity to defend the claim). It does not advise that the third respondent would proceed on a prematurely signed consent to judgment.
 - (d) Section 130(3) of the NCA makes it clear that despite any provision of law or a contract to the contrary, the court may determine the matter only if it is satisfied that the procedures required by section 129 have been complied with. This provision is fortified by rule 4(1)(b) of the Magistrates' Court rules which states that where the original cause of action is a credit agreement under the NCA, the letter of demand referred to in section 58 of the MCA must deal with each one of the relevant provisions of sections 129 and 130, and allege that each one has been complied with. In this instance the clerk of the court (assuming for the moment that he/she was not exceeding his/her powers when the order was made) could not possibly have been satisfied that there had been due compliance on the basis of the letter of demand and the consent to judgment. Neither of these documents even make reference to s129. In a majority judgment in *African Bank Ltd v Myambo* NO 2010 (6) SA 298 (GNP) at 320D-321F, Du Plessis J made a declaratory order the main effect of which was the following:

(i) The commencement of the NCA did not repeal s58 or render it nugatory in respect of debts to which the NCA applies.

(ii) In order to obtain judgment in terms of s58 where the original cause of action was a credit agreement under the NCA, the plaintiff must comply with the provisions of s58 and attach to the request for judgment a true copy of the s129 notice. Such a plaintiff must in the summons or letter of demand, as the case may be, deal with each of the relevant provisions of sections 129 and 130 and allege that each one has been complied with.

See also paras 11 and 12 of the undated unreported judgment of Van Papendorp AJ (with Lowe J concurring) in Grahamstown case no. 1922/2016 in the matter of Dyantyi-Tali v The King Williams Town Magistrate and Another.

(e) Incidentally, and in terms of rule 12(5) of the Magistrates' Court rules (substituted by GN R2 of 19 February 2016 with effect from 22 March 2016), it is now peremptory for the registrar or clerk of the court to refer to open court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement specifically governed by the NCA. I will, in due course, traverse the contention that rule 12(6A) in any event had already provided for judicial oversight in matters of this nature when this judgment was granted.

(f) Section 59 of the MCA read with rule 4(2) furthermore provides that where no summons has been issued (as in the matter before us), the request in writing where the defendant has consented to judgment must be supported by an affidavit containing such evidence as is necessary to establish that the requirements in law have been complied with. This prerequisite is confirmed by the provisions of rule 12(6A) which state that if a claim is founded on any cause of action arising out of or regulated by legislation (in this case the NCA), 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. This procedure is further governed by rule 12(6) which makes it clear that where the action is based on an agreement in writing (as in the matter before us) the plaintiff shall, together with the request for judgment, file the original agreement in writing or an affidavit setting out reasons to the satisfaction of the court or the registrar or the clerk of the court, as the case may be, why such original cannot or should not be filed. This was not done.

(g) It is also significant that the judgment granted fails to comply with the provisions of section 58(1)(b) of the MCA which provides that judgment may only be entered for amounts for which the debtor has consented to. Ex facie the consent to judgment, no provision is made for a specified sum in respect of costs. I am not surprised. This document appears to have been signed before any costs could have been incurred in any event.

(h) It has furthermore been contended that the clerk of the court exceeded his/her powers in making the order. In this regard the applicant relies on the provisions of rule 12(5) read with rule 11(6) and 12(6A). I agree that if the clerk of the court indeed acted ultra vires the point is well made and that such conduct amounts to a further gross irregularity in the proceedings. As I have said, the provisions of rule 12(5) were not yet in force during 2013. That is not

however, the end of the matter. Rule 12(6A) stipulates that if a claim is founded on a cause of action arising out of or regulated by legislation (such as the NCA), the plaintiff shall, together with the request for judgment, file evidence confirming compliance with the provisions of such legislation to the satisfaction of the court (ie a judicial officer). In terms of rule 4(4) the provisions of rule 12(6A) apply to a request for judgment by consent under section 58 of the MCA.

- [5] In view of the number of irregularities which I have referred to, which to my mind cumulatively and individually amount to gross irregularity in the proceedings as contemplated in section 22(1)(c) of the Superior Courts Act, the order of the third respondent serves to be set aside.
- [6] The second respondent is a registered credit provider who has abused the court process and its rules, and who has misapplied legislation which it ought to be acutely familiar with. This has resulted in the applicant having been constrained to incur unnecessary legal costs in bringing this matter on review, which costs the second respondent must pay.

Case no. 407/16

- [7] The factual matrix upon which this application is based is the following:
- (a) On 20 February 2014 the applicant entered into a second written loan agreement with the second respondent.
 - (b) The material terms and conditions of the loan are that the second respondent would lend the applicant the sum of R27 722,50 for one month with interest calculated at 30 per cent per annum.
 - (c) On 22 February 2014 the second respondent's member, Buntu Mxenge, signed a "certificate of balance" reflecting that on 20 February 2014 the applicant was indebted to the second respondent in the sum of R27 722,50 (the capital loan amount).
 - (d) On 3 July 2014 the applicant signed a consent to judgment in the aforesaid amount incorporating an undertaking to pay the debt in instalments of R500,00 per month commencing on 15 August 2014, and consenting to the issuing of an emoluments attachment order to this effect against his salary.
 - (e) On 4 July 2014 the second respondent's attorneys addressed what purports to be a notice in terms of section 129(1) of the NCA to the applicant. According to the applicant's attorney there is no proof of postage of this document in the court file and the applicant denies having received it. The notice informs the applicant that he has failed to pay the second respondent the money which it lent to him and demands payment of the full sum of R27 722,50 together with interest at the rate of nine per cent per annum calculated from 3 July 2014 to date of payment, as well as the costs of the letter in the sum of R51,84. The notice thereafter complies after a fashion with the requirements of section 129(1)(a) of the NCA.

- (f) Thereafter the second respondent's attorneys filed a request for judgment against the applicant at the Zwelitsha magistrates' court. The document is dated 18 September 2014. The request purports to be in terms of section 58 of the MCA and claims a judgment debt of R27 722,50 plus interest in the sum of R526,35 and R450,30 in costs (totalling R28 248,85). The request states that a letter of demand and the applicant's written consent to judgment are attached. According to the applicant's attorney, a letter of demand was not in the court file when it was uplifted.
- (g) On 11 December 2014 the first respondent (the Zwelitsha magistrate apparently in charge of civil matters) granted judgment against the applicant in the amounts claimed, and directed him to settle the debt in instalments of R500,00 per month. The order is silent on when repayments are to commence and is nonsensical with regard to the continuation of payments. The relevant extract from the order reads as follows:

'The first instalment must be paid on or before the ____day of ____20____ and thereafter on or before the 15th day of every succeeding until the outstanding balance of the judgment debt and costs has been paid in full.'

Once again ex facie the order, the applicant can either pay these instalments monthly or weekly.

- [8] This application for review is similarly brought under section 22 of the Superior Courts Act 10 of 2013. The applicant once again relies on the contention that the proceedings were grossly irregular as his principle ground for the order to be set aside.
- [9] The applicant has, as in the previous application, raised a number of relevant issues in support of his application. Indeed, the irregularities are once again obvious from a mere reading of the salient facts. I mention but a few of them. Much of what I am about to say has already been alluded to with respect to the first application, but must be repeated as this is an ex tempore judgment and it is accordingly not possible to simply refer to the numbering of relevant paragraphs in the first judgment.
- (a) Section 130(3) of the NCA makes it clear that despite any provision of law or contract to the contrary, the court may determine the matter only if it is satisfied that the procedures required by section 129 have been complied with. This provision is fortified by rule 4(1)(b) of the Magistrates' Court rules which states that where the original cause of action is a credit agreement under the NCA, the letter of demand referred to in section 58 of the MCA must deal with each one of the relevant provisions of sections 129 and 130, and allege that each one has been complied with.
- (b) In this instance there is no letter of demand. I am confident that if such a document existed at some stage, either or both of the respondents would have said so. In the premises, the magistrate could not possibly have been satisfied that there had been due compliance on the basis of a written consent to judgment only. I refer mutatis mutandis to the Myambo

judgment.

- (c) In this matter there has likewise been no compliance with sections 29 and 30 of the NCA.
- (d) As I have said, rule 4 of the Magistrates' Court rules read inter alia with rules 12(6), (6A) and (7) governs the procedure whenever an application in terms of sections 57 or 58 of the MCA is brought before the court. I have already alluded to what the rule says about the letter of demand. A request for judgment in terms of section 58 of the MCA which is not supported by at least a letter of demand amounts to a gross irregularity in the proceedings. Any order granted in the absence thereof falls to be set aside on this ground alone. I once again refer to paras 11 and 12 of the unreported Dyantyi-Tali

judgment.

- (e) Section 59 of the MCA read with rule 4(2) furthermore provides that where no summons has been issued (as in this matter on review), the request in writing where the defendant has consented to judgment must be supported by an affidavit containing such evidence as is necessary to establish that the requirements in law have been complied with. The comments which I have made in this regard in the first matter also apply here.
 - (f) Likewise, in this matter, there has been no compliance with the provisions of rule 12(6A). I say this because there is no evidence confirming compliance with the provisions of the NCA. There is also no written agreement. This prerequisite is confirmed by the provisions of rule 12(6A) which state that if a claim is founded on any cause of action arising out of or regulated by legislation (in this case the NCA), the plaintiff shall, together with the request for default judgment, file evidence confirming compliance with the provisions of the NCA.
 - (g) It is once again significant that in this matter the judgment granted also fails to comply with the provisions of section 58(1)(b) of the MCA which state that judgment may only be entered for amounts to which the debtor has consented to.
 - (h) Ex facie the consent to judgment no provision is made for a specified sum in respect of costs. Although the consent to judgment refers to mora interest, there is no evidence as to if and when the applicant was placed in mora, as there is no letter of demand.
- [10] Here too, in view of the plethora of irregularities which I have referred to, which once again cumulatively and individually amount to gross irregularity in the proceedings as contemplated in section 22(1)(c) of the Superior Courts Act, the order of the first respondent falls to be set aside.
- [11] With respect to costs, I repeat the sentiments which I expressed with respect to the first application. The applicant (in the absence of opposition from the first respondent) has not sought costs based on joint and several liability despite the fact that the conduct of the first respondent is not beyond reproach.
- [12] In the premises, I make the following orders:

- (a) The application for review succeeds and the judgment and the order granted by the Zwelitsha clerk of the civil court (the third respondent) against the applicant on 28 October 2013 under Zwelitsha case no. 4980/13 is set aside.
- (b) Wilberforce Trading CC trading as Buntu Mxenge (the second respondent) is directed to pay the applicant's costs.
- (a) The application for review succeeds and the judgment and the order granted by the Zwelitsha civil magistrate (the first respondent) against the applicant on 11 December 2014 under Zwelitsha case no. 3801/14 is set aside.

I.T. STRETCH

JUDGE OF THE HIGH COURT, BHISHO

I agree:

D. VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT, BHISHO

For the applicant: Ms N.R. Makaula Instructed by: NJ Du Plessis & Associates Inc. East London

Matter heard and judgment delivered: 23 February 2017

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