

SOUTH AFRICA / JUDGMENT

Ntebe v Residual Debt services Limited (CA232/2016) [2017] ZAECHGHC 27 (9 March 2017) [2017] ZAECHGHC 27

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N Molony, C Plasket

CASE / FILE NUMBER

CA232/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: CA232/2016

[NOT

REPORTABLE]

Date heard: 9 December 2016

Date delivered: 9 March 2017

In

the matter between:

NOSIPHO

NTEBE

Appellant

and

RESIDUAL

DEBT SERVICES LIMITED

(formerly

AFRICAN BANK LIMITED

(under

Curatorship))

Respondent

JUDGMENT

MOLONY AJ:

Background

1. On or about 1 December 2008 the Appellant entered into a credit agreement with the Respondent whereby the Respondent advanced credit of R 8 750.00 to the Appellant.
2. The terms of the agreement were that the Appellant would make 30 monthly repayments of R 570.21 in order to pay off the debt. The installment amount included interest, fees and credit life insurance. There was an additional initiation fee which was charged, as well as a monthly service fee.
3. The total amount which the Appellant would therefore pay to the Respondent, once the installments had been paid in full (including the loan amount, interest, fees and credit life insurance) would amount to R 17 106,30.[1]
4. The Appellant thereafter defaulted on her payments.
5. On 3 May 2013 judgment was granted against the Appellant by consent in the King William's Town District Magistrate's Court.[2]
6. Thereafter the Appellant launched an application for rescission of the aforementioned judgment, on 9 February 2016, in terms of Rule 49 of the Magistrates' Courts Rules.[3] The Respondent opposed the rescission application.
7. The matter was duly heard in the opposed motion court at the Magistrate's Court in King William's Town and judgment delivered on 29 March 2016.[4] The result was that the rescission application was refused.
8. The Appellant filed a notice of appeal (which is dated 30 March 2016) on 14 April 2016.[5]
9. The Respondent has opposed the appeal, and the presiding Magistrate has not added anything to his written judgment dated 29 March 2016.[6]

Condonation

10. The Appellant brought an application for condonation for the late prosecution of the appeal, which in essence is due to delay from the Clerk of the Magistrate's Court in sending the record of proceedings to the Registrar of the High Court, Grahamstown. Further delays were encountered when the record, once sent to the Registrar of the High Court, appeared to have been misfiled by the Registrar.
11. The Respondent did not oppose the application for condonation and, given the legitimate explanation provided, the application was granted at the hearing of this matter.

Grounds of Appeal

12. The Appellant's grounds of appeal amount to the allegation that the Magistrate erred or misdirected himself due to his contrary findings on the following[7]:
 - 12.1 The Respondent's failure to comply with the applicable Magistrates' Courts Rules[8];
 - 12.2 The Respondent's failure to comply with the applicable sections of the NCA[9];
 - 12.3 The Respondent's failure to submit a certificate of balance with the section 58 application, as well as making an order allowing the Respondent to remedy this defect by annexing a statement of account to the Respondent's opposing papers in the rescission application.
13. The Appellant alleges that the above factors amount to a bona fide defence; that the section 58 application was fatally flawed; and that the judgment in terms of section 58 was therefore void ab origine.
14. The Appellant also appeals against the costs order made in the Magistrate's court. The grounds of appeal relating to costs all presuppose the success of the appeal against the refusal of the rescission application. As such, in my view, they really amount to stating that the costs should follow the outcome of the matter.

Relevant Provisions of the Magistrates' Courts Act and Magistrates' Courts Rules

15. Section 58 of the Magistrates' Courts Act states as follows:

"(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of any debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by —

- (a) if no summons has been issued, a copy of the letter of demand;
- (b) the defendant's written consent to judgment,
- (i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and
- (ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified

instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his consent, and such order shall be deemed to be an order of the court mentioned in section 65A(1).

- (2) The provisions of s 57(3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this

section.”[10]

16. Rule 4 of the Magistrates’ Courts Rules states the following in regard to applications in terms of section 57 and 58 of the Magistrates’ Courts Act:

“(1)

- (a) The letter of demand referred to in sections 57 and 58 of the Act shall contain particulars about the nature and amount of the claim.
 - (b) Where the original cause of action is a credit agreement under the National Credit Act, 2005, the letter of demand referred to in section 58 of the Act must deal with each one of the relevant provisions of sections 129 and 2>130 of the National Credit Act, 2005, and allege that each one has been complied with.
- (2) 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 requirements in law have been complied with.
- (3) A consent to judgment in terms of section 58 of the Act shall be signed by the debtor and by two witnesses whose names shall be stated in full and whose addresses and telephone numbers shall also be recorded.
- (4) Rules 12(5), (6), (6A) and (7) apply to a request for judgment in terms of sections 57 and 58 of the Act.”
17. Rule 12(5) requires that the registrar or clerk of the Magistrate’s Court refer all applications governed by, inter alia, the NCA, to the court.

18. Rule 12(6) states that:

“(6) If the action be on a liquid document or any agreement in writing the plaintiff shall together with the request for default judgment file the original of such document or the original agreement in writing or an affidavit setting out reasons to the satisfaction of the court or the registrar or clerk of the court, as the case may be, why such original cannot or should not be filed.”

19. Rule 12(6A) states that:

“(6A) 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.”

20. Rule 49 of the Magistrates’ Courts Rules contains the requirements for a rescission application.

21. Rule 49(3) states that:

“(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.”

22. The Appellant brought her application in terms of Rule 49(8), which states that:

“(8) Where the rescission or variation of a judgment is sought on the ground that it is void ab origine 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.”

23. The requirements of Rule 49(3) apply to an application in terms of Rule 49(8).[11]

Non-Compliance with Magistrates' Courts Rules and the National Credit Act

25. The Appellant does not dispute the correctness of the copy of the agreement filed at the time judgment by consent was sought.
26. The Appellant does not dispute that she was in default of her obligations in terms of the credit agreement.
27. The Appellant does not dispute that she received a notice in terms of section 129 of the NCA, and the consent to judgment which the Appellant signed specifically records that she has not responded to the section 129 notice.[12]
28. The Appellant does not dispute that she signed the consent to judgment, and commenced making payments in accordance therewith.
29. The Appellant, in fact, did not attest to an affidavit at all in the rescission application. The Appellant's attorney attested to such affidavit on her behalf instead.
30. What is evident from the founding affidavit in the rescission application is that no factual evidence is provided in regard to the following:
- 30.1 What occurred when the consent to judgment documents were signed by the Appellant;
- 30.2 When the Appellant learned about the judgment and the alleged irregularities relating to the judgment;
- 30.3 Whether the Appellant has a defence, and whether such defence is bona fide. It is further noted that at no stage in the papers does the Applicant allege that she in fact wishes to defend this matter, nor that she has any defence other than the technical points raised by her attorney of record.
- 30.4 Whether or not the Appellant read the consent to judgment when signing it, and/or whether it was explained to her.

31. The Appellant's application for rescission therefore rested purely on technical grounds relating to her attorney of record's interpretation of the documentation in the application for judgment by consent. The Appellant at no stage confirms any of the allegations made by her attorney of record,[13] nor does she or her attorney provide any factual averments to substantiate the technical issues raised.
32. The Respondent raised the issue of the founding affidavit in the rescission application being composed entirely of inadmissible hearsay,[14] which has not been confirmed by the Appellant herself.
33. The Respondent also referred to the fact that the power of attorney attached to the rescission application papers, which allegedly forms the basis of the attorney's authority to depose to the founding affidavit,[15] makes no reference to such attorney signing an affidavit in regard to a rescission application.[16]
34. I consider the above two points to be well made and dispositive of the appeal in the Respondent's favour. For the sake of completeness, however, I shall also consider the grounds of appeal advanced by the Appellant.
35. I turn now to consider the Appellant's grounds of appeal.
36. The first leg of the Appellant's argument is that the Respondent failed to submit a certificate of balance, and therefore failed to properly quantify its claim when judgment was requested. [17]
37. The Respondent submitted in response that a certificate of balance was not required, given the Appellant's acknowledgment of liability, as embodied in the consent to judgment.[18]
38. In the absence of some explanation by the Appellant herself as to what occurred when the consent form was signed, I am in agreement that the acknowledgment of liability went as far as was necessary, at the time, regarding quantification of the debt in question.
39. The Appellant contends further that the Respondent's original request for judgment by consent did not comply with Rule 4(1)(b) of the Magistrate's Courts Rules.[19]
40. In this regard the Appellant alleges that the Respondent did not send a proper letter of demand, which dealt with each of the requirements of sections 129 and 130 of the NCA.
41. The Respondent submits that the letter of demand in question did comply with Rule 4(1)(b), and that the Appellant's averments in this regard are without merit.[20]
42. The Appellant's allegations in regard to Rule 4(1)(b) represent a technical approach to this matter which places form over substance, under circumstances where such is unnecessary, as the Appellant herself has laid no factual basis in regard to prejudice she may have suffered.[21]

43. Whilst the letter of demand does not refer to section 130 of the NCA, and nor does it refer to specific subsections of section 129, it does quite clearly refer to section 129 and draw the Appellant's attention to the relevant elements required by those sections. There has therefore, in my view, been substantial compliance with the requirements of Rule 4(1)(b), as there does not appear to have been any breach of the provisions of sections 129 and 130 of the NCA.[22]
44. The Appellant, furthermore, in the consent to judgment, acknowledges the requirements of sections 129 (and 130 of the NCA, although it is not explicitly referred to), her rights as referred to in those sections, and confirms that she has elected not to exercise her rights in this regard.[23]
45. The Appellant also argues that the Respondent's request for judgment was not supported by an affidavit containing the appropriate averments, as contemplated in Rule 4(2) of the Magistrates' Courts Rules.
46. The relevant affidavit, attested to by Mr Roderick Govender,[24] was described by the presiding magistrate, during the rescission application, as 'a bit thin on the required information'.[25]
47. In my view this is remedied by the consent to judgment signed by the Appellant, which specifically confirms the necessary in regard to compliance with the NCA.[26]
48. This issue has also not been referred to by the Appellant in any affidavit signed by the Appellant, and therefore no factual basis is laid to consider the Rule 4(2) affidavit to be deficient.
49. The Appellant then shifts the focus to non-compliance with Rule 12(6A), which must be read in conjunction with Rule 4(2).
50. The Respondent, inter alia, again points out that the Appellant has not provided any factual basis upon which to attack this issue.[27]
51. The founding affidavit attested to by the attorney of record for the Appellant also does not specify how Rule 12(6A) was not complied with.[28]
52. The objection in relation to Rule 12(6A) therefore must suffer the same fate as the objection to Rule 4(2).
53. The Appellant, in the founding affidavit in the rescission application, took issue with compliance by the Respondent with Rule 12(6) as well. A reference to Rule 12(6) is not, however, to be found in the notice of appeal, and it is therefore not necessary to consider it any further.[29]
54. I, in any event, consider the objection in regard to Rule 12(6) to be spurious in the same manner as the objections in regard to Rules 4(2) and 12(6A) above.

55. Lastly, the Appellant alleges that sections 103(5), 75, 81 and 90 of the NCA have not been complied with.
56. Section 103(5) of the NCA states that:
- “Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.”*
57. This section forms part of the Appellant’s argument that the debt has not been properly quantified, due to a certificate of balance not being provided.
58. The Respondent, in opposition to this, filed a statement of account in regard to the Appellant’s debt, as an annexure to the Respondent’s opposing affidavit in the rescission application.[30]
59. The Appellant signed the consent to judgment, and acknowledged the quantum of her debt therein. The Appellant has laid no factual basis for alleging that the amount is incorrect in any way, and has not, in response to the statement filed by the Respondent, taken issue with the contents of the statement in reply, other than to provide a bald denial.[31]
60. Reference to Rule 4(3) is made in the papers relating to the rescission application, but no reference has been made thereto in the notice of appeal. The merits of an objection relating to Rule 4(3) will therefore not be considered further, other than to state that they would be without merit.[32]
61. What is significant, in my view, is the Respondent’s averment that the objection base upon Rule 4(3) demonstrates that the rescission application was not bona fide.[33]
62. The Respondent has also, in developing its argument relating to a lack of bona fides on the part of the Appellant, referred to numerous other similar matters that the Appellant’s attorney of record has initiated, and states that the same pro-forma affidavit is utilized, with only names and dates (and other minor information) being changed to suit the circumstances.[34]
63. This appears to be the case, when one compares the averments made by the Appellant in regard to Rule 4(3),[35] which amount to alleging that witnesses did not sign or record their details appropriately, with the consent to judgment, in which all the necessary detail in regard to witnesses is recorded.
64. The consent to judgment was in the Appellant’s possession and was annexed to her founding affidavit when the rescission application was launched.
65. In my view this aspect, combined with the reference in the notice of appeal to a paragraph in the judgment of the court a quo which did not appear in the judgment in question,[36] casts serious doubt on the Appellant’s bona fides in applying for rescission.

66. The Appellant further refers to contraventions of sections 75, 81 and 90 of the NCA.
67. Section 75 of the NCA relates to the marketing and sales of credit at the home or work of the consumer.
68. Section 81 refers to reckless credit
69. Section 90 refers to unlawful provisions of credit agreements.
70. There is no factual basis laid by the Appellant for suggesting that any of the above-mentioned sections of the NCA have been contravened.
71. Whilst section 92(2)(b) of the NCA, regarding pre-agreement disclosure is not referred to in the notice of appeal, it does feature in the papers in the rescission application.
72. The Appellant appears to have alleged that the consent to judgment constituted a new credit agreement, entered into between the parties,[37]and that, inter alia, section 92(2)(b) needed to be complied with.
73. The consent to judgment[38] is not a credit agreement. It is a confirmation, inter alia, of the Appellant's indebtedness, to the Respondent, which indebtedness is based on the underlying credit agreement, which forms the basis for the judgment the Appellant seeks to rescind.[39]
74. Any reliance which the Appellant seeks to place on the aforementioned grounds is therefore incorrect.

Bona Fide Defence

75. On the assumption that I am incorrect in my conclusions regarding the grounds of appeal advanced by the Appellant, the fact remains that Rule 49(3) requires the Appellant to set out the reasons for the Appellant's absence or default,[40] as well as the grounds of the Appellant's defence to the claim.
76. The Appellant has at no stage stated that she wishes to defend the proceedings.
77. The only defence set out by the Appellant is that of non-compliance with the above-mentioned rules and sections of the NCA.
78. Such a defence would not meet the requirements of Rule 49(3), as it is merely dilatory, and is not capable of defeating the Respondent's claim, were the matter to go to trial.[41]
79. Therefore, even when an application for rescission is based upon the allegation that the judgment in question is void ab origine, compliance with Rule 49(3) is still peremptory.[42]
80. The Appellant has set out no valid defence, other than to allege technical procedural shortcomings. The Appellant also did not attest to an affidavit in the rescission application, and has placed no factual version of events before the court.

81. It is therefore evident that the Appellant has not complied with the requirements of Rule 49(3).

82. The Appeal falls to be dismissed for this reason alone.

Costs in the Court a quo

83. Given the decision reached in this matter, it is clear that the Magistrate in the court a quo did not improperly exercise his discretion in awarding costs on an attorney and client scale against the Appellant, and I see no reason to disturb that order.

Costs of the Appeal

84. The Respondent has been successful in the appeal, under circumstances where the Appellant launched an evidently spurious rescission application, followed by an equally spurious appeal.

85. It is therefore appropriate that the Appellant be ordered to pay costs on an attorney and client scale.

Order

86. In the result the appeal is dismissed with costs on an attorney and client scale.

N. Molony

Acting Judge of the High Court

C. Plasket

Judge of the High Court

APPEARANCES:

For Plaintiff: Ms Makaula

Instructed by: Huxtable Attorneys

GRAHAMSTOWN

For Defendant: Adv. Dobie

Instructed by: Neville Borman and Botha

[1] See p. 29 of the record.

[2] In terms of section 58 of the Magistrates' Courts Act 32 of 1944.

[3] See p. 1 of the record.

[4] See pp. 133 - 134 of the record.

- [5] See pp. 136 - 139 of the record.
- [6] In terms of Rule 51(8) of the Magistrate's Court Rules.
- [7] See pp. 135 - 139 of the record.
- [8] Those being Rules 4(1)(b), 4(2) and 12(6A).
- [9] Those being sections 129, 130, 103(5), 75, 81 and 90 of the NCA.
- [10] Sections 57(3) and (4) refer to service of the order upon the Defendant by registered letter, and the judgment having the effect of a default

judgment.

- [11] See *Leo Manufacturing CC v Robor Industrial (Pty) Ltd* 2007 (2) SA 1 (SCA) at para 6.
- [12] See p. 28 of the record.
- [13] By way of confirmatory affidavit or otherwise.
- [14] See pp. 54 – 56 of the record.
- [15] See p. 21 of the record.
- [16] See p. 56 of the record. The Appellant has made a similar allegation in regard to the opposing affidavit of the Respondent, alleging that the deponent had no personal knowledge surrounding the documents prepared for court when judgment by consent was requested – see paras 4 – 5 at p. 121 of Appellant's answering affidavit.
- [17] See p. 135 of the record.
- [18] See para 49 of Respondent's heads of argument.
- [19] See p. 136 of the record.
- [20] See pp. 80 – 81 of the record.
- [21] See *Federated Trust Limited v Botha* 1978 (3) SA 645 (A) at the headnote.
- [22] See p. 114 of the record.
- [23] See p. 117 of the record.
- [24] See p. 24 of the record, and para 52 of Respondent's opposing affidavit at pp. 79 – 80 of the record.
- [25] See p. 133 of the record.
- [26] See p. 28 of the record and paragraphs 43 and 44 above.
- [27] See paragraph 49 of the Respondent's opposing affidavit at pp. 74 – 75 of the record.

- [28] See paras 21 – 22 of the Appellants founding affidavit at pp. 9 – 10 of the record.
- [29] See pp. 135 – 139 of the record.
- [30] See pp. 97 – 98 of the record and para 51.4 of the Respondent's opposing affidavit at p. 78 of the record.
- [31] See para 20 of the Appellant's founding affidavit at p. 125 of the record.
- [32] They would be without merit for the same reasons as the grounds of appeal in relation to the other Magistrates' Courts Rules. See p. 28 of the record.
- [33] See paras 54.2 and 54.3 of the Respondent's opposing affidavit at p. 81 of the record.
- [34] See paras 11 and 12 of the Respondent's Opposing Affidavit at pp. 57 – 58 of the record. See further *Annelise Leonata Smith v Finbond Mutual Bank* (unreported decision of the Eastern Cape Division, Grahamstown, case no. CA235/2016, delivered on 24 January 2017; and *Nontanda Diniso v African Bank* (unreported decision of the Eastern Cape Division, Grahamstown, case no. 240/2016, delivered on 24 January 2017).
- [35] See paras 39 and 40 of the Appellant's founding affidavit at p. 15 of the record.
- [36] See para 4.4 of the notice of appeal at p. 138 of the papers.
- [37] See paras 42 and 43 of the founding affidavit at p. 16 of the record and
- [38] The consent to judgment also includes an undertaking made by the Appellant that she could afford the installment amounts she agreed to pay by way of emoluments attachment order, as well as a breakdown of her financial circumstances, which was completed on the same day the consent was signed. See pp. 27 – 28 and
- p. 100 of the record.
- [39] Section 92(2)(b) in any event applies to intermediate or large credit agreements. The original credit agreement in this matter would qualify as a small credit agreement, and thus section 92(2)(b) would not be applicable.
- [40] The extent to which this is dealt with by the Appellant is an averment that she only came to know of the voidness of the consent to judgment when the affidavit in the rescission application was signed (by her attorney). See para 17 of the Appellant's founding affidavit at p. 8 of the record.
- [41] See *Annelise Leonata Smith v Finbond Mutual Bank* (supra) at para 25 and *Nontanda Diniso v African Bank* (supra) at para 23.
- [42] See *Leo Manufacturing CC v Robor Industrial (Pty) Ltd* (supra) at paras 6 and 7.

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