

SOUTH AFRICA / JUDGMENT

Sakata v Bayport Securitisation (Pty) Ltd, Sakata v Bayport Securitisation (Pty) Ltd (CA134/2017, CA135/2017) [2017] ZAECBHC 18 (16 November 2017)

[2017] ZAECBHC 18

COURT

Eastern Cape High Court, Bhisho

BEFORE

Rugunanan, Shartle

CASE / FILE NUMBER

CA134/2017, CA135/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, BHISHO

Case

No: CA 134/2017

Date

heard : 08 September 2017

Date

delivered: 16 November 2017

In

the matter between

NOLUVUYO

SAKATAAppellantAndBAYPORT

SECURITISATION (PTY) LTDRespondentCase

No: CA 135/2017In

the matter between :NOLUVUYO

SAKATAAppellantAndBAYPORT

SECURITISATION (PTY) LTDRespondent

NOLUVUYO

SAKATAAppellant

NOLUVUYO

SAKATA

Appellant

BAYPORT

SECURITISATION (PTY) LTDRespondent

BAYPORT

SECURITISATION (PTY) LTD

Respondent

Case

No: CA 135/2017

In

the matter between : APPEAL

JUDGMENT

RUGUNANAN AJ:

[1] Two appeals involving the same parties have been enrolled for concurrent hearing before this court. The appeals emanate from the Magistrates court in Zwelitsha and are against the dismissal of applications for rescission of judgments granted by the clerk of the civil court against the appellant. The judgments were granted under section 58 of the Magistrates' Courts Act 32 of 1944, as amended, ('the Act') and are in respect of credit advances to the appellant in terms of the National Credit Act 34 of 2005 (the 'NCA'). Although the credit advances are for different amounts, the facts relevant to each appeal are similar in material respects and the foundation on which they were argued is identical. In addition, the judgments delivered by the learned magistrate in dismissing each application for rescission are crafted in identical terms.

section 58

Magistrates' Courts Act 32 of 1944

'NCA').

[2] Briefly, the facts in case number CA 134/2017 are that on 14 May 2013 the appellant (as defendant) signed a written consent to judgment in favour of the respondent (as plaintiff) for the amount of R13 793.18 to be paid in monthly instalments of R761.98 effective from 20 June

2013. In case number 135/2017, the facts similarly reveal that on 14 May 2013 the appellant signed a second consent to judgment for the amount of R3 435.40 payable in monthly instalments of R420.72 effective from 20 June 2013. Following lodgement, in both matters, by the respondent of a request for judgment under section 58 of the Act, judgments were granted against the appellant on 19 July 2013. By notice of motion issued on 14 December 2015 the appellant sought rescission of the judgments. The applications for rescission were brought in terms of Magistrates' Court Rules 49(1) and 49(3) read with rule 49(8).

- [3] Since the bases upon which both appeals are to be adjudicated are common, it is considered convenient in this judgment to deal with the appeal under case number CA 134/2017 because its resolution, as the parties have agreed, will be determinant of the outcome of the appeal under case number CA 135/2017.
- [4] It is considered unnecessary to traverse the numerous disparate grounds on which the application for rescission was motivated except to say that in a judgment dated 5 December 2016, the magistrate upheld a point in limine raised by the respondent in opposition to the application and dismissed the application with costs. Regard being had to the fact that the application was issued on 14 December 2015, the point in limine was that the appellant did not seek condonation for her failure to have brought the application for rescission within the 20 day prescript in rule 49(1) which, factoring the presumption in rule 49(2) that an applicant is presumed to have knowledge of a judgment 10 days after the date on which it was granted, required that the rescission application ought to have been delivered no later than 30 August 2013.

in limine

- [5] During argument on appeal, Mr Du Plessis, the attorney appearing for the appellant, contended at the outset that condonation was not necessary since the application was brought within the time frame prescribed in rule 49(8). The composition of the rule is as follows:

"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."

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- [6] The material contained in the appellant's founding affidavit in the application for rescission indicates that the respondent did not notify the appellant of the judgment by registered mail as is required by section 58(2) of the Act and that she acquired knowledge of the voidness of the judgment only upon signature of the affidavit on 12 November 2015 when investigations by her legal representatives (whom she instructed on 9 September 2015 to act on

her behalf and to investigate the circumstances under which the judgment against her was granted), were completed. With the application having been launched on 14 December 2015, Mr Du Plessis contended that it was brought within the period prescribed by rule 49(8). Although the appellant's affidavit is somewhat discrepant of factual detail pertaining to when or the circumstances prior to 9 September 2015 in which she acquired knowledge of the judgment and considering that the respondent did not seek to seriously impugn the appellant's averments, it is concluded that it was open to the magistrate to have made a finding consonant to that as

contended for by Mr Du Plessis. The application for rescission was brought on the cumulative premises of rules 49(1), 49(3) and 49(8) and in upholding the point in limine, the magistrate respectfully overlooked consideration of a factual chronology that was not discordant of the period in rule 49(8). Stated otherwise, the application was sufficiently widely presented to have enabled the court to have properly directed itself to all the relevant facts (see *Bakhoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD) at 468 H-1). As such, the conclusion arrived at in the judgment by the magistrate is erroneous.

in limine,

Bakhoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (ECD) at 468 H-1).

1992 (2) SA 466

[7] In the proceedings presently before this court the question concerning the appealability of the magistrate's judgment did not

pertinently arise and does not require determination. All the same it is apposite to point out: (i) that section 58(2) (incorporating

reference to

section 57(4) of the Act) decrees that a judgment by consent shall have the effect of a default judgment[1]; and (ii) that a refusal by a magistrate to rescind a default judgment has the effect of a final and definitive judgment and is in terms of section 83(b)[2] of the Act, appealable.[3]

section 57(4) of the Act) decrees that a judgment by consent shall have the effect of a default judgment[1]

; and (ii) that a refusal by a magistrate

to rescind a default judgment has the effect of a final and definitive judgment and is in terms of section 83(b)

[2] of the Act, appealable.[3]

Consequently, it is open to this court to consider if the appellant has established grounds for rescinding the judgment granted by the clerk of the court.

[8] Regard being had to the particular facts of the matter including the documentation incorporated in the record, there are primarily two courses which it is believed are determinant of the outcome of these proceedings (this notwithstanding the various points of contention raised by Mr Du Plessis). The first deals with the setting aside of the judgment by the clerk of the court on the ground of voidness ab origine, and the second concerns the question whether the judgment was granted in error. Taken as a whole the result in these proceedings is informed by a recognition of the trite principle that an appeal is a retrial on the record, that a high court has an inherent jurisdiction to grant relief where the rules of court make no provision therefor (see *Titty's Bar and Bottle Store v ABC Garage & Others* 1974

(4)SA362(TPD) at 368G)and in the exercise of its powers on the hearing of an appeal a court having appeal jurisdiction may confirm, amend or set aside the decision which is the subject of the appeal and render anydecision which the circumstances may require.[4]

- [8] Regard being had to the particular facts of the matter including the documentation incorporated in the record, there are primarily two courses which it is believed are determinant of the outcome of these proceedings (this notwithstanding the various points of contention raised by Mr Du Plessis). The first deals with the setting aside of the judgment by the clerk of the court on the ground of voidness

aborigine,

and the second concerns the question whether the judgment was granted in error. Taken as a whole the result in these proceedings is informed by a recognition of the trite principle that an appeal is a retrial on the record, that a high court has an inherent jurisdiction to grant relief where the rules of court make no provision therefor (see

Titty's Bar and Bottle

v ABC Garage

Others1974 (4)

1974 (4)

362(TPD) at 368G)

and in the exercise of its powers on the hearing of an appeal a court having appeal jurisdiction may confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.[4]

- [9] Section 58 of the Act makes itclear that a consent to judgment cannot precede a letter of demand or a summons (seeThemba Mjongile v Magistrate Twani and Others[5])Generally, a debtor who consents in writing to a judgment under section 58 does so in respect of a cause of action specified inthe letter of demand or thesummons. When a plaintiff requests the clerk of the court to grant judgment in terms of the section, the request isbased on a cause of action set out in the letter of demand or the summons. The function of the written consent obviates thenecessity for theplaintiff toprove its claim based on the underlying legal relationship. Absent service of a summons, as in the present case, where a cause of action arises from a credit agreement, as in this instance, the letter of demand referred to in the section must deal with each of the provisions of sections 129 and 130 of theNGAand allege that each has been complied with. The significance of the allegation is that it completes the cause of action and ensures that the debtor must be aware the allegation is made. If the debtor is not so aware then the written consent will not be informed consent (seeAfrican Bank Ltd v Myambo & Others2010 (6) SA 298(GNP) at 3078-D and 311A-C).[6]The record reflects that amongst thedocumentation submitted to the clerk of the court along with the

request for judgment, was a letter of demand addressed to the appellant. It is dated 5 April 2012 and purports to have been sent by registered mail. The appellant denies having received the letter, which denial Mr Du Plessis contended is augmented by the respondent's failure to have provided proof of postage. Although at the time (19 June 2013) it was permissible for the clerk of the court to have dealt with the request for judgment,[7]the absence of proof of postage ought to have signalled doubt that the request was properly made. In the circumstances it must necessarily

be concluded that the appellant's denial of receipt of a letter of demand not only meant that she had no knowledge of the respondent's

cause of action but that her written consent to judgment was not the product of informed consent. It follows therefore that the

judgment

granted by the clerk of the court was voidaborigine(see alsoNonyameko Rebecca Manzi v Finbond,[8]where a judgment granted in the absence of a letter of demand was rescinded on the same ground).

[9] Section 58 of the Act makes it

clear that a consent to judgment cannot precede a letter of demand or a summons (see Themba Mjongile v Magistrate Twani and Others[5]

Generally, a debtor who consents in writing to a judgment under section 58 does so in respect of a cause of action specified in

the letter of demand or the

summons. When a plaintiff requests the clerk of the court to grant judgment in terms of the section, the request is

based on a cause of action set out in the letter of demand or the summons. The function of the written consent obviates the

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and allege that each has been complied with. The significance of the allegation is that it completes the cause of action and ensures that the debtor must be aware the allegation is made. If the debtor is not so aware then the written consent will not be informed consent (see

African Bank Ltd v Myambo & Others 2010 (6) SA 298

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Nonyameko Rebecca Manzi v Finbond,[8]

where a judgment granted in the absence of a letter of demand was rescinded on the same ground).

[10] I turn to address the question whether the judgment by the clerk of the court was granted in error. Given the particular facts of this matter, two legal precepts are employed in dealing with this question. The first is that once an applicant can point to an error in the proceedings, then a rescission ought to follow without further ado (Bakhovensupra at 471G). The second, is that a high court has an inherent jurisdiction to grant relief where the rules of court make no provision therefor (Titty's Bar and Bottle Storesupra at 368G). During argument Mr Du Plessis drew attention to the following objective attributes emerging from the documentation submitted by the respondent along with the request for judgment to the clerk of the court:

(Bakhoven

supra at 471G).

(Titty's Bar and Bottle Store

supra at 368G).

- (i) the pre-agreement statement signed by the appellant on 10 October 2011 is in respect of a credit advance of R8 000.[9]In the appeal under case number CA 135/2017, the credit advance is for an amount of R1 500;
- (i) the pre-agreement statement signed by the appellant on 10 October 2011 is in respect of a credit advance of R8 000.[9]

In the

appeal under case number CA 135/2017, the credit advance is for an amount of R1 500;

(ii) the section 129 notice issued under the NGA reflects an outstanding amount of RB 966.22 due by the appellant as at 19 March 2012;.[10]In the second appeal the notice bears the same date and reflects an amount of R2 093.62;

(ii) the section 129 notice issued under the

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outstanding amount of RB 966.22 due by the appellant as at 19 March 2012;

.[10]In the second appeal the notice bears the same date and reflects an amount of R2 093.62;

(iii) the letter of demand (purportedly sent by registered mail) indicates an outstanding balance of R13 793.18 due by the appellant as at 5 April 2012. Similarly in the second appeal the letter of demand (also purportedly sent by registered mail) refers to an outstanding balance of R3 435.40; and

(iv) the written consent to judgment signed by the appellant on 14 May 2013 is in respect of an amount of R13 793.18[11]and in the second appeal it is in respect of an amount of R3 435.40 .

(iv) the written consent to judgment signed by the appellant on 14 May 2013 is in respect of an amount of R13 793.18[11]

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[11] Evident from (ii) and (iii) is that in the interval between 19 March 2012 and 5 April 2012 there is a significant escalation in the debt by a margin of R4 826.96, all within a space of two weeks and a few days. In the second appeal this margin amounts to R1 341.78. Further, the debt in both matters seemingly remained constant at R13 793.18 and R3 435.40 for just more than a year in the period 5 April 2012 to 14 May 2013; and in both cases the amount of the debt does not correspond with the figures reflected in the appellant's

transactional history[12]as at those dates.

[11] Evident from (ii) and (iii) is that in the interval between 19 March 2012 and 5 April 2012 there is a significant escalation in the debt by a margin of R4 826.96, all within a space of two weeks and a few days. In the second appeal this margin amounts to R1 341.78. Further, the debt in both matters seemingly remained constant at R13 793.18 and R3 435.40 for just more than a year in the period 5

2012 to 14 May 2013; and in both cases the amount of the debt does not correspond with the figures reflected in the appellant's

transactional history[12]

as at those dates.

[12] Rule 4(2) requires that a request for judgment lodged by a plaintiff with the clerk of the court shall be supported by an affidavit

containing such evidence as is necessary to establish that all requirements in law have been complied with. Save for a mere confirmation of the debt amounting to R13 793.18 plus costs and necessary disbursements in the amount of R421.35, the affidavit[13]accompanying the respondent's request for judgment is deficient in that it does not in any meaningful or constructive manner provide detail that would constitute evidence of the quantification of the debt (The same applies to the affidavit in the second appeal, albeit that the amounts for the judgment debt and costs are for R3 435.40 and R421.35, respectively). This inadequacy in the affidavit is particularly telling in the light of the significant margin of escalation in the period shown above. Furthermore rule 12(6) obliges a plaintiff in an action based on a liquid document or a written agreement to lodge the original of such document or agreement with the request for judgment or, by affidavit, set out reasons why such original could not be lodged. Neither the original credit agreement nor a scanned copy (as indicated by the deponent in the abovementioned affidavit) was lodged with the clerk of the court. The conclusion inescapably is that no agreement was placed before the clerk of the court when the request for judgment was dealt with. Had the clerk of the court been alive to the fact that no evidence of an agreement was available and had he/she been properly cognisant of the deficiency in the affidavit and taken careful note of the objective attributes in the additional documentation mentioned in (i), (ii), (iii) and (iv) above, it is doubtful if judgment would have been granted against the appellant. It follows that the judgment was granted in error and that its rescission must ensue, this on the premise of the court's inherent jurisdiction to grant relief where the rules of court make no express provision therefor.

[12] Rule 4(2) requires that a request for judgment lodged by a plaintiff with the clerk of the court shall be supported by an affidavit

containing such evidence as is necessary to establish that all requirements in law have been complied with. Save for a mere confirmation of the debt amounting to R13 793.18 plus costs and necessary disbursements in the amount of R421.35, the affidavit^[13]

accompanying the respondent's request for judgment is deficient in that it does not in any meaningful or constructive manner provide detail that would constitute evidence of the quantification of the debt (The same applies to the affidavit in the second appeal, albeit that the amounts for the judgment debt and costs are for R3 435.40 and R421.35, respectively). This inadequacy in the affidavit is particularly telling in the light of the significant margin of escalation in the period shown above. Furthermore rule 12(6) obliges a plaintiff in an action based on a liquid document or a written agreement to lodge the original of such document or agreement with the request for judgment or, by affidavit, set out reasons why such original could not be lodged. Neither the original credit agreement nor a scanned copy (as indicated by the deponent in the abovementioned affidavit) was lodged with the clerk of the court. The conclusion inescapably is that no agreement was placed before the clerk of the court when the request for judgment was dealt with. Had the clerk of the court been alive to the fact that no evidence of an agreement was available and had he/she been properly cognisant of the deficiency in the affidavit and taken careful note of the objective attributes in the additional documentation mentioned in (i), (ii), (iii) and (iv) above, it is doubtful if judgment would have been granted against the appellant. It follows that the judgment was granted in error and that its rescission must ensue, this on the premise of the court's inherent jurisdiction to grant relief where the rules of court make no express provision therefor.

^[13] Since error is of course not a specific ground for rescission incorporated in rule 49 and should I err in my conclusion above, then it remains to consider whether the judgment by the clerk of the court falls to be rescinded on some other ground. In this regard it bears repeating that the application for rescission was brought cumulatively in terms of rules 49(1), 49(3) and 49(8). Rule 49(1) entitles a court in the exercise of its discretion to rescind a default judgment upon good cause shown or if it is satisfied that there is good reason to do so. Although courts have refrained from attempting to formulate a comprehensive definition of what constitutes good cause, it has been held in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345(AD) at 352G that good cause includes but is not limited to the existence of a substantial defence.^[14] On the other hand, a rescission based on the ground of good reason may be granted without good cause being shown in order to do justice between the parties (see *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462(W) at 466A). This is certainly not intended to suggest that a less stringent criterion is applicable for lowering the threshold for success in obtaining rescission of a judgment. The provision merely confers upon a court the power to grant rescission in circumstances where good cause has not been shown (perhaps one would guess, due to deficiencies in the applicant's papers) but the court merely does so if it considers that the interests of justice merit the granting of the application (see *Wright v Westerlike Provinsie Kelders Bpk* 2001 (4) SA 1165(C) at 1181H).

[13] Since error is of course not a specific ground for rescission incorporated in rule 49 and should I err in my conclusion above, then it remains to consider whether the judgment by the clerk of the court falls to be rescinded on some other ground. In this regard it bears repeating that the application for rescission was brought cumulatively in terms of rules 49(1), 49(3) and 49(8). Rule 49(1) entitles a court in the exercise of its discretion to rescind a default judgment upon

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2001 (4) SA 1165

[14] Mr Mundell SC, who appeared for the respondent, contended that rescission of the judgment granted by the clerk of the court was not competent on grounds of voidness^{aboriginewhere} the appellant has formulated her claim for rescission in terms of rule 49{8). Although a finding in favour of rescission on this ground has already been made, it is considered necessary to deal with this argument. Rule 49 regulates applications for rescission of default judgments. Sub-rule (3) stipulates that where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted and who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim. The rule requires explicitly that the affidavit must set out the grounds of the defendant's defence to the claim.[15]Although it is not necessary in an application for rescission to deal fully with the merits of the matter an applicant for rescission must set out a defence with sufficient particularity to enable the court to decide whether or not there is a valid andbona tidedefence. (seeLeo Manufacturing CC v Robor Industrial (Pty) LtdtlaRobor Stewarts and Lloyds2007

(2) SA 1(SCA)at 4G).

[14] Mr Mundell SC, who appeared for the respondent, contended that rescission of the judgment granted by the clerk of the court was not competent on grounds of voidness

where the appellant has formulated her claim for rescission in terms of rule 49{8). Although a finding in favour of rescission on this ground has already been made, it is considered necessary to deal with this argument. Rule 49 regulates applications for rescission of default judgments. Sub-rule (3) stipulates that where an application for rescission of a default judgment is made by a

defendant against whom the judgment was granted and who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim. The rule requires explicitly that the affidavit must set out the grounds of the defendant's defence to the claim.[15]

Although it is not necessary in an application for rescission to deal fully with the merits of the matter an applicant for rescission must set out a defence with sufficient particularity to enable the court to decide whether or not there is a valid and

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Leo Manufacturing CC v Robor Industrial (Pty) Ltd

Robor Stewarts and Lloyds

2007

(2) SA 1(SCA)

2007

(2) SA 1

at 4G).

[15] Relying on theLeo Manufacturing[16]case, Mr Mundell argued that the requirements of rule 49(3) find equal application where rescission is sought in terms of rule 49(8) on the basis that the judgment was voidab initioand absent the appellant having disclosed a valid andbona tidedefence (an element of good cause), rescission cannot be granted. Although the soundness of the legal authority relied on by Mr Mundell is not questioned, the earlier finding that the judgment by the clerk of the court was voidab originestems from the particular facts of this matter. The absence of proof that a fetter of demand was posted by registered mail to the appellant and the appellant's denial that' she received such letter carries the consequence that the respondent's cause of action was not pertinently communicated to her. The further consequence is that, her written consent to judgment could not have amounted to informed consent (more about this below). In the particular circumstances of the matter it is doubtful if it was incumbent of the appellant to have pleaded a defence as an element of good cause. In my view this scenario also makes a case for rescission for'good reason',since the papers before this court and the material contained therein are sufficiently wide enough to incorporate this ground.

[15] Relying on the

Leo Manufacturing[16]

case, Mr Mundell argued that the requirements of rule 49(3) find equal application where rescission is sought in terms of rule 49(8) on the basis that the judgment was void

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and absent the appellant having disclosed a valid and

defence {an element of good cause), rescission cannot be granted. Although the soundness of the legal authority relied on by Mr Mundell is not questioned, the earlier finding that the judgment by the clerk of the court was void

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stems from the particular facts of this matter. The absence of proof that a fetter of demand was posted by registered mail to the appellant and the appellant's denial that she received such letter carries the consequence that the respondent's cause of action was not pertinently communicated to her. The further consequence is that, her written consent to judgment could not have amounted to informed consent (more about this below). In the particular circumstances of the matter it is doubtful if it was incumbent of the appellant to have pleaded a defence as an element of good cause. In my view this scenario also makes a case for rescission for

'good reason',

since the papers before this court and the material contained therein are sufficiently wide enough to incorporate this ground.

[16] In seeking to assail the appellant's stance of a lack of informed consent, Mr Mundell pointed out that the appellant does not

pertinently deny having signed a written consent for the debt in the amount of R13 793.18, nor does she deny having agreed to settle it by payment in specified instalments. I do not think this is sufficient to support the conclusion contended for by the respondent. It is common cause that the appellant was approached by an agent who represented the respondent when the written consent to judgment was signed. It is also apparent that the agent has not been identified by either of the parties in their papers. The appellant alleges (somewhat obliquely) that she could not afford the monthly instalment incorporated in the consent to judgment. In answer thereto the respondent alleges that at the time of the consent being obtained the appellant "specifically suggested the instalment that she could afford". This allegation undoubtedly qualifies as hearsay and does not lend support for the contention advanced for the respondent. Absent a confirmatory affidavit from the agent as to the nature and exigency of the consent to judgment or an explanation from the respondent proffering a reason why such affidavit could not have been obtained, I am unable to hold that informed consent was present at the relevant time. All indications from the papers (especially the written consent) are that the agent approached the appellant, an

employee in the Department of Education, at her workplace and presumably during working hours. It is the appellant's trenchant

complaint that no proper appointment was arranged and that she was made to sign documents without applying her mind thereto. In these circumstances there is reason to believe that she could not have engendered a meaningful and informed appreciation of her actions. This is all the more so if one considers that written consents were simultaneously procured in respect of two credit advances.

"specifically suggested the instalment that she could afford".

[17] In summary, there is substance in the contention by Mr Du Plessis that the respondent did not consider the rights of the appellant as is manifest by the manner and circumstances in which the consent to judgment was procured, the manner in which the request for

judgment

and supporting documentation was lodged and the failure by the respondent to notify the appellant of the judgment by registered mail as is required by section 58(2) of the Act. In opposing the application the respondent did not in its opposing affidavit deal

with its failure to ensure that the credit agreement or a copy thereof was placed before the clerk of the court neither did it deal with its failure to have provided proof of postage in respect of the letter of demand purportedly sent by registered mail nor, without intending to attribute criticism, were these aspects dealt with by Mr Mundell during argument.

[18] In the result the following order will issue in the appeal under case number CA 134/2017 and the appeal under case number CA 135/2017:

1. The appeal succeeds with costs;
2. The Magistrate's order of 5 December 2016 upholding the point in limine with costs is set aside;

in limine

3. The judgments granted by the clerk of the court on 19 July 2013 under case numbers 3710/2013 and 3711/2013 are rescinded and set aside with costs on the scale as between attorney and client.

S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree.

SHARTLE

JUDGE OF THE HIGH COURT

Appearances:

For Appellant :Mr N J Du Plessis,Instructed byN J Du Plessis & Associates Inc.,c/o Squire Smith & Laurie,King William's TownFor Respondent :Adv A R G Mundell SC,Instructed byMarie-Lou Bester Inc.,c/o Hutton & Cook.King William's Town

For Appellant :Mr N J Du Plessis,

For Appellant :

Mr N J Du Plessis,

Instructed byN J Du Plessis & Associates Inc.,

Instructed by

N J Du Plessis & Associates Inc.,

c/o Squire Smith & Laurie,

King William's Town

For Respondent :Adv A R G Mundell SC,

For Respondent :

Adv A R G Mundell SC,

Instructed byMarie-Lou Bester Inc.,

Marie-Lou Bester Inc.,

c/o Hutton & Cook.

[1]As is obtained in an undefended action. See Jones & Buckle, The Civil Practice of The Magistrates Courts in South Africa, Vol 1, The Act at 377 [Service 11, 2016], see alsoAfrican Bank v Myambo2010 (6) SA 298(GNP) at 304E

[1]As is obtained in an undefended action. See Jones & Buckle, The Civil Practice of The Magistrates Courts in South Africa, Vol 1, The Act at 377 [Service 11, 2016], see also

African Bank v Myambo2010 (6) SA 298(GNP) at 304E

[2]Section 83 is worded as follows :“Appeal from magistrate's court Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal, against –(a) ...(b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;(c) ...”(d)

[2]Section 83 is worded as follows :

“Appeal from magistrate's court Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal, against –

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- (a) ...
- (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;
- (c) ..."

[3]See Jones & Buckle, op cit at 256 [Service 10, 2016] and Pilelli v Everton Gardens Projects CC2010 (5) SA 171(SCA) at page 176 E

[3]See Jones & Buckle, op cit at 256 [Service 10, 2016] and
Pilelli v Everton Gardens Projects CC2010 (5) SA 171(SCA) at page 176 E
2010 (5) SA 171

[4]Section 19(d) of the Superior Courts Act, 2013 (Act No. 10 of 2013)

[5]Case No 406 and 407/2016, Eastern Cape Local Division, Bhisho at para [4(b)]

[6]It is also a requirement of rule 4(1)(b) that these allegations be made

[7]A situation which no longer prevails in consequence of an amendment on 27 June 2014 to Magistrates court rule 4(4) incorporating

reference to rule 12(5) (per Government Notice R507 in Government Gazette No. 37769). The effect of the amendment is that it is no longer competent for the clerk of the court to grant section 58 judgments by consent which are based on a cause of action arising from the National Credit Act.>

National Credit Act.>

[8]Unreported Case No 234/2016, Eastern Cape Division, Grahamstown delivered 15 December 2016 at paragraph [4]

[9]Opposing affidavit, annexure 'BH6'

[10]Opposing affidavit, annexure 'BH7'

[11]Opposing affidavit, annexure 'BH5'

[12]Opposing affidavit, annexure 'BH13'

[13]Opposing affidavit, annexure 'BH4' pp 92-94

[14]The defence need not be established with a probability of success; it suffices if a prima facie defence is shown or the existence of an issue fit for trial.

[15]see *Cooper & Ferreira v Magistrate for the District of Humansdorp and Another* [1997] 1 All SA 420(E); *F & J Car Sales v Damane* 2003

(3) SA 262(W); and *Leo Manufacturing CC v Robor Industrial (Pty) Ltd tla Robar Stewarts and Lloyds* 2007 (2) SA 1 (SCA)

[15]see

Cooper & Ferreira v Magistrate for the District of Humansdorp and Another

[1997] 1 All SA 420(E);

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and *Leo Manufacturing CC v Robor Industrial (Pty) Ltd tla Robar Stewarts and Lloyds*

2007 (2) SA 1 (SCA)

[16]at 4E-F

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