

SOUTH AFRICA / JUDGMENT

Smith v Finbond Mutual Bank (CA235/2016) [2017] ZAECHGHC 4 (24 January 2017) [2017] ZAECHGHC 4

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, M J Lowe

CASE / FILE NUMBER

CA235/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

No.: CA235/2016

Date

Heard: 2 December 2016

Date

Delivered: 24 January 2017

In

the matter between:

ANNELISE

LEONATA

SMITH

Appellant

and

FINBOND

MUTUAL

BANK

Respondent

JUDGMENT

EKSTEEN J:

- [1] On 29 January 2015 the magistrate for King William's Town granted judgment by consent against the appellant in the sum of R3 251,33. Payment of the judgment debt was to be made in instalments as agreed in the consent to judgment and the debt was duly paid in full. After the debt had been fully settled and on 7 December 2015 the appellant launched an application in the Magistrates' Court for King William's Town in terms of rule 49(8) of the Magistrates' Courts Rules (the rules) in which she sought rescission of the judgment together with a further order that the status quo ante be restored. The magistrate rescinded the judgment of the monetary award and granted the respondent leave to submit an affidavit in order to prove the quantum of the debt for a reconsideration thereof, however, he declined to make an order that the status quo ante be restored and he ordered the appellant to pay the costs occasioned by the application on a scale as between attorney and client.

The appellant appeals against this decision.

- [2] The original debt which gave rise to the judgment was a credit agreement as envisaged in the National Credit Act, 34 of 2005 (the NCA). The appellant does not dispute that she entered into the credit agreement nor is any dispute raised in respect of the terms of the agreement, a copy of which is included in the founding papers. The appellant does not dispute that she was in default of her obligations under the agreement nor that she consented to the judgment and the quantum thereof. She does not assert that the quantum was incorrectly calculated nor does she deny that the money was due owing and payable at the time that the judgment was taken. In fact, the appellant has not deposed to an affidavit at all.
- [3] The founding affidavit was deposed to by the appellant's attorney of record, one Du Plessis. Du Plessis states that he has been advised that judgment by consent must be submitted following a procedure set out in rules 4, 11 and 12 of the rules as read with section 57 and 58 of the Magistrates' Court Act, 32 of 1944. These rules, he believes, were not complied with. I pause at this juncture to record that the constitutionality of section 58 of the Magistrates' Court Act has not been challenged in these proceedings (compare *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice* 2016 (6) SA 596 (CC) at para [32] p. 608).
- [4] As alluded to earlier the application for rescission was brought in terms of rule 49(8) of the rules, it being contended that the

judgment was void ab initio for want of compliance with the rules and certain statutory provisions to which I shall revert below. Reliance is placed on the failure to comply with rule 4(1)(b) and (2) and rule 12(6) and (6A) of the rules.

- [5] The material provisions of rule 4 provide:

“(1)(a) ...

- (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 section 129 and 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, supported by an affidavit containing such evidence as is necessary to establish that all requirements in law have been complied with.”
- [6] It is significant that the appellant does not allege that any relevant provision of section 129 or 130 of the NCA has in fact not been complied with. The point taken is a purely procedural one that the letter of demand was deficient. The papers themselves reveal, however, that a notice in terms of section 129(1) was properly and timeously sent by registered post, that it reached the post office in King William’s Town and that a notification for the collection thereof was sent out to the appellant on 3 October
2014. (Compare *Sebola and Another v Standard Bank of South Africa Limited and Another* 2012 (5) SA 142 (CC) at para [68], [75] and [76].) The appellant does not allege that she did not receive it. It is apparent from the credit agreement itself that the debt was repayable in a single instalment payable on 30 November 2013 and that the default accordingly occurred on this date. The appellant was therefore in default for a period in excess of the twenty days referred to in section 130(1) of the NCA at the time. The consent to judgment was signed on 16 October 2014, more than ten days after the delivery of the section 129(1) notice and the judgment was noted, as alluded to earlier, on 8 January 2015. The papers accordingly established that the respondent did not approach the court prior to the lapse of ten days from the delivery of the section 129(1) notice as is envisaged in section 130(1)(a). The appellant does not allege that any of the circumstances set out in section 130(3) of the NCA which would prevent a court from granting judgment existed at the time. It is accordingly apparent that

the relevant provisions of section 129 and 130 of the NCA were complied with prior to the granting of judgment.

- [7] In respect of rule 4(2) the point taken is broader. It is not in dispute that the request for judgment was not supported by an affidavit containing evidence which would be necessary to establish that all requirements in law have been complied with. The appellant, however, contends further that in fact various provisions of the NCA have not been complied with. I shall revert to these provisions below.
- [8] Rule 12(6) and (6A) of the rules provide:

“(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 the reasons to the satisfaction of the court ... why such original cannot or should not be filed.

(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.”

[9] Rule 12(6A) echoes the requirements set in rule 4(2) and I shall deal further with the alleged failure to comply with provisions of the NCA below. I accept for purposes of this judgment, however, that evidence confirming compliance with the provisions of the NCA was not filed prior to judgment. In respect of rule 12(6) the point taken is again purely procedural, it being contended that the original of the agreement was not delivered together with the request for judgment nor was an explanatory affidavit provided. In this respect, however, I emphasise again that it is not denied that the copy of the agreement annexed to the founding affidavit in the rescission application is indeed a true copy of the original concluded between the parties.

[10] Rule 49 regulates applications for rescission of judgment. Sub-rule

(3) stipulates that where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted and 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 (see also *Cooper & Ferreira v Magistrate for the District of Humansdorp and Another* [1997] 1 All SA 420 (E); *F & J Car Sales v Damane* 2003

(3) SA 262 (W); and *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts and Lloyds* 2007

(2) SA 1 (SCA)).

[11] Whilst it is not necessary in an application for rescission to deal fully with the merits of the matter an applicant for rescission must set out a defence with sufficient particularity so as to enable the court to decide whether or not there is a valid and bona fide defence. (See *Leo Manufacturing CC supra* at 4G.) The requirements of rule 49(3) find equal application where rescission is sought in terms of rule 49(8) on the basis that the judgment was void ab initio (see *Leo Manufacturing CC supra* at 4E-F). In the absence of a valid and bona fide defence to the claim rescission cannot be granted.

[12] For purposes of the present judgment I shall accept, without making any finding in this regard, that the judgment was void ab initio by virtue of the non-compliance with the rules. It is accordingly necessary to consider the alleged non-compliance with the

statutory provisions raised in order to determine whether a valid and bona fide defence to the claim has been raised.

- [13] In the application for rescission of the judgment reliance is placed on the failure to comply with the provisions of section 75, 92(2)(b) and 103(5) of the NCA as defences to the claim. I shall deal with these provisions consecutively.
- [14] Section 75 of the NCA relates to marketing and sales of credit at the home or place of work of a credit consumer. It seeks to prevent a credit provider from harassing a person in attempting to persuade that person to apply for credit or to enter into a credit agreement. Subsection (2) prohibits a credit provider from entering into a credit agreement at a private dwelling save in certain prescribed circumstances and subsection (3) prohibits a credit provider from visiting a person's place of employment for the purpose of inducing the person to apply for or obtain credit or to enter into a credit agreement save under certain prescribed conditions.
- [15] The appellant contends merely that there is no evidence before the court that there has been compliance with the provisions of section 75 and therefore that the judgment is void for want of compliance with rule 4(2) set out above. The simple answer to this issue is that the appellant has not attested to any affidavit. It has not been suggested that she has been harassed nor that the provisions of section 75 have been contravened in any manner. Compliance with section 75 is not an essential component of the cause of action and it is not for a plaintiff to raise this issue in each claim. The appellant knows what the facts are and if any contravention of this section occurred it was incumbent on her to raise it. For this reason alone I do not think that the failure to address section 75 of the NCA when the request for judgment was made can constitute a defence to the claim.
- [16] Whilst the founding papers are somewhat coy in respect of the application of section 75 it appears, in the context in which it is raised on the papers and in argument that it is contended that the conclusion of the consent to judgment constitutes a fresh credit agreement in terms of the NCA and that it was at the signature of the consent that the requirements of the NCA should have been complied with. The consent to judgment does not involve the advancement of fresh credit. It constitutes merely a concession of the merits of the pre-existing claim arising from credit already granted and an agreement in respect of the quantum thereof and manner of payment. It is an agreement as envisaged in section 129(1) of the NCA. The provisions of section 75 of the NCA finds no application thereto and there can be no objection in principle to it being recorded in a judgment or an order of court (compare *Eke v Parsons* 2016 (3) SA 37 (CC)). For this reason too I do not consider that any contravention of section 75 appears from the papers.
- [17] Even if I err in the conclusion to which I have come a failure to comply with section 75 of the Act in concluding the consent to

judgment

cannot constitute a defence to the respondent's claim, which had arisen earlier, in circumstances where neither the agreement nor the default is in dispute.

[18] Section 92 relates to pre-agreement disclosures. Section 92(2)(b) requires of a credit provider to desist from entering into an intermediate or large credit agreement unless the credit provider has given to the consumer a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total costs of the proposed agreement, and the basis of any costs that may be assessed under section 121(3) if the consumer rescinds the contract.

[19] The credit agreement underlying the judgment is annexed. The principal debt is R2 500,00. It was repayable, together

with interest, fees, and the cost of credit life insurance in a single instalment being R3 251,33 at the conclusion of the

period. It is accordingly a small agreement as defined in section 9 read with section 7(1)(b) of the NCA. Section 92(2)(b) clearly finds no application to the underlying credit agreement.

[20] As in the case of section 75 it appears from the context in which it is raised and from the argument presented that the appellant contends that section 92(2)(b) ought to have been complied with when the consent to judgment was concluded. The amount of the judgment is set out earlier herein. In this instance too, if the consent to judgment were to be considered to be a credit agreement, it would be a small agreement as defined in the Act. The section can therefore find no application.

[21] I turn to consider the provisions of section 103(5) which provides:

“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.”

[22] The appellant contends that the principal debt amounted to R2 500,00 and that it is therefore clear that the judgment debt included costs, interest and fees which have not been properly quantified. Again it is not alleged that there has been a breach of section 103(5). The affidavit raises merely the possibility of such a breach.

[23] Again there is no merit in this contention. The agreement is annexed to the founding papers. As alluded to earlier it was repayable in a single instalment of R3 251,33 on 30 November 2013. The default accordingly occurred on 30 November 2013 and the entire principal debt was then outstanding. The consent to judgment and the judgment granted was in the amount of R3 251,33 together with collection commission calculated at 10% and interest calculated at 5% per month from 30 November 2013 to 16 October 2014, being the date of judgment. The interest ordered is simple interest. On the evidence before us it clearly demonstrated therefore that the amounts contemplated in section 101(1)(b) to (g) which accrued during the time that the consumer was in default do not exceed the principal

debt.

[24] For these reasons I do not consider that any defence is raised under section 103(5) of the NCA. In the circumstances I am not persuaded

that any defence to the claim has been set out with the measure of particularity required and the appeal on the merits must therefore

fail.

[25] Ms Makaula, who appeared on behalf of the appellant argues, however, that because the rules referred to earlier were not complied with the order was void ab initio by virtue of the fact that the magistrate had no jurisdiction to make the order. The defence, so it is argued, is therefore that the magistrate lacked jurisdiction. The term “jurisdiction” is used in a wide sense in the argument. It is not suggested that the magistrate did not have the authority to entertain the action, but merely that he ought not to have granted judgment by virtue of the respondent’s failure to adhere to the rules. That is not a defence to the claim. At best it may be a procedural shortcoming which prevented the magistrate from granting judgment by default or consent at the time, however, it is not a defence which could defeat the claim if it were to proceed to trial before the magistrate. In *Leo Manufacturing, supra*, the proceedings before the magistrate had been a nullity as the process had not been served on the defendant at all. The

magistrate in that case therefore did not have the power to grant the order. This too strikes at the jurisdiction of the magistrate in the sense contended for by the appellant. The application for rescission nevertheless failed because no defence to the claim appeared from the papers. The position in the present case is the same.

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

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

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

[27] In respect of the costs the magistrate reasoned as follows:

“Regarding costs, the respondents have obtained a judgement without properly complying with the rules of court and on the other hand the applicant has brought an application for rescission, which for the reasons set out above, would not have succeeded in the normal course ... In an effort by the court to dissuade applicants from bringing vague and generalised applications where the bona fides thereof may be in question I order that the applicant pay the costs of the application on an attorney and client scale.”

[28] The reference to “the reasons set out above” relates to the magistrate’s earlier reasoning that an applicant who seeks rescission of judgment on the grounds set out in rule 49(8) of the rules must allege and prove facts which vitiate the judgment.

Whilst the judgment is terse the magistrate appears to have found that the application ought ordinarily not to have succeeded and that it was not bona fide. I agree the magistrate ought not to have granted rescission at all.

[29] As I have stated earlier, there is no dispute that the appellant entered into the credit agreement nor as to the terms of the agreement.

Save for the spurious challenge under section 103(5) of the NCA no challenge to the quantification of the claim has been raised.

In any event the appellant acknowledged the sum claimed. The appellant does not deny that she was in default of her obligations or that the amount of the judgment debt was due owing and payable when judgment was taken. She acquiesced fully in the execution of the judgment and the full debt has been repaid. No defence has been raised which may hold a reasonable prospect of success in defeating the claim and the appellant does not even say that she wishes to defend the action. I accordingly agree with the magistrate that the application raises serious questions relating to the bona fides of the appellant in the institution of the application. In these circumstances I do not think that the magistrate exercised his discretion wrongly.

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

J W EKSTEEN

JUDGE OF THE HIGH COURT

LOWE J:

I agree.

M J LOWE

Appearances:

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

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