

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NOS: 2010/6708, 2010/6710 and 2010/6711

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

DATE

SIGNATURE

In the matter between:

PAPAGEORGIO, R G

Applicant

and

**WAINBERGAS, G M t/a WAINBERGAS
FINANCIAL SERVICES
VELOZA T P S
LDV TRADING CC**

First Respondent
Second Respondent
Third respondent

In re:

CASE No: **2010/6708**

**WAINBERGAS, MICHAEL GARY t/a WAINBERGAS
FINANCIAL SERVICES**

Plaintiff

and

**QUESTE BUSINESS ENTERPRISES CC
PAPAGEORGIO, R G**

First Defendant
Second Defendant

and

In re:

CASE No: **2010/6710**

**WAINBERGAS, G M t/a WAINBERGAS
FINANCIAL SERVICES**

Plaintiff

and

**LDV TRADING CC
PAPAGEORGIO, R G**

First Defendant
Second Defendant

and

In re:

CASE No: **2010/6711**

**WAINBERGAS, MICHAEL GARY t/a WAINBERGAS
FINANCIAL SERVICES**

Plaintiff

and

VELOZA TERCIO P S

Defendant

JUDGMENT

OPPERMAN AJ

Introduction

[1] This is an application for the rescission of provisional sentence judgments granted by Vally J on 5 November 2010 under case numbers 2010/6708, 2010/6710 and 2011/6711. The applicant contends for rescission of those judgments granted in 2010 on the basis that the applicant discovered in March 2013 that the first respondent was not registered as a "*Credit Provider*" as required in terms of section 40 of the National Credit Act, No. 34 of 2005 (hereinafter referred to as "the NCA").

Factual matrix

[2] During or about March 2013, the first respondent served an application on the applicant in terms whereof he sought to have applicant's home declared specially executable for purposes of satisfying the provisional

sentence judgment which had been granted against him and which at that stage, had become final.

[3] After the application to have the applicant's home declared specially executable had been served on him, he discussed the matter with a mutual friend who disclosed to the applicant that the first respondent had never been registered as a "*Credit Provider*" as required in terms of section 40 of the NCA.

[4] Five months later the applicant brought the application for rescission in which he contended that the transactions forming the subject matter of the provisional sentence judgments were unlawful and unenforceable as contemplated in sections 89(5)(a) and 89(5)(b) of the NCA and that the first respondent is required to refund all monies paid by him to the first respondent in respect of the transactions pertaining to the cheques upon which the provisional sentence was granted.

[5] The cheques upon which the first respondent sued were post-dated cheques issued by the second respondent and the third respondent in respect of goods purchased on consignment from the applicant. Certain of such cheques were discounted by the applicant with the first respondent.

[6] It is common cause that the applicant did not put up security for the judgment debt and did not enter into the principal case, that the judgments had become final and that the appeal procedure had not been pursued.

[7] Adv Nowitz, representing the applicant, also represented the applicant in the hearing before Vally J. The following appears from the transcript of the argument before Vally J.:

'Mr Nowitz: ... Firstly let me hand to your lordship a copy of relevant extracts from the National Credit Act. What I have done M'lord is I have put an asterisk next to each of the paragraphs in the National Credit Act upon which we rely.'

Procedure adopted by the applicant

[8] The respondent's counsel argued that the applicant has adopted the incorrect procedure in approaching the court by way of a rescission application. It was argued that rescission applications are generally only utilised where an order was granted by default and not where the applicant

was properly represented in court and where the matter had been argued and ventilated before a judge.

[9] Much reliance was placed on the judgment of Thirion J in *Port Edward Town Board v Kay and Another* 1994 (1) SA 690 (D&CLD) at 705, where the following was held:

'In *Schierhout v Union Government* 1927 AD 94 at 102, De Villiers JA was prepared to assume in favour of the applicant for rescission that the Court 'would grant relief where new documents came to light after the trial which would have entitled him to judgment had they been produced, provided he can show weighty reasons by which he was prevented from producing such documents at the trial'.

It seems clear that in the case of *instrumentum noviter repertum* the Court would only grant restitution if the document had been discovered by the unsuccessful litigant after judgment only. There seems no reason why the position should be any different in the case of a fraud committed in a manner other than by falsifying documents.

In *Schierhout's* case the Court stressed the fact that a final judgment of a court of law, being *res judicata*, should not be lightly set aside. As it was put by Steyn JA in *Making's* case at 349:

'Waar die moontlikhede van appèl en hersiening langs gewone weg uitgeput of onbenut gelaat is, word die gewysde, hoe aanvegbaar ook, die judisieel vasgelegde reg tussen die partye (Leyser *Meditationes* 7.470 op 300 en 301) en is dit in die openbare belang dat daaraan die gesag toegeken word wat nakoming daarvan sonder weerspraak sal verseker en dat inbreuk op die afdoendheid daarvan deur 'n buitengewone prosedure van restitusie, binne strenge perke gehou sal word.'

In a somewhat different context it was said by Wessels CJ in *Colman v Dunbar* 1933 AD 141 at 161:

'It is essential that there should be finality to a trial and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances.'

[10] The first respondent argued that it is incumbent upon applicant to show weighty reasons which prevented him from arguing the point now sought to be relied upon at the hearing of the matter before Vally J. The first respondent argues that the applicant has clothed what is in truth an appeal, with a rescission 'coat' under circumstances where the applicant had failed to utilise the remedies which were available to him at the time, i.e. to enter the principal

case or to take the final judgment on appeal. Having failed to do this, first respondent points out that the applicant then sought to rescind the judgment under circumstances where, even after obtaining knowledge of the existence of the fact, waited a further five months, before launching the application without explaining such delay at all.

Principles applicable to rescission under the common law.

[11] In *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T), Melamet J (with whom Boshoff J and Curlewis J concurred) held at 776F as follows:

'Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by our law such as fraud or justus error in certain circumstances. *Childerley Estate Stores v. Standard Bank of SA Ltd.* 1924 OPD 163 at pp. 166 - 168: *Seme v Incorporated Law Society*, 1933 (1) T.P.D. 213 at p. 215: *Makings v Makings*, 1958 (1) SA 338 (AD) at p. 343: *Athanassiou v Schultz*, 1956 (4) SA 357 (W). It would appear that the procedure to set aside a judgment on grounds justifying *restitutio in integrum* is by way of action.

The position as set out above recognises the finality of a judgment once delivered or issued (*vide, Estate Garlick v Commissioner for Inland Revenue*, 1934 AD 499 at pp. 502 - 503).

Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court is intended to modify such rigid provisions but within the confines of such Rules. The Court is empowered to grant relief in certain additional circumscribed circumstances.' (The judgment was confirmed on appeal, *De Wet v West Bank* 1979 (2) 1031 (A)).

[12] It should of course be borne in mind that the judgment under consideration was not granted by default. The applicant was duly represented and in addition, the NCA was debated and argument was advanced that it had application, albeit not on the point now raised. In terms of the common law, the rescission of final and definitive judgments can only occur on limited grounds. In *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (AD), Trengove AJA comments as follows at 1041C:

'The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf *Athanassiou v Schultz* 1956 (4) SA 357 (W) at 360G and *Verkouteren v Savage* 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being *functus officio*, and judgments could only be set aside on the limited grounds mentioned in the Childerley case.'

[13] At 1040 Trengove AJA held as follows:

'In the *Childerley* case, DE VILLIERS JP was primarily concerned with the Court's jurisdiction to set aside a final and definitive judgment, on the merits of the dispute between the parties, after evidence had been led. The issue in that case was whether the Court was empowered to set aside a final judgment on the ground that it was subsequently discovered that the judgment had been obtained as a result of fraudulent and false statements made by a witness during the course of the trial. Referring to a number of authorities, which had been quoted in support of the proposition that judgments could be set aside, under Roman-Dutch law, on the ground of *justus error*, DE VILLIERS JP remarked at 166:

"It is evident that these cases and also the other cases of similar nature mentioned by Voet in (4.6.10, 11) are rather instances of purging default or granting extensions of time such as are still recognized by our modern Rules of Court in cases in which *judgments are entered for default and not on the merits of the dispute*"(my italics).

Then, after discussing the exceptions to the rule that a judgment could not be set aside on the ground of the discovery of new documents after judgment, the learned Judge said at 168:

"We arrive at this position then that so far as *justus error* is concerned default judgments may in some cases be set aside under the Roman-Dutch law on the ground of *justus error*, and that judgments, whether by default or not, may be set aside in the seven exceptional cases above-mentioned on the ground of *instrumentum noviter repertum*, though evidently some of those cases are nowadays obsolete and inapplicable; there are, further, the exceptional cases of setting aside a judgment in a matrimonial suit on the ground of *justus error*... There may be other exceptional instances. But I must say that I know

of no such further general application of the doctrine of *justus error* to judgments as would entitle the vanquished party to bring an action to set aside a judgment on the ground that the court gave the judgment in error, even if such error was just and was induced by a non-fraudulent misrepresentation made by the other party to the case. And no attempt has been made by plaintiff's counsel in this case to produce any authority which would justify such an extensive application of the doctrine. On the contrary it seems clear that Voet, in stating that judgments may be set aside on the ground of fraud, and (in exceptional cases) on the ground of *instrumentum noviter repertum* (42.1.28) intends impliedly to exclude any other grounds *ejusdem generis* for setting aside judgments delivered in defended cases *after both parties have been heard and the action has been fought to a finish*. (my italics).

[14] In *Nyingwa v Moolman* N.O. 1993 (2) SA 508 (Tk GD) White J summarises the principles succinctly as follows at 511J:

"It follows that any judgment, including a summary judgment, can be rescinded under the common law. If the merits of the dispute were considered before summary judgment was granted, rescission can follow only on the grounds set out in the Childerley case; if the merits were not considered and the judgment was granted by default, the grounds for rescission are virtually unlimited, and the only prerequisite is that 'sufficient cause' therefor must be shown. It follows that, if an answering affidavit, or evidence, has been considered by the Court before it grants summary judgment, the Court would then have considered the merits of the case and its judgment cannot then be held to be by default, even if there was no appearance for the defendant when the application was heard.'

Application of the foregoing principles to the facts of this matter.

[15] The nub of the applicant's argument is that the first respondent ought to have been registered as a "*Credit Provider*" as provided for in section 40 of the NCA. Section 40(3) of the NCA provides if one is required to be registered as a "*Credit Provider*", but isn't so registered, such person must not offer, make available or extend credit, enter into a credit agreement, or agree to do, any of those things. Section 40(4) makes any agreement concluded with a person required to be registered as a "*Credit Provider*" and who is not so registered, unlawful and void to the extent provided for in section 89 of the NCA.

[16] Although the judgment of Vally J was not made available to this court, the argument in front of Vally J had been transcribed and was annexed to the respondent's answering affidavit.

[17] The applicability of the NCA was argued before Vally J. This is apparent from the argument of Adv Nowitz at p 54 of the transcription. I quote the relevant portion:

'M' lord, just, I asked your lordship to take cognisance of two things with regard to section 15(G). One, the limit at the relevant time was R500 000 and I think, ja [inaudible] mention it as well, but I think it is R500 000 and the second aspect M'lord is when your lordship reads this section 15(G) and invite your lordship to read it carefully, your lordship will see that it relates to a specific transaction and not to cumulative transactions as my learned friend invites your lordship to, to interpret it. He talks about the principal debt on the date when such transaction is entered into and it then talks about the aggregate amount of the principal debt. That the principal debt is, the principal debt in respect of each cheque not the cumulative, you take all the cheques that you can find that you want to sue on and of course your lordship knows from the plaintiff's case that what they have decided is to appropriate payments where they want to and then take a bunch of cheques and say we are going to sue on these cheques and my learned friend he says when you look at 15(G), when your lordship sees the word aggregate of the principal debt you must take all the cheques that they have decided to sue on and that is going to give you your aggregate and that is in excess of R500 000 [intervenes]'

... and further at page 55 :

"Court: Now your submission is you must look at each cheque individually?"

Mr Nowitz: Yes. ...

Court: Each claim is an individual, separate claim?"

Mr Nowitz: An individual principal debt.'

[18] It is apparent from the foregoing quotation that Adv Nowitz, on behalf of the applicant, was arguing for the application of the NCA. He requested the Court to consider each and every cheque to be a separate claim and a separate transaction. Thus arguing that each cheque constituted a principal debt and that each cheque should be viewed individually. The acceptance of such an argument would have resulted in the NCA being applicable.

[19] In this hearing, there has been an about turn. Adv Nowitz, on behalf of the applicant, contended that section 40 required a person to apply to be

registered as a “*Credit Provider*”, if that person were the “*Credit Provider*” under at least 100 credit agreements or the total principal debt owed to that “*Credit Provider*” under all outstanding credit agreements exceeded R500 000. It is in respect of the latter requirement that the applicant argued that the first respondent had entered into more than 100 credit agreements with the applicant alone and annexed a schedule evidencing this to his replying affidavit alleging that the principal debt owing under all such credit agreements, exceeded the prescribed threshold of R500 000.

[20] Apart from the glaring *volte face* on a factual level, the applicant clearly had an opportunity to deal with the applicability of the NCA before Vally J. Rescission applications cannot be used to serve as veiled appeals.

[21] In *Schierhout's* case, the Court stressed the fact that a final judgment of a court of law should not be lightly set aside and in the *Makings* (supra) case (quoted in *De Wet* (above)), Steyn JA emphasised that where the appeal procedure is not exhausted, the legal position between the parties will be honoured regardless of how judicially flawed such position is, as it is in the public interest that a final judgment be afforded the authority that compliance with it will be guaranteed. The unusual procedure of restitution should be kept in check by strict constraints. It is essential that there should be finality to a trial, particularly under circumstances where a litigant has had an opportunity to advance a legal argument and did so, but is then advised by a friend that there is a different angle to the argument which could have, or might have, yielded a different result.

[22] In my view, the applicant has failed to make out a case for the rescission of the judgments in question. Adv Nowitz argued that should the Court fail to rescind the judgments, the Court would effectively be complicit in enforcing and upholding a situation which is unlawful and which is contrary to the provisions of the NCA.

[23] A similar argument was advanced in the matter of *Port Edward Town Board* (supra) and Thirion J dealt with it as follows at 705A:

'But, argued counsel for the plaintiff, the fact that plaintiff had been aware during the pendency of the case that evidence of decisive importance was being withheld from the court, is not fatal to plaintiff's case because of the fact that it was the court which had been fraudulently misled into giving a wrong judgment.

Voet 42.1.28, however, is to the effect that, if the falsity had become known to either the opposing party or to the Judge during the pendency of the case (*quae lite pendente neque adversario neque judici innotuerat*), rescission would not be granted. Knowledge on the part of the party while the case is pending would therefore be sufficient to disentitle him from rescission. I find it in any event difficult to understand why Voet imports the knowledge or absence of knowledge on the part of the Judge into the enquiry. If the Judge trying the case or hearing the application were to obtain knowledge extra-curially of a fraud affecting the case, he would have to recuse himself. If, on the other hand, he were to become aware of the fraud through evidence placed before him, then the opposing party would equally become aware of the fraud. If from evidence before him it should appear to the Judge that the claim is fraudulent, he would undoubtedly draw the attention of the parties to it. But, if after having been so informed the opposing party were to decide not to rely on the fraud as a ground of defence, there would be little or nothing that the Judge would be able to do about it - save perhaps in the rarest of circumstances.'

[24] Although one is not dealing with fraud in this instance and this case is to be distinguished, in that in respect of the applicability of the NCA, the court would be entitled to raise it *mero motu* and the Applicant did not wilfully withhold reliance on sections 40 and 89 of the NCA, parties can not be permitted to rescind judgments every time they conceive of a possible better argument. Policy considerations weigh against permitting this. See *Makings* (above) per Steyn JA at 349.

The inherent nature of the transactions forming the subject matter of the provisional sentence summonses.

[25] I have already found that the rescission application should fail as the applicability of the NCA was argued and dealt with before Vally J, I would also find against the applicant on another basis.

[26] Applicant contends that the cheques upon which the first respondent sued were post-dated cheques issued by the second respondent and the third respondent in respect of goods purchased on consignment from the applicant. Certain of such cheques were discounted by the applicant with the first respondent in order to generate cash-flow. Applicant contends that this was done on the strict understanding that if customers such as the

second and third respondents returned the goods covered by such cheques, before the due date of such post-dated cheques, three things would happen. Firstly, the applicant would notify the first respondent of the return of such goods; secondly, the first respondent would not deposit such cheques but would return same to the applicant; thirdly, the applicant would reimburse the first respondent in respect thereof. The applicant contends that the cheques in question pertain to goods which had been returned and of which return, applicant had notified the first respondent. Applicant contends that by depositing such cheques, the first respondent breached the agreement which covered their relationship. Implicit in this accusation is an admission that the first respondent was the holder in due course of the cheques and that the instruments empowered him to present same for payment.

[27] In order for the applicant to succeed in showing that the first respondent ought to have been registered as a "*Credit Provider*", applicant must show that the first respondent provided credit agreements under at least 100 transactions.

[28] In *Bridgeway Limited v Markham* 2008 (6) SA 123 (W) at para [18] Motopo J held as follows:

'[18] He submitted that the discount sale can neither be classified as a credit facility nor credit transaction because no payments were made periodically or deferred as envisaged in the Act. Once the applicant pays the purchase price upfront, he steps into the shoes of the seller vis-à-vis the purchaser and no money is borrowed in this instance. Again he submitted that, if regard is had to the intention of the parties and the objective facts, the inescapable inference or conclusion to be drawn is that this was a discount sale and not a money lending, and the applicant as discounter is purchasing and not lending See *De Villiers v Roux* 1916 CPD 295 at 298 where Kotze J said the following:

'The difference between "advancing", "lending money" and "discounting" is distinct and palpable. "Discounting" is purchasing, not lending. The discounter, whether of a bill or bond, or any other security, becomes the owner. If the thing bought, turns out, when realised, to be of less value than the price paid for it, the loss falls upon the purchaser or discounter. If a profit or gain is made upon the transaction, it belongs wholly and exclusively to the discounter or purchaser.' The view, therefore, which I expressed during the argument that the relation between the discounter of a bill or promissory note

and the person who presents it for discount seems rather that of purchaser and seller than that of lender and borrower, is borne out by authority. The discounter becomes owner of the note; it is his property and he in turn can discount it, pass it over to others, or deal with it in any other legitimate way; whereas, if the transaction were one of the loan of money against the security of the bill or note, the discounter would not be able to deal with the document in the way described.'

[29] I conclude that if regard is had to the nature and substance of the transaction, the inescapable inference to be drawn is that this was a discount sale and not a money-lending transaction or credit transaction. I therefore conclude that these transactions do not fall within the ambit of the provisions of section 8 of the NCA, and that the first respondent would thus not have been obliged to register as a "*Credit Provider*" as contended for by the applicant.

[30] A final aspect is whether the declaration of invalidity in respect of provisional sentence judgments contained in *Twee Jongegezellen v Land and Agricultural Development Bank* 2011 (3) SA 1 (CC), has application in this matter. It does not, as was correctly submitted by Adv Novitz, as these judgments had become final prior to such declaration.

CONCLUSION

[31] I thus find that the applicant has failed to make out a case for the rescission of the provisional sentence judgments.

[32] The parties were in agreement that the application declaring the immovable property specifically executable be set down at a later date and I will accordingly postpone such application with no order as to costs.

ORDER

1. The applications brought for the rescission of judgments under case nos. 6708/2010, 6710/2010 and 6711/2010, are dismissed with costs.
2. The application declaring the property executable, brought under case no. 6710/2010 is postponed *sine die* and costs are reserved.

I OPPERMAN

Acting Judge of the High Court

Heard: 18 March 2014

Judgment delivered: 5 September 2014

Appearances:

For Applicant: Adv M Nowitz

Attorneys: Steve Merchak Attorney

For the First Respondent: Adv B E Gradidge

Attorneys: Dadic Attorneys