Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No:A104/2010
Wynberg Magt Ct Case No: 4193/2009

In the matter between:

THE ASSAFAN TRUST (IT384/1989)	**1st Appellant**
SHEIK DAWOOD HOOSAIN N.O.	**2nd Appellant**
NAZREEN HOOSAIN N.O.	**3rd Appellant**
SHEIK DAWOOD HOOSAIN	**4th Appellant**
NAZREEN HOOSAIN	**5th Appellant**

And

ABSA BANK LIMITED	**Respondent**

JUDGMENT DELIVERED: 6 December 2010

BINNS-WARD, J:

[1] The appellants have come before this court on appeal against the dismissal by the magistrate's court of their application for the rescission of the judgment entered against them in that court by default. The judgment was for payment of the sum of R1 132 722,66, plus interest thereon as provided in terms of an applicable mortgage contract. In terms of an ancillary order, the hypothecated immovable property was also declared directly executable.

[2] It is appropriate to describe the circumstances in which the default judgment came to be granted in the court below. The appellants, having delivered notice of their intention to defend the action instituted against them by the respondent bank, were given notice of bar in the context of their having failed to timeously deliver a plea. Within the period afforded to them in terms of the notice of bar, the appellants delivered not a plea, but a notice of exception to the summons. The exception was delivered outside the period provided in terms of rule 17(1)(a) of the magistrates' court rules. But notwithstanding the provisions of rule 17(1)(b), read with rule 60(5) - which requires leave of the court to be obtained for the late delivery of an exception - the respondent noted no objection to the late exception. The exception was thereafter set down for argument.

[3] A few days before the date on which the exception was due to be argued the appellants gave notice of the withdrawal of their notice of exception and, simultaneously therewith, delivered what purported to be their plea in the action. The appellants' attorney did not attend at court on the date set down for the hearing of the exception, believing that the appellants' position had been adequately addressed by the prior withdrawal of the exception and the delivery of a plea.

[4] The respondent's attorney attended court on the date on which the exception had been due to be argued and moved for judgment by default against the appellants. She did so on the basis that the exception had been out of time and that the appellants had not delivered their plea within the period afforded in terms of the aforementioned notice of bar. The respondent's attorney alleged

that the magistrate had required that the appellants' attorney be informed of the application for default judgment. The respondent's attorney claims that she telephoned the appellants' attorney to inform him of the application for default judgment, but the appellants' attorney disputes having been so informed.

[5] The magistrate, apparently persuaded by the respondent's attorney's interpretation of the magistrates' court rules, granted judgment by default against the appellants accepting that they had been barred from pleading to the action by the time they purported to plead after the withdrawal of the notice of exception. The subsequently brought application for rescission of the judgment appears to have been dismissed because the magistrate was of the view that in the applicable circumstances the effect of the magistrates' court rules was to exclude any discretionary basis to deny the respondent's application for default judgment. He considered the effect of the rules to have been 'the alpha and the omega' and seems to have considered it unnecessary to consider whether the appellants might have had a *bona fide* defence to the action, or that they might have wished to request an extension of time within which to validly deliver their plea.

[6] The magistrate's approach was clearly misdirected. Although the lower courts are indeed creatures of statute and lacking in the inherent jurisdiction that vests in the High Court, it is nevertheless well-established by authority that the rules of the magistrates' courts, properly construed, clearly vest magistrates with a judicial discretion when it comes to deciding applications for default judgment. In the circumstances in which it was evident that they had wished to defend the action, default judgment should not have been granted against the appellants

without adequate and formal notice of the application for such judgment having been given to them. Authority for that conclusion is afforded in the reasoning in judgments such as *Modesi v Mosiga* 1927 TPD 150, *Olivier v Fourie* 1966 (3) SA 401 (C), *Mthanthi v Pepler* 1993 (4) SA 368 (D) and *Santam Ltd and Others v Bamber* 2005 (5) SA 209 (W). It was always open to the appellants to have applied for an extension of the period within which to validly deliver their plea. For the same reasons, it was, to say the least, misdirected of the respondent's attorney to have pressed the application for default in the manner in which she did. The principles articulated in the authorities, just cited, are underscored by the provisions of s 34 of the Constitution. The disregard for them by the judicial officer and legal practitioner concerned is therefore all the more regrettable.

[7] The respondent opposed the appeal principally on the basis that the appellants' application for the rescission of the default had been fatally deficient by reason of its failure to set out the grounds of their defence, as required by the provisions of rule 49(3) of the rules of the magistrates' court. Rule 49 is applicable to all applications for the rescission or variation of judgments in the magistrates' courts. Insofar as currently relevant, it provides as follows:

> (1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit.

(2) It will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.

(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.

(4) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who does not wish to defend the proceedings, the applicant must satisfy the court that he or she was not in wilful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his or her knowledge.

(5) ...

(6) ...

(7) ...

(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.

(9) ...

[8] The appellant's counsel argued that the judgment was void *ab origine*, having been granted in violation of the appellants' constitutional right to a fair hearing, and that the provisions of rule 49(3) were therefore not applicable. In the alternative, he submitted that the content of the appellants' plea, a copy of which was annexed to in the affidavit in support of the application for the rescission of the default judgment, was sufficient to satisfy the 'grounds of defence' requirement in the sub-rule.

[9] The first of the aforementioned arguments goes against the weight of authority that is binding on this court. In *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds* 2007 (2) SA 1 (SCA), the Supreme Court of Appeal held that rule 49(3) precluded the rescission of default judgment where the applicant had failed to set out grounds of a defence to the respondent's claim. Approving the approach adopted in *Cooper & Ferreira v Magistrate for the District of Humansdorp and Another* [1997] 1 All SA 420 (E) and *F & J Car Sales v Damane* 2003 (3) SA 262 (W), Zulman JA held (at para. [6]), 'the provisions of Rule 49(3) are peremptory when a court considers an application to rescind a default judgment. More particularly, the wording of the subrule makes it clear that the grounds of the defendant's defence to the claim must be set out. Where the objection is that the judgment was void *ab origine*, compliance with Rule 49(3) nevertheless involves further proof of the existence of a valid and bona fide defence to the claim.'

[10] There had been no attack in *Leo Manufacturing* on the constitutionality of rule 49(3) (or of its predecessor rule 49(2) - which, differently to the current requirement, required the grounds of defence to be only 'briefly' set forth) insofar as it bore on applications to rescind default judgments that were void *ab origine*. No reference was made in the SCA judgment to s 34 of the Constitution. There was also no attack on the constitutionality of the sub-rule in the current appeal. It is therefore unnecessary to express a view, but it seems to me *prima facie* that even if there had been such an attack, a rational basis might be found in the public policy in favour of the desirability of finality in litigation to support any

limitation of the s 34 right arguably brought about by the sub-rule. After all, there seems no practicable reason to set aside an invalid, but nevertheless effective, default judgment if the applicant for rescission has no defence to the claim; to do so would be to encourage further litigation for no practical purpose and to contribute to unnecessarily clogging the court rolls.

[11] Turning to the alternative argument advanced by the appellants' counsel, the principal affidavit made in support of the application for rescission of judgment, which was deposed to by the appellants' attorney, does not, in terms, set out the grounds of any defence, as required by rule 49(3). The affidavit does refer to the plea that was delivered, but not to incorporate its content; rather, merely to narrate the date on which it was delivered and the circumstances of such delivery. I do not think that this constituted compliance with the rule; cf. *Taylor v Additional Magistrate, Vereeniging, and Others* 1984 (4) SA 1 (T) and *Kruger v Standard Krediet Korporasie Bpk* 1988 (1) SA 570 (T).

[12] But even if I were to be incorrect in such conclusion, the allegations in the plea are so baldly and opaquely formulated as to be insufficient to set out the grounds of the appellants' defence in the manner contemplated by rule 49(3). It will be recalled that the claim is for payment of an amount due in terms of a mortgage loan. It is admitted in the plea that the contract provided for the *prima facie* proof of the amount due by a certificate from the mortgagee. A certificate as contemplated in the contract was attached to the summons in support of the claim. It follows that at any trial of the action there would have been an evidential onus on the defendants to rebut the effect of the certificate of balance (cf. e.g.

Bank of Lisbon International Ltd v Venter and Another 1990 (4) SA 463 (A) at 481H - 482C, read with *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 382 *in fine* – 383). They would be obliged to adduce evidence to demonstrate the incorrectness of the certificate. Their mere statement, without substantiation, that the amount was incorrect would be insufficient for this purpose. All the plea alleges in the relevant respect is that the amount claimed is not accurate. The grounds on which this conclusion is premised are not set out in the plea. There is therefore no indication in the plea of the evidential basis on which the defendants might seek to rebut the presumptive effect of the certificate of balance. It is not sufficient to satisfy the requirement of rule 49(3) for the deponent to merely identify the nature of a defence, but fail to set forth the grounds upon which it will be advanced (compare the provisions of rule 14(3)(c) which requires of a defendant opposing an application for summary judgment to disclose the 'nature *and grounds*' of its defence; and consider the discussion of the meaning of the expression 'grounds of the defence' in that connection by Erasmus et al in *Jones & Buckle, The Civil Practice of the Magistrates Courts in South Africa* 9ed (Juta) Vol. II at 14-26 [Service 25, 2009]).

[13] The fourth and fifth appellants were sued in their capacity as sureties for the principal debt. The plea annexed to the supporting affidavit filed in support of the application for the rescission of default judgment admits the execution of the deeds of suretyship and the alleged effects of the provisions thereof. The relevant paragraph of the plea reads as follows:

> 'Save for pleading that the fourth and fifth defendants did not fully understand the implications and obligations imposed by a surety agreement, and that such implications were not explained to them by the plaintiff, the contents [of para.s 16 and 17 of the particulars of claim] are admitted.'

[14] I agree with the submission by the respondent's counsel that the plea does not make out a defence by the sureties. No basis for the existence of any duty on the respondent to explain the implications and obligations is alleged; and insofar as it might be inferred that the fourth and fifth appellants were seeking to rely on the defence of *justus error* (which is far from clear), the allegations necessary to support such a defence with reference to the principles set forth in decisions such as those in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) and *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) are notably absent.

[15] The failure by the appellants to comply with rule 49(3) is therefore an insuperable obstacle to the success of their appeal.

[16] It remains, however, to deal with the order made by the magistrate declaring the property hypothecated by the mortgage bond directly executable. This order was sought by the respondent and granted by the magistrate simultaneously with the order granting default judgment. The appellants had alleged in their plea, which, as mentioned was before the magistrate when he made the orders, that an order for execution against the property would lead to an infringement of their constitutional right to adequate housing. The plea indicated their intention to adduce evidence and/or submit argument in support of that contention. The issue of the order in those circumstances without an enquiry

into the facts sufficient to establish a basis for a consideration by the court of all relevant circumstances, as contemplated by s 26(3) of the Constitution, was unlawful; cf. *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) (2005 (1) BCLR 78).

[17] In a note submitted after the hearing at the court's invitation, the respondent's counsel submitted that the appellants should have dealt with their contentions on the constitutional rights aspect as part of their setting out of grounds of defence in terms of rule 49(3). He submitted that as a consequence of their failure to do so, the order for execution should stand. I do not agree.

[18] The order for direct execution against the property was not integral to the default judgment; it was an order that followed consequentially on the default judgment. It was an order of the nature contemplated by s 66(1)(a) of the Magistrates' Court Act 32 of 1944, as that provision falls to be read in the context of the Constitutional Court's judgment in *Jaftha*. The enquiry enjoined by s 26(3) of the Constitution is an aspect to be addressed irrespective of the merits of the rescission of default judgment application; cf. *Standard Bank of SA Ltd v Adams* 2007 (1) SA 598 (C). While the question of quite how the application of s 26(1) of the Constitution should operate in the context of the execution by mortgagees against hypothecated property has not, as far as I am aware, been determined (cf. *Standard Bank of SA Ltd v Saunderson* 2006 (2) SA 264 (SCA) (2006 (9) BCLR 1022; [2006] 2 All SA 382)), the summons in this case drew the defendants' attention to s 26 of the Constitution and invited them to place information that might support any claim by them that an order for execution

would infringe their constitutional right to access to adequate housing before the court. As to what circumstances might possibly be relevant in the circumstances, see *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) (2006 (6) BCLR 669) at para. [8]. The manner in which the order for direct execution was obtained in this matter deprived the appellants of the opportunity of which they apparently wished to avail to take up that invitation.

[19] Ordinarily, the issue would have been canvassed during the trial of the action or, if no defence on the merits of the claim were advanced, at a specially set-down hearing. The consideration enjoined by s 26(3) of the Constitution is one for which there is no special procedural provision in the rules of court. The respondent cannot deprive the appellants of the opportunity to put their circumstances up for consideration by the court in terms of s 26(3) by purporting to bring the enquiry under the rules pertaining to the granting and rescinding of default judgment.

[20] Although the order for direct execution made in the magistrates' court will be set aside, the respondent has nevertheless been wholly successful in opposing the appeal against the refusal of the appellants' application for rescission of the default judgment. A setting aside of the execution order does not, for the reasons already discussed, amount to a partial rescission of the default judgment (assuming such an order were competent). The respondent is therefore entitled to the costs of the appeal.

[21] I propose that the following orders should issue:

1. The appeal is dismissed with costs.

2. The order made by the magistrate declaring the hypothecated property directly executable is set aside. In the event that the respondent wishes to apply afresh for such an order in terms of s 66(1)(a) of the Magistrates' Court Act, it shall make such application on notice to the appellants, as provided in terms of rule 55 of the Magistrates' Court Rules of Court.

A.G. BINNS-WARD
Judge of the High Court

ERASMUS J:

I agree and it is so ordered.

N.C. ERASMUS
Judge of the High Court