IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: CA13/16

Heard on: 30/08/19

Delivered on: 13/09/19

In the matter between:

BAYPOINT SECURITISATION RF LTD Appellant

and

FUNDISWA MTSELI Respondent

Coram: Nhlangulela DJP et Jaji J

APPEAL JUDGMENT

NHLANGULELA DJP

[1] This matter concerns an appeal against judgment of the magistrate of Mdantsane which was made in the following terms:

> 1. The judgment granted by the Clerk of the Court on the 18th July 2013 is *null* and *void.*

> 2. It is ordered that the status *a quo ante* the judgment be and is hereby set aside.
>
> 3. Respondent is ordered to pay costs of this application on the scale between Attorney and Client Scale.

[2] In the magistrates' court the appellant was cited as the respondent; and the respondent was the applicant respectively.

[3] The judgment of the magistrate arose out of an application for rescission that had been brought by the respondent against a judgment by consent granted by the Clerk of the Court in terms of s 58 of the Magistrates' Court Act 32 of 1944 (the MCA). The respondent was the beneficiary of that judgment.

[4] Two issues fall to be decided in this appeal matter. The first is whether the judgment granted by the Clerk of the Court in terms of s 58 of the MCA on a debt governed by the National Credit Act 34 of 2005 (the NCA) was *null* and *void ab origine*. The second issue is whether paragraphs 2 and 3 of the order granted by the magistrate were competent.

[5] The background facts are the following: On 29 May 2012 a credit agreement sanctioned in terms of the provisions of the NCA was concluded by the parties. A loan debt due by the respondent to the appellant was calculated at R25 000,00, and to be liquidated in instalments until the whole debt was extinguished. It was agreed that upon the respondent failing to pay instalments at the times as agreed the appellant would be entitled to sue on the outstanding balance, obtain a judgment and execute it as a way of recovering the debt. When the respondent defaulted in making payments as agreed the appellant issued notices in terms of sections 129 (1) and 130 (1) of the NCA, and upon non-compliance therewith approached the respondent at her place of employment on 20 September 2013 to consent to judgment in terms of s 58 of the NCA read with the provisions of rule 12 of the Magistrates' Court Rules (the MCR). On 27 November 2013 the appellant approached the Clerk of the Court, applied for judgment by consent whereafter it was granted the judgment. Further, on 10 February 2014 the appellant applied for and obtained an

emolument attachment order that landed it into the salary account of the respondent. As a result payments towards settlement of the loan were resumed. Feeling the pinch of deductions against the salary, on 05 August 2014 the respondent applied for and obtained an order in the magistrates' court interdicting the appellant from collecting the instalments pending the bringing of the application for rescission of the consent judgment. The respondent duly brought the application for rescission on 22 September 2014.

[6] In the affidavit that the respondent filed in support of the application for rescission of the consent judgment she relied on various provisions of the NCA, the MCA and MCR, contending that the violation thereof by the appellant rendered the consent judgment to be *null* and *void.* She asserted that the signing of the document consenting to judgment at her place of employment rather than at the office of the appellant was a conduct that is prohibited by s 75 of the NCA; the failure of the appellant to give her a pre-contract information and a quotation of the debt before the signing of the credit agreement was not a compliance in terms of s 92 of the NCA; the failure by the appellant to file the NCA agreement contravened MCR 12 (6); and that the failure on the part of the appellant to file in court the letters of demand issued in terms of s 129 and 130 of the NCA read with s 58 of the MCA and MCR 4 (4) vitiated the consent judgment. Finally, the respondent alleged that the consent judgment cannot stand because in terms of MCR 12 (5) the magistrates' court, not the Clerk of the Court, did not grant the judgment.

[7] The respondent went on to conclude that the irregularities raised in the founding affidavit constituted "a good cause" and a "*bona fide* defence" as is envisaged in MCR 49 (1). The provisions of rule 49 (1) read as follows:

> "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 is it satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days'

> period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5)."

[8] The affidavit filed on behalf of the appellant in opposition to the application for rescission of default judgment sets out the historical background that I have already summarised hereinabove, and disputes the correctness of the conclusion of law made by the respondent. It also alerted the magistrate that the alleged issues of non-compliance with the provisions of NCA, the MCA and MCR (which were denied by the appellant) were matters of law to be disposed of in argument.

[9] It is common cause that the bases of the magistrate's judgment are anchored in the findings he made, namely:

> "1. It is the Applicant's prerogative to choose which sub-rule he wants to rely on in Rule 49 of the Magistrates' Court Rules;
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> 2. The Applicant has made a *prima facie* case for the relief claimed;
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> 3. The Respondent has failed to deal with the allegations made by the Applicant.
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> 4. The Respondent has failed to place evidence before this Court that he has complied with the peremptory provisions in Rule 12 (5) of the Magistrates' Court Rules;
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> 4. Had there been compliance by the Respondent with Rule 12 (5), the Court would not have granted the Section 58 judgment without being satisfied that all the prescribed legal requirements have been complied with by the Respondent".

[10] The grounds upon which the appeal was noted are premised the findings of the magistrate as aforementioned, which this Court is called upon to regard as erroneous.

[11] It bears mentioning at this early stage that the appeal is not opposed and, as it was expected, neither the respondent nor her legal representative appeared in court during the hearing of the appeal.

[12] I am in agreement with *Ms Sephton*, counsel who appeared for the appellant, that the provisions of the amended Rule 12 (5) of the MCR do not find application in the present matter. In this regard she submitted that prior to 28 July 2014 MCR 4 (4) made MCR 12 (6), (6A) and (7) applicable to a request for judgment in terms of s 58 of the MCR. By interpretation, on the application of the *maxim: inclusion unius est exclusion alterius* the specific reference in MCR 4 (4) to MCRs 12 (6), (6A) and (7) must be taken to have expressly been intended by the Legislature to exclude from MCR (4) any reference to MCR 12 (5). In the result, as at 27 November 2013 only those portions of MCR 12 specifically incorporated into MCR 4 (4) applied to a request for judgment in terms of sections 57 and 58.

[13] On 28 July 2014 MCR 4 (4) was amended to read as follows:

> "Rules 12(5), (6), (6A) and (7) apply to a request for judgment in terms of sections 57 and 58 of the Act".

[14] When MCR 4 (4) was amended on 28 July 2014 the provisions of MCR 12 (5), having been amended several times up to 23 August 2010, read as follows:

> "The registrar or the clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of actin arising out of or based on an agreement governed by the National Credit Act, or Credit Agreement Act, 1980 (Act No 75 of 1980), and the court shall thereupon make such order or give such judgment as it may deem fit".

[15] The exposition of the law regarding the history of the legislative amendments to MCR 4 (4) and MCR 12 (5) that brought about the change in the manner in which a consent judgment in terms of MCA 58 may be obtained was discussed by the appeal court in the case of *MBD Securitisation (Pty) Ltd v Booi* 2015 (5) SA 450 (0) at 456-461. This case is the foundation on which the

interface between MCA 58 (1) and MCR 12 (5) is discussed in the present matter.

[16] Therefor the magistrate *erred* in finding that the appellant did not comply with MCR 12 (5) because the judgment by consent was obtained on 27 November 2013, before the amendment of the sub-rule on 4 (4) on 28 July 2014. Before 28 July 2014 there was not a legal prescription in place that an applicant for consent judgment in terms of s 58, and based on an agreement under NCA, must approach the magistrate. An applicant for a consent judgment could only approach the Clerk of the Court. It was also not imperative for such an applicant to comply with the procedural matters as alluded to by the respondent before the clerk can grant judgment by consent. Consequently, the magistrate *erred* in holding that the appellant contravened any of the procedural irregularities that were raised by the respondent. By parity of reasoning, the judgment granted by the clerk of the court was not *null* and *void ab origine.*

[17] Ineluctably, there is merit in the ground of appeal that the magistrate *erred* in finding that the respondent's reliance on MCR 49 (8) was a sufficient ground to rescind the consent judgment, and without a need to show "good cause" or "good reason" as provided in MCR 49 (1).

[18] The approach adopted by the magistrate that the applicant for rescission who seeks to set aside a judgment on the basis that it is *null* and *void ab origine* may be exonerated from complying fully with the provisions of Rule 49 (1), (2), (3) and (4) is erroneous. Such an approach was corrected in the case of *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts and Lloyds* 2007 (2) SA 1 (SCA) in the statements made therein, which read as follows:

> "[6] Put differently, 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 sub-rule 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.

> [7] Insofar as sub-rule 49 (8) may be relevant to the matter, in that it specifically refers to the rescission or variation of a judgment which is sought, *inter alia*, on the ground that it is *void ab origine* and requires the application to be served and filed within one year after the applicant first have knowledge of such voidness, this, in no way, overrides the provisions of rule 49 (3). Rule 49 (8) simply provides a different time period for the filing and service of an application for rescission of a judgment (not only a default judgment) on a certain specified grounds. In their comment upon rule 49 (8), the learned authors Erasmus and Van Loggerenberg make the point that an applicant seeking rescission of a default judgment on the grounds that the judgment in question in *void ab origine* must in terms of rule 49 (3)) set out a defence "with sufficient particularly" so as to enable the court to decide whether or not there is a valid and *bona fide* defence."

[19] In terms of MCR 49 (2) the respondent was presumed to have had knowledge of the default judgment 10 days after 27 November 2013. The respondent did not rebut that presumption. She merely set out on affidavit conclusions of law which were not supported by facts. Further, in terms of MCR 49 (8) she was supposed to serve and file an application for rescission within one year after obtaining knowledge that the judgment was vitiated by voidness, fraud or mistake. In terms of MCR 49 (1) she was supposed to show good cause or good reason why the default judgment was succeptible to being rescinded. And in terms of MCR 49 (3) she was enjoined to file an affidavit setting out the reasons for her absence or default and the grounds of her defence to the appellant's claim. However, the respondent merely alleged that the consent judgment was *void ab origine* by reason of non-compliance with the provisions of the NCA. She failed to tell when exactly she gained knowledge that the consent judgment was granted in favour of the appellant; she did not show good cause or give a reason(s) why the consent judgment should be rescinded, as well as to deal with the matters that are listed in MCR 49 (3). The allegation that the appellant had not complied with the provisions of the NCA were not sufficient and an omission of that step alone ought not to have entitled the respondent to rescission of the consent judgment.

[20] In the light of the fact that the magistrate did not declare that the emolument attachment order was unlawful the order in paragraph 2 of the judgment of the magistrate that the appellant must, in essence, refund the emoluments already drawn from the salary account of the respondent towards settlement of the loan debt would never be enforceable in law. For that reason the magistrate committed an error in making an order that was legally unenforceable.

[21] The magistrate did not give reasons for an order that the appellant should pay costs on attorney and client scale. The only inference capable to be drawn from the proceedings before the magistrate can be none other than that the cost order was made following upon the order rescinding the default judgment. However, it was not competent of the magistrate to grant a punitive costs order in the absence of substantive reasons for it. In the circumstances, the punitive cost order cannot stand.

[22] On the consideration of all the grounds of this appeal the following order shall issue:

1. **The appeal is upheld with costs.**
2. **The order granted by the magistrate on 26 October 2015 be and is hereby set aside, and is replaced with the following:**
   "The application be and is hereby dismissed with costs."

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Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

I agree:

N. P. JAJI

JUDGE OF THE HIGH COURT

Counsel for the appellant	:	Adv. S.A. Septhon
Instructed by	:	Neville Borman & Botha
		GRAHAMSTOWN.
For the Defendant	:	No appearance
		c/o Huxtable Attorneys
		GRAHAMSTOWN.