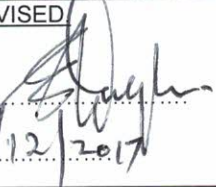


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/ <u>NO</u>
(2)	OF INTEREST TO THE JUDGES: YES/ <u>NO</u>
(3)	REVISED
Signature	
Date	<u>6/12/2017</u>

CASE NO: REV 152/2017

In the matter between:

OLD MUTUAL FINANCE (PTY) LTD

**PLAINTIFF
(JUDGMENT CREDITOR)**

and

MOTLATSO JOYCE MAKALAPETLO

**DEFENDANT
(JUDGMENT DEBTOR)**

JUDGMENT

MAKGOBA JP

- [1] A default judgment in this matter was entered by the Clerk of the Court in Polokwane Magistrates' Court on 12 November 2013. After judgment the matter was transferred to the Magistrates' Court, Morebeng, it being the district in which the judgment debtor was employed, to enable the judgment creditor to institute proceedings in terms of Section 65A(1) of the Magistrates Court Act 32 of 1944 in order to recover the judgment debt.
- [2] The Magistrate at Morebeng, Ms Raborife-Nchabeleng could not proceed with the Section 65A (1) proceedings as she, correctly so, discovered that the judgment granted in Polokwane Magistrate's Court was invalid in that it was entered by the clerk of the Court contrary to the provisions of Rule 12(5) of the Magistrates' Court Rules.

Magistrates' Court Rule 12(5) provides that –

“The registrar or clerk of Court shall refer to the Court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act, or the 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.”

It is common cause that the cause of action in the default judgment in issue arose out of, or was based on an agreement (being money lent and advanced) governed by the National Credit Act 34 of 2005.

- [3] The Magistrate, having realized that she could not set aside or vary the default judgment, *mero motu* submitted the matter to the High Court for review. At the High Court the matter came to the attention of Judge President who expressed the view that there is no procedure in the Rules of Court in terms whereby a Magistrate can *mero motu* refer a judgment or proceedings of the lower Court to the High Court for review. That the proper procedure to be followed should be in terms of Rule 53 of the Uniform Rules of Court.

[4] It would appear that our Magistrates have been following a precedent laid down in two Review Judgments emanating from the Limpopo Division of the High Court. I am indebted to Magistrate Raborife-Nchabeleng for having brought to my attention those decided cases.

[5] The first case is a judgment by Raulinga J (Vorster AJ concurring) in case number 86/2013 date 30 July 2013. In this case the Magistrate of Dzanani simply submitted fifteen default judgments to the Limpopo High Court with a request that they be reviewed and the judgment were indeed reviewed and set aside.

The second case is that of A M Alberts (Pty) Ltd t/a Progress Milling versus M S Masutha t/a Makepies Store General Dealer also emanating from the Magistrate's Court of Morebeng. The review judgment in the Limpopo High Court, Case No 02/2015 was handed down by Legodi J (with Kgomo J concurring). The learned Judge in this matter also reviewed and set aside the default judgment as submitted by the Magistrate.

- [6] Realising that there is a precedent and that our Magistrates are compelled to follow the *stare decisis* principle in their judgments, the Judge President found it prudent to constitute a Full Bench of the Limpopo Division to look into the correctness of the aforementioned decisions in the same Division.
- [7] It is against this background that a Full Bench of this Division consisting of Makgoba JP, Mokgohloa DJP and Muller J has been constituted to come up with a decision that will guide the Magistracy in matters of this nature.
- [8] This judgment will look into the following issues:
- 8.1. Whether in Civil Proceedings a Magistrate can *mero motu* send a judgment or decision to the High Court for review just like in Criminal Proceedings where the review procedure is laid down in Sections 302 up to 304 of the Criminal Procedure Act 51 of 1977.
 - 8.2. What Magistrates should do when faced with a situation where a civil judgment is null and void and needs to be set aside by the High Court.

[9] The Criminal Procedure Act 51 of 1977 in Sections 302 up to 304 provides for a procedure in relation to the review of the Magistrates' Court proceedings by the High Court. Section 302 deals with sentences subject to review in the ordinary course. This is what is usually called "automatic review".

[10] Section 304(4) provides that –

"304(4) If in any criminal case an in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional Court has imposed any sentence, it is brought to the notice of the provincial division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms section 303 or this section."

The review procedure laid down in section 304(4) is what is colloquially called "Special review". Herein the magistrate simply submits the record of the proceedings to the registrar of the high Court under a covering letter or memorandum requesting a Judge to set aside the proceedings in the Magistrate's Court.

[11] It should be pointed out that in civil proceedings there is no such a procedure as set out in sections 302 and 304 of the Criminal Procedure Act. In my view this is where the confusion arises. Our Magistrates seem to assume that the review procedure in criminal proceedings is equally applicable in civil proceedings.

[12] Section 21 of the Superior Courts Act 10 of 2013 provides for the jurisdiction of the high Court in respect of persons over whom and matters in relation to which the Court has jurisdiction. The relevant portion reads:

“21(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes of action arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –

(a) to hear and determine appeals from all Magistrates Courts within its area of jurisdiction;

(b) to review the proceedings of all such Courts.”

[13] The grounds for review of proceedings of the Magistrates' Court are set out in Section 22:

“22(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a Court of a Division are –

- (a) *absence of jurisdiction on the part of the Court;*
- (b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
- (c) *gross irregularity in the proceedings; and*
- (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

In terms of Section 22(1) (c) proceedings of any Magistrate Court may be brought under review before the high Court on the ground of gross irregularity in the proceedings. This provision is relevant to the issue before us in this matter wherein an irregular judgment from the Magistrates' Court is sought to be reviewed and set aside by this Court.

[14] It should be noted that whilst sections 21 and 22 of the Superior Courts Act provide for the powers and jurisdiction of the high Court, they do not lay down the procedure whereby the high Court would handle the review proceedings.

In this regard the Uniform Rules of Court would come into the picture. This is unlike in criminal proceedings where sections 302 to 304 of the Criminal Procedure Act, 1977 establish the right of review and the procedure thereof. In civil proceedings the relevant rules of procedure for review applications are Rule 6 and Rule 53.

[15] Uniform Rule 6(5) (a) (b) and (d) of the Rules governing the proceedings in the high Court provides that:

“(5) (a) Every application other than the one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

(b) In such notice the applicant shall.... Subject to the provisions of section 27 of the Act, set forth a day, not less than five days after service thereof on respondent, on or before which such respondent is required to notify the applicant, in writing, whether he intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.

*(d) Any person opposing the grant of the order sought in the notice of motion shall –
(i) within the time stated in the said notice, give applicant notice in writing, that he intends to oppose the application.....”*

(Underlining is mine for emphasis only)

[16] Uniform Rule 53(1) and (2) provides:

“53(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior Court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the

Court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and*
 - (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.*
- (2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.”*

[17] As I have already stated, the default judgment which is sought to be reviewed herein was granted by the clerk of the Court. Section 58A of the Magistrates' Court Act 32 of 1944 provides that any judgment by default entered in terms of this Act by the clerk of the Court, shall be deemed to be a judgment of the Court. The effect of this provision is that a magistrate is precluded from varying the judgment by the clerk of the Court and must enforce it despite its irregularity unless it is set aside by the high Court. Therefore where Rule 53 refers to a review of decisions of a magistrate, this

will include review of the judgments entered by the clerk of the Court.

- [18] The notice of motion in both Rule 6 and Rule 53 makes provisions for giving notice to the respondent, calling upon the latter to respond. Furthermore the respondent is called upon to give reasons for the decision taken and / or show cause why the decision should not be reviewed and set aside. This is in conformity with the legal principle of *audi alteram partem rule*.
- [19] The procedure adopted by our Magistrates whereby they would *mero motu* submit judgments to the high Court for review without knowledge and / or participation of the erstwhile plaintiff and defendant is clearly not in accordance with the *audi alteram partem rule*. It must be borne in mind that the judgment creditor and judgment debtor are the interested parties in the purported review proceedings. I am unable to see how the magistrate can be an interested party in the proceedings and assume the role of the applicant.

[20] The guidance this Court can give to the magistrate faced with irregular judgment like in the present case is that the irregularity should be pointed out to the interested or affected parties (plaintiff or defendant, judgment creditor or judgment debtor) and advise them that the matter is reviewable by the High Court under Rule 53.

There is no room for the magistrate to simply submit the case to the high Court for review.

[21] The alternative procedure whereby a judgment which is void *ab origine* can be set aside is an application for rescission of judgment in terms of Section 36(1) (b) of the Magistrates' Court Act, 1944 read with Rule 49 of the Magistrates' Court Rules. This application is brought in the Magistrate Court by any of the interested parties except the magistrate. I need not go further into the aspect of rescission of judgment assuming that all magistrates are conversant with the procedure.

[22] The Magistrate in bringing this matter to this Court for review submitted that this Court has inherent powers to review any matter before it wherein an irregularity is noted and it should not be left to

the judgment debtor to institute proceedings to set aside such a judgment. Whilst appreciating the learned magistrate's noble idea in this regard, we are not persuaded that this matter calls for the exercise of the High Court inherent powers.

- [23] A high Court may not use its inherent jurisdiction to create a right. It follows that a high Court can only exercise its inherent jurisdiction in relation to the regulation of its own process when confronted with a case over which it already has jurisdiction and when faced with procedures and rules of the Court which do not provide a mechanism to deal with an instant problem. A Court will, in that case, be entitled to fashion the means to deal with the problem to enable it to do justice between the parties.

**See: Oosthuizen v Road Accident Fund 2011 (6) SA 31 (SCA)
at [20].**

- [24] In *casu* there are rules of Court in the form of Rule 6 and Rule 53 which provide a mechanism to implement the provisions of sections 21 and 22 of the Superior Courts Act, 2013 and allowing the high Court to exercise its right or jurisdiction to review the

proceedings of the lower Courts. There is no need for this Court to exercise its inherent powers in this case.

- [25] It is indeed so that Courts have exercised inherent jurisdiction when justice required them to do so. However, Botha J, in **Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & Another 1979 (2) SA 457 (W) at 462H – 463B** sounded the following caution:

“I would sound a word of caution generally in regard to the exercise of the Court’s inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course.

The rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly..... I think the Court will exercise an inherent jurisdiction whenever justice requires that it should do so.... The Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.”

- [26] The legal principles laid down in this judgment should not be misconstrued to mean that the high Court cannot or should not review and set aside the judgments or proceedings of the lower

Courts. Sections 21 and 22 of the Superior Courts Act, 2013 clearly provide for such review powers. This judgment is concerned with the procedural aspects of how to implement sections 21 and 22 of the Superior Courts Act, 2013.

Parties are at liberty to bring under review by the high Court the proceedings or judgments of the lower Courts as long as the correct procedures as laid down in Rule 6 or Rule 53 are followed and complied with. In *casu* the appropriate procedure to be followed in reviewing the judgment or proceedings in the magistrate Court is Rule 53.

- [27] It is trite law that a magistrate has no jurisdiction to *suo motu* rescind a judgment entered by the clerk of the Court under section 58 of the Magistrates' Court Act. See: **Laduma Financial Services v De La Bat NO and Others 1999 (4) SA 1283 (O)**. It would appear that since the judgment in *casu* has been granted on 12 November 2013 none of the parties in that case approached the Court with an application to rescind or vary same. The result is that the judgment as granted by the clerk of the Court, albeit null

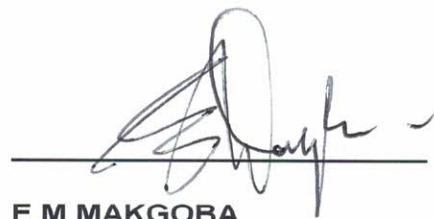
and void, stands as judgment until there is an application to the Court to rescind it.

In *Ramodike v Mokeetsi Trading Store* 1955 (2) SA 169 (T) at 171H it was stated:

“Until properly attacked and rescinded a judgment of Court of record, even if obtained by default, must stand and be presumed binding. A magistrate has no power mero motu to set aside a judgment of his Court except where there are patent errors therein....”

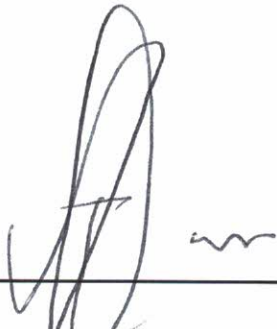
[28] In the light of what is set out in this judgment we are of the view that the precedents as established in the aforementioned judgments of Raulinga J and Legodi J are clearly wrong and should not be followed.

[29] The case before us from Morebeng Magistrate Court (Case No 52/2017) is accordingly not subject to review by this Court and is therefore struck from the roll.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

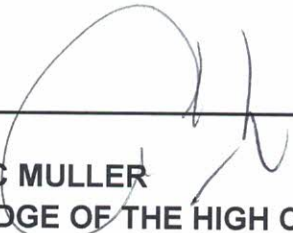
**E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

I agree



F E MOKGOHLOA
DEPUTY JUDGE PRESIDENT OF
THE HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

I agree



G C MULLER
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE