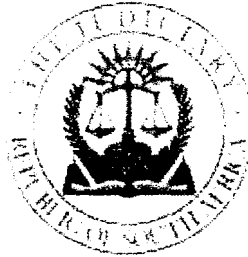


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

1/3/2017

APPEAL CASE NO: A400/2016

**NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

THELMA THANDISWA PONCANA

Appellant

and

36 WINDSOR ROAD CC

1st Respondent

SUMAIYA ABDOOL GAFAAR KHAMMISSA N.O.

2nd Respondent

YASHICA CHETTY N.O.

3rd Respondent

NARAN MAHARAJH N.O.

4th Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. A judgement sounding in money was granted against the Appellant, by default, on 24 December 2009, in the Klerksdorp Magistrate's Court.
2. An application for the rescission thereof was dismissed on 30 May 2013, by the Magistrate in Klerksdorp ("the 30 May 2013 dismissal order").
3. The Appellant then brought an application for the setting aside of the 30 May 2013 dismissal order. Such application was likewise dismissed upon 29 April 2016.
4. This is an appeal against the dismissal order granted upon 29 April 2016.
5. In the notice of motion, for the setting aside of the 30 May 2013 dismissal order, the Appellant sought the following relief, inter alia:
 - 5.1. An order setting aside the dismissal of her first rescission application on 30 May 2013; and
 - 5.2. An order setting aside the judgement sounding in money, which had been granted on 24 December 2009.
6. The Appellant failed to file the record in relation to her initial application for the rescission of the default judgement granted on 24 December 2009. As a result of this failure, it would not be competent for us to grant an order setting aside the said judgement. Mr Hollander, who appeared for the Appellant, abandoned such relief. In the result, the Appellant merely sought an order setting aside the dismissal of her first rescission application on 30 May 2013.
7. In argument, counsel for both the Appellant and the First Respondent were in agreement that in the event of the appeal being upheld for the limited relief now sought, the effect thereof would be the mere setting aside of the dismissal of the First Rescission Application, which would serve to resuscitate such rescission application, so as to enable the parties to set same down for argument in the court below.

8. In order to gain a full understanding of the subject matter of this appeal, regard must be had to the following background:

8.1. On 24 December 2009, judgment for a claim sounding in money was granted by the court below, by default against the Appellant (whose attorneys had failed to file an appearance to defend). Such default judgement was granted in favour of the First Respondent, a close corporation which was subsequently placed under provisional liquidation. Subsequently, the Second to Fourth Respondents were appointed in their respective capacities as the joint liquidators of the First Respondent, and effectively replaced the First Respondent, by way of substitution orders. On 17 September 2015, the provisional winding up order in respect of the First Respondent was discharged, which served to resuscitate the First Respondent and the Second to Fourth Respondents were discharged as the provisional liquidators of the First. As such, the Second to Fourth Respondents no longer have any interest in this appeal;

8.2. The First Respondent, had sold an immovable property to the Appellant for the purchase consideration of R2 000 000.00, in terms of an agreement of sale signed between the parties;

8.3. In terms of paragraph 18 of the agreement of sale, the purchaser was to *"take registration of the property within six months of acceptance of this offer to purchase and a deposit to be paid within six months of acceptance of offer..."* Such clause amplified clause 2(a) of the agreement, which provided for a deposit of R800 000.00. The said clause 18 also set out a list of items in relation to the property, which were to be provided by, or attended to by the seller, being the First Respondent;

8.4. Transfer was passed into the name of the Appellant and a first mortgage bond was registered by her over the property in favour of ABSA Bank;

8.5. Subsequent to the signature of the agreement of sale, an Acknowledgement of Debt was signed by the Appellant, in favour of the First Respondent, the material terms of which were:

- 8.5.1. The Appellant acknowledged herself to be truly and lawfully indebted to the First Respondent in the amount of R830 645.86, being in respect of the balance of the purchase price and transfer and bond registration costs for the property known and described as Erf [...] Wilkoppies Extension 49 Township, which the Appellant had purchased from the First Respondent in the amount of R2 000 000.00;
- 8.5.2. The Appellant undertook and promised to pay the aforesaid amount in consecutive monthly instalments of R100 000.00 each, commencing upon 01 November 2009, for eight successive months, with a final instalment of R30 645.89 on 01 July 2010;
- 8.5.3. The Appellant undertook to pay Jassett Mitchell Inc Attorneys the costs for the drawing of the acknowledgement of debt;
- 8.5.4. In the event of legal action being instituted for the recovery of any monies payable in terms of the acknowledgement of debt, the Appellant consented to pay costs on an attorney / client scale;
- 8.5.5. The acknowledgement constituted the whole agreement between the parties and no representations or warranties not contained therein would be of any force or effect, unless in writing and signed by both parties;
- 8.6. The Appellant failed to effect any payments under the acknowledgement of debt;
- 8.7. On the Appellant's version, its failure to effect payment was occasioned by the First Respondent's failure to undertake the repairs to the property per clause 18 of the agreement of sale;
- 8.8. Arising out of the failure to pay, the Appellant was sued and judgment was

granted by default, as aforesaid, in respect of such claim on 24 December 2009;

- 8.9. On or about 14 April 2010, the Appellant launched her first application in the court below, for the rescission of the said judgment, which application could not be enrolled immediately, as soon after the launching thereof, the First Respondent was placed under provisional liquidation;
- 8.10. At a time after the Second to Fourth Respondents were substituted for the First, in their respective capacities as the joint liquidators of the First Respondent, they enrolled the Appellant's first rescission application for hearing upon 26 April 2013, upon which date such application was postponed until 30 May 2013;
- 8.11. Whilst the Appellant had not received notification of the enrolment for 26 April 2013, a Notice of Set Down for the hearing on 30 May 2013 was delivered to the Appellant's then Attorneys of Record, being her correspondent attorney in Klerksdorp, Kennedy Kgomongwe;
- 8.12. Such attorneys failed to communicate the enrolment of the application for 30 May 2013 to the Appellant's Johannesburg attorneys, in consequence of which the Appellant had no knowledge of the hearing on 30 May 2013 and there was no appearance on her behalf. On that day - 30 May 2013, the Appellant's first Application for Rescission of the 24 December 2009 judgement was dismissed with costs, in the absence of the Appellant;
- 8.13. The Appellant first became aware of the dismissal of her first application for the rescission of the default judgment, when the sheriff attended at her home on 22 September 2015, to attach her assets;
- 8.14. Within the twenty day time period provided for in Rule 49(1) of the Magistrate's Court rules, the Appellant launched her second rescission application in which she sought:
 - 8.14.1. the setting aside of the dismissal of her first rescission application; and

8.14.2. an order for the rescission of the default judgement granted in favour of the First Respondent on 24 December 2009;

8.15. In the second rescission application, both parties were represented and such application was dismissed by the Magistrate upon 29 April 2016. It is the dismissal of the latter application which now forms the subject matter of this Appeal, but as set out above, only in relation to relief sought for the setting aside of the dismissal of her first rescission application and not for the relief sought for the granting of the rescission of the default judgement granted in favour of the First Respondent on 24 December 2009, which Mr Hollander correctly abandoned;

8.16. In the result, the sole issue forming the subject matter of this appeal is whether or not the second application for rescission was correctly dismissed by the Magistrate in the court below, on 26 April 2016.

9. The First Respondent filed a notice of objection to this appeal being heard, together with an application which it enrolled to be heard at the commencement of this appeal, in which it sought an order for:

9.1. The striking of this appeal from the roll;

9.2. The upholding of its objection to this appeal being heard; for want of filing of security for the due performance of the judgement, as ordered by the court below, on 05 July 2016. The latter order was granted by the court below, pursuant to an application launched by the First Respondent, in terms of Section 78 of the Magistrate's Court Act 32 of 1944, as amended ("the Act"), and notwithstanding the order, security for the satisfaction of the 24 December 2009 judgement had not been filed by the Appellant.

10. In response to the First Respondent's said application, Mr Hollander correctly argued that the effect of the order of 05 July 2016, was such that the execution of the judgement granted by default on 24 December 2009 would be suspended, pending the filing of

security within the time period provided for in such order. Mr Hollander's submission to the effect that such order did not serve to suspend the appeal is correct. Thus we can find no basis for the First Respondent's objection to the appeal proceeding, or for the appeal to have been struck from the roll.

11. The Appellant's heads of argument were filed a day or two before the hearing of this appeal, and were accompanied by a formal application, on notice of motion, for the condonation of the late filing of such heads. Such application was predicated upon attorney error on the part of the attorneys representing the Appellant. In the interests of justice, we condoned the late filing of such heads and conversely condoned the handing up of the First Respondent's supplementary heads of argument.

12. Mr Pretorius, who appeared for the First Respondent, contended that the Magistrate was correct in dismissing the second rescission and argued that the court below was *functus officio* upon the dismissal of the first rescission application and that the correct remedy would have been the noting of an appeal or review against such order, as opposed to the launching of the second rescission application.

13. In response to such submission, and placing reliance upon the judgement of Jafta J (as he then was), in Mutebwa v Mutebwa 2001 (2) SA 193 (TkH), Mr Hollander correctly contended that rescission of judgements in the Magistrate's Court could be brought either under common law, alternatively in terms of Section 36 of the Act, as read with Rule 49 and did not need to specify the section of the Act or rule number under which the rescission was brought. In accordance with Section 36(1)(a) of the Act, the Magistrate's Court may *suo moto*, rescind or vary any judgement granted by it, in the absence of the person against whom that judgement was granted.

14. Given that the first rescission application had been dismissed by the court below, in the absence of the Appellant, who had not been advised of the set down by her own local correspondent attorney, we find that the second application for rescission of such order was competently brought in accordance with Section 36(1)(a) of the Act, inasmuch as the first order had been granted by default, without the Appellant having had knowledge of such rescission application proceedings.

15. Mr Pretorius raised in his heads of argument, that the dismissal of both the first and second rescission applications, were sterile inasmuch as the Appellant's right to pursue the first rescission application had lapsed by operation of Section 75 (1) of the Insolvency Act 24 of 1976, which reads:

75 *Legal proceedings against estate*

(1) Any civil legal proceedings instituted against a debtor before the sequestration of this estate, shall lapse upon the expiration of a period of three weeks, as from the date of the first meeting of the creditors of that estate, unless the person who instituted those proceedings gave notice, within that period, to the trustee of that estate, or if no trustee has been appointed, to the Master, that he intends to continue those proceedings, and after the expiration of a period of three weeks as from the date of such notice, prosecutes those proceedings with reasonable expedition: Provided that the court in which the proceedings are pending, may permit the said person (on such conditions as it may think fit to impose) to continue those proceedings, even though he failed to give such notice within the said period, if it finds that there was a reasonable excuse for such failure.

16. Mr Hollander correctly raised in response that Section 75 of the Insolvency Act was of no application to the First Respondent, being a close corporation. Such argument was predicated upon the definition of "debtor" in section 2 of the insolvency act, which means:

'a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the Jaw relating to companies'.

17. Moreover, the First Respondent was never the debtor of the Appellant as envisaged in terms of section 75(1) of the Insolvency Act, with the result that this point falls by the wayside.

18. The usual principles applicable to the granting of a rescission of judgement

application are twofold. Firstly, the Appellant must prove that she was not in wilful default and secondly that she is vested with a valid and *bona fide* defence.

19. In dismissing the Appellant's second rescission application, the learned Magistrate correctly noted that the Appellant's non-appearance on 30 May 2013 was attributable to fault on the part of her local correspondent attorneys, who had received a Notice of Set Down, but had failed to communicate such set down to the Appellant or to their instructing attorneys.

20. It must thus be accepted, as a *fait accompli*, that the Appellant was not aware of the set down in respect of the first rescission application, which had been enrolled by the First Respondent. As a result, there was no appearance for the Appellant at the first rescission application, which was dismissed at the instance of the First Respondent, absent the Appellant.

21. The question which begs to be asked is: was such non-appearance on the part of the Appellant, in circumstances where she had no knowledge of the hearing, tantamount to wilful default on her part? More aptly, can the First Respondent be visited with the prejudice occasioned by the failure on the part of the Appellant's local correspondent to have communicated the set down to the Appellant or her instructing attorney?

22. I agree with the learned Magistrate that even if the Appellant had not been notified of the set down by her attorneys, there ought to have been some duty which rested upon her shoulders, to follow up on the process given and instructions conveyed to her attorneys, over a period of several years.

23. The Appellant sat back in blissful ignorance, having taken transfer of the property (with knowledge of the non-payment by her of the R830 000.00), without offering any explanation as to what steps were taken by her in following up the process with her attorneys of record, over a very lengthy period of time. Against this, it is clear that the entire process had been derailed by the provisional liquidation of the First Respondent, the appointment of the Second to Fourth Respondents as liquidators of the First, their substitution of the First Respondent by way of several court applications and the setting aside of such provisional order. It is thus not correct to lay too much blame upon the

Appellant, given that these were circumstances which were not of her making.

24. In the judgement of Trengrove AJA, with Wessels JA, Rabie JA, Muller JA and Corbett JA concurring in the case of De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A), similar circumstances arose. In summary, in that matter, the attorney for three of the plaintiffs withdrew shortly before the trial, but in contravention of Rule 16(4) of the High Court Rules, failed to notify his erstwhile clients of his withdrawal as their attorney of record. The notice of withdrawal had been served upon the opponent and filed, without coming to the attention of the plaintiffs. In the result, the plaintiffs were unrepresented at the trial before Van Reenen J, on 16 August 1976, who at the request of the defendant's counsel dismissed their claims by virtue of such non-appearance and granted judgement against them for the counterclaims.

25. In the judgement Trengrove AJA recorded: *"Having regard to all of the relevant facts and circumstances, I am of the view that, on common law principles, this court would not be justified in exercising its discretion in favour of granting the appellants the relief sought. They are, as Melamet J correctly remarked at 780G: 'the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct'."*

26. Whilst following the rationale of Trengrove AJA in *De Wet supra*, it does not seem appropriate for the First Respondent in the case *in casu* to be visited with the prejudice occasioned by the negligence of the Appellant's local attorney in failing to have communicated the set down or appear at the first rescission hearing, one must be mindful of the approach of Moseneke J (as he then was) in Harris v ABSA Bank Limited trading as Volkskas 2006 (4) SA 527 (T), paragraphs 8 and 9, where the learned judge said: *"Before an applicant in a rescission of judgement application can be said to be in wilful default, he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to refrain from filing a notice to defend or a plea, or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown, the applicant is barred; that he or she is then*

never entitled to relief byway of rescission as he or she has acquiesced. The court's discretion in deciding whether sufficient cause has been established must not be unduly restricted."

27. Similarly, in Maujean trading as Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 {C}, at 803 H to I, King J described the act of wilfulness as follows: *"More specifically in the context of default judgement, wilful connotes deliberateness in the sense of knowledge of the action and its consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be."*

28. Viewed in the context of both *Harris* and *Maujean supra*, we find that the Appellant was not in wilful default, in circumstances where the non-appearance at the first rescission hearing was solely attributable to the failure of her attorney to have communicated the set down to her. She had no knowledge of the hearing on that day and was not in wilful default of appearing.

29. Having overcome the hurdle of wilful default the question begs to be asked whether it is necessary to engage the second leg of the enquiry as to whether or not the Appellant is vested with a valid and *bona fide* defence. Given that the effect of this appeal, if upheld, would merely serve to set aside the dismissal of the first rescission application, which in turn would resuscitate such application for enrolment and hearing in the court below, it would be incumbent upon the Appellant to argue that application in the court below and as part of such process, to prove that she is vested with a valid and *bona fide* defence. It is thus not strictly necessary for us to determine whether or not a valid and *bona fide* defence exists, and we are not able to make such determination, absent the record in relation to the first application for rescission. We do not have the benefit of the summons, the particulars of claim, or the papers for the first rescission application before us, rendering the task of determining the presence of a valid and *bona fide* defence, impossible.

30. It would be the function of the court below to determine at the hearing of the first rescission application, whether or not the Appellant has made out a valid and *bona fide* defence, on those papers, which we have not had sight of, and if so, to grant the

rescission of the default judgement order of 24 December 2009, which we are no longer required to do, in the light of Mr Hollander's abandonment of such relief.

31. Mr Hollander argued that the acknowledgement of debt constitutes a credit agreement in terms of Section 8(4)(f) of the NCA and that the First Respondent had not complied with the provisions of Sections 129 and 130 of the NCA, which omission would give rise to a valid and *bona fide* defence.

32. The First Respondent denied the applicability of the NCA, and it appears to be common cause that notices under Sections 129 and 130 were not dispatched.

33. On the face of it, and in isolation, the acknowledgement of debt meets with the criteria set out in-Section 8(4)(f) of the NCA, the effect of which section would render the acknowledgement of debt to be an agreement as contemplated in the NCA, as the document serves to defer payment and embodies a provision for payment of fees.

34. Mr Hollander based his argument upon the judgement of Van Der Byl AJ, in the case of Carter Trading (Pty) Ltd v Blignaut 2010 (2) SA 46 (ECP). In the latter case, summary judgement was sought under Rule 32, where the plaintiff contended that the defendant had signed an acknowledgment of debt on 23 December 2008, for payment to the plaintiff in an amount of R107 082.30, to be paid in full by 16h00 on 24 December 2008, being the date immediately after the date on which the acknowledgement was signed. In opposition to the summary judgement, the defendant raised that the acknowledgement was a credit agreement in terms of Section 8(4)(f) of the NCA and that there had been non-compliance with Sections 129 and 130 of the NCA. Van Der Byl AJ ruled that the acknowledgement did constitute a credit agreement within the meaning of Section 8(4)(f) of the NCA, inasmuch as payment was deferred, and the document rendered the defendant liable for the cost of negotiating and preparing the acknowledgement.

35. Against Mr Hollander's aforementioned submissions, Mr Pretorius placed reliance upon Ribeiro and another v Slipknot Investments 77 (Pty) Ltd 2011 (1) SA 575 (SCA) and Grainco (Pty) Ltd v Broodryk 2012 (4) SA 517 (FB) in arguing that an acknowledgment of debt would not fall under the NCA, if the underlying cause of action

giving rise to the subsequent acknowledgement of debt was not subject to the NCA. In further support of such submission, Mr Pretorius referred us to the article by Hess entitled "*Acknowledgement of Debt and the NGA*", published in De Rebus Volume 3, August 2012, in which the view was expressed that in the event of a debtor already being liable in terms of a cause of action, which is not subject to the NGA, in respect of an acknowledgement of debt, merely confirming such existing obligation, such debtor is not a 'consumer' as defined in the NCA.

36. These are considerations which must ultimately be weighed up, with the benefit of the record in relation to the first rescission application and will fall to be determined by the presiding magistrate when the first rescission application is ultimately argued. It would be wrongful for us to make findings and thereby circumscribe the issues, absent the full record of all the proceedings.

37. Whilst we do not find that the Appellant has established a valid and *bona fide* defence, she may be able to establish such defence, in the presentation of her argument for her first rescission application. To deny her an opportunity to advance a case, would be to bring about an injustice, particularly given that the initial judgement was granted by default, without the Appellant's evidence having been raised or heard.

38. Accordingly, we make the following order:

38.1. The First Respondent's application for the striking of the appeal from the roll, is dismissed.

38.2. The late filing of the Appellants heads of argument is condoned.

38.3. The Appeal is upheld and the order of the magistrate is replaced with the following:

"The default order granted in favour of the First Respondent on 30 May 2013, in terms of which the Appellant's application for rescission launched on 14 April 2010 was dismissed with costs, is hereby set aside."

38.4. The costs of the appeal are to be costs in the First Rescission Application.

NOCHUMSOHN, G
ACTING JUDGE OF THE HIGH COURT

I AGREE

MOLOPA-SETHOSA, LM
JUDGE OF THE HIGH COURT

On behalf of Applicant:

Advocate L Hollander

Instructed by:

Mathopo Attorneys

On behalf of the First Respondent:

Advocate JJ Pretorius

Instructed by:

Theron Jordaan and Smit Inc

Date of Hearing:

01 December 2016

Date of Judgment: