FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A263/2014

In the matter between:-

MBD SECURITISATION (PTY) LTD Applicant

and

NTHOMBI FIKILE BOOI Respondent

CORAM: DAFFUE, J *et* WILLIAMS, AJ

JUDGMENT BY: DAFFUE, J

HEARD ON: 1 JUNE 2015

DELIVERED ON: 2 JULY 2015

I INTRODUCTION

[1] This is an appeal which has to be adjudicated by judges of the Free State High Court in Bloemfontein. The judgment of a magistrate in Hennenman, a small Free State town some 180 km to the north of Bloemfontein, is the subject of the appeal. The appellant and plaintiff in the court *a quo,* is a company with its head and/or registered office apparently in Johannesburg. It appears from the papers that appellant's

address is [………], Hyde Park, Johannesburg, Gauteng. The respondent, and defendant in the court *a quo,* is resident and employed in the small town of Alice close to East London in the Eastern Cape, approximately 620 km to the southeast of Bloemfontein and some 800 km from Hennenman. The cause of action, whatever it may, did not arise in Hennenman or the Free State Province for that matter. There is no indication in the papers where it has arisen, if at all. More details of the extraordinary facts will be recorded later.

II THE PARTIES

[2] The appellant is MBD Securitisation (Pty) Ltd. Nothing more is known of this company, save that it has a Johannesburg address and that its company's secretary, Me Jennifer Williams signed a special power of attorney in Johannesburg to nominate attorneys to act on its behalf in this appeal. Adv A R G Mundell SC argued the appeal on its behalf.

[3] Respondent is Me Nthombi Fikile Booi, a […….] year old female employed by the Department of Health in Alice, Eastern Cape and also resident in Alice as mentioned above. Adv C D Pienaar argued the appeal on her behalf.

III THE ORDER OF THE COURT *A QUO*

[4] On 28 August 2014 the magistrate of Hennenman made the following orders:

"1. That the judgment granted on 20 February 2012 under case number 582/2011 by the clerk of the court be and is hereby rescinded; and

2. Declaring that all benefit derived from the judgment granted by the clerk of the court under case number 582/2011 on 20 February 2012 be *void ab initio* and that restitution take place; and

3. Costs of this application on a scale as between attorney and client."

[5] Respondent in this appeal was the applicant in the court *a quo*, but for purposes of clarity the parties will be referred to as in this court. Appellant did not file an opposing affidavit in the court *a quo. Ex facie* the appeal record appellant's representative asked for a postponement on 28 August 2014 which was declined by the court *a quo* whereupon the matter was heard by that court without the advantage of any argument on behalf of appellant. Judgment was apparently granted by default. I shall return to this issue hereinlater.

IV **GROUNDS OF APPEAL**

[6] Appellant relies on the following five grounds of appeal:

"4. The learned magistrate erred in law in finding that the clerk of the court was not, in terms of the provisions of the Magistrates Court Rule 12(5), authorised to grant the relevant judgment by consent;

5. The learned magistrate erred in law in finding that the appellant had not complied with the relevant Magistrate's Court Rules in obtaining the judgment by default;

6. The learned magistrate erred in law in finding that, in applying for judgment, the appellant had contravened the provisions of section 90(2)(k)(vi)(bb) of the National Credit Act, 2005;
7. The learned magistrate erred in law in granting an order which, in effect, set aside the emoluments attachment order that had been awarded in appellant's favour;
8. The learned magistrate erred in law in granting costs in favour of the applicant on the scale as between attorney and client."

V **THE MATERIAL FACTS**

[7] In order to follow the evaluation of the evidence and legal submissions it is necessary to set out the unbelievably peculiar circumstances which culminated in the judgment of the court *a quo*.

[8] Respondent does not recall ever entering into an agreement with appellant and the amount claimed is unknown to her. Let it be known at this stage already that her belief is justified as it is not appellant's case that a contractual relationship exists or existed between them. The origin of the debt is also unknown to her and it was never explained to her. According to her an agent representing appellant approached her at her place of employment and explained to her that she was indebted to appellant in the amount of R4 854,14. She never received a statement of account in this regard. She does not deny signing documents presented to her, but mentions that she was embarrassed when approached at work and just responded by signing the documents presented for signature.

[9] The documents that respondent refers to in her application for rescission of judgment in the court *a quo* are probably the notice in terms of s 129(1) of the National Credit Act, 34 of 2005 ("the NCA") which incorporated a letter of demand in terms of sections 56 and 58 of the Magistrates' Court Act, 32 of 1944 ("the Act") and the consent in terms of sections 45, 58 and 65J of the Act which documents are dated 25 May 2011. The consent bears the signatures of two witnesses, one being Thinus Nel and the other Tania Nel, both of East Londen, but with different addresses. These two documents were presented to the court *a quo* with the request for judgment by consent.

[10] *Ex facie* the notice in terms of s 129(1), incorporating the letter of demand, appellant demanded payment of the amount of R4 854.14, being the amount outstanding to it as creditor in respect of goods sold and delivered. In signing the consent respondent confirmed receipt of a letter in terms of s 129(1), acknowledged that the amount of R4 854,14 was due and payable and accepted liability to appellant for the debt, the costs of the letter of demand, further costs on an attorney and client scale in the amount of R2 452.92 plus 10% collection commission on all payments received and 14% VAT thereon. There is no indication in either of these documents that the appellant acted as cessionary of book debts; to the contrary the documents are indicative of a claim by appellant as creditor and the letter of demand specifically refers to the cause of action as goods sold and delivered to respondent.

[11] As indicated the consent referred to embodies consent to the issue of an emoluments attachment order in the Hennenman magistrates' court in terms of s 65J. Respondent also explicitly consented in terms of s 45 to jurisdiction of that court in respect of the proceedings about to be instituted against her. The typed document contains the names, Kempton Park and Nelspruit. These were deleted and the word "Hennenman" was inserted in pen. Respondent did not initial or sign at the amendment. It was never disclosed on whose initiative the Hennenman magistrates' court was elected as the appropriate court and for what reason. It could never be the more convenient court to deal with the matter in so far as appellant is from Johannesburg and its attorney who initiated the debt collection process is from Nelspruit, probably about 600 km from Hennenman.

[12] Some four and a half months after signature of the aforesaid documents appellant's attorney, Mr Gerhard van der Merwe of Nelspruit in Mpumalanga, prepared and signed a request for judgment in accordance with the provisions of s 58 of the Act. Mr Van der Merwe instructed Badenhorst Attorneys of Henneman as his local correspondents in the matter. The request of judgment was accompanied by the notice in terms s 129(1) incorporating the letter of demand, the consent referred to above as well as two affidavits by one Renay Laura Greaver, a candidate attorney employed by Mr Van der Merwe. In the first affidavit the candidate attorney confirmed under oath that sections 129 and 130 of the NCA had been complied with, an aspect which I shall consider

again later. In the second affidavit she makes astonishing hearsay statements, alleging that appellant, *"... has purchased a number of debtors' books from various companies. During the transfer of the portfolio, the physical file was not supplied to the applicant (the appellant in this matter). All attempts to obtain the documentation have been unsuccessful and I therefore submit that the original agreement as well as a copy cannot be obtained as proof of the agreement."*

[13] On 13 October 2011 an unidentified person signed the request for judgment prepared by Mr Van der Merwe as if he was the magistrate of the Hennenman magistrates' court. In terms hereof judgment was granted in favour of appellant in the amount of R4 854.14 plus interest at the rate of 15,5% per annum from date of judgment to final payment, together with costs in the amount of R2 452.92 and sheriff's fees to be added. It must be mentioned in this regard that in the consent to judgment respondent also consented to an order in terms whereof the judgment debt shall be paid in instalments of R300.00 per month and the order of 13 October 2011 also stipulates that the judgment debt shall be paid in instalments of R300.00 per month, to be paid on or before the 7th day of the month following service of an emolument attachment order granted pursuant to the judgment by consent.

[14] On 20 February 2012 an emolument attachment order was issued by the Hennenman clerk of the court at the written request of Mr Van der Merwe dated as far back as 11 October 2011.

[15] As late as 2 June 2014 respondent consulted with attorneys in East Londen, Messrs Tinto, Du Plessis and Associates. This firm of attorneys contacted Mr Van der Merwe's firm in Nelspruit and eventually obtained various documents as requested in order for them to advise their client. On 7 July 2014 an application in terms of Magistrates' Court rule 49(8) was issued. The relief claimed in the notice of application was eventually granted by the court *a quo* on 28 August 2014 as stated above. As mentioned, appellant did not file an answering affidavit and did not present any argument in support of any opposition. The application was enrolled for hearing on 31 July 2014 on which date it was postponed by agreement for a week. On 7 August 2014 it was again postponed for three weeks to 28 August 2014 on which date the court *a quo* refused to postpone the matter a third time where after it granted judgment in favour of respondent.

VI APPEALABILITY OF THE ORDER OF THE COURT *A QUO*

[16] In order to be appealable, an order must be final in effect and not susceptible to alteration, or put otherwise, it must be definitive of the rights of the parties. See **Zweni v Minister of Law and Order** 1993 (1) SA 523 (A) at 532I – 533B.

[17] The Supreme Court of Appeal has recently reconsidered **Zweni** *loc cit* and indicated that the requirements stated in that judgment were neither cast in stone, nor exhaustive. See **Absa Bank v Mkhize** 2014 (5) SA 16 (SCA) at para [17]. In order to determine whether an order is final, one

must have regard not to its form only, but predominantly to its effect, or put otherwise, an order irreparably anticipates or precludes some of the relief claimed which would or might be given at the hearing, will be appealable. See **Jacobs v Baumann NO** 2009 (5) SA 432 (SCA) para [9]. See also **NDPP v King** 2010 (2) SACR 146 (SCA) at para [42].

[18] In **Pitelli v Everton Gardens Projects** 2010 (5) SA 171 (SCA) the Supreme Court of Appeal found at para [27] as follows:

> "[27] An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the Court that granted it, and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under Rule 42(1)(a) and if it is not covered by that rule, as Van der Merwe, J correctly found, it is any event capable of be rescinded under the common law." (emphasis added.)

[19] The Supreme Court of Appeal furthermore held at para [31]:

> "It seems to me that the appealability of an order must be dependent on the nature of the order and not upon what the litigant chooses to make of it. An order made by default is by its nature

> not final in its effect because it is capable of being revisited, albeit that condonation might be required for the delay. It is true that once rescission has been refused, and an appeal against that order has been dismissed, the order is then not capable of being revisited. But that order of the Court of Appeal brings the proceedings as a whole to an end and it is not then open to a litigant to return to an order that was made midway in proceedings."

In **Pitelli** *loc cit* the court of first instance refused an application for postponement where after the appellant's counsel withdrew on the basis that he had no instructions to pursue the matter. The Supreme Court of Appeal held that the subsequent order granted by the court of first instance was a default order which was susceptible to rescission and not appealable. See also **Sparks v David Polliack and Co (Pty) Ltd** 1963 (2) SA 491 (T), a not too dissimilar matter where the defendant also applied for a postponement of the trial and when that was refused, his attorney withdrew and judgment was entered against defendant.

[20] In *casu* Mr Badenhorst on behalf of the appellant asked for a further postponement on 28 august 2014 which was not granted whereupon the court *a quo* granted judgment by default. It is not apparent from the record whether Mr Badenhorst remained present until the orders were granted, but it is evident from the court *a quo's* notes that no submissions by Mr Badenhorst were recorded. However Mr Badenhorst had no reason to remain present.

[21] I am of the view that appellant has not convinced us at all that the court *a quo's* judgment is appealable. The

authorities quoted above indicate clearly to the contrary. The judgment was thus granted by default. Appellant would be entitled to apply for rescission of the judgment of the court *a quo* and whether or not he would be successful is not to be considered at this stage. Obviously bearing in mind the delay, an application for condonation should be filed as well.

[22] Mr Pienaar has also argued that the judgment is on a further basis not appealable, it being the rescission of an emoluments attachment order granted on 20 February 2012 and not the judgment by consent granted on 13 October 2011. He argued that insofar as the emoluments attachment order was set aside, it did not have the effect that the proceedings of the court *a quo* were complete and that that court was not capable of revisiting the order. Mr Pienaar conceded that a cursory reading of the application leaves one with no doubt that respondent intended to have the consent judgment set aside. Mr Mundell conceded in this regard that it would be the better approach to arrange with the court *a quo* to amend its orders. He also conceded that the court *a quo* (or the clerk of the court) did not have jurisdiction to issue an emoluments attachment order. Notwithstanding respondent's consent it could only be issued out of the court where the debtor is employed.

VII <u>LEGISLATION AND RELEVANT AUTHORITIES</u>

[23] In so far as I may have erred in coming to the conclusion that the judgment of the court *a quo* is not appealable, I deem it appropriate to consider the following relevant legislation and

authorities where after I shall evaluate the facts and legal submissions by the parties under the next heading.

[24] Section 58(1) of the Act reads as follows:

> "The clerk of the court shall enter judgment in favour of the plaintiff if the written request for judgment is accompanied by the letter of demand, if there is one, and the defendant's written consent to judgment."

[25] Magistrate's Court Rule (MCR) 4(3) reads as follows:

> "A consent to judgment in terms of Section 58 of the Act shall be signed by the debtor and by two witnesses whose names shall be stated in full and whose addresses and telephone numbers shall also be recorded."

Subrule 4(4), prior to its amendment on 28 July 2014, read as follows:

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

[26] MCR 12(5) was amended several times, the last amendment being made on 23 August 2010 and it reads now 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 action arising out of or based on an agreement governed by the National Credit Act, or Credit Agreements Act, 1980 (Act No 75 of 1980), and the court shall thereupon make such order or give such judgment as it may deem fit."

There can be no doubt that the legislature had in mind with MCR 12(5) and its predecessors to ensure that the oversight function of the court in respect of credit agreements was established in order to protect consumers.

[27] On 27 June 2014 MCR 4(4) was amended by the inclusion therein of an express reference to MCR 12(5). The amendment came into operation on 28 July 2014 and after the judgment by consent was granted in the court *a quo,* but before the judgment of the court *a quo* appealed against.

[28] As correctly conceded by appellant's counsel there can be no debate following the amendment of 28 July 2014 and the incorporation into MCR 4(4) of a reference to MCR 12(5) that the clerk of the court is not entitled to grant judgments by consent which are based on a cause of action arising from the National Credit Act ("the NCA"). The clerk of the court is now obliged to refer the request for judgment in terms of the NCA to a magistrate for determination.

[29] MCR 12 deals with judgments by default which follow on service on the defendant of a summons claiming relief and a consequent judgment entered or given in the absence of the party against whom it is made. A consent judgment in terms of MCR 4 is not a default judgment within the meaning and definition of default judgment. Consequently consent to judgment in terms of s 58 of the Act does not fall within the ambit of MCR 12. Only those portions of MCR 12 which are specifically incorporated into MCR 4(4) apply to a request for

judgment by consent and as indicated above, that excluded MCR 12(5) previously. If the applicable section and the rules are properly interpreted, it appears that the clerk of the court had the necessary authority to grant judgments by consent prior to 28 July 2014 even in the event of a claim founded on a cause of action governed by the NCA. I shall deal with this aspect in the submissions of the parties herein later again.

[30] The next issue turns around the jurisdiction of the Hennenman Magistrate's Court. The provisions of the Act as well as the NCA must be considered and I refer to s 45 of the Act and sections 90(2)(k)(vi)(bb) and 91(a) of the NCA. In terms of s 90(2)(k)(vi)(bb) a provision in a credit agreement is unlawful if it contains a consent to jurisdiction of "any court seated outside the jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept." Section 91(a) extends the above prohibition to supplementary agreements. See also s 95 of the NCA read with s 91(a). A credit provider is prohibited in terms of s 91(a) to directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in the credit agreement. See also s 95 of the NCA relating to deferral of amounts due under an existing credit agreement.

[31] There is no doubt that the Hennenman Magistrate's Court never had any jurisdiction over the person of respondent in accordance with s 28 of the Act. She is not resident or

employed in that district and was never resident or employed there. Section 29 of the Act does not apply as the whole cause of action did not arise in the Hennenman Magistrate's Court.

[32] Section 45(1) contains the following proviso "Provided that no court other than a court having jurisdiction under section 28 shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in such matter". (Emphasis added)

Section 45(2) of the Act reads as follows:

> "Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to sub-section (1), shall be null and void." (Emphasis added)

[33] Section 90(2)(k)(vi)(bb) precludes a credit agreement as defined in the NCA from including a consent by a consumer to the jurisdiction of a court seated outside the area of jurisdiction in which the customer resides or works or where the goods in question, if any, are ordinarily kept.

[34] There can be no doubt that both the Act and the NCA prohibit a provision in a contract embodying consent to jurisdiction to a specific district by one of the parties. The proviso to section 45(1) appears to provide for an exception to the common law principles and those contained in the Act as well as the NCA. It should be scrutinised carefully. I am

of the view that the interpretation of statutes as recently summarised by Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality**, 2012 (4) SA 593 (SCA) must be considered and I quote the following passages:

> "[18] ……Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appear; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

> "[19] …. from the outset one considers the context and the language together, with neither pre-dominating over the other. This is the approach that courts in South Africa should now follow, …"

> "[25] …. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning

suggested by apparently plain language would lead to a glaring absurdity, the court will ascribe a meaning to the language that avoids absurdity. This is said to involve a departure from the plain meaning of the words used."

"[26] … In resolving the problem, the <u>apparent purpose</u> of the provision and the <u>context</u> in which it occurs will be <u>important guides to the correct interpretation</u>. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

(emphasis added)

…. "

[35] Even if it might be found that respondent validly consented to the jurisdiction of the Hennenman Magistrate's Court in *casu*, such consent could only have been in respect of the institution of proceedings in that court, i.e. the issuing of summons until judgment is granted or the request for judgment by consent . Section 65J of the Act is clear. It provides that only the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or if the judgment debtor is employed by the State in which the judgment debtor is employed, has jurisdiction to issue and emoluments attachment order. Therefore even if judgment could have been granted in terms of the consent to jurisdiction by the Henneman Magistrate's Court, the judgment creditor was duty-bound to obtain an extract from the Hennenman Magistrate's Court judgment and refer the matter to the Alice Magistrate's Court for the emoluments attachment order to be issued there.

[36] I have quoted the proviso to s 45 of the Act above. It is also necessary to quote the first part of the section which reads as follows:

> "1. Subject to the provisions of Section forty-six, the Court shall have jurisdiction to determine any action or proceeding otherwise beyond jurisdiction, if the <u>parties consent in writing thereto</u>:"

In **<u>McClaren v Badenhorst</u>** 2011 (1) SA 214 (ECG) at para [12] the court found that "consent" in the proviso to s 45(1) cannot be interpreted to mean the consent of only one of the parties, the section being clear that "the parties" (plural) must consent in writing. All the parties to the action or proceedings must therefore consent and if only one of the parties consents to the jurisdiction of the court, such consent is null and void. The requirement of consent by both parties could be satisfied by the written consent of the defendant and the issue of summons by the plaintiff alleging the consent of the parties. See **<u>Suid-Westelike Transvaalse Landbou Koöperasie v Kotze</u>** [2000] 1 All SA 170 (NC) at 177B – C.

[37] It must be considered whether the consent to judgment signed by respondent *in casu* constitutes a credit agreement as contemplated in the NCA, and if not, whether it is a supplementary agreement to the initial credit agreement. In the consent to judgment respondent agreed that payment of the amount owed by her be deferred and costs, fees in

respect of collection commission as well as interest shall be payable in terms of the agreement to appellant. See in this regard s 8(4)(f) of the NCA and **Carter Trading (Pty) Ltd v Blignaut** 2010 (2) SA 46 (ECP) at paras [17] and [18] and **Friend v Sendal** 2015 (1) SA 395 (GP) at para [10]. Unlike in the last-mentioned judgment, it is not appellant's case that it is not a credit provider and that it was not required to comply with the provisions of sections 129 and 130 of the NCA.

[38] The NCA serves to promote *inter alia* a consistent and harmonised system of debt enforcement and the protection of consumers is a significant purpose of the NCA and this shall be given full consideration in adjudicating this appeal.

[39] It is also necessary to establish whether the prerequisites set out in s 58 of the Act read with rule 4 of the MCR have been met. Rule 4(1) reads as follows:

> "(1)(a) The letter of demand referred to in Section 57 and 58 of the Act shall contain particulars about the nature and amount of the claim.
>
> (b) Where the original cause of action is a credit agreement under the National Credit Act, 2005, the letter of demand referred to in Section 58 of the Act must deal of each of the relevant provisions of Section 129 and 130 of the National Credit Act, 2005, <u>and allege that each one has been complied with</u>." (Emphasis added)

The letter of demand as contemplated should be a demand issued after compliance with the provisions of s 129 of the

NCA. It cannot be incorporated in the s 129 notice. See **African Bank v Myambo** 2010 (6) SA 298 (GNP) at 310 – 314. Compliance with s 130 of the NCA includes that at least ten business days must have elapsed since the credit provider delivered a notice to the consumer as contemplated in s 129(1) of the NCA before proceedings are commenced in a court, such proceedings to include those under s 58. The proposals to be contained in the s 129 notice must be such that the consumer can respond thereto. The consumer should be informed that debt enforcement proceedings will follow if the consumer fails to respond to the notice or reject the proposals. As stated by the Supreme Court of Appeal, the purpose of s 129(1)(a) of the NCA is to resolve a dispute under a credit agreement or to develop and agree on a plan to bring the agreement up to date prior to enforcement of that agreement and in order to avoid enforcement in the event that the matter is successfully resolved. The notice is a necessary step before legal proceedings may be instituted. Compliance with the provisions of s 129(1)(a) is thus mandatory notwithstanding the use of the word "may". See **Nedbank Ltd and Others v National Credit Regulator** 2011 (3) SA 581 (SCA) at paras [8], [9] and [14].

[40] Another procedural requirement of s 58(1) of the Act is that the consent in writing to judgment in favour of a creditor can be for the amount of the debt and the costs claimed in the letter of demand, or for any other amount. In *casu* the costs of the letter of demand is set out to be R17,00 excluding VAT, but respondent was requested to sign a consent to

judgment in the capital amount of R4 854,14 and a further amount of R2 452,92 in respect of appellant's legal costs, much of which have not even been incurred by then. The reference to "any other amount" is apparently a reference to a lesser amount than the full amount of the claim and costs. See: Jones and Buckle, **The Civil Practice of the Magistrates' Courts of South Africa**, vol 1 at Act 372 and Act 377.

VIII EVALUATION OF THE FACTS AND SUBMISSIONS OF THE PARTIES

[41] The court *a quo* has set aside the emoluments attachment order granted on 20 February 2012. That order is not before us but it was apparently issued by the clerk of the court. It could not have been issued by the Hennenman Magistrate's Court in light of the provisions of s 65J of the Act, an aspect that does not have to be discussed any further as Mr Mundell has correctly conceded this. Appellant was not entitled to such an order and it was also not entitled to any benefits obtained as a result of that order. Consequently, and if it was the intention, the court *a quo* would have been correct in setting aside the order of 20 February 2012 and to have granted the further relief. This is apparently not what the learned magistrate had in mind when he granted his order of 28 August 2014 if his reasons supplied in terms of MCR 51 are considered. The wrong order was requested in the notice of application, although the tenor of the respondent's founding affidavit indicates that she sought the setting aside of the consent judgment.

[42] In so far as the parties probably had in mind that the court *a quo* intended to set aside the consent judgment granted at the request of appellant, which is obviously not the case as the order stands, it is apposite to briefly make the following comments. It is uncertain whether we can entertain the appeal on the grounds relied upon on the basis of the existing order. Appellant should have seen to it that the obviously patent errors be corrected by the magistrate prior to lodging appeal procedure. This could have been done in terms of s 36(1)(c) of the Act or by requesting the respondent to consent to rescission or variation of the judgment.

[43] The procedure followed by appellant by incorporating the notice in terms of s 129(1) of the NCA with the letter of demand in terms of sections 56 and 58 of the Act is fatally incorrect based on the authorities quoted above. The fact that appellant waited for ten days to expire before application was made for judgment by consent did not cure the fatal defect. There was no compliance with MCR 4 in this regard and the court *a quo* was correct in stating that the "relevant rules", excluding rule 12(5), were complied with.

[44] Furthermore both the consent to judgment and the letter of demand refer to appellant as the plaintiff and apparent credit provider. No reference is made in any of the documents to the fact that plaintiff is merely a purchaser of certain book debts of a specific and identified credit provider. The allegations in the documents prepared by appellant's attorney – the notice in terms of s 129(1) and the consent to

judgment - are therefore blatantly false. The candidate attorney's affidavit, indicating that neither the original agreement, nor a copy thereof could be found and that when appellant purchased the book debts, the "physical file was not supplied to the applicant (the present appellant)", is inadmissible hearsay. The resultant judgment is no doubt one of the reasons why the legislature deemed it fit to ensure that judicial oversight was made obligatory in all proceedings against consumers in terms of the NCA.

[45] The appellant did not consent to the jurisdiction of the Hennenman Magistrate's Court. Its attorney at the time, Mr Van der Merwe of Nelspruit in Mpumalanga, decided for a reason still unknown to us that proceedings had to be instituted in Hennenman notwithstanding the addresses of the parties and the fact that the cause of action, not to speak of the whole cause of action, a requirement in the Magistrates' Court - did not arise in that district. Appellant also did not sign the consent to judgment and no averment was made in the application for judgment that the parties, it included, consented to the jurisdiction of the Hennenman Magistrate's Court. This is on its own fatal for appellant's case.

[46] In view of the purpose of the NCA set out in s 3 and briefly referred to above, I am of the view that the proviso to s 45(1) of the Act does not apply in the circumstances with which the respondent was confronted. The legislature in all probabilities had in mind to make it as convenient as possible for parties to approach a court in order to obtain speedy

resolution of a dispute. Examples where parties may prefer to consent to jurisdiction of a particular court are in abundance, especially bearing in mind the requirement in the Magistrates' Court that the whole cause of action must have arisen in the jurisdiction of a court for that court to adjudicate the matter, unless s 28 of the Act applies. Respondent was tricked into consenting to jurisdiction of a court in another province and about 800 km from her home. It would make a mockery of our judicial system if we were to find that her consent was suitably covered by the proviso in s 45 of the Act, bearing in mind all relevant circumstances. Even appellant was inconvenienced by the selection of the forum *in casu.* Its attorney had to appoint correspondents to act on his behalf and thereby causing an increase in costs. Two sets of attorneys were never called for and cannot be supported. When the application for rescission was issued, Mr Van der Merwe and his client were caught by surprise. Notwithstanding two postponements they did not succeed in filing answering affidavits in order to contest the application. I am of the view that respondent's consent could not be relied upon as it was in direct conflict with s 45(2) of the Act and s 90(2)(k)(vi)(bb) of the NCA read with s 91(a).

[47] The court *a quo* granted costs on an attorney and client scale and it is blamed by appellant for not giving reasons for such an order. It might be so that no reasons were given by the court *a quo*, but bearing in mind the background, there can be no doubt that the court *a quo* was perfectly correct in granting a punitive costs order. The application was initially postponed for one week by agreement between the parties,

apparently because appellant's legal representative was not ready to proceed, where after it was postponed at the request of appellant's legal representative for a further period of three weeks and on the last date, 28 August 2014, a further postponement was sought unsuccessfully as appellant had failed to file any papers. The appellant, who decided to institute action in the small town of Hennenman some 800km from respondent's hometown of Alice in the Eastern Cape, must blame itself for the predicament. It should never have followed the procedure it did and it should never have instituted action the Hennenman Magistrate's Court. A serious abuse of process has occurred and there is no reason to find fault with the punitive costs order.

IX ABUSE OF PROCESS

[48] I must say a few things in conclusion. The claim is for an amount of just over R4 000,00. The cause of action is unknown, but we know that appellant did not sell any goods to respondent as alleged. The attorney and client costs, claimed to be incurred before action was instituted, is alleged to be R2 452,92. However when the statement of account is scrutinised it is evident that respondent consented to costs still to be incurred in future. Instead of issuing summons in Alice where respondent works and resides, or where the whole cause of action had arisen if that could be established, plaintiff, a Johannesburg company, instructed a Nelspruit attorney some 400km away who elected to approach the Hennenman Magistrate's Court for judgment based on a dubious procedure. The Hennenman court is some 600km

away from Nelspruit and a second set of attorneys had to be instructed to act as correspondents. This caused respondent to instruct local attorneys in East Londen who also had to appoint correspondents in Hennenman for the rescission application. When appellant decided to appeal, it instructed its Johannesburg attorneys who instructed Bloemfontein attorneys as correspondents and the East Londen attorneys had to do the same. The legal costs must be over R250 000,00 by now, bearing in mind the several firms of attorneys involved and the fact that appellant elected to appoint senior counsel from Johannesburg to argue the appeal and respondent decided to make use of a senior junior of the local bar. There is no explanation why the Hennenman Magistrate's Court was elected. Two possible reasons come to mind, i.e. (i) the personnel of that court deliver services of professional and high quality standard in an efficient manner, ensuring thereby that court processes are dealt with swiftly and in accordance with the rules. The other reason is too ghastly to contemplate. Absolutely no finding is made in this regard as I do not have any facts to point in such direction, but it is possible that there is a link between the appellant and/or a legal representative on the one hand and someone or more than one person at the Hennenman Magistrate's Court and that favours can be obtained unduly. My attention has been drawn to Circular 030/2014 by the Department of Justice and Constitutional Development dated17 March 2014. Therefore I am of the view that the interests of justice require that copies of this judgment be sent to the Law Society for the Northern Provinces, the Minister of Justice and Constitutional

Development and the National Credit Regulator for their attention and investigation if so required.

X ORDER

[49] Consequently the following orders are made:

1. The appeal is dismissed with costs.
2. The registrar of the court is directed to forward copies of this judgment to the Law Society for the Northern Provinces, the Minister of Justice and Constitutional Development and the National Credit Regulator.

J. P. DAFFUE, J

I concur.

A. WILLIAMS, AJ

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