Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION KIMBERLEY)

Case No: CA&R34/23

In the matter between:

BRIDGE DEBT (PTY) LTD First Appellant

FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS Second Appellant

and

MOTHIBI, LETHLOGONOLO PERCY Respondent

Neutral citation: *Bridge Debt (Pty) Ltd and Another v Mothibi, LP* (Case no: CA&R 34/23) (14 March 2025)

Heard: 29 July 2024

Delivered: 14 March 2025

Coram: Mamosebo J *et* Nxumalo J

Summary: Appeal — Rule 51(3) of the Magistrates' Courts Rules. Jurisdiction by consent of parties - section 45 of the Magistrates' Courts Act 32 of 1944. Judgment debtor not permitted to consent to jurisdiction in place other than where resident or employed. Emoluments Attachment Order - Consent to judgment or to judgment and an order for payment of judgment debt in instalments – section 58 of the Magistrates' Courts Act. Rescission of order by Magistrate. Restoration of status *quo ante* and costs. Whether the Magistrate erred in granting the order.

ORDER

(a) The appeal against orders 1,2,3,4 and 6 of the court *a quo* is dismissed;

(b) The appeal against order 5 of the impugned order is upheld in part and the said order is substituted with the following:

"5. All the benefits that Bridge Debt obtained from the judgment granted against the applicant under case number 8874/2012, are void ab initio and the court orders that restitution is to be effected against Bridge Debt within five (5) days of this order."

(c) The appellant shall bear the costs of this appeal on an attorney and client scale.

JUDGMENT

NXUMALO J

INTRODUCTION

[1] On 18 May 2023 Magistrate K Padayachee granted an order in favour of EDJ Attorneys who appeared on behalf of Mr Letlhogonolo Percy Mothibi, against Experato (Pty) Ltd (now cited in the appeal as Bridge Debt (Pty) Ltd) together with Flemix & Associates Incorporated in the following terms:

'1. The late filing of the rescission application is condoned.

2. That the judgment granted against the applicant on 18 April 2012 under Case Number 8874/2012 is declared void *ab initio* and is hereby rescinded.

3. The emoluments attachment order issued against the applicant under Case Number 8874/2012 is declared void *ab initio* and hereby rescinded.

4. The applicant is restored to his respective position status *quo ante* before the judgment was granted against the applicant on or before the 18^{th} of April 2012.

5. All benefits that the 1^{st} and 2^{nd} respondents obtained from the judgment granted against the applicant under Case Number 8874/2012 are void *ab initio* and the court orders that restitution is to be effected, jointly and severally, the one paying the other to be absolved within five (5) days of this order.

6. Costs, including preparation and travelling, to be paid by the 1^{st} and 2^{nd} respondents on a scale as between attorney and client.'

[2] The first appellant is Bridge Debt (Pty) Limited, a company with limited liability, incorporated in terms of the Laws of the Republic, with its registered office; alternatively, principal place of business situate at Block 1[…] Boardwalk Office Park, 7[…] E[…] Street, Faerie Glen, Pretoria. The second appellant is Flemix and Associates Incorporated Attorneys, practicing from Ground Floor, Block C, Law Chambers, Menlyn Woods, 2[…] S[…] Avenue, Faerie Glen, Pretoria. The first and second appellants (collectively referred to as the appellants) filed a Notice of Appeal on 14 June 2023 as contemplated in Rule 51(3) of the Magistrates' Courts Rules impugning the decision of the Magistrate both on the facts and the law.

[3] The first appellant, Bridge Debt (Pty) Limited, has since abandoned its appeal and did not participate in these appeal proceedings. In that case,

the order by Magistrate Padayachee remains valid and enforceable against Bridge Debt.

[4] The grounds of appeal as appearing in the Notice of Appeal are that the Magistrate erred in fact and in law in the following respects:

Findings of fact

(1) That the second respondent [the appellant] admitted having made a systematic practice of forum shopping or that there can be such a conclusion based on an article, the author of which never deposed to a confirmatory affidavit vis-à-vis the content of the article;

(2) That the legal submissions by the applicant [EDJ Attorneys Incorporated] regarding the alleged abuse can be given any weight to, under circumstances where the submissions were copied and pasted, and under circumstances where the attorney for the applicant failed to file a confirmatory affidavit whatsoever;

(3) That the applicant never met the two witnesses that appear on the consent to judgment under circumstances where such an averment was also copied and pasted;

(4) That the applicant became aware that the judgment was void during 30 March 2022, as opposed to being coerced by his attorneys and Gorr Assist (Pty) Ltd in order to circumvent Rule 49(8);

(5) That the second respondent's intent with section 45 was to prejudice the applicant;

(6) That the second respondent litigates in a manner aimed at increasing litigation costs and exposing the applicant to such costs while the judgment acknowledges that the applicant's attorneys used copied and pasted affidavits to advance a case for a certain Gorr Assist (Pty) Ltd, not the applicant/debtor;

(7) That the second respondent chose to oppose the rescission as opposed to merely the restitution and costs portion;

(8) That there exists any rescindable benefits against the second respondent;

(9) That the second respondent's affidavit contained hearsay allegations;

(10) That the second respondent's affidavit contained scandalous and irrelevant allegations;

(11) That the second respondent is liable for restitution and costs jointly and severally.

Findings of law

(12) That the evidence under paragraph 86 of the founding affidavit may be admitted in accordance with sections 3(1)(a) and (b) of the Law of Evidence Amendment Act, 45 of 1988;

(13) That the applicant was entitled to restitution *ipso facto,* once the rescission was granted;

(14) That restitution is possible against the second respondent who received no rescindable benefit;

(15) That the applicant satisfied the requirements under Rule 49(8) of the Magistrates Court Rules; and

(16) That a *de bonis propriis* costs order was warranted 10 years after the fact and under circumstances under which the application was brought by EDJ Attorneys.

[5] This appeal, by Flemix & Associates Incorporated Attorneys, (hereinafter referred to as the appellant) pivots on two issues, namely, whether Magistrate Padayachee had erred when granting the order restoring the parties to their respective positions before the judgment was granted on 18 May 2023 and in directing the appellants to pay the costs of the application

on the scale as between attorney and client including preparation fees jointly and severally, the one paying the other to be absolved.

THE RECORD

[6] The record of proceedings in the court a quo is incomplete. The transcribed record only pertains to the Rule 52(2) of the Magistrates' Courts Rules application where the authority of EDJ Attorneys Incorporated to act on behalf of the respondent, Mr Mothibi, in the rescission application, was challenged. Counsel agreed that the appeal court would be able to determine the matter on the available papers and neither party would be prejudiced provided the appeal focuses on only two grounds, namely, whether the Magistrate was correct in granting restitution jointly and severally in favour of the respondent and whether the Magistrate had erred in granting a cost order against the appellant. The Court allowed counsel to proceed and argue the appeal.

BACKGROUND FACTS

[7] Bridge Debt is a credit provider and through its predecessor, Experato (Pty) Ltd, advanced money to the respondent pursuant to a loan agreement within the contemplation of the National Credit Act 34 of 2005 (NCA). The respondent is a major male senior typist, employed as such by the South African Police Service, situate at 1 Commissioner Street, Johannesburg. At all material times hereto, the respondent resided at Mulbarton, Johannesburg South.

[8] The respondent failed to meet his obligations in terms of repayment and fell into arrears. On 13 April 2012 the appellant, as Bridge Debt's attorneys in the proceedings in the magistrates' court for the district of Francis Baard held in Kimberley, obtained the judgment and order based on the consent to jurisdiction in terms of s 45 of the Magistrates' Courts Act 32 of 1944 (MCA), to the jurisdiction of the Magistrates Court, Pretoria, as per Annexure AA7. The consent reads:

'The parties mentioned above [Experato (Pty) Ltd (plaintiff) and Mr Letlhogonolo Percy Mothibi (defendant)] hereby agree that the Magistrates Court for the district of PRETORIA held at PRETORIA shall have jurisdiction in the proceedings of

Experato (Pty) Ltd (hereinafter referred to as "plaintiff") is about to institute against Mr L Mothibi (hereinafter referred to as the "defendant") for the judgment in terms of s 58 of Act 32 of 1944 in respect of monies in the amount of R17838.20 (One Seven Eight Three Eight Rand and Two Zero Cents) lent and advanced by the plaintiff to the defendant at the latter's special instance and request together with contractual interest thereon at 60.00% per annum from handover to date of final payment and legal costs on Attorney and Client scale.'

[9] The consent to judgment, offer to pay debt in instalments and Emoluments Attachment Order in terms of s 58[1] and 65J of the MCA was purportedly signed in the presence of two witnesses on the same day, 13 April 2012, in Johannesburg, as per Annexure AA8. Section 65J (1)(a) of the MCA enjoined the judgment creditor (Experato (Pty) Ltd and/or Bridge Debt (Pty) Ltd to cause an emoluments attachment order to be issued from the court of the district in which the judgment debtor resides, carries on business or is employed.

[10] Notwithstanding the above, the appellant obtained judgment, also referred to as an Emoluments Attachment Order (EAO), on 18 April 2012 against Mr Mothibi in Kimberley, a distance of approximately 503 km from his residence or workplace, for a judgment debt of R17 838.20 and costs on a scale as between attorney and client in the amount of R3 202.02. In addition, the appellant succeeded in obtaining interest at 60% per annum where the monthly repayment would be R600.00.

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[1] '**58. Consent to judgment or to judgment and an order for payment of judgment debt in instalments**

(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by-

(a) if no summons has been issued, a copy of the letter of demand; and

(b) the defendant's written consent to judgment,

(i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and

(ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1).

(2) The provisions of section 57 (3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this section.'

[11] On 09 June 2022, Mr Mothibi's attorneys (EDJ Attorneys Incorporated), lodged an application in terms of section 36(1)(b) of the MCA and rule 49(8) of the Magistrates' Courts Rules seeking orders in the following terms: (a) that the court grants condonation for the late filing of its application; (b) that the court rescind the judgment granted against the respondent, Mr Mothibi, on or about 18 April 2012, under case number 8874/2012; (c) that the emoluments attachment order granted against him be rescinded; (d) restoring the parties to their respective positions *status quo ante* (i.e., before the judgment was granted on or about 18 April 2012), (e) declaring that all benefits obtained by the appellants from the impugned judgment are null and *void ab initio* and that restitution is to take place, jointly and severally, the one paying the other to be absolved; (f) directing the appellants to pay the costs of the application on the scale as between attorney and client jointly and severally, the one paying the other to be absolved, such costs to include preparation and travelling costs.

[12] Section 36(1)(b) of the MCA, expressly stipulates as follows; that:

*"**36 What judgments may be rescinded***

(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu-

(a) . . .

(b) rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;

(c) . . .

(d) . . . "

[13] It is common cause that the loan amount and interest have since been paid in full. It is also significant that the appellants did not oppose the application for the rescission of the judgment as well as the Emoluments Attachment Order (EAO). Of more significance is that gleaning from the section 45 consent to jurisdiction, annexed as 'AA7', the respondent had consented to the jurisdiction of Pretoria and not the Kimberley Magistrates Court. The appellant conceded, correctly so in my view, that the Kimberley Court

lacked the required jurisdiction.

First ground of appeal: *Restitution*

[14] In its Notice of Appeal, the appellant maintained that no rescindable benefits exist against it; thus, the trial court erred in its finding that it is liable for restitution and costs jointly and severally; that Mr Mothibi was entitled to restitution *ipso facto*, once the rescission was granted and that restitution is not possible against the appellant who received no rescindable benefit.

[15] The appellant contends in paragraph 13.4 of its answering affidavit, that it was already punished by the Law Society for its "incorrect interpretation" of the law in the 150 000 cases. In paragraph 25 of the appellants' answering affidavit, the appellant and Bridge Debt averred as follows, without more:

*"**PARAGRAPHS 86 TO 87 THEREOF**:*

25.

25.1 The applicant's [Mothibi's] attorneys and their benefactor are once again defaming the second respondent by stating that we deliberately made sure the courts granting the judgments were not the courts that had jurisdiction.

25.2 It's very convenient for the applicant's attorneys to mention 9 outlier cases, out of more than 150 000 active ones that were open at the time in 2012.

25.3 I reiterate, that we never acted mala fide and these outlier cases are merely being mentioned to advance a convoluted narrative."

[16] The appellant argued that even if the trial court would have found that the nine cases that it prosecuted in the incorrect jurisdiction show a systemic practice of forum shopping or a mala fide intention, those were only nine of the 150 000 and would not support such a finding. According to the appellant, the trial court placed heavy reliance on a judgment annexed as "LP5" to the reply remarking that it was identical to Mr Mothibi's rescission application. However, in the said LP5, so the argument went, no restitution order was made.

[17] The appellant is adamant that it did not receive any rescindable benefits from Bridge Debt (Pty) Ltd and that it was merely paid for services

rendered. Mr Muller, for the appellant, submitted that the natural effect will be that the rescindable benefits that the judgment creditor obtained would be reversed but that it should not befall the attorney but the client. In this instance, the effect should be on the microlender, being Bridge Debt, and not on Flemix and Associates Inc.

[18] The contention on behalf of Mr Mothibi was that the appellant knew or ought to have known that obtaining a judgment in a court that is 503 kilometres away from his correct district of jurisdiction is unlawful and unethical. That the opposing parties did not deny the veracity of the listed debtors in the impugned paragraph. That it does not matter if it is only nine cases listed because the whole point was to show how the appellant has made a systematic practice of forum shopping. That this is the reason why the appellant was found guilty by the Law Society.

[19] The date of commencement of the Courts of Law Amendment Act, 7 of 2017 is 01 August 2018 and remained in force until 11 March 2022. The purpose of the Act was, among others, to amend the Magistrates' Courts Act, 1944, inserting definitions and to regulate the rescission of judgments where the judgment debt has been paid; to further regulate jurisdiction by consent of parties; to amend the Superior Courts Act, 2013, so as to provide for the rescission of judgments by consent and the rescission of judgments where the judgment debt has been paid.

[20] The trial court relied on *MBD Securitisation (Pty) Ltd v Booi*[2] in granting the restitution order. The facts in *Booi* are almost similar to the facts in *casu*. The main difference is unlike in *casu* where the firm of attorneys responsible for obtaining the judgment was cited as a party, the attorneys were not cited in *Booi*.

[21] A contention by the appellant is that Mr Mothibi could have just asked the firm for a rescission, and he would have been furnished with a copy of the consent letter to have the judgment reviewed in terms of the Courts of Law Amendment Act. There was no reason for him to litigate, 10 years later,

[2] 2015 (5) SA 450 (FB)

after the repeal of the Courts of Law Amendment Act, through a debt restructuring company, Gorr Assist (Pty) Ltd, who intends to mulct the firm with fees following the remarks by Desai J in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*[3] of the book debt of over R1.5 billion collected by the appellant.

[22] In *Baker v Probert*[4] the Appellate Division definitively pronounced that a claim for restitution is to be regarded as a distinct contractual remedy — see also the unreported judgment in *Zimbabwe Consolidated Diamond Company v Smit Investment Holdings SA (Pty) Ltd t/a Gecko Projects*[5]. The trial court could not have found, without more, that there were rescindable benefits to the appellant justifying an order jointly and severally with Bridge Debt (Pty) Ltd. It follows, therefore, that the appeal on this leg stands to succeed.

[23] Lest I be seen to be condoning this behaviour by the appellant, who in the first place was responsible for the enrolment of the matters in incorrect jurisdictions, the principle emphasised by the Constitutional Court in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*[6] bears repeating:

'. . . It has been established in the jurisprudence of this court that execution of court orders is part of the judicial process. It requires judicial oversight. Though previous cases dealt with debtors' homes, the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable. Clearly then, the fundamental principles relating to the proscription against self-help flowing from the s 34 right of access to courts apply, with equal force, to the execution process. I would therefore affirm the breadth of the High Court's approach.'

The Constitutional Court went on to say:[7]

'An emoluments attachment order is clearly burdensome. It severely constricts

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[3] 2015 (5) SA 221 (WCC).
[4] 1985 (3) SA 429 (A) at 438I – 439B
[5] (3105/2022) [2023] ZAECQBHC 48 (5 September 2023) para 17.
[6] 2016 (6) SA 596 (CC) para 129
[7] *Ibid* para 131

the autonomy of the debtor to decide how she will pay off the debt. It is also inflexible as it does not adapt to the debtor's changing circumstances from week to week. It goes directly off a debtor's wages — and these wages will often form the means for the debtor's day-to-day survival. These are all-important considerations to be borne in mind when deciding whether an emoluments attachment order should be granted.[8] What is more, a debtor's personal circumstances may well have changed in the interim between when a judgment debt is entered and ordered to be paid in instalments and when an emoluments attachment order is sought. It is, therefore, crucial that these considerations are taken into account at the time the emoluments attachment order is sought.'

Ground 2: Costs

[24] In as far as costs are concerned, the appellant argues from the premise that it was not a party when the rescission application was brought. However, based on the averment that it had acted *mala fide* when obtaining the judgment coupled with the remarks by the Constitutional Court, more particularly, where the Constitutional Court said[9]: 'Though the matter is difficult, I am inclined to issue a prospective order only. It is true that the grievous effect of this is that past emoluments attachment orders, unscrupulously procured or issued, will continue to be operative, unless individually challenged.' It is now targeted by the restructuring companies.

[25] It remains inexplicable how the appellant, despite the respondent's consent to judgment, with Pretoria as the Court with jurisdiction, opted to bring the application in Kimberley, a distance of some 503km's from Mr Mothibi's residence or place of work. The costs have already been incurred and it is plain that the appellant fails to appreciate that it has effectively denied Mr Mothibi access to court and as remarked by Cameron J in the *University of Stellenbosch* matter, the grievous effect of the unscrupulously procured or issued emoluments attachment orders will continue to operate unless challenged.

[26] The appellant seems to argue that, because there is a fee agreement

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[8] [A decision that illustrates the practical operation of emoluments attachment orders is *MBD Securitisation (Pty) Ltd v Booi* [2015] ZAFSHC 134, 2015 (5) SA 450 (FB) especially at paras 29 and 41]

[9] *Ibid* para 159

between Mr Mothibi and Gorr Assist in the Rule 52(2) application, Mr Mothibi is not entitled to costs. That cannot be correct. The action was against him and not Gorr Assist. He is a party against whom the order was obtained. Ms Jordan is an attorney and director of the appellant. She ought to have known that obtaining judgment in Kimberley was wrong, but continued to do so anyway. Any attorney would know that the correct charge for a s 58 consent to judgment at the time was R241.75 but the legal fees charged were R3 202.02. Arguably, this was an exorbitant fee. (See *Pheko and Others v Ekurhuleni City*[10]*;* see also *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others*[11]*).*

[27] Costs are in the discretion of the court. The ordinary rule is that the successful party is awarded costs as between party and party. However, there are instances where the court would want to show its displeasure by granting attorney and client costs even where a party has partially succeeded in its application, as in this instance. The appellant has not convinced the court why judgment was obtained in Kimberley and for that reason Mr Mothibi had to incur unnecessary costs for the judgment to be rescinded. He has had to appoint correspondence attorneys because he litigated from another province. It was further within his right to oppose the appeal. I am satisfied that the trial court did not make a mistake by granting a cost order against the appellant.

ORDER

[28] In the premise, the following order is issued:

a. The appeal against orders 1, 2, 3, 4 and 6 of the court *a quo* is dismissed;

b. The appeal against order 5 of the impugned order is upheld in part and the said order is substituted with the following:

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[10] 2015 (5) SA 600 (CC) paras 51 – 55.
[11] 2009 (1) SA 565 (CC) para 54.

> *"5. All the benefits that Bridge Debt obtained from the judgment granted against the applicant under case number 8874/2012, are void ab initio and the court orders that restitution is to be effected against Bridge Debt within five (5) days of this order."*

c. The appellant shall bear the costs of this appeal on an attorney and client scale.

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APS NXUMALO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur.

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MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For appellant: Adv Noens M.A. Muller
Instructed by: Verster & Associate Attorneys, Pretoria
C/o Majiedt Swart Inc, Kimberely

For respondent: Adv H.P. van Staden
Instructed by: EDJ Attorneys Incorporated, Bloemfontein
C/o Van Der Wall Incorporated Attorneys, Kimberely