REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 12/15125

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

AIR TRAFFIC NAVIGATION SERVICES COMPANY LIMITED Applicant

and

DIVERSIFIED PROPERTIES SERVICES COMPANY LIMITED Respondent

J U D G M E N T

WEINER J:

Notice of set down

[1] Subsequent to the hearing of this matter and when the parties were informed that judgment would be handed down on the 24th of April 2014, my Registrar received correspondence from the Respondent's attorney. In Summary, they contend that:-

1. Two stamped Notices of Set Down were served on them on the 10th of March 2014 at 10h58. A computerised copy stating that the matter would be heard on the 10th of March at 10h00 and the other stating that it would be heard on the 14th of March at 10h00.
2. They did not appear on the 10th of March as the Notice of Set Down was only served on that day at 10h58.
3. There was previous correspondence in which the Respondent was willing to consent to the rescission but that the Applicant had made certain allegations in the Founding Affidavit, which the Respondent required the Applicant to retract.

[2] None of these allegations and correspondence was brought to the court's attention by the Applicant's counsel at the time of the hearing on the 14th of March. The stamped Notice of Set Down for the 10th of March was amended to the 14th of March as it was only filed on the 10th of March. The copy served on the Respondent has not been amended (this appears from the copy attached to the correspondence received on the 23rd of April). As stated above, another stamped Notice of Set Down for the 14th of March was served on the Respondent on the 10th of March 2014. This was not a computerised copy. There was no appearance for the Respondent at the hearing on the 14th of March.

[3] However, the court *mero motu* raised the question of whether the Applicant could obtain rescission without setting out a *bona fide* defence as required in terms of the Uniform Rules of Court. Argument was provided by the Applicant's counsel in this regard and my judgment is based upon such submissions.

[4] As a result of the decision at which I have arrived, the Respondent's procedural concerns, although legitimate, do not require further adjudication.

Background

[5] The Applicant seeks an order in terms of the common law for the rescission of a default judgment granted against them on 26 July 2012.

Business of the Applicant

[6] The Applicant provides air traffic and navigation services for the air traffic management community, primarily in South Africa, as well as the rest of Africa and the Indian Ocean region. The Applicant is obliged to raise funds from time to time. Accordingly, the Applicant approaches financial institutions and applies for credit facilities.

The lease agreement

[7] On 3 November 2008, the Applicant and the Respondent concluded a

written lease agreement. The Applicant leased from the Respondent certain premises for a period of four years commencing on 1 October 2008 and terminating on 30 September 2012.

[8] On 26 July 2012 the Respondent obtained default judgment against the Applicant for a total amount of R3 746 437.39 on three claims arising from the breach of the lease agreement.

The settlement agreement

[9] On 11 September 2012, the Applicant launched an application to rescind the default judgment on the basis that the summons did not come to the Applicant's attention. However, this application was not pursued further as the parties subsequently agreed to the settlement of the default judgment. This settlement agreement was signed by the Applicant and the Respondent on the 3rd and 4th of October 2013 respectively. It was agreed that the Applicant would pay the Respondent an amount of R3 352 581.82 ("the settlement amount") in full and final settlement of the default judgment obtained by the Respondent.

[10] It was further agreed that upon payment of the settlement amount by the Applicant, the Respondent would immediately provide the Applicant with written consent to the rescission of the default judgment granted against the Applicant.

[11] On 5 October 2013 the Applicant paid the settlement amount to the Respondent. However the Respondent has failed to provide the Applicant with

written consent to the rescission of judgment.

[12] The Applicant contends that, on the basis that the Applicant has settled the judgment debt to the satisfaction of the Respondent, the Applicant should have the judgment against it rescinded. The judgment currently prevents the Applicant from accessing credit, which is essential to the Applicant's continued operations.

Rescission – applicable principles

[13] The question is whether a default judgment of the High Court can be set aside simply because it has been satisfied in full by the judgment debtor, with no prejudice to the judgment creditor. The Applicant contends that there is sufficient cause for the rescission on the basis of justice and fairness. It is noted that even if the Respondent did consent, the same question would arise by virtue of the authorities cited below.

[14] In terms of Rule 31(2)(b) of the Uniform Rules of Court, "good cause" must be shown for an application for rescission to succeed. This requires, *inter alia,* that there is a *bona fide* defence to the plaintiff's claim and that he was not in wilful default. The mere subsequent settlement of judgment debt is not in itself a cause for setting aside a default judgment. See *31.11 of the Uniform Rules of Court*.

[15] The Magistrate Court Rules differ in this regard, permitting rescission where there is a subsequent settlement of the judgment debt. *See Rule 49(5) of the Magistrates' Court Rules.*

Rescission in terms of the common law

[16] The Rules are not the only mechanisms by which a judgment can be set aside. The common law provides an alternative basis on which an application for rescission can be brought, and it was on this basis that the application *in casu* was brought.

[17] To rescind a judgment under the common law, "sufficient cause" must be shown. Miller JA in ***Chetty v Law Society, Transvaal*** 1985 (2) SA 756 described "sufficient cause" as having two essential elements. Miller JA at 764 I – 765 E said:-

"(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success."

[18] The above was emphasised in the SCA in ***Colyn v Tiger Food Industries Ltd. t/a Meadow Feed Mills (Cape)*** 2003 (6) SA 1 (SCA) where Jones AJA stated at 11:-

"In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause."

[19] Flemming DJP in ***Saphula Necor Bank Ltd*** 1999 (2) SA 76 (W) refused an application for rescission on the basis that the applicant failed to establish a b*ona fide* defence to plaintiff's claim. He stated at 79:-

"The object of rescinding judgment is to restore a chance to air a real dispute…It has always

been the hallmark of what lawyers call a bona fide defence (which has to be established before rescission is granted), that a defendant honestly intends to pursue before a Court a set of facts which, if true, will constitute a defence".

[20] In ***RFS Catering Supplies v Bernard Bigara Enterprises C.C.*** 2002 (1) SA 896 (C) the court departed from ***Saphula***. In this case there was a subsequent settlement of the judgment debt and the judgment creditor had consented to rescission. On appeal, Josman J held that the concept of "good cause" was sufficiently wide and flexible so as to include the case at hand, since such circumstances fell within the ambit of "justice and fairness" which lies at the root of the "good cause" requirement. At 902 E-G. Thus, the court took it upon itself to promote the development of the common law so as to enable rescission on the basis of the settlement of the judgment debt and consent on the part of the creditor.

[21] This approach was followed by Binns-Ward AJ in ***Damon and Another v Nedcor Bank Limited*** 2006 JOL 18550 (C) He held at 8:-

"There is no equivalent of rule 49(5) in the High Court rules of procedure, but it seems to me that if I am bound by the judgment in RFS Catering Supplies to accept that there is no inconsonance between the remedy which was there held to be available in terms of rule 49(5) and the common law, I am equally bound to recognise the existence of an equivalent remedy in this jurisdiction notwithstanding the absence of any equivalent rule of court. In RFS Catering Supplies, Josman J (Van Reenen J concurring) expressed the view, contrary to the opinions expressed by learned judges in the Witwatersrand Local Division, that it was preferable for the common law to develop to cater for the difficulties posed by default judgments to applicants for credit than for the problem to be addressed by legislation."

[22] In ***Vilvanathan and Another v Louw NO*** 2010 (5) SA 17 (WCC) Thring J however disagreed with the findings in ***RFS Catering Supplies*** *(supra).* Thring J

held at 340 that at common law, the two essential elements must both be met for rescission of a default judgment to be granted. Implicit in the requirement of a *bona fide* defence, "the circumstance which are relied on as a ground for setting aside the final judgment must have existed at the date of the judgment, and not have arisen subsequently". See also ***Swadif (Pty.) Ltd. v. Dyke, N.O.*** 1978 (1) SA 928 (AD) at 939 E.

Thring further stated at 340:-

"It is my respectful view that where, as here, certain principles have been clearly laid down by the Appellate Division or the Supreme Court of Appeal it is not for a Provincial or Local Division of this Court to depart from them in the name of development or adaption of the law so as to meet altered social circumstances, no matter how unpalatable or outdated such a Division may find those principles: in such circumstances, it seems to me, with respect, to be the exclusive prerogative of the Supreme Court of Appeal or, perhaps, of the Constituional Court, to bring about any development or adaption of the law which may be called for".

See also ***Whitehead v Absa Bank Limited*** 2241/2010 [2011] ZAWCHC 87 (13 April 2011); ***Kalikhan, Anoj t/a Tri-star Logistics v Firstrand Bank Ltd*** (2011/31466) [2013] ZAGPJHC 133 (9 May 2013).

[23] It thus appears that there is conflicting authority in the different divisions and within such divisions of the various jurisdictions.

[24] The Applicant submits that the Constitution of the Republic of South Africa Act 108 of 1996 expressly grants the High Courts of South Africa the inherent power to develop the common law. Section 173 states the following:-

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[25] It was held by Ngcobo J in ***Barkhuizen v Napier*** 2007 (5) SA 323 (SCA) at 35:-

"No law is immune from constitutional control… And courts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with the values that underlie our Constitution."

Subsequent Developments

The NCA

[26] Section 71(2) of the National Credit Act 34 of 2005 provides that a debt counsellor must issue a clearance certificate if the consumer has fully satisfied all the obligations under every credit agreement that was subject to a debt-rearrangement or agreement, in accordance with that order or agreement. Subsection (5) states that upon receipt of a copy of a clearance certificate issued by a debt counsellor, a credit bureau, or the national credit register, must expunge the fact that the consumer was subject to the relevant debt re-arrangement order or agreement, as well as all information relating to any default by the consumer from its records.

[27] This provision thus provides a remedy for those consumers under a debt rearrangement scheme, upon discharging their outstanding financial obligation. *In casu* the Applicant has submitted that the Legislature could not have been intended to

discriminate against one class of consumers, while giving benefits to another class; while they all fall under one category of failing to honour their contractual financial obligations.

[28] Section 71(6) of the NCA states as follows:-

"Upon receiving a copy of a court order rescinding any judgment, a credit bureau must expunge from its records all information relating to that judgment".

[29] The Applicant submits that the provisions of Section 71 of the NCA was not in operation at the time of handing down judgment in ***Saphula*** *(supra).* Accordingly, these provisions were not considered.

[30] Section 3 of the NCA states its purpose to be to: -

"…promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".

[31] The Act's main objective is to protect consumers. However it is recognized that an appropriate balance must be struck between the protection of consumers and the rights of credit providers. As was stated by Malan J in the SCA decision of ***Nedbank Ltd and Others v National Credit Regulator and Another*** 2011 (3) SA 581 (SCA) at 2:-

"[t]he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."

[32] This view was subsequently endorsed by Cameron J in ***Mashilo Shadrack Sebola and Nombeko Daphne Sebola v Standard Bank of SA Ltd*** [2012] ZACC 11 at 40:-

"…the Act aims to secure a credit market that is "competitive, sustainable, responsible [and] efficient". And the means by which it seeks to do this embrace "balancing the respective rights and responsibilities of credit providers and consumers". These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers … I also agree that "whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked".

[33] In the early Constitutional Court case of ***Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others*** 1995 (4) SA 63 the constitutionality of provisions 65A to 65M of the Magistrates' Courts Act, which provided a magistrate the ability to issue an order to commit a judgment debtor to prison for contempt of court for failure to pay the debt, were declared unconstitutional. Of relevance to the case at hand is the *dicta* in a concurring judgment by Didcott J at 26:-

"The interests of creditors are plainly relevant to any constitutional appraisal of the provisions with those effects. Credit plays an important part in the modern management of commerce. The rights of creditors to recover the debts that are owed to them should command our respect, and the enforcement of such rights is the legitimate business of our law. The granting of credit would otherwise be discouraged, with unfortunate consequences to society as a whole, including those poorer members who depend on its support for a host of their ordinary requirements. That does not mean, however, that the interests of creditors may be allowed to ride roughshod over the rights of debtors."

[34] It was further submitted by the Applicant that allowing unequal treatment of debtors falling within Magistrate's Court jurisdiction and debtors falling within the High Court's jurisdiction would fall foul of Section 9(1) of the Constitution. This would apply equally to debtors falling under Section 71(2) read with Section 71(5) of the NCA. This argument is persuasive as the distinction between debtors based on jurisdiction or registration appears to be arbitrary.

[35] In ***Kalikhan*** *(supra)* the applicant urged the court to develop the common law meaning of the words "on good shown" in Rule 31(2)(b) to include a situation where the Respondent consents to a rescission. The applicant relied on Section 9(1) of the Constitution, which gives every person the right to equal protection and benefit of the law. It was submitted that, to allow for rescission by consent in the Magistrates Court and not in the High Court, is discriminatory. Miltz AJ did agree that this was iniquitous, but went on to state at 5:-

"It does not mean however that the Court can rewrite the well-developed common law relating to what constitutes good cause for rescinding a default judgment"

[36] In ***Lazarus and Another v Nedcor Bank Ltd; Lazarus and Another v Absa Bank Ltd 1999 (2) SA 782 (W)*** Cloete J (as he then was) quoted the following dicta by Melamet J in ***De Wet and Others v Western Bank Limited*** 1979 (2) SA 1031 (A) at 787:-

"A court obviously has inherent power to control the procedure and proceedings in its Court... This, in my view, does not include the right to interfere with the principle of the finality of judgments other than in circumstances specifically provided for in the Rules or at common law".

[37] In ***Kalikhan*** *(supra)* Miltz AJ noted that at the time of the judgment of ***Lazarus*** *(supra),* the Constitution had been promulgated, and thus, due regard had been

given to Section 173 hereof. Miltz AJ further cautioned against overstepping the Court's mandate and breaching the separation of powers doctrine. At 9:-

"In amending the rules of the Magistrate's Court, the legislature enacted laws in accordance with its legislature objectives. Where the development of the common law goes beyond what is required to give full effect to the Bill of Rights in the Constitution, the Court may well be found to have usurped the constitutionally mandated powers of the legislature unreasonably. This may amount to a breach of the doctrine of separation of powers."

And further at 11:-

"The task of achieving the legislative imperative of amending the Rules of Court to ensure the equality of all litigants before the law belongs to the Legislature."

[38] As is evident *in casu*, default judgments pose significant difficulties to applicants for credit. This has resulted in two significant developments. Firstly, the National Credit Regulator (NCR) has implemented, as from 1 April 2014, a Regulation that adverse credit information must be removed by all credit bureaus when the capital amount of the judgment has been settled. Secondly, the draft Superior Courts Amendment Bill 2014 takes into account the various decisions in the different jurisdictions and notes that certain judgments have suggested the need for intervention of the Legislature to allow rescission by consent or even in a situation where the creditor has not consented.

[39] Section 23A of the Superior Courts Amendment Bill 2014 states as follows:

"(1) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court may rescind or vary such judgment on application by any person affected by it.
(2) Except where a judgment was obtained erroneously or fraudulently, the rescission of a judgment referred to in subsection (1) does not affect the rights of third parties or parties to the

case.
(3) Nothing precludes a court from proceeding with the rescission or variation of a judgment if there is proof that the judgment debt has been settled by the judgment debtor, where an agreement in writing that the judgment be rescinded or varied cannot be obtained from the judgment creditor."

[40] The right to have such judgment rescinded would thus be in line with the stated purposes of the NCA and the Regulation of the NCR, applicable from 1 April 2014, referred to in paragraph [33] above.

[41] The Regulation referred to in paragraph [33] above will adequately deal with the Respondent's problem in not being able to procure credit because of the adverse report of the Credit Bureau.

[42] The Legislation will in due course, bring the law dealing with rescission of judgments into line with the purposes of the NCA, the credit information amnesty implemented from 1 April 2014, and the equality clause in the Constitution.

[43] For these and the reasons stated above, it is not necessary nor advisable to interfere in the realm of the Legislature.

[44] Accordingly, the application is dismissed.

_____

WEINER J

Counsel for the Applicant: U. Mansingh

Applicant's Attorneys: Tshisevhe Gwina Ratshimbilani Inc.

Counsel for the Respondent: (No appearance)

Respondent's Attorneys: Kokinis Incorporated (no appearance)

Date of Hearing: 14 March 2014

Date of Judgment: 24 April 2014