

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2011/31466

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES</u>
(3)	<u>REVISED.</u>
	<u>09/05/13</u>
	DATE
	<u>[Signature]</u>
	SIGNATURE

In the matter between:

KALIKHAN, ANOJ t/a TRI-STAR LOGISTICS

Applicant

and

FIRSTRAND BANK LIMITED

Respondent

JUDGMENT

MILTZ AJ:

1. The applicant applies for the rescission of a money judgment granted in favour of the respondent on 30 March 2012. Not only does the respondent not oppose the application but it has consented in writing thereto.
2. Mr Thompson who appeared for the applicant conceded that in terms of the law as it stands the applicant is not entitled to the order sought. He urged me however to develop the common law meaning of the words “on good cause shown” in rule 31(2)(b) to include the situation such as arises in this matter when the judgment debt is discharged and the judgment creditor consents to the rescission of the judgment concerned.
3. Mr Thompson referred me to several judgments that are binding on me¹ although he submits that I should depart from the ratios therein in developing the common law.
4. Mr Thompson’s argument amounts to this:
 - 4.1. section 9(1) of the Constitution allows that every person is equal before the law and every person has the right to equal protection and benefit of the law;

¹ *Saphula v Nedcor Bank Limited* 1999 (2) SA 76 (W); *Lazarus and Another v Nedcor Bank Limited*, *Lazarus and Another v ABSA Bank Limited* 1999 (2) SA 782 (W); *Swart v ABSA Bank Limited* 2009 (5) 219 (C) and *Vilvanathan v Louw*, NO 2010 (5) SA 17 (WCC)

- 4.2. the amendment by the legislature of rule 49(5) of the Magistrate's Court Rules to allow for the rescission of a judgment in the Magistrate's Court by consent renders the law relating to rescission of judgments in the High Court discriminatory;
 - 4.3. the Court should develop the common law to include consent by the judgement creditor thereto as a ground constituting good cause to rescind a default judgment.
5. The effect of the amendment to the relevant rule of the Magistrate's Court placed litigants in that forum on a better footing when applying for rescission of judgment than those in the High Court. This is obviously iniquitous. 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.
 6. In *Lazarus v Nedcor Bank Limited; Lazarus v ABSA Bank Limited* (*supra*), Cloete J (as he then was) at 787, in considering a similar argument to that raised by Mr Thompson in this application, stated that:

"If rescission can be granted in the magistrate's court with the consent of the judgment creditor and without more ... there would be an anomaly as the rights of a party in the magistrate's court would be greater than the rights of a party in the High Court. But any such anomaly would be due to the provisions of the Magistrates' Courts Rule and, in the absence of any similar provision in the High Court Rules, consent by the creditor cannot, without more, justify rescission in the High Court. Counsel's submission that I should eliminate the perceived anomaly by having resort to the inherent power of the High

Court overlooks the following remarks of Melamet J in *De Wet and Others v Western Bank Limited (supra at 780 H)*:

"A court obviously has inherent power to control the procedure and proceedings in its Court. This is done to facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. This has been recognized in many decided cases which are collected by the learned authors of Herbstein and Van Winsen *The Civil Practice of the Superior Courts of South Africa* 2nd ed at 20-1. 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."

The learned Judge's remarks were concurred in by the other members of the Full Bench and the decision was confirmed on appeal: 1979 (2) SA 1031 (A)."

7. At the time of the judgment in the *Lazarus* case the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") had been promulgated. Section 173 thereof recognised the inherent power of the High Court to protect and regulate their own process and to develop the common law, taking into account the interests of justice.
8. In the application before me the discrimination that arises is not caused by the rules of the High Court *per se* and the common law pertaining thereto at all. The discrimination is due entirely to the legislature having amended the rules of the Magistrate's Court to enable default judgments in the Magistrate's Court to be rescinded by consent.
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. See *Masiya v the Director of Public Prosecutions Pretoria (The State) and Another*. 2007 (5) SA 30 (CC) para [33] at 47G-48C

10. If I acceded to Mr Thompson's request to extend the common law as he suggests I would undoubtedly and legitimately be accused of usurping the constitutionally mandated power of the legislature under section 39(2).
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. As referred to in the passage from the judgment of Melamet J referred to with approval in the judgment in *Lazarus* (above), that imperative is not within the purview of section 173 of the Constitution.
12. In the premises, the iniquity constituted amongst litigants in different courts as aforesaid is not a matter to be addressed and corrected by this Court. There is no basis for the Court to include the judgment creditor's written consent to the rescission of its judgment as constituting good cause shown for the purpose of rule 31(2)(b).
13. Accordingly the application is dismissed.



I. MILTZ

ACTING JUDGE OF THE SOUTH
GAUTENG HIGH COURT,
JOHANNESBURG