THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1320/17

In the matter between:

BAYPORT SECURITISATION RF LTD **APPLICANT**

and

NOLUVUYO SAKATA **RESPONDENT**

Neutral Citation: *Bayport Securitisation v Sakata* (1320/17) [2019] ZASCA 73 (30 May 2019)

Coram: Cachalia, Swain, Zondi, Mathopo and Makgoka JJA

Heard: 7 May 2019

Delivered: 30 May 2019

Summary: Magistrates' Court Act 32 of 1944 – s 58 – default judgment – Magistrates' Court Rules – Rules 49(1), (3) and (8) – rescission of judgment – failure to set out bona fide defence – liability acknowledged – procedural error in proceedings – rescission refused.

ORDER

On appeal from: The Eastern Cape Division of the High Court, Bhisho (Hartle J and Rugunanan AJ sitting as court of appeal):

1 The applicant is granted special leave to appeal.

2 The appeal is upheld with costs

3 The order of the full court is set aside and replaced with the following:

'The appeal is dismissed with costs.'

JUDGMENT

Mathopo JA (Cachalia, Swain, Zondi and Makgoka JJA concurring):

[1] This application for leave to appeal concerns two judgments granted by the clerk of the court, Zwelitsha Magistrates' Court, acting in terms of s 58(1) of the Magistrate Court Act 32 of 1944 (the Act) as amended.[1] It arises from a consent to a judgment signed by the respondent on 14 July 2013 wherein she acknowledged her indebtedness to the applicant in the sum of R13 793.18. On 14 December 2015 the respondent launched an application in the Zwelitsha Magistrates' Court for the rescission of the two judgments in terms

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[1]'(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him or her 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 court may, on the written request of the plaintiff or his or her attorney and subject to subsection (1B) –

(a) 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

(b) if it appears from the defendant's written consent to judgment that he or she 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 or she 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).

. . . .'

of the provisions of rule 49(1), (3) and (8) of the Act.[2] The basis of the application was that the judgments were void *ab origine*. Despite the lateness of the application, the respondent did not seek condonation for the late delivery of the application.

[2] The Magistrate dismissed the application on the basis that no proper application for condonation had been made in terms of the rules and that the respondent had failed to set out a valid and bona fide defence to the applicant's claim in terms of rule 49(3). Dissatisfied with that decision, the respondent appealed to the Eastern Cape Division of the High Court, Bhisho (the high court) (Hartle J and Rugunanan AJ). The high court rejected the submissions on behalf of the applicant which were in line with the provisions of rule 49(3) and (8). It granted rescission of the judgments on the basis that the judgments by the clerk of the court, acting in terms of s 58, of the Act, were void *ab origine* and had been granted in error, expressing itself in the following terms:

'In summary, there is substance in the contention by Mr Du Plessis that the respondent did not consider the rights of the appellant as is manifest by the manner and circumstances in which the consent to judgment was procured, the manner in which the request for judgment and supporting documentation was lodged and the failure by the respondent to notify the appellant of the judgment by registered mail as is required by section 58(2) of the Act. In opposing the application the respondent did not in its opposing affidavit deal with its failure to ensure that the credit agreement or

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[2]'(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (4) or (5A).

. . .

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.

. . .

(8) Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.

. . . .'

a copy thereof was placed before the clerk of the court neither did it deal with its failure to have provided proof of postage in respect of the letter of demand purportedly sent by registered mail nor, without intending to attribute criticism, were these aspects dealt with by Mr Mundell during argument.'

[3] The high court then concluded that good cause existed for the rescission of the judgment and that this was justified in order to do justice between the parties stating the following:

'It follows that the judgment was granted in error and that its rescission must ensue, this on the premise of the court's inherent jurisdiction to grant relief where the rules of court make no express provision therefor.'

[4] The effect of the judgment is that once there is a procedural error in the grant of the judgment, it is unnecessary for an applicant to set out a valid and bona fide defence and a court must invoke its inherent jurisdiction and rescind a judgment. In so doing it ignored the provisions of rules 49(3) and (8).

The application for leave to appeal

[5] An application for leave to appeal to this court was referred for oral argument in terms of s 17(2)(d) of the Superior Court Act 10 of 2013. This court ordered that the parties be prepared, if called upon to do so, to argue the merits in terms of s 17(2)(b) of the Act. In *Cook v Morrison* [2019] ZASCA 08 with reference to the requirements of special leave, this court held that:

'The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or general public. This is not a closed list (*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E; *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 21).'

[6] This matter is of great importance to the parties and the general public because the judgment of the high court introduced a new ground for rescission which is clearly at odds with the judgment of this court in *Leo Manufacturing CC v Robor Industrial (Pty) Ltd* 2007 (2) SA 1 (SCA) (*Leo Manufacturing CC*) and two judgments of its own division namely *Diniso v African Bank Ltd* [2017] ZAECGHC 3 and *Smith v Finbond Mutual Bank* [2017] ZAECGHC 4. These judgments held that where rescission is sought in terms of rule 49(8) on the basis that the judgment was void *ab origine*, the applicant must still set out a valid and bona fide defence to the claim. In view of the conflicting decisions, it is in the interest of justice that leave to appeal should be granted. As to the merits we are of the view that there are reasonable prospects of success for the applicant's appeal.

Factual background

[7] The background to the application for the rescission of judgment can be summarised as follows: The debt, which gave rise to the judgment, arose from a credit agreement concluded between the respondent and the applicant. The agreement was subject to the provisions of the National Credit Act 34 of 2005 (the NCA). The respondent did not dispute that the provisions of ss 129 and 130 of the NCA were complied with. In the consent papers the respondent agreed to the quantum of the applicant's claim as well as the manner of payments. She did not deny that she was indebted to the applicant nor that the amount of the judgment debt was owing and payable when the judgment was granted by the clerk of the court. In her founding affidavit in support of the application for rescission of the judgment she acknowledged being indebted to the applicant arising from the credit agreement and did not dispute receipt of the letter of demand sent to her in terms of s 58(1) of the Act. Annexed to the applicant's application for a request for judgment before the clerk of the court were the following documents:

(a) An affidavit in terms of rules 4(2) and 12(6) supporting the request for judgment, dated 2 July 2013.

(b) The consent to judgment by the respondent, dated 14 May 2013.

(c) The pre-agreement statement, and quotation and credit agreement in respect of which judgment was sought.

(d) The notice as contemplated under s 129 of the NCA.
(e) Proof of postage of the s 129 notice.
(f) The track and trace report showing delivery of the s 129 notice to the respondent.
(g) The letter of demand addressed to the respondent.
(h) A letter certifying that the s 129 notice was sent to the respondent, signed by the applicant.
(i) Proof of registration of the applicant as a credit provider.
(j) A statement of the respondent's loan account dated 20 April 2016.

[8] Except for the argument that certain documents were not annexed to the request for judgment, the respondent did not set out any defence to the applicant's claim as required by rule 49(3). No explanation was advanced why the application was launched late and again the respondent did not explain how and when she obtained knowledge of the judgment. The high court rightly criticised her papers as 'somewhat discrepant of the factual detail', but then went on to conclude that the magistrate should have concluded that the respondent had brought the application for rescission within a period of one year, after the respondent had gained knowledge of the voidness *ab origine,* of the judgments as provided for in rule 49(8). The high court stated that 'the application was sufficiently widely presented to have enabled the court a quo to have properly directed itself to all the relevant facts.'

[9] Before us the principal issue was whether it was competent for the high court to invoke what it described as its 'inherent jurisdiction to grant relief where the rules of court make no express provision therefore' and rescind a judgment on the basis of a procedural error, in the absence of any valid and bona fide defence. No heads of argument were filed on behalf of the respondent. Upon an enquiry by the Registrar of this Court the attorney for the respondent, Mr Du Plessis, indicated that her whereabouts were unknown. A day before the hearing of this appeal Mr Du Plessis withdrew as attorney of record for the respondent.

[10] In her application for rescission of judgment, the respondent relied solely on the alleged procedural irregularities to impugn the judgment of the clerk of the court. In the result a substantial portion of the high court's judgment was dedicated to the resolution of these procedural defences, which culminated in the high court reaching the following conclusion:

'In the circumstances it must necessarily be concluded that the appellant's denial of receipt of a letter of demand not only meant that she had no knowledge of the respondent's cause of action but that her written consent to judgment was not the product of informed consent. It follows therefore that the judgment granted by the clerk of the court was void ab origine.'

As pointed out above the high court then concluded that the judgment was also granted by the clerk of the court in error and then proceeded to rescind the judgments.

[11] The high court in rescinding the judgments sought to distinguish the decision of this court in *Leo Manufacturing CC,* on the following basis:

'Relying on the *Leo Manufacturing* case, Mr Mundell argued that the requirements of rule 49(3) find equal application where rescission is sought in terms of rule 49(8) on the basis that the judgment was void ab initio and absent the appellant having disclosed a valid and bona fide defence (an element of good cause), rescission cannot be granted. Although the soundness of the legal authority relied on by Mr Mundell is not questioned, the earlier finding that the judgment by the clerk of the court was void *ab origine* stems from the particular facts of this matter. The absence of proof that a letter of demand was posted by registered mail to the applicant and the appellant's denial that she received such letter carries the consequence that the respondent's cause of action was not pertinently communicated to her. The further consequence is that, her written consent to judgment could not have amounted to informed consent (more about this below). In the particular circumstances of the matter it is doubtful if it was incumbent of the appellant to have pleaded a defence as an element of good cause. In my view this scenario also makes a case for rescission for "good reason", since the papers before this court and the material contained therein are sufficiently wide enough to incorporate this ground.'

[12] In *Leo Manufacturing CC* this court stated the following:

'[6] Put differently, the provisions of rule 49(3) are peremptory when a court considers an application to rescind a default judgment. More particularly the wording of the sub-rule makes it clear that the grounds of the defendant's defence to the claim must be set out. Where the objection is that the judgment was void *ab origine*, compliance with rule 49(3) nevertheless involves further proof of the existence of a valid and bona fide defence to the claim.

[7] Insofar as subrule 49(8) may be relevant to the matter, in that it specifically refers to the rescission or variation of a judgment which is sought, *inter alia*, on the ground that it is void *ab origine* and requires the application to be served and filed within one year after the applicant first had knowledge of such voidness, this, in no way, overrides the provisions of rule 49(3). Rule 49(8) simply provides a different time period for the filing and service of an application for rescission of a judgment (not only a *default* judgment) on certain specified grounds. In their comment upon rule 49(8), the learned authors Erasmus and Van Loggerenberg make the point that an applicant seeking rescission of a *default* judgment on the grounds that the judgment in question is void *ab origine* must (in terms of rule 49(3)) set out a defence "with sufficient particularity" so as to enable the court to decide whether or not there is a valid and *bona fide* defence.'

[13] It is accordingly clear that the high court erred in seeking to distinguish the decision in *Leo Manufacturing CC,* on the facts of the present appeal. Absence of proof that a letter of demand was posted by registered mail to the respondent and her denial that she received such a letter, did not absolve her from the obligation of setting out with sufficient particularity, a valid and bona fide defence to the claim of the applicant.

[14] For the reasons stated above, reliance by the high court on its 'inherent jurisdiction to grant relief where the rules of court make no express provision therefore' was misplaced. A proper reading of the rules makes it plain that where the objection is that the judgment is void *ab origine* compliance with rule 49(3) is peremptory. The defence to the claim must be set out with sufficient particularity to enable the court to decide whether there is a valid and *bona fide* defence. It follows that the judgment of the high court must be set aside.

[15] In the circumstances the following order is made:

1 The applicant is granted special leave to appeal.

2 The appeal is upheld with costs.

3 The order of the full court is set aside and replaced with the following:

‘The appeal is dismissed with costs.’

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R S Mathopo
Judge of Appeal

APPEARANCES:

For applicant:	A R G Mundell SC Instructed by: Marie-Lou Bester, Johannesburg Bokwa Attorneys, Bloemfontein
For respondent:	No appearance