IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

"REPORTABLE"
Case No. 11975/08

In the matter between:

GAWIE SWART Applicant

and

ABSA BANK LIMITED Respondent

Coram	:	**Veldhuizen, J**
Judgment by	:	**Veldhuizen, J**
For the Applicant	:	**Adv. M. Muller**
Instructed by	:	De Witt de Villiers (Ref. Ms. M.H. Steyn) Tel. No. 021-949 1830 1 Poort Street BRACKENFELL 7560
For the Respondent	:	
Instructed by	:	
Date(s) of Hearing	:	05 September 2008
Judgment delivered on	:	09 December 2008

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In the matter between:

GAWIE SWART Applicant

and

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JUDGMENT DELIVERED ON 9 DECEMBER 2008

VELDHUIZEN, J:

[1]This was an unopposed application for the rescission of a judgment granted by default on 18 September 2006 against the applicant in favour of the respondent. The application was refused.

The applicant then requested reasons for the refusal. These are my reasons.

[2]The applicant, a businessman, granted a mortgage bond in favour of the respondent. The applicant failed to make payments due to the respondent in terms of the mortgage bond and the respondent thereafter obtained default judgment against the applicant.

[3]It is common cause that the applicant subsequent to judgment being obtained settled the debt and obtained the respondent's consent to rescission of the judgment. The ground on which the applicant based the application for rescission, is stated in his affidavit as follows:

'I would like to clear my credit records so as to enable myself to secure a mortgage bond to buy a house.'

[4]It was held in *De Wet and Others v Western Bank Ltd*[1]:

> '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 recognised in many

[1] 1977(4) SA 770(T) at 780H – 781A

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., pp. 20-21. 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. Such a power is not a necessary concomitant to the inherent power to control the procedure and proceedings in a Court. I am of the opinion, as set out above, that the powers in the Rules of Court, in this regard, are specific powers vested in the Court over and above the powers to assist in this connection in the common law.'

[5]The requirements for the rescission of a judgment under the common law was referred to in *Swadif (Pty) Ltd v Dyke NO*[2]:

'However, I do not consider it necessary to enter upon a discussion of the grounds upon which the rescission of a judgment may be sought at common law because, whatever the grounds may be, it is abundantly clear that at common law any cause of action which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. There must be some causal connection between the circumstances which give rise to the claim for rescission and the judgment . . .'

In *Weare v Absa Ltd*[3] it was held:

'In my opinion, a contention that there is sufficient cause for rescission of a lawfully granted judgment where the judgment debt has been

[2] 1978(1) SA 928(A) at 939D-E
[3] 1997(2) SA 212(D + CLD) at 216E

> discharged, to the formed judgment debtor in relation to his 'business activities', is unsound.'

In the present matter the reason put forward by the applicant was that it would be just and equitable to rescind the judgment because it is prejudicial to him. I do not agree. I respectfully agree with the reasoning in the above mentioned decisions that the fact that the judgment is prejudicial to him does not afford a cause for the rescission of the judgment. It is also clear that the cause relied upon by the applicant for rescission did not exist at the time that the final judgment was handed down. It is also clear that no causal connection exists between the circumstances that gave rise to the application for rescission and the judgment. The applicant's need to obtain credit has nothing to do with his failure in paying the debt in the first place and which gave rise to the judgment.

[6]Rule 42 provides for the variation and rescission of orders. Sub-rule 1 sets out the grounds on which an application can be made namely, where an order or judgment was erroneously sought or granted in the absence of any affected party; where there is an ambiguity or a patent error or omission to the extent of such ambiguity, error or omission or where an order or judgment was granted as a result of a mistake common to the parties. It is clear

from the papers that Rule 42 does not assist the applicant as there is no ambiguity, error or mistake in the judgment and it was also not erroneously granted.

[7]Rule 31(2)(b) reads as follows:

> 'A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.'

I was of the view that the applicant's application did not comply with the requirements in terms of rule 31(2). I am in agreement with the judgment in *Saphula v Nedcor Bank Ltd*[4] where the practice of applying for rescission of judgments after the debt has been settled was discussed. Similar to the facts in the present matter, the Applicant sought rescission of a judgment on the basis that it had the effect that he was unable to raise credit for his business. The court said:

> 'What they are seeking is that courts participate in falsifying a true perspective of the past. To them the only way to say that a judgment should no longer weigh (or weigh too much) against creditworthiness is to require court records to create the false impression that the person never had any adverse default. For that purpose it is sought to prod

[4] Saphula v Nedcor Bank Ltd, 1999(2) SA 76 (W)

> courts into saying that the judgment was wrong and a defence is available although the judgment was in fact correctly granted.[5]

The same issue was at the centre of the judgment of the Cape Provincial Division in *Theodore Damon* and *Carla Damon v Nedcor Bank Limited*[6], delivered on 30 October 2006. Applicants applied for rescission of a default judgment 'so that the credit records could be amended'. The judge discussed the new National Credit Act 34 of 2005 and concluded that, because the remedies in the Act with regards to debt re-arrangements were not available to the applicants at the time, they were entitled to a rescission of the default judgment. The court in the Damon case relied on the judgment of *RFS Catering Supplies v Bernard Bigara Enterprises CC*[7]. Both these decisions considered the concepts of 'justice and fairness' broad enough to capture a number of circumstances that are not covered by the common law or the rules. In both of these cases rescission was granted. I respectfully disagree with these decisions. As mentioned above the inherent jurisdiction of the court does not include the right to interfere with the principle of finality of judgments, other than in circumstances specifically provided for in the rules or at common law. This is also the view I subscribe to.

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[5] P78H-I
[6] Case No. 3970/04
[7] 2002(1) SA 896(C)

(See especially *Lazarus and Another v Nedcor Bank Ltd, Lazarus and Another v Absa Bank Ltd* 1999(2) SA 782 (WLD).

[8]For these reasons I came to the conclusion that the Applicant did not comply with the requirements in terms of the common law nor the additional requirements provided for in terms of rule 31(2)(b) and rule 42 and refused the application for rescission of the judgment.

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A.H. VELDHUIZEN