REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 3970/04

In the matter between:

THEODORE PETER DAMON First Applicant

CARLA YOLANDA DAMON Second Applicant

and

NEDCOR BANK LIMITED Respondent

JUDGMENT DELIVERED THIS 30TH DAY OF OCTOBER 2006

BINNS-WARD AJ

[1] The applicants, who are husband and wife, have applied for an order rescinding the judgment granted by default against them by this court at the instance of Nedcor Bank Ltd in September 2004. Nedcor had obtained the judgment in an action for payment of the amount outstanding in respect of a

loan secured by a mortgage bond registered against certain immovable property then owned by the applicants.

[2] The applicants did not oppose the claim because they had no defence to it. They had been unable to service the bond repayment instalments as a consequence of their joint income having diminished when one of them (it is not altogether clear which) lost their employment. The subsequent sale of the property enabled the payment of the judgment debt in full.

[3] The applicants have, however, subsequently discovered that the judgment has been listed by the credit bureaux and that, as a consequence, they are unable to obtain credit. The purpose of obtaining the rescission of judgment that is now applied for is, as the second applicant puts it in the founding affidavit, 'so that the credit records could be amended'.

[4] The judgment creditor has consented in writing to the rescission of the judgment.

[5] When the matter was called I drew counsel's notice to the fact that it has been held on a number of occasions that the court does not have the power to grant a rescission of judgment in circumstances like this, and even if such powers did vest in the court, that it would not be appropriate to grant relief of a nature that has the effect for practical purposes of falsifying actual credit records by allowing the impression to be given that a default judgment had never properly been given against the debtor. See *Saphula v Nedcor Bank Ltd*

1999 (2) SA 76 (W); Lazarus and Another v Nedcor Bank Ltd; Lazarus and Another v Absa Bank Ltd 1999 (2) SA 782 (W) and *Venter v Standard Bank of South Africa [1999] 3 All SA 278 (W).*

[6] I was aware when I raised the point that a two-Judge Bench of this court had held in *RFS Catering Supplies v Bernard Bigara Enterprises CC 2002 (1) SA 896 (C)* that rule 49(5) of the Magistrates' Court Rules, which appears to allow for the rescission of a default judgment where a plaintiff in whose favour a default judgment has been granted has agreed thereto in writing, is not inconsistent with the common law. In so doing this court disapproved of the judgment in *Venter v Standard Bank of South Africa*, but made no reference to the other two judgments that I have mentioned. In arriving at its decision, this court took a different view from that adopted in the judgments in the Witwatersrand Local Division on the effect of the Appellate Division's judgment in *De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A).* In the latter judgment, Trengove AJA (as he then was) held at 1042F-H, '*Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by Kersteman (op cit sv defaillant) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been*

influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case.' Those remarks fall to be read with the observation by the learned judge of appeal at 1041C-D of the judgment that '*The Courts of Holland… appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf Athanassiou v Schultz 1956 (4) SA 357 (W) at 360G and Verkouteren v Savage 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being functus officio, and judgments could only be set aside on the limited grounds mentioned in the Childerley case.*'[1] The essential basis for the difference between the approach in *RFS Catering Supplies* and the judgments in the Witwatersrand Local Division appears to me therefore to be the consideration by the latter court that in a case where the merits of the case on which judgment had been given were not open to being revisited, the court was *functus*.

[7] Apart from the fact that it was made in terms of magistrates' court rule 49(5), the rescission of judgment application in issue in *RFS Catering Supplies* was not dissimilar in material respects to the one currently under consideration.

[1] Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163.

[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.

[9] In *RFS Catering Supplies* it was held that the right to the remedy under the common law, as adapted to meet the exigencies created by the modern phenomena of debt records and credit bureaux, was founded in 'fairness and justice'. That of course begs the question of by what criteria or considerations the fairness and justice of a given case fall to be established. The answer must necessarily depend on the peculiar circumstances of the case. The availability of a statutory remedy making it unnecessary to extend the common law, particularly when there is disharmony between the divisions of the High Court on the current state of the common law, must also be part of the answer. I have considerable reservation about accepting that the judgment creditor's consent should by itself be determinative of the question. On the contrary, if the need for relief is established by the applicants' need not to unreasonably be denied

access to credit, it is readily conceivable that a more compelling case might be made out in fairness and justice in a matter where the judgment creditor was unwilling, for no good reason, to furnish written consent of the sort referred to in Magistrates' Court rule 49(5). It also appears to me that fairness and justice in this context must entail having regard not only to the interests of the applicant for rescission, but also to the economic and societal functions of accurate debt and credit records in modern commercial life. A further consideration must be whether the particular remedy sought is the appropriate one in the context of other potentially available common law remedies, including remedies against the credit bureaux. The latter consideration did not enjoy consideration in *RFS Catering Supplies* because of the focus of the enquiry in that matter; viz. whether rule 49(5) was consistent with the common law.

[10] Josman J pointed out in *RFS Catering Supplies* that the Roman-Dutch common law in South Africa is, and always has been, amenable to adaptation according to changing conditions in society. This is undoubtedly so; and indeed conditions have continued to change since judgment in that matter was given in October 2001. Subsequent to that date the legislature has responded to the suggestion made by Cloete J (as he then was) in *Lazarus*, supra, at 786 E-F, that the predicament of persons such as the applicants in this case be addressed by the parliamentary lawmakers. The National Credit Act 34 of 2005 (hereafter referred to either as 'the NCA', or 'the Act') has been adopted.

[11] The long title of the NCA states (insofar as relevant for current purposes) that it is an Act *'to promote a fair and non-discriminatory market place for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improve standards of consumer information … to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting … to regulate credit information; to provide for registration of credit bureaux, creditor providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the national credit regulator and the national consumer tribunal … and to provide for related incidental matters'*. The objects of the Act as they might be deduced from the long title are confirmed in relevant respects by the provisions of s 3 thereof.

[12] The Act establishes the National Credit Regulator, which is a juristic person, with the responsibility, amongst other things, for the registration of credit bureaux. Section 43 of the NCA provides that the business of a credit bureau may only be carried on by a person that has obtained registration as a credit bureau in terms of the Act. The National Credit Regulator is not permitted to register a person as a credit bureau unless satisfied as to the appropriate qualification, competence, knowledge, experience and capacity of such person to operate as a credit bureau. One of the requirements for registration as a credit bureau is the satisfaction by the applicant for registration

of the National Credit Regulator that the applicant has adopted procedures to ensure that questions, concerns and complaints of consumers or credit providers can be treated equitably and consistently in a timely, efficient and courteous manner (see s 43(3)(c)). In terms of Part B of Chapter 2 of the Act a National Consumer Tribunal is established with the power to adjudicate upon any application that might be made to it in terms of the Act and any allegations of prohibited conduct under the Act. The decisions of the National Consumer Tribunal have the status of judgments of the High Court (see s 152 of the Act).

[13] Section 70 of the NCA makes a registered credit bureau responsible for maintaining accurate information on record and, in this connection, it is required, amongst its other duties, to accept without charge the filing of consumer credit information from the consumer for the purpose of correcting or challenging information otherwise held by that credit bureau concerning that consumer. In terms of s 70(2)(d) of the Act, a registered credit bureau is required to retain any consumer credit information reported to it for the prescribed period, irrespective of whether that information reflects positively or negatively on the consumer.

[14] Part D of chapter 4 of the Act provides for a system of assisted debt management or debt re-arrangement for persons who, like the applicants in this case did, encounter difficulty in meeting their obligations in terms of credit agreements. (A mortgage contract is expressly included within the meaning of 'credit agreement' under the Act.) A person subject to a debt re-arrangement

becomes entitled to the issue of a clearance certificate once he or she has discharged the outstanding financial obligations which are subject to the debt re-arrangement. The issue of such a clearance certificate entitles the credit receiver to the expungement of the affected transactions in respect of which he or she had been in default of his or her contractual obligations from the credit records maintained by registered credit bureaux. In the event of a credit bureau failing or refusing to expunge the record, the credit receiver is afforded remedies under the Act to address such failure or refusal without it being necessary to approach a court.

[15] A consideration of the provisions of the Act as a whole makes it clear that the legislature has sought to balance the commercial need for reliable debtor and credit information with the social need that an incidence of bad debt in a person's life should not, once rectified, thereafter unduly prevent such person from again accessing credit. The provisions of the Act also make it plain that the legislature considers it to be a matter of public policy that encouragement should be given to ensuring that the extension, obtaining and management of credit or debt, as the case might be, is handled responsibly by all concerned, whether they be lenders, borrowers or credit information managers. It should therefore no longer be necessary to seek adaptations to the common law, arguably by uncomfortable and artificial contrivance, to address the sort of unhappy predicament that the applicants in this case find themselves in. In future persons who find themselves in this predicament through failure to make responsible use of the machinery which the Act provides should, in my

view, have to wait out the five year period provided under the regulations to the Act, after which default judgments fall automatically and compulsorily to be expunged from the records maintained by credit bureaux.

[16] Mr *Abrahams*, who appeared for the applicants pointed out that in terms of item 6 of the table in s 17(1) of the regulations published under the Act[2] consumer credit information related to civil court judgments, including default judgments, may be displayed and used for purposes of credit scoring or credit assessment for a maximum period of five years, or '*until the judgment is rescinded by a court or abandoned by the credit provider in terms of section 86 of the Magistrates' Court Act*'. I understood him to suggest that this reference to the rescission of judgments in the regulations afforded legislative recognition that applications such as this should be positively entertained. I do not agree.

[17] It is an established principle that the legislature is taken to be aware of the existing state of the relevant law, including the reported judgments of the superior courts, when it enacts legislation in respect of any particular matter. Cf. e.g. *Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A)* at 649G: *Harpur NO v Govindamall and Another 1993 (4) SA 751 (A)* at 770E-F. In the context of a series of judgments emanating from what is undoubtedly the busiest seat of the High Court dealing with commercial matters, in which that court has refused to recognise the existence in common law of a remedy of rescission of judgment in cases like the present, I consider it

[2] Published under GN R489 in GG 28864 of 31 May 2006.

to be significant that there is no provision in the Act providing a statutory basis for rescission of judgments in such cases. Considering the extra-curial remedies (outlined in general terms above) that are provided in the Act, which effectively address the issues identified in the WLD judgments, I do not find it surprising that the legislature did not consider it necessary to provide an additional statutory basis for the rescission of judgments over and above the limited common law grounds recognised in the Witwatersrand Local Division in the context of that court's reading of the exposition of the common law in *De Wet and Others v Western Bank Ltd*, supra, and *Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)* at 764I - 765D. Once the Act becomes fully operational,[3] relief by way of rescission of judgments in the context acknowledged in this division of the High Court in the *RFS Catering Supplies* case should be unnecessary.

[18] The NCA does not, however, contain any transitional provisions that would enable persons such as the applicants whose adverse credit history reaches back to a time before the commencement of the Act to obtain expungement of their default judgments from the records of the credit bureaux. Such persons will, if they are not to obtain relief on the basis permitted in terms of the judgment in *RFS Catering Supplies*, have to wait out the period of five years prescribed in the regulations.

[3] The commencement of the operation of the provisions of the Act has been staggered, with many of the provisions relevant to the discussion in this judgment due to come into effect only on 1 June 2007.

[19] It is clear on the facts that the applicants could in the context of the Act's debt re-arrangement provisions, had they been available at the time, probably have obtained appropriate relief that would have permitted them upon the subsequent liquidation of the debt to obtain the immediate expungement of any reference to the default judgment from the records of registered credit bureaux. In the circumstances I have been persuaded that the applicants are entitled in the peculiar circumstances of this case to the advantage of the law as stated in the *RFS Catering Supplies* case, vestigial as the authority of that judgment appears to have become.

[20] Accordingly an order is made rescinding the default judgment granted against the applicants in favour of Nedcor Bank Limited in case no.3970/04.

A.G. BINNS-WARD

ACTING JUDGE OF THE HIGH COURT