Rescission of judgments by consent – a critical analysis

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1 *Introduction*

At common law it is a general rule that a South African court becomes *functus officio* after pronouncing a final judgment and that a court has no authority to set aside, alter, correct or supplement the judgment in any way.[1] However, provision is made in both the high court and magistrates' courts for the variation and rescission of judgments in certain limited circumstances. In the high court a judgment can be varied or rescinded under rule 31(2)(*b*), rule 42[2] or in terms of the common law. In the magistrates' courts, a judgment can be varied or rescinded on the grounds as provided for under section 36,[3] read together with rule 49, which provide the machinery pertaining to the procedure to be followed in order to rescind a judgment. In all instances an applicant must be able to show that there is sufficient or good cause to rescind the judgment. This entails, firstly, the presentation of a reasonable and acceptable explanation for his default, and, secondly, that on the merits of the main case, he has a *bona fide* defence which, *prima facie*, carries some prospect of success. These principles were, however, further extended in the magistrates' courts, where rule 49(5) makes provision for the situation whereby a judgment may be rescinded by the consent of the judgment creditor. This provision gave rise to some conflicting decisions and culminated in a situation where there are currently two different approaches followed in the high court and magistrates' courts respectively. This article focuses on the basic principles pertaining to rescission of judgments by consent in the South African law of civil procedure. It also provides a critical analysis of the relevant decisions pertaining thereto and the current position in relation to the different approaches followed in the high court and magistrates' courts. Certain recommendations are made to rectify the current position in order to make provision for uniformity in the approach relating to rescission of judgments by consent.

2 *Development in the magistrates' courts*

Section 36(1) of the Magistrates' Courts Act[4] sets out the general grounds for the rescission of judgments in the magistrates' courts and reads as follows:

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1 See *eg West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 176; *Sundra Hardeware v Mactro Plumbing* 1989 1 SA 474 (T) 477B; *First National Bank of South Africa Ltd v Jurgens* 1993 1 SA 245 (W) 246J-247A; *Zondi v MEC, Traditional and Local Government Affairs* 2006 3 SA 1 (CC) 12G-19F; *Adonis v Additional Magistrate, Bellville* 2007 2 SA 147 (C) 153I-154B and *Vilvanathan v Louw* 2010 5 SA 17 (WCC) 20F-31G.

2 of the Uniform Rules of Court.

3 of the Magistrates' Courts Act 32 of 1944.

4 32 of 1944.

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"The court may, upon application by any person affected thereby, or, in cases falling under paragraph *(c)*, *suo moto* —

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
(b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
(c) correct patent errors in any judgment in respect of which no appeal lies."

Rule 49 deals with the procedure to be followed where a party seeks to rescind a default judgment. Before 1997 the rule required an applicant to prove that he was not in wilful default and that he had a *bona fide* defence on the merits of the main case. The rule was, however, amended in 1997 to make provision for two different kinds of applications:

(a) firstly, in instances where judgment was granted against an applicant who intends to defend the proceedings in the main action,[5] and
(b) secondly, in instances where judgment was granted against an applicant who does not wish to defend the proceedings in the main action.[6]

In the first instance an applicant must set out in a founding affidavit, firstly, the reasons for his default or absence and, secondly, the grounds of his defence against the claim in the main action. In the latter instance, the applicant must satisfy the court, firstly, that he was not in wilful default, and, secondly, that the judgment was satisfied, or arrangements were made to satisfy the judgment. Rule 49(5) even goes further than this and states that:

"*(a)* Where a plaintiff in whose favour a default judgment was granted has agreed in writing that the judgment be rescinded or varied, either the plaintiff or the defendant against whom the judgment was granted, or any other person affected by such judgment, may, by notice to all parties to the proceedings, apply to the court for the rescission or variation of the default judgment, which application shall be accompanied by written proof of the plaintiff's consent to the rescission or variation.
(b) An application referred to in paragraph *(a)* may be made at any time after plaintiff has agreed in writing to the rescission or variation of the judgment."

In *Venter v Standard Bank of South Africa*[7] the Witwatersrand local division[8] held that rule 49(5) was *ultra vires* the Magistrates' Courts Act, as it purported to make inroads into the substantive-law requirements for rescission of judgments in the magistrates' courts. Joffe J accordingly held that the mere satisfaction of a judgment, coupled with the consent to the rescission thereof by the judgment creditor, did not *per se* constitute "good cause" as required at common law.[9]

In *RFS Catering Supplies v Bernard Bigara Enterprises CC*,[10] the Cape provincial division, however, departed radically from the *Venter* decision. Josman J, with Van Reenen J concurring, held that rule 49(5) was consonant with the common law and therefore *intra vires* the Magistrates' Courts Act.

Apparently, in an attempt to resolve the controversy surrounding the rescission of judgments by consent in the magistrates' courts, section 36 of the Magistrates'

5 rule 49(3).
6 rule 49(4).
7 1999 3 All SA 278 (W).
8 As it was then called.
9 281b-d and 283f-g.
10 2002 1 SA 896 (C).

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Courts Act was amended in 2003 by the insertion of the following subsection: "(2) 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 must rescind or vary such judgment on application by any person affected by it." This was the last development regarding the rescission of judgments by consent in the magistrates' courts, and the position is therefore clear that any default judgment may be rescinded by consent as long as the application is accompanied by written proof of the judgment creditor's consent to the rescission or variation.

3 *Development in the high court*

As mentioned, a judgment can be rescinded on three different grounds in the high court, namely:

(a) in terms of rule 42;
(b) in terms of rule 31(2)(*b*); and
(c) in terms of the common law.

3.1 Rule 42

Rule 42(1) deals extensively with the grounds for the rescission and variation of judgments obtained in the high court and provides as follows:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
> *(a)* An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
> *(b)* an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
> *(c)* an order or judgment granted as the result of a mistake common to the parties."

Rule 42(2) deals with the procedure to be followed and provides that a judgment in the high court can be rescinded or varied only by way of an application to court with notice to all parties whose interests may be affected by the variation sought. Rule 42(3) also provides that the court shall not grant any rescission or variation of a judgment unless it is satisfied that all parties whose interests may be affected received notice thereof.

3.2 Rule 31(2)(*b*)

Rule 31(2)(*b*) deals exclusively with the rescission of judgments by default and reads as follows: "A defendant may within 20 days after he 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 it seems meet."

According to Peté *et al* "good cause" involves three different elements, namely (a) that the applicant must give a reasonable explanation of his default; (b) his application must be brought *bona fide*; and (c) he must show the existence of a *bona fide* defence.[11]

[11] Peté, Hulme, Du Plessis and Palmer *Civil Procedure A Practical Guide* (2008) 299.

3.3 Common law

The courts of Holland apparently had a relatively wide discretion regarding the rescission of default judgments. A distinction was drawn between the rescission of judgments after evidence had been heard on the merits of the dispute and those judgments rescinded without going into the merits of the dispute. In the former instance the court was regarded as being *functus officio* and could rescind a judgment only on certain limited grounds. In the latter instance, the court had relatively wide powers to set aside a judgment.[12] A good example of the application of this principle can be found in *Nyingwa v Moolman*.[13] In this matter the applicant applied for the rescission of a summary judgment that was granted against him by the court *a quo*. When the application for summary judgment was heard, neither the applicant nor his legal representative was present and no defence had been presented by, or on behalf, of the applicant by way of oral evidence or affidavit. The court *a quo* therefore granted summary judgment without considering the merits of the matter. The court, with reference to the common-law position, held that if the merits of a dispute were considered before judgment, a rescission of judgment can be granted only on the limited grounds as set out in the *Childerley* case,[14] but if the merits were not considered, the grounds for a rescission are "virtually unlimited" and the only requirement is that "sufficient cause" must be shown.[15]

The courts of Holland were therefore entitled in their discretion to rescind default judgments on sufficient cause shown. The courts also laid down certain general principles to guide them in the exercise of their discretion, and these were to a large extent influenced by the notions of justice and fairness. The applicant had the onus to show the existence of sufficient cause to rescind the judgment, which, *inter alia*, included a reasonably satisfactory explanation of why the judgment was allowed to go by default.[16]

[12] Voet *Commentarius ad Pandectas* 2 11 9, where it is stated that: "*Nevertheless there must at all times be need for special restitution. But after definitive judgment has been given it is far more difficult, and only happens by means of solemn restitution, to be vouchsafed for the justest of reasons* …" (Gane's translation). See also *De Wet v Western Bank Ltd* 1979 2 SA 1031 (A) 1040-1043, where Trengove AJA, with reference to *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163, gave a detailed summary of the common law position pertaining to the rescission of judgments.

[13] 1993 2 SA 508 (Tk).

[14] Which basically consists of fraud, exceptional cases of *justus error*, instances provided for in the modern rules of court and, in exceptional circumstances, where new documents have been discovered.

[15] 511-512.

[16] Merula *Maniere van Procederen* 4 33 11, footnote *(h)*, refers, for example, to the situation where a defendant could "purge" his default and states that: "*Uit welk geval te zien is, dat het verleenen van purge der Defaulten met den effecte van dien, of niet, hangt ab arbtrio judicis, en dat die zulks verleent, of niet, naar de omstandigheden der zaken*." Wassenaer *Practyk Judicieel* 1 5 6 refers to the fact that a presiding officer could "purge" the default of a litigating party in its own discretion ("arbitrage van den Rechter") and that some of the instances that would qualify for such a "purging" entails "*water-nood, ofte andere diergelijke zaken*". Van der Linden *Verhandeling over de Judicieele Practicq* points out that a litigant was allowed to "purge" his default if there is a substantial and evident reason for such a default ("*mits daar toe dienen groote en evidente redenen, en anders niet*"). In Voet *Commentarius ad Pandectas* 2 4 14 it was stated that: "… restitution should not be refused were he able to show a most just cause of ignorance, free from all negligence." Under the defintion of "purge van defaulten" in Kersteman *Hollandsch Rechtsgeleert Woorden-Boek* it is also stated that a rescission of judgment could be granted in the discretion of the presiding officer on good cause shown ("*het verlenen van Purge der Defaulten , met of zonder den effecte van dien, alleen afhangt arbitrio Judicis of ter bescheidentheid van den Rechters, welke zulks accorderen, of afslaan naar de omstandigheden der zaken*.") See also the *De Wet* case (n 12) 1042F-1043A.

The common-law grounds for rescission of a judgment were therefore not limited to the grounds as contained in rules 31 and 42(1)[17] or as set out in the *Childerley* case, but also entailed

> "the case of a litigant, or his legal representative whose default is due to unforeseen circumstances beyond his control, such as sudden illness, or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief".[18]

No reference is, however, made by any of the old authorities as to the possibility of rescinding a judgment based on the consent of the judgment creditor.

3.4 Case law

The decision in *Venter v Standard Bank of South Africa*[19] was followed in *Saphula v Nedcor Bank Ltd*[20] in the context of the rescission of a high court judgment. The court held that there is no reason for a court to grant rescission of judgment in the absence of a hallmark *bona fide* defence, and despite the fact that the creditworthiness of the judgment debtor may be adversely affected.[21] *In Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank Ltd*[22] Cloete J held that, despite the fact that there was a clear anomaly between the rights of a party in the magistrate's court and the rights of a party in the high court pertaining to the consent-rescission of judgments, "consent by the creditor cannot, without more, justify rescission in the High Court".

In *Swart v Absa Bank Ltd*[23] a similar application for the rescission of a judgment by consent was refused because the satisfaction of the relevant judgment coupled with the consent of the judgment creditor did not constitute "good cause". As a further ground for refusing the application, the court also pointed to the fact that the cause relied on by the applicant, namely the satisfaction of the judgment and subsequent consent to the rescission thereof, did not exist at the time the judgment was handed down.

However, the watershed moment came with the decision in *Vilvanathan v Louw*,[24] when a full bench of the Western Cape high court made a detailed analysis of the rescission of judgments by consent in the high court. Thring J, with Moosa and Baartman JJ concurring, overruled the decision in the *RFS Catering Supplies* case,[25] and held in effect that the satisfaction of a judgment and the consent of a judgment creditor to the rescission thereof did not constitute "sufficient cause" as required at common law.[26] The court, with reference to *Chetty v Law Society, Transvaal*,[27] emphasised that the appellate division and supreme court of appeal laid down that, at common law "it is clear that in principle and in the long-standing practice of our courts", the following two elements of sufficient cause must be present for the successful rescission of a default judgment:

17 of the Uniform Rules of Court.
18 the *De Wet* case (n 12) 1042H-1043A.
19 (n 7).
20 1999 2 SA 76 (W).
21 79B-D.
22 1999 2 SA 782 (W).
23 2009 5 SA 219 (C).
24 (n 1).
25 (n 10).
26 31G.
27 1985 2 SA 756 (A).

(a) the presentation of a reasonable and acceptable explanation for a party's default; and
(b) that he has a *bona fide* defence which, *prima facie*, carries some prospect of success.[28]

The court, with reference to *Swadif (Pty) Ltd v Dyke*,[29] also added a third requirement, namely that the circumstances relied on for rescinding a judgment must have existed at the date of the judgment and not have arisen subsequently.[30]

This decision therefore ended the controversy surrounding the rescission of default judgments by consent in the high court and made it clear that the satisfaction of a debt coupled with the consent of the judgment creditor to rescission did not constitute sufficient cause for the rescission of such judgments. This also gave rise to a clear discrepancy between the procedure adopted in the magistrates' courts and the procedure now followed in the high court.

3.5 Constitutional challenge

In *Kalikhan t/a Tri-Star Logistics v Firstrand Bank Ltd*[31] the applicant's legal representative requested the court to develop the common-law meaning of the words "on good cause shown" in rule 31(2)(*b*) to include the situation where a judgment debt is discharged and the judgment creditor consents to the rescission of the judgment concerned. The court held that it could not rewrite the well-developed common law relating to what constitutes good cause for rescinding a default judgment and that the alleged discrimination in the high court against an applicant in a consent-rescission application is not caused by the rules of the high court and the common law *per se* but is entirely due to the legislature having amended the rules of the magistrates' courts to enable default judgments in these courts to be rescinded by consent. The court held that, if it were to develop the common law as requested, the court would legitimately be accused of usurping the constitutionally mandated power of the legislature and that this may amount to a breach of the *trias politica* doctrine. The court therefore dismissed the application and held that it was the duty of the legislature to address any inequality that arises from the different approaches followed in the magistrates' and high court relating to consent-rescissions.

This decision cannot be faulted. It is clearly up to the legislature to rectify an anomaly caused by its own doing. It is, however, a pity that the court did not voice an opinion on how the legislature may rectify this anomaly, as the legislature is in some instances clearly influenced by the opinions of the courts.

4 *Critical analysis*

4.1 General

It seems clear that the different approaches followed in the magistrates' courts and high court, respectively, are unacceptable. This anomaly also stands in stark contrast to recent developments in which a complete new set of rules were enacted in 2010 in the magistrates' courts in an attempt to bring about more uniformity in the

[28] 27B-C.
[29] 1978 1 SA 928 (A).
[30] 27D-E.
[31] case no 31466/11 (GSJ) (unreported).

approach followed by the high court and the magistrates' courts in civil litigation.[32] It is therefore clear that this anomaly should be rectified and that the procedures pertaining to the rescission of consent-judgments should be applied uniformly in both courts.

The question arises, however, as to what the correct procedure should be. Should section 36(2) and rule 49(5) of the Magistrates' Courts Act be abolished so as to bring the magistrate's court practice in line with the high court practice, or should a provision similar to section 36(2) be inserted into the Supreme Court Act to bring the high court practice in line with the magistrate's court practice?

In its published comments on the Constitution Seventeenth Amendment Bill and the Superior Courts Bill the Law Society of South Africa was also of the opinion that there is no reason why the position should be different in the high court and magistrate's court when it comes to the rescission of judgments by consent.[33] However, the Law Society conceded that it could not be accepted without reservation that the amendment to the Magistrates' Courts Act to introduce section 36 was properly considered.[34] The Law Society therefore suggested that the decision in *Vilvanathan v Louw*,[35] and specifically the concerns raised in this matter against the rescission of judgments by consent, should be carefully considered, and, if it had any merit, the Superior Courts Bill should not contain provisions relating to consent to a rescission of judgment. The Law Society also proposed that the provisions of section 36 of the Magistrates' Courts Act should be researched and, if found to be problematic, that this section should be amended accordingly.[36]

Both viewpoints pertaining to the procedure to be followed in the rescission of judgments by consent have considerable merit. Before the merits can be analysed and compared, it is, however, necessary first to investigate the fundamental purpose of rescission of judgment by consent.

4.2 Purpose of rescission of judgment by consent

The purpose in all instances where an applicant wishes to rescind a judgment by consent seems quite clear, namely to clear his name from the records of all the relevant credit bureaux. Before the new National Credit Act[37] came into full operation on 1 June 2007, the situation had been that all civil judgments were recorded against the names of the relevant judgment debtors on the records of all the major credit bureaux.[38] These recorded judgments then also had an extremely adverse effect on the creditworthiness of the relevant judgment debtors, which made it virtually impossible for them to gain any access to the granting of any legitimate and reputable financing. The only way in which a judgment debtor could expunge

[32] The rules regulating the conduct of the proceedings of the magistrates' courts were repealed and replaced by a comprehensive set of new rules with effect from 15 Oct 2010. The new rules were published in parts 1 to 3 of *GG* 33487 (23-08-2010) and were put into operation by GN 888 (08-10-2010) (*GG* 33620 (08-10-2010)).

[33] "LSSA comments on courts' Bills" 2011 *De Rebus* 18. [The Supreme Court Act has been repealed by the Superior Courts Act 10 of 2013 which came in operation 23-08-2013, the same date the Constititution Seventeenth Amendment Act also came into operation – ed.]

[34] *ibid*.

[35] (n 1).

[36] 18.

[37] 34 of 2005.

[38] See *eg* the *Venter* case (n 7); the *Saphula* case (n 20); the *Lazarus* case (n 22); the *Swart* case (n 23); the *Vilvanathan* case (n 1).

his records at a credit bureau was to have the judgment against him rescinded by a formal court procedure.[39]

The National Credit Act did not drastically change this situation. Section 70(1)(*a*) deals with the definition of "consumer credit information", which may include any of the following:

> "[A] person's credit history, including applications for credit, credit agreements to which the person is or has been a party, pattern of payment or *default under any such credit agreements*, debt re-arrangement in terms of this Act, *incidence of enforcement actions with respect to any such credit agreement*, the circumstances of termination of any such credit agreement, and related matters" (my emphasis).

Section 71 *inter alia* deals with the removal of a consumer's information from the records of a credit bureau. For purposes of this discussion, the provisions of section 70(6) have real significance and read 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."

Section 70(4)(*a*) furthermore provides that the minister may prescribe standards for the filing, retention and reporting of credit information by credit bureaux. Section 73(1)(*a*) also prescribes, in no uncertain terms, that the minister must within six months from the effective date, *inter alia*, prescribe the timeframe in which consumer credit information must be removed by a credit bureau. These regulations were indeed published on 30 November 2006.[40] The maximum period in which a civil court judgment, including a default judgment, may be retained by a credit bureau is the earlier 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' Courts Act. This in effect means that a judgment debtor's creditworthiness may be adversely affected for a period of as long as five years. What is of significant interest, however, is the reference to a second possible route in section 86 to remove a debtor's credit information from a credit bureau's records, namely an abandonment of judgment in terms of section 86 of the Magistrates' Courts Act. The feasibility of this option is briefly considered below.

4.3 Abandonment of a civil judgment

If the abandonment of a civil judgment by a judgment creditor can provide a viable alternative to the rescission of judgments by consent in the magistrates' courts in terms of section 36(2) and rule 49(5) it may, at first glance, provide a solution to the existing anomaly in the magistrates' courts and high court. A judgment debtor who wishes to clear his record at a credit bureau can then simply make use of section 86, and any similar procedure as provided for in terms of legislation or Uniform Rules of the High Court, to rescind a judgment. Section 36(2) and rule 49(5) can then simply be abolished in the magistrates' courts.

The first obstacle in this regard is the fact that regulation 17(1) of the National Credit Act refers only to an abandonment in terms of section 86 of the Magistrates' Courts Act and makes no mention of any abandonment of a judgment in the high court. It is indeed strange that regulation 17(1) refers only to an abandonment in the magistrates' courts especially in light of the fact that there is no similar provision

[39] See *eg* Smith "Skaakmat? Tersydestelling van vonnisse en 'skoonmaak' van kredietrekords in die landdroshowe?" 2000:12 *De Rebus* 26.

[40] GN R1209 in *GG* 29442 (30-11-2006).

to section 36(2) and rule 49(5) in the high court. This situation therefore creates yet another anomaly in that the abandonment procedure could be utilised indirectly to clear a debtor's credit record pertaining to a magistrate's court judgment but not a high court judgment.

In their submission on the proposed credit information amnesty, the national credit regulator and department of trade and industry also recommended that the relevant data retention regulations should be amended as follows:

> "The earlier of 5 years or until the judgment is rescinded by a court or abandoned by a credit provider in terms of section 86 of the Magistrates' Courts Act 32 of 1944 *or as provided in terms of Rule 41(2) of the Uniform Rules of Court issued in terms of section 43 of the Supreme Court Act 1959*".[41]

Even if regulation 17(1) is amended as proposed by the national credit regulator and department of trade and industry, this possible solution may, however, also prove to be problematic. In the first instance there is seemingly a substantial difference between the application of the abandonment procedure in the magistrates' courts and high court respectively. The abandonment of a judgment in the high court is governed by rule 41(2), the substantive part of which provides as follows:

> "Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment."

The position in relation to the magistrates' courts is set out in section 86. Section 86(1) is worded more or less the same as rule 41(2) and states that "[a] party may by notice in writing abandon the whole or any part of a judgment in his favour".

The rule, however, goes further and states rather controversially in subsection 2 that: "Where the party so abandoning was the plaintiff, or applicant, judgment in respect of the part abandoned shall be entered for the defendant or respondent with costs."

As far back as 1980, Van den Berg contended that section 86 should be utilised more in practice and that it "would greatly contribute towards a less expensive and more expeditious completion of litigation".[42] Twenty years later, Smith supported this viewpoint and recommended that section 86 may be a viable alternative to rescissions of judgments by consent in the magistrates' courts in terms of rule 49(5).[43] Both authors, however, mention the different interpretations of section 86(2) by the courts. On the one hand the courts have placed a literal interpretation on this subsection by stating that the procedure results in a complete reversal of the abandoned judgment, or the part thereof that was abandoned. On the other hand the courts held that the abandoned judgment is merely replaced by an opposite order to the one that would have been granted should the judgment initially have been refused by the court.[44]

One has to agree with the viewpoint of both authors that the latter, more flexible, viewpoint should be the correct one, as the legislature could never have intended the procedure as represented by the first, literal, viewpoint to prevail. However, in practice the problem would be to convince a judgment creditor as to the correctness

41 Logan "Submission by the National Credit Regulator and Department of Trade and Industry on the Proposed Credit Information Amnesty" http://bit.ly/16HTGiS (15-08-2013), my emphasis.

42 Van den Berg "Section 86 – the Cinderella of the Magistrates' Courts Act 32 of 1944" 1980 *De Rebus* 155 156.

43 Smith (n 39) 27.

44 *ibid*.

of the second viewpoint, especially in those divisions where an opposite view was held. It is submitted that, due mainly to the fact that the rescission of a judgment will only be to the advantage of the judgment debtor, no judgment creditor will take the risk of abandoning the judgment in his favour until the matter is decided once and for all by, for example, the supreme court of appeal, which is not likely to happen. Even if one were able to convince those creditors who fall within the jurisdiction of the divisions that followed the more flexible approach that an abandonment of their judgments would be safe, one would still be confronted with the anomaly that in certain jurisdictions there would be no reverse judgments when there is an abandonment whilst in others the situation will be the opposite. It is therefore submitted that, in as far as legislation does not rectify the position in the magistrates' courts as to the practical effect of section 86(2) on abandoned judgments, this procedure will not at present serve as a viable alternative to the rescission of judgments by consent in the magistrates' courts.

4.4 Arguments in favour of position in high court

The following arguments are raised in favour of the current position that prevails in the high court in relation to the rescission of judgments by consent. In general, the high court will usually not assist a judgment debtor where he is the author of his own predicament.[45] In *Weare v Absa Bank Ltd*[46] it was held that a contention that there is sufficient cause for the rescission of a lawfully granted judgment where the judgment debt has been discharged, simply because the fact that the judgment was granted is prejudicial to the judgment debtor "in relation to his business activities", is unsound.[47] The court also stated that:

> "The suggestion that it would be just and equitable to rescind the judgment is without substance. It is neither unjust nor inequitable to the applicant that the judgment should continue to exist where, as I have endeavoured to indicate, the fact that it was granted is to be attributed entirely to the applicant's own fault."[48]

In *Venter v Standard Bank of South Africa*[49] the court held that:

> "If there is a commercial need for judgments properly sought and granted in the courts to be rescinded it is for the legislature to provide the necessary enactment. It is certainly not the function of the courts to make themselves a party to a fiction *to satisfy what may be commercial needs*."[50]

In *Saphula v Nedcor Bank Ltd*[51] Flemming DJP embarked on a crusade against the procedure adopted by credit bureaux in recording credit information of defaulting debtors. According to Flemming DJP, a judgment by default is only an insurmountable problem for judgment debtors because of their incompetence or unwillingness to cause their records to reflect a fair reflection of credit risk. He was therefore also not prepared to accept that credit reputation could be considered

[45] See for example the *De Wet* case 1044 D-E, where Trengove AJA agreed with the court *a quo*, which stated that the applicants were "the authors of their own problems" and that it would therefore be inequitable to penalise the other party to the action with "the prejudice and inconvenience" arising from such conduct.
[46] 1997 2 SA 212 (D).
[47] 216D, my emphasis.
[48] 216H.
[49] (n 7).
[50] 283f-g, my emphasis.
[51] (n 20).

a *bona fide* defence and stated that it is known that for several years credit bureaux have been pushing for procedures for the rescission of judgments to readily help a debtor who settled a debt after judgment had been granted. According to him the credit bureaux want the courts to participate in falsifying a true perspective of the past in that the court records are required to create the false impression that the person never had any adverse default. The bureaux therefore want to convince the courts to say that a judgment was wrong and a defence was available although the judgment was in fact correctly granted. Flemming DJP was also of the opinion that the bureaux themselves retain an "impotency to add a comment that default has been satisfactorily cured in the eyes of the creditor" and that, "instead of giving a correct and updated version of the past and of later events they want courts to set aside correct orders as if there was and still is a defence to them."[52]

Flemming DJP also referred to the true purpose of a rescission of judgment as the restoration of a chance to air a real dispute and that he could see nothing in the needs of credit bureaux for the court process to be abused by granting leave to defend in a matter in which the cause of action was already dead.[53]

In *Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank Ltd*[54] Cloete J questioned the morality of a commercial system which considers a default judgment to be an absolute bar to the obtaining of credit facilities. He went on to state that the predicament in which such defaulters find themselves is not the making of the courts, and that the solution also does not lie with the courts.[55]

In *Swart v Absa Bank Ltd*[56] Veldhuizen J agreed with the abovementioned *dicta* and stated that "the fact that the judgment is prejudicial to him does not afford a cause for the rescission of the judgment".[57] Veldhuizen J also held that the applicant's need to obtain credit had nothing to do with his failure to pay the debt in the first place and that it is therefore clear that the cause relied upon by the applicant for rescission did not exist at the time that the final judgment was handed down. He stated that it was therefore clear that there was no causal connection between the circumstances that gave rise to the application for rescission and the judgment itself.[58]

In *Vilvanathan v Louw*,[59] Thring J agreed with all the above mentioned decisions but also made the following very relevant remarks:

> "Furthermore, it seems to me that the public has a legitimate interest in what happens in the Courts, and, in particular, in what judgments and orders are handed down by them. Justice and fairness must also be extended to members of the public other than the judgment debtor, including his or her potential future creditors; it cannot be properly served, I do not think, by expunging from the Court's records judgments and orders which have been correctly and lawfully granted."[60]

Thring J further stated that it may seem "hard, unjust or inequitable that a debtor who has failed to pay his debt when it fell due, and subsequently has had a default judgment granted against him, should thereafter indefinitely be barred from further credit, or should experience difficulty in obtaining it". According to him, such hardship has, however, now been dealt with by the legislature, and, whatever the

52 78G-I.
53 79B-C.
54 (n 22).
55 786E-F.
56 (n 23).
57 221H.
58 221I-222A, my emphasis.
59 (n 1).
60 28I-J.

position may have been before, there can no longer be any equitable need to interfere with the principle of the finality of judgments.[61]

4.5 Arguments in favour of position in magistrate's court

In *RFS Catering Supplies v Bernard Bigara Enterprises CC*[62] Josman J held as follows:

> "If a plaintiff has consented to rescission of judgment it can be inferred that he or she no longer wishes to execute on that judgment; it no longer serves any purpose. Presumably the defendant has settled the debt or the plaintiff has forgiven the debt and there is no longer any need for the judgment. The procedure laid down in the Magistrates' Courts Rules also encompasses the situation where the plaintiff might incorrectly have obtained judgment by default and wishes either to initiate proceedings to rescind the judgment or to accommodate the defendant in doing so."

Josman J went on to state that these situations fall within the ambit of "justice and fairness", which lies at the root of the "good cause" requirement. He cautioned that the court must be astute in ensuring that its rules are not flouted, but that, because the rules are intended to protect a plaintiff, his consent to a rescission of judgment reduces the risk involved to such an extent that it seems unnecessary to require the courts to "act as policeman".[63]

Smith argues convincingly that rule 49(5) was inserted in the Magistrates' Courts Act to make provision for the growing demand of debtors who wish to expunge a negative credit record.[64] The slowing down of the economy caused default judgments and sequestrations to increase dramatically over the past few years. This in turn gave rise to a large number of people who wanted to return to the commercial world with the accompanying need to rectify their credit records.[65]

Smith is furthermore rightly of the opinion that, whatever the merits may be pertaining to the rectification of a debtor's credit records, there are often meritorious circumstances. If such a debtor is unable to rescind the judgment granted against him it would result in a negative credit record with all its far-reaching implications. Smith also poses the pertinent question as to why the concept of "good cause" or "sufficient cause" should be set in stone. He argues that it may be time for the courts to give content to these concepts which will correspond with the realities of the economic traffic and the development in the trade industry. He asks why a judicial discretion cannot be afforded to a magistrate to adjudicate the circumstances in which there will be good reasons for the rescission of a judgment notwithstanding the existence of a defence. He is of the opinion that the judicial exercise of this discretion will guard against the abuse of this process in order to "clean up" debtors' credit records without any merit.[66]

4.6 Critical analysis and conclusion

It is submitted that both arguments have considerable merits. On the one hand, one cannot fault the approach of those decisions in which it was held that the mere consent of a judgment creditor to the rescission of a judgment or the fact that a judgment

61 30I-31A.
62 (n 10).
63 902E-H.
64 Smith (n 39) 26.
65 26.
66 27.

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debtor wishes to clear his credit record at the relevant credit bureaux does not constitute good or sufficient cause for such a judgment to be rescinded. On the other hand, one can also not discard the very valid viewpoint that the demands of modern society and trade and industry, coupled with the notions of justice and fairness, which lie at the root of the "good cause" requirement, require that judgments should be capable of being rescinded by consent if the relevant merits allow for it.

In this regard a distinction should also be drawn between two main types of defaulters. On the one hand there is the person who defaults due to factors beyond his control and mainly because of fluctuations in the economy. On the other hand there are the "habitual defaulters" who default on a regular basis, usually mainly due to overspending, and who basically have no real regard for the court process. It is submitted that the first category of defaulters should enjoy some protection from the court process but not the second group.

In the *Vilvanathan* matter Thring J stated that any hardship that may be occasioned by any injustice which may follow a refusal to rescind a judgment by consent has now been dealt with by the legislature, and it seems that there can no longer be any equitable need to interfere with the principle of finality of judgments. In this regard he referred to the provisions of sections 43 and 70 of the National Credit Act and the regulations promulgated thereunder, which provide for the automatic and compulsory expungement of default judgments from the records maintained by credit bureaux after the passage of a certain period or in the event where the relevant judgment is abandoned by the judgment creditor.[67]

Thring J also referred with approval to the following statement by Binns-Ward AJ in *TP and CY Damon v Nedcor Bank Ltd*:[68]

> "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."[69]

These viewpoints cannot be supported. While this may hold true for your habitual defaulter, it is submitted that it is totally unacceptable to expect a judgment debtor, who may have had a judgment granted against him due to factors beyond his control, to put his whole life on "hold" for a period of five years. Statements like these may also have a negative impact on the country's economy in that a person who is able to make a valuable economic contribution now has to wait for a period of five years before he will be able to gain access to any proper financing that will probably enable him effectively to return to any commercial activity.[70]

[67] the *Vilvanathan* case (n 1) 30J-31A-C.
[68] case no 3970/04 (WCC) (unreported).
[69] 31C-E par 15.
[70] In June 2007, a credit information amnesty was published by GN R1209 in *GG* 29442 (30-11-2006) in terms of which credit bureaux expunged adverse information from the credit records of about eight million qualifying South Africans. A statistical analysis conducted by the Credit Bureau Association "Amnesty Analysis" http://www.cba co.za (23-08-2013) has shown that a staggering 74% of these individuals who benefitted in terms of the amnesty defaulted again after the amnesty was granted. At present the department of trade and industry is proposing a second credit amnesty to once again remove all adverse information from the records of credit bureaux. (See for example National Credit Regulator "Proposed credit information amnesty" http://www.thedti.co.za (26-08-

It is submitted that a *via media* would perhaps present the best solution in which both viewpoints can be accommodated. The following three possibilities may be considered in this regard.

The first possibility is that the provisions of section 86 (magistrate's court) and rule 41(2) (high court), in terms of which a judgment creditor can abandon a judgment in his favour, be utilised to rescind judgments by consent in an indirect way. This possibility is already envisaged to an extent by the regulations to the National Credit Act, which provide that a civil judgment must be expunged from a person's credit record where the judgment concerned has been abandoned by the judgment creditor in terms of section 86 of the Magistrates' Courts Act. For this possibility to be viable it is important firstly to amend regulation 17(1) of the National Credit Act to include the abandonment of high court judgments, and, secondly, to amend section 86(2) of the Magistrates' Courts Act to ensure that the result of such an abandoning would not be a reverse judgment for the judgment debtor and that there will be no cost implications for the judgment creditor. It is, however, submitted that this may not be the best solution to follow, as it will probably take a long period of time to convince judgment creditors that this may be a viable alternative to rule 49(5) and that their rights will in no way be adversely affected.

The second possibility entails a total restructuring of the way in which credit bureaux compile their credit records pertaining to the default of and subsequent payment by judgment debtors. This approach would be in line with the approach advocated by most of the courts. In this regard there will have to be extensive consultation with all the role players concerned. A change in the credit rating system in terms of which every defaulter is rated in accordance with his risk profile may, for example, be considered in this regard.[71] However, it will be crucial that all major credit providers also buy into any amended credit rating system. One possibility would be to include much more information pertaining to a judgment debt, for example the circumstances in which the judgment was obtained, the degree of fault on the part of the judgment debtor and the fact that the judgment debt was indeed repaid to the judgment creditor. These factors may then perhaps play a role in convincing credit providers to grant credit in meritorious circumstances although the consumer may have a default judgment listed against his name. However, it is submitted once again that it is difficult to see how it would be possible to convince all the major credit bureaux to change their credit rating systems which have been in operation for many years.

The third possibility entails that the provisions of the Magistrates' Courts Act and the Supreme Court Act be amended in such a way as to afford a judicial discretion to adjudicating officers. This will also be in line with the approach advocated by Smith. The only criticism that may be levelled against the approach recommended by Smith is that an open-ended judicial discretion on the part of presiding officers may not be the best route to follow. Such an open-ended discretion will inevitably give rise to conflicting decisions based on the presiding officer's own sense of fairness and equity and his own personal experiences and possible prejudices towards bad debt and defaulters. This in turn may once again lead to legal uncertainty. It is therefore proposed that the respective revised acts and/or rules should make provision for

2013).) These initiatives from government to assist defaulters cannot be supported as they do not take into account the substantial difference between habitual defaulters and meritorious defaulters, which will impact the country's economy in a negative way rather than improve it.

[71] For an explanation on how the credit rating system of the major credit bureaux operate, see Campbell and Logan *The Credit Guide Manage your Money with the National Credit Act* (2008) 20.

certain factors to be taken into consideration and weighed by a presiding officer in making the decision as to whether the merits of a specific instance would allow for the rescission of the relevant judgment by consent. These factors may include the past credit behaviour of the person concerned, the circumstances in which the debt became due and payable, the degree of fault that may be attributed to the defaulter with regard to the judgment concerned, any possible positive contribution that such a person may make to the country's economy in the near future, any attempt by the defaulter to defend the initial proceedings, any blatant disregard for the court process and/or rules of court, the period in which the judgment debt was settled, et cetera. It is once again submitted that these factors should be decided on by all the relevant role players after the necessary discussion and consultation has taken place. These factors would then also be in line with the common-law position in terms of which notions based on justice and fairness formed the basis of the "good cause" requirement pertaining to the rescission of default judgments. The revised acts and/ or rules may even make provision for situations in which an unreasonable judgment creditor refuses to grant the necessary consent.

It is submitted that this third possibility may prove to be the best solution in the circumstances. On the one hand it will ensure that the public and economic sector, as well as the sanctity of the court process and the finality of properly announced court orders, is protected against unscrupulous and habitual defaulters; and on the other hand, it will ensure that there is a procedure available to assist meritorious judgment debtors to rescind a civil judgment and therefore enable them to get rid of an adverse credit record with all its negative consequences.

SAMEVATTING

DIE TERSYDESTELLING VAN VONNISSE BY WYSE VAN TOESTEMMING – 'N KRITIESE ONTLEDING

As algemene gemeenregtelike reël word 'n Suid-Afrikaanse hof *functus officio* nadat 'n finale uitspraak gelewer is en het die hof daarna geen bevoegdheid om die uitspraak te wysig, ter syde te stel of aan te vul nie. Daar word egter in sowel die hooggeregshof as die landdroshowe voorsiening gemaak vir die tersydestelling van vonnisse in sekere beperkte omstandighede. In die hooggeregshof kan 'n vonnis gewysig of tersyde gestel word ingevolge reël 31(2)(*b*), reël 42 of die gemenereg. In die landdroshowe kan 'n vonnis gewysig of tersyde gestel word ingevolge die gronde uiteengesit in artikel 36, saamgelees met reël 49, wat die prosedure uiteensit wat gevolg moet word ten einde vonnisse tersyde te stel.

In alle gevalle moet 'n applikant kan aantoon dat daar 'n voldoende of goeie rede is om die vonnis tersyde te stel. Dit behels eerstens die verskaffing van 'n redelike en aanvaarbare verduideliking vir sy verstek en tweedens dat hy op die meriete van die hoofaksie 'n *bona fide* verweer het wat *prima facie* oor 'n gedeeltelike vooruitsig op sukses beskik. Hierdie beginsels is verder uitgebrei in die landdroshowe waar reël 49(5) voorsiening maak dat 'n vonnis tersyde gestel kan word op grond van die toestemming van die vonnisskuldeiser. Hierdie bepaling het tot 'n aantal teenstrydige beslissings aanleiding gegee wat uitgeloop het op 'n situasie waar daar tans verskillende benaderings gevolg word in die hoë en landdroshowe.

Hierdie artikel fokus op die algemene beginsels van toepassing op die tersydestelling van vonnisse by wyse van toestemming in die Suid-Afrikaanse siviele prosesreg. Dit bevat voorts 'n kritiese ontleding van die verskillende beslissings wat daarop betrekking het en die huidige posisie in verband met die verskillende benaderings wat in die hooggeregshof en landdroshowe gevolg word. Sekere aanbevelings word gemaak ten einde die huidige posisie reg te stel deur voorsiening te maak vir eenvormigheid in die benadering ten aansien van die tersydestelling van vonnisse by wyse van toestemming.