Speculum Juris

Vol 37 No 1 (2023)
Published 28 July 2023

ISSN 2523-2177

University of Fort Hare
Together in Excellence

**Cite as: Bekker "Rescission of Judgments by Consent – Recent Developments and Lessons from England and Wales " 2023 (37) Spec Juris 118–131**

# Rescission of Judgments by Consent – Recent Developments and Lessons from England and Wales

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## Abstract

*This article contains a critical discussion of the recent developments relating to the rescission of judgments by consent in both the High and magistrates' courts, the amended periods relating to the retention and removal of adverse information from credit bureaus, and the impact thereof on the South African credit consumer market. The position in relation to the setting aside of judgments in England and Wales is discussed and it is argued that some of these provisions should be incorporated in the South African law. The author concludes that the current, as well as proposed application of the rescission of judgments by consent still has certain shortcomings and that the legislature will have to intervene to ensure a uniform and fair application of the procedure in relation to both credit providers and credit consumers.*

**Keywords:** rescission of judgments; consent; credit bureaus; adverse information; retention periods; England and Wales; credit providers; credit consumers

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## 1 INTRODUCTION

In a previous article, the law relating to the rescission of judgments by consent in both the High and magistrates' courts were critically analysed and certain recommendations were made to ensure uniformity in the approach relating to the application of this procedure in South African law.[1] Subsequently, a number of important developments took place relating to the rescission of judgments by consent. This article will focus on a critical discussion of these recent developments, the amended periods relating to the retention and removal of adverse information from credit bureaus, and the impact thereof on the South African credit consumer market. The position in relation to the setting aside of judgments in England and Wales and its possible contribution to South African law will also be discussed. It will be argued that the current, as well as proposed application of the rescission of judgments by consent still has certain shortcomings and that the legislature will have to intervene to ensure a uniform and fair application of the procedure in relation to both credit providers and credit consumers.

## 2 THE 2014 CREDIT AMNESTY REGULATIONS

On 1 April 2014, the Removal of Adverse Consumer Information and Information relating to Paid up Judgments Regulations,[2] came into force. These regulations, *inter alia*, provided that:

(a) a registered credit bureau must remove adverse consumer credit information and information relating to paid-up judgments, as reflected on a consumer's records, within a period of two months from the effective date of 1 April 2014;[3]

(b) a registered credit bureau must remove information relating to paid-up judgments, on an ongoing basis;[4]

(c) a credit provider must submit all information relating to paid-up judgments to all registered credit bureaus within seven days of receipt of such payment from the consumer.[5]

In a media statement, the Minister of the Department of Trade and Industry explained the rationale behind the granting of a second credit amnesty. The Minister stated that, if one takes into account the extent of the information gap in our society, most consumers could not take advantage of the first amnesty in 2007, as they were either not aware of the amnesty or that the procedures were not simplified enough to extend this benefit to the affected consumers. The 2007 amnesty therefore only benefitted a handful of the affected consumers.[6]

The 2014 amnesty regulations were met with a lot of criticism. Some valid points that were raised include the following:

(a) where adverse credit information is removed, retailers and banks will be left without any indication of the history of their prospective clients' past credit behaviour and debt management;[7]

(b) the amnesty will basically render credit bureaus impotent in that they would no longer be in a position to provide credit providers with information relating to the assessment of the risk of providing credit to a prospective client;[8]

(c) credit providers may in the future be more cautious in granting credit, especially to lower-income groups;[9]

(d) the increased risk that the credit amnesty will place on credit providers may be passed

8 *Ibid.*

9 *Ibid.*

on to other consumers in the form of more expensive credit;[10] and

(e) consumers that are already drowning in debt, would be encouraged to borrow more money, giving rise to a vicious debt circle.[11]

The conundrum caused to credit providers, and especially banks, by the 2014 credit amnesty regulations was aptly described in the following statement by Ackotia:

> Key stakeholders in the economic sector, such as banks and other credit providers, have rightly expressed opposition to the proposal. Their primary concern is that the lack of access to adverse listings would lead to an increase in risk, as providers would not be able to tell the difference between consumers who have received amnesty although they are high-risk borrowers and those who are low-risk borrowers who can manage credit. This means that those with positive credit records may be prejudiced by high lending rates for home loans, microloans and other sorts of credit, after the amnesty.[12]

It seems as if these concerns relating to the 2014 credit amnesty regulations, were indeed justified. In less than a year since the 2014 credit amnesty regulations came into force, more than two million consumers, whose credit records were "wiped clean", defaulted again.[13] There was also a steep increase in the number of consumers with accounts that had reached adverse-enforcement status.[14]

## 3 THE NATIONAL CREDIT ACT

In line with the objectives of the 2014 credit amnesty regulations, the National Credit Act[15] was also amended. A new section 71A was inserted into the National Credit Act which provides as follows:

> (1) The credit provider must submit to all registered credit bureaux within seven days after settlement by a consumer of any obligation under any credit agreement, information regarding such settlement where an obligation under such credit agreement was the subject of -
>
> *(a)* an adverse classification of consumer behaviour;
>
> *(b)* an adverse classification enforcement action against a consumer;
>
> *(c)* an adverse listing recorded in the payment profile of the consumer; or
>
> *(d)* a judgement debt.
>
> (2) The credit bureau must remove any adverse listing contemplated in subsection (1) within seven days after receipt of such information from the credit provider.
>
> (3) If the credit provider fails to submit information regarding a settlement as contemplated in subsection (1), a consumer may lodge a complaint against such credit provider with the

10 *Ibid.*

11 *Ibid.*

12 Ackotia "Banks have Legitimate Beef with Credit Data Amnesty" http://www.iol.co.za (accessed 15-01-2017).

13 Steyn "Two Million South Africans Still Fail to Stay Out of Debt" http://www.mg.co.za (accessed 15-01-2017).

14 *Ibid.*

15 34 of 2005.

National Credit Regulator.

(4) For the purposes of this section -

*(a)* 'adverse classification of consumer behaviour' means classification relating to consumer behaviour and includes a classification such as 'delinquent', 'default', 'slow paying', 'absconded', or 'not contactable'; and

*(b)* 'adverse classification of enforcement action' means classification relating to enforcement action taken by the credit provider, including a classification such as 'handed over for collection or recovery,' 'legal action', or 'write-off'.[16]

Section 73(1) of the National Credit Act was also amended to provide, *inter alia*, that the Minister had to, within a period of six months after the effective date, prescribe the nature of, time-frame, form, and manner in which consumer credit information held by credit bureaus must be reviewed, verified, corrected or removed. In terms of the amended regulation 17(1) of the National Credit Act, adverse information regarding any civil judgment must be retained for a period representing 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[17] or within the period prescribed in section 71A of the National Credit Act. It is therefore now clear that any information with regard to a civil judgment granted against a consumer must be removed within a maximum period of fourteen days after the full payment thereof by the consumer.[18]

## 4 CASE LAW

In *Air Traffic Navigation Services Company Ltd v Diversified Properties Services Company Ltd*,[19] the applicant requested the court to develop the common-law meaning of the words "on good cause shown" to include a situation where the respondent consents to a rescission of judgment.[20]

In this matter, the Applicant leased certain premises from the Respondent for a period of four years. On 26 July 2012, the Respondent obtained a default judgment against the Applicant in a total amount of more than three million rand based on three claims arising from the breach of the lease agreement. The parties agreed to the settlement of the default judgment on 4 October 2013. It was further agreed that upon payment of the settlement amount by the Applicant, the Respondent would immediately provide the Applicant with written consent to the rescission of the default judgment granted against the Applicant. On 5 October 2013, the Applicant paid the full settlement amount to the Respondent, but the Respondent has failed to provide the Applicant with written consent to the rescission of judgment. The Applicant contended that the judgment against it should be rescinded because the Applicant had settled the judgment debt to the satisfaction of the Respondent. The Applicant further argued that the judgment prevented

16 By section 22 of the National Credit Amendment Act 19 of 2014 published in *GG* 37665 of 19 May 2014 and which came into operation on 13 March 2015.

17 See the discussion in para 7.1 below.

18 Also see s 70(5) of the National Credit Act which provides for the removal of adverse information by a credit bureau after receipt of a copy of a clearance certificate by a debt counsellor and s 70(6) which provides that a credit bureau must expunge from its records all information relating to any judgment upon receiving a copy of a court order rescinding such a judgment.

19 Case no 15125/2012 (GSJ) (unreported).

20 Paragraph 24.

the Applicant from accessing credit, which was essential to its continued business operations.[21]

Weiner J referred with approval to the decision in *Kalikhan, Anoj t/a Tri-Star Logistics v Firstrand Bank Ltd*,[22] where a similar request was made after the applicant submitted that, to allow for rescission by consent in the magistrates' courts and not in the High Court, is discriminatory as it offended against the provisions of section 9(1) of the Constitution, which gives every person the right to equal protection and benefit of the law.[23] The court emphasised that although the court in *Kalikhan* agreed that this position was iniquitous,[24] it did not mean that a court could rewrite the well-developed common law relating to what constitutes good cause for rescinding a default judgment.[25]

Weiner J therefore endorsed the approach of the court in *Khalikan* where it was held that when the development of the common law goes beyond what is required to give full effect to the Bill of Rights in the Constitution, a court may well be found to have usurped the constitutionally mandated powers of the legislature unreasonably and that this amounted to a breach of the doctrine of separation of powers.[26] Weiner J agreed that it was thus not necessary nor advisable to interfere in the realm of the Legislature.[27]

Weiner J referred to the 2014 credit amnesty regulations which provided that adverse credit information must be removed by all credit bureaus when the capital amount of the judgment has been settled as well as the draft Superior Courts Amendment Bill of 2014,[28] which took into account the various decisions in the different jurisdictions that suggested the need for intervention of the legislature to allow rescission by consent, even in a situation where the creditor has not consented to a rescission of the judgment.[29] Weiner J, therefore, held that the 2014 amnesty regulations would adequately deal with the respondent's problem of not being able to procure credit because of the adverse report of the credit bureaus[30] and that:

> The Legislation will in due course, bring the law dealing with rescission of judgments into line with the purposes of the NCA, the credit information amnesty implemented from 1 April 2014, and the equality clause in the Constitution.[31]

## 5 THE COURTS OF LAW AMENDMENT ACT

On 1 August 2018, the Courts of Law Amendment Act came into operation. [32] This Act brought on certain radical amendments to the current legislation governing the rescission of judgments by consent in both the High and magistrates' courts.

21 Paragraph 7–12.

22 Case no 31466/2011 (GSJ) (unreported). For a discussion of this decision see Bekker 2014 *TSAR* 90.

23 *Kalikhan Anoj v Firstrand Bank* para 4.

24 *Kalikhan Anoj v Firstrand Bank* para 5.

25 *Air Traffic Navigation Services v Diversified Properties Services* para 35.

26 *Air Traffic Navigation Services v Diversified Properties Services* para 37.

27 *Air Traffic Navigation Services v Diversified Properties Services* para 43. Also see the discussion of Bekker 2014 *TSAR* 90.

28 This Bill initially set out the proposed amendments to the rescission of judgments by consent in the High Court and was subsequently replaced by the Courts of Law Amendment Bill.

29 *Air Traffic Navigation Services v Diversified Properties Services* para 38.

30 *Air Traffic Navigation Services v Diversified Properties Services* para 41.

31 *Air Traffic Navigation Services v Diversified Properties Services* para 42. This was indeed the case. See the discussion in para 5.1 below.

32 7 of 2017.

### 5 1 High Court

In the High Court, a new section 23A, was inserted in the Superior Courts Act[33] which provides that:

> (1) If a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded, a court may rescind such judgment on application by any person affected by it.
>
> (2) *(a)* Where a judgment debt has been settled, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment.
>
> *(b)* The application contemplated in paragraph *(a)* -
>
> (i) must be made on the form prescribed in the rules;
>
> (ii) must be accompanied by proof that the judgment creditor has been notified, at least five days prior, of the intended application;
>
> (iii) may be set down for hearing on any day, not less than five days, after the lodging thereof; and
>
> (iv) may be heard in chambers.
>
> *(c)* If an application contemplated in paragraph (a) is opposed, a court may make a cost order it deems fit.

This amendment brought the long-awaited High Court procedure relating to the rescission of judgments by consent in line with the approach as followed in the magistrates' courts. It is interesting to note that the proposed amendment even goes further than the rescission of judgments by consent, as it also provides for the situation where the judgment debt has been settled without the consent of the judgment creditor.

### 5 2 Magistrates' Courts

The Courts of Law Amendment Act substituted section 36(2) of the Magistrates' Courts Act[34] with the following subsection:

> If a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded or varied, a court *may* rescind or vary such judgment on application by any person affected by it. [*my emphasis*][35]

The Act furthermore added the following subsection to section 36 of the Magistrates' Courts Act:

> (3) *(a)* Where a judgment debt has been settled, a court may, on application by the judgment

33 10 of 2013.

34 32 of 1944.

35 See the discussion in para 7.2 below.

debtor or any other person affected by the judgment rescind that judgment.

*(b)* The application contemplated in paragraph *(a)*—

(i) must be made on the form prescribed by the rules;

(ii) must be accompanied by proof that the judgment creditor has been notified, at least five days prior, of the intended application;

(iii) may be set down for hearing on any day, not less than five days, after lodging thereof; and

(iv) may be heard in chambers.

(4) If an application contemplated in subsection (3)*(a)* is opposed, a court may make a cost order it deems fit.

This proposed amendment now also deals with the situation where a judgment may be rescinded if the judgment debt has been settled and the consent of the judgment creditor cannot be obtained.

Lastly, the Courts of Law Amendment Act brought on an amendment to section 86 of the Magistrates' Courts Act by the addition of the following subsection:

(5) If a party abandons a judgment given in his or her favour because the judgment and costs have been settled, no judgment referred to in subsection (2) or (3) shall be entered in favour of the other party.

## 6 ENGLAND AND WALES

From 6 April 2006, all High Court and County Court judgments ("CCJ's") in England and Wales are contained in the Register of Judgments, Orders and Fines unless exempt from registration.[36] The Register is operated by Registry Trust Limited, a not-for-profit company, on behalf of the Ministry of Justice.[37]

Any CCJ will also be recorded on the credit report of the debtor at the credit reference agencies in the UK and Wales. Civil judgments remain on the Register for a period of six years[38] unless:

(a) the judgment is set aside; or

(b) paid in full within one calendar month.[39]

The Registry Trust website states that a judgment registration will only be removed from the

36 Section 98(1) of the Courts Act 2003. For a list of these exempted judgments, see reg 9 of the Register of Judgments, Orders and Fines Regulations 2005.

37 https://www.registry-trust.org.uk/about (accessed 19-01-2022).

38 Regulation 26. In most jurisdictions of the European Union, there is a retention period of at least one to five years in relation to a consumer's default credit information after the debt has been settled. See for example, Rothemund and Gerhardt T*he European Credit Information Landscape An Analysis of a Survey of Credit Bureaus in Europe* (2011) 17. In Germany, for example, negative Schufa entries will remain on a consumer's record for a period of three years. However, negative entries may be deleted early, after 1 July 2012, if the debt is less than two thousand euros and the claim, which may not be a titled claim such as an enforcement order, was settled within six weeks after an entry was made on the Schufa register [Personal Financial *Delete Schufa Entry: How to Proceed* https://personal-financial.com/2020/06/29/delete-schufa-entry-how-to-proceed (accessed 19-01-2022)].

39 Regulation 11(2).

Register where it was:

(a) entered in error and set aside by a court;

(b) paid before the court date; or

(c) cancelled because the judgment debt was paid in full within one calendar month from the judgment date.[40]

It seems clear that a CCJ will not be automatically removed unless the debtor pays the judgment debt in full within one calendar month. However, the debtor must first obtain a certificate of satisfaction of the debt from the court after completing Form N443.[41] Once the court notifies the Registry Trust that a judgment has been cancelled, it will remove the judgment from the Register and notify all credit-reference agencies to remove the judgment from their records immediately.[42]

If the debt is paid in full after one calendar month, the judgment registration will remain on the Register for a period of six years.[43] The debtor can, however, apply on Form N443 for a certificate of satisfaction and the Register will then be endorsed as "judgment satisfied".[44]

A CCJ can only be set aside if the judgment was entered in error, and no provision is thus made in England and Wales for the position where the judgment creditor consents to the setting aside of the judgment. Part 13 of the Civil Procedure Rules ("CPR") set out the position relating to the setting aside of a default judgment. In terms of CPR 13.2, the court must set aside a default judgment which was erroneously entered because:

- in the case of a judgment by default of an acknowledgement of service any of the conditions in CPR 12.3(1) and 12.3(3) were not satisfied. CPR 12.3(1) provides that a claimant may obtain judgment by default of acknowledgement of service only if at the date when the judgment is entered, the defendant has not filed an acknowledgement of service or defence to the claim within the relevant time allowed to do so. CPR 12.3(3) provides that a claimant may not obtain a default judgment if the defendant has applied for summary judgment or to have the claimant's statement of claim struck out which has not been disposed of, or if the defendant has satisfied the full claim of the claimant;
- in the case of a judgment by default of a defence any of the conditions in CPR 12.3(2) and 12.3(3) were not satisfied. CPR 12.3(2) provides that a claimant may obtain judgment by default by defence only if at the date when the judgment is entered, the defendant has filed an acknowledgement of service but not a defence to the claim or in a counterclaim if at the date when the judgment is entered, a defence has not been filed and, in either case, the time limit for doing so has expired, or
- the full claim was satisfied before judgment was entered.[45]

40 https://www.registry-trust.org.uk/rt-learn-ew/remove-ccj (accessed 19-01-2022).

41 Regulation 17.

42 https://www.registry-trust.org.uk/rt-learn-ew/remove-ccj (accessed 19-01-2022).

43 Regulation 26.

44 Regulation 11(3).

45 Also see Practice Direction 12 to the CPR. This Direction does not make any provision for the setting aside of paid-up judgments.

In terms of CPR 13.3, the court may set aside a default judgment if:

- the defendant has a real prospect of successfully defending the claim; or
- it appears to the court that there is some other good reason why the judgment debt should be set aside or why the defendant should be allowed to defend the claim.
- In its decision to set aside a judgment the factors that the court must take into consideration also include whether the defendant made the application to set aside the judgment promptly.
- The court may attach conditions to any order setting aside a judgment.

In *Penta Ultimate Holdings Ltd & Anor v Storrier*,[46] it was held that an applicant who applies for the setting aside of a regular judgment in terms of CPR 13.3 has two hurdles to clear. In the first instance, the applicant must overcome the threshold test set out in CPR 13.3 to show that it has a real prospect of successfully defending the claim or that there is some other good reason why the judgment should be set aside. At this stage, the court must also consider if the application was made promptly.[47]

Secondly, the court must apply the three-stage test as set out in *Denton v TH White Ltd*[48] (the so-called "*Denton* test").[49] In terms of this test, the court must: identify and assess the seriousness and significance of the applicant's non-compliance; consider why the breach occurred; and evaluate all the circumstances of the case to ensure the application is dealt with fairly.[50]

It is clear that an applicant will not be in a position to convince a court that it has a real prospect of successfully defending the claim where the application is brought only on the basis that the judgment debt has been paid or that the claimant consented to the judgment being set aside. An applicant will therefore have to bring its application in terms of CPR 13.3(1)(b) to indicate that the payment of the judgment debt or consent of the claimant qualifies as some other good reason why the judgment should be set aside.[51]

The requirement of some other good reason why the judgment should be set aside is not defined anywhere but it seems clear that the overriding objective of enabling the court to deal with cases justly and at proportioned costs, will also be relevant.[52]

In *Credit Agricole Indosuez v Unicof Ltd*,[53] the court gave an example of what would constitute some other good reason to set aside a judgment. The court held that because the claimant knew that the defendant was likely to challenge the jurisdiction of the court, the judgment had to be set aside as it would cause real prejudice to the defendant if he was denied the opportunity to do so. The court, therefore, set aside the judgment regardless of the merits of the defence of the defendant.[54]

There is however no authority that a court may exercise its discretion in favour of a defendant

46 [2020] EWHC 2400 (Ch).

47 *Penta Ultimate Holdings v Storrier* para 7.

48 [2014] 1 WLR 3926.

49 *Penta Ultimate Holdings v Storrier* para 10.

50 *Denton v White* paras 25, 29 and 31.

51 In the *Penta Ultimate Holdings* case para 9 the court held that CPR 13.3(1)(b) is a free-standing alternative ground for the setting aside of a default judgment. In *Berezhovsky v Russian Television and Radio Broadcasting Co* [2009] EWHC 1733 (QB) the test in terms of this rule has been described as a broad one.

52 Loughlin and Gerlis *Civil Procedure* 2 ed (2004) 343. See CPR 1.1 (2) for a detailed explanation of what "justly and at a proportionate cost" entails.

53 [2003] EWHC 77 (Comm).

54 Paragraph 20.

and set aside a judgment where the application is brought only on the basis that the judgment debt has been paid or that the claimant consented to the judgment being set aside. In theory, however, nothing would prevent a court from taking one or both factors into account in the exercise of its discretion, if the defendant can convince the court that there are additional factors present that may support the overriding objective.[55]

## 7 CRITICAL ANALYSIS

The recent developments relating directly, or indirectly, to the application of the rescission of judgments by consent in both the High Court and magistrates' courts, must, for the most part, be welcomed. Most of the recommendations that were previously made have also been dealt with in some form or another.[56] There are however still a few problematic aspects that warrant closer analysis.

### 7 1 Amendment of Section 86 of the Magistrates' Courts Act

Previously, it was argued that section 86 of the Magistrates' Courts Act could be utilised in order to achieve the same result as a rescission of judgment by consent, but that this was not a viable option as the literal wording of section 86(2) basically resulted in a complete reversal of the abandoned judgment in favour of the initial defendant.[57] The amendment brought on in section 86(5) will rectify this position as it provides that if a party abandons a judgment given in its favour where the judgment and costs have been settled, no judgment shall be entered in favour of the other party. Although this may provide a viable alternative to the procedure relating to the rescission of judgment by consent in some instances, it will only provide relief for an applicant judgment debtor where the respondent judgment creditor could be convinced to abandon the judgment granted in its favour. This may prove difficult in practice, especially in these instances where the judgment debt has already been settled, as there would be no incentive for the judgment creditor to do so.

### 7 2 Amendment of the Superior Courts and Magistrates' Courts Acts

The most important development relating to the rescission of judgments by consent is the amendment of the Superior Courts Act to provide for the rescission of judgments by consent, and the rescission of judgments where the judgment debt has been settled in the High Court. This has removed the anomaly of two different approaches in the High Court and magistrates' courts relating to the rescission of judgments by consent. However, there are still a few problematic aspects relating to the proposed amendments.

The first point of critique has to do with the ambit of the discretion afforded to the High Court and magistrates' courts respectively. The previous section 36(2) of the Magistrates' Court Act, provided that a court *must* rescind or vary a default judgment where the plaintiff has consented in writing that the judgment be rescinded or varied. That meant that if a magistrate's court was satisfied that the plaintiff had agreed in writing that the default judgment be rescinded or varied, the court was obliged to rescind or vary the judgment and had no discretion in this regard.[58]

The new section 36(2) of the Magistrates' Courts Act as well as section 23A of the Superior Courts Act, now provides that a magistrate's court and a division of the High Court *may* rescind

55 See *eg C v Richmond Borough Council* [2022] 5 WLUK 99 where the court held that it would be wrong to impose a liability of millions of pounds on a local authority where, despite a considerable delay in bringing the application, there was sufficient plausible material indicating that it had no liability.

56 See *eg* Bekker 2014 *TSAR* 96–99.

57 Bekker 2014 *TSAR* 92–94.

58 Van Loggerenberg *Jones and Buckle Civil Practice of the Magistrates' Courts* vol 2 (2020) 49–14.

a default judgment where the plaintiff has consented in writing that the judgment be rescinded. Similarly, a division of the High Court or a magistrate's court *may* now also rescind a default judgment at any stage after judgment, where the judgment debt, together with interest and costs have been paid by the defendant. The proposed new position in the High Court raises and interesting question: Will the consent of a plaintiff to the rescission of a judgment granted in their favour automatically satisfy the requirement of "good cause", or will it be only one of the factors that a court will consider in deciding whether there is compliance with the "good cause" requirement? It is contended that the wording of section 23A can only allude to the latter. The High Court will therefore still have the discretion to refuse an application for the rescission of judgment by consent, even if the plaintiff consents thereto.[59]

This amended open-ended discretion is however problematic for a number of reasons. First, it will be very difficult to predict with certainty how courts will effectively exercise the discretion awarded to them. In the High Court, it was previously made clear that the consent of the plaintiff to a rescission of judgment (or, for that matter, the payment of the judgment debt, interest and costs by the defendant) would not constitute good cause to rescind a judgment in terms of the common law.[60] The recent amendments may now persuade some judges to exercise their discretion in favour of a defendant when there is consent by the plaintiff or payment of the judgment debt by the defendant. However, other judges may only take this into consideration as one of the factors in their final decision. Similarly in the magistrates' courts, presiding magistrates may still be of the opinion that consent or payment of the judgment debt warrants the rescission of a judgment in line with the practice previously followed. This may result in legal uncertainty and, ironically, in a position where there may again be two different approaches followed in the High Court and magistrates' courts, respectively.

It is contended that this potential anomaly can be resolved by removing consent and payment of the judgment debt as independent grounds for rescission, and inserting certain predetermined, non-exhaustive factors in the Superior Courts Act and Magistrates' Courts Act, respectively, which must at least be considered as part of the court's discretion before a rescission of judgment is granted. The fact that the plaintiff had consented to the rescission or that the judgment debt has been paid by the defendant should be included in these factors and should be afforded the appropriate weight considering the specific facts of the matter.

Secondly, the new position in the High Court does not cater for instances where the defendant was not in wilful default. In terms of rule 49(4) of the Magistrates' Courts Act, a defendant who does not wish to defend the proceedings, but who can satisfy the court that they were not in wilful default may apply for a rescission of judgment if the judgment debt was paid or

59 See Van Loggerenberg *Erasmus Superior Court Practice* vol 1 (2019) Appendix C for a detailed discussion on the interpretation of the words "shall" and "may" in statutes. The author, with reference to relevant case law, clearly states that the words "shall" (or "must") and "may" can never bear the same meaning and that the word "may" is always used in the sense of simply conferring a power on the court. In *Northwest Townships Ltd v The Administrator, Transvaal* 1975 4 SA 1 (T) at 12H–13A the court held that in a very limited sense the word "may" is sometimes used in a context which gives it a mandatory significance: the word itself gives the presiding officer a power, but the context in which this power is given suggests that the presiding is under a duty to exercise the power. This is clearly not the case with s 23A of the Superior Courts Act. Also, see the commentary on s 23A of the Superior Courts Act in Van Loggerenberg *Erasmus Superior Court Practice* (2021) vol 1 A2-138B and the commentary in Van Loggerenberg *Jones and Buckle Civil Practice of the Magistrates' Courts* (2022) vol 1 246B on s 36(2) of the Magistrates' Courts Act where it is categorically stated that the word "may" only confers a discretion on the court which should be judicially exercised "in accordance with principle and with due regard to the relevant circumstances."

60 See for example *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); *Venter v Standard Bank of South Africa* [1999] 3 All SA 278 (W); *Swart v Absa Bank Ltd* 2009 5 SA 219 (C) and *Vilvanathan v Louw* 2010 5 SA 17 (WCC). See also the discussion of these decisions in Bekker 2014 *TSAR* 89–91.

arrangements were made to pay it within a reasonable period after the debt became known to them. There is, however, no similar provision in the Superior Courts Act or Uniform Rules of Court.

It is argued that the position in England and Wales can offer valuable guidance in this regard. It is recommended that a distinction be made between those matters where the court has no discretion to rescind a judgment (must rescind) and those where the court has discretion (may rescind).[61] The High Court should not be afforded a discretion where the defendant can prove that they were not in wilful default and that the judgment debt was paid or arrangements were made to pay within a reasonable period after the debt became known to them. The only provision that may perhaps be added is that a reasonable period should be replaced by a specific period, for example, ninety days. Arguably, however, the defendant should be afforded ninety days to pay the judgment debt after it became known to them and not within thirty days of the judgment itself as per English law.[62] A rebuttable presumption can then be inserted to the effect that it is presumed that the defendant had knowledge of the judgment after ten days of the granting thereof. The reason for this is simple: in most instances, a judgment will only come to the attention of a defendant when execution steps are instituted, which is usually more than ninety days after the granting of the judgment. The Superior Courts Act or Uniform Rules of Court should be amended accordingly to also make provision for the compulsory rescission of judgments in the High Court in these circumstances.

Thirdly, there is no period attached to the rescission of judgment by consent or after payment of the judgment debt. It is contended that if the judgment debt is not paid within a period of ninety days after the defendant became aware thereof, the court should have the discretion to rescind the judgment. The promptness of the consent or payment of the judgment debt should also be specifically considered by the court in line with the position in England and Wales.

The position in the magistrates' courts has now also been drastically amended and the court will now have the discretion to refuse to rescind a judgment by consent where it could not do so previously. If this view is correct, it would mean that both the High Court and the magistrates' courts now have a judicial discretion to rescind the judgment by consent which the court must exercise, not capriciously, but in accordance with principle and with due regard to the relevant circumstances. It is argued that this approach is in the best interests of justice. Even if a plaintiff consents in writing that a judgment be rescinded, the court should still have judicial discretion to decide whether it be in the best interests of all the parties concerned, as well as the overall impact on the country's economy, to rescind the judgment. The consent of the judgment creditor to the rescission of the judgment, or the satisfaction of the judgment debt in absence of such consent, should only be one of the factors that a court considers in exercising its judicial discretion to rescind the judgment.

The wording of both section 36(3) of the Magistrates' Court Act as well as section 23A of the Superior Courts Act, refers to an open-ended discretion by both the High Court and magistrates' courts. Both these proposed provisions refer to the fact that the courts *may* rescind a judgment but there are no factors listed that a court must consider in exercising its judicial discretion. It is once again contended that the amendments to both the Superior Courts Act and Magistrates'

61 See the discussion in para 6 above.

62 It is contended that the grace period of ninety days relating to the payment of the judgment debt should only be available to defendants who can satisfy the court that they were not in wilful default and not to all defendants as in England and Wales. In a debt-ridden country such as South Africa, the latter will not provide a workable solution as it may create incentives for habitual defaulters to obtain further loans to pay off judgments against them in the ninety-day grace period to obtain a rescission of judgment resulting in a vicious debt cycle. The socio-economic position in South Africa should, however, be considered in the calculation of the grace period afforded to debtors, not in wilful default, and it is therefore recommended that this period should be ninety days, and not thirty days as in England and Wales.

Court Act should include the relevant factors to be considered by a court in the exercise of its discretion.[63]

### 7 3 Amendment of the National Credit Act

In *Nedbank Ltd v National Credit Regulator*[64] the Supreme Court of Appeal held that:

> [t]he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider.[65]

This view was shared by the Constitutional Court in *Sebola v Standard Bank of SA Ltd*:

> … the Act aims to secure a credit market that is "competitive, sustainable, responsible [and] efficient". And the means by which it seeks to do this embrace "balancing the respective rights and responsibilities of credit providers and consumers". These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers … I also agree that "whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked.[66]

These statements are just as relevant when it comes to the rescission of judgments by consent, where the rights of (current and future) credit providers and credit consumers must be carefully balanced to ensure a fair credit market for both role players. Unfortunately, the recent amendments to the National Credit Act skewed this balance too much in favour of the credit consumer. It is especially section 71A(2) that is problematic, as it provides that a credit bureau must remove any adverse listing within a period of seven days after receipt of information from a credit provider relating to a settlement by a consumer of any obligation under any credit agreement. The rationale behind the adoption of this subsection is clear — a consumer should not have to approach a court and pay extravagant court fees to have a judgment rescinded when the credit provider consented to the rescission of such a judgment.

While this may have rung true for the previous position relating to the application of the rescission of judgments by consent in the magistrates' courts, where the court had no discretion and was obliged to rescind the judgment by consent, the position will now be different in the High Court and magistrates' courts as there is now a general discretion to rescind a judgment by consent. If section 71A(2) of the National Credit Act remains intact, it would basically render the rescission of judgments by consent in both the High Court and magistrates' courts superfluous as there would be no need for it in most instances where the debt incurred falls within the ambit of the National Credit Act.

These amendments to the National Credit Act will now also give rise to another anomaly, namely where the rescission of a judgment relates to a debt not covered by the National Credit Act. Such debtors will not be protected by section 71A(2) of the National Credit Act which basically means that they would have to rescind the judgments against them if they want to clear their names at the credit bureaus. The same will apply to juristic persons that don't qualify

63 See Bekker 2014 *TSAR* 99 where it was argued that 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 regarding 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 and the period in which the judgment debt was settled.

64 2011 3 SA 581 (SCA).

65 Paragraph 2.

66 2012 5 SA 142 (CC) para 40.

as consumers in terms of the National Credit Act.[67] These debtors may validly argue that this different treatment comes down to unfair discrimination, as there would be no justifiable basis on which a distinction could be drawn between debtors who defaulted under a credit agreement and those who did not.

It is therefore recommended that section 71A of the National Credit Act be amended to provide that a credit bureau may only remove information relating to the granting of a default judgment from its records if it receives a copy of a court order rescinding that judgment. It is contended that this will go some way in restoring the balance between the rights of credit providers and consumers and provide for a uniform approach in the removal of adverse credit information for both debtors who defaulted under a credit agreement and those who did not.

## 8 CONCLUSION

At present, it is also possible to rescind a judgment by consent in the High Court. However, if the debt incurred falls within the ambit of the National Credit Act a judgment debtor does not need to apply for the rescission of a judgment by consent if the only purpose is to clear the debtor's credit record at all the relevant credit bureaus. This can now be achieved by simply paying the judgment debt to the credit provider and ensuring that the credit provider gives this information to all registered credit bureaus within seven days, as set out in section 71A of the National Credit Act. It is contended that a lot of progress has been made recently to ensure equal treatment of judgment debtors in applications for the rescission of judgments by consent in both the High Court and magistrates' courts. However, these developments skewed the balance too far in favour of the judgment debtor, to the detriment of current and future credit providers. It is therefore recommended that adverse credit information of a consumer relating to a default judgment should only be removed by credit bureaus in the future after receipt of a court order rescinding such judgment. Both the High Court and magistrates' courts now have the judicial discretion to rescind a judgment by consent. The fact that the plaintiff consented to the rescission of the judgment, or, if the plaintiff refuses consent, the payment of the judgment debt, should only be one of the factors that a court considers in exercising this discretion.

67 Section 4(1)(a)(i) provides that the National Credit Act is not applicable to credit agreements where the consumer is a juristic person with an asset value or annual turnover of more than one million rand. In terms of s 4(1)(b), the Act is also not applicable where a juristic person with an asset value or annual turnover of one million rand enters into a large agreement (more than R250 000) as a consumer.