

SOUTH AFRICA / JUDGMENT

Coetzer v Wesbank, a division of Firststrand Bank Limited (2020/7439) [2021] ZAGPJHC 112; 2022 (2) SA 178 (GJ) (24 May 2021)

[2021] ZAGPJHC 112

COURT

South Gauteng High Court, Johannesburg

BEFORE

T Siwendu

CASE / FILE NUMBER

2020/7439

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED. NO

DATE:

24

May 2021

CASE

NO: 2020/7439

In the matter between:

ERIKA COETZER

Applicant

and

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

Respondent

In re: WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED
 Plaintiff
 and
 INVESTMENT AUTO GROUP (PTY) LTD
 First Defendant
 GAVIN ANTHONY SMITH
 Second Defendant
 ERIKA COETZER
 Third Defendant

JUDGMENT

SIWENDU J

Introduction

- [1] This court is seized with two interlocutory applications.
- [2] In the first application the applicant, Erika Coetzer, seeks to compel in terms of Rule 35(7) that the respondent, Wesbank, discover and make available certain finance documents pertaining to Mr Papa Mbodji.
- [3] In the second interlocutory application, the applicant seeks to compel further and better particulars following a request made to Wesbank on 18 February 2021.
- [4] The two interlocutory applications arise from action proceedings instituted by Wesbank against Investment Auto Group (Pty) Ltd, a dealership operating its business from Fourways. The applicant is the third defendant in the main action.
- [5] A Master Sale and Representation Agreement (MSA) was concluded by Wesbank and the dealership in July 2017, pertaining to the sale and financing of motor vehicles, motorcycles, and boats selected by customers at the dealership.
- [6] The genesis of the main action pertains to a sale concluded between the dealership and one Mr Papa Mbodji in respect of a BMW 640i Grand Coupe M Sport motor vehicle. It is alleged that despite the sale and the financing of R596 677.27 paid and advanced by Wesbank to the dealership, it was found that the vehicle was still encumbered to BMW SA who held lawful title over same, in breach of the MSA. Wesbank seeks to recover amount. The applicant is cited her capacity as surety and co-principal debtor, together with Investment Auto Group (Pty) Ltd, in the main action.
- [7] I understand the trial in the main action is set down for hearing on 25 May 2021, and the two applications to compel served before me 20 May 2021.

Interlocutory applications

- [8] The applicant launched the applications to compel in March 2021.

[9] It seems that, unbeknown to the applicant, a default judgment was already granted against her in the main action. The application for default judgment, embodied in a duplicate court file, reveals that on 10 June 2020, Wesbank applied for default judgment against the first and second defendant on account that they, unlike the applicant, had not entered an appearance to defend the action.

[10] The default judgment application served before the Registrar on 19 September 2020, who referred the application to open court. Despite the fact that the application for default judgment was sought against the first and second defendant only, on 10 December 2020, Acting Judge Bam granted default judgment against all the defendants, ordering that:

'...default judgment is granted against the respondents jointly and severally, the one paying the other to be absolved, for the following:

1. Payment of the sum of R596,677.27
2. Interest at the rate of 15,5% per annum from the date of demand to date of full payment.
3. Costs of the application.'

[11] I observe that the order of Acting Judge Bam followed the terms of the draft order presented by Wesbank to the court verbatim.

[12] It is common cause that the applicant received a copy of the order on 19 April 2021. On 20 April 2021, the applicant's attorney wrote the Wesbank's attorneys as follows:

'We refer to the judgment sent to our office on 19 April 2021. The judgment granted by Mr Justice Bam on the 10th of December 2020 was against "the respondents jointly and severally, the one paying the other to be absolved". Our client is cited as the third respondent on the order.

It is our understanding of the legal position that all steps taken subsequent to the judgment being granted on 10 December 2020 are null and void. No judge can give a further judgment in the face of the judgment on the court file. That being so, all steps taken to procure another hearing are of no consequence.

Our client will have to bring an application to rescind the judgment. In order to do so, she needs to know the circumstances under which the judgment was granted. We intend launching that application as soon as possible.'

[13] On 21 April 2021, Wesbank's attorneys responded as follows:

'The application for default judgement was made only against the first and second defendants as it is evident from the application for default judgement of which we attach hereto. However, judgment was granted against all of the defendants.

The default judgment that was granted against the third defendant, your client, on 10 December 2020 was done so erroneously by the court. Find attached hereto our client's notice to abandon the whole judgment against the third defendant. We respectfully submit that your client has suffered no prejudice and any prejudice that was suffered has been remedied by the abandonment of the judgment.'

[14] Wesbank filed a notice in terms of Rule 41(2) of the Uniform Rules of Court, stating that it 'abandons the whole default judgment granted against the third defendant on 10 December 2020.' Rule 41(2) 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....'

[15] On 23 April 2021, Wesbank's attorney sent the following email to the applicant's representatives, indicative of its view that the abandonment obviated any obstacle to the advancement of the main action:

'We refer to paragraph 9.10 of the practice manual for Gauteng with regards to the interlocutory applications for which a trial date has been set.

We request that your client being the applicant in respect of the two applications to compel in the above matter, urgently have the application placed on the interlocutory roll for hearing due to the matter being set down for trial on 25 May 2021.

We have served our answering affidavits in respect of both applications and there seems to be no provision made in the practice manual for a replying affidavit to be served.

Please urgently set down the applications for hearing so that we may timeously resolve any issues in order to avoid any postponement of the trial.'

[16] According to counsel for the applicant, on 29 April 2021, the applicant addressed a letter to the Office of the Deputy Judge President of this Court, setting out the history and issues in the matter, and requesting that the matter be removed from the trial roll. It reiterated the stance that the matter could not proceed to trial due to the default judgment.

Issue

[17] The question before this Court is whether it can hear the applications to compel in light of the existing order. It is also whether once granted, the default judgment against the applicant can now simply be partially abandoned at the instance of Wesbank, thereby entitling it to proceed with the main action.

Applicable principles

- [18] Mr van Reenen (for the applicant) argued that once the judgment was granted, no further actions can be validly taken to proceed with the trial as the default judgment rendered the main action *res judicata*, and the court is *functus officio* in respect of the matter. As evident in the exchange between the attorneys, it would be necessary for the judgment to be rescinded if the trial was to proceed. Therefore, it argued that the applications to compel could not be heard by the Court.
- [19] In contrast, Mr Marx (for Wesbank) argued that the applicant raised the judgment as a point in *limine*. The issue serves to be dealt with at the upcoming trial, and not at the hearing of the applications to compel. The plaintiff argued that it was for the trial court to decide on the effect of the default judgment and subsequent partial abandonment thereof.
- [20] Wesbank sought to proceed with the hearing of the applications to compel on the merits stating that, notwithstanding the court order, the applications were validly brought before the Trials Interlocutory Court for consideration. It had 'abandoned' the judgment against the applicant. I pause to mention that Wesbank has not referred me to any authorities to support this position.
- [21] Erasmus Superior Court Practice:[1] sets out the effect of an order or judgment a court as follows:

'The general, well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to set it aside or to correct, alter or supplement it. The reasons are twofold: first, the court becomes *functus officio* and its authority over the subject-matter ceases; secondly, the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end. The inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law. The general rule does not apply to interlocutory orders.'

- [22] Importantly the author, similarly to the Oudekraal Rule, further states that—

'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct.'[2]

- [23] On this score the applicant relies on the court decision in *Firestone South Africa (Pty) Ltd v Gentiruco AG*,[3] where the Appellate Division iterates the position above stated as follows:

'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.'

[24] As to the abandonment and its effect on the default judgment, the Court in *Jacobson v Havinga t/a Havingas*,^[4] dealt with the question (on appeal) of whether a default judgment can be accepted as a prior judgment for the purposes of raising the special plea of *res judicata*. In this case, default judgment had been granted even though the plaintiff had filed a notice of withdrawal. The plaintiff subsequently issued an action *de novo* against the defendant. The Court found as follows:

'...even though the judgment was voidable ab origine and ought to have been set aside or rescinded, it does not detract from the fact that the judgment stands and is binding. (See *Ramodike v Mokeetsi Trading Store* [1955 (2) SA 169 (T)]) Even if it is void, it has the appearance of *res judicata*, noted in a public record and will be looked upon and be acted upon as *res judicata* until set aside, at great cost, by the respondent. It also binds heirs and executors unless they can prove it is void and ostensibly

prescribes after 30 years only. It proclaims itself to the world to be valid until set aside by the court. Because it has the appearance

of *res judicata* and proclaims itself to be *res judicata* although perhaps void in the minds of the few who know the true facts, and has the potential to remain on the record book if an

application to set aside fails or because proof that it is void is lost, it has to be treated as if it is what it proclaims to be.'^[5]

[25] The Court applied the dicta in *African Farms and Townships Ltd v Cape Town Municipality*,^[6] and the principle has been applied in subsequent cases like the *Minister of Justice v Bagattini and Others*.^[7]

[26] On the question of the effect of abandonment, the Court was referred to the case of *Liberty Group Limited v Bezuidenhout*,^[8] where the High Court was faced with the question of whether a default judgment entered in favour of the plaintiff, and subsequently abandoned, renders the action *res judicata*. As I have it, an abandonment is an election available to Wesbank whether to enforce the rights obtained in terms of the judgment or not. A mere abandonment does not extinguish the existence of the judgment against the applicant's name.

[27] The default judgment is final in effect, and stands until it is varied, rescinded or set aside. The gateway, which I understand the applicant embarked upon, is provided for in Rule 4(2). It is not within the power of the plaintiff to vary or rescind a judgment. It cannot usurp the court's role in purporting to do so by using Rule 41(2).

- [28] Mr Marx persisted that these matters must be raised by way of a special plea before the trial court. As to the applications to compel before this Court, it is superfluous and contrary to the established principle to call on this Court to adjudicate on interlocutory applications in respect of a lis between the same parties, over the same cause of action, for the same relief, over which there is an existing pronouncement by a court – at least until its validity is set aside.
- [29] I disagree with Mr Marx that this Court can validly adjudicate the two applications to compel. Accordingly, the applications fall to be dismissed.
- [30] As to the question of cost for the day, the parties were, once again, at loggerheads. From submissions made, and also evident from the correspondence and stance by Wesbank's attorneys, it is clear that Wesbank persisted that the case must proceed to trial. The applicant was compelled to set down the hearing of the interlocutory applications despite the default judgment.
- [31] Mr Marx made clear before me that Wesbank persists with the trial set down for 25 May 2021, even though it stands the risk of being met with the special plea and the same issues raised before me. Be that as it may, I am of the view that Wesbank must bear the costs of the day.
- [32] In my view, the matter ought to have been resolved between the parties, failing which, through mediation, if it became necessary, and without recourse to the court. I find Wesbank must bear the costs.

Therefore, the following order is made:

1. The applications brought by the third defendant/applicant to compel further particulars and further and better discovery, are removed.
2. The plaintiff/respondent is ordered to pay the costs of the hearing of the two applications, set down for 20 May 2021.

T SIWENDU

JUDGE OF THE HIGH COURT

This revised judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 24 May 2021.

Date of hearing:

20 May 2021

Date of judgment:

24 May 2021

Appearances:

Counsel for the applicant:

WHJ van Reenen

Attorney for the applicant:

Bezuidenhout Lak Attorneys

Counsel for the respondent:

P Marx

Attorney for the respondent:

Rossouws, Lesley Inc

- [1] Van Loggerenberg et al Erasmus Superior Court Practice at D1-561 (RS 15, 2020) (footnotes omitted).
- [2] Van Loggerenberg et al Erasmus Superior Court Practice at D1-562 (RS 15, 2020) (footnotes omitted).
- [3] Firestone South Africa (Pty) Ltd v Gentiruco AG 1977
- (4) SA 298 (A) at 306F-G.
- [4] Jacobson v Havinga t/a Havingas 2001 (2) SA 177 (T).
- [5] Ibid at 181D-G.
- [6] African Farms and Townships Ltd v Cape Town Municipality 1963
- (2) SA 555 (A) at 564F-G. Quoted in Havinga (note 4 above) at 181G-H.
- [7] Minister of Justice v Bagattini and Others 1975 (4) SA 252 (T) at 265G quoted at 182J-A in Havinga (note 4 above).
- [8] Liberty Group Limited v Bezuidenhout [2014] ZAKZPHC 16 para 2.

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Prepared on 11 October 2026 · Esheria