

SOUTH AFRICA / JUDGMENT

Inter Africa Carriers CC v Show-Down Tradaing 16 CC t/a Kroondal Garage CC (65353/2011) [2013] ZAGPPHC 247 (16 August 2013)

[2013] ZAGPPHC 247

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa

CASE / FILE NUMBER

65353/2011

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REPORTABLE

NORTH

GAUTENG HIGH COURT PRETORIA (REPUBLIC OF SOUTH AFRICA)

Case

no:65353/2011

DATE:16/08/2013

In

the matter between:

INTER

AFRICA CARRIERS

CC.....APPLICANT

AND

SHOW-DOWN

TRADAING 16

CC.....RESPONDENT

T/A

KROONDAL GARAGE CC

JUDGMENT

BAQWA J

[1] On 15 August 2011, a trial took place in which applicant was represented by Messrs Joop and Driaan Smith with applicant's

attorney Mr Anton De Beer. In that case the current respondent was the applicant.

[2] During the course of the trial the applicant and the respondent's respective attorneys negotiated a settlement of the merits and quantum of the trial. A draft order was conceived and later made an order of court. The draft order is annexed to the applicant's papers as annexure "C". The terms of the draft order read as follows:

"Per ooreenkoms tussen die partye word die volgende bevei verleen:

1. Die verweerder betaal aan die eiser die bedrag van R1000000-00 (een miljoen rand), betaalbaar as voig:

1.1. Die bedrag van R1000 000-00 is betaalbaar in paaielemente van R40 000-00 (veertig duisend rand) per maand, die eerste betaling te geskied op 30 September 2011, en daarna voorofop die laaste dag van elke gevolgde maand.

1.2. Die bedraag van R1000 000-00 is rentvry buiten soos hier onder uiteengesit.

2. Indien die verweerder versuim om enige betaling ingevolge paragraaf 1 stiptelik te betaal, word die bedrag van R1264 923.82 (een miljoen twee honderd vier en sestig duisend nege honderd drie en twintig rand en twee and tagtig sent) tesame met rente teen 15.5% per jaar vanaf 5 December 2008, minus enige betaling wat die Verweeder reeds aan die eiser betaal het, onmiddelik opeisbaar en betaalbaar.,

3. Die verweerder betaal die eiser se getakseerde, alternatiewelik ooreengekome party en party koste, welke koste sal insluit die

reistyd en opwagting ten aansien van die konsultasie met Rudi Van Der Westhuizen te Potchefstroom op 14 Augustus 2011, asook advokaatskoste

ten aansien van sodanige konsultasie.

4. Alle betalings deur die verweerder word gemaak in die eiser se prokureur van record, William Tintinger Prokureura, se trustrekening

met die volgende besonderhede.

Williem Tintinger Prokureur Trust Rekening

Standaard Bank Gezina Tak

Rekeningnommer: 013 143 875

Takkode: 014 845

Verwysing: UK52

5. Die eiser sal sy samewerking aan die verweerder verleen ten aansien van enige stappe wat die verweerder mag neem teen Mnr Rudi Van Der Westhuizen, dieselfde sal geld ten aansien van Mnr S Venter, die lid van die eiser, wat sy samewerking aan die verweerder sal verleen.
6. Buiten soos hier uiteengesit sal die partye geen verder eise van welke aard teen mekaar he op datum hiervan. ”

[3] This is an order which the applicant in the present case seeks to vary. Applicant seeks to amend certain payment dates contained in that order. Applicant failed to adhere to those dates in terms of which it was to make certain payments to the respondent. Respondent,

acting in terms of the order claimed the full amount payable. When applicant failed to pay the full amount, respondent issued a writ of execution against applicant.

[4] Simultaneously with the variation which applicant seeks, it also seeks to set aside the said writ of execution.

[5] Applicant admits in its founding affidavit that it did not adhere to the stipulated payment dates because it was not timeously informed of the said dates by its then attorney, Anton De Beer. Applicant subsequently withdrew instructions from the said attorney ostensibly because of his omission.

[6] Indeed the order was made in terms of the agreement reached by the parties and it reflects such agreement. It is on that basis that the respondent states that it would not have entered into the agreement on the terms the applicant now proposes.

[7] Applicant is bringing the application in terms of Rule 27(1) of Rules of Court which reads as follows:

‘In the absence of an agreement between the parties, the court may upon application on notice and on good cause shown, make an order

extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. ”

[8] The operative phrase in this case with regard to Rule 27(1) is “doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. ”

Applicant had to pay certain sums of money on specified dates in terms of the agreement which was subsequently made an order of court. Applicant failed to comply in regard to the very first payment and the order applicant now seeks to obtain is amend the payment dates. In other words, the variation sought is no longer about the proceedings which have since been finalised. It is about payment of money. This fact alone puts this application outside the ambit of Rule 27. The applicant can therefore not validly bring this application in terms of Rule 27.

[9] Respondent submits that Rule 27(1) and Rule 27(2) has no application where the court has granted a final judgment in terms of an agreement between the parties, disposing of the whole action between the parties as same is *res judicata*. Respondent submits that this court has no jurisdiction to vary a consensual agreement between the parties.

[10] The introduction of the draft order read as follows:

'Per ooreenkoms tussen die partye word the volgende bevel verleen.' Paragraph 6 of the draft order further reads as follows:

"Buite soos hierbo uiteengesit sal die partye geen verder eise van welke aard teevoor mekaar he' op datum hiervan. "

Respondent submits that these terms cannot but point to the absolute finalisation of the action.

[11] Rule 42(1) of the Rules of this court provides for a variation of a court order and sets out the terms on which such variation may occur:

"42(1) The court may in addition to any other powers it may have *mero motu* or upon 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. "

This application has however not been brought in terms of Rule 42(1).

[12] Respondent further submits that the applicant has delayed payment of R1, 264, 923.82 since 5 of December 2008 and that in the event of the court exercising its discretion, it should exercise such discretion against the applicant.

[13] Respondent further submits that the applicant is in terms of the doctrine of *res judicata*, barred from placing before the court

issues

that that have already been decided upon by the court. Respondent in making this submission further emphasises the point that in making the order, the court was giving effect to the consensual agreement of the parties. The essence of the submission is that a variation would essentially vitiate that consensus.

[14] In *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng 2009(3) SA 577 (SCA)* paragraph 21 the Supreme Court of Appeal held thus :

‘In considering the argument, it is necessary to deal briefly with the principles of *res judicata* and so called ‘Issue estoppels’”

relied on by both sides. The underlying ratio of the exception *rei judicata vel litis finitae* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other on the same cause of action should not be permitted. In *National Sorghum Breweries v International Liquor Distributors*

Olivier JA [2] paragraph 239 at SCA 232 SA(2) stated the requirements for a successful reliance on the exception be as follows:

‘The requirements for a successful reliance on the exception were, and still are: *idem actor*, *idem reus*, *eadem res* and *eadem causa petendi* This means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is 1demanding the same thing on the same ground’ (per Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality 1963(2) SA 555(A) et 562A*); or which causes to the same thing, ‘on the same cause for the same relief (per Van Win sen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) SA 462(A) at 472 A-B*; see also the discussion in *Kommissaris Van Binnelandse Inkomste v ABSA Bank BPK 1995(1) SA 653(A) at 664 C-E*); or which also comes to the same thing, whether the ‘same issue’ had been adjudicated upon (see *Horowitz v Brock and Others 1988(2) SA 160 at 179 A-H*)”

[15] The court held further in the *Yellow Star Properties 1020 (Pty) Ltd* decision (paragraph 22) that:

‘It has been recognised though that the strict requirements of the exceptio, especially those relating to *easdem res* or *eadem petendi*

causa (the same relief and the cause of action) may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment are the same issue (*viz idem actor* and *eadem quaestio*). It has become common place to refer to it as being a matter of so-called ‘issue estoppel’. But this is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law, and the defence remains *res judicata*. Importantly when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the parties must be the same but that the same

issue of fact or law which was an essential element of the judgment on which reliance in place must have arisen and must be regarded as having been determined in the earlier judgment. ”

[16] In casu it is common cause that the parties are the same. The same issue of fact or law which formed the basis of the order was the consensual agreement of the parties. The applicant seeks to use Rule 27 to restructure the agreement which was based on the consensus of the parties. The basis of the application is the act or omission of applicant's representative, Anton De Beer. Neither in fact nor in law does it seem to me proper to visit the impact of such act or omission on the respondent. It would be neither logical nor in the interest of justice to do so. A litigant cannot escape or avoid the results of his lawyer's lack of diligence. If a litigant relies on his lawyer's negligence in trying to avoid the consequences of such negligence, he cannot pass on the impact of those consequences to the opposing party in litigation. Granting the present application would indirectly pass on the consequences of the lawyer, Anton De Beer's action to the respondent.

As matters stand though and with reference to the legal principle, *res judicata* and case law in support thereof I have come to the

conclusion that the applicant has not made out a proper case.

[17] This conclusion finds support in the case of *Fourie NO v Merchant Investors (Pty) Ltd and Another* 2004(3) SA 422(C) in which the following is stated:

"A party having obtained a court order cannot seek to undo the agreement by seeking to clothe its apparent desire not to be bound to its end of the bargain by seeking to appeal against the court order which made the agreement an order of court. To grant leave in such circumstances would have the effect of

granting a party leave to appeal against its own decision and not decision of the court. In such circumstances, the court cannot entertain an application for leave to appeal against such an order. " (At 424 H-425A)

[18] In casu, granting this application would be tantamount to the court substituting terms which were never contemplated nor agreed by the parties. This the court cannot do because the agreement which the parties entered into embodies their undertakings to each other and not to the court. A breach of such undertakings should be dealt with in terms of the agreement and not by resorting to an amendment or variation of the court.

[19] A similar issue was also dealt with in the case of *Wallach v Lew Geffen Estates CC* 1993(3) SA 258(A) at 261 B-D in which Miine JA stated as follows:

"There was accordingly a dispute of fact on the papers in this regard, but the learned Judge in the Court a quo, Lazarus J, dealt with it as follows:

'firstly, she (referring to the appellant) said of her failure to pay the interest from 6 to 31 March 1990 that she had overlooked her obligation to do so. She tied this to a contention that the agreement was illegible and that she had not yet received a typed copy as at the time when she

was obliged to perform. She of course had a handwritten copy, and I find no difficulty in deciphering clause 3 thereof which requires her to pay interest. But if it is indecipherable, and if she did not know what she was signing, she should not have signed it. Having signed it the rule is caveat subscriptor. Nor can it be contended pending the receipt of a

transcript. The learned Judge could not possibly have made such an order as it would amount to a variation of the parties'

agreement which had been made an order of Court. Moreover, the suggestion of a suspension is not made in respondent's affidavit and it cannot be said that it is a fact in dispute'.

A court therefore ought not to interfere with the parties' agreement even where such agreement has been made an order of court.

[20] In the result, I find that the order in case number 33363/09 is final and dispositive of the matter and that the applicant is bound by the order in that case.

It is accordingly ordered as follows:

20.1. Respondent's special plea of Res Judicata is upheld.

20.2. It is held further that applicant cannot validly bring this application in terms of Rule 27(1) to vary payment dates with regard to proceedings which have been finalised.

19.3. Applicant's application is dismissed with costs including costs of the two counsel. The costs order includes the payment of costs for attendance on 27 May 2013 which shall include the cost of one counsel.

It is so ordered.

(JUDGE OF THE HIGH COURT)

Counsel for the applicant: Adv M.A Badenhorst SC

Instructed by: Magda Kets Attorneys

Counsel for the respondent: Adv S Wagner SC

Adv M.C Hartman

Instructed by: William Tintinger Incorporated

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Prepared on 10 October 2026 · Esheria