

SOUTH AFRICA / JUDGMENT

Liberty Group Limited v Bezuidenhout (4072/2010) [2014] ZAKZPHC 16 (4 March 2014) [2014] ZAKZPHC 16

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mbatha

CASE / FILE NUMBER

4072/2010

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IN

THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC

OF SOUTH AFRICA

CASE

NO: 4072/2010

In

the matter between:

LIBERTY

GROUP

LIMITED.....APPLICANT

and

JOHAN

COENRAAD

BEZUIDENHOUT.....RESPONDENT

JUDGMENT

Delivered on: 04 March 2014

MBATHA J

- [1] Defendant raised a Special Plea of res judicata in his defence and subsequently obtained an order that the Special Plea be adjudicated upon separately in terms of Rule 33 (4) of the Rules of this Court.

[2] The issue that require determination in the Special Plea being:

- (a) Whether the judgment entered in favour of the Plaintiff, by default, and subsequently abandoned by the Plaintiff renders the action *res judicata*; and
 - (b) Whether the Plaintiff is entitled to proceed with the action on the same papers in respect of which it obtained default judgment against the Defendant, after the default judgment had been abandoned by the Plaintiff.
- [3] It is common cause that the Defendant bears the onus of proof and it is also common cause that there are no material disputes of facts.

[4] The summary of the facts in this matter are as follows:

4.1 The Plaintiff issued summons from this Court on the 2nd of June 2010. The cause of action arises from a termination of an agency agreement between the Plaintiff and the Defendant.

The Plaintiff's claim is for the recovery of the funds due to the Plaintiff in terms of their agreement.

4.2 Judgment by default was entered in favour of the Plaintiff on the 11th of October 2010 in the amount of R65 501, 21, together with a *tempora morae* interest and costs.

4.3 The Plaintiff subsequently abandoned the judgment in terms of "common law" and a notice to this effect was filed.

4.4 On the 14th of December 2011, the Defendant served its Notice of Amendment, and substituted its claim for R65 501, 21 for an amount of R126 131, 05.

[5] In the light of the aforementioned developments, the defendant raised a special plea of *res judicata* in that:

- (a) It is a claim for the same thing on the same ground against the same parties;
- (b) which has been fully adjudicated by the Honourable Court;
- (c) the Defendant pleads that this claim was fully adjudicated upon on the 11th of October 2010, when the Plaintiff obtained the Default Judgment;
- (d) It is therefore a final judgment as it finally disposed of the matter between the parties;
- (e) Further, the Plaintiff is not entitled to proceed with the action as the previous judgment disposed of the action and the matter is therefore *res judicata*.

[6] The requirements for a Plea of *res judicata* are as follows:

- (a) Judgment must have been entered in an action or application by a competent Court;
- (i) Between the same parties;
- (ii) based on the same cause of action;

(iii) with respect to the same subject matter or thing and it makes no difference, in this type of Plea, that no evidence was led prior to the judgment being granted. The Court was referred to *Jacobson v Havinga t/a Havingas*[1] in this regard.

[7] The question is whether a matter has been finally adjudicated upon by the granting of a default judgment and what are the implications are for abandoning such a judgment under common law by the Plaintiff.

[8] The Defendant has referred me to *Jacobson v Havinga t/a Havingas*[2] where the Court held that a default judgment is binding until it is rescinded and a plea of *res judicata* may be raised successfully. The Court held that it is irrelevant whether evidence was led or not, a default judgment remains a judgment even if erroneously obtained irrespective whether it was granted by the Clerk of the Court, a Magistrate or Judge.

I refer to *Ramodike v Mookeetsi Trading Store*[3] where the following was said:

“Until properly attacked and rescinded a judgment of a Court of record, even if obtained by default, must stand and presumed to be binding.”

8.2 The facts of that case were slightly different from the facts of this case in that default judgment had been erroneously obtained after the withdrawal of the matter and a new summons had been issued.

In this case a valid judgment is abandoned, no new fresh summons have been issued, but an amendment is effected only in so far as the claim amount is concerned.

8.3 The same principle was applied by Steyn CJ in *African Farms Township LTD v Cape Town Municipality*[4] where he had this to say:

“even if the judgment is wrong, a person can rely on res judicata.”

8.4 It was more or less a similar scenario in *Shackleton Credit Management (PTY) LTD v Grobler and Another*[5]. A judgment was erroneously sought in the name of the cedent instead of Shackleton Credit Management, the cessionary. The Court held that the judgment erroneously obtained by Nedcor ought to have been rescinded, even if it is a default judgment, and until rescinded it was binding and competent to sustain a Plea of *res judicata*. It supported the principles set out in *Havinga* above.

[9] The Plaintiff further submits that the granting of a default judgment is an administrative action arising from the default of the Defendant. However, I hold a different view. I accept that the default judgment granted by the Registrar was and is a final judgment, irrespective that it was granted by the Registrar – see *Shackleton* case and others. I am not persuaded by counsel for the Plaintiff that it is merely an administrative process. It has legal consequences and it is valid until it is rescinded by a Court of law – see *Jacobs v Havenga*.

[10] I will now deal with the issue of abandonment of the judgment. The Defendant's view is that irrespective of whether this abandonment of the judgment was in terms of common law or the Rules of this Court, a Plea of res judicata can still be relied upon and referred to the Court to Scrooby v Engelbrecht[6].

[11] It is trite that a party that obtains a judgment on the merits is barred from litigating on the same issue by the doctrine of res judicata. Hoffman and Zeffert, the South African Law of Evidence, 4th Edition states as follows:

"...that a prior final judgment had been given in the proceedings involving:-

(a) the same subject matter;

(b) Based on the same res or thing;

(c) Between the same parties, or put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to proceed against the other on the same cause, for the same relief, can be met by the exception res judicata."

[12] The Plaintiff in opposing the Special Plea of res judicata submits that the special plea should not be upheld because it was a "common law abandonment" and the fact that it was an abandonment of a default judgment. Due to lack of relevant case law a "common law abandonment", I have only been referred to Rule 41 of the Rules of this Court and Section 86 of the Magistrates Court Act 32 of 1944 by the Plaintiff.

12.1 It is submitted by counsel for the Plaintiff that in terms of the Magistrates Court Rules if one party abandons the judgment, then judgment is effectively entered in favour of the other party and there is no similar provision in the High Court Rules. In the High Court when default judgment is refused, the matter is either referred to trial or for the hearing of oral evidence. The same would apply if the matter is referred by the Registrar to Court. Plaintiff's argument is that if default judgment is abandoned, all that remains is a referral of the matter to Court or for trial. The matter is currently at the stage where it can be referred to Court.

11.2 The Plaintiff further submitted that this is not a classical case where one can plead res judicata as there is no new and separate action corresponding to the old matter. What is before this Court is the same summons under the same case number. The Plaintiff refers to a principle stated in Mvaami (Pty) LTD v Standard Finance LTD[7] held that:

"The test laid down in New Brunswick Railway Co. v British and French Trust Corporation LTD 1939 A.C.I, that 'default judgments, though capable of giving rise to estoppel, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided, and... they can estop only for what must necessarily and with complete precision, have been thereby determined', accords with consideration, common sense and equity, and should be applied where res judicata based on default judgment is raised."

11.3 The authorities are clear that a party can abandon even at the stage prior to an appeal. The Plaintiff referred to Baloyi NO. v Schoeman NO. and Others[8], where the Court indicated that abandonment should not thwart the Plaintiff in continuing with its claim, stating as follows at 267 G:

“It would in my opinion result in extremely unfair and unjustifiable consequences if the abandonment of a judgment under these circumstances were allowed to lead to a successful defence or res judicata.”

11.4 I was referred to Total Zimbabwe (PTY) LTD v Power Express (PTY) LTD[9] by counsel for the Defendant where he quoted the following paragraph:

“The papers would have to show that the defendant has relinquished its claim for delivery of the tanks, and further that it had no intention of pursuing the matter to recover the tanks, in satisfaction of the judgment in its favour.”

11.5 It is pertinent to note at this stage that the Plaintiff could not have resorted to an application for rescission of judgment. The judgment was valid; it was not erroneously granted like the judgment in the Shackleton case. Mr Roux did not use the Rule 41(2) which deals with the abandonment of a judgment either wholly or in part by a plaintiff. Rule 41(2) reads 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 abandonment in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall mutatis mutandis apply in the case of a notice delivered in terms of this sub-rule.”

11.6 Mr Roux in support of his argument has referred the court to a paragraph (b) on page 167 of Becks Theory, where the learned author says:

“As regards to the second requisite, namely that the prior action and judgment must concern the same subject matter, it may be remarked

that where the cause of action is a continuing one in fact the judgment was previously been given to satisfy the obligation up to a certain point is of course no bar to further action in respect of the obligation thereafter.”

and went on to further state that:

“Thus judgment for a money sum awarded as maintenance for an illegitimate child is no bar to an action for further maintenance.

Similarly, a judgment for one month’s rent is obviously no bar to judgment for rent of the subsequent month.”

[12] Plaintiff could have executed on the default judgment in its favour and continued to issue a fresh summons for the balance of its claim against the Defendant. Any prudent plaintiff would have done so. The question remains whether in this particular case the notice to abandon the judgment with the intention to amend the Particulars of Claim to reflect the balance of the claim then allegedly owing by the Defendant to the Plaintiff has resulted in

the Plaintiff effectively losing its claim as this will be the result if the Plea of res judicata is successful.

- [13] I have extensively researched and taken time to find more material by way of case law on the effect of an abandonment of judgment in terms of common law and could find none. I was not referred to any authority by either counsel that had any bearing on this issue.
- [14] A plaintiff armed with a judgment will usually only abandon such a judgment for a specific purpose. Rule 41 (2) seems to cater for the abandoning of a judgment if for whatever reason the plaintiff does not want the judgment but is primarily adopted by plaintiffs if a matter is on appeal and such a plaintiff is of the view that the prospects of defending the judgment is not all that rosy. The abandoning of the judgment usually also involves the tendering of costs by the plaintiff. *Durban City Council v Kistan*[10].
- [15] I have alluded to the fact that in principle there is no difference between a judgment granted by default and a judgment granted after a trial. A successful plaintiff who abandons a judgment in the latter situation would undoubtedly be visited by a successful plea of res judicata if he should thereafter reinstate the claim in the hope of securing a better judgment on quantum.
- [16] Mr Roux has argued that the subject matter of the claim as reflected in the amended Particulars of Claim is not similar to the claim when default judgment was granted as the quantum now merely brings up to date the full extent of the claim bearing in mind that the quantum of the claim would have increased as the extent of the claim itself would only have been known after the expiry of the full term of the agency agreement. This argument loses sight of the fact that the major portion of the present claim includes the amount for which default judgment had been granted.
- [17] Whether it should in fact succeed is what I should consider having regard to the peculiar facts of this particular case. The Plaintiff abandoned in terms of the common law and I cannot find any jurisprudence in that regard. A judgment in my view can only be abandoned in terms of Rule 41(2) of the Rules of this Court. If there is such an abandonment in terms of common law, I fully agree with the submission made by counsel for the Defendant that it would therefore also have the effect of there being a res judicata in respect of the action
- [18] I therefore find that the Defendant has successfully proved its case. The requirements for a res judicata plea have been fully satisfied.

(i) The Special Plea is upheld with costs.

JUDGE MBATHA

Date of hearing: 05 August 2013

Date of Judgment: 04 March 2014

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[1] 2001

(2) SA 177 (T) at 179 (H-I).

[2] 2001

(2) SA 177 (T) at 179 (H-I).

[3] 1955

(2) SA 169.

[4] 1963

(2) SA 555 (AD)

[5] (2009) JOL 23599 (GNP) at 11.

[6] 1940 TPD 100 at 105.

[7] 1977

(1) SA (R) 963.

[8] All SA Law Report [2003] 4 All SA 261 (NC) at paras 24 and 25.

[9] 2012 JOL 28560 ZH at page 8.

[10] 1972

(4) 465 NPD.

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