

**REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEAL CASE NO A5027/2016

CASE NO A QU02014/12979

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

23/6/2017

In the matter between:

FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK

Appellant

and

FONDSE ADRIAAN RUDOLPH N.O.

First Respondent

O'NEIL, JANE ELIZABETH

Second Respondent

JUDGMENT

Sutherland J:

Introduction

[1] This is a case about the purpose, scope and reach of the defence of *res judicata* or issue estoppel in respect of an abandoned judgment. It arises from unusual

circumstances.

[2] The appellant lent money to Mr and Mrs O'Neil against the security of a mortgage bond. The O'Neils did not pay up. The appellant sued. The O'Neils defended. The appellant sought and got summary judgment. The O'Neils applied for leave to appeal. At that hearing, the appellant abandoned the judgment. Later the appellant withdrew that action, and instituted fresh proceedings on application for the identical indebtedness of the O'Neils to the appellant. At the time of instituting that application, Mr O'Neil had died; the first respondent is the executor of his estate. A defence was put up to the appellant's application that it was bad because *res judicata* applied. That defence was upheld. The appeal is against the judgment upholding the defence of *res judicata* and the consequent dismissal of the application.

[3] Several interrelated arguments have been advanced. They are dealt with discreetly, but first the exact facts need to be described, to which these contentions were addressed.

What exactly happened?

[4] The accounts given in the affidavits filed by the appellant and Mrs O'Neil, and the transcript of the proceedings in the summary judgment hearing reveal the unfolding saga.

[5] The O'Neils obtained two loans from the appellant, on 29 August 2005 and on 18 October 2007. Both were secured by mortgage bonds over their home at [...], Kleve Hill, Johannesburg. In April 2010, the O'Neils fell into arrears and stopped paying altogether in December 2011. The appellant's first demand to remedy the breach was made in October 2013.

[6] The reasons for not paying, although not relevant to their legal relationship with the appellant *per se*, bears mention, because these circumstances were ventilated in the dealings between the parties. The O'Neils were ostensibly hard up. Mr O'Neil was terminally ill. Mrs O'Neil was in dispute with a former employer about money due. Mrs O'Neil who was the principal spokesperson for the couple throughout, continually

advanced the idea that the debt was capable of resolution once her dispute with her former employer had been resolved. Notably, throughout this entire saga, the indebtedness of the O'Neils to the appellant has never been denied.

[7] The appellant instituted an action to obtain a money judgment against the O'Neils. The action was defended and Mrs O'Neil deposed to three opposing affidavits on 5 and 10 and 27 February 2012. She had not obtained legal representation. In these affidavits, she traversed the woes that befallen her and her husband, alluded to her disputes about money owed to her, her husband's illness, and attached material, chiefly from copies of *Noseweek*, condemning her former employer and its management as gangsters. The thrust of the contents was to the effect that money was owed to her and if allowed time to obtain satisfaction in that regard, she would have money to discharge her admitted indebtedness to the appellant.

[8] Importantly, in her last affidavit, after having alluded to the fact that she had consulted an attorney, who was not on record, she stated that:

'The Defendants did not receive the notification in terms of section 129 of the National Credit Act as it was sent to [...] Crescent and not [...] Crescent. Neither of the defendants received notice. This is presently (sic) being debated in the Constitutional Court.'

The facts so alleged were true. The source of the mischief was an erroneous recordal in the second loan agreement of the name of the street.

[9] On 28 February 2012, the matter came before Court. A transcript records the exchanges. Counsel for the appellant/applicant sought a money judgment for the debt; no relief was sought in respect of the executability of the property subject to the mortgage bonds. Mrs O'Neil is recorded as being aggrieved that the appellant would not accept a tender of payments on the arrears. An exchange between her and the judge took place, in which he invited her to express her point of view about why whatever she had put before the court could constitute a defence to the claim. In essence, her responses were allusions to her travails in pursuing a claim against her former employer, which was by then in liquidation and being subjected to an enquiry

in terms of section 417 of the Companies act, in which she had been called to testify. No mention of the alleged non-compliance with section 129 of the National Credit Act 34 of 2005 (NCA) occurred in the exchanges. Ultimately, summary judgment was granted, in which no allusion to the wrong address or the impossibility of a delivery of the section 129 notice was made.

[10] On 13 March 2012, an application for leave to appeal was instituted. On 29 August 2012, the hearing for the application for leave to appeal took place. At this moment, the appellant announced that it abandoned its judgment. No hearing therefore took place.

[11] Why the appellant did so is explained in paragraph 50 of its founding affidavit of the subsequent application:

'...in an endeavour to assist the O' Neils' and to save costs as well as in the light of the Constitutional Court ruling in the matter of *Sebola & another v Standard Bank of southern Africa Ltd & Another* 2012 (5) SA 142 (CC) the applicant [ie, appellant] abandoned the judgment that was obtained in its favour. This was done with a view to amicably settle the matter and possibly conclude some form of down payment with the O' Neils and to allow them to invoke the provisions of section 129 of the [National Credit] Act.'

[12] It might fairly be observed that in this passage, the lady 'doth protest too much', but the averments stand un rebutted. However, even if the profuse expostulations of goodwill are discounted, what remains is the expression of a business-orientated approach to the predicament in which the appellant, unquestionably, found itself. That predicament was non-compliance with section 129 of the Credit Agreements Act 34 of 2005 (NCA) as required by the judgment in *Sebola*, which was delivered by the constitutional Court on 7 June 2012; ie after the summary judgment hearing and shortly before the set down date of the application for leave to appeal.

[13] A slight digression into the application of the NCA is necessary. The purpose of the NCA is the protection of consumers of credit. Several safeguards have been introduced, among which is section 129. The relevant portion reads:

- '(1) If the consumer is in default under a credit agreement, the credit provider-
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
 - (b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130.
- (2) ...
- (4)
- (5) The notice contemplated in subsection (1) (a) must be delivered to the consumer-
- (a) by registered mail; or
 - (b) to an adult person at the location designated by the consumer.
- (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
- (7) Proof of delivery contemplated in subsection (5) is satisfied by-
- (a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
 - (b) the signature or identifying mark of the recipient contemplated in subsection (5) (b).

[14] In pursuance of these injunctions, a bank typically would send a notice. The method of notification would be one chosen by the debtor. A typical choice was by registered post to a stipulated address. How far had a creditor to go in respect of ensuring receipt? The answer to that question was given in *Roussouw & Another v Firstrand Bank Ltd 2010 (6) SA 439 (SCA)*. The SCA held that proof of the dispatch was sufficient and the risk of non-delivery was upon the debtor. That was what the law was understood to be when the summary judgment hearing took place. *Sebola*

changed that understanding. The law according to *Sebola* is thus:

[74] the meaning of 'deliver' in s 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach - by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the s 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the s 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.

[75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a 'high degree of probability that most of them are delivered'. But the mishap that afflicted the *Sebolas*' notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by s 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[76] In practical terms this means the credit provider must obtain a post-despatch 'track and trace' print-out from the website of the South African Post Office. As BASA's submission explained, the 'track and trace' service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed.

...

[79] If, in contested proceedings, the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to

once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true, and, if so, adjourn the proceedings in terms of s 130(4)(b).

[15] The appellant upon reading this judgment appreciated that the appeal by the O'Neils would result in the overturning of the summary judgment. Resisting the application for leave to appeal was pointless. It might be noted that the consequences of the wrongly recorded address, in any event, would not have satisfied even the Roussouw test.

[16] There followed what might be described as an interregnum. The parties engaged one another but without the benefit of cordiality. Mr O'Neil died. When Fondse was appointed as executor the possibility of further litigation became a reality.

[17] The appellant formally withdrew the action. The court a quo remarks that this act carried no juridical significance. We have not been called upon to examine the point and therefore express no view about it.

[18] On 8 August 2014, the appellant instituted proceedings afresh against Fondse and Mrs O'Neil, by way of application. The founding affidavit candidly disclosed the history of the dispute; in paragraph 40- 41 it was stated:

'[40] The [appellant] previously instituted action against the O'Neils based on the first and second home loan agreements and the first and second mortgage bonds.

[41] the cause of action as set out in this summons is the same as made out above'

[19] The appellant also, in the founding affidavit, set out all the necessary material facts to demonstrate that it had complied with section 129 of NCA in the manner required by *Sebola*. There was also express acknowledgement of receipt. Ostensibly, the sole cogent point raised in the initial proceedings had now been resolved.

[20] The answering affidavit raised *Res Judicata* as a defence to the claim.

[21] 20 October 2015, the matter came before court. The defence of *Res judicata* was upheld. That is the judgment on appeal to this court with leave of the Supreme Court of appeal.

The Nature of *Res Judicata* and Issue Estoppel

[22] The arguments advanced to us covered several aspects of the concept of *res judicata* and the ambit of its application to these facts. It is useful to briefly address the juridical character of the defence before marrying the law to these facts.

[23] The requirements of *Res Judicata* are that the proceedings are in respect of a dispute between the same parties on the same cause of action for the same relief as has previously been dispositively adjudicated. It is hard to think of a more perfect example than that presented by these facts to illustrate that position. Indeed, such is the contention on behalf of the respondents.

[24] The label *Issue Estoppel*, derived from the parlance of English jurisprudence, is given to a relaxed application of these requirements in the interests of fairness. What this means in practice was addressed by Brand JA in *Prinsloo NO v Goldex 15 (Pty) Ltd & Another 2014 (5) SA 297 (SCA)*:

'[10] The expression 'res iudicata' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the exceptio was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA)* ([2001] 1 All SA 417) at 239F - H and the cases there cited). In time the requirements were, however, relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in

Smith v Porritt and Others 2008 (6) SA 303 (SCA) para 10: 'Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res iudicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res iudicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 667J - 671B, this is not to be construed as implying an abandonment of the principles of the common-law in favour of those of English law; the defence remains one of res iudicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by- case basis (Kommissaris van Binnelandse Inkomste v Absa (supra) at 670E - F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others. . .'

[25] The critical dimension of *Goldex v Prinsloo* judgment is the caution to a court to apply the defence with regard to the fact-specific circumstances and to be wary of applying it.

[26] The most recent attention given to the scope and reach of *Res Judicata* is in *Molaudzi v The State* 2012 (2) SACR 341 (CC). The *Molaudzi* case was truly exceptional, principally because it was raised in a criminal matter and that it was raised on behalf of a convicted person to enable a second application for leave to appeal to be made, the first having been dismissed.

[27] Mr Molaudzi had been one of several Accused convicted of serious crimes and sentenced to life imprisonment. He had appealed to a Full Court of the North West Division of the High Court without success. He had thereafter launched applications for leave to appeal, which had been repeatedly refused all the way to the Constitutional Court itself. The grounds advanced related to the admissibility of the evidence of Co-Accused. Separately from Mr Molaudzi, other Co-Accused sought leave to appeal and raised certain constitutional issues which they contended should have resulted in the evidence being excluded. Those Accused were granted leave, and subsequently their appeal on those grounds succeeded. Accordingly, that left Mr Molaudzi in jail for life whilst others in a similar legal position were freed.

[28] The Constitutional Court thereupon invited a second application from Mr Molaudzi to seek leave to appeal. There was consensus between the prosecution and Mr Molaudzi that the two applications for leave to appeal were distinct because the grounds were distinct and therefore, *Res judicata* could not apply. (at [12])

[29] The Constitutional Court addressed the nature and application of *Res Judicata* at [14] ff. The Constitutional Court held, at [16] that the rationale for the defence was to 'give effect to the finality of judgments'. Observing the developments, both in our law and in other jurisdictions, away from the strict application of *Res Judicata*, The Constitutional Court held thus:

'[32] Since *res judicata* is a common-law principle, it follows that this court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 [of the Constitution] does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.

[33] This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with

inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This court held in *South African Broadcasting Corp Ltd*:

'The power in s 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.'

[34] The power in s 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have.' (footnotes omitted) (Emphasis supplied)

[30] The heart of the *Molaudzi* judgment is that when confronted with a substantial injustice that would result from the application of *Res Judicata* and the absence of an 'effective alternative remedy' [at [39]] *res judicata* should be relaxed to prevent injustice.

The evaluation of whether Res Judicata should be relaxed in this case

[31] The prominent issue is whether an abandonment of a judgment *per se*, or if not *per se* under what peculiar circumstances, would be proper grounds upon which to relax the application of *res Judicata*, if at all.

[32] In the court *a quo* the proposition was advanced that the fact that it was a summary judgment which was abandoned meant that the consequent legal position was tantamount to the granting of leave to defend in the ensuing trial. Whether that is correct need not be decided in this case because it is irrelevant, because owing to the institution of the fresh proceedings, that scenario never existed. Also, the debate about the character and effect of a default judgment, later abandoned need not be examined because that scenario is not relevant. The court *a quo* was correct to emphasise that:

'The judgment in this court followed upon a consideration of the evidential material before it and the judgment is final and binding.'

Accordingly, the legal position that needs to be examined is that where a decision on the merits has been given.

[33] The judgment *a quo* also referred to earlier decisions which influenced its approach on the effect of abandonment of a judgment. These decisions are re-examined to determine whether they really support the conclusions of the judgment *a quo*.

[34] The most important decision relied upon, which was that which was said to be on all fours with the present case, is *Liberty Group Ltd v Bezuidenhout ZAKPHC 15 (4 March 2012)*. The court *a quo* cited paragraph [15] of *Liberty Group*.

'...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*.'

[35] The circumstances in *Liberty Group* were that the plaintiff sought and obtained a money judgment by default. The cause of action was money due to the plaintiff after a reconciliation of account at the termination of an agency agreement. The plaintiff then abandoned its judgment and served an amended summons for a higher sum, about double the initial claim. A *res judicata* defence was upheld. The judgment comprises several responses to arguments advanced and found each wanting. Ultimately, the *ratio* seems to be that stated in paragraph [17]:

'Whether [*res judicata*] 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.'

[36] The facts were odd indeed. It may be surmised that the explanation for the plaintiff's conduct was that it had miscalculated the sum due and did not want to forfeit the full sum of the indebtedness. It abandoned the judgment in order to 're-serve' an amended claim. It did not issue a fresh summons. These facts seem, to me, to distinguish *Liberty Group*¹ from the present case. The *once and for all* rule seems to be the rationale that best explains the outcome in *Liberty Group*.¹ That is not the position in the present case, as a comparison with the description of events plainly shows. If the approach is to be fact-specific the importance of this distinction must be weighed. In my view, the *Liberty Group* judgment is not on all fours because of these distinctions.

[37] In *Jacobson v Havinga 2001(2) SA 177 (T)*, a case invoked in *Liberty Group*, what happened was that the plaintiff sued in the Johannesburg Magistrate's Court and got default judgment. Thereafter it was realised that the Johannesburg court lacked territorial jurisdiction. The plaintiff then withdrew the action and sued in a court of competent jurisdiction. *Res Judicata* was raised and upheld. On appeal the decision was confirmed. The appeal court decided the matter on the basis that the Johannesburg court judgment stood, even though incompetent, and would continue to do so until it was set aside; thus, the plea of *res judicata* was good. (at s182B) The implication is that the withdrawal of proceedings after a judgment had been given is ineffectual. In my view, this is correct and a rescission seems to have been the appropriate solution for that debacle as it was plainly an order taken in error as contemplated by Rule 42(5) of the Uniform Rules of the high Court. (at 179C). As to the notion of an abandonment, a peripheral argument in this case, the court said:

'The appellant's final submission that the judgment that was granted in his favour was abandoned has no substance because the abandonment of a

¹ See: *Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (AD)* at 835 F-G.

judgment can only be effected in terms of Rule 27(4). The subrule requires the delivery of notice of abandonment. In the absence of such a notice, in my view, there was no abandonment of the judgment by the appellant.'

[38] Accordingly, this decision having found there was no 'abandonment' cannot be authority for the effect of an abandonment.

[39] The decision in *Baloyi NO v Schoeman NO & Others [2003] 4 All SA 261 (NC)* was cited in *Liberty Group* and in the judgment a quo, but for different propositions. However, neither judgment analysed the *Baloyi* case. The critical facts are related to a sale of shares. The respondent had sold shares to the applicant, with a reservation of ownership pending payment in full, the purchase price to be discharged in instalments. A provision expressly stipulated that a failure to keep up with instalments would result in the respondent either suing for specific performance or cancelling the agreement with the payments to date being forfeited. The applicant failed to pay as agreed and fell behind. The respondent sued and obtained default judgment for the full price, ie a sum inclusive of the sums not yet due, notwithstanding that the agreement contained no acceleration provision. The respondent then abandoned the judgment.

[40] Thereafter, a demand was made to pay the overdue sums and when that demand was not met, the respondent cancelled the sale. Then the applicant took the initiative by making an application in which, first, a declarator was sought to declare the cancellation invalid, and second, an order of specific performance was sought, to deliver the shares without having to pay the outstanding balance on the grounds that because the default judgment for payment had been abandoned, a right to payment had been forfeited by the respondent.

[41] Self-evidently, these are peculiar facts indeed. It was contended that the abandonment evidenced a waiver but that argument was not pressed and this case is no authority on that question, despite the remarks made by the court that proof of a waiver had not been established. (at [15]).²

² This conclusion was based on the Zimbabwean authority of *Ngani v Mbanje & Another* 1988(2) SA 644 (ZS). In that case, English authority was the source of that finding; ie the decision in *Macfoy v United Africa Ltd*

[42] The rationale for the dismissal of the application was multiple. One notable foundation was that the default judgment was a nullity because no cause of action existed upon which a claim for the full price could have been made and thus the judgment was null and void. (at [22]-[23]) This view contrasts with that expressed in *Jacobson v Havinga*. In my view, this proposition in *Baloyi* cannot be correct because the fact that a judgment is wrong on the facts or law does not render it a nullity; rather it is fatally susceptible to an appeal. *Jacobson v Havinga*, which was not cited, expresses 'the preferable view.

[43] In respect of the defence of *Res Judicata*, the mistaken nullity finding loomed large in *Baloyi*. The court held that:

'[22] Not only at the stage when summons had been issued but also when judgment was granted in terms thereof, was there therefore no cause of action to found a claim for or a judgment in the amount of the whole outstanding balance. The position where judgment is granted in the absence of a cause of action or a legal basis for such a judgment must in my opinion be distinguished from the position where a summons does not disclose a cause of action. Such a summons could normally be amended, but "If there is no cause of action then a judgment pronouncing that a non-existent cause exists is void and of no effect"

(see *Ngani v Mbanje and another, Mbanje and another v Ngani* 1988 (2) SA 649 (ZS) at 6528-C & I).

[23] This means that the abandoned judgment had actually been a nullity. The question is then whether the abandonment of such a judgment could found a defence of *res judicata*. In my opinion it cannot and Ms *Hassim* also conceded this. Even if the effect of an unqualified abandonment of a default judgment might otherwise have been a complete reversal and might therefore have resulted in a deemed refusal of default judgment (see *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa*, Volume I, Erasmus &

[1961] 3 ALL ER 1169 (PC). The notion that an act performed by the exercise of public power is ipso facto void and does not require any step to set it aside is a contradiction of the South African decisions in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) and *MEG for Health & Another v Kirfand Investments*

Van Loggerenberg, 9ed, at 364 and *Ntshiqqa v Andreas Supermarket (Pty) Ltd* 1997 (1) SA 184 (Tk) at 1918), the same could certainly not apply when the abandoned judgment had been a nullity. The reversal of a nullity could never result in a judgment in favour of the other party, as if the judgment initially granted had been competent. Due to the fact that the default judgment had been void and a nullity it did not constitute "a judicial declaration" and because it was of no force and effect it did not in actual fact have the effect of regulating the legal relationship between the parties (compare *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd and others* 1978 (1) SA 74 (D) at 798-C).

[24] There is in my opinion yet another and even more compelling reason why the *exceptio rei judicatae* should not be allowed to succeed in circumstances like these. The void default judgment could never have been regarded as a judgment "which necessarily and with complete decision" decided the issue which would now arise should the first and second respondents claim payment of the outstanding balance of the purchase price at this stage (see *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) SA 861 (R) at 868C-D and G). The issue at that stage was whether the whole outstanding balance had become payable in advance because of the breach while the issue now would be whether the full purchase price had been paid by the date agreed upon as the final date of payment.

[25] The defence of *res judicata* or "*issue estoppel*" is based upon principles of fairness and equity (see *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 676C-D) and it would in my opinion result in extremely unfair and unjustifiable consequences if the abandonment of a judgment under these circumstances were to be allowed to lead to a successful defence of *resjudicata*. It follows therefore that the applicant would not be entitled to insist upon transfer of the shares without tendering payment of the full outstanding balance and this too was eventually conceded by Ms Hassim.'

[44] Although the nullity rationale, cannot be excised from the *ratio decidendi* of

Baloyi, paragraph [25] states that gross inequity trumps the application of *res judicata*, which is undoubtedly the correct fact-specific approach in keeping with the dicta in *Goldex* and in *Molaudzi*.

[45] The next case to trawl these waters was *Shackleton Credit Management (Pty) Ltd v Grobler* 2009 JDR 0469 (GNP). In this matter, *Jacobson v Havinga* was cited, but not *Baloyi*. The controversy arose in the context of an application to substitute a cessionary for a cedent. Nedcor sought a default judgment against the respondent, its debtor. However, before the default judgment was granted, Nedcor ceded its rights to the applicant. To compound the confusion, Nedcor, after the grant of the default judgment, abandoned the judgment on the premise that it had no rights as against the debtor at the critical moment when the default judgment was granted and was therefore the order was erroneously sought. The applicant contended that the abandonment resulted in a reversion of the *status quo ante* the grant of the default judgment, and could not be understood to mean the 'entire cause of action' had been abandoned, a contention rightly rejected at [12] of the judgment.

[46] The respondent then argued that *res judicata* should apply, alternatively, that the abandonment should result in absolution from the instance. The court held thus:

'(10). The correct procedure for the applicant to follow would have been an application for rescission of the judgment. In *Jacobson v Havinga t/a Havingas* 2001(2) SA 177 (T) it was found that default judgment, until rescinded, was binding and thus competent to sustain a plea of *res judicata*. In that matter, a notice of withdrawal of the action was filed by the plaintiff after default judgment had been granted and a new summons was issued from a different court. The court found that in the new summons the plea of *res judicata* was competent because the court granting the default judgment although not having territorial jurisdiction did have jurisdiction in the sense to adjudicate upon, determine and dispose of the matter. The judgment thus stood and constituted *res judicata* until set aside. (11). In casu, the default judgment is however void and not effective as *res judicata inter partes*. In the alternative, there is a request that the judgment be rescinded. As it is common cause that Nedcor had already ceded its rights they could not proceed with obtaining

default judgment or abandoning the default judgment. The application for the rescission of the default judgment is clearly brought as an alternative to the void abandonment. The papers before me do not strictly comply with the requirements of rule 42. A Court however has a discretion to correct an obviously wrong judgment and the respondent's representative did not in address object to a rescission of the judgment.

(12). The further question is whether the abandonment of this default judgment does give rise to a defence of *res judicata*. In certain circumstances the abandonment of a judgment could arguably give rise to such a defence. In casu however the void abandonment of a void judgment cannot be seen as a matter that has been finally disposed of. There was accordingly no finality to the issue in the matter. As stated in the Jacobson-matter (*supra*), the correct procedure would be to rescind the judgment and not abandoning of the judgment. I cannot find that the abandonment of a void default judgment constitutes absolution from the instance. I accordingly rescind the judgment.'

[47] It seems to me that the *ratio* of this judgment is simply that grounds to rescind were shown. The remarks about *Res Judicata* are obiter. The several remarks seem to suggest that the default judgment was found to be void, yet support for the proposition upheld in *Jacobson v Havinga* is also expressed: this is inconsistent. The remark that: 'In certain circumstances the abandonment of a judgment could arguably give rise to such a defence', cited in the judgment a *quo*, is a broad observation and is inherently speculative. Moreover, the remark must be understood within the context of the equitable discretion that the courts must apply to the application of *res judicata*, and implies that other factors in a fact-specific enquiry would influence any such possible outcome. Accordingly, in my view, *Shackleton* is not authority that supports the conclusions in the judgment a *quo*.

[48] In my view, the traverse of these cases illustrates the wisdom of the fact-specific nature of the assessment. None of these decisions offer strong support for the proposition that an abandonment of a judgment ought *ordinarily* to result in a successful defence of *Res Judicata*.

[49] The relevant fact -specific attributes of the present case are these:

49.1 If the act of abandonment can, in an appropriate case (ie together with other facts), constitute a waiver, it must also mean that the intention of the party abandoning the judgment must be relevant. No question of a waiver of the right to claim the indebtedness, which was ongoing, can be contrived from the events because all the evidence contradicts an intention to release the O'Neils from their indebtedness. Moreover, as it is, apparently, not uncommon for a party to abandon part of a judgment and retain another part, the intention of that party to make that distinction has to be expressed and is thus a legitimate source of information in determining the extent of the abandonment, a point well illustrated in *Feyt v Myers 1919 CPD 122*. In that case, a ruling was given by a magistrate that the onus lay with the defendant and the case was subsequently decided against him. The plaintiff, thereafter, whilst on appeal, abandoned reliance on the wrong ruling and tendered to begin the case afresh. The court held that the abandonment was limited and did not result in a sacrifice of his claim.

49.2 The judgment that the appellant had obtained was guaranteed to be overturned on appeal for want of compliance with a peremptory procedural requirement, which if challenged for non-compliance would result merely in a dilatory defence. To acquiesce in the grant of leave to appeal and embark on the long, ritualistic slouch towards the court of appeal where the point would be upheld, before resuming the litigation in earnest, is so obviously an exercise in costly futility, that any reasonably minded person would wince at having to endure such a process. Seeking to obviate it is not pernicious.

49.3 No alternative suitable remedy existed. No grounds to invoke Uniform Rule 42 exist,³ there being no error committed within the meaning of that rule. The summary judgment ought not to have been granted because the section

³ See: 'Rule 42 (1) The court may, in addition to any other powers it may have, mere motu or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

129 point was good, but that is not a procedural error as contemplated by Rule 42; rather, it is a reason to overturn the judgment on appeal. Inasmuch as the appellant might be said to have been obliged to allow the appeal to run its course, and that, tiresome as it would be, was the alternative procedural channel, the contention is correct, but ought not to trump the application of common sense and fairness to the exact circumstances shown to exist. *In Feyt v Myers* the court remarked that the parties were compelled to exhaust the appeal procedure to achieve the objective of a fresh beginning, but the impact of *res judicata* was not considered in that case and therefore that decision cannot be authority for a proposition adverse to the finding in this case that the appellant ought not be unsuited by the defence of *Res Judicata* under the particular circumstances.

49.4 The effect of applying *res judicata* would result in a gift of involuntarily releasing the debtors from the debt with no *quid pro quo*. That outcome would be grossly unfair.

49.5 There is, on the facts, no abuse of the process. The policy rationale for the existence of the defence of *Res Judicata* is not at all upset by its relaxation in this case. It was argued that the appellant's predicament is the consequence of its own conduct and it is not the random victim of an unfair procedure. This is true, but that notion does not offer a cogent reason not to relax the application of *Res Judicata*, upon a holistic appreciation of the circumstances, amongst which is no shred of unfairness that could be suffered by the debtor owing an admitted debt.

49.6 Lastly, section 34 of the constitution is worthy of being given weight:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[50] Lastly, it was argued that an implication of not applying *res judicata* in this case is that the effect would be to treat the initial summary judgment as *res judicata* from the moment the order was granted until it was abandoned, and then to treat the judgment as not *res judicata* thereafter, which would be an impermissible anomaly. In my view, this question does not truly arise. *Res judicata* is not an indelible attribute

which adheres to an initial judgment, which cannot thereafter be exorcized. The concept of *res judicata* is that of a defence to be raised at a given moment when a second case is launched, whereupon, a court shall then pronounce, at that moment, whether the mantle of *res judicata* is to be cast over a second action or application.

[51] Accordingly, upon a fact specific appreciation aimed at fairness, *Res Judicata* ought not to be applied.

Conclusions and costs

[52] Accordingly, the appeal should be upheld.

[53] The matter warranted the employment of two counsel and the costs should follow the result inclusive of such costs.

The Order

The appeal is upheld with costs including the costs of two counsel.

Sutherland J (with whom Matojane and Makume JJ concur)
Judge of the High Court,
Gauteng Local Division, Johannesburg

Matojatone J
Judge of the High Court,
Gauteng Local Division, Johannesburg

Makume J
Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 30 May 2017

Judgment: 26 June 2017

Appearances:

For the Appellant:

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With him, Adv H M Viljoen and Adv M L S Msimang

Instructed by Chari Cilliers Inc

For the Respondent:

Adv J Suttner SC,

Instructed by Walter Niedinger & Associates