



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 30528/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 23 March 2023

In the matter between:

INVESTEC BANK LIMITED

Applicant

and

NOSIZWE ABADA

Respondent

JUDGMENT

DE VOS AJ

[1] The case is curious. The parties agreed to withdraw a flawed application. The applicant dutifully tendered and paid costs to the respondent and then launched fresh proceedings. But, at the hearing of these fresh proceedings, the respondent points to an interim order made in the flawed application and contends it is a bar to the fresh

proceedings. The respondent accepts the validity of the withdrawal of the first proceedings, but contends that, despite the valid withdrawal, the first application is to run its course in terms of the interim order.

[2] Essentially, the respondent, costs in pocket and after giving consent to withdraw the flawed application, contended that the interim order renders the fresh proceedings *res judicata*. I rejected the respondent's submissions and granted relief for the applicant. The respondent now seeks leave to appeal against my judgment and order. The starting point for the respondent is its understanding that: despite a valid and consensual withdrawal, the parties have to see the first application through, in particular, to give effect to the interim order. The majority of the respondent's grounds of appeal flow from this understanding.

[3] I have considered the grounds of appeal, the submissions filed and the arguments presented to me. I conclude that there are no reasonable prospects of success that another court will come to a different conclusion. The respondent would have to convince an Appellate Court that despite a valid withdrawal (by consent), the first application ought to have continued, as if never withdrawn. This would require a wishing away of a valid and consensual withdrawal. I do not see an Appellate Court coming to this conclusion. I set out my reasons for this conclusion below, but first set out the context within which the issue arose.

[4] The applicant lent the respondent money. The money lent was for a home loan and a personal loan. It appears that the respondent then fell on hard times. The respondent has not taken the Court into its confidence to explain the full set of circumstances that led to the respondent being unable to pay the monthly instalments. There are suggestions on the papers, of a restructuring at work. Regardless, it is common cause that the respondent could not service the monthly payments.

[5] The applicant cancelled the agreements and launched an application for the home to be declared specially executable (based on the home loan) and for a money judgment

(based on the personal loan). These first proceedings were flawed. The applicant did not, in this first proceeding, distinguish between the accounts in the home loan and the personal loan. The first application resulted in an interim order by Holland-Muter AJ referring certain issues to oral evidence.

- [6] The applicant, realising the flaw in the first application, decided to withdraw the application. Rather than let the flawed first application limp along, the applicant decided to cut its losses, tender costs and commence proceedings afresh. As a result of the stage of the proceedings (it had been set down) it could only be withdrawn with either the consent of the respondent or the leave of the court. The applicant therefore tendered costs to the respondent and requested that the matter be withdrawn.
- [7] The respondent in this moment was faced with an election: to object or to consent to the withdrawal. The applicant could only withdraw the application with the leave of the court or consent of the respondent. If the respondent objected, the applicant would have had to convince the court it was in the interest of justice to permit the applicant to withdraw the application - despite the interim order having been granted. The respondent rejected this path. Instead, the respondent elected to consent to the withdrawal. The respondent was entitled to costs. It was common cause at the hearing of the matter that costs were tendered and accepted. The effect of the respondent's election, is that the first application was validly withdrawn by consent.
- [8] The applicant then instituted a second application, being the present proceedings. In the second application, the applicant properly distinguished between the two loan accounts. The respondent opposed the second application. The central theme of the opposition was that the interim order granted in the first application blocked the second application.
- [9] The respondent's position is that the Court must proceed as if the first application was not withdrawn. The respondent's argument is that this Court is bound by the order of Holland-Muter AJ and could not continue with the present proceedings. I rejected this

contention. The facts that gave rise to the order of Holland-Muter AJ to refer matters to oral evidence did not serve before this Court. The interim order, does not bind this Court as these are separate proceedings properly instituted. The interim order is binding as between the parties in the first proceedings, and does not bind them in subsequent proceedings. It would have been a different issue had the respondent contended that the first proceedings were improperly or belatedly withdrawn. However, it was accepted by all that it had been validly withdrawn by consent. The respondent was at all times represented and had consented to the withdrawal. The applicant was well within its rights, having established a consensual withdrawal, to institute these proceedings afresh.

[10] The issue may have been different had the interim order made findings of fact which were binding on this Court by way of issue estoppel or operated in rem. However, no finding of fact had been made which this Court would be issue estopped from considering and there is no contention that the order operates in rem. In fact, the main reason for granting the interim order was the flaw in the first application. The flaw was fixed in the present application and the facts on which Holland-Muter AJ made the interim order did not serve before this Court.

[11] In addition, no argument served before this Court that the order of Holland-Muter AJ prevented the withdrawal of the first application. In fact, the respondent's argument was that the withdrawal was valid, but that the order of Holland-Muter AJ stands in the way of these proceedings. The order of Holland-Muter AJ applies to the withdrawn proceedings, not those that served before this Court.

[12] I conclude that there is no basis to conclude that another court would come to a different conclusion in relation to *res judicata* and the grounds of appeal that flow from this argument.

[13] The respondent raised two other grounds not related to the *res judicata* argument. The first of these are that the Court imposed an onus on the respondent by inviting

the respondent to provide certain information to the Court. The information sought by the Court are those that are identified in rule 46A of the Uniform Rules of Court.

[14] The Court, before declaring a home specially executable, has to make a proportionality assessment. The respondent had raised purely technical grounds of opposition and the Court did not have any substantive allegations that would assist it in reaching a conclusion on whether or not it was proportionate to declare the respondent's home specially executable. The Court did not have information regarding the respondent's explanation for the default; the impact of an order declaring the home specially executable or whether there were other means of satisfying the debt that would not result in the loss of the respondent's home. Aware of its obligations in this regard, the Court invited the respondent to place further evidence before the Court.

[15] The respondent declined this invitation. The respondent, now, raises this invitation as a ground of appeal on the basis that this invitation was a reversal of the onus. The Court did not reverse the onus, it sought to obtain the necessary information from the respondent. In fact, in this case it matters very little where the onus lies as the relevant facts are common cause. The relevant facts are that the respondent had made only four months' payments before falling into arrears. No payment had been made for the 27 months leading to the hearing. The arrears had doubled since the launch of the proceedings and the hearing of the matter. The respondent had acknowledged that she had fallen into arrears, had undertaken to the debt and had failed to do so. Section 127 had been complied with and the applicant had made several attempts to come to an agreement prior to launching proceedings. The Court is aware that the respondent at some stage lived in the house with children. The Court has no information in this regard, despite requesting to be provided with the necessary information. During the entirety of this hearing, including the request for more information, the respondent has been represented. The Court was acting in terms of its duties to ensure it had taken the necessary steps to place it in a position to conduct the proportionality analysis. It is unfortunate that the respondent viewed this invitation as a reversal of the onus.

[16] The second stand-alone ground of appeal is that the Court concluded that the indebtedness of the respondent is not in dispute. The respondent contends, as a ground of appeal, that the indebtedness is in fact in dispute. There is no factual basis for this submission to be found in the pleadings before the Court. The respondent, when pressed, could refer only to a single allegation in the answering affidavit that is presented as the dispute. The allegation states only that the respondent would have taken issue with the acceleration clause were the matter referred to oral evidence as ordered by Holland-Muter AJ. Despite the Court's invitation to place additional facts before it, the respondent did not plead any facts which indicated she disputed being indebted to the applicant. The respondent would be hard-pressed to do so. After receipt of the section 127 letter the respondent sent an email to the applicant in which she states that following -

“Recently my finances experienced depression as a result of workplace restructuring, which affected my ability to service my obligations to you. Currently by the grace of God I am working on ways to get back to addressing the backlogs.

I am a responsible person and will settle my debt.”

[17] The respondent did not allege any facts that explained this email in any way other than an acknowledgement of indebtedness. There appears no dispute of fact before the Court that the respondent owes the applicant what it claims. Certainly no bona fide dispute of fact.

[18] Lastly, the Court turns to costs. The agreement on which these claims are premised provide for costs on the scale as between attorney and client and the Court therefore grants costs on this scale.

Order

[19] In the result, the following order is granted:

- a) The application for leave to appeal is dismissed.
- b) The respondent is to pay costs as between attorney and client.



I DE VOS AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 23 March 2023.

APPEARANCES:

Counsel for the applicant: **BD STEVENS**
Instructed by: Delpont van den Berg Inc

Counsel for the Respondent: **K MOKOATLO**
Instructed by: Delberg Attorneys

Date of the hearing: 16 February 2023
Date of judgment: 23 March 2023