IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR666/16

In the matter between:

LEIRA INVESTMENTS CC t/a AUTO STOP SERVICE STATION	APPELLANT
and	
OSMANS TAJ MAHAL BRANDS CC	RESPONDENT

JUDGMENT

Delivered on **17 November 2017**

POYO DLWATI J:

[1] The question to be answered in this appeal is whether the learned magistrate erred in finding that the appellant's claim against the respondent for the fuel products sold and supplied to the respondent was *res judicata* as the parties had previously obtained a court order by consent between them subsequent to them having agreed to settle the matter.

[2] The background to the matter is that the appellant, also the plaintiff in the court *a quo*, was the supplier of fuel products in the Durban region. The respondent, also the defendant in the court *a quo*, was one of the appellant's

customers with their relationship dating back to 2004. During September 2013, the appellant instituted an action against the respondent under case no 44207/13 for payment of the sum of R85 139.30 arising from fuel products sold and supplied to the respondent. It is common cause between the parties that on the date of trial of that matter, being 23 April 2014, the parties entered into settlement negotiations and ultimately a settlement was reached.

[3] As a result of such settlement the legal representatives of the parties approached the learned magistrate presiding over the trial and sought an order by consent. An order in the following terms was granted by the learned magistrate:

> 'It is agreed by Advocate A Moodley instructed by Ayoub Kadwa & Company and Mr R Naidoo that the matter has been settled.
> That the defendant to pay the plaintiff an amount of R24 438 plus costs in agreed sum of R5000. Payment to be made on or before 12 May 2014. The settlement is hereby made an order of court in terms of Rule 27(4) of the Magistrates Court Rules.'

[4] Subsequent to the settlement, various exchange of correspondence ensued between the appellant's and the respondent's legal representatives about the balance of the appellant's claim. Nothing turned on the correspondence and on 4 September 2014 the appellant issued summons against the respondent for payment of the sum of R53 133.40 for fuel products sold and supplied to the respondent. In its particulars of claim at paragraph 5.2 and 5.3, the appellant averred as follows:

> '5.2 On 23 April 2014, and under case number 44207/13, in terms of a consent order, the defendant was ordered to pay the plaintiff the sum of R24 438.60 together with costs in the agreed sum of R5000 on or before 12 May 2014.

> 5.3 The said sum of R24 438.80 is excluded from the figures referred to in Annexure "A" hereto. A copy of the court order issued by the Durban Magistrate Court on 23 April 2014 is annexed hereto marked "B".'

[5] The respondent defended the action. It raised a special plea of *res judicata* on the basis that the same matter had been settled before Ms Mnyandu, the Magistrate who presided over the matter on 23 April 2014, after the settlement agreement entered into by the parties was made an order of court. It further alleged that as the respondent had effected payment in terms of that settlement agreement, the appellant's claim had been extinguished or alternatively compromised and therefore the appellant had no further right to claim any amount from the respondent or to institute another claim for the same amount that had been claimed under case number 44207/2013.

[6] The appellant replicated and averred that the amount of R53 133.40 claimed in the current action was specifically excluded from the amounts claimed under case no. 44207/2013. It further averred that each amount of fuel product purchased by the respondent from the appellant constituted a separate and distinct transaction between the parties. It therefore denied that the claim was *res judicata*. The matter was set down and it was agreed that the court would only deal with the special plea.

[7] It was agreed between the parties that the respondent bore the onus during the hearing of the special plea. No witnesses were called on behalf of the respondent. The respondent's legal representative advised the court that he had hoped to call Adv Moodley, who had dealt with the matter when it was previously settled, to testify on behalf of the respondent but she had advised him that she was not available. As a result only argument was presented on behalf of the respondent.

[8] On the other hand, Mr Rajan Naidoo, the attorney that represented the appellant previously when the settlement was reached, testified on behalf of the appellant. His evidence, in summary, was that on the date of trial for case no. 44207/2013, being 23 April 2014, the appellant had failed to discover timeously various fuel slips that pertained to the computation of that claim. It was then agreed between himself and Advocate Moodley representing the respondent that the appellant would only pursue its claim based on the undisputed vouchers that appeared on the initial discovery affidavit and on those vouchers which were discovered late but the respondent had not been prejudiced by such late discovery.

[9] He testified that it was also agreed between him and Advocate Moodley that after going through the exercise of identifying those agreed vouchers, which appear at pages 37A to 37E of the record, all the disputed amounts which made up the balance of that claim would form part of a separate and new action that could be launched by the appellant if no settlement was reached by the parties. He added that the respondent's attorney who had briefed Advocate Moodley when these discussions were held was also present in court.

[10] It was only after those discussions that the learned magistrate was approached and advised that the matter had been settled. The terms of the settlement were recorded as reflected in the order of 23 April 2014 referred to in paragraph 3 *supra*. It was for these reasons, so he testified, that the previous settlement did not relate to the whole sum of R85 139.30. He testified that it was for those reasons that he sent the letter dated 9 May 2014 to the respondent's attorney, which was shortly after the settlement had been reached, advising them that they must advise him of their dates of availability with the respondent so as to consult and review documents pertaining to the balance of

the appellant's claim. In response to that letter, he testified, the respondent's attorney in his letter dated 13 May 2014 requested copies of the documents pertaining to the balance of the appellant's claim in order to do a reconciliation prior to the meeting with the appellant's legal representatives.

[11] Mr Naidoo's evidence was that this meeting had been agreed upon during the settlement negotiations so that if parties agreed on the amounts and vouchers, then there would be no need for a new action to be launched. However, because there was no settlement reached for the outstanding amount, this action had to be launched as contemplated. Under cross-examination, he conceded that there was nothing in the court order that indicated that the settlement was a partial settlement of that claim. In his view, he testified, the matter was not partially settled as it was settled on certain terms. When asked if it was open to the appellant to again set down for trial the matter under case no. 44207/2013 in view of the fact that there was an outstanding amount, his view was that it was not, as that was not part of the settlement agreed to.

[12] His evidence was that the appellant's claim at that stage was reduced by R24 438 hence the matter could not be set down again for trial. He also conceded that the word 'reduced' did not appear on the consent order. His explanation was that in his experience as an attorney for 19 years, it was not the norm that the magistrate would record all details of the settlement, but only the gist of the agreement would be recorded. He further conceded that some of the amounts in the current claim had appeared in the previous claim but explained that these were the unsettled ones. After argument, the learned magistrate upheld the special plea hence this appeal.

[13] The argument on behalf of the appellant by Mr *Moosa* on appeal was that as each fuel slip was a different transaction, the learned magistrate erred in

finding that the appellant's claim was *res judicata* as those transactions claimed were never adjudicated upon. It was for those reasons that the appellant's legal representatives sent the respondent's legal representatives the letter of 9 May 2014 and hence the response requesting for copies of documents prior to the meeting. It was argued that those letters were clear indications that the appellant's claim was not entirely settled and the respondent's response was an acknowledgment of that assertion.

[14] It was further submitted that Mr Naidoo's evidence was not challenged during cross-examination and was not rebutted either. On the other hand, Mr *Vawda*, on behalf of the respondent, submitted that as no notice was filed to withdraw some of the claims by the appellant in terms of Rule 27 (5), the claim remained *res judicata* as it was settled in terms of the court order. It was further submitted that the consent order did not make any reference to the settlement negotiations and to what was agreed in those negotiations. For that reason, the parties were bound by the consent order as the appellant had never questioned the correctness of that order. Mr *Vawda* therefore supported the learned magistrate's judgment.

[15] The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments. 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 party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts.[1] In *Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and others*[2] the

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[1] See *Molaudzi v S* 2015 (8) BCLR 904 (CC) para 16
[2] *Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and others* 2014 (5) SA 406 (SCA) para 14

court held that the strict requirements for a plea of *res judicata* should not be understood literally in all circumstances and applied as an inflexible or immutable rule. With all this in mind, was the appellant's claim *res judicata*?

[16] Mr *Moosa* conceded that the court order of 23 April 2014 was binding on the parties. He submitted, however, that the various transactions (the undiscovered fuel slips) were never adjudicated upon and therefore cannot be *res judicata*. These were reflected on pages 37A to 37 D of the record where some amounts were ticked and others not. Furthermore, Mr Naidoo's evidence was never challenged in this regard. I agree with Mr *Moosa* that as no witness testified on behalf of the respondent, Mr Naidoo's evidence in this regard and about the prior agreement before obtaining the court order remains unchallenged as it was not rebutted.[3] If those claims were never adjudicated upon, then they can never be said to be *res judicata* if one applies the above principles.

[17] Furthermore, it was common cause between the parties before the court *a quo* that each transaction of sale of a fuel product by the respondent to the appellant was a separate cause of action. In my view, that was so because each amount had to be proved in order to support the appellant's right to judgment.[4] In that event, the amounts that were not ticked on pages 37 A-D of the record, as per Mr Naidoo's evidence, remained unadjudicated. Those causes of action have not been brought to finality and cannot be said to be *res judicata*. For these reasons the appeal ought to succeed.

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[3] *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 61.

[4] See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 838E-G

[18] On the issue on whether there was a prior agreement before the court order was obtained, my view is that the failure by the respondent to call Advocate Moodley or the attorney that represented the respondent previously leads one to draw an inference that the only reason they were not called or they refused to testify was because they would have agreed with Mr Naidoo's evidence. This, therefore, means that whilst the appellant's claim, in the absence of the oral agreement, and on the strength of the consent order only, might have been *res judicata*, this, however was not the case because of the reasons advanced above and because of the agreement reached between the parties' legal representatives before the consent order was taken.

[19] That there was an agreement is supported by the appellant's letter of 9 May 2014 to the respondent's attorney calling for a meeting to sort out or resolve the balance of the appellant's claim. The respondent's legal representative did not at that stage dismiss the appellant's legal representative's call for a meeting as he ought to have done so if there was no prior agreement. He agreed to a meeting and called for documents because this was as per their agreement as testified to by Mr Naidoo.

[20] On the issue as to whether those claims had been withdrawn by the appellant in terms of Rule 27 (5) of the Magistrate's Court Rules, my view is that the evidence does not support this submission as it was not Mr Naidoo's evidence that the claims had been withdrawn.

[21] In my view, therefore, the learned magistrate erred in finding that the Appellant's claim was *res judicata* in the face of Mr Naidoo's unchallenged evidence about a prior agreement. Furthermore, as held in *Molaudzi supra*,[5] there can be no legitimacy in a legal system where final judgments, which

[5] See para 37

would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principles of *res judicata.*

Order

[21] Accordingly, I make the following order:

'the appeal is upheld with costs'.

POYO DLWATI J

I agree and it is so ordered

MADONDO DJP

APPEARANCES

Date of Hearing	: 08 September2017
Date of Judgment	: 17 November 2017
Counsel for Appellant	: Mr Moosa
Instructed by	: Naidoo & Co Inc
	c/o Vathers Attorneys
Counsel for Respondent	: Mr Vawda
Instructed by	: Omar Attorneys
	c/o Bhamjee Attorneys