REPUBLIC OF NAMIBIA NOT / REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 151/08

In the matter between:

1.1.1.1. **HAW RETAILERS CC t/a ARK TRADING**
1st APPLICANT

COASTAL HIRE CC **2nd APPLICANT**

and

TUYENIKELAO NIKANOR t/a
NATUTUNGENI PAMWE CONSTRUCTION CC **RESPONDENT**

1.1.1.2. **Neutral citation:** *HAW Retailers CC t/a Ark Trading v Tuyenikelao Nikanor t/a Natutungeni Pamwe Construction CC* (A 151-2008) [2013] NAHCMD 121 (17 April 2013)

Coram: SCHIMMING-CHASE, AJ

Heard: 19 March 2013, 27 March 2013, 17 April 2013

Delivered: 17 April 2013 *ex tempore*

Flynote: Practice – interlocutory application to interdict respondent from executing claim against first applicant, and for an order declaring that the respondent's claim has been set off against the claim of the first applicant.

Res judicata – requirements – restated – first applicant obtained

default judgment in magistrate's court against respondent. Respondent obtained costs order in its favour against first applicant in the High Court. Respondent alleged that judgment debt in magistrate's court substantially paid. First applicant raised defence of *res judicata* on the basis that respondent's application for rescission of the default judgment in the magistrate's court was unsuccessful. The question the court had to decide, namely whether the first applicant can set off its debt to respondent against respondent's debt to it, is not *res judicata*. It is not the same subject matter or based on the same ground of action.

Summary: The first applicant applied to set off the respondent's claim in respect of a costs order made against it against monies owing by the respondent to the first applicant in respect of a default judgment granted in favour of the first applicant in the magistrate's court. The respondent's claim against applicants was N$64,601.85, the first applicant's aliquot share being N$32,300.92. The amount for which default judgment was obtained against the respondent was N$173,753.81. The respondent, some considerable time after the default judgment was granted applied for rescission of that judgment. As part of the allegations in support of the rescission, respondent alleged that N$150,000.00 had already been paid, leaving a balance of N$23,753.81. The court dismissed the application for rescission on the grounds that a reasonable explanation for the default had not been provided by the respondent. The court also found that the respondent had not provided sufficient proof of payment of the N$150,000.00 as alleged. However, a later application for default judgment (in respect of the same parties and the same cause of action and debt) by the first applicant clearly indicated that an amount of N$150,000.00 had been paid. It was submitted on behalf of the first applicant that the issue of whether or not the N$150,000.00 had been paid was *res judicata,* and the respondent's application for rescission was unsuccessful.

Furthermore, it was submitted that the second application for default in the lesser amount was null and void, because it was granted in error by the Clerk of the Magistrate's court after the first applicant abandoned that application. Thus the judgment for the greater amount stood.

Held: For purposes of establishing whether the amounts claimed by the respondent should be set off against the claim of the first applicant, *res judicata* did not come into play. The cause of action in this court and the subject matter is not the same even though the parties are the same. The defence of *res judicata* accordingly failed.

Held: It was clear on the papers that the respondent paid N$150,000.00 in respect of the default judgment, leaving a balance of N$23,753.81. Thus the first applicant still owed the respondent N$8,547.11 which it was ordered to pay.

ORDER

(a) The first applicant's application is dismissed with costs.

(b) The first applicant is directed to pay the amount of N$8,547.11 to the respondent.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an application by the first applicant for an order that the

respondent be interdicted from executing her claim in the amount of N$64,601.85 against the first applicant and declaring that the respondent's claim for this amount has been set-off against the claim of the first applicant against the respondent for an amount of N$173,753.81 plus interest and costs.

(c) The claim of the first applicant against the respondent relates to a costs order awarded in the respondent's favour, which the applicants were ordered to pay as a result of sequestration proceedings brought against the respondent by the applicants. These costs were taxed and an allocatur issued. The respondent accordingly sought payment of those costs. The first applicant's contention in these proceedings, is that the respondent owes it N$173,753.81 plus interest and costs as a result of a default judgment granted in favour of the first applicant against the respondent in the Magistrate's Court for the district of Windhoek.

(d) For purposes of this judgment I shall only deal with the capital amounts claimed by the various parties. The second applicant is not involved in these proceedings and does not seek any relief against the respondent. Thus where any reference is made to 'the applicant' in this judgment, it refers to the first applicant unless the context shows otherwise.

(e) This matter has a somewhat checkered history resulting in the necessity of an exposition of the background facts leading to the launching of this interlocutory application.

(f) On 12 June 2008, the applicant applied to this court for an order that the respondent be placed under provisional sequestration. No personal notice of this application was given to the respondent, it having been served on the legal practitioners that represented the respondent in proceedings in the Magistrate's Court instituted against the respondent by the first applicant.

(g) The above sequestration proceedings were launched subsequent to the first applicant obtaining default judgment in the Magistrate's Court for the district of Windhoek for the amount of N$173,753.81 against Natutungeni Pamwe

Construction CC as the first defendant and T Nikanor as the second defendant. In these proceedings, the respondent is cited as T Nikanor t/a Natutungeni Pamwe Construction CC. It is common cause that the same parties were involved in both proceedings, and that T Nikanor is the sole member of Natutungeni Pamwe Construction CC and also accepted full responsibility for the debts of the CC. The second applicant similarly obtained default judgment against the respondent in the High Court on 14 March 2008 for the amount of N$180,179.32.

(h) Having obtained the above default judgments, the applicants then set in motion execution proceedings against the respondent. The applicants however were unable to execute the judgment against the respondent as the messenger of court's return showed that T Nikanor could not be traced. The first applicant then proceeded to apply in the Magistrate's Court to attach claims due to the respondent from various Ministries of Government. These proceedings were opposed by the respondent. As a result, sequestration proceedings were launched in this court.

(i) On 8 August 2008 Hoff, J granted a provisional order of sequestration in the following terms:

> (a) That the respondent be placed under provisional sequestration into the hands of the Master;
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> (b) That a rule *nisi* be issued calling upon the respondent and all interested parties to show cause if any, on a date and time to be determined by the Registrar why
>
> > (aa) the respondent should not be placed under a final order of sequestration and,
> >
> > (bb) the costs of the application should not be costs in the sequestration;

(c) That service of the above rule *nisi* be effected upon the respondent as follows:

(aa) by service of a copy thereof by the Deputy Sheriff for the district of Windhoek upon the respondent's residential address and

(bb) by publishing same in one edition of each of the Government Gazette and the Namibian newspaper.

(j) On the return date of the rule *nisi* the respondent opposed the grant of the final relief relying on certain points *in limine* regarding in particular, improper service of the provisional order. In a judgment by Damaseb, JP delivered on 4 October 2010 in Case No A 151/2008, and in particular paragraph 20 thereof, the court found that the provisional order was not served on the respondent in the manner directed by the order. The respondent's point *in limine* was upheld and the application for condonation in respect of the improper service was refused. Accordingly the rule *nisi* was discharged with costs.

(k) Subsequent to the taxation of the bill of costs and the issue of the allocatur in the amount of N$64,601.65, payment was demanded from the first applicant by the respondent. The first applicant refused to pay this amount to the respondent before its claim of N$173,753.81 in respect of the default judgment in the Magistrate's court had been paid in full. This precipitated the institution of proceedings now before Court.

(l) The court has to decide whether the amount claimed by the respondent should be set-off against the first applicant's claim.

(m) On 9 November 2007, the first applicant obtained default judgment against the respondent in the Magistrate's court for the district of Windhoek in Case No 2650/2007 for the amount of N$173,573.81. On 30 August 2011, after the discharge of the provisional sequestration order of this court referred to above (4 October 2010), the respondent applied to the Magistrate's court for rescission of that default judgment. On 9 December 2011 the application for

rescission was dismissed. It was held in essence that the respondent had not made out a proper case for or provided a proper explanation for the considerable time taken to apply for rescission of the judgment.

(n) In the written judgment of the learned Magistrate, mention was made of the fact that subsequent to the granting of the default judgment, a further default judgment was granted in favour of the first applicant against the respondent for a lesser amount of N$23,883.18 on 12 February 2008 in the same cause of action comprising the same parties, and the same case number.

(o)

(p) The learned Magistrate specifically stated in her ruling that she would not venture into this second default judgment as "the third defendant was not before Court". Mrs Petherbridge pointed out however that the reference was an incorrect reference because default judgment was actually granted against the respondent in her personal capacity and as sole member of Natutungeni Pamwe Construction CC. Not much turns on this aspect except with regard to the issue as to whether or not the second default judgment, or the lesser amount claimed should be considered by the court. This aspect is dealt with in more detail below.

(q) In this second application for default judgment the following was stated:

> " … judgment be given against the defendant *(sic)*, as claimed in the summons for N$173,753.81 (N$173,753.81 claimed, less paid N$150,000.00 during 2007 …".

(r) In the judgment refusing the respondent's application for rescission of the first default judgment, the learned Magistrate had the following to say on this aspect:

(s)

> "In oral submissions the legal practitioner for the applicant volunteered that the applicants transferred a N$150,000.00 to plaintiff and referred us to annexure "NT14" of the rescission application. The practitioner for the plaintiff responded that no, the method of payment in question was per cheque but to their dismay

> the cheque was dishonoured. In perusing "NT14" it is a page of a bank statement showing amongst others a debit of N$150,000.00 with no cheque serial number next to the line item. It also contains no account name or number, so it is unclear whose statement it is or if it indeed relates to this transaction. There is also the issue of whether payment was made, was it per cheque, in which case the statement does not support it, or was it an electronic transfer? The question the Court has is, if the applicant redeems this amount of N$150,000.00 why does she not provide sufficient proof thereof?"

(t) Mrs Petherbridge on behalf of the respondent submitted that the respondent indeed paid an amount of N$150,000.00 during 2007 in reduction of the judgment debt, and had accordingly already paid the applicant a substantial portion of the amount owing. According to Mrs Petherbridge, the respondent only owes the first applicant the balance of N$23,753.81. She further submitted that the general rule in awarding costs is that the liability of co-litigants is joint, each being liable for his aliquot share. Reliance was placed on the learned authors Herbstein & Van Winsen: The Civil Practice of the Supreme Courts of South Africa, 4th ed, Juta at p 734. Thus, relying on this principle, the first applicant's share in the costs award amounts to N$32,300.92, and if this amount and the balance owing in the default judgment (N$23,753.81) is set-off, the first applicant still owes the respondent the amount of N$8,547.11.

(u) Mr Grobler however, submitted that the question of whether the amount of N$150,000.00 was paid or not, should not be considered by the court because the issue, having been dealt with by the Magistrate's court is *res judicata.* He further submitted that as the respondent's attempt to rescind the default judgment was unsuccessful, the first default judgment still stands and the respondent owes the first applicant the total amount of N$173,753.81. He submitted further that a person cannot "sneak in the backdoor" and raise an issue that the Magistrate's court already decided upon. In addition, Mr Grobler submitted that the second default judgment in the lesser amount of N$23,753.81 is in any event null and void against the respondent because it was granted in error by the Clerk of the Court after it was abandoned by the first applicant. His submission was that the first default judgment would have to be set aside by the

respondent before the court could take cognisance or consideration of the payment of the amount of N$150,000.00.

(v) After argument on this aspect, the Court directed the parties to under oath indicate whether or not the respondent had indeed paid N$150,000.00 to the first applicant in reduction of the judgment debt in respect of the first default judgment. Proceedings were adjourned to 26 March 2013 for these purposes.

(w) The respondent provided the Court an affidavit by one Fabian Ferris, a Relationship Support Officer of Bank Windhoek Ltd at the Windhoek branch. In this affidavit Mr Ferris stated that he had access to the records kept at the bank and also to the respondent's account number. He attached a copy of the statement for the period 1 March 2007 to 31 March 2007 and pointed out that the account is in the name of Natutungeni Pamwe Cosntruction CC. Mr Ferris further confirmed that an amount of N$150,000.00 was transferred electronically to Bank Windhoek into an account in the name of the first applicant on 13 March 2007 and that there were sufficient funds or facilities available on the account for such transfer at that time. He further stated that this transfer was never reversed.

(x) I pause at this stage to deal with the issue concerning the argument raised by Mr Grobler that the Court cannot consider whether or not the N$150,000.00 was paid to the first applicant in reduction of the judgment debt because it was *res judicata* as a result of the judgment of the Magistrate.

(y) The general principle is that a matter adjudged upon is *res judicata* and the decision as accepted as true (*res judicata pro veritate accipitur*). The consequence is that in any future legal proceedings, the judgment is binding on the parties to the original case and their successors in title provided:

(a) it was a final judgment;

(b) the new case concerns the same subject matter (emphasis supplied); and

(c) is based on the same ground of action (emphasis supplied). [1]

(z) *Res judicata* can be raised as a defence when a dispute which has been brought to an end is again set in motion between the same persons, about the same thing and on the same cause for claiming. According to Voet if any of the three requisites mentioned above is absent, the defence or *exception (res judicata)* does not apply. This aspect has been frequently followed and applied. [2]

(aa)

(bb) The requirements for a successful defence of *res judicata* were recently stated by Muller, J [3] as follows: The essentials for the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties (2), based on the same cause of action (3) with respect to the same subject matter or thing. Requirements (2) and (3) are not immutable requirements of *res judicata*.

(cc) In paragraph 11 of that judgment Muller, J further quoted with approval the *dictum* of Steyn, CJ in African Farmers and Townships v Cape Town Municipality [4] as follows:

> "The rule appears to be that where a Court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same parties cannot be resuscitated in subsequent proceedings."

(dd) I disagree with Mr Grobler's attempt to rely on the defence of *res judicata*. Firstly, the issue in the rescission application on which the learned Magistrate gave judgment, was whether or not the respondent had satisfied the

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[1] Wille's Principles of South African Law 9th ed Juta 2007 at 856 and the authorities collected there.

[2] The Law of South Africa, 2nd ed Vol 9 para 624 and the authorities collected there.

[3] after extensively reviewing the relevant authorities in Erastus Tjiundikua and another v Ovambanderu Traditional Authority and 5 others delivered on 26 November 2010 in Case No 336/2010

[4] 1963(2) SA 555 A at 562 D

Magistrate's Court that there was a reasonable explanation for the late application for rescission. The application for rescission was refused and the default judgment did stand as a result. The issue concerning the amount already paid was mentioned in the judgment but the learned Magistrate did not deal with that aspect on the basis that the default had not been properly explained. All she stated was that the respondent had not provided satisfactory proof of payment, of N$150,000.00.

(ee)

(ff) The issue before this court does not relate to the default judgment. I do not see that this court is prevented from determining whether the monies were paid to the first applicant for purposes of his claim for set-off in this application against the claim of the respondent, simply because the application for rescission was refused.

(gg) Mr Grobler relies on a default judgment in place for the whole amount. However, there is clear evidence that a substantial portion of the default judgment has been paid. Thus Mr Grobler's argument that the court is barred from considering that evidence in these proceedings is devoid of merit. Should the Court ignore this evidence and simply rely on the first default judgment, that would mean that the first applicant will effectively obtain more than what he would be entitled to in the circumstances, resulting in the first applicant being unjustly enriched. There is a marked difference between setting N$32,300.92 against N$173,753.81 and setting off the same amount against the amount of N$23,883.18 if that is all that is owed.

(hh) It is clear from the affidavit of Mr Ferris that N$150,000.00 has indeed been paid in reduction of the judgment debt. In my opinion it is the first applicant that is attempting to sneak behind the judgment of the Magistrate's court dismissing the application for rescission in order to obtain more than what it is entitled to, considering that the basis for the first applicant's application for sequestration was the unsatisfied default judgment. Mr Grobler was in any event not in a position to meaningfully dispute that this amount was paid.

(ii)

(jj) It is accordingly clear based on the amounts paid as well as the first applicant's share of the costs award, that the first applicant still owes the amount of N$8,547.11 to the respondent. In light of the above I make the following order:

(kk)

(a) The first applicant's application is dismissed with costs.

(b) The first applicant is directed to pay the amount of N$8,547.11 to the respondent.

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E SCHIMMING-CHASE

Acting Judge

APPEARANCES

FIRST APPLICANT:	Mr Z Grobler Instructed by Grobler & Company
RESPONDENT:	Mrs M Petherbridge Instructed by Petherbridge Law Chambers