



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 362/2010

In the matter between:

BV INVESTMENTS 264 CC
FREDRICH WILLY SCHROEDER

FIRST PLAINTIFF
SECOND PLAINTIFF

And

FNB NAMIBIA HOLDINGS LIMITED
ALLGEMEINE ZEITUNG
ERWIN LEUSCHER

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT

Neutral citation: *BV Investments 264 CC v FNB Namibia Holdings Limited* (I 362/2010) [2015] NAHCMD 6 (29 January 2015)

Coram: PARKER AJ
Heard: 6 November 2014
Delivered: 29 January 2015

Flynote: Practice – Judgments and orders – Default judgment – Application for default judgment brought in relation to action which had long been dismissed – Court held that as a matter of law and logic where there is no action which the court may adjudicate one is not entitled to bring an application for judgment by default in relation to such non-existent action – Court held further that in the legal reality of our law and in terms of the principle of rule of law which is so enshrined in our law a

decision of the court is binding and must be obeyed and implemented unless and until it has been set aside by a competent court.

Summary: Practice – Judgment and orders – Default judgment – Application for default judgment brought in relation to action which had long been dismissed – The plaintiffs instituted action whereupon the first defendant raised an exception to the particulars of claim – The exception was upheld – The plaintiffs did not move to amend the particulars of claim – Defendant therefore applied for dismissal of the action which the court granted – Meanwhile, when the exception remained undetermined by the court the plaintiffs brought an application for judgment by default – The application was dismissed – Undeterred the plaintiffs brought subsequent default judgment applications and they were dismissed – The instant proceeding is the latest in the series of such unsustainable application for judgment by default – Court dismissed with costs the latest application also on the basis that there was no action existing in which or in relation to which the plaintiffs are entitled to bring such application.

ORDER

- (a) The application for judgment by default is dismissed.
- (b) The plaintiffs must pay costs of the application; one paying, the other to be absolved, on a scale as between attorney (legal practitioner) and client.
- (c) The office of the registrar must not issue process or accept for filing any document relating to application for judgment by default or any other application in respect of case no. I 362/2010 or in respect of an application for judgment by default made by any of, or all, the plaintiffs in a matter which is the subject of the action dismissed by the court in terms of the order made by the court on 18 July 2011 and in the judgment delivered by the court on 28 July 2011.

JUDGMENT

PARKER AJ:

[1] This is an 'application for default judgment' instituted by BV Investments 264 CC (first plaintiff/first applicant) and Fredrich Willy Schroeder (second plaintiff/second applicant) against FNB Namibia Holdings Ltd (first defendant/first respondent), Allgemeine Zeitung (second defendant/second respondent) and Erwin Leuscher (third plaintiff/third respondent) under case no. I 362/2010). Process issued from the registrar's office on 22 October 2014. For the sake of clarity and neatness I shall henceforth, where the context allows, refer to this application as the '22 October 2014 default judgment application'. The relief sought is set out in the application. I shall refer to the parties as they are described in the action, ie plaintiffs and defendants. Mr Schroeder appears in person for the plaintiffs, and Mr Schickerling appears for the first defendant.

[2] The first defendant has, in terms of rule 66(1)(c), raised points *in limine*, that is questions of law, which in a word of one syllable is that the court 'no longer enjoys any jurisdiction in the above cases on this issue'. The cases are under case no. I 471/2010 and case no. I 362/2010; and the 'issue' relates to the plaintiffs' unabated insistence that the defendants have no authority to defend the suit. So says the plaintiffs in this regard, and I quote *verbatim et literatim*: 'The defendants entered an fundamental defective appearance to defend'.

[3] It will help to clarify the present proceeding to set out here a brief history of this matter. On 15 February 2010 the plaintiffs instituted action against the defendants under case no. I 362/2010. Thereafter, on 26 February the same year, the plaintiffs issued summons under case no. (P) I 471/2010 against the first defendant, the *Republikein* newspaper (as second defendant) and a Ronelle Rademeyer (as third defendant) under case no. I 471/2010. It is the first defendant's position that both matters are founded on 'the exact same cause of action'. Be that

as it may, on 19 February 2010 the first defendant duly entered appearance to defend the matter under case no. I 362/2010, ie the case number of the instant proceeding, and noted an exception against the plaintiffs' particulars of claim on the basis that the particulars failed to disclose any cause of action against the first defendant.

[4] While the exception stood undetermined by the court, the plaintiffs, on 2 September 2010, took the irregular step of delivering an application for default judgment. (ie 'the 2 September 2010 default judgment application'). The basis of the application is this; so say the plaintiffs, *verbatim et literatim*: 'The first defendant having failed to defend the action (purporting to file its appearance to defend on the 17 March 2010 without a valid resolution) failed to do so'. And the plaintiffs say they rely on 'Authority of the Supreme Court case no. SCR 1/2008' for so contending.

[5] In fully-reasoned judgment delivered on 12 January 2011, Botes AJ dismissed the application for judgment by default against the first defendant with costs and also against the second defendant, also with costs. It is worth noting that the 'issue' of authority was determined in the Botes AJ judgment.

[6] I must flag this critical finding: the plaintiffs did not appeal against the Botes AJ judgment. Accordingly, I hold that no default judgment can be brought by the plaintiffs against the first defendant (FNB Namibia Holdings Ltd) and the second defendant (Allgemeine Zeitung) in the court in this matter. But the plaintiffs brazenly did bring such selfsame default judgment application under the selfsame case no. I 362/2010, filed on 30 November 2010. The court, per Siboleka J, too, in an order made on 12 January 2011 did under the selfsame case no. I 362/2010 dismiss the selfsame default judgment application against the first defendant and the second defendant. And what is more; I heard the aforementioned exception brought by the first defendant in the selfsame matter under the same case no. I 362/2010. I gave an *ex tempore* decision and made an order in the following terms:

That the first defendant's exception is hereby upheld with costs, which costs shall include the costs occasioned by the employment of one instructing counsel and one instructed counsel.

[7] Thereafter, on 18 July 2011, I heard an application to dismiss the action instituted against the first respondent under the same case no. I 362/2010. The basis of that application was that where an exception to a combined summons is upheld and there is no motion for leave to amend by the plaintiffs, it is proper for the court, on application for dismissal, to dismiss the action. I gave an ex tempore decision and made an order in the following terms:

The action instituted against the first defendant under Case No. I 362/2010 is dismissed with costs, which costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

[8] It is worth noting that, thereafter, I delivered a fully reasoned judgment on 28 July 2011 for so deciding and ordering on 18 July 2011, as aforesaid. An attempt by the plaintiffs to appeal from the judgment of 28 July 2011 was a fiasco; the appeal lapsed. Thus, as far as the court is concerned case no. I 362/2010 no longer exists on the roll of the court because the action there has been dismissed. It is dead and buried. It cannot by any stretch of legal imagination be resurrected – not by anybody; not by the plaintiffs. It follows that as a matter of law and common sense where there is no action which the court may adjudicate, one is not entitled to bring an application for judgment by default in relation to such non-existent action. In the instant proceeding, I hold that there is no action existing under case no. I 362/2010 for the court to adjudicate; and, so, logically, there cannot be an application for judgment by default which the plaintiffs are entitled to bring.

[9] In this regard, one must not lose sight of the legal reality in our law and in terms of the principle of rule of law, which is so enshrined in the Namibian Constitution that a decision of the court is binding and must be obeyed and implemented unless and until it has been set aside by a competent court. See *Standard Bank Namibia Limited v Maletzky* (I 3956/2009) [2013] NAHCMD 131 (17

May 2013) (Unreported). In the instant case, it is with respect, dangerously presumptions on the part of BV Investments 264 CC and Fredrich Willy Schroeder and absolutely fallacious for BV Investments 264 CC and Fredrich Willy Schroeder to think that they are entitled to decide contrariwise on the final and binding effect of the aforementioned orders made in case no. I 362/2010 and that they are entitled to disobey those orders. By a parity of reasoning, these conclusions go for case no. I 471/2010 and the order made there by Miller AJ on 5 April 2013.

[10] In this regard it is opposite to perorate the foregoing reasoning and conclusions with what I said in *Vaatz v The Municipal Council of the Municipality of Windhoek* (A 287/2010) [2011] NAHC 178 (22 June 2011) (Unreported) about the duty of all to enjoy their basic human rights by pursuing responsible behaviour. At para 17 I said:

'It must be remembered that basic human rights without commitment to responsible behaviour are made into purposeless absolutes. But I do not think the Namibian Constitution, with the noble ideals of basic human rights and rule of law embedded in its bosom, says that those basic human rights are absolutes – to be enjoyed by an individual without the individual looking to see if in pursuit of his or her enjoyment of his or her rights he or she is violating the basic human rights of other individuals.'

[11] With the greatest deference to the plaintiffs, I should – without beating about the bush – say that it does not conduce to responsible behaviour for one to approach the seat of judgment of the court in pursuit of one's basic human rights guaranteed by art 12(1) of the Namibian Constitution but refuse to obey the orders of the selfsame court.

[12] Based on these reasons, the first respondent's points *in limine* are upheld. As I say, there is no action upon, or in, which the plaintiffs can, or are entitled to, bring an application, as they have done, for judgment by default. The application is, consequently, dismissed. And I hold that the application is frivolous and vexatious in the superlative, and, therefore, upon its dismissal it calls for a punitive costs order to demonstrate the court's revulsion at the superlative frivolousness and vexatiousness of the application.

[13] I have declined the invitation by the defendants to find that the plaintiffs are in contempt of the court. There is no application before the court as contemplated in rule 74(1) of the rule of court. It is, in my opinion, enough that the application for judgment by default is dismissed with costs on a scale as between attorney (legal practitioner) and client. The buck stops here.

[14] In the result, I make the following order:

- (a) The application for judgment by default is dismissed.
- (b) The plaintiffs must pay costs of the application; one paying, the other to be absolved, on a scale as between attorney (legal practitioner) and client.
- (c) The office of the registrar must not issue process or accept for filing any document relating to application for judgment by default or any other application in respect of case no. I 362/2010 or in respect of an application for judgment by default made by any of, or all, the plaintiffs in a matter which is the subject of the action dismissed by the court in terms of the order made by the court on 18 July 2011 and in the judgment delivered by the court on 28 July 2011.

C Parker
Acting Judge

APPEARANCES

PLAINTIFFS: In person

FIRST DEFENDANT: J Schickerling
Instructed by Van der Merwe-Greeff Andima Inc.,
Windhoek

SECOND AND THIRD
DEFENDANTS: No appearance
Of Koep & Partners, Windhoek