

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

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| Case Title: THE GENERAL CONSULATE OF THE REPUBLIC OF ANGOLA IN RUNDU PLAINTIFF VS ANTON ERIK VAN SCHALKWYK T/A RUNDU WELDING AND CONSTRUCTION 1 ST DEFENDANT DAVID EMMANUEL FREITAS DIAS 2 ND DEFENDANT RENARD HATTINGH 3 RD DEFENDANT | Case No: HC-MD-CIV-ACT-CON-2020/01309 |
| | Division of Court: HIGH COURT(MAIN DIVISION) |
| Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE | Date of hearing: 16 November 2020 |
| | Date of order: 4 December 2020 |
| Neutral citation: <i>The General Consulate of the Republic of Angola in Rundu v Van Schalkwyk</i> (HC-MD-CIV-CON-2020/01309) [2020] NAHCMD 560 (4 December 2020) | |

Results on merits:

Merits not considered.

The order:

Having heard **MR UJAHA** for the Plaintiff (Respondent)) and having read the documentation filed of record:

IT IS HEREBY ORDERED THAT:

1. The third defendant's special plea is hereby upheld.
2. The plaintiff is hereby ordered to pay the costs of one instructing and one instructed counsel.
3. Parties must file a joint status report on or before 25 January 2021 setting out further conduct of the matter.
4. The case is postponed to **28 January 2021** at **15:00** for Status hearing.

Reasons for orders:

PRINSLOO, J

[1] Serving before me is an application by the applicant, who is the third defendant in the main action, in which he raised a special plea of res judicata against the respondent who is the plaintiff in the main action. (In this ruling, I will refer to the parties as they are cited in the main action.)

Brief background

[2] Sometime in July 2018, the plaintiff instituted action against the first, second and third defendant under case number: HC-MD-CIV-CON-2018/02850 in which the plaintiff claimed for the confirmation of the deed of sale and the contract of transfer in respect of Erf 1582, Extension 3, Rundu entered into by the first and second defendants on the one hand and the plaintiff on the other, the cancellation of the Deed of Transfer number 321/20120 and ordering that the abovementioned property be transferred into the his name as well as various payments

against the defendants, which is the very same relief as sought for as in the main action of this matter.

[3] The first and third defendant entered an appearance to defend the action and subsequently demanded security of cost in the amount of N\$100,000 each against the plaintiff in terms of Rule 59. The plaintiff unsuccessfully opposed the application for security for costs on which this Court ordered the following:

‘1. Plaintiff is ordered to furnish security for costs of the third defendant in the amount of N\$100,000.00 on or before 08/03/2019.

2. The proceedings pending before this Court are stayed until the aforesaid security has been furnished by the plaintiff.

3. The plaintiff is ordered to pay the third defendants costs of this application.

4. The case is postponed to 11/03/2019 at 14:00 for Status hearing (Reason: Absence of Legal Practitioners for plaintiff and first defendant).¹

[4] By 11 March 2019, plaintiff failed to provide the security for costs and the following order was made:

‘1. Matter is removed from the roll: Case finalized, action dismissed in terms of Rule 59 (5).

2. Plaintiff shall pay the costs of first and third defendants.²

[5] On 25 March 2020, plaintiff caused summons to be issued under case number: HC-MD-CIV-ACT-CON-2020/01309 (being the present matter) based on the same claim (founded on the same facts and grounds) between the same parties. In defending this action, the third defendant raised the special plea of res judicata and is seeking for security of costs in the amount of N\$150,000 for the present matter, which the plaintiff opposed.

¹ Court Order dated 28 January 2019 under case number: HC-MD-CIV-ACT-CON-2018/0250.

² Court Order dated 11 March 2019 under case number: HC-MD-CIV-ACT-CON-2018/0250.

The plaintiffs case

[6] The plaintiff avers that the application for security for costs under case number HC-MD-CIV-ACT-CON-2018/02850 was never heard on merits but granted on the plaintiff's non-compliance with the court order under judicial case management and as such court orders granted under judicial case management are still subject to be reconsidered by the Court at the instance of any of the party or at the instance of the court in terms of rule 18 (3).

[7] Plaintiff submitted that in terms of rule 18 which deals with the power of the court under judicial case management it is clear that court orders granted under judicial case management are only final if the court does not vary or revoke such order or any of the party does not call upon the court to exercise its powers to do so. Therefore judicial case management orders as the one in issue cannot be appealed. Plaintiff further submitted that the request for security is aimed at delaying the finalization of this matter and not advancing justice and amounts to abuse of the court process.

[8] As such according to the plaintiff the order granted under case number HC-MD-CIV-ACT-CON-2018/02850 for security of costs in favour of the third defendant under judicial case management without ventilation of merits and demerits can be revoked, varied, corrected, altered and supplemented by the same court that granted it just as the case plan order and case management order in these proceedings was varied by the same court that issued orders.

The third defendants case

[9] The third defendant avers that the court order under the case HC-MD-CIV-ACT-CON-2018/02850 is final and remains unsatisfied by the plaintiff. He submits that the dispute around the provision of security or not, and the amount thereof, is accordingly res judicata between the third defendant and plaintiff, alternatively, issue estoppel between third defendant and plaintiff, has been finally adjudicated by a court of competent jurisdiction.

[10] Third defendant submitted that the granting of an application for security if costs is

appealable and, therefore, the order of security of costs granted by this Honourable Court was a final order in effect, at least in so far as the issue of liability of the plaintiff to provide security for costs was determined.

[11] Third defendant contends that it is common cause that the plaintiff never paid the security for costs as ordered and that the plaintiff simply instituted a new action again against the third defendant in an attempt to avoid the consequences of the final order made by this Honourable Court in respect of the issue of liability of the plaintiff to provide security for costs to the third defendant. By instituting a new action the third defendant is called upon to defend for a second time the same cause of action instituted by the plaintiff and yet the issue surrounding the order for security for costs made in the previous court proceedings remain unsatisfied.

[12] Third defendant continued to submit that the security for costs order made by this Honourable Court on 28 January 2019 had a final and definitive effect on the issue of security for costs vis-à-vis the plaintiff and the third defendant, even though it may be interlocutory in the wide sense, hence, the issue of security for costs is *res judicata*. He submits that the previous action instituted by the plaintiff was correctly dismissed and subsequent to that the plaintiff has taken no steps to deal with the final orders made by this Court and more particularly in respect of the security for costs order issued in the previous action, by either launching an application for reinstating the action and/or appealing the said order for security for costs.

The legal principles applicable to *res judicata*

[13] The requirements for a defence of *res judicata* are well laid out in law. *Res judicata* is a Latin term meaning “a thing adjudicated”. This refers to an issue that has been definitely settled by judicial decision. This bars the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction that could have been but was not raised in the first suit.³ (Own emphasis).

[14] The essential elements for *res judicata* are threefold, namely that the previous

³ *S K v S K* (I 3754/ 2012) [2017] NAHCMD 344 (17 November 2017).

judgment was given in an action or application by a competent court:⁴

- 1.) between the same parties,
- 2.) based on the same cause of action (*ex eadem petendi causa*), and
- 3.) with respect to the same subject-matter, or thing (*de eadem re*).

Requirements (2) and (3) are not immutable requirements of *res judicata*. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

[15] The concept of *res judicata* ascended as a method of preventing injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court system. *Res judicata* does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, and confusion. The true basis of the doctrine is to prevent an abuse of the process⁵.

[16] In the case of *Fish Orange Consortium v !Gooseb and 3 Others*⁶ the court stated the following:

‘In *African Farms and Townships Ltd v Cape Town Municipality*, Steyn CJ succinctly stated the rule 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 thing between the same parties, cannot be resuscitated in subsequent proceedings.’

[18] In the *State v Moodie* Hoexter ACJ said:

‘. . . I am of the opinion that in our common law the *exceptio rei judicatae* cannot succeed unless it is based on a final judgment on the merits.’

[19] Thus a judgment or order which does not have the effect of settling or disposing of the dispute between the parties with finality cannot found the *exceptio rei judicatae*.

⁴ *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B) at 566B - 567B.

⁵ *Coetzee vs Eva Salt Traders and Four Others* (I 2728/2012) [2016] NAHCMD 359 (8 November 2016).

⁶ Case No A 209/2008 judgment of the High Court delivered delivered on 23 January 2012.

[20] The effect of the final judgment on a party's cause of action has been described as follows:

'The effect of a final judgment on a claim is to render the claimant's cause of action res judicata. If therefore a party with a single cause of action giving rise to a single claim obtains a final judgment on part of his claim, the judgment puts an end to his whole cause of action, with the result that a subsequent claim for the balance of what is his cause of action entitled him to claim in the first instance can be met with a plea of res judicata. When a cause of action gives rise to more than one remedy, a plaintiff who pursues one of those remedies and obtains a judgment thereon can be met with a plea of res judicata if he should subsequently seek to pursue one of the other remedies, the reason being that the final judgment on part of one's cause of action puts an end to the whole of such cause of action.'⁷

[17] In the *Liley and Another v Johannesburg Turf Club and Another*⁸ the following was held:

'The exception res judicata is a form of estoppel and means that, where a final judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of a judgment in rem, any other person) are not allowed to place in issue the correctness of that judgment. This rule is principally founded upon the public interest.'

[18] On the issue of appealability of judgments or orders the applicable guidelines as formulated by Harms JA in *Zweni v Minister of Law & Order*⁹ pages, were cited with approval and the considerations applied by the courts over time were then analysed in *Shetu Trading CC v Chair, Tender Board of Namibia and Others*¹⁰ as follows :

'[18] This court has considered the appealability of judgments or orders of the High Court on several occasions. In *Vaatz v Klotsch and Others* this court referred with approval to the meaning of 'judgment or order' in the equivalent provision in the South African High Court Rules given by Erasmus

⁷ *Ekonolux CC and another vs Shadjanale* (I 905/2014) [2016] NAHCMD 173 (16 June 2016).

⁸ 1983 (4) SA 448 (WLD) at 550 H.

⁹ 1993 (1) SA 523 (A) ([1992] at 531I to 533F).

¹⁰ (SA-2011/26) [2011] NASC 12 (04 November 2011). Also see *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00220) [2019] NAHCMD 136 (02 April 2019).

in Superior Court Practice. Relying on the jurisprudence of the South African Supreme Court of Appeal, Erasmus concluded that an appealable 'judgment or order' has three attributes: it must be final in effect and not susceptible to alteration by the court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[19] This summary is drawn directly from the judgment of *Zweni v Minister of Law and Order*. In that case, the South African Appellate Division referred to the distinction between 'judgments and orders' that are appealable and 'rulings' that are not. According to the court in *Zweni*, the first characteristic of a ruling, as opposed to a judgment or order, is that it lacks finality. As Harms AJA, formulated the test: unless a decision is res judicata between the parties and the court of first instance is thus not entitled to reconsider it, it is a ruling. He continued —

'In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. . . .'

[20] There are important reasons for preventing appeals on rulings. In *Knouwds NO v Josea and Another*, this court cited with approval the following remarks of the South African Supreme Court of Appeal in *Guardian National Insurance Co Ltd v Searle NO*,

'There are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable for obvious reasons, that such issues be resolved by the same court and at one and the same time.'

[21] As the court in *Guardian National Insurance* went on to note, one of the risks of permitting appeals on orders that are not final in effect, is that it could result in two appeals on the same issue which would be 'squarely in conflict' with the need to avoid piecemeal appeals. '

[19] At common law a purely interlocutory order may be corrected, altered, or set aside by

the Judge who granted it at any time before final judgment; whereas an order which has a final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.¹¹

[20] For the judgment or order in question to be *res judicata* which effectively renders it final and disqualifies it from resuscitation, it should have been on the same issue determined but the court based on the same facts and between the same parties.¹²

[21] In the *Somaeb v Standard Bank (Pty) Ltd*,¹³ a statement which I fully concur with Masuku, J stated the following:

[22] Where a party is dissatisfied with any order or judgment of the court, it must challenge same at the earliest possible time and not wait for the 'injustice' the party perceives, to crystallise and for the other parties to be lulled into thinking and accepting that the *status quo* remains, namely, that the result of the judgment stands.

[21] A party who decides to rest on his or her laurels and not to challenge a decision they are unhappy about, shoot themselves in the foot as they may be refused the right to re-open their complaint by the sheer passage of time as legal certainty is a high priority in such matters. Parties have a right to certainty as to their conduct and resumption of normal life. They should not be dragged in and out of court indefinitely at the whim of the losing party.'

Application of the legal principles to the facts

[22] It is common cause that plaintiff caused summons to be issued under case number: HC-MD-CIV-ACT-CON-2020/01309 (being the present matter) based on the same claim (founded on the same facts and grounds) between the same parties. It is also common cause that the plaintiff has not satisfied the security for costs granted in favour of the third defendant as ordered by this Honourable Court on 28 January 2019 which led to the case being dismissed and regarded as finalized.

¹¹ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550-551.

¹² *Elias Andreas v Namutenya* (I 130/2014) [2016] NAHCNLD 08 (12 February 2016).

¹³ (HC-MD-CIV-MOT-GEN-2017/00443) [2018] NAHCMD 406 (14 December 2018).

[23] The plaintiff is of the opinion that the orders granted under case HC-MD-CIV-ACT-CON-2018/02850 are not final and as such can be varied, altered or rescinded, however, if that was the case the plaintiff would have followed that route instead he brought a fresh application. The court order issued under the aforementioned case number is still valid and has not been challenged. Plaintiff in his heads of arguments ¹⁴ confirms that court orders granted under judicial case management are only final if the court does not vary or revoke such order or any of the party does not call upon the court to exercise its powers to do so. Correctly so, the plaintiff concedes that the order granted in the initial case is final.

[24] I am of the view the actions of the plaintiff, in the context of this matter, falls neatly within essential elements for *res judicata*. It seems nothing less than an attempt to wear the third respondent with endless litigation by suing him to what appears to be arising from the same facts and in respect of the same cause of action. There must come a time when a case must come to an end and this should be it in this matter.

Conclusion

[25] Having considered the submissions and papers before me I am of the view that the special plea of *res judicata* must succeed with costs such costs to include costs of one instructing and one instructed counsel.

[26] My order is therefore set out as above.

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| Judge's signature | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Plaintiff/ Respondent | Third Respondent/ Applicant |

¹⁴ See heads of arguments par 17.

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