



REPORTABLE

CASE NO: SA 14/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARTHINUS HERMANUS MANS NO

First Appellant

MAGDALENA PETRONELLA MANS

Second Appellant

MARTHINUS HERMANUS MANS

Third Appellant

And

LLEWELLYN COETZEE

First Respondent

JOHANNES HENDRIK VAN DER MERWE

Second Respondent

EVA SALT TRADERS

Third Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 10 October 2018

Delivered: 30 October 2018

Summary: C instituted action against V on the basis of a deed of suretyship, the latter signed in favour of a corporation that borrowed money from C and which amount was allegedly owing to C.

When no notice of intention to defend was filed C obtained default judgment against the corporation, V and another surety.

V launched an application to rescind the default judgment. The papers in the rescission application were finalised, but before the application could be heard, C and V concluded in an agreement to the following effect:

C would abandon the judgment, V would file a notice to defend the action which thereafter would proceed in the ordinary course. C would amend his particulars of claim to address the issues of a technical nature raised in the rescission application by V and the relevant pleadings would follow thereafter.

In the process of finalising the pleadings V issued a third party notice alleging that the third parties (appellants) had to indemnify him against any amount that C would be granted should his action against V be successful. The third parties thus became parties in the suit between C and V and also filed their pleadings. In a late amendment to their plea the third parties raised a plea of *res judicata* averring that the abandoned judgment (as it was not rescinded) was still in place. The third parties submitted that they were, through their relationship with V, privies to the judgment. The abandonment simply meant that C waived his rights to enforce the default judgment and as they were not parties to the agreement they were not bound by the agreement. The abandonment according to the third parties also meant that C had to institute action afresh under a new case number as the default judgment stood as a final judgment.

V in a late amendment to his plea then also raised a plea of *res judicata*. It was however conditional upon the third parties plea of *res judicata* being upheld. In addition they made common cause with the third parties that summons had to be instituted afresh.

The court *a quo* dismissed the special plea of the third parties (with the consequence that V's conditional plea also fell away). The third parties, with leave of the court *a quo*, appealed against this order.

Held that the High Court (court *a quo*) had the inherent jurisdiction to govern its own procedure. That C and V acted in terms of their agreement when they partook in the further exchange of pleadings. That the third parties likewise partook in the procedure without demur up to their late amendment to raise the issue of *res judicata* and summons that had to be issued afresh. That the judge *a quo* was correct to continue with case management in these circumstances as it was in line with the main objective of case management to finalise the matter on the real issues and as speedily and cost effectively as possible. Should there be reason for it the court *a quo* can add a numeral or letter to its final order to distinguish this order from the default judgment initially granted.

Held further that for the third parties to be able to raise a defence of *res judicata* they had to be parties to the judgment. This they were not. They were not parties to the agreement between C and V and C was not a party to the agreement between the third parties and V. There was no basis on which C could sue them directly or on which he could execute the judgment against them directly. Their liability to V arises from a contract, containing an indemnity and which has nothing to do with C as he was not a party thereto and that the third parties cannot be deemed to be the same person as V *vis-à-vis* C so as to render them privies (parties) to the default judgment.

In the result the appeal is dismissed.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and HOFF JA concurring):

Introduction

[1] First respondent (Coetzee) issued summons against Eva Salt Traders CC (the corporation), Johannes Hendrik Van der Merwe (Van der Merwe) and Erik Wilhelm Voges (Voges) seeking repayment of a loan allegedly made to the corporation. Van der Merwe and Voges allegedly bound themselves jointly and severally liable with the corporation for the repayment of the loan by the corporation in terms of written deeds of suretyship.

[2] Judgment by default was granted in an amount of N\$250 000 to Coetzee against the corporation, Van der Merwe and Voges during November 2012.

[3] During April 2013 Van der Merwe launched a rescission application to set this judgment aside. Coetzee responded to this application and affidavits were filed in opposition thereto after which Van der Merwe filed a replying affidavit. The rescission application was thus ripe for hearing.

[4] Prior to the hearing of the rescission application, Coetzee's lawyers gave notice to 'abandon the default judgment and to grant [Van der Merwe] leave to defend the main action' The rest of the notice dealt with a proposal as to the costs of the rescission application which is not of any moment in this appeal. Van der Merwe's lawyers accepted the notice of abandonment as follows:

'Kindly be advised that it is our instruction to accept your abandonment of the default judgment whereby you grant our client (second defendant) leave to defend the main action. We will serve and file our notice to defend as soon as possible and subsequently file our plea accordingly.'

[5] Subsequent to the receipt of the response aforesaid on behalf of Van der Merwe the lawyers for Coetzee informed Van der Merwe's lawyers that:

'We shall file our notice of abandonment shortly. Please note that we intend to amend our particulars of claim in due course.'

The amendment was necessary to address some of the issues raised in the rescission application relating to the alleged excipiable nature of the particulars of claim. The envisaged notice of abandonment in terms of the rules of court was then filed stating that it was filed 'by agreement between the parties'.

[6] Coetzee's particulars of claim were duly amended and pleadings with Van der Merwe were exchanged. However during July 2015 Van der Merwe joined the third parties on the basis that they had to indemnify him in respect of any amount he had to pay Coetzee pursuant to a written agreement he had concluded with them in respect of the purchase of a member's interest in the corporation.

[7] The third parties filed their pleas and in a late amendment of their pleadings they raised a special plea of *res judicata* on the basis that the judgment by default was not rescinded and that the abandonment by Coetzee of that judgment simply meant that he waived his right to enforce it. As an adjunct to this it is also contended that the matter could not proceed as it did under the same case number and in the same action. Van der Merwe initially opposed the special plea but later changed tack and raised the same special plea of *res judicata* as a conditional plea. The condition being that the third parties are successful with their special plea of *res judicata*.

[8] The court *a quo* dealt separately with the special plea of *res judicata* raised by appellants and dismissed it with costs. This, by necessary implication, meant that the conditional special plea of Van der Merwe also fell by the wayside. The third parties (appellants) were granted leave to appeal against this judgment and hence this appeal.

Appellants' stance

[9] Appellants' stance as appears from its special plea (*res judicata*) and heads of argument is twofold. Firstly, it is submitted that 'In law, the agreement of abandonment contains an *ex lege* term that the defendant in whose favour the judgment was abandoned, may not raise a plea of *res judicata* if the plaintiff sues the defendant again on the same cause of action, provided summons is instituted in new proceedings with a new case number'. Secondly, that as the judgment was not rescinded and the appellants are privy, with substantial interest in and to the judgment, and were not parties to the agreement surrounding the abandonment, they (the third parties/appellants) could raise a defence of *res judicata*.

Must be summoned afresh

[10] The gist of appellants' complaint in respect of the first issue mentioned above is that the judge *a quo* should have directed that Coetzee issue summons afresh against Van der Merwe so that a new case number could be allocated to the matter. In other words, when he was informed that the rescission application would not proceed because of the agreement between the parties referred to above he should have declined to continue with the case on the basis of the

agreement between the parties and should have indicated to Coetzee that he had to issue summons afresh. This is so because the abandonment did not amount to a rescission of the default judgment but only to a waiver by Coetzee of his rights to execute it. In the words of the heads of argument 'while the judgment still exists (as) it is not rescinded. It is simply unenforceable in plaintiff's hands'. This meant that the case had been finalised and that the action based on the agreement relating to the abandonment of the judgment had to be instituted afresh by the issue of a new summons which would be allocated a new case number.

[11] I accept for the purpose of this judgment that the abandonment of the judgment by default had the effect contended for without deciding this issue.¹

[12] It is trite law that the High Court has an inherent jurisdiction to regulate its own procedure.² Furthermore, in terms of the Rules of the High Court the overriding objective of those Rules is to 'facilitate the resolution of the real issues . . . speedily, efficiently and cost effectively'. This purpose is what the agreement between the parties sought to achieve. What purpose would it serve to direct Coetzee to issue summons afresh save to waste time and incur further unnecessary costs. This for the sole purpose of getting a new case number. The managing judge with the agreement of the parties (including that of the third parties up to the late amendment raising the plea of *res judicata*) did what was expected of him in terms of the rules relating to judicial case management. In fact the judge *a quo* should be commended for assisting the parties to have their disputes determined without incurring additional costs and without wasting time

¹ *Scrooby v Engelbrecht* 1940 TPD 104 at 105 and *Body Corporate of 22 West Road South v Ergold Property Number 8* CC 2014 JDR 2258 p6-7.

² *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC).

unnecessarily. The parties to the abandoned judgment were not prejudiced by this course of action and in fact benefited from it. It is also in accordance with the agreement between them. For Van der Merwe to make common cause with the appellants on this score in a late amendment and after being a party to the filing of pleadings and case management up to the late amendment is contrary to the agreement reached with Coetzee and should not be countenanced. To uphold this point at this stage would be to sanction Van der Merwe's disregard of the agreement he entered into with Coetzee. Neither can the appellants claim any prejudice as they were entitled to all the rights that third parties were entitled to in finalising the pleadings including the raising of a defence against Van der Merwe premised on his agreement relating to the abandonment of the default judgment. If the appellants are aggrieved that the final judgment in the matter will not have the same case number as that appearing on the default judgment, they can take it up with the judge *a quo* at the appropriate time and he can add a numeral or letter to the case number to distinguish it from the default judgment if there is sufficient reason for such alteration.

[13] I am thus of the view that the first complaint raised by the appellants is without merit and cannot be upheld.

Res judicata

[14] For the appellants to successfully raise a defence of *res judicata* they must establish that they were parties to the default judgment.³ This they attempted to do by submitting that they are privy to the default judgment because of their

³ *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* 2014 (5) SA 297 (SCA), *Royal Sechaba Holdings (Pty) Ltd v Coote & another* 2014 (5) SA 562 (SCA) and *Fish Orange Mining Consortium (Pty) Ltd v !Gooseb & others* 2014 (2) NR 385 (SC) paras [19] – [21].

agreement with Van der Merwe to indemnify him against claims such as the one pressed by Coetzee. According to the submission, that makes them privy to the judgment. This is apparently so because Van der Merwe can only enforce the indemnity against the appellants on the back of the judgment against him.

[15] As mentioned, Van der Merwe is sued on the basis of a deed of surety he signed in favour of the corporation which borrowed money from Coetzee. Appellants do not feature at all in the claim of Coetzee against the corporation, Van der Merwe and Voges. It is not surprising because the loan agreement did not involve the appellants at all. It was money lent to the corporation on the back of sureties by Van der Merwe and Voges. There is not even a suggestion that Coetzee knew about the contract between Van der Merwe and the appellants in which they allegedly indemnified Van der Merwe for claims of the nature instituted by Coetzee. The indemnity agreement relied upon by Van der Merwe in respect of the claim of Coetzee was entered into between the corporation, Van der Merwe and Voges, on the one hand, with the appellants as the counterparties on the other. Coetzee was not a party to this agreement. In short the appellants were not parties to the loan agreement on which Coetzee relies, ie they were not privy to this agreement and Coetzee was not a party to the agreement containing the indemnification, ie he was not privy to this agreement.

[16] A privy in general is a person who can be sued instead of another party in the sense that the party sued is taken to have assumed the responsibility of the person or entity for the alleged liability. Examples are when an heir is sued for liabilities incurred by a deceased or the principal for liabilities incurred by his agent. The privy must, again as a general rule, derive title from the party he acts

as privy to or be his lawful successor in title.⁴ There is simply no such relationship in the present matter. Would Coetzee be able to execute on the default judgment against the appellants? The answer is obviously in the negative. He did not issue summons against them. He had no agreement with them.⁵ There is and was simply no legal nexus between Coetzee and the appellants. If Van der Merwe sued the appellants subsequent to the default judgment entered against him, would they be bound by the judgment? The answer is again in the negative. They would be entitled to raise any defence against him including that the default judgment was wrongly granted for whatever reason as they were not parties to that litigation. If the appellants were privies in the true sense of the word, Coetzee would have been able to sue appellants directly (once their existence and relationship with Van der Merwe came to his knowledge) and furthermore they would then be bound by the agreement relating to the abandonment entered into between Coetzee with Van der Merwe. This would mean that they would also not have been allowed to raise the defence of *res judicata*. However, there is no basis on which Coetzee could sue them as he has no contractual or other relationship with them at all.

[17] I am thus of the view that the second complaint raised by appellants against the dismissal of their special plea is likewise without merit and stands to be dismissed.

⁴ *Royal Sechaba Holdings (Pty) Ltd v Coote & another* 2014 (5) SA 562 (SCA).

⁵ A writ cannot be issued against a person against whom there is no judgment. *White, Ryan and Co v Hilliard* 1903 SC 334, *Tompson v Batayi* (1906) 18 CTR 1191, *Sellar v Marais* (1908) 18 CTR 286 and *Lepleman v Temple* (1908) 18 CTR 726.

Conclusion

[18] It follows from what is stated above that the appeal is to be dismissed. It is only the question of costs that needs to be considered. Because appellants in their heads of argument submitted that Coetzee and Van der Merwe should pay the costs on appeal of appellants. Van der Merwe filed heads on this aspect only, pointing out that he does not oppose the merits of the appeal and in fact makes common cause with appellants' submissions on the special plea of *res judicata*. The fact is that had appellants not sought a cost order against Van der Merwe he would not have incurred any costs on appeal. In my view the costs on appeal should follow the result and appellant should also be liable for Van der Merwe's costs on appeal as they, through the stance that he should be liable with Coetzee for their costs, caused him to incur costs on appeal.

[19] In the result the appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

FRANK AJA

SHIVUTE CJ

HOFF JA

APPEARANCES

APPELLANTS: R Heathcote, with him Y Campbell
Instructed by Behrens & Pfeifer

FIRST RESPONDENT: J P R Jones
Instructed by Ellis Shilengudwa Inc

SECOND RESPONDENT: A W Corbett, with him A van Vuuren
Instructed by Delport Legal Practitioners