REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO	CASE NO: 2020/7439
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO	
(3) REVISED.	
..... SIGNATURE	..... DATE

In the matter between:

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED	**PLAINTIFF**
AND	
INVESTMENT AUTO GROUP (PTY) LIMITED	**FIRST DEFENDANT**
GAVIN ANTHONY SMITH	**SECOND DEFENDANT**
ERIKA COETZER	**THIRD DEFENDANT**

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This matter was set down for hearing on the trial roll before this court on 25 May 2021. On 17 May 2021 the third defendant filed a special plea. The nub of the special plea is that the plaintiff had set the matter down in the face of a judgment against the

third defendant, which judgment has not been rescinded. It is pleaded that the matter is therefore *res iudicata*.

[2] It was agreed between the parties that the special plea needs to be resolved before the trial can proceed. The plaintiff further conceded that even if the special plea is decided in the plaintiff's favour that the trial could not proceed before this court as certain interlocutory applications, to which I will return to later in the judgment, had not been dealt with and were still unresolved.

[3] This judgment therefore deals with one issue only: Is the matter *res iudicata*.

BACKGROUND FACTS

[4] Summons was issued against the three defendants on 3 March 2020. The plaintiff sought monetary judgment for damages suffered due to the first defendant's breach of an agreement. The second and third defendants were cited in their capacities as sureties for the first defendant's indebtedness towards the plaintiff. Only the third defendant filed a notice to defend the matter. On 10 June 2020 the plaintiff filed an application for default judgment in terms of Rule 31(5)(a) against the first and second defendants only. The default judgment application served before the Registrar on 19 September 2020, who referred the application to open court.

[5] The plaintiff also applied for summary judgment against the third defendant, which was opposed. On 30 June 2020 the summary judgment was heard and the third defendant was granted leave to defend. Litigation between the plaintiff and the third defendant thereafter continued in the normal course of litigation, and the plaintiff discovered all the relevant documents in its possession for purposes of proceeding to trial. However, on 10 December 2020, despite the fact that the application for default judgment was sought against the first and second defendant only, default judgment

was granted against all three defendants. The order granted followed the terms of the draft order presented by the plaintiff to the court verbatim.

[6] Both the plaintiff and the third defendant were unaware that default judgment was granted against the third defendant. Consequently, on 18 February 2021 the plaintiff set the matter down against the third defendant for trial for 25 May 2021. On the same date the third defendant requested further documentation from the plaintiff in terms of Rule 35(3), and simultaneously filed a request for further particulars to prepare for trial. On 4 March 2021 the plaintiff filed its response to the third defendant's request for further particulars for purposes of trial. On 26 February 2021 and 10 March 2021 the plaintiff filed its notice in terms of Rule 35(6) and its reply to the third defendant's Rule 35(3) notice respectively. On 26 March 2021 the plaintiff filed its affidavit in compliance with Rule 35(3) and on 19 April 2021 filed its answering affidavit to the third defendant's application to compel in terms of Rule 35(7). On 1 April 2021, the third defendant filed an application to compel further and better discovery in terms of Rule 35(7), and simultaneously filed an application seeking further and better particulars. The plaintiff opposed both applications and on 13 April 2021 the plaintiff filed its answering affidavit to the third defendant's application to compel further and better particulars.

[7] On 19 April 2021 the third defendant became aware of the judgment granted against her. As a result, on 20 April 2021, the attorneys representing the third defendant, wrote to the plaintiff recording that:

i. Judgment had been granted against the third defendant on 10 December 2020;

ii. The steps taken after the judgment were granted, are null and void;

iii. An application to rescind the judgment would have to be brought;

iv. The parties cannot continue litigating in the face of the judgment.

[8] The plaintiff's attorneys responded on 21 April 2021. In the letter it was stated that the default judgment was granted erroneously against the third defendant, and that the plaintiff has therefore decided to abandon the judgment against the third defendant. The plaintiff further attached a notice to the letter in terms of Rule 41(2) wherein it unconditionally abandoned the whole of the judgment against the third defendant.[1]

[9] In the meantime the interlocutory applications reached a point where it could be set down for argument in the interlocutory court. On 23 April 2021 the plaintiff, with reference to paragraph 9.10 of the Practice Manual for Gauteng dealing with interlocutory applications, requested that the third defendant, in respect of the two applications to compel, urgently place the applications on the interlocutory roll for hearing, due to the trial being set down for trial on 25 May 2021. The plaintiff's attitude was that as it had properly sought and obtained a trial date, it was entitled to proceed with the hearing and therefore the interlocutory applications had to be resolved timeously in order to avoid any postponement of the trial.

[10] On 14 May 2021 the third defendant filed heads of argument in respect of the application to compel further and better discovery and the application to compel further particulars. In the heads of argument, the third defendant raised a point *in limine* which dealt with the default judgment granted against the third defendant. On 17 May 2021

[1] Rule 41 (2) states: Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment.

the third defendant filed a notice of intention to amend her plea to include a special plea of *res iudicata*.

[11] On 20 May 2021 both applications to compel were heard before Siwendu J. The learned Judge refused to hear the two interlocutory applications in the light of the default judgment. She specifically held that it was "*superfluous and contrary to the established principle to call on this Court to adjudicate on interlocutory applications in respect of a lis between the same parties, over the same cause of action, for the same relief, over which there is an existing pronouncement by a court — at least until its validity is set aside.*" The two interlocutory applications were consequently removed from the roll and the plaintiff was ordered to pay the costs of the hearing of the two applications.

IS THE MATTER PROPERLY BEFORE COURT?

[12] The third defendant raised a point *in limine*, namely the non-compliance of the Practise Directive dated 18 September 2020. It is contended that as a result the matter is not properly before court. The Practice Directive provides in paragraphs 6 and 13 thereof that:

> *"Prior to the enrolment of any matter or the allocation of a hearing date, the litigating party or its representative is to upload a Directive Compliance declaration in the form of an affidavit which is to confirm that no duplicate file for the matter exists on CaseLines ... Where no affidavit is filed the Registrar cannot allocate a hearing date."*
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> And
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> *"When applying for a hearing date, the litigating party or its legal representative shall complete and upload a date application form (as per the example annexed to this Directive) together with the Directive Compliance declaration in terms of paragraph 6 above prior to inviting the relevant Registrar's Office profile."*

[13] The plaintiff filed an application for a trial date on CaseLines on 8 January 2021. It also filed Form 4 provided for in the relevant Practice Directive on 22 January 2021. The third defendant submits that no Directive Compliance Declaration as required by the aforesaid directives and notices was uploaded on CaseLines, nor was one served on the third defendant. That being so, a trial date should not have been allocated.

[14] The failure to upload a Directive Compliance Declaration had serious consequences. A duplicate file did exist on CaseLines on the date that the plaintiff sought a trial date. That duplicate file contained a judgment against the third defendant — granted on 10 December 2020. If the plaintiff complied with the Directive, the fact that a judgment had been granted against the third defendant would have become known to the Registrar allocating the trial date and to the third defendant.

[15] I agree that there was non-compliance with the Practice Directive and the Registrar should not have given a trial date. It does, however, not mean that the matter is not properly before court. To insist that the matter be removed because of the non-compliance with the Practice Directive would be to place form above substance. That would be a narrow technical approach that serves nothing but that a particular procedure should be followed. In the particular circumstances of this matter it does however have an impact on the cost order that is granted. The point in *limine* is dismissed.

IS THE MATTER RES JUDICATA?

[16] The requirements of *res judicata* are that the proceedings are in respect of a dispute between the same parties on the same cause of action for the same relief as has previously been dispositively adjudicated. In *Prinsloo NO v Goldex 15 (Pty) Ltd &*

Another,[2] Brand JA recognised that, in time, the requirements were relaxed in situations which gave rise to what became known as issue estoppel and stated that the recognition of the defence in certain cases will require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis.[3] Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others.

[16] Counsel on behalf of the third defendant, Adv. van Reenen contends that, having regard to the facts in this case, the court became *functus officio* upon the granting of the judgment on 10 December 2021. Until the judgment is rescinded, the plaintiff could not continue litigating as though the judgment had not been granted. The plaintiff was not entitled to seek a trial date and enrol the matter for trial with such judgment in place. In addition, the interlocutory applications were abortive, having been launched in the face of the judgment.

[17] Counsel on behalf of the plaintiff, Adv. Marx submits that the plaintiff was not aware that default judgment was granted against the third defendant. It is contended that the third defendant has not suffered any prejudice, and to the extent that she has, it is cured by the abandonment. The steps taken after the judgment was granted were not null and void and the matter must proceed to trial.

The law

[18] It is trite that the discretion to correct a judgment is that of the court and that a judgment stands until it is rescinded by a court, regardless of whether it was

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[2] 2014 (5) SA 297 (SCA)
[3] See *Kommissaris van Binnelandse Inkomste v Absa* 1995 (1) SA 653 (A) at 669D, 667J - 671B.

erroneously granted, or not.[4] In *De Wet and Others v Western Bank Ltd,*[5] Trengrove AJA (as he then was), made it clear that the power to rescind judgments on default of appearance "was entrusted to the discretion of courts" and courts have laid down principles to guide them in this process. There is also a need to proceed rapidly to correct an order mistakenly granted as it is in the interests of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect or orders of court.[6]

[19] There are three ways in which a judgment taken in the absence of a party may be set aside – in terms of rule 31(2)(b) or rule 42(1) of the Uniform Rules, or at common law. Rule 42(1) was designed, "to correct expeditiously an obviously wrong judgment or order".[7] A party has to satisfy the court that there is a satisfactory explanation in order to rescind a judgment. In *Firestone South Africa (Pty) Ltd v Gentiruco*[8] AG Trollip JA stated the following:

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio* : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.[9]

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[4] See *Jacobsen v Havinga t/a Havingas* 2001 (2) SA 177 (T) where Patel J, writing for the full bench, endorsed a finding in *Ramodike v Mokeetsi Trading Store* 1955 (2) SA 169 (T) in relation to a magistrate's court judgment and stated the following: "*Until properly attacked and rescinded a judgment of court of record, even if obtained by default, must stand and be presumed to be binding.*"

[5] 1979 (2) SA 1031 (A) at 1042G-1043A.

[6] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at p 306 F-G. Also see *Liberty Group Limited and Johan Coenraad Bezuidenhout,* Unreported judgment in the Kwa-Zula Natal High Court, Pietermaritzburg, case number 4072/2010.

[7] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 468H and 471E-F.

[8] *Supra* footnote 6.

[9] See *West Rand Estates Ltd. v New Zealand Insurance Co. Ltd.* 1926 AD 173 at p.176,178 186-7 and 192; *Estate Garlick v Commissioner of Inland Revenue* 1934 AD 499 at p. 502.

[20] There are exceptions to this principle. If a court is approached within a reasonable time it may correct, alter, or supplement the judgment in certain instances recognised in law. The court itself may also *mero moto* correct errors in its own judgment in appropriate circumstances. Trollip JA however warned that this discretionary power "*should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded – interest rei publicae ut sit finis litium.*"[10]

[21] The reason for the warning is obvious: a judgment, even if it is voidable *ab origine*, and ought to have been set aside or rescinded, has the appearance of *res judicata*, noted in a public record and will be looked upon and be acted upon as *res judicata* until set aside. As stated in *Jacobsen*[11] "*it proclaims itself to the world to be valid until set aside by the court*" and it "*has to be treated as if it is what it proclaims to be.*"[12][13]

[22] In *FirstRand Bank Ltd t/a First National Bank v Fondse Adriaan Rudolph N.O. and Another*,[14] ("*Fondse*") the plaintiff obtained summary judgment in circumstances where such judgment should not have been granted. An appeal was lodged by the defendant. The plaintiff abandoned the summary judgment and then formally withdrew the action. The plaintiff issued a fresh summons, claiming an increased amount. The defendant raised a plea of *res judicata* in the new action. Sutherland J (as he then was), on

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[10] At page 309 A-B.

[11] Footnote 4.

[12] See also *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564F. The court held: "*It is quite clear, therefore, that a defendant is entitled to rely on res judicata notwithstanding that the judgment is wrong. That being what the law allows for reasons of public policy, his knowledge that the decision is erroneous would not, I consider, expose a defendant to a charge of bad faith cognisable in a court of law.*"

[13] See also *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 265G. Botha J held: "*Whatever the nature of the third respondent's error, and however glaring it may have been, his judgment stands and constitutes res judicata until it is set aside.*"

[14] 2017 JDR 1043 (GJ)

appeal, referred, *inter alia*, to the matter of *Molaudzi v The State*[15] and found that when a court is confronted with a substantial injustice that would result from the application of *res judicata* and, in the absence of an 'effective alternative remedy', that *res judicata* should be relaxed to prevent injustice. In *Molaudzi*, the Constitutional Court explained it as follows:

> '[32] Since res judicata is a common-law principle, it follows that this court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 [of the Constitution] does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.
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> [33] This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This court held in *South African Broadcasting Corp Ltd:*
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> > 'The power in s 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.'
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> [34] The power in s 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have.' (footnotes omitted) (Emphasis supplied)

[23] In arriving at this conclusion, Sutherland J in *Fondse* performed an evaluation of all the previous cases to establish whether the requirements of *res judicata* had to be relaxed in that case. In doing so he found that the earlier cases were distinguishable

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[15] 2015 (2) SACR 341 (CC).

on the facts and did not *"offer strong support for the proposition that an abandonment of a judgment ought ordinarily to result in a successful defence of res judicata".* The court specifically considered the unique facts of the case before it and noted that it was not possible in that case to seek a rescission of the judgment in terms of Rule 42 – as no error had been committed within the meaning of the rule and that there was no alternative suitable remedy. It was held that the summary judgment ought not to have been granted because the section 129 point was good, but that is not a procedural error as contemplated by Rule 42; rather, it is a reason to overturn the judgment on appeal.

[24] I agree with counsel for the third defendant that the facts in the present matter are very different. The plaintiff, *in casu*, refused to make use of the clear remedy afforded by rule 42(1) – which provides for the rescission of the judgment in the prescribed manner. Instead, the plaintiff elected to abandon the judgment and proceed with the trial and then contends that the mere abandonment of the judgment is sufficient to trump the defence of *res judicata*.

[25] The matter raises important considerations of policy and practice. Firstly, if the plaintiff argument is correct it would create uncertainty in regard to the finality of judgments and serve to divest the courts from the discretion vested in it and enable parties to "correct" the judgment themselves. This is without precedent, and as a matter of public policy, it cannot be allowed. Secondly, it is clearly prejudicial to the third defendant. The public record will show that this court granted judgment against the third defendant and that it was not rescinded by the court. The record will proclaim to the world at large that the plaintiff was entitled to a judgment and that this court found the third defendant to be liable. In a modern commercial world, such record holds the potential of harm. The fact that the judgment was abandoned does not

change this. Even if it is made known that the judgment was abandoned, all it signifies is that the plaintiff elected to waive its rights in terms of the judgment. The reasons why it did so are not recorded and will not serve to inform the world at large that the judgment was not validly granted. In the matter of *Body Corporate of West Road South v Ergold Property Number 8 CC*[16], Boruchowitz J stated: "*The act of abandonment is of a unilateral nature and operates ex nunc and not ex tune. It precludes the party who has abandoned its rights under the judgment from enforcing the judgment but the judgment still remains in existence with all its intended legal consequences.*" Thirdly, there is a suitable remedy available to the plaintiff, namely an application for rescission of the judgment, as it was plainly an order taken in error as contemplated by Rule 42 of the Uniform Rules of the High Court.

[26] In the result it follows that the judgment stands, even though incompetent, and will continue to do so until it is set aside. The plea of *res judicata* is good and the abandonment of the judgment in the current circumstances is ineffectual. The judgment must first be rescinded before the trial can proceed.

COSTS

[27] Siwendu J found that the court will not hear the third defendant's interlocutory applications as a result of the fact that a judgment has been granted against the third defendant and removed the interlocutory applications from the roll. This had the effect that the interlocutory applications were not finalized and that the trial was in any event not able to proceed on 25 May 2021.

[28] Furthermore, the plaintiff was invited more than a month ago to remove the matter from the roll. No costs were then sought against the plaintiff. It however, rejected the

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[16] 2014 JDR 2258 (GJ)

invitation and demanded that the interlocutory applications be heard and that the trial must proceed - with the judgment on record. Had the plaintiff utilised the correct remedy, these consequences would not have followed. The plaintiff should be ordered to pay the all the costs arising from the hearing set down for 25 May 2021.

[30] In the result the following order is made:

1. The special plea of *res judicata* is upheld.

2. The matter is removed from the roll

3. The plaintiff to pay the costs.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for the hand-down is deemed to be ..... 2021.

APPEARANCES

Counsel for plaintiff:	Advocate Marx
Instructed by:	Rossouws Leslie Inc
Counsel for third defendant	Advocate WHJ van Reenen
Instructed by:	Bezuidenhout Lak Attorneys
Date matter heard:	25 May 2021
	Further submissions 25 August 2021
Judgment date:	24 September 2021