IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 57944/2021

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: NO OF INTEREST TO OTHERS JUDGES: NO REVISED: YES	
28 February 2023	_____
DATE	SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA

Plaintiff

and

MICAH DOCTA NKOSI

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

1. This is a summary judgment application in which the plaintiff claims payment of an amount outstanding in respect of a home loan agreement and an order

declaring the defendant's immovable property specially executable in terms of the provisions of rule 46A of the uniform rules of court.

2. The defendant raised the following defences in his plea:

   2.1 lack of jurisdiction;

   2.2 *Res judicata* and issue estoppel;

   2.3 declaring the home loan agreement invalid and unconstitutional due to an unfair term in the agreement; and

   2.4 a right to housing as guaranteed in the Constitution.

3. The respondent appeared in person and made submissions in support of the defences *supra*. The respondent was, furthermore, granted an opportunity to file a list of authorities in respect of the defences.

Jurisdiction

4. Although the home loan agreement was entered into in Sandton, Gauteng, the immovable property and the defendant's chosen *domicilium citandi et executandi* is in Kwa-Zulu Natal.

5. In the result, the defendant denies that this court has jurisdiction to hear the matter.

6. In response, the plaintiff submitted that this court has jurisdiction in terms of section 21 of the Superior Courts Act, 10 of 2013. Section 21(1) provides that

a division will, *inter alia,* have jurisdiction over a person if the cause of action arose in the area of jurisdiction of the court.

7. The loan agreement in *casu* was concluded in this court's area of jurisdiction and as a result, the claim for payment of the amount due in terms of the loan agreement *(ratio contractus)* confers jurisdiction on this court.

8. The fact that the immovable property that is to be declared specially executable is situated in another area of jurisdiction does not alter the position. In *Moodley v Nedcor Bank Ltd* [2007] SCA 27 (RSA), the Supreme Court of Appeal had regard to a similar defence and held as follows at para [4]:

> *"[4] Following the rescission of the order the appellant filed a plea and counterclaim on 2 February 2004. In his special plea, he alleged that the Pretoria High Court lacked jurisdiction over the matter because the property was situated within the Province of Kwazulu-Natal, and also because his chosen domicilium citandi et executandi was there. The* ***special plea was clearly bad*** *because the Pretoria High Court obviously had jurisdiction over the matter on the basis that the cause of action arose there…"* (own emphasis")

9. In the premises, this defence has no merit.

***Res Judicata* and estoppel**

10. The facts underlying this defence are as follows:

10.1 The defendant previously fell in arrears with his obligations under the home loan agreement and the plaintiff issued summons in the Kwa-Zulu Natal Local Division, Durban. On 26 April 2016 judgment was granted in favour of the plaintiff and the immovable property forming the subject matter of this action was declared specially executable.

10.2 On 16 September 2016 the plaintiff abandoned the judgment obtained on the 26th of April 2016.

10.3 On 29 March 2017 the plaintiff also filed a notice of withdrawal of the action.

11. In view of the aforesaid facts, the defendant pleaded that the action is *res judicata* and subject to issue estoppel.

12. Mr Rakgoale, counsel for the plaintiff referred to various authorities in which it was held that a plea of *res judicata* cannot be sustained if an action was withdrawn.

13. I agree. Rule 41(1)(a) specifically provides as follows:

"A person instituting any proceedings may at any time <u>before the matter has been set down</u> and thereafter by consent of the parties or leave of the court withdraw such proceedings, …." (own emphasis)

14. The withdrawal of the action entails that the matter is not heard and no decision is taken on the merits of the dispute between the parties. In the result *res judicata* does not arise.

15. Once an action has run its full course and judgment has been delivered in respect of the merits of the action, rule 41(2) however, comes into play. Rule 41(2) provides that:

"Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment."

16. The legal consequences of the abandonment of a judgment are, for obvious reasons, vastly different from the consequences that follows from the withdrawal of an action.

17. In **Body Corporate of 22 West Road South v Ergold Property Number 8 CC** 2014 JDR 2258 (GJ). Boruchowitz J stated the following:

"*It is common cause that on 18 October 2010 default judgment was granted in favour of the applicant against the respondent for payment of the sum of R123 101.60, together with interest and costs. Relying on that judgment, the plaintiff issued a warrant of execution and attached a Porche Cayenne motor vehicle. An application was thereafter launched to interdict the plaintiff from levying execution. It appears from that application that the*

default judgment had been erroneously granted without a notice of bar having been served on the defendant.

The plaintiff's attorney elected to abandon the judgment and invoked the provisions of Rule 41(2). That Rule reads:

'2.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 giving notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provision of sub-rule (1) relating to costs shall mutatis mutandis apply In the case of a notice delivered in terms of this sub-rule.'

Counsel for the plaintiff sought relief principally on two arguments. The first is that the judgment is a nullity and as such could not support the defence of res judicata. Reliance in this regard was placed upon two decisions, the decision The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA) and Baloyi NO v Schoeman NO and Others [2003] 4 All SA 261 (NC).

The second proposition contended for was that the plaintiff's invocation of the provisions of Rule 41(2) had the effect of setting aside or rescinding the judgment. It was argued that once the provisions of Rule 41 were invoked the judgment no longer had any legal effect and therefore could not sustain a plea of res judicata.

In the Motala decision the Supreme Court of Appeal reaffirmed that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. Reference was made to the case of Lewis and Marks v Middel 1904 (2S) 291 in which it was held that where an order was null and void a court may, upon proof of such invalidity, disregard the judgment without the necessity of a formal order setting it aside.

In Motala the court below granted an order interdicting the Master from appointing a particular person or persons as a judicial manager. It was held on appeal that the court below was not empowered to issue such an order, as the power to appoint a judicial manager had been expressly left to the Master in terms of the Companies Act. The order granted was thus a nullity (see para 14 of the Motala judgment).

In Baloyi, judgment was granted for the outstanding balance of a purchase price where the underlying contract did not contain an acceleration clause. Judgment was thus granted on a non-existent cause of action. Such summons was held to constitute a nullity. In Baloyi there had also been an abandonment of the judgment, and it was emphasised that the abandoned judgment was a nullity and therefore could not sustain a plea of res judicata (see Baloyi paras 22 to 25).

Unlike the facts in Motala and Baloyi, the judgment in the present instance is not null and void. The legal basis for the default judgment in the recent instance is distinguishable from those in the Motala and Baloyi cases. Here, judgment was obtained without service upon the defendant of a notice of bar as required in terms of Rule 31. Such failure constituted an irregularity and did not render the judgment a nullity. There is a clear distinction in our law between juristic acts that constitute a nullity and those constituting an irregularity. When an irregular step has been taken the opposite party may have to avail itself of the provisions of Rule 30 and apply to set that step aside as an irregular proceeding. The first contention advanced on behalf of the plaintiff is therefore rejected.

I do not agree with the plaintiffs second contention that the invocation of Rule 41(2) had the effect of setting aside or rescinding the judgment and therefore such judgment could not sustain a plea of res judicata. It is settled

law that parties to a judgment cannot unilaterally or by consent cancel a judgment. A judgment stands until either rescinded or set aside by a court of appeal.

The grant of a judgment, whether by default or otherwise, has important legal consequences. It stands until set aside by a court of competent jurisdiction, and until that is done it must be obeyed even if the court order was incorrectly granted (see Clipsal Australia (Pty) Limited v GAP Distributors 2010 (2) SA 289 (SCA) pares 21 and 22 and the reference therein to the decisions of Kotze v Kotze 1953 (2) SA 184 (C) at 187f-g; Culverwell V Beira 1992 (4) SA 490 (W) at 494a-e; Bezhuidenhout v Patensie Citrus Beherend Bpk 2001 (2) SA 224 (E) at 228f to 230 a. See also in this regard Motala supra.

The act of abandonment is of a unilateral nature and operates ex nunc and not ex tunc. 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. The opposite party need not accept such abandonment. It was open to the defendant to accept the abandonment, which it did not do in the present case. Had the defendant accepted the abandonment it would have been precluded from raising a plea of res judicata."

18. In the result, the defendant has disclosed a *bona fide* defence to the plaintiff's claim and leave to defend the action should follow.

19. In view of the aforesaid finding, it is not necessary to consider the remainder of the defendant's defences.

ORDER

1. Leave is granted to the defendant to defend the action.
2. Costs is costs in the cause.

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N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of hearing: 14 February 2023

Date of judgment: 28 February 2023

APPEARANCES

COUNSEL FOR THE PLAINTIFF: **Advocate R Rakgoale**

ATTORNEYS FOR THE PLAINTIFF: **Vezi De Beer Inc**

APPERANCE FOR THE DEFENDANT: **Appeared in person**