

HUBERT NYAMBUYA
and
HUGHER PETROLEUM (PVT) LTD
versus
BRENT OIL AFRICA (PROPRIETARY) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 March and 18 May 2016

Opposed Application

S Hashiti, for the plaintiffs
A B C Chinake, for the defendant

TAGU J: This is an application for rescission of judgment in terms of Order 49 r 449 subrule 1 (b) of the High Court Rules, 1971 for the rescission of the judgment obtained by the respondent under case No. HC 1292/12. The basis of the application being that the judgment under case No. HC1292/12 is erroneous as it was granted against the wrong parties who never contracted with the respondent. The application is opposed by the respondent.

At the hearing of the matter the respondent took a point *in limine* and prayed that the application be dismissed with costs *de bonis propiis* and that the conduct of the applicants' legal practitioners be reported to the Law Society of Zimbabwe since the application is a gross abuse of legal process wherein the applicants are seeking a third bite of the cherry. The point *in limine* taken by the respondent is that an application for rescission of judgment before this Honourable Court was previously made by the applicants and dismissed. In short the respondent submitted that the court is now *functus* and raised the defence of *res judicata*. In support of its point *in limine* the respondent attached the judgment of Honourable Mathonsi J under HC 1292/12.

The brief history of the matter is that the respondent issued summons against the applicants claiming US \$677 366.00 in respect of diesel fuel they had allegedly appropriated. The summons was served on the applicants on 6 February 2012. The applicants did not enter

appearance to defend until the *dies inducae* expired. They tried to enter a defective appearance on 21 February 2012 when the bar was now operational against them. A default judgment was entered against them on 1 May 2012 followed by writ of execution dated 11 June 2012. They instituted a defective application for rescission of the default judgment under case HC 1292/12 in terms of r 63 (2) of the High Court Rules. They further instituted a defective application for stay of execution which was dismissed by the High Court on the return day under case HC 2719/12. The application for rescission was dismissed by Mathonsi J in a written judgment in HC 1292/12 where a scathing of the conduct of the applicants and their legal practitioners was made.

Still undeterred by the scathing attack by Mathonsi J the applicants mounted this current application for rescission of the same judgment now in terms of Order 49 r 449. This prompted the respondent to raise the point *in limine* that the matter is now *res judicata* and the court is *functus*.

The issue this court is seized with now is whether or not the point *in limine* has been properly taken or not. *Res judicata* is a special plea that can be raised by a defendant seeking to quash the action by pleading that the same cause has already been tried and decided upon by some other court of competent jurisdiction. See Herbstein & van Winsen – *The Civil Practice of High Courts of South Africa*, 5th ed, Vol 1 at p 598.

At law, therefore, a defendant may plead *res judicata* as a defence to a claim that raises an issue disposed of by a judgment delivered in a prior action between the same parties, concerning the same subject-matter and founded on the same cause of action. See *Lowrey v Steedman* 1914 AD 532; *Narshi Ranchod NO* 1984 (3) SA 926 (C) at 934 B-C; *POSB v Chimanikire* 2005 (1) ZLR 285 at 288 E-G; *Munemo v Muswera* 1987 (1) ZLR 20; *Maparura v Maparura* 1988 (1) ZLR 234 (HC) and *Stephen Pasipanodya N.O v Tracy Ruwizhi & Another* HH 82, 2009.

The same principle was expressed by Friedman JP in *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (B) following *Kommissaris van Binnelade Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (SCA) where it was said-

“...the essentials of the exception *res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject-matter, or thing (*de eadem re*).”

In *casu* there is a judgment in HC 1292/12 by Mathonsi J previously given between the same parties involving the same subject matter. The slightest difference is that in HC 1292/12 the application for rescission was made in terms of r 63 while the application in the present matter is in terms of r 449. In my view what is sought in both applications is to rescind judgment given in case HC 1292/12. At the end of the day to allow the application will amount to allowing the applicants a third bite of the cherry as explained by the defendant. The decision by Mathonsi J is still extant. It has not been overturned nor appealed against. The applicants are alleging that the judgment in HC 1292/12 was granted in error. When *res judicata* is raised the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment. See *African Farms & Townships v Cape Town Municipality* 1963 (2) SA 555 A at 564.

Hence a default judgment, granted in error and which should have been set aside or rescinded, stands and constitutes *res judicata* until set aside. See *Jacobson v Havinga t/a Havingas* 2001 (1) SA 177 (T).

In the present case the applicants applied for rescission in case HC 1292/12 and lost. That decision cannot be revisited. The only option open to the applicants if they were not satisfied by that decision was to appeal. At the very least, if the applicants felt that the judgment was issued in error, should have made the application in terms of r 449 at the very beginning. In the circumstances the preliminary point taken by the respondent is meritable and capable of disposing this matter. The point *in limine* is therefore upheld.

I will now turn to deal with the issue of costs. The respondents submitted that the present application amounts to a gross abuse of legal process and ought to be sanctioned with an order of costs *de bonis propiis* against Tawanda Law Practice. They asked that the copy of the order made by this honourable court be served on the Secretary of the Law Society of Zimbabwe and that the Law Society should take such steps as they may be required or directed by this Honourable Court in accordance with the Law Society of Zimbabwe regulations and guidelines. See *Matamisa v Mutare City Council* (AG Intervening) 1998 (2) ZLR 439.

Given the number of blunders made by the applicants' counsels in this matter, and if regard is heard to the judgment by MATHONSI J, I am persuaded that this case deserves to be referred to the attention of the Law Society of Zimbabwe, and that since it was clear from

the onset that the application is doomed to fail, and that the respondent has been put to unnecessary cost of opposing this application and filing heads of argument with no prospects of recovery of the costs from the applicants, the applicants' lawyers be visited with costs *de bonis propiis*.

In the result it is ordered as follows-

1. The application for rescission of default judgment granted in case HC 1292/12 be and is hereby dismissed.
2. Applicants' legal practitioners to pay costs *de bonis propiis*
3. The copy of this order be and is hereby referred to the Secretary, Law Society of Zimbabwe who will take such steps as they may be required in accordance with the Law Society of Zimbabwe regulations.

C Nhemwa and Associates, applicants' legal practitioners
Kantor and Immerman, respondent's legal practitioners