THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1424/2018

In the matter between:

THEMBINKOSI KHULEKANI RUDOLF JIYANA **FIRST APPELLANT**

NOMVO JIYANA **SECOND APPELLANT**

and

ABSA BANK LIMITED **FIRST RESPONDENT**

CAPE TOWN NORTH SHERIFF **SECOND RESPONDENT**

GARY NIGEL HARDISTY **THIRD RESPONDENT**

JENNIFER JEANINE DOROTHY HARDISTY **FOURTH RESPONDENT**

REGISTRAR OF DEEDS, WESTERN CAPE **FIFTH RESPONDENT**

Neutral citation: *Jiyana and Another v Absa Bank Limited and Others* (1424/2018) [2020] ZASCA 12 (19 March 2020)

Coram: PETSE DP, WALLIS, MAKGOKA, SCHIPPERS and MBATHA JJA

Heard: 18 February 2020

Delivered: 19 March 2020

Summary: Peremption – effect of settlement agreement – appellants signed a settlement acknowledging validity of a judgment which they previously sought to set aside – appellants perempted from further challenge to validity of judgment.

Res judicata – appellants' rescission application against a default judgment dismissed – appellants applying again to declare the default judgment a nullity – latter application effectively sought same relief as in the rescission application – defence of res judicata correctly upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Boqwana J, Allie and Samela JJ concurring sitting as a court of appeal):

The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

Makgoka JA (Petse DP, Wallis, Schippers and Mbatha JJA concurring)

[1] This appeal, with special leave of this court, is against the judgment of the full court of the Western Cape Division of the High Court (the high court). That court dismissed the appellants' appeal against a judgment of a single judge, who had dismissed the appellants' application for certain declaratory orders to set aside a default judgment granted against them, and the consequences of execution of that judgment. It should be mentioned at this stage that none of the second to fifth respondents took part in this appeal.

[2] The appeal has its genesis in a default judgment granted by the high court on 15 April 2014 against the appellants, Mr and Mrs Jiyana, in favour of the first respondent, Absa Bank Ltd (Absa). The appellants, husband and wife, had concluded a loan agreement with Absa in January 2004 for the purchase of their immovable property known as erf 1593 Parklands, situated in Cape Town (the

property).[1] A mortgage bond was registered over the property in favour of Absa to secure the loan.

[3] The appellants defaulted on their repayment obligations to Absa, which issued summons in the high court in November 2006 for payment of the outstanding amount and for an order declaring the property specially executable. In the absence of a notice of intention to defend by the appellants, default judgment was granted against them in June 2008, followed by a warrant of execution for the sale of the property in execution. The appellants subsequently applied for a stay of execution and the rescission of the default judgment. The latter application was set down for 3 November 2008.

[4] On 13 October 2008 the parties concluded a settlement agreement, which was made an order of court. In terms of that order, the appellants would settle the arrears by 7 November 2008, in addition to the monthly bond instalments. The order also provided that should the appellants fail to make the payments as agreed, the respondent would be entitled to apply for judgment for the outstanding balance under the mortgage bond, and for an execution order against the property.[2] As a result of this order, the appellants' rescission application on 3 November 2008, was granted on an unopposed basis.

[5] Pursuant to the order of 13 October 2008, the appellants settled the arrears on their account, but again fell into arrears in May 2013. In March 2014 Absa applied to the high court, seeking payment of the full outstanding amount and an order declaring the property specially executable, as it was entitled to do in terms of the October 2008 order. The appellants failed to oppose the application, and default judgment was granted against them on 15 April 2014. The several attempts made by the appellants to invalidate this default judgment lie at the heart of this case.

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[1] Although the loan agreement was concluded before the coming into effect of the National Credit Act 34 of 2005 (NCA) on 1 June 2006, in terms of item 1 of schedule 3 of the NCA, the loan agreement became governed by the NCA as a 'pre-existing' credit agreement, which is defined as 'an agreement that was made before the effective date and to which this Act applies.'

[2] The procedure set out in that court order is provided for in rule 41(4) of the Uniform Rules of Court.

[6] On 10 June 2014 the appellants applied for rescission of the two orders referred to above (the October 2008 order and the default judgment). Their complaint in respect of both orders was that the court had failed to take into account their rights in terms of s 26(3) of the Constitution not to be deprived of a home without an order of court after considering all the relevant circumstances. The application came before court on 6 November 2014. During argument, the first appellant, who appeared in person and on behalf of the second appellant, made a muted reference to Absa not having complied with s 129(1) of the National Credit Act 34 of 2005 (NCA).[3]

[7] None of the arguments found favour with the court. With regard to the October 2008 order the court observed that it was made by consent, and was therefore neither a default judgment nor a judgment obtained in the absence of the appellants. Regarding the default judgment, the court remarked that it was not clear on what factual basis non-compliance with the NCA was asserted. Accordingly, it took the view that absent such a basis, that argument was not open to the appellants. Consequently the application for rescission of the two orders was dismissed.

[8] Following the dismissal of the rescission application, the property was attached. A sale in execution was scheduled by the sheriff for 3 February 2015. The appellants applied for leave to appeal against the dismissal of the rescission application. That application was dismissed on 10 December 2014. The appellants applied to this court for leave to appeal, which application was dismissed on 26 March 2015. The appellants' further application for leave to appeal to the Constitutional Court was similarly dismissed on 27 July 2015.

[9] On 27 August 2015, the parties concluded another settlement agreement for the payment of the arrears, and ancillary provisions. I shall revert to that agreement later in the judgment. Once again, the appellants failed to comply with the terms of

[3] That section provides for the service of a notice by a credit provider on a consumer notifying them of their default, and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date. A credit provider is precluded from commencing any legal proceedings to enforce the agreement before first providing such notice to a consumer.

the agreement. As a result, Absa caused a further sale in execution of the property to be arranged, which the sheriff scheduled for 5 April 2016. On 30 March 2016, a week before the sale in execution, the appellants launched an urgent application to stay the sale. The application was dismissed, and so was the subsequent application for leave to appeal. On 5 April 2016 the property was sold in execution to the third and fourth respondents, and was transferred into their names on 10 June 2016. The appellants' application for leave to appeal against the refusal to stay execution was subsequently dismissed by this court.

[10] On 5 September 2016 the appellants launched the application for declaratory relief, to which this appeal relates. They sought a declaratory order that the credit agreement between them and Absa was lawfully reinstated in terms of s 129(3) of the NCA,[4] upon payment of the arrears pursuant to the October 2008 agreement. Accordingly, the appellants sought relief setting aside all that had been done after the reinstatement, namely: the default judgment granted against them on 15 April 2014; the sale in execution of the property; and, its transfer to the third and fourth respondents. In addition, the appellants sought an order confirming the 'reinstatement' of the credit agreement between the parties in terms of the settlement agreement of 27 August 2015.

[11] The basis of the application was this. The court which considered the application for default judgment should have verified that the appellants had paid all the arrears pursuant to the October 2008 order. Upon such payment, the credit agreement had been reinstated by operation of law. If Absa wished thereafter to enforce the credit agreement, it had to issue a fresh notice in terms of s 129(1) of the NCA. Absent such notice, Absa was not entitled to apply for default judgment. By failing to make such an enquiry, and by granting judgment under those circumstances, the court violated s 130(3) of the NCA, which enjoins a court to ensure that the court may determine a matter concerning the enforcement of a credit agreement only if it is satisfied that s 129(1), among others, has been complied.

[4] The section provides that a consumer may at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement.

[12] This, the appellants asserted, rendered the default judgment a failure of justice, a breach of s 1 of the Constitution, and overall, a nullity. For this proposition the appellants sought refuge in *Nkata v Firstrand Bank Ltd and Others* 2014 (2) SA 412 (WCC). There, the high court at para 34 held, although somehow tentatively, that payment of arrears had the effect of reinstating a credit agreement, and that if the consumer again fell into arrears, the credit provider had to obtain a fresh judgment and authority to execute after complying again with the provisions of s 129(1) of the NCA.[5]

[13] The application was dismissed on 29 June 2017. The subsequent appeal to the full court met the same fate on 17 August 2018. Both courts rejected the appellants' submission that the default judgment was a nullity. They further concluded that the issues raised in the application for declaratory relief were res judicata between the parties. The issues, they concluded, were finally pronounced upon by the Constitutional Court when it refused leave to appeal on 27 July 2015. However, this court granted the appellants leave to appeal.

[14] Both the court of first instance and the full court commendably gave detailed and closely reasoned judgments. However, I take a much narrower view. The anterior issue is peremption – whether it is at all permissible for the appellants to impugn the default judgment in the light of the settlement agreement of 27 August 2015. Then there is the applicability of the doctrine of res judicata. I consider these in turn.

[15] The law on peremption is settled. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he or she does not intend to attack the judgment, then they are held to have acquiesced in it. The conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. The onus of establishing that position is upon the party alleging it. See *South African Revenue Service v Commission for Conciliation, Mediation and*

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[5] That tentative view was confirmed by the majority of the Constitutional Court in *Nkata v Firstrand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC) paras 101 – 106.

Arbitration and others [2016] ZACC 38; 2017 (1) SA 549 (CC) para 26 with reference to *Dabner v South African Railways and Harbours* 1920 AD 583 at 594.

[16] In this case, the conduct of the appellants appears from the settlement agreement concluded between the parties on 27 August 2015. It is a detailed agreement, providing for payment of the outstanding amount and for the payment terms. The crucial portion is contained in clause 1. There, it is provided that 'defendants [appellants] confirm that the judgment against them stands and [they] accept liability to plaintiff [Absa] jointly and severally for payment of R391 797.06.' The agreement made further provision for an order declaring the property specially executable in the event of non-compliance. It is common cause that the judgment referred to in that settlement agreement is the default judgment. Clauses 1.1 to 1.4 mirror clauses 1 to 4 of that judgment in terms of the amount owed, interest payable, special executability of the property and costs.

[17] By confirming to the validity of the default judgment and accepting their liability towards Absa pursuant to that judgment, it was no longer open to the appellants thereafter, to impugn it. As explained by the Constitutional Court in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 CC para 31, the result of a settlement agreement made an order of court is that a party is precluded from relying on a cause of action or defence that could have been advanced or raised but for the settlement order. Although the remarks in *Eke* were made in respect of an agreement made an order of court, in my view, they apply with equal force to settlement agreements which do not have the imprimatur of a court order.

[18] In my view, there could be no clearer conduct pointing to the abandonment of their right to attack the default judgment than clause 1 of the settlement agreement. The appellants clearly resigned themselves to the consequences of the judgment against them, and committed themselves to fulfilling its terms. It was suggested in argument that the appellants were in some way coerced by Absa into concluding this agreement. This suggestion is refuted by the fact that the first appellant, Mr Jiyana, a former practising attorney and a businessman, wrote to Absa on 9 July 2015, before the Constitutional Court refused him and his wife leave to appeal against the refusal

of the rescission application, asserting that they were in a position to pay the outstanding arrears and service the bond and suggesting that they conclude a settlement agreement. The conclusion is accordingly inescapable that the appellants are perempted from impugning the default judgment. Whatever irregularities there might have been in the manner in which that judgment was sought and granted, were ratified in clause 1 of the settlement agreement. That should ordinarily be the end of the matter. I will however, also consider the res judicata argument,[6] to which I now turn.

[19] A matter is res judicata if in the previous proceedings, the matter adjudicated upon was for the same cause, between the same parties and the same thing was demanded. See *Smith v Porritt and others* 2008 (6) SA 303 (SCA) para 10 in which a flexible approach was adopted to the doctrine of res judicata. That approach was approved by the Constitutional Court in *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC) paras 22 and 23. To consider whether this threshold had been met in the present case, it is necessary to consider the applications for leave to appeal against the dismissal of the rescission application in this court and in the Constitutional Court. Those applications were not before us. At our request, the application to the Constitutional Court was subsequently furnished to us. We also had regard to the application for leave to appeal in this court.

[20] In both applications, the appellants' main argument was two-fold. First, that they were not in wilful default as they had not been served with the application for default judgment. Second, that Absa had not complied with ss 129 and 130 of the NCA which had the effect that the appellants could not 'exercise their rights in terms of the NCA.' This in turn, so went the submission, violated the appellants' rights enshrined in ss 25, 26 and 34 of the Constitution.

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[6] See *S v Jordaan & others (Sex Workers Education and Advocacy Task Force & others as amici curiae,* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) para 21 where it was held that where a provision or decision is attacked on one ground that is considered decisive of the matter, the other grounds raised in the matter should nevertheless be ventilated and decided upon for the benefit of a court that may later have to hear an appeal arising from that matter.

[21] Having set out what was submitted in the Constitutional Court, it has to be determined whether the appellants demanded the 'same thing' in the application for declaratory relief. I have already mentioned that non-compliance with s 129(1) was raised in the rescission application, albeit mutedly. In light of the facts of this case, that argument could only have been raised in the context of re-instatement of the agreement following the payment of the arrears pursuant to the October 2008 order. As appears from the preceding paragraph, the same argument was made in the applications for leave to appeal in this court and in the Constitutional Court. In the application for declaratory relief that issue was one of the key contentions.

[22] Counsel for the appellants urged us to consider, with reference to *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) and *National Sorghum Breweries Ltd (t/a) Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (SCA), that what was sought in the application for declaratory relief was totally different from the relief sought in the rescission application.

[23] *Evins* involved the question whether at common law a claim for damages by a plaintiff for bodily injury and the claim for damages by the same plaintiff for loss of support caused by the death of a breadwinner (where both the bodily injury and the death result from the same accident) were separate causes of action or simply facets of a single cause of action. This court concluded at 839D that even though the two claims may flow from the same event or accident, the cause of action in each may arise at different times. In respect of bodily injury this will normally arise at the time of the accident, whereas in the case of death, the cause of action for loss of support will arise only upon the death of the deceased, which may be different from the date of the accident. The one claim arose from the injuries suffered by the plaintiff, while the other arose from the death of the breadwinner, and these were held to constitute separate causes of action.

[24] The appellants' position is different. Their right to challenge the default judgment on the grounds that the credit agreement had been reinstated under s 129(3) of the NCA was not deferred, but existed when they applied for rescission of

the default judgment. Unlike a claimant for loss of support whose claim does not arise until death occurs, the appellants faced no such impediment. The right to challenge the default judgment on any available legal ground inured to them immediately the judgment was given. They initially elected to apply for rescission, and in these proceedings sought to have the default judgment set aside, which was in essence the same as seeking its rescission. Only when rescission was unsuccessful did the appellants launch the review application. This is impermissible. It follows that the *Evins* principle does not avail the appellants.

[25] In *National Sorghum*, the respondent had obtained default judgment against the appellant for restitution flowing from breaches of three written agreements between the parties. Later, in a second action the respondent claimed damages suffered as a result of the breach of contract. The appellant's special plea of res judicata was dismissed on the basis that the claims were not based on the same grounds or cause of action. In the first suit the cause of action was a claim for repayment of the purchase price, whereas the second was a claim for damages consisting of expenses which the respondent had incurred in carrying out its obligations under the agreements, and loss of income.

[26] In the present case, the common 'cause of action' in the rescission application and the application for declaratory relief was whether the default judgment should remain of force and effect. The relief in both instances was the same, ie the setting aside of that judgment. It is irrelevant whether one aims to 'rescind' it or set it aside as claimed in the notice of motion or 'declare it a nullity, as counsel expressed it.' Its true nature was not altered by pinning a new label on the review application, or by advancing different reasons from those in the rescission application. The relief sought was essentially the same, namely to undo the default judgment. As pointed out in *African Farms & Townships v Cape Town Municipality* 1963 (2) SA 555 (A) at 563C-E, different reasons leading to a different conclusion cannot affect the identity of the question to be decided. In all the circumstances, the issue was res judicata.

[27] Counsel for the appellants also attacked the October 2008 order, in particular, clause 7 thereof. That clause provided that in the event that the appellants failed to

comply with the terms of the order, Absa was entitled to apply for judgment for the outstanding amount, on five days' notice to the appellants. Counsel submitted that the clause was unlawful in light of s 90(2)(*a*)(i) and 90(2)(*b*)(i), which respectively prohibit provisions in credit agreements that defeat the purposes of the NCA or deprive a consumer of a right set out in the NCA.

[28] The appellants are not entitled to revisit this point. As set out in paras 5 and 6 above, part of the rescission application was aimed at setting aside several clauses of the October 2008 order, including clause 7. That was dismissed. Applications for leave to appeal against the refusal of rescission were dismissed by this court and the Constitutional Court. In all the circumstances, I conclude that the 'same thing' was demanded by the appellants in the rescission application, the various applications for leave to appeal and in the application for declaratory relief, ie the setting aside of the default judgment. The issue was plainly res judicata.

[29] Closely allied to the doctrine of res judicata, is the 'once and for all' rule. In *Evins* at 835E it was held that the purpose of the rule is to 'prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.' See also *National Sorghum* para 10, where it was observed that the scope of the rule requires that all claims generated by the same cause of action be instituted in one action'.

[30] In *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E it was held that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. If a cause of action has previously been finally litigated between parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by a defence of res judicata.

[31] The argument by the appellants was that the credit agreement had been reinstated when the arrears were paid. Resultantly, when they again fell into arrears, Absa was obliged to again comply with s 129 before taking judgment. As stated already, that argument was based on *Nkata* para 34. By the time the rescission

application was launched, *Nkata* had been handed down six months earlier, on 16 January 2014. Thus, that argument was available to the appellants then.

[32] It is therefore inexplicable that in their supporting affidavits, the appellants did not assail the default judgment on the basis that it was erroneously granted for want of compliance with *Nkata*. In terms of the once and for all rule, the appellants are not permitted to revisit the issue. When the attack on the default judgment was considered the appellants were bound to put their whole case before court. They were bound to assemble all the weapons in their arsenal to set aside the default judgment, which included *Nkata*.

[33] Although they did not refer to *Nkata*, without specifying the basis therefor, they raised non-compliance with s 129(1), which could only have been required if the agreement had been reinstated under s 129(3). It is of their own doing that the application was dismissed on that basis. They are not permitted, without special circumstances, to approach the court again on a different basis. Their assertion that the law was uncertain until the Constitutional Court judgment handed down its judgment in *Nkata* is unconvincing. That there was an application for leave to appeal pending in the Constitutional Court at the time of the rescission application, did not prevent the appellants from relying on the high court judgment, subject to the outcome of the appeal.

[34] In all the circumstances, the appeal must fail. It is dismissed with costs, including costs of two counsel.

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T M Makgoka

Judge of Appeal

APPEARANCES:

For the Appellants:	M Donen SC
Instructed by :	Godla & Partners Inc., Cape Town
	Matsepes Inc., Bloemfontein
For First Respondent:	A Bham SC (with him P Ngcongo)
Instructed by :	Webber Wentzel, Johannesburg
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