THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1290/18

In the matter between:

LIBERTY GROUP LIMITED t/a LIBERTY LIFE	**APPELLANT**

and

K AND D TELEMARKETING	**FIRST RESPONDENT**
KAREN SHAFER	**SECOND RESPONDENT**
ERIC BUTOWSKY	**THIRD RESPONDENT**

Neutral citation: *Liberty Group Ltd v K & D Marketing* (Case no 1290/18) [2020] ZASCA 41 (20 April 2020)

Coram: NAVSA and VAN DER MERWE JJA and LEDWABA AJA

Heard: 11 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 20 April 2020.

Summary: Effect of an order of absolution from the instance at end of trial – application to reopen a case under same case number on same pleadings in order to thwart prescription-not permissible.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J, sitting as court of first instance): judgment reported *sub nom Liberty Group Limited t/a Liberty Life v K and D Telemarketing CC and Others* [2015] ZAGPPHC 1135.

The appeal is dismissed with costs.

JUDGMENT

Ledwaba AJA (Navsa and Van der Merwe JJA concurring)

[1] The central issue in this appeal is whether, after an order of absolution from the instance at the end of a trial, the appellant, Liberty Group Limited t/a Liberty Life (Liberty), was entitled to reopen its case, to pursue its original claim on the same pleadings, in an attempt to thwart a plea of prescription. The Gauteng Division of the High Court, Pretoria (Tuchten J), dismissed the appellant's application for leave to reopen its case. The question is whether that conclusion was correct. The background is set out hereafter.

[2] In about June 2009 the appellant and first respondent, K and D Telemarketing, entered into a written commission agreement in terms of which the latter would act as an independent intermediary to canvas insurance contracts on the appellant's behalf.

[3] In 2010, Liberty issued summons under case no 75525/2010 against the respondents and claimed R 515 964.95, being the commission paid to the first respondent on the basis that the insurance policies registered by the first respondent had lapsed. In terms of the commission agreement the first respondent was liable to refund the appellant the commission paid. The second and third respondents, Ms Karen Shafer and Mr Eric Butowsky, were sued as sureties.

[4] The trial was conducted in April 2015 before Louw AJ. Two witnesses testified in support of Liberty's case. After their testimony Liberty closed its case. Thereupon the respondents applied for absolution from the instance. That application was refused.

[5] The respondents proceeded to lead the evidence of one witness and thereafter closed their case. Judgment was reserved and delivered on 4 September 2015, absolving the respondents from the instance with costs. The trial court found that the appellant had not presented sufficient evidence to prove that its claim was correctly calculated. In short, the court held that quantum was not proved. In respect of Mr Butowsky, the court found, in addition, that the suretyship had not been proved. Louw AJ's judgment was not appealed against. It is necessary to record that on the day that Louw AJ handed down his judgment Liberty's claim if it had to be pursued anew had become prescribed.

[6] Subsequent to the judgment in February 2016 and March 2016, Liberty delivered a notice of amendment in terms of Rule 28 and a summary of expert evidence in terms of Rule 36. It sought thereby to rectify the gap in its case, which led to the order of absolution from the instance. The respondents regarded the procedure followed by the appellant as irregular and challenged it. The challenge was upheld. In upholding the objection to the steps sought to be taken by Liberty, Van der Westhuizen AJ observed that a plaintiff against whom an order for absolution is made, and who wants to proceed on the same papers, must apply to court for leave to do so.

[7] Thereafter, Liberty brought an application for leave to reopen the trial. That application was dismissed by Tuchten J. Liberty, with the leave of the court below, now appeals against that decision.

[8] The court below noted that there was no doubt that it was competent for a plaintiff to reopen its case after absolution was granted at the end of the defendant's case. It is clear that in such an instance a defendant cannot raise a plea of *res judicata*. The court below had regard to the decision of this court in *Colman v Dunbar* 1933 AD 141. In that case this court had to consider whether to hear further evidence on appeal where a judgment of absolution of the instance had been entered. The court held (at 160-161) that it was empowered both, to hear further evidence itself or to remit the matter to the trial court for this purpose. The court below noted that in *Colman* an appeal had been lodged, which distinguished

it from the facts of this case, because the appellant had never sought to appeal the order of Louw AJ.

[9] In terms of chronology the court below recorded that Liberty had instituted action against the defendants in 2010, had absolution awarded against it in 2015 and did not appeal the order of absolution. It was only in 2017 that Liberty sought the leave of the court below to reopen its case. This was done because, if it reinstituted action, Liberty would be met with a special plea of prescription. The court below stated that there were a number of reasons why the application before it could not succeed. It stated that a litigant faced with an order of absolution of the instance always has the right to bring further proceedings to enforce his or her claim and that he or she may do so by instituting proceedings afresh. For that a plaintiff does not require the leave of the court.

[10] Tuchten J went on to state that a plaintiff could also pursue his or her claim by proceeding on the same papers and for that it required a court's permission. But whichever route is followed a plaintiff must proceed *de novo*. In this regard the court below referred to a decision of this court more than a century ago, namely, *Steytler v Fitzgerald* 1911 AD 295 at 304. At para 24 of the judgment of the court below, Tuchten J said the following:

'That, to my mind, identifies the most important reason why the main application must fail. [Liberty] does not ask, and has never asked, that the order of absolution be set aside. The consequence of that, counsel all agree, was that prescription supervened. No order of a

procedural nature can deprive the [respondents] in this case of the right to invoke that defence.'

[11] The court below took the view that Liberty had not made out a case for the development of the common law and that, in any event, the common law could not be developed because of the provisions of the Prescription Act 68 of 1969.

[12] *Steytler* is the definitive answer to whether Liberty's application in the court below ought to have succeeded. At 304 Lord De Villiers CJ said the following:

'Take the case of a judgment of absolution from the instance. It is classed by *Voet* (42.1.5), among interlocutory sentences, but it has the force of a definitive sentence inasmuch as by our practice the particular suit in which it has been pronounced is ended, and a fresh suit is necessary to enable the plaintiff again to proceed against the same defendant. It has accordingly been frequently held in our Courts that a judgment of absolution from the instance may be appealed against, and such appeals have been brought from the Cape Supreme Court to the Privy Council. It would be different, however, where a Court refuses to grant absolution from the instance on the application of the defendant. Such a refusal is purely interlocutory and has not the effect of a definitive sentence, inasmuch as the final word in that suit has still to be spoken.'

[13] Counsel on behalf of Liberty relied on the decision of this court in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563 as authority for its submission that it was entitled to reopen its case on the same papers. In *African Farms*, Steyn CJ said the following (at 563E-F):

'As pointed out in *Purchase v Purchase* 1960 (3) SA 383 (N) at 385, dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent. The equivalent of absolution from the instance would be that no order is made, or that leave is granted to apply again on the same pers.'

That dictum relates to motion proceedings. In motion proceedings, usually in unopposed matters, an applicant might be given leave to approach a court on the same papers, supplemented if so advised. That is not an order susceptible to appeal. It is no authority for the proposition that it is permissible, after an order of absolution from the instance, to reopen a trial under the same case number on existing pleadings. The only equivalence is that in either instance a defence of *res judicata* could not be raised. This would be so when an action is instituted *de novo* or when the application, in terms of leave having been given, is brought on the same papers, supplemented, if so advised. That is what the dictum in African Farms was conveying.

[14] The dictum from *Steytler* cited above makes it clear that it is established practise that a decision of absolution from the instance in a trial has the effect of a definitive sentence. Simply put, a decision on the sufficiency of evidence led in that suit, by way of an order of absolution from the instance, has a definitive effect and is susceptible to appeal. The court is *functus officio* and has no power or jurisdiction to hear any further evidence in relation thereto.[1] To hold otherwise, that is, if Liberty's contentions were to be upheld, it would have the effect of litigants being

[1] *Minister of Police and Another v Gasa* 1980 (3) SA 387 (N) at 389C-E.

left in a state of uncertainty, in that actions would remain susceptible to resuscitation indefinitely. This offends against the principle of finality in litigation.

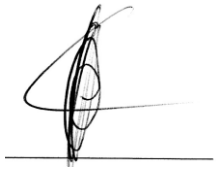
[15] Although Liberty proposed in its heads of argument that the common law as expressed in *Steytler* should be developed so as to enable Liberty to reopen its case, on the basis of the constitutional right of access to courts,[2] counsel did not pursue this with any enthusiasm or vigour. The short answer to that proposition is that Liberty had its day in court. That it provided insufficient evidence to sustain its case is entirely its own fault. There is no systemic failure here. In light of the conclusions reached above, it is not necessary to deal with the submissions by counsel on the effects of the Prescription Act. It suffices that the 1969 Prescription Act has been in effect for 5 decades and that, contrary to counsel's submissions, the practical effect of the 1943 Act[3] on the reinstitution of Liberty's case would have been the same.

[16] Finally, there is no justification for the punitive costs order sought by the respondents. For the reasons set out above it is clear that the appeal must fail.

[2] See s 34 of the Constitution.
[3] Prescription Act 18 of 1943.

[17] The following order is made:

The appeal is dismissed with costs.



A P Ledwaba
Acting Judge of Appeal

Appearances

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