REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

DATE 2 December 2018 SIGNATURE

CASE NO: 33936/2016

In the matter between:

MAPULA SOLUTIONS (PTY) LTD **Plaintiff**

And

AFRICAN BANKING CORPORATION OF ZAMBIA LIMITED **1st Defendant**

AFRICAN BANKING CORPORATION OF BOTSWANA LIMITED **2nd Defendant**

STANDARD CHARTERED BANK JOHANNESBURG BRANCH **3rd Defendant**

STANDARD CHARTERED BANK BOTSWANA LIMITED **4th Defendant**

JUDGMENT

TSOKA J

[1] The plaintiff, Mapula Solutions (Pty) Limited (Mapula Solutions) instituted an action against four defendants, three of which are foreign companies, for payment of damages in the sum of R163 000 000. As three of the four companies are foreign companies, the defendants after pleading over, raised two special pleas, namely lack of jurisdiction by this court and prescription of plaintiff's claim.

[2] At the commencement of the hearing of this matter, the parties agreed in terms of Rule 33(4) to proceed to determine the two special pleas. The defendants have since abandoned the special plea of lack of jurisdiction by this court. Mapula Solutions, however, prays that the court must still pronounce that this court has jurisdiction over the first, second and the fourth defendants. Although the issue of prescription is still alive, the parties have diluted that issue by agreeing that this court should only proceed to determine whether the finding by a Judge in an application for rescission of a judgment obtained by default, where

such judgment was rescinded, is *res judicata*. The issue of prescription thus morphed into the defence of *res judicata*.

[3] The facts, in brief, that gave rise to the issues are the following. On 28 February 2017, the four defendants, on urgent basis, approached this Court for an application rescinding a default judgment granted by Maleka AJ in favour of Mapula Solutions on 12 December 2016. The application served before Weiner J. Having heard the application Weiner J found that the four defendants were not in willful default as the service of the summons, in her view, was irregular. The default judgment granted against the defendants was thus rescinded.

[4] The Sheriff's Return of service rendered in this matter reads -

'This is to certify that on 28 September 2016 at 15:33 at 6th Floor, Green Park Corner, Green Park, Cnr West Road South & Lower Road, Morningside being the chosen domicillium citandi et executandi of Brendan Harmse of TMF Corporate Services (Services) (Pty) Ltd, a copy of the combined summons was duly served upon Mrs Trytsman, the manager, a responsible person, apparently not less than sixteen years of age after the original document had been shown and the nature and contents thereof explained to the said person. Rule 4(1)(a)(v).'

[5] Although it is common cause that the premises were the chosen *domicilium* address of the defendants, they contended that as the summons were not served

on Brendan Harmse but Mrs Trytsman, the service was irregular with the fatal result that the said service did not interrupt prescription hence the contention that Mapula Solutions' claim against the defendants has become prescribed. It being common cause that the claim was instituted three years after it arose.

[6] The crisp issue for determination is therefore whether Weiner J's finding that the service was irregular, even though the default judgment was rescinded, is *res judicata*.

[7] The real issue raised by the defendants in the instant matter is what is the effect of a rescission order, and coupled therewith, whether a finding made in a rescission application is *res judicata*, that is to say, such finding is final and thus no *lis* may arise therefrom.

[8] Almost a century ago, De Villiers JP in *Gatebe v Gatebe*[1] in finding that an order rescinding a judgment granted by default is interlocutory in nature and thus not appealable, stated that such order does not dispose of any of the issues in the main case and has no direct effect upon the final issue. The court unequivocally stated that such order does "not dispose of the main case or of any of the issues

[1] Gatebe v Gatebe 1928 OPD 145 at 149

in the main case, and therefore has not the effect of a definitive sentence in this behalf..."

[9] That an order rescinding a default judgment is not final and therefore not appealable, has been the law since 1928. Since then, there has been a line of decided cases affirming this state of the law. Recently in *Pitelli v Everton Gartens Projects CC*[2], the court, in determining whether judgments by default are final and therefore appealable, stated that –

> *'[26] On the other hand, had the court refused to rescind its order, as it did, that would clearly have been appealable because it would have brought the proceedings to completion in the court of first instance. And had this court then upheld the appeal, the matter would have been remitted to that court to bring the proceedings to completeness.*
>
> *[27] An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order.'*

[10] *Cadit Quaestio*. The proceedings of the court of first instance not being complete and there being a possibility of the order being revisited, there cannot be any contention that an issue of *res judicata* arises. The fact that her Ladyship in the instant matter in rescinding the judgment found that the service of the summons

[2] Pitelli v Everton Gartens Projects CC 2010 (5) SA 171 SCA

was irregular is of no moment. The proceedings in that court not having been completed, the issue of *res judicata,* in my view, does not arise at all.

[11] The defendants, however, are of a different view. Although they readily concede that an order rescinding a judgment granted by default is not final and therefore not appealable, they contend that the pronouncement on the irregularity of service of the summons is final, and that, on the authority of *Prinsloo NO and others v Goldex 15 (Pty) Ltd and Another*[3], the issue of service of the summons has already been decided thus preventing Mapula Solutions ever raising the issue again.

[12] I, however, regret to say that the defendants in the instant matter misunderstood what Brand JA said in Prinsloo. Before restating what Brand JA said in Prinsloo I need to say something about the defendants' assertion that this court has no jurisdiction to hear this matter as the first, second and fourth defendants are *peregrini*.

[13] It has been the defendants' stance since the plea was filed that this court has no jurisdiction in this matter hence the raising of the special plea in that regard. This

[3] Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA) para 10

raising of lack jurisdiction of this court was persisted with in spite of Her Ladyship Weiner J's finding that –

> *'[12] In my view, there is sufficient connection to find that this Court had jurisdiction to hear the matter. There does not appear to be a more appropriate forum conveniens in which this matter could be heard.'*

[14] One would have thought that, as the defendants contend with regard to the service of the summons, that this issue was then *res judicata*. Contrary to their stance with regard to the service of summons, they persisted with the contention that this court lacks jurisdiction and that issue is still alive. To the court's surprise, during argument the issue of lack of jurisdiction was abandoned. If there is double speak, this it is!

[15] Returning to the matter of *Prinsloo*, Brand JA in that matter said –

> *'[10] The expression 'res judicata' literally means the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again…In time the requirements were, however relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in Smith v Poritt and Others 2008 (6) SA 303 (SCA) para 10:*
>
> > *'Following the decision in Boshoff v Union of Government 1932 TPD 345 the ambit of the exceptio res judicata has*

over the years been extended by relation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res) and (eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res iudicata is raised in the absence of commonality of cause of action and relief claimed it has become common place to adopt the English law and speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 66J – 671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence raised remains one of res iudicata. The recognition of the defence in such cases will however 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 (Kommisaris van Binnelandse Inkomste v Absa (supra) at 670 E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others…'

[16] The facts in Prinsloo are a mile apart from the facts in the present case. In that matter the court of first instance was dealing with the sale and purchase of a

farm. An issue of fraudulent misrepresentation arose on which the court of first instance made a finding. When the seller brought an application for leave to appeal, same was refused. Special leave to appeal to the Supreme Court of Appeal was also refused. Sometime later, the purchasers brought a delictual damages claim as a result of the fraudulent misrepresentation. The fraudulent misrepresentation was denied by the seller. The purchasers replicated that since the court of first instance's finding of fraudulent misrepresentation, the *exceptio rei judicata* estopped the seller from denying the allegation. The plea was upheld. On appeal it was held that as the seller had no opportunity to ventilate the issue of fraudulent misrepresentation, to uphold the plea in the circumstances would be unfair. The plea of *res judicata* failed.

[17] In the present matter, the court of first instance did not delve into the merits of Mapula Solutions' claim. Only a preliminary procedural issue was dealt with. The pronouncement by the court of first instance did not have any effect on the merits of the claim. The proceedings between the parties were not brought to finality. The pronouncement could not be appealed against. Evidently, to raise the issue of *res judicata* estoppel in the circumstances of this matter would be unfair to Mapula Solutions.

[18] I conclude therefore that Mapula Solutions, in the circumstances of this matter, cannot be prevented to pursue its claim to finality by the raising of issue estoppel which in essence is the plea of *res judicata*.

[19] Regarding the issue of jurisdiction, it is common cause that the first defendant although incorporated in England, it is registered as an external company in South Africa in terms of the Companies Act 71 of 2008. It is authorized to operate its business of a bank in South Africa by way of a branch under section 18A of the Banks Act 94 of 1990.

[20] The debt rescheduling agreement (the DRA) which is the basis upon which Mapula Solutions' claim is founded, was concluded on 13 September 2011 at Randburg. The DRA is said to be governed by the laws of the Republic of South Africa. Any dispute that may arise from the DRA, the parties agreed, such dispute may be resolved in South Africa in accordance with the laws of this land. The Plaintiff's claim against the defendants is joint and several as the factual events giving rise to Plaintiff's claim against the four defendants are common to each of the defendants.

[21] In the circumstances, I find that this court is the *forum conveniens* as there are sufficient links between Mapula Solution's suit and this country to render litigation

appropriate here rather than in the court of the first, second and fourth defendants' domicile. See *Bid Industrial Holdings (Pty) Ltd v Strong and Another (Minister of Justice and Constitutional Development, Third Party)*[4].

[22] In the result, the following order is made –

22.1 It is directed that this court has jurisdiction on all the four defendants;

22.2 The finding by the court of first instance regarding service of the Summons does not amount to *res judicata* estoppel;

22.3 The plea of *res judicata* estoppel is dismissed with costs including the costs of Senior Counsel.

M TSOKA

JUDGE OF THE HIGH COURT

[4] Bid Industrial Holdings (Pty) Ltd v Strong and Another (Minister of Justice and Constitutional Development, Third Party 2008 (3) SA 355 (SCA) para 55, 56 and 59.

Appearances:

For the Plaintiff:	Adv ARG Mundell SC
Instructed By:	MAP Attorneys
For the Defendant:	Adv JP Daniels SC & Adv K Premhid
Instructed by:	Norton Rose Fulbright South Africa Incorporated
Date of hearing:	1 November 2018
Date of judgment:	12 December 2018