



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: A5006/2020  
COURT A QUO: 48941/2017**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

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DATE

In the matter between:

**CHECKMATE DISTRIBUTION (PTY) LTD**  
(Registration Number: 1998/009444/07)

Appellant

and

**KINGS PROP DEVELOPMENT (PTY) LTD**  
(Registration Number: 2004/003319/07)

Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 December 2021.)

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**JUDGMENT**

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**CORAM: WEPENER J, MIA J and MALINDI J**  
**MALINDI J (WEPENER J and MIA J concurring)**

## Introduction

- [1] The parties had entered into a number of agreements that are referred to as the First Agreement or the 2010 Agreement entered into on 5 August 2010, the Second Agreement or the 2011 Agreement entered into on 22 March 2011, the Third Agreement or the 2013 Agreement entered into on 6 September 2013, and the Settlement Agreement or 2014 Settlement Agreement entered into on 17 November 2014.
- [2] On 25 April 2016 the Respondent ("Checkmate Distribution") sent a letter of demand, through its attorneys, to the Appellant ("Kings Prop Development") for payment of R9 432 142.45, alternatively for Kings Prop to transfer certain sectional title units and payments of certain amounts.  
[053-185]
- [3] The demand was based on the terms of an agreement entered into on 22 March 2011 ("the Second Agreement"). The Second Agreement was on the same terms and conditions as the First Agreement entered into on 5 August 2010.
- [4] Following upon the letter of demand, Checkmate Distribution brought an application for payment of the above amount against Kings Prop on 28 June 2016. The consequent judgment in this application by Mokhari AJ is also referred to as the 2017 Application. The founding affidavit, deposed to by Checkmate Distribution's sole director, Mr Jonathan Mashudu Matshavha, states that the original purchase price of the units was R11 267 281.50 and that the full amount had been paid by September 2013.

[5] Consequently, on 25 September 2013, the Second Agreement was cancelled and the Third Agreement was entered into on 6 September 2013. The effect of this agreement was to cancel the sale of two units under the 2011 Agreement and to refund R5 million to Checkmate Distribution.

[6] As a result of a dispute arising out of the refund payable in terms of the Third Agreement (2013) a settlement agreement was entered into. The effect of the 2014 Settlement Agreement was to settle all disputes between the parties and was entered into during the subsistence of the Third Agreement. The terms of the Settlement Agreement were set out in part in the letter of demand.

[7] The Settlement Agreement on 17 November 2014 reads as follows:

*“This Agreement is entered into in full and final settlement of all claims and*

*obligations owed or owing by any of the parties to the other in terms of the Agreement of Partial Cancellation concluded on or about the 6<sup>th</sup> September 2013, and neither parties shall have any further claims against the other of whatsoever nature arising from the Agreement of Partial Cancellation concluded on or about the 6<sup>th</sup> September 2013, other than such claims that either party may have for the enforcement of their rights in terms of this Agreement.”*

[8] In his founding affidavit in the 2017 Application Mr Matshavha states that he represented Checkmate Distribution in the conclusion of all these

agreements. However, Kings Prop in answer aver that the 2011 agreement was entered into with Checkmate Properties (Pty) Ltd as the purchaser as Mr Matshavha chose not to use Checkmate Distribution due to divorce proceedings between him and his wife. This averment is not denied by Checkmate Distribution in its replying affidavit, save to deny that the subject matter had nothing to do with Mr Matshavha's domestic issues. He however does assert in the 2017 Application that Checkmate Distribution had entered into the Second Agreement.

- [9] The 2017 Application was heard by Mokhari AJ. He delivered judgment on 5 May 2017.

### **Default judgment**

- [10] Subsequent to the judgment of Mokhari AJ, Checkmate Distribution issued a new letter of demand dated 14 November 2017 against Kings Prop. In this letter Checkmate Distribution relies fully on the First Agreement (2010) which it alleges "still subsists and remains binding." In this letter a demand is made for the transfer of all units referred to in that agreement into its name. [11] On 13 December 2017 Checkmate Distribution issued summons against Kings Prop claiming R11 862 354.82 as owed to it due to Kings Prop's failure to transfer the units it purchased in terms of the First Agreement notwithstanding payment of the full purchase price. Checkmate Distribution alleges cancellation of the First Agreement on 1 December 2017, alternatively pleads for its cancellation by summons.

[11] On 2 March 2018 Checkmate Distribution obtained a default judgment against Kings Prop before Strydom AJ on the basis that Kings Prop had failed to enter its intention to defend.

### **Rescission application**

[12] Kings Prop brought an application for rescission of the default judgment in June 2018. On 8 October 2019 Southwood AJ dismissed the application. The court *a quo* confirms that the claim in the action was based on the First Agreement (2010). The court found that Kings Prop had failed to prove that the First Agreement had been cancelled and ordered the payment of the claimed amount as constituting the restoration of the monies paid by Checkmate Distribution to Kings Prop in terms of the agreement. It was also found that issue estoppel had not been established as a bona fide defence.

[13] The finding by Mokhari AJ that the claim was based on the First Agreement has not been appealed against. However, the parties are in agreement that the cause of action in the 2017 Application was based on the Second Agreement (2011).

[14] Kings Prop contends that the court below erred in finding that it does not have a *bona fide* defence.

[15] That the First Agreement had been cancelled at the time of entering into the settlement agreement of 17 November 2014 is common cause or indisputable on the papers in the 2017 Application and in these proceedings. Mokhari AJ had found that Checkmate Distribution had lied

about not having knowledge of the settlement agreement and about contending that Mr Matshavha's signature was fraudulently attached on the settlement agreement. Furthermore, the Second Agreement (2011) specifically states that the First Agreement is cancelled. On these bases, Kings Prop had established a *bona fide* defence. A triable issue has arisen whether the cause of action under the First Agreement was still available to Checkmate Distribution in the 2019 action.<sup>1</sup>

[16] Checkmate Distribution submitted that these facts were not before Southwood AJ and was therefore entitled to not have taken them into consideration. This submission has no substance in that as stated in respect of the Second Agreement (2011), the Third Agreement (2013) dealt with the same subject matter as the one before. These agreements were before the court below.

[17] The Second Agreement refers to a payment by the purchaser to the seller "in terms of an agreement previously cancelled between the parties..." Furthermore, that the First Agreement (2010) had been consensually cancelled was found to be so in the 2017 proceedings in the judgment of Mokhari AJ. This was also pleaded by Checkmate Distribution in the 2017 application.

[18] The second compelling ground of appeal is that Checkmate Distribution was issue estopped. The cases commend a non-rigid application of the issue estoppel and *res judicata* rules and that circumstances of each case require scrutiny. Checkmate Distribution was not entitled to the full

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<sup>1</sup> Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 573 (W) at 575H-576A

restitution of the purchase price of R11 000 000.00 in circumstances where Kings Prop could show at least partial restitution to Checkmate Distribution. An example of this is that the 2013 Agreement resulted in the cancellation for two units in terms of which Kings Prop refunded Checkmate Distribution therefor. This reduced the R11 000 000.00 award made by default. This constitutes a triable issue too. Checkmate Distribution further admitted receipt of an amount of R2 900 000 in respect of the November 2014 cancellation and settlement agreement.

[19] Although the 2017 Application and the 2019 action were based on two different causes of action, the two contracts respectively, flowed from one another and dealt with the purchase of the residential units in the same development as described in both contracts.

[20] It must be borne in mind that even if the facts evincing a cancellation of the First Agreement were not before the court below when it dismissed the rescission application, Kings Prop could have, as it submits, argued these facts in the 2019 action had default judgment not been taken against it. For example, that the First Agreement had been cancelled and that an agreement dispositive of all disputes between the parties had been found in the 2017 judgment of Mokhari AJ. The court below ought to have granted rescission on this basis even if it was of the view that the grounds for rescission are not before it.

[21] Although the 2017 application and the 2019 action were based on different causes of action they involve the same parties and the same issues arose. The same issue related to the purchase of residential units

in King's Square, being the property described in the agreements. The sale of these units flowed from the First Agreement. Fundamentally the question whether Checkmate Distributors could rely on the cancelled 2010 Agreement in the 2019 action raised both questions of law and fact which were the essential elements of the judgment on which reliance is placed. On the application of the principles enunciated in *Royal Sechaba Holdings (Pty) Ltd v Coote and Another*<sup>2</sup>, this case meets the requirements to relax the classic requirements of *res judicata* and apply *issue estoppel*. These are that the inquiry is whether "an issue of fact or law was an essential element of the judgment on which reliance is placed."<sup>3</sup> These principles are reiterated in *Aon South Africa (Pty) Ltd v Van den Heever NO and Others*<sup>4</sup>

[22] The 2017 judgment was attached to the founding affidavit in the application for rescission and the court below ought to have taken these requisites into account when considering *issue estoppel*.

[23] For these reasons this court is entitled to come to a different conclusion from that of the court below which had found as a matter of fact that these defences were not established. Therefore, the appeal stands to be upheld and the order of the court below sets aside.

[24] The following order is made:

1. The appeal against the whole judgment and order of Southwood AJ's judgment dated 8 October 2019 is upheld.

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<sup>2</sup> *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* 2014 (5) SA 562 (SCA) at [12]-[22].

<sup>3</sup> *Smith v Porritt and Others* 2008(6) SA 303 (SCA) at [10]

<sup>4</sup> 2018 (6) SA 38 (SCA) at [22]-[23]



2. The default judgment granted against the Applicant dated 2 March 2018 under case number 48941/2017 is hereby rescinded.
3. The costs of the present appeal and application to be determined in the action.

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**G MALINDI**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, JOHANNESBURG**

I agree

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**L WEPENER**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, JOHANNESBURG**

I agree

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**S MIA**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, JOHANNESBURG**

COUNSEL FOR THE APPEALANT:

A Vorster

INSTRUCTED BY: Christelis Artemides Attorneys

COUNSEL FOR RESPONDENTS: T Moretlwe

INSTRUCTED BY: Gwebu Inc.

DATE OF THE HEARING: 11 August 2021

DATE OF JUDGMENT: