



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

- (1) Reportable: No
- (2) Of interest to other judges: No
- (3) Revised.

24 November 2023
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J.J. STRIJDOM

Case No: 39950/19

Heard on: 28/08/2023

Judgment: 24/11/2023

In the matter between:

VOLTEX (PTY) LIMITED

PLAINTFF

T/A VOLTEX EAST RAND

and

MARIUS KRIEL

FIRST DEFENDANT

TMK ELECTRICAL

COMPANY (PTY) LTD

SECOND DEFENDANT

ZELDEEN KRIEL

THIRD DEFENDANT

CHANTE DANIELLE KRIEL

FOURTH DEFENDANT

JUDGMENT

STRIJDOM AJ

INTRODUCTION:

1. The plaintiff has instituted proceedings against the defendants in order to hold the defendants liable for the judgment debt of TMK Electrical CC (TMK CC) to the plaintiff. TMK CC was owned by the first defendant Marius Kriel (who was subsequently sequestrated)
2. The plaintiff instituted proceedings against TMK CC and Marius Kriel during 2014 for payment for electrical goods supplied by the plaintiff to TMK CC. The

action was defended, and the plaintiff eventually obtained default judgement against TMK CC and Marius Kriel in November 2018.

3. In June 2018 Marius Kriel had placed TMK CC under voluntary liquidation. In December 2015 Marius Kriels' wife and daughter Zeldeen Kriel (Third defendant) and Chante Kriel (fourth defendant) had formed a new company called TMK Electrical Company (Pty) Limited (TMK (Pty) limited).
4. TMK (Pty) Limited carried on the same business as TMK CC and utilised the services of Marius Kriel.
5. The plaintiff contends that TMK (Pty) Limited was incorporated to take over the business of TMK CC in order to avoid payment by TMK CC of its debt to the plaintiff and if TMK (Pty) Limited had not taken over the business of TMK CC, TMK CC would have been able to make payment of such indebtedness.

BACKGROUND:

6. During or about January 2005 the first defendant Marius Kriel registered TMK Electrical CC. (TMK CC).

7. The first defendant Marius Kriel was at all times the sole member of TMK CC and was in control of TMK CC.

8. It is alleged that the third defendant Zeldeen Kriel was at all times employed by TMK CC and was: knowingly a party to the carrying on of the business of TMK CC.

9. The defendants plead that the third defendant Zeldeen Kriel performed casual and ad hoc administrative tasks for TMK CC, as and when the first defendant Marius Kriel and TMK CC required the third defendant Zeldeen Kriel to perform such tasks.

10. On 21st January 2013 the first defendant caused TMK CC to apply to the plaintiff to purchase goods from the plaintiff, a copy of such written application is included in annexure A to the particulars of claim. Pursuant to such purchases the plaintiff sold and delivered goods to TMK CC for the agreed purchases prices of:¹

10.1 R 772 737.54;

10.2 R 1 195 389.72.

¹ Caselines: 001-6 para 17

11. The defendants in their plea admits that the plaintiff sold and delivered goods to TMK CC.² As a result of proceedings instituted against TMK CC and first defendant default judgment was granted in November 2018 against TMK CC and first defendant. In June 2018 first defendant had placed TMK CC under voluntarily liquidation. The first defendant was also sequestrated.

12. The plaintiff alleges that the first, third and fourth defendant, caused the second defendant TMK CC to be registered as a limited liability company on 8th December 2015.

THE SPECIAL PLEA:

13. It was agreed upon by the parties that the court should determine the defence of – issue estoppel- as a separate issue, because if successful it would be dispositive of the entire dispute between the parties.

14. The defendants raised the shield of judicata in the form of – issue estoppel by way of a special plea. The basis of this shield is the argument that the plaintiff cannot litigate the issues raised in the particulars of claim as these issues has already been finally determined against the first defendant and TMK CC in case number 45680/2014.

² Caselines: 001-303 to 001-304

15. The defendants raised a special plea of *res judicata* as follows:

‘1. In paragraphs 6 to 18 of the particulars of claim, the plaintiff alleged that a contractual relationship existed between the plaintiff and TMK CC during 2013 to 2014 in respect of which the plaintiff alleges it has sold and delivered goods to TMK CC to the respective values of R 772, 737.54 and R 1 195 389.72 (the original claims).

2. In paragraphs 19 and 20 of the particulars of claim, the plaintiff alleged that TMK CC failed to pay the original claim, after which the plaintiff issued summons against TMK CC and the first defendant (*in casu*) out of the above Honourable Court in case number 45680/2014 for the payment of the original claim.

3. In paragraph 23 of the particulars of claim the plaintiff alleged that the second defendant was registered.

4. In paragraph 24 of the particulars of claim the plaintiff alleged that the first defendant is the sole share holder of the second defendant, alternatively is in control of the second defendant.

5. In paragraph 25 of the particulars of claim the plaintiff alleged that the third and fourth defendants are the directors of the second defendant.

6. in paragraph 30 of the particulars of claim the plaintiff alleged that TMK CC was placed in voluntary liquidation on 20 June 2018.

7. In paragraph 31 of the particulars of claim the plaintiff alleged that after the liquidation of TMK CC (subsequently thereto) the first, second, third and fourth defendants took over the business, assets, goodwill, and customers of TMK CC for no consideration.

8. In paragraph 37 to 41 and 45.1.1 of the particulars of claim the plaintiff alleged that on 12 November 2018 judgment was entered against TMK CC and the first defendant for the original claims amounting to R 772 737.54 and R 1 195 389.72 ('the judgment amount') and costs on the scale as between attorney and own client and attorneys' collection commission ('the attorneys and client costs').

9. In paragraph 45 the plaintiff alleged that:
 - a. The attorneys and own client cost is the sum of R 559 123.79

- b. The costs of an application for the sequestration of the first defendant in the sum of R 43 410.25

- c. The costs of an application for the liquidation of TMK CC in the sum of R 38 435.29

- d. The costs of an enquiry into the affairs of TMK CC (in liquidation) in the sum of R 174 726,28 and

- e. The costs of persisting to resist the application for sequestration of the first defendant and application to rescind the judgment in the sum of R 186 646.28; (Herein further collectively referred to the costs, totalling the amount of R 1 002 342.10).

10. In paragraph 46 of the particulars of claim the plaintiff alleged that the conduct of the first, second, third and fourth defendants constituted a deliberate, fraudulent, and unlawful scheme to deprive the plaintiff of payment of the judgment amount and costs.

11. The present claims of the plaintiff against the defendants are for one and the same amount and costs as judgment amount and the attorney and client costs, which were awarded against TMK CC.

12. Insofar as the first defendant included the costs of the sequestration and rescission applications, same were already claimed by and awarded to the plaintiff in the said applications and in the liquidation of TMK CC.

13. The amounts which are presently claimed by the plaintiff against all the defendants arose from the same causes of action which were already finally adjudicated.

14. The first, second, third and fourth defendants accordingly pleads that the plaintiffs' claims in the present action was finally adjudicated upon a court of competent jurisdiction.'

Wherefore the first, second, third and fourth defendants pray that the claims of the plaintiff are dismissed with costs.

THE PLAINTIFFS REPLICATION:

16. The plaintiff replicated to the special plea as follows:

1. The first defendant Mr Marius Kriel has been provisionally sequestered by the above Honourable Court and accordingly has no locus standi in the present action.

2. Unless such order should be discharged, the plaintiff is not proceeding against the first defendant.
3. However, the plaintiff reserves the right to join the trustee of the second defendant in the present action.
4. As regards the remaining defendant, they were not parties to the judgment granted against the first defendant or the other matters referred to in paragraph 45.1 of the plaintiffs' particulars of claim.
5. The second, third and fourth defendants accordingly have no defence of *res judicata* of the plaintiff's claims against them.

Wherefore the plaintiffs prays that the second, third and fourth defendant's special plea be dismissed with costs.

APPLICATION OF THE LAW:

17. The essentials of the *exceptio 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*). Requirements (2) and (3) are not immutable requirements of *res judicata*, the subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

18. The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, (b) if the same issue is again involved and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties even if the later action is founded on a dissimilar cause of action.

19. It was decided in **Bafokeng Tribe v Impala Platinum Ltd**³ that:

‘A court must have regard to the object of the *exceptio res judicata*, that it was introduced with the endeavour of putting a limit to needless litigation, and in order to prevent the recapitulation of the same thing in dispute in diverse actions with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.’

20. The recognition of the defence of issue estoppel require careful scrutiny. Each case will depend on its own facts and any extensions of the defence will

³ 1999 (3) SA 517 (B)

be on a case-by-case basis. Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others.⁴

21. The plaintiff in replication to the special plea, did not dispute the allegation that the claims by the plaintiff against all the defendants arose from the same causes of action which were already finally adjudicated.

22. The only issue raised by the plaintiff was that the second, third and fourth defendants were not parties to the judgment granted against the first defendant or the other matters referred to in paragraph 45.1 of the plaintiffs' particulars of claim.

23. For the plea of *res judicata* to succeed the parties concerned in both sets of proceedings must either be the same individuals or persons who are in law identified with those who were parties to the proceedings. Such persons must be privy to one another, and they must derive their interest in the later proceedings from the parties to the earlier proceedings.

24. In **Aon**⁵ the SCA held as follows in respect of the identity of the parties:

'[25] It is correct that there is a technical distinction between the plaintiffs in the present action and the plaintiffs in the previous action, but that is a matter of form, not substance.'

⁴ See *Smith v Porrit and Others* 2008 (6) SA 303 (SCA) and *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A)

⁵ *Aon SA (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA) (13 May 2017)

25. The plaintiff assert that the first defendant was the driving force behind the registration of the second defendant and that the first defendant is involved in the management of the second defendant and that they were involved in a fraudulent conspiracy to act in a manner that prejudiced the plaintiff from recovering its money.

26. It was submitted by the respondents that the facts in (**Aon** are remarkable similar to the facts *in casu*. The plaintiff also seeks to recover debt, owed by a liquidated company from a company that was allegedly conceived with the intention of defrauding and prejudicing the plaintiff.

27. I concluded that there was a complete identity of interests between the defendants in both actions and that the parties are, in fact the same parties.

28. Having considered the questions of equity and fairness to the parties and others, I am of the view that that the special plea should be upheld.

29. In the result the following order is made:

1. The special plea is upheld;
2. Plaintiff's claim is dismissed wit costs.

STRIJDOM JJ

**ACTING JUDGE OF
THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG**

Appearances:

For the applicant: Adv N Segal

Instructed by: J van Huyssteen Attorneys

For the Respondent: Adv PA Wilkins

Instructed by: Orrelowitz Inc.