

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020/10026

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

04 December 2023

.....  
G Farber AJ

.....  
DATE

In the matter between:

ABSA BANK LIMITED

Applicant

and

PRINSLOO FAMILIE TRUST

First Respondent

PRINSLOO: JASPER JOHANNES N.O.

Second Respondent

PRINSLOO: SANDRA N.O.

Third Respondent

JAHASAN FAMILY TRUST

Fourth Respondent

HOLL: THEUNIS N.O.

Fifth Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be on 4 December 2023.

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JUDGMENT

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**FARBER AJ:**

INTRODUCTION

- [1] On 25 March 2020 Absa Bank Limited (“the Bank”) issued summons out of this Court against the Prinsloo Family Trust, Mr Jasper Johannes Prinsloo N.O., Ms Sandra Prinsloo, the Jahasan Family Trust, and Mr Theunis Holl N.O. as the first, second, third, fourth and fifth defendants respectively. Where appropriate, the third defendant will be referred to in this judgment as “Ms Prinsloo”. Similarly, where appropriate, the first, second, fourth and fifth defendants will be referred to herein as “the remaining defendants”.
- [2] The relief sought by the Bank was formulated in the particulars of claim attached to the combined summons thus.

*“As against the second and third defendants jointly (in their representative capacities as trustees for the first defendant) for:*

*and*

*“Against the second, third and fifth defendants jointly (in their representative capacities as trustees for the fourth defendant) for:*

*and*

*jointly and severally the one paying the other to be absolved against the second and third defendants jointly and severally (in their personal capacities) for:*

**CLAIM A**

- 1. Payment of an amount of R15 009 972,27;*
- 2. Interest on the amount of R15 009 972,27 at the rate of 9,25% (prime 10% less 0,75%) linked per annum, calculated and*

*capitalised monthly from 19 September 2018 to date of payment,  
both days included;*

3. *An order whereby the following property be declared executable in respect of the first defendant:*

*Erf 570 Blair Atholl Extension Township; registration division J.Q.,  
Province of Gauteng;*

*In extent: 3069 (three thousand and sixty-nine) square metres;*

*Held under Deed of Transfer No. T3907/2011*

4. *Costs of suit on the scale between attorney and client;*
5. *Further and/or alternative relief.*

**CLAIM B**

1. *Payment of an amount of R3 781 483,52;*
2. *Interest on the amount of R3 781 483,52 at the rate of 10,25% (prime 10% plus 0,25%) linked per annum, calculated and capitalised monthly from 2 September 2018 to date of payment, both days included;*
3. *Costs of suit on the scale between attorney and client;*
4. *Further and/or alternative relief.”*

[3] The third defendant and the remaining defendants entered appearances to defend the action.

[4] On 2 November 2022 this Court (per Makume J) entered judgment in favour of the Bank against Ms Prinsloo (the default judgment) in the following terms:

- “1. *The defence of the Third Respondent/Defendant, in her personal capacity, is hereby struck out.*
  
2. *Judgment is granted in favour of the Applicant/Plaintiff against the Third Respondent/Defendant in her personal capacity for:*
  - 2.1.1. *Payment of an amount of R15 009 972,27;*
  - 2.1.2. *Interest on the amount of R15 009 972,27 at the rate of 9,25% (prime 10% less 0,75%) linked per annum, calculated and capitalised monthly from 19 September 2018, to date of payment, both days included;*
  - 2.1.3. *Payment of an amount of R3 781 483,52.*
  - 2.1.4. *Interest on the amount of R3 781 483,52 at the rate of 10,25% (prime 10% less 0,25%) linked per annum, calculated and capitalised monthly from 2 September 2018, to date of payment, both days included;*
  
3. *Costs of suit on the scale between attorney and client.”*

[5] The Bank subsequently abandoned the default judgment. Following thereon, the remaining defendants advanced the contention that despite its subsequent abandonment the default judgment had the effect of finally disposing of the suit between the Bank and them. They on this score asserted that when the default judgment was granted the Court became *functus officio* and that the *lis* between the Bank and them became *res judicata*. Ms Prinsloo was to follow suit.

[6] This resulted in the Bank making application to rescind the default judgment on the basis that it had been erroneously sought and granted within the

meaning of Uniform Rule of Court 42(1)(a). In the alternative, the Bank grounded its application for the rescission of the default judgment on the common law. The Bank's application is opposed by both Ms Prinsloo and the remaining defendants. The remaining defendants have moreover instituted a counter application against the Bank wherein they seek the dismissal of the Bank's application for the rescission of the default judgment. Additionally, they seek declaratory orders to the effect that on the entry of default judgment the Court became *functus officio* and that the Bank's claims in the action were finally disposed of not only as between the Bank and Ms Prinsloo but as between the Bank and them.

[7] I am now seized with both the application and the counter application.

## **FACTUAL MATRIX**

[8] The facts are relatively straight forward, albeit that in some respects they are quite unusual. These facts are now summarised in the paragraphs which immediately follow.

[9] On 25 March 2020 the Bank instituted the proceedings more fully referred to in paragraphs [1] and [2] hereof.

[10] On 18 June 2020, the remaining defendants entered an appearance to defend the action. Shortly thereafter, Ms Prinsloo's then attorneys entered an appearance to defend the action on her behalf.

- [11] On 26 March 2021, the Bank furnished notice of its intention to amend its particulars of claim. On 13 April 2021, the remaining defendants served a notice in terms of Rules 30 and 30A, asserting that the Bank's notice of intention to amend constituted an irregular step and that it had not complied with the Rules in several identified respects.
- [12] On 28 April 2021, Ms Prinsloo, pursuant to Rule 28(3), objected to the proposed amendments.
- [13] On 29 April 2021, the remaining defendants, under a notice in terms of Rule 28(3), raised a series of objections to the foreshadowed amendments.
- [14] Following thereon, the Bank delivered an application for leave to amend its particulars of claim in terms of its notice of intention to amend of 26 March 2021 ("the amendment application").
- [15] On 19 May 2021, Ms Prinsloo gave notice of her intention to oppose the amendment application and following thereon she delivered a document detailing the points of law upon which she relied in founding her opposition.
- [16] On 9 June 2021, the remaining defendants delivered their answering affidavit (referred to by them as an opposing affidavit) in the amendment application. On 24 June 2021, the Bank filed a replying affidavit therein, in which affidavit it dealt with both the opposing affidavit of the remaining defendants and with the points of law raised by Ms Prinsloo.
- [17] On 11 November 2021, the Bank served its heads of argument, practice note, list of authorities and chronology table in the amendment application in terms of the Practice Manual regulating the conduct of proceedings in this

Division. on Ms Prinsloo's attorneys of record. By reason thereof, Ms Prinsloo was required to deliver her heads of argument, practice note, list of authorities and chronology table in the amendment application by 25 November 2021. She failed to do so and she was then put on terms to do so by 7 January 2022. This was extended to 8 January 2022. There was still no compliance and in February 2022, the Bank instituted motion proceedings against Ms Prinsloo for the delivery by her of the documents in question, such to be effected within three days of the grant of an order compelling the delivery thereof, failing which "Ms Prinsloo's defence (was to) be struck out". The matter was not opposed and on 2 August 2022, Acting Judge Thupaatlase issued an order in the following terms:

*"1. The Third Respondent shall deliver heads of argument and a Practice Note within 3 (three) days from the date of this order being granted.*

*2. The Third Respondent shall pay the costs of this application."*

[18] This order was served on Ms Prinsloo on 12 August 2022. She failed to comply with it and on 2 November 2022, the Bank made application for an order striking out her defence and for the entry of default judgment against her for payment of the sums of R15 009 972,27 and R3 781 483,52, together with interest thereon, and costs. On 2 November 2022, default judgment in those terms was granted.

[19] On 12 December 2022, Ms Prinsloo in terms of Rule 49(1)(c) requested Judge Makume to furnish reasons for the Order. It is not clear from the

papers filed of record whether reasons were in fact furnished or not. Be that as it may, Ms Prinsloo on the same day (12 December 2022) lodged an application for leave to appeal against the whole of the Order, including that relating to costs.

[20] In the interim, the Bank had instituted proceedings for the rescission of the default judgment. On 19 January 2023, the Bank's attorney addressed a letter to Ms Prinsloo attorney in the following terms:

- “1. The above matter and the Third Defendant's Notice of Application for Leave to Appeal served on us on 12 December 2022 refer.*
- 2. The Third Defendant's Notice of Application for Leave to Appeal is defective because the judgment granted against the third defendant was granted by default.*
- 3. However, our instructions are that our client is prepared to abandon the judgment on condition that:*
  - 3.1. The third defendant deliver her heads of argument to our client's application to amend within one week;*
  - 3.2. If the third defendant fails to deliver heads within one week as per 3.1 above, then she is deemed to have consented to withdrawing her opposition to the application for leave to appeal.*
- 4. We look forward to your response by return correspondence.*



5. *All our client's rights remain strictly reserved."*

[21] On 7 February 2023 (09:36), Ms Prinsloo's then attorney addressed an e-mail to the Bank's attorneys recording the following:

*"I refer to previous correspondence.*

*We propose that the matter be settled as follows:*

1. *Applicant abandons the judgement (if any) and order granted on 1 November by the honourable Makume J.*
2. *My client withdraws her opposition to the application for amendment of the plaintiffs' particulars of claim.*
3. *Each party is to pay its own cost relating to compel the heads of argument, the Application that served before Makume J. on 2 November 2022 and the Application for leave to appeal.*

*Can you please revert."*

[22] Pursuant to that exchange, the Bank on 13 February 2023 abandoned the default judgment.

[23] On 24 February 2023, the remaining defendants service a notice on the Bank indicating that it intended raising a series of questions of law relating to the consequences of the default judgment. The questions raised are twenty-two in number and those relevant to the central issues which arise in the

case now under consideration were formulated thus:

- “1. ...
2. ...
3. *In granting the default judgment, this Court duly pronounced a final judgment or order and thereby becomes functus officio and its authority over the subject matter of litigation in the main action ceases.*
4. *The principle of finality of litigation being in the public interest, is thereby confirmed and dictates that the power of the Court comes to an end.*
5. ...
6. *The judgment granted is an order of the above Honourable Court and stands until set aside by a Court of competent jurisdiction.*
7. *The notice to abandon does not constitute a setting aside of the judgment granted and does not constitute the setting aside by a Court/Court of competent jurisdiction as the same is merely a notice.*
8. *The notice to abandon filed by the plaintiff does not constitute an order by a competent Court that may alter or supplement the default judgment.*

9. *A notice to abandon does not nullify the court being functus officio subsequent to the granting of the judgment.*
10. *...*
11. *By applying for judgment against the third defendant, the plaintiff elected to seek judgment in respect of the entire action. By virtue thereof, the plaintiff cannot continue against other parties/defendants to its action subsequent to exercising the election to obtain judgment against one party.*
12. *An abandonment is yet another election available to the plaintiff, whether to enforce the rights obtained in terms of the judgment, if any, or not.*
13. *The notice of abandonment does not extinguish the existence of the judgment, wherefore the prosecution of any relief that forms the subject matter of the main action, cannot continue against any other party to this action.*
14. *By virtue of the judgment granted, the main action became res judicata.*
15. *...*
16. *The judgment renders the entire action res judicata vis-a-vis any other parties and/or defendants cited in the action.*
17. *...*

18. ...

19. ...

20. ...

21. *A pronouncement by this Court and/or the seeking of the pronouncement pertaining to any issue which stands to be adjudicated cannot be heard and/or adjudicated upon until the default judgment has been set aside, alternatively until there is a pronouncement upon its validity.*

22. ...”

[24] On 1 March 2023, the Bank instituted an application for the rescission of the default judgment. As I have said, the remaining defendants have raised a counter application in those proceedings, in which they seek relief in the following terms:

“1. *That the applicant’s application for rescission of default judgment granted on 2 November 2022 be dismissed with costs on the scale as between attorney and client, including the cost of two counsel.*

2. *That this Court is functus officio in the action under the above case number.*

3. *That the action under the above case number is res judicata and is hereby dismissed.*

4. *That the applicant pays the costs of the action on a scale as between attorney and client, including the cost of two counsel."*

## THE ISSUES RAISED

### The Rescission Application

[25] The rescission application raises the following questions:

- 25.1. Does the abandonment of the default judgment hold the consequence that the Bank has forfeited the rights which it might otherwise have held in relation thereto, including the right to rescind it, whether under Rule 42(1)(a) or under the common law?
- 25.2. Was the default judgment final in nature, in consequence whereof this Court became *functus officio* in the sense that its authority over the subject matter of the litigation in the main action ceased?
- 25.3. Is the default judgment *res judicata* as between the Bank and Ms Prinsloo and as between the Bank and the remaining defendants, thereby finally disposing of the *lis* between the parties?
- 25.4. Have cognisable grounds in any event been established for the rescission of the default judgment, more particularly whether it was erroneously sought or granted within the meaning of Rule 42(1)(a)?

25.5. Does the Bank have the legal competence to institute proceedings for the rescission of the default judgment, whether under Rule 42(1) (a) or under the common law?

25.6. Whether given the excipiable nature of the Bank's particulars of claim as they now stand it may fairly be said it has no prospects of success in the action, thereby precluding it from making an application for the rescission of the default judgment?

#### The Counter Application

[26] The remaining defendants seek the dismissal of the Bank's rescission application.

[27] They moreover seek two declarations, namely that on entry of the default judgment this Court became *functus officio* and that the *lis* between both the Bank and Ms Prinsloo and the Bank and the remaining defendants was finally disposed of, according to all of them the right to raise a plea of *res judicata*.

#### **THE APPROACH**

[28] It will readily be appreciated that the main application and the counter application are closely connected, dominated as they are by principles of law common to both of them.

[29] Given this commonality, I intend approaching the application and counter application as a composite whole. In doing so, I will deal with the relevant

principles of law and apply those principles to the facts which I have already set out, which facts constitute common cause matter.

**THE LEGAL EFFECT OF AN ABANDONMENT OF A JUDGMENT OR ORDER**

[30] In the case of *Body Corporate of West Road South v Ergold Property Number 8 CC 2014 (JDR) 2258 (GJ)*, Boruchowitz J characterized the nature of an act of abandonment and its consequences thus:

*“The act of abandonment is of a unilateral nature and operates ex nunc and not ex tunc. It precludes the party who has abandoned its rights under the judgment from enforcing the judgment but the judgment still remains in existence with all its intended legal consequences.”*

[31] In my judgment the abandonment, however, does not hold the consequence that the abandoner is irretrievably deprived of the right to rescind the abandoned judgment in appropriate circumstances. Despite the abandonment, the abandoner may still retain a very real interest in the abandoned judgment and thus may be affected should it continue to exist. This may notionally arise in a situation where there is a dispute between the abandoner and the abandonee in relation to whether the abandoned judgment is final and definitive in nature (and that in consequence the doctrine of *res judicata* applies) or not. The abandoner may contend that the abandoned judgment is not final in effect and ought thus not to be subject to the strictures of the *res judicata* doctrine. To that end, the abandoner will be an affected party in relation to the abandoned judgment. As such it will notionally be open to it to take steps to undo the consequences of the abandoned judgment by for example, by an application to set it aside.



[32] It moreover needs to be stressed that an abandonment will not without more result in a successful defence of *res judicata*. This much appears from paragraph [48] of the judgment in the case of *FirstRand Bank Ltd t/a First National Bank v Fondse and Another* (A5027/2016) [2017] ZAGPJHC 184 (23 June 2017) at para [48]), which judgment is addressed in greater detail later herein.

### **THE FINALITY OF JUDGMENTS AND THE CONCEPT OF A COURT BEING *FUNCTUS OFFICIO***

[33] On the face of it the default judgment was vis-à-vis Ms Prinsloo final in nature for it fully determined her liability to the Bank in the action which it had commenced against her. Thus, on the pronouncement of the default judgment, the Court's jurisdiction vis-à-vis Ms Prinsloo was on the face of it fully and finally exercised with the result that its authority over the subject matter in the action against her ceased. The Court would then ordinarily have become *functus officio* (*Firestone SA (Pty) Limited v Genterico AG* 1977(4) SA 298 (A) at 306 F-G and *First National Bank of SA Ltd v Jurgens* 1993(1) SA 245 (W) at 246 J). As such, the Court would ordinarily have no authority to correct, alter or supplement the order.

[34] The Rule serves considerations of public interest, more particularly that of bringing litigation to finality and permitting litigants to conduct their lives accordingly (*Zandi v MEC, Traditional and Local Government Affairs* 2006(3) SA 1 (CC) at para 28).

[35] There are some recognised exceptions to the general rule. The order may be supplemented in respect of accessory or consequential matters in

circumstances where the Court overlooked or inadvertently failed to deal therewith, default judgments or orders may be clarified in circumstances where their meaning is obscure, ambiguous or otherwise uncertain, clerical, arithmetical or other errors in the order may be corrected and costs orders may be corrected, altered or supplemented when the need to do so arises.

[36] The list is by no means exhaustive. Thus, in the case of *Zondi v MEC, Traditional Local Government Affairs* 2006(3) SA 1 (CC), Ngcobo J said the following in paragraphs 34, 35 and 46:

*“[34] What emerges from our pre-constitutional era jurisprudence is that the general rule that an order once made is unalterable was departed from when it was in the interests of justice to do so and where there was a need to adapt the common law to changing circumstances and to meet modern exigencies. It is equally clear that the case law that in departing from the general rule, the Court invoked its inherent power to regulate its own process. Thus, in West Rand Estate, the Court held that:*

*“It is within the province of this Court to regulate its own procedure in matters of adjective law. And, now that the point has come before it for decision, to lay down a definite rule of practice. I am of the opinion that the proper rule should be that which I have just stated. The Court, by acting in this way, does not in substance and effect alter or undo its previously pronounced sentence, within the meaning of the Roman and Roman-Dutch Law.*

*The sanctity of the doctrine of res judicata remains unimpaired and of full force, for the Court is merely doing justice between the same parties, on the same pleadings in the same suit, on a claim which it has inadvertently overlooked.”*

*[35] This approach to the general rule by the Appellate Division is consistent with the Constitution. It is now entrenched in s173 of the Constitution, which provides that:*

*“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”*

*[46] In my view, an application to extend the period of suspension of the declaration of invalidity falls to be dealt with under the Court’s power to make an order that it is ‘just and equitable’. In view of this conclusion, it is not necessary to consider whether such application can also be dealt with under the Court’s power to develop the common law under s 173. Nor is it necessary in this case to develop the common law and adapt it to the powers of this Court in deciding the constitutional matters within its jurisdiction. And as indicated above, our pre-constitutional jurisprudence indicates that the power of the Court to vary an order is rooted in the interests of justice and the need to adapt the common law to changing circumstances. And furthermore,*

*as this Court observed in Ntuli, the determination of what is ‘just and equitable’ or is ‘in the interests of justice’ involves similar considerations. What is just and equitable will ordinarily be in the interests of justice.”*

[37] Despite its seeming finality, it is thus plain that the true content of a judgment may be revisited where justice and equity so demand. Similarly, and as will presently become evident, the true effect of a judgment seemingly final in nature may be revisited where the equity so requires. I at this stage merely record that on a conspectus of the facts as a whole, I for reasons which will presently follow, consider that it is “just and equitable” and “in the interests of justice” that the default judgment is not to be treated as a final order. It would, I perceive, be unconscionable to decree otherwise.

#### **THE CONCEPT OF *RES JUDICATA* AND THE RELAXATION THEREOF: THE BANK VIS-À-VIS MS PRINSLOO**

[38] The application of the *res judicata* doctrine arises where proceedings in respect of a dispute between the same parties, on the same cause of action and for the same relief have been previously dispositively determined (*Prinsloo N.O. v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA) at para [10] and the authorities referred to therein and *FirstRand Bank Ltd t/a First National Bank v Fondse and Another* (A5027/2016) [2017] ZAGPJHC 184 (23 June 2017) at para [23]).

- [39] The doctrine is not immutable and may be relaxed in circumstances where a substantial injustice would result from its application. (*Goldex* at para [24], *Fondse* at para [25] and *Molaudzi v The State* 2012 (2) SACR 341 (CC) at para [16]).
- [40] The facts in *Fondse* affords a classic illustration of the circumstances under which the doctrine will be relaxed. Mr and Mrs O'Neil were loan debtors of FirstRand, which indebtedness was secured by mortgage bonds registered over their home. The O'Neils fell into arrear and stopped paying altogether. FirstRand then instituted action against them for a money judgment. The action was opposed and FirstRand launched summary judgment proceedings, which proceedings were sustained against. The O'Neils then launched an application for leave to appeal and at the commencement of the hearing of that application FirstRand abandoned its summary judgment. It did so in the realisation that it had no answer to the application for leave to appeal and the appeal which would follow thereon, postulating that leave would in fact be granted, which seemed inevitable. FirstRand thereafter abandoned the proceedings and instituted proceedings against the O'Neils afresh. They, in the fresh proceedings, relied upon the *res judicata* doctrine in resisting FirstRand's claim. The defence was upheld.
- [41] In the following appeal, a Full Bench of this Division (per Sutherland J [as he then was] with whom Matojane and Makume JJ concurred) held that the Court *a quo* erred in applying the *res judicata* doctrine which, on the specific facts of the case, ought properly to have been relaxed. The Full Bench on this score expressed itself in paras [48] and [49] (footnotes omitted) thus:

[48] *In my view, the traverse of these cases illustrates the wisdom of the fact-specific nature of the assessment. None of these decisions offer strong support for the proposition that an abandonment of a judgment ought ordinarily to result in a successful defence of Res Judicata.*

[49] *The relevant fact-specific attributes of the present case are these:*

*49.1 If the act of abandonment can, in an appropriate case (i.e. together with other facts), constitute a waiver, it must also mean that the intention of the party abandoning the judgment must be relevant. No question of a waiver of the right to claim the indebtedness, which was ongoing, can be contrived from the events because all the evidence contradicts an intention to release the O'Neils from their indebtedness. Moreover, as it is, apparently, not uncommon for a party to abandon part of a judgment and retain another part, the intention of that party to make that distinction has to be expressed and is thus a legitimate source of information in determining the extent of the abandonment, a point well illustrated in *Feyt v Myers* 1919 CPD 122. In that case, a ruling was given by a magistrate that the onus lay with the defendant and the case was subsequently decided against him. The plaintiff, thereafter, whilst on appeal, abandoned reliance on the wrong ruling and tendered to begin the case afresh. The court held that the abandonment was limited and did not result in a sacrifice of his claim.*

49.2 *The judgment that the appellant had obtained was guaranteed to be overturned on appeal for want of compliance with a peremptory procedural requirement, which if challenged for non-compliance would result merely in a dilatory defence. To acquiesce in the grant of leave to appeal and embark on the long, ritualistic slouch towards the court of appeal where the point would be upheld, before resuming the litigation in earnest, is so obviously an exercise in costly futility, that any reasonably minded person would wince at having to endure such a process. Seeking to obviate it is not pernicious.*

49.3 *No alternative suitable remedy existed. No grounds to invoke Uniform Rule 42 exist, there being no error committed within the meaning of that rule. The summary judgment ought not to have been granted because the section 129 point was good, but that is not a procedural error as contemplated by Rule 42; rather, it is a reason to overturn the judgment on appeal. Inasmuch as the appellant might be said to have been obliged to allow the appeal to run its course, and that, tiresome as it would be, was the alternative procedural channel, the contention is correct, but ought not to trump the application of common sense and fairness to the exact circumstances shown to exist. In *Feyt v Myers* the court remarked that the parties were compelled to exhaust the appeal procedure to achieve the objective of a fresh beginning, but the impact of res judicata was not considered in that case and therefore that*

*decision cannot be authority for a proposition adverse to the finding in this case that the appellant ought not be unsuited by the defence of Res Judicata under the particular circumstances.*

*49.4 The effect of applying res judicata would result in a gift of involuntarily releasing the debtors from the debt with no quid pro quo. That outcome would be grossly unfair.*

*49.5 There is, on the facts, no abuse of the process. The policy rationale for the existence of the defence of Res Judicata is not at all upset by its relaxation in this case. It was argued that the appellant's predicament is the consequence of its own conduct and it is not the random victim of an unfair procedure. This is true, but that notion does not offer a cogent reason not to relax the application of Res Judicata, upon a holistic appreciation of the circumstances, amongst which is no shred of unfairness that could be suffered by the debtor owing an admitted debt.*

*49.6 Lastly, section 34 of the constitution is worthy of being given weight:*

*'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'*



- [42] It is thus clear that dependent on the specific facts of a particular case, the *res judicata* doctrine may be relaxed.
- [43] The facts giving rise to the abandonment of the judgment and what was then to happen in relation to the litigation vis-à-vis Ms Prinsloo are clear, albeit somewhat unusual. The Bank and Ms Prinsloo agreed that the judgment was to be abandoned and that the Bank would not enforce its terms. It was furthermore agreed that the litigation between the Bank and Ms Prinsloo was to continue. Ms Prinsloo was in this regard required to withdraw her opposition to the Bank's application to amend its particulars of claim. It was clearly implicit in what had been expressly agreed upon that Ms Prinsloo's appeal against the grant of the order would be abandoned and that the litigation between the Bank and her would continue. The Bank's particulars of claim would be amended, and Ms Prinsloo would be required to deliver a plea to it. In short, the matter would have continued as if the judgment had not been granted to begin with.
- [44] Ms Prinsloo now contends that a situation of *res judicata* has arisen between her and the Bank and that by virtue of the Bank's abandonment of the default judgment, it is now powerless to secure any form of redress against her, whether in the current action or any subsequent action. This consequence would in my view be quite unconscionable and most certainly inimical to what is "just and equitable" and "in the interests of justice". The Bank in its dealings with Ms Prinsloo did not have the slightest intention of bestowing a gift on her running into several millions of rand. Ms Prinsloo, moreover could not have reasonably believed that this most generous gift

would accrue to her. The result she seeks will, if upheld, amount to a denial of justice.

[45] It thus seems to me on the facts of the case that the *res judicata* principle needs to be relaxed, provided only that the Bank does not have some alternative form of redress. As will presently emerge there is none.

[46] Ms Prinsloo (and the remaining defendants) sought to avoid the relaxation of the *res judicata* doctrine on two additional grounds. Firstly, reliance was placed on a series of cases to the effect that once the Court enters judgment it becomes *functus officio* with the result that it is precluded from further entertaining the suit. (See for example *Jacobson v Havinga t/a Havingas* 2001(2) SA 177 T). Secondly, it was contended that the *Fondse* judgment was of no application on the facts of the case. It was in this regard contended that in *Fondse* the Court was concerned with a summary judgment and not a default judgment.

[47] As to the first, it seems to me that the principle that a Court on entering a final judgment becomes *functus officio* is closely aligned to the operation of the *res judicata* doctrine in the sense that where the principles of *res judicata* apply, finality is reached with the consequent result that the Court truly does become *functus officio*. This is a principle of general application. However, a party always remains free to contend that the *res judicata* doctrine does not apply to the particular judgment because, as was said in *Fondse*, the enquiry as to whether it does or does not apply is fact-specific to each case. Thus, a judgment may on the face of it be so framed that it supports the notion that its effect is final and that *res judicata* does in fact operate. Further

enquiry, however, may reveal that because of equitable considerations the *res judicata* doctrine should be relaxed. In that event finality will not have been reached and the Court will not be considered *functus officio*. It will remain free to determine the *lis*. It short, it may happen that a contest arises as to whether a particular judgment has the effect of being *res judicata* between the parties. This as the facts of this case illustrated may arise in the very litigation where judgment is taken. I can conceive of no reason why the judge in that litigation cannot determine the issue. All that needs to happen is that the party who asserts that the action is now barred because of the operation of the *res judicata* doctrine is to file a special plea asserting that position. Its protagonist may contend otherwise and that of course is an issue which the Court will determine. I see no advantage in the judge declining to entertain the matter on the basis that he or she is now *functus officio*, thereby possibly compelling an aggrieved party to resort to further litigation.

[48] Cases which proclaim finality must be understood in the context that the *functus officio* principle will only apply in a situation where it is either common cause or beyond dispute that the judgment granted brings the *res judicata* doctrine into operation. Where there is a dispute in relation to whether the doctrine applies or not, the Court is duty-bound to determine that dispute and it cannot avoid doing so on the basis that it is now *functus officio*. To hold otherwise would be to subordinate substance to form.

[49] As to the second, I fail to comprehend the distinction sought to be drawn between a summary judgment and a judgment by default in *relation* to the

application of the *res judicata* principle and its possible relaxation in any given case. The fact that the judgment in issue in this case was one taken by default and is not a summary judgment as was the case in *Fondse* does not in my view impact on the situation. Both default judgments and summary judgments will ordinarily have final effect capable of sustaining the operation of the *res judicata* principle. The question whether that doctrine will in any particular case fall to be relaxed will not turn on whether it is a summary judgment or a default judgment but rather on their effect and whether there are, on the specific facts of the case, any considerations of equity which would warrant a departure from the operation of the doctrine. In short, summary judgments and default judgments may each give rise to situation of *res judicata*, provided only that the requisites for the operation of the doctrine are satisfied, namely a *lis* between the same parties on the same cause of action for the same relief which has previously been dispositively adjudicated. Equitable considerations which might persuade a Court to relax the application of the doctrine will apply irrespective of whether the judgment is summary in nature or has arisen in consequence of a litigant's default.

#### **THE CONCEPT OF *RES JUDICATA* AND THE RELAXATION THEREOF: THE BANK VIS-À-VIS THE REMAINING DEFENDANTS**

[50] I am of the view that in the particular circumstances of the case Ms Prinsloo cannot contend that the default judgment is *res judicata* as between the Bank and her.

- [51] Given this, it is not open to the remaining defendants to rely on that principle in seeking to resist the claims which the Bank has proffered against them. Strikingly, they were not even parties to the proceedings before Judge Makume and they thus fall short of one of the essential elements necessary to sustain the defence of *res judicata*.
- [52] The remaining defendants, however, contend that by applying for default judgment against Ms Prinsloo the Bank elected to seek judgment in respect of the entire action. Thus, so the argument runs, when granting the default judgment against Ms Prinsloo, the Court pronounced a final judgment and that in consequence it became *functus officio* with the result that its authority over the subject matter of the litigation as a whole came to an end. Hence, the contention that a situation of *res judicata* arose not only as between the Bank and Ms Prinsloo but also as between the Bank and the remaining defendants. I have rejected these contentions vis-à-vis Ms Prinsloo, and I similarly reject them vis-à-vis the remaining defendants.
- [53] It is perhaps well to remember that the liability of debtors *in solidum* is joint and several and each one of them is liable to the creditor for the full amount of the debt (*Williams v Kirk* 1932 (CPD) 159). The creditor may elect to sue any one of them for the full debt or any lesser amount (*Segell v Kerdia Investments (Pty) Limited* 1953(1) SA 20 (W) at 26G). The creditor in electing to sue one debtor for the full amount or for that matter more than one of the debtors for equal or varying amounts does not thereby limit himself to recovering from that debtor or those debtors alone with any accompanying abandonment to claim from the others (*Boyce v Bloem* 1960

(3) SA 855 (T) at 857D). This is so even if the creditor pursues his claim to judgment for as long as the judgment remains unsatisfied the debt remains owing to him jointly and severally by all his debtors (*Greke v Jankelowitz* 1918 CPD 140 at 140 and *Williams v Kirk* 1932 CPD 159 at 162).

[54] It is thus clear that the Bank did no more than seek judgment against one of several parties jointly and severally liable for payment of the debts sued upon. It did so because that party (Ms Prinsloo) was in default, and this is precisely what principles of procedure permitted the bank to do. This judgment has not been satisfied and on all known authority the Bank was despite its default judgment against Ms Prinsloo perfectly entitled to proceed against the remaining defendants. This entitlement will have endured even if a situation of *res judicata* had obtained between the Bank and Ms Prinsloo.

## THE RESCISSION APPLICATION

[55] The Bank in the founding affidavit in the rescission application relies on the provisions of Rule 42(1)(a), alternatively on the common law.

[56] Rule 42 (1) reads as follows:

*“(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary*

—

*(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

*(b) an order of judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, oerror or omission;*

*(c) an order or judgment granted as a result of a mistake common to the parties.” (My underlining)*

[57] Before determining whether the Bank has the competence to invoke Rule 42(1)(a) it is perhaps desirable that I consider the grounds upon which it seeks to do so.

[58] The Bank contends that the default judgment against Ms Prinsloo was erroneously sought and granted in that it was entitled to no more than an order striking down her opposition to the Bank’s application to amend its particulars of claim and not to the striking down of the defence on the merits of the claim. In its replying affidavit, the Bank sought to enlarge the grounds upon which it had invoked Rule 42(1)(a). It in this regard contended that the default judgment had also been erroneously sought and granted by virtue of the fact that the Bank’s particulars of claim in their then form were excipiable and did not sustain a cognizable cause of action. This enlargement was grounded on a point in law and the Bank’s reliance thereon will not occasion prejudice to the defendants. I will consequently approach the matter on the basis of the enlarged grounds.

[59] The Practice Manual provides for the following in Directive 9.8.2:

*“Where a party fails to deliver heads of argument and/or a practice note within the stipulated period, the complying party may enrol the*

*application for hearing. Such party shall simultaneously bring an application on notice to the defaulting party that on the date set out therein, (which shall be at least 5 days from such notice), he or she will apply for an order that the defaulting party delivers his or her heads of argument and practice note within 3 days of such order, failing which the defaulting party's claim or defence be struck out. Such application shall be set down on the interlocutory roll referred to in 9.10. below."*

[60] The application which had been enrolled related to the Bank's attempt to amend its particulars of claim. The defendants had opposed the amendment and the matter would necessarily have had to be determined by the Court.

[61] Heads of argument and the required practice notes needed to be filed. Ms Prinsloo omitted to do so, which omission endured despite the compelling order which had been granted against her and which had put her on terms to file the necessary documents. It would thus have been quite proper for the Bank to approach the Court in order to strike down Ms Prinsloo's defence on the merits of the action. The Bank was not confined to striking down Ms Prinsloo's opposition to the amendment, thereby (and postulating that relief was given to that effect) allowing it vis-a-vis Ms Prinsloo to amend its particulars of claim on an unopposed basis. I am in this regard mindful that Ms Prinsloo had as yet not filed a plea in the action. She had however entered an appearance to defend it and it is that entry which the Court was entitled to strike down. This would have entitled the Bank to take the default judgment which it did in fact take. I am by no means



persuaded that the order was on this ground erroneously sought and granted.

[62] It is common cause that when default judgment was sought by the Bank against Ms Prinsloo its particulars of claim were excipiable and did not sustain a cause of action. It was clearly errant on the part of the Bank to seek a default judgment on those defective particulars of claim. (See *Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd 2012 (3) SA 371 (KZP)*). It seems to me that had the true facts been drawn to the attention of Judge Makume, he would not have granted judgment. To that extent, Rule 42(1)(a) would notionally have been available to the Bank but for the impediment to which I will now refer.

[63] The question arises whether the remedy of a rescission under Rule 42(1)(a) is available to the Bank.

[64] The words “any party affected” where it appears for the first time in Rule 42 are of wide import and on the face of it, it would include any one or more of the parties to the suit. On that basis a plaintiff who had sought and obtained a judgment will have the competence to subsequently seek its rescission. However, the words “any party affected” where they appear in subsection (a) of Rule 42(1) must be given effect to. Those words connote that the foreshadowed remedy is to be confined to the party who was absent at the time when the judgment was sought and granted. It would not have been necessary for the words in question to be qualified by the words “in the absence” if it had not been intended to impose some limitation on the party competent to apply for the rescission of the judgment in question. This holds

the consequence that the remedy under sub-rule (a) is only available to the absent party and thus not to the party who had initially sought and obtained the judgment. This constraint does not apply where relief is grounded on subsection (b) and (c) of Rule 42(1).

[65] I am mindful of the decision in *Ex parte Jooste* 1968(4) SA 427 O where it was held that Rule 42(1)(a) is in its terms wide enough to permit a party who had obtained a judgment in an *ex parte* application to subsequently apply for the rescission of that judgment. This gives rise to an incongruent result. If the application is *ex parte* in nature the applicant who sought and obtained the order, may seek to rescind it. However the applicant who sought and obtained the order in an application where others were party to it would not enjoy that competence. Rescission in the latter situation would only be available if one of those parties was absent and then only at the instance of that absent party. This incongruence is perhaps due to the fact the words “in the absence of any party affected thereby” in sub-rule (a) will have no application where the application is *ex parte* in nature.

[66] In short, the words “*in the absence of any party affected thereby*” are in my judgment of a limiting nature. It confines the remedy under Rule 42(1)(a) to the absent party only and thus not to the party who had initially sought and obtained the judgment.

[67] This approach is consonant with the approach which was adopted in *Stander v Absa Bank* 1997(4) SA 873 (E) where Neppen J at 882 E – F had this to say on the sub-rule:

*“It seems to me that the very reference to “absence of any party affected,” is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the Court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the Court in order to have such order or judgment rescinded or varied on the basis of facts, of which the Court would initially have been unaware, which would justify this being done. Furthermore, the Rule is not restricted to cases of an order or judgment erroneously granted, but also to an order or judgment erroneously sought. It is difficult to conceive of circumstances where a Court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this is so, were placed before the Court.”*

[68] The approach of Neppen J was endorsed by H J Erasmus J in *President of the RSA v Eisenberg and Associates* 2005 (1) SA 247 (C) at 264 D – J.

[69] It would thus seem to me that Rule 42(1)(a) is designed to afford a remedy to the party who is absent when a judgment which affects that parties' interests is taken, provided only that the judgment was erroneously sought or erroneously granted. This remedy does not extend to the party who sought the order and who was thus present when it was moved and granted.

[70] Ms Prinsloo was absent when Judge Makume granted the default judgment against her. Notionally then, she enjoyed the right under Rule 42(1)(a) to institute proceedings for the rescission of that order, provided she could

demonstrate that the order was either erroneously sought or granted. The Bank was not the absent party and could consequently not rely on the sub-rule to secure the required rescission.

[71] I remain unpersuaded that the Bank had the necessary *locus standi* to institute proceedings for the rescission of the default judgment. This then disposes of the rescission application, insofar as it is based on Rule 42(1)(a). I merely add that but for the *locus standi* issue I would have been disposed to rescind the default judgment.

[72] The Bank's reliance on the common law in grounding its application for rescission is equally misplaced. It in this regard seems to me that the common law remedy is confined to persons who in consequence of some or other default have been saddled with a judgment against them (see in this regard *De Wet & Others v Western Bank Limited* 1979(2) 1031 (AD) at 1041A-1043A.

[73] The Bank consequently has no alternative remedy.

## **SUMMARY**

[74] In the result, the Bank cannot succeed in its application to rescind the default judgment. It falls to be dismissed. Prayer 1 of the counter-application was not necessary and I need not make an order in relation thereto. As to rest the case asserted by Ms Prinsloo and the remaining defendants must fail. This Court is not *functus officio* and the default judgment is not to be treated as a final judgment. *Res judicata* does not arise, whether as between the Bank and Ms Prinsloo or whether as between the Bank and the remaining

defendants. The action will consequently proceed in the ordinary course and presumably the next step in those proceedings will be concerned with the Bank's application to amend its particulars of claim.

[75] As to costs, it is of course true that the Bank's application for the rescission of the default judgment must fail. Ms Prinsloo and the remaining defendants have to that end enjoyed some degree of success. Having said this, the Bank has enjoyed overall success in the litigation. It has defeated the central and all important contentions that the Court is *functus officio* and that the litigation between it, Ms Prinsloo and the remaining defendants is at an end by virtue of the *res judicata* doctrine. The Bank has enjoyed the overall substantial success and it seems to me that in all the circumstances it would be proper to direct the respondents to pay the costs of the proceedings, jointly and severally, the one paying the others to be absolved, on the attorney and client scale, being that which was contractually agreed upon.

I consequently make the following orders:-

1. The applicant's application to rescind the judgment of Makhume J of 2 November 2022 against the third respondent in her personal capacity is dismissed.
2. There will be no order on prayer 1 of the counter-application.

3. The orders sought in prayers 2 and 3 of the counter-application are dismissed.
4. The first to fifth defendants are to pay the costs of the proceedings, jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.

**Gerald Farber**  
**Acting Judge of the High Court**  
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