IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 27048/2003

14/6/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

14\6\13 .... DATE

.... SIGNATURE

In the matter between:

AEM PRATT **PLAINTIFF**

And

FIRSTRAND BANK LIMITED **DEFENDANT**

JUDGMENT

Fabricius J,

1.

The only issue before me is whether or not to uphold par. 1 of First Defendant's replication (Pleadings Bundle 159.1 to 159.4) to the effect that par. 2 of Ms. Pratt's plea to First Defendant's counter claim is *res judicata.*

I was provided with various bundles of documents by agreement between the parties, and Counsel's very detailed heads of argument for which I am very grateful.

2.

The relevant background facts are fully set out in a judgment of Mokgoatlheng AJ of 5 April 2007 under case no: 27048/03. I do not intend to repeat all of them. For present purposes however it is necessary to refer to some detail, and to have regard to the relevant pleadings.

3.

On 25 September 2003 Ms. Pratt instituted action against *inter alia* Firstrand, for an order declaring that "the agreement between Plaintiff and First Defendant, contained in annexure "AP1", "AP2" and "AP3" and in annexure "B" to annexure "AP6" to the particulars of claim, *ab iniotio* null and void." She had entered into, amongst others, a loan agreement with First Defendant, being the Bank, and, having pleaded the relevant background to that loan, she pleaded that the relevant amount lent to her "exceeded the fair value" of a certain shareholding and, that the relevant annexures referred to in her prayer for the relief sought, constituted a transaction or transactions whereby capital or a right to capital was directly or indirectly exported from the Republic of South Africa in contravention of Exchange Control Regulation 10(1)(c), and accordingly, the loan agreement was at all times null and void. This regulation was promulgated in terms of s9 of the Currency and Exchange Act 9 of 1933. I may just mention that her case based on Regulation 3(1)(e) was later abandoned. The other Defendants are not before Court.

4.

On 16 November 2004 Firstrand pleaded to the particulars of claim, and also raised a counter-claim for the repayment of the loan advanced by it. Ms. Pratt then pleaded to Firstrand's counter claim, and denied liability to repay the loan advanced to her by Firstrand on the grounds that the loan agreement was void because it formed part of a suite of agreements that contravened Regulation 10(1)(c).

5.

The matter proceeded to trial on 31 January 2007, and the separated issues before the court were then the following (as formulated by the parties):

5.1 do the agreements as "AP1" to "APb" of the Plaintiff's particulars of claim constitute transactions falling within the ambit of Regulations 3(1)(e) and 10(1)(c)?

5.2 If so, did the First Defendant have permission to conclude such agreement and/or was the First Defendant exempted from the provisions of Regulation 3(1)(e) and 10(1)(c)?

5.3 If not, were the agreements a contravention of Regulation 3(1)(e) and 10(1)(c)?

5.4 If so, did the contravention of Regulation 3(1)(e) and 10(1)(c) result in the agreements being null and void?

Ms. Pratt gave no evidence during those proceedings, but Firstrand lead the evidence of Mr.Ribbens, who was the Bank's head of the foreign exchange division, and was also the bank's official representative at the quarterly committee meetings of the South African Reserve Bank. He was not cross-examined.

I may just mention in the context of the questions posed to the court, that the learned acting judge was in agreement with the decision of ***Couve and Another v Reddot International (Pty) Ltd 2004 (6) SA 425 (W)*** to the affect that an agreement witch contravened the provisions of regulation 10(1)(c) was null and void. In ***Oilwell (Pty) Ltd v Protec International Limited and Others 2011 (4) SA 394 (SCA)***, the court disagreed with that decision, amongst others on the basis that the Treasury could consent to any transaction *ex post facto*, and because the relevant legislation contained a penalty clause.

Before concluding that the mentioned agreements constituted transactions falling within the ambit of regulation 10(1)(c), and that Firstrand had permission to conclude the agreements, and that they did therefore not contravene the said Regulations, and were therefore not null and void, the learned judge dealt with the evidence, and held in par. 143 of the judgment that Plaintiff had not proven on a balance of probabilities that the Bank knew that the amount of R25m significantly exceeded fair value of the particular 70% shareholding, and furthermore that the relevant transaction was concluded at arms-length.

Accordingly the learned acting judge dismissed Plaintiff's action. I must mention that the learned acting judge found, as a matter of fact, that the right to export capital accruing from the purchase of shares by a non-resident is a prior approved and committed transaction, and that therefore the present type of transaction was permitted in terms of Regulation 10(1)(c). The conclusion of the court was based on the evidence received by it which was not challenged. In the context of the relevant transaction being concluded at arms-length, reference was made to the market related price as contemplated in Exchange Control Ruling E5(A)(i)(a).

6.

Ms. Pratt appealed to the Supreme Court of Appeal and on 12 September 2008 the appeal was dismissed with costs.

The judgment of the Supreme Court of Appeal also briefly sets out the relevant background, and I deem it important to repeat what the Court said regarding Plaintiff's case: "Her case as pleaded was that the agreements or the implementation constituted a transaction whereby capital or a right to capital was directly or indirectly exported from the Republic in contravention of Exchange Control Regulation 10(1)(c), because no exemption or permission to do so was granted by the Treasury or a person authorised by the Treasury, and a loan agreement, being part of that transaction, was illegal, null and void and unenforceable at the instance of the Respondent." There was no dispute in the appeal that regulation 10(1)(c) was engaged by the agreements or certain of them. The Supreme Court of Appeal then dealt with the onus of proof, and held that Ms. Pratt was at all times required to plead the illegality relied on, and to adduce evidence of all necessary and relevant facts to support her claim. The incidence of the onus was therefore of the greatest importance, and the cardinal question in the first stage of the case was compliance (or not) with the requirements of Regulation 10(1)(c). The failure by her to adduce any evidence of absence of permission should have been fatal to the success of her claim. Since however evidence was placed before the Court concerning the issue of permission, this could not be ignored, and the Court then dealt with its admissibility and substance. In the context of the Bank's purpose in presenting the evidence to show that if the transactions were struck by regulation 10(1)(c), which they were, it was held, that the export of capital or the right to capital took place with permission granted by the Treasury, and in accordance with whatever conditions it had imposed. In the particular context Mr.Ribbens had explained that Ruling E5(c)(a) was a blanket permission granted to remit off-shore the proceeds of the sale of securities owned by foreigners, provided that that was affected through normal banking channels. His evidence in the historical context of slackening of exchange controls upon assets held by non-residents, and evidence of such ongoing practice by authorised dealers at the behest of the Reserve Bank gave rise to a rebuttable inference of fact, *viz* that the practice had the approval of the Reserve Bank. The Appellant did not challenge this evidence, The Supreme Court of Appeal then held that the evidence established that the Respondent had been authorised to remit the proceeds of the relevant sale.

7.

I must mention that it was the Bank's case, via Mr. P. Louw SC, that the relevant permission had been granted when Standard Bank stamped the particular share certificate on 8 May 2000, which was prior to Firstrand Bank's involvement in the matter. His point was, having regard to the evidence of Mr. Ribbens, and the way that the issues were pleaded, and put before the Court, that the relevant permission had been granted as a matter of course, taking into account the practice that had evolved between the Reserve Bank and authorised dealers in the present context. It is clear from the judgment of the learned judge of appeal, Heher JA, that the Court held that the relevant permission had been granted, and on that basis it dismissed the appeal, but did not make any order in respect of the counterclaim.

8.

Some 19 months after the dismissal of her appeal, Ms. Pratt gave notice of her intention to amend her plea to Firstrand's counter claim. This amendment was granted during July 2010. The affect of this amendment in essence is the allegation that Firstrand devised and implemented the transactions on behalf of her, with the intention of circumventing regulation 10(1)(c) of the regulations, and that in consequence the suite of agreements, including the loan made to her, were illegal and thus null and void. In the alternative, she contended that because Firstrand exceeded its authority as an authorised dealer to remit the proceeds of the sale of the particular shareholding in Aem Pratt and Associates through normal banking challenge, it did not have the necessary permission by Treasury, and in consequence again, the agreements were illegal and therefore null and void.

As a result, Firstrand delivered a replication in which it introduced the defence of *res judicata*, and that is the question that I have to decide. As I have said, Counsel went to great lengths, (for which I thank them) to place all relevant facts and argument before me, principally relating to the facts that I have mentioned (briefly), and the legal principles relating to *res judicata* issues. I think it is fair and concise to say that Mr. P. Louw SC's argument was that the question whether Firstrand had permission or not to conclude such agreements., had been before Mokgoatlheng AJ, had been decided in the affirmative by him, and that his decision had been upheld on appeal. The issue of permission had thus been decided once and for all. It was *res judicata,* whether the decisions were right or wrong. What Ms. Pratt now sought by way of the mentioned amendments was to have the issue of permission retried on the basis that there were two further alternative reasons why the finding of the provincial division and the Supreme Court of Appeal was wrong. It was wrong amongst others because neither of the Courts had the facts at hand that she now wished to place before this Court. Having regard to the pleadings, and the evidence and the judgments, it was the Bank's case, in deciding the question of *res judicata*, that the approach must be one as on exception i.e. that the relevant allegations contained in the amended plea must be taken as proven, and it must then be determined whether the ultimate case made out, sought to contradict the findings of the previous Courts. No evidence could be produced on this issue.

9.

I may mention at this stage that Mr. Harris SC sought to lead the evidence of Ms. Pratt and Mr. Bruce-Brand to explain to me why the fomer had not been called as a witness in the proceedings, what the relevant circumstances had been at the time, and how the issue of the alleged fraudulent conduct of the bank had risen and when. Mr. Bruce-Brand in turn wished to give evidence how the Reserve Bank would have regarded a certain hypothetical case. During the proceedings before me, and after due consideration of the relevant facts, I decided that this evidence was irrelevant and therefore inadmissible. Ms. Pratt gave no evidence in the original proceeding and her Counsel preferred not to challenge the evidence of Mr. Ribbens. Having regard to the issues that were before the trial Court and the Supreme Court of Appeal, I fail to see how that evidence could be of any relevance herein. Apart from that, It would be grossly unfair to the Bank to allow such evidence of this stage of the proceedings, and it would, in the absence of any substantive application, in essence amount to a re-opening of Plaintiff's case.

10.

I do not deem it necessary to refer to all the judgments that Counsel for both sides had placed before me in the context of a plea of *res judicata* and issue-*estoppel*. See: ***Janse van Rensburg and Others NNO v Steenkamp and Another 2010 (1) SA 649 (SCA) at 660 to 661***.

Mr. Harris SC on behalf of Plaintiff pointed out that her allegation of First Defendant having committed fraud, does not appear anywhere in the pleadings, nor was it an issue either before the trial Court or before the SCA. Looking at that in isolation this submission is factually correct. Mr. Louw SC in turn argued that the central question before the Courts was the question of permission. The Courts had found that permission had been granted on a blanket basis, and this finding stood, it cannot be varied, and it was not open to anyone to challenge it, even it was wrong. The further reason that Ms. Pratt now wish to advance amounted to a challenge of a central finding, and ought not to be allowed. In any event they were mere *facta probantia*. The central issue between the parties was the absence or presence of permission, and this was die *factum probandum* that had been finally decided by the SCA. This could not be undone by now relying on *facta probantia. A factum probandum* is a fact in issue and *facta probantia* are facts relevant to the facts in issue. Sometimes different phrases are used such as "main fact in issue" and "subordinate or collateral fact in issue". See: ***Schmidt Bewys reg, 4th ed. Lexis Nexis 2000 at 388 to 390***.

11.

It is clear from the relevant decisions, and especially those of ***Smith v Porritt 2008 (6) SA 303 (SCA)*** and ***Janse van Rensburg v Steenkamp supra***, that the defence of *res judicata* must require careful scrutiny, that each case will depend on its own facts, and that any extension of the defence will be on case-by-case basis. Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others. It is at this stage convenient refer to a summary of the whole debate by Leach AJA in ***Yellow Star Properties 1020 v MEC, Gauteng 2009 (3) SA 577 (SCA) at 586 par. 21 and 22***:

"...it is necessary to deal with the principles of *res judicata* and so-called "issue *estoppel*" relied on by both sides. The underlying *ratio* of the *exceptio rei judicatia vel litis finitae* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other on the same cause of action should not be permitted. In ***National Sorghum Breweries Limited (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA)... at 239 par 2*** Olivier JA stated the requirements for a successful reliance on the *exceptio* to be as follows: "the requirements for a successful reliance on the *exception* were, and still are: *idem actor, indem reus, eadem res* and *eadem causa pentendi.* This means that the *exception* can be raised by a defendant in their later suit against a plaintiff who is "demanding the same thing on the same ground" (See: Steyn CJ in ***African Farms and Townships Limited v Cape Town Municipality 1963 (2) SA 555 (A) at 562A***); all which comes to the same thing, "on the same cause for the same relief" (per von Wissen AJA in ***Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472A to B***; see also the discussion in ***Kommissaris van Binnelandse Inkomste v ABSA Bankk Beperk 1995(1) SA 653 (A) at 664C to E***; or which also comes to the same thing, whether the "same issue" had been adjudicated upon (See: ***Horowitz v Brock and Others 1988 (2) SA 160 (A) at 179A to H***).

It has been recognised that though the strict requirements of the exception, especially those relating to *eadem res* or *eadem petendi causa* (the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (*viz idem actor* and *eadem questio*), it has become common place to refer to it as being a matter of so-called "issue *estoppel*". But that is merely a phrase of convenience adopted from English Law, the principles of which have not been subsumed into our law, and the defence remains one of *res judicata*. Importantly when dealing with issue *estoppel*, it is necessary to stress not only that the parties must be the same, but that the same issue of fact of law which was an essential element of the judgment on which reliance is placed must have arisen, and must be regarded as having been determined in the earlier judgment."

12.

I deem this brief summary by the learned acting judge of appeal as being appropriate in the present proceedings. It is in my view clear from the judgment of the SCA, the judgment of the trial Court, and the evidence presented therein, as well as the relevant pleadings between the parties, that the issue which was an essential element in the litigation between the parties is one of permission by the Reserve Bank for the particular transaction in the context of the evidence of Mr.Ribbens and of course, having regard to the share certificate endorsed by Standard Bank prior to the entering into of the contracts which form part of Plaintiff's particulars of claim. That issue has been decided, and that essential issue cannot now be revisited by way of reliance on the allegation contained in the amended plea. That topic, in my view, is in any event one that would be referred to as being a *facta probantia*. See in this context: ***Dusheiko v Milbern 1964 (4) SA 648 (A) at 658A*** where the following was said: "I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in ***Mckenzie v Farmers Co-operative Meat Industries Limited (supra)*** in any given case, it is born in mind that the definition relates only to "material facts", and if at the same due regard be paid to the distinction between the *facta probanda* and the *facta probantia*." In this context "cause of action" was defined in the mentioned ***Mckenzie*** decision ***1922 AD 16 at 23*** as "every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." Further, in ***Evans v Shield Insurance Company Limited 1980 (2) SA 184 (A) at 825G*** where it was said that "cause of action...is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action."

13.

It is clear in the light of all of the above that it was, and is Plaintiff's case that there was no permission in the context of the mentioned Regulation 10(1)(c) read with the relevant ruling that applies to South African assets owned by non-residents. In my view it is clear that Plaintiff's amendment persist with this approach which, in my, has already been decided. In the amendment she raises the same issue which was an essential element of the judgment on which reliance was placed. It is differently worded, of course, but the essence of her attack, if I can call it that, remains the same.

14.

For the sake of completeness I must however repeat the Bank's argument, that permission was already in place before the various contracts that Plaintiff refers to in her particulars of claim, were concluded. This is clear from the evidence of Mr.Ribbens and the view of the SCA on appeal as well. If that is so, the Bank's conduct at the time, even if it is accepted to be true for present purposes, is irrelevant.

15.

In the light of all of the above the following order is made in the context of Plaintiff's amendment of her plea to First Defendant's counter claim:

it is declared that the question of the validity of the loan agreement, in the context of Regulation 10(1)(c) that this Court, and on appeal the Supreme Court of Appeal, has finally decided that issue, and First Defendant's plea of *res judicata* in this context is therefore upheld with costs, including the costs of two Counsel.

JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

Case number	: 27048/2003
Counsel for the Plaintiff:	Adv. L. Harris SC
	Adv. A Steyn
Instructed by:	Van Zyl Hertenberger Inc.
	Northcliff
Counsel for the First Defendant:	Adv Louw SC
	Adv. M. Chohan
Instructed by:	Routledge Modise Incorporated
	Sandton
Heard on:	05 June 2013
Date of Judgment:	14 June 2013