



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

CASE NO: 2015/32049

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

26 September 2024
DATE

.....
SIGNATURE

In the matter between:

GLOBAL AVIATION OPERATIONS (PTY) LIMITED

Applicant

and

INGOSSTRAKH

Respondent

In re:

GLOBAL AVIATION INVESTMENTS (PTY) LIMITED

First Plaintiff

**GLOBAL AVIATION INVESTMENTS GROUP (BVI)
LIMITED**

Second Plaintiff

GLOBAL AVIATION OPERATIONS (PTY) LIMITED

Third Plaintiff

and

INGOSSTRAKH

Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand down is deemed to be 10h00 on 26 September 2024

JUDGMENT

VAN NIEUWENHUIZEN AJ

[1] This matter came to me in the opposed motion court on 15 May 2024 and the following relief is claimed in the notice of motion:

- “1. Declaring that the respondent's purported plea to the applicant's claim B, a copy of which is annexure L to the founding affirmation herein, is invalid and of no force or effect.*
- 2. Declaring that the applicant is entitled to make application for default judgment in respect of the applicant's said claim B on a date to be assigned by the Registrar or the above Honourable Court.*
- 3. Ordering the respondent to make payment of the costs hereof.”*

[2] The matter has a lengthy litigation history, the details of which I do not intend to repeat here in full.

[3] For the sake of convenience the applicant will be referred to as “Operations” and the respondent as Ingosstrakh. When referring to the pleadings in claim “A” I will simply refer to the three Global companies (the third of which is Operations) as “the Plaintiffs” or the 1st, 2nd or 3rd

Plaintiff as the context may require. In respect of the Appeal to the Constitutional Court I will also refer to the respondents in that matter as the Plaintiffs.

- [4] The Plaintiffs issued summons against Ingosstrakh which summons referred to a Claim A and Claim B. Claim A deals with the claim of the first, second and third Plaintiffs based on an insurance agreement in respect of an Airline Hull “*all risks*” insurance agreement under contract number AD231512 with unique market reference B0509AD231512 (“the policy”), a copy of which is marked “X” to the particulars of claim.
- [5] The indemnity Ingosstrakh granted to the Plaintiffs during the period of the policy whilst in flight, taxiing on the ground, howsoever occasioned to certain aircraft, one of which is a MD82 aircraft, with registration mark ZS-TOG, aircraft manufacturer serial number 49905 (“the aircraft”). The aircraft was insured under the policy for the agreed sum of USD2.5 million and the insurance premium would be 3.34% of the agreed value of the USD2.5 million and payable in terms of the premium payment clause.
- [6] I do not deal with the details of the policy, given the fact that the main issue in this matter is whether or not Ingosstrakh is barred from pleading.
- [7] The lengthy litigation referred to pertains to Claim A and includes the fact that, after service of the summons Ingosstrakh did not plead

timeously and a notice in terms of Rule 26 was served upon it to deliver its plea within five (5) days of receipt of the notice. The notice provides, further, that, *“should the plaintiff (sic) fail to deliver its plea within the aforesaid period, it will be in default and will be ipso facto barred from delivering its plea”*.

[8] The summons was issued on 9 September 2015 and the notice of bar was only served on 3 November 2015. It is necessary to briefly refer to the litigation history pertaining to Claim A.

[9] On 8 September 2015, the applicants applied, by *ex parte* application, for leave to serve the summons in the action upon Ingosstrakh by causing a copy thereof to be served by the Sheriff upon Ingosstrakh care of Slatter.

[10] This relief avoided the necessity of serving the summons on Ingosstrakh in Russia, which would involve the translation of the summons into Russian and would be a costly and time-consuming process. The insurance policy to which the action relates provides that notices were to be served on Ingosstrakh care of Slatter and it was also clear that any process served upon Slatter would be immediately forwarded to Ingosstrakh by Slatter.

[11] The application for substituted service was granted on 8 September 2015 by Ms Justice Masipa and was duly served on 10 September 2015.

[12] It is clear from this affirmation that Slatter forwarded the summons to Ingosstrakh which, in turn, instructed its attorneys, Clyde & Co, to enter an appearance to defend the action. Clyde & Co were not only instructed by Ingosstrakh but were well aware of the Plaintiffs' claim long before the service of the summons.

[13] Clyde & Co served a notice of intention to defend on behalf of Ingosstrakh on 30 September 2015 and, when it did not deliver its plea to the summons 20 days after service of the summons on 28 October 2015, and failed to do so right up to 4 November 2015, the notice of bar, already referred to, was served.

[14] Despite the delivery of the notice of bar, Ingosstrakh persisted in its failure to deliver a plea, whereafter, on 10 November 2015, Ingosstrakh's attorneys served a notice of motion, dated 9 November 2015, upon the Plaintiffs' attorneys, in which the following relief was sought:

14.1 that the court order handed down by Her Ladyship Ms Justice Masipa on 8 September 2015 be set aside;

14.2 consequent upon the setting aside of the order, the service of the summons by the Plaintiffs on Ingosstrakh on 9 September 2015 under case number 32049/15 be set aside;

14.3 that the notice of bar served by the Plaintiffs on Ingosstrakh on 3 November 2015 be uplifted;

14.4 seeking costs of suit on the attorney and client scale.

[15] This application was opposed and answering and replying affidavits were delivered and ultimately heard by His Lordship the Honourable Mr Justice Van Oosten on Monday, 29 August 2016. The court delivered its judgment on 2 September 2016 and:

15.1 dismissed the application; and

15.2 ordered Ingosstrakh to pay the costs of the application, such costs to include the costs consequent upon the employment of two counsel on the attorney and client scale.

[16] No application for leave to appeal against van Oosten J's order was sought.

[17] Consequently Ingosstrakh was now required to plead to the Plaintiffs' summons. The period prescribed by the notice of bar served by the Plaintiffs' attorneys had expired on or about 11 November 2015.

[18] On 27 September 2016 Plaintiffs served an application for default judgment against Ingosstrakh in respect of Claim A in the sum of USD2.5 million, plus interest on that sum at the rate of 9% per annum

a tempore morae to date of payment and costs of suit. The application for default judgment also dealt with Claim B, seeking:

- “(i) *payment of the sum of USD170,245.24 per month, commencing from 1 February 2013 and for each month thereafter until the respondent pays the applicants the amount owed in respect of Claim A above;*
- (ii) *interest on each monthly amount at the rate of 9% per annum calculated from the first day of each month until date of payment;*
- (iii) *costs of suit.”*

[19] However in view of the fact that Claim B is an unliquidated claim, it was decided that the application for default judgment would be made only in respect of Claim A and that Claim B would stand over for determination in due course. Ingosstrakh’s attorneys were advised thereof by letter from applicant’s attorneys dated 28th September 2016.

[20] Ingosstrakh opposed this application and also delivered a counter-application, in terms of which it sought, in prayer 1, that the judgment of 2 September 2016 be considered in relation to whether there was an obvious omission in failing to deal with its prayer for the uplifting the notice of bar. In the alternative, Ingosstrakh sought an order that *“the court supplement the judgment to deal with the oversight in relation to the alternative relief sought by Ingosstrakh in its application”*. Further in the alternative, Ingosstrakh sought an order uplifting the notice of bar served on 4 November 2015 and condoning the late delivery of its plea. Plaintiffs opposed Ingosstrakh’s counter-application.

- [21] The applications were heard on 26 April 2018. In a judgment delivered on 31 July 2018 the court considered it an 'unfair procedure' for the Plaintiffs to seek default judgment, 'in the midst of protracted litigation' between the parties, and long after the entry of appearance to defend. The court also held that there were disputed issues, both of a factual and technical nature, which could only be resolved by expert evidence in a trial. Operations' decision not to proceed with the default judgment in respect of claim B was a further reason to refuse the application, as the court considered the two claims interlinked.
- [22] Ingosstrakh's counter-application for the 'clarification' and 'supplementation' of the order of 2 September 2016, and for condonation of the late filing of its plea was also dismissed given that it lacked any basis and was misplaced as that the court did not have the appeal or review jurisdiction to interfere therewith.
- [23] Both the Plaintiffs and Ingosstrakh obtained leave to appeal against the dismissal of their respective applications to the SCA. It held that the issue whether Ingosstrakh is entitled to the upliftment of the notice of bar has been determined in the judgment of 2 September 2016, in terms of which its prayer to that effect was dismissed and that Ingosstrakh was not entitled to seek the same relief under the rubric of 'condonation for the late delivery of its plea'. In all the circumstances the order made by the court on 2 September 2016

stands. The issue is res judicata and Ingosstrakh is barred from filing its plea to Claim A.

[24] The court nevertheless considered whether Ingosstrakh could obtain condonation for the late filing of its plea.

[25] It appears to be common cause between the parties that the SCA was only dealing with Claim “A” and hence Claim “B” remains unaffected by the findings in the SCA.

[26] Although the SCA was not dealing with claim “A” there can be no reason in logic why its observations regarding the Van Oosten J judgement of 2 September 2016 which was never appealed does not hold up in respect of Claim B as well. The question whether Ingosstrakh is under bar was finalised by van Oosten J. Although the SCA was dealing with Claim A when it ruled that this judgment stands and the matter is res iudicata it equally applies to Claim B for the same reasons.

[27] It now turn to the allegations made in the Answering Affidavit in the case before me. I have to consider whether any of the assertions therein upsets the position as I see it above.

Ingosstrakh’s case on claim B

[28] Mr Lawrenson sets out Ingosstrakh’s stand as follows:

- 5.1 First that Operations agreed to the delivery of a plea in terms of Claim B, i.e. that to the extent necessary, it agreed to condone the late filing of the plea;
- 5.2 Second that Operations waived its entitlement to rely on the barring of Ingosstrakh to deliver a plea to Claim B, expressly and/or by conduct;
- 5.3 Third that delivery of a plea to Claim B, was at best an irregular step, which thus required of Operations to invoke Rule 30 or Rule 30A. Operations did not do so and what is more it proceeded to take further steps by calling for security for costs and for discovery.

[29] It is convenient to deal with 5.3 first. Leaving aside 5.1 and 5.2 the delivery of a plea on Claim B would in view of van Oosten J's decision simply be a nullity. A party who is under bar is not absolved from putting up security if an appropriate case is made out for same nor is he absolved from making discovery. The effect of the bar is to deprive it from its right to plead and defend the action as a party. Nothing in the rules of court suggests that it absolves it from any obligations that can be enforced against it as a party.

[30] I now deal with 5.1. It is asserted that Operations always understood and accepted that Ingosstrakh was entitled to deliver a plea in relation

to Claim B and there has been a potential misrepresentation to the Court. This is based on the notion that Ingosstrakh approached the Constitutional Court because it was *inter alia* going to be deprived of access to Court in relation to Claim B. On the basis that the SCA did not deal with Claim B the application for leave to appeal to the Constitutional Court could hardly have had anything to do with same. It is contended that the Plaintiffs countered this by assuring the Constitutional Court that Ingosstrakh would not be affected by the bar in respect of claim B and, in so doing, was successful in persuading the Constitutional Court not to grant leave to appeal and if they misrepresented the position, then this has a further consequence in relation to the relief granted by the Constitutional Court. In this regard Ingosstrakh's rights are reserved. The non sequiturs are obvious. This, however, does not mean that the Plaintiffs did not refer to Claim B in their answering papers.

[31] In support of the aforesaid Ingosstrakh relies on the following extracts from the Plaintiffs' answering affidavit in the Constitutional Court:

"14. The applicant now contends that because of the judgment of the SCA it is precluded from defending the Damages Claim (i. e.Claim 8).

15. This is not correct. The respondents initial application for default judgment did relate both to the claim for indemnity against the applicant as insurer as Claim A (the insurance claim) and the Damages Claim as Claim B

18. This was confirmed in the judgment of the SCA in footnote 1 to paragraph 7, in which it was stated:

" This claim was abandoned in the Court a quo and accordingly is not an issue in this appeal. "

19. The applicant is correct in stating that such claim was not abandoned in toto, but only for purposes of the application for default judgment. That is what was meant by the SCA in the said footnote to its judgment. Paragraph 10 of the judgment expressly noted that the Court a quo had mentioned the respondent's decision not to proceed with the default judgment in respect of Claim B.

20. The effect of the foregoing is that the damages claim was excluded from the matter and is not affected thereby. The judgment of the SCA was clearly predicated on the fact that the matter related only to the Insurance Claim and all of the factors considered by the SCA related only the Insurance Claim.

21 The applicant is thus incorrect in contending that it is unable to oppose the Damages Claim and prejudiced thereby. The Damages Claim was not relevant to the proceedings heard in the SCA and was accordingly not affected thereby

51. As I have set out above, the damages claim B, is not affected by the judgment of the SCA. There is thus no unfairness whatsoever

52. The question whether Global is entitled to the damages claim and if so, the quantum thereof has yet to be decided by

the Court as set out above. Ingosstrakh has not been deprived the right to plead to such claim.

54 The SCA was thus aware of the position relating to Claim B as appears from its judgment. There is no basis for the allegation that "the SCA was, with respect, wrong."

55 As set out above the decision of the SCA does not mean or even appear to mean that Ingosstrakh has been deprived of filing a plea to Claim B.

- [32] It is alleged that the above statements are important. It is important because (1) the default judgment that served before the Supreme Court of Appeal was in relation to Claim A only. (2) Plaintiffs always understood and accepted that Ingosstrakh was entitled to deliver a plea in relation to Claim B and (3) there has been a potential misrepresentation to the Court. It is alleged that at least part of the basis upon which Ingosstrakh approached the Constitutional Court was that it was inter alia going to be deprived of access to Court in relation to Claim B. Plaintiffs countered this by assuring the Constitutional Court that this was not the case and, in so doing, was successful in persuading the Constitutional Court not to grant leave to appeal. If Plaintiffs misrepresented the position, then this has a further consequence in relation to the relief granted by the Constitutional Court. In this regard the respondent's rights are reserved.

[33] Ingosstrakh based on the above states that the said conduct demonstrates a clear agreement by Plaintiffs that Ingosstrakh is to be allowed to deliver its plea to Claim B or, at the very least, and insofar as it may be necessary, an agreement by Operations to condone delivery of the plea and alternatively specifically indicates a waiver of reliance on the Supreme Court Judgment, to the extent that it can be construed as not permitting a plea to be filed in relation to Claim B.

[34] The conclusion is simply not sustainable in as much as a clear agreement to file a plea to Claim B is contended for. It is incomprehensible that Ingosstrakh could have thought that the SCA judgment should be appealed so as to achieve the result that a plea to Claim B could be filed. On its own version the SCA judgment does not deal with Claim B so why would leave to Appeal to the Constitutional Court be of any help? The inferences sought to be drawn are based on confused thinking and certainly does not support a clear agreement that a plea to Claim B could be filed. The highwater mark is where it is said above in 52 that Ingosstrakh was not deprived of the right to plead to Claim B. This is still not enough. In the context it can only mean that the SCA did not deprive Ingosstrakh of the right to file a plea to claim B. It is abundantly clear that the van Oosten J judgment deprived Ingosstrakh from the right to file a plea and not the SCA . The Constitutional Court was not faced by a misrepresentation at all. If anybody is misrepresenting anything it is Ingosstrakh who tries to distort the context in which all the above was said.

[35] The next point raised is paragraph 5.2 above to the effect that no steps were taken to set aside the irregular proceedings in as much as Ingosstrakh has filed its “plea to claim B” on 2 November 2021. To my mind once the bar has set in whatever Ingosstrakh tries to dish up as a plea is simply a nullity. No need existed at all to set same aside. From a practical point of view the plea is as good as *pro non scripto*. This was done after the Plaintiffs/Operations allegedly indicated that there is no impediment to such plea being filed to claim B. The passages referred to in the Plaintiffs answering affidavit to Ingosstrakh’s application for leave to appeal does not demonstrate the result it is contending for. If anything, it demonstrates that the SCA judgment had no effect on the bar in respect of claim B. To me it appears to be an opportunistic and clumsy attempt to circumvent the findings of van Oosten J.

[36] I have already dealt with the application for discovery and the application for security. Nothing in the following passages quoted from the application for security suggests that there is an agreement to file a plea to claim B:

“37. Claim B to the summons is now proceeding and the applicant wishes to persist with such claim in the above Honourable Court.

38. Pleadings have closed and the applicant is proceeding with preparation for trial

41. ... Claim B will be a protracted action which will require inter alia expert evidence of at least two witnesses in order to prove damages, and the applicant's costs will be substantial”

- [37] The reference to the fact that pleadings have now closed is but a repetition of the consequence of the bar.
- [38] To my mind nothing in Annexure “D” suggests that Operations is not entitled to the relief sought in the notice of motion.
- [39] The fact that Ingosstrakh has objected to putting up security and that Operations has done nothing further in this regard is neither here nor there. The notion that the plea is now immunised because no steps were taken to declare same an irregular step because Operations has taken a further step is preposterous. The bar stands. The whole point of a bar is that the defendant cannot take any step at all in defence of his case.
- [40] The fact that the Constitutional Court found that the Application for leave to Appeal does not engage its jurisdiction is unsurprising.
- [41] Ingosstrakh has as set out above contended that on the facts before me there is a basis to find that there was a waiver of the bar alternatively a condonation of the late filing of the plea on Claim B. Firstly the notion that the Plaintiffs or Operations would waive the bar or condone Ingosstrakh’s conduct in filing a plea on Claim B borders on the absurd. The van Oosten J judgement bestowed on it a massive advantage and when faced with an intractable opponent such as Ingosstrakh it is

difficult to conceive that the Plaintiffs or Operations would abandon its advantageous position. As I understand Ingosstrakh's submissions on this point the waiver could have been express or by conduct. There is simply no evidence of any express waiver. Even if I take the quote that Ingosstrakh could still file a plea out of context and add to that the failure to take steps to declare the plea on claim B irregular coupled with the notion that pleadings have closed and Operations requires discovery together with the application for security for costs cumulatively it still does not stack up to an express or tacit waiver by conduct. I have already dealt with the effect of these allegations on a one by one basis. To amount to a waiver it must be unequivocal and be proved on a balance of probabilities by Ingosstrakh.¹

[42] The principles were stated by INNES, C.J., in Laws v Rutherford, 1924 AD 261 at p. 263:

"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is always difficult, and in this case specially difficult to establish"

[43] I am also mindful of the following:

"But, in considering whether the onus of establishing waiver by conduct has been discharged on a preponderance of probability, a court may nevertheless take cognizance of the fact that persons do not as a rule

¹ See Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration - 1977 (4) SA 310 (T)

lightly abandon their rights. In Cassim v Kadir, 1962 (2) SA 473 (N), MILLER, J., said at p. 478:

... but the onus of proving waiver is on the party alleging it, and the plaintiff cannot discharge that onus short of proving conduct which gives rise to a clear inference that there was an intention to abandon or renounce it. It may be that the onus is discharged by proof on a balance of probabilities (see Kannemeyer v Gloriosa, 1953 (1) SA 580 (W) at p. 585) as in any other civil matter. But the reason for the time honoured dictum that 'waiver must be clearly proved' is that persons are not lightly held to have abandoned their rights or to have made donations."

[44] The same reasoning as above mitigates against Operations condoning the late filing of a plea.

[45] I have considered the notion that the Plaintiffs/Operations committed a mistake of law. The facts do not support this. I have also considered the various authorities put forward by Ingosstrakh. I am unable to see how any of them advances its case.

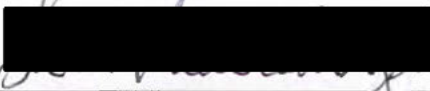
Conclusion

[46] In the circumstances I hold that Ingosstrakh has failed on every leg to justify and establish a basis for the filing of the plea in respect of Claim B.

[47] Hence, I make the following order:

1. declaring that the respondent's purported plea to the applicant's Claim B, a copy of which is annexure "D" to the founding affirmation herein, is invalid and of no force or effect;

2. declaring that the applicant is entitled to make application for default judgment in respect of the applicant's said Claim B on a date to be assigned by the Registrar of the above Honourable Court;
3. ordering the respondent to make payment of the costs hereof on a party and party basis to be taxed on scale C of the relevant Uniform Rule


S VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

Date delivered: 26 September 2024

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