THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 696/13

Reportable

In the matter between

ANNE ELIZABETH MARY PRATT **APPELLANT**

and

FIRSTRAND BANK LIMITED **RESPONDENT**

Neutral citation: *Pratt v Firstrand Bank Ltd* (696/13) [2014] ZASCA 110 (11 September 2014)

Coram: Mpati P, Maya, Shongwe and Zondi JJA and Schoeman AJA

Heard: 28 August 2014

Delivered: 11 September 2014

Summary: Estoppel – *res judicata* – requirements for successful reliance on *exceptio rei judicatae* – plaintiff seeking declarator that agreement concluded with defendant invalid – plea of invalidity of agreement raised to defendant's counterclaim for payment of contract amount – agreement held not to be invalid and summons dismissed – plea to counterclaim amended but still alleging invalidity of agreement – same issue arising between same parties - defendant entitled to rely on *exceptio*.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Fabricius J sitting as court of first instance):

1 The appeal is dismissed with costs, which shall include the costs of two counsel where employed.

JUDGMENT

Mpati P (Maya, Shongwe and Zondi JJA and Schoeman AJA concurring):

[1] This appeal concerns the validity of a loan agreement concluded between the appellant and the respondent (FirstRand). During 2001 the appellant owned 30 per cent of the shares in a local company known as Anne Pratt and Associates (Pty) Ltd (the company). The balance of the shares was held by an off-shore entity, Fast Track Trust (the Trust), which was registered in the Isle of Man. The appellant was a beneficiary of the Trust. With a view to restructure her affairs, the appellant consulted FirstRand, a commercial bank, in or about August 2001. On 6 September 2001 she and FirstRand concluded an agreement in terms of which the latter lent and advanced to her a sum of R25 million. This amount was to be paid to a close corporation, Classy Living Investments CC (Classy Living), which would then acquire the Trust's 70 per cent shares in the company. The payment to Classy Living was for the acquisition by the appellant of a member's interest in it. Further agreements were concluded between the parties as well as between FirstRand and the only trustee of the Trust, the terms of which are not germane for the determination of this appeal. In accordance with the appellant's directions the loan amount, in the form of its equivalent in US Dollars, was transferred directly into an account held by the Trust in Jersey in the Channel Islands.

[2] It appears that upon due date for the repayment of the loan the appellant failed to honour her obligation. Consequently, FirstRand indicated its intention to take steps to enforce the relevant terms of the agreement. On 25 September 2003, however, the appellant took a pre-emptive step and issued summons out of the then Transvaal Provincial Division of the High Court, seeking an order declaring the loan agreement to be null and void. She alleged in her particulars of claim that the agreements 'were entered into and carried out without any exemption or permission granted by the Treasury (as defined in regulation 1 of the Exchange Control Regulations) or a person authorised by the Treasury'.[1] The appellant averred further, inter alia, that the agreements, or their implementation, constituted a transaction or transactions whereby capital, or a right to capital, was directly or indirectly exported from the country in contravention of regulation 10(1)(*c*)[2] of the Exchange Control Regulations (regulations). The loan agreement was consequently illegal and thus null and void.

[3] FirstRand denied in its plea that the agreement constituted a transaction or transactions falling within the ambit of regulation 10(1)(*c*). In addition, it pleaded, in the alternative, that the Minister of Finance had, in terms of regulation 22E,[3]

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[1] In the Schedule to the Exchange Control Regulations promulgated in terms of the Currency and Exchange Act 9 of 1933, in GN R1111, published in *Government Gazette Extraordinary* 123 of 1 December 1961, the definition reads: '"Treasury", in relation to any matter contemplated in these regulations, means the Minister of Finance or an officer in the Department of Finance who . . . deals with the matter on the authority of the Minister of Finance.'

[2] The relevant part of the regulation reads:

'10 Restriction on export of capital

(1) No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose –

. . .

(c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.'

[3] It provides:

'22E Delegation of powers

(1) The Minister of Finance may delegate to any person any power or function conferred upon the Treasury by any provision of these regulations or assign to any such person a duty imposed thereunder to the Treasury.

(2) The Treasury shall not be divested of any power or function or duty delegated to any person under sub-regulation (1) and may at any time withdraw or amend any decision taken by any such person in the exercise or performance of the power or function or duty in question.'

delegated the powers and functions conferred upon Treasury in respect of regulation 10(1)(*c*) to the Governor of the Reserve Bank or the South African Reserve Bank (Reserve Bank). The alternative plea continued that the Reserve Bank, in particular its exchange control department, acting in pursuance of the delegated powers, issued exchange control rulings applicable to authorised dealers;[4] that in terms of exchange control ruling E5(C)(*a*)[5] FirstRand was permitted,[6] in accordance with the requirements of regulation 10(1)(*c*), to remit through normal banking channels, the local sale or redemption proceeds of non-resident owned assets in the country; and that FirstRand was accordingly permitted to conclude and implement the transactions in issue.

[4] FirstRand also raised a counterclaim against the appellant, claiming payment of the loan amount and ancillary relief, as well as a conditional counterclaim based on unjust enrichment. The enrichment claim does not feature in this appeal. The appellant's plea to the counterclaim contained a denial of liability on the grounds that the loan was void because it contravened the provisions of, inter alia, regulation 10(1)(*c*) of the regulations. On 31 January 2007 the parties proceeded to trial, having agreed to a separation of issues in terms of rule 33(4) of the Uniform Rules of Court. They formulated the following issues, which I have paraphrased, for adjudication by the court:

(a) Do the agreements constitute transactions falling within the ambit of regulations 3(1)(*e*) and 10(1)(*c*) [of the regulations]?

(b) If so, did FirstRand have permission to conclude such agreements and/or was FirstRand exempted by the provisions of regulation 10(1)(*c*)?

(c) If not, were the agreements a contravention of regulation 10(1)(*c*)?

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[4] In the Schedule to the regulations '"authorised dealer" means, . . . in respect of any transaction in respect of foreign exchange, a person authorised by Treasury to deal in foreign exchange'.
[5] The ruling reads: 'The local sale or redemption proceeds of non-resident owned assets in South Africa may be regarded as remittable through normal banking channels . . . .'
[6] The respondent is listed in rule 3 of the Orders and Rules under the Exchange Control Regulations issued under GN R1111 of 1 December 1961 as an appointed authorised dealer.

(d) If so, did the contravention of regulation 10(1)(*c*) result in the agreements being null and void?

[5] On 5 April 2007 the court (Mokgoatlheng AJ), to which I shall, for convenience, refer as 'the trial court', answered the questions as follows:

'(a) The agreements . . . constitute transactions falling within the ambit of Regulation 10(1)(*c*).

(b) [FirstRand] had permission to conclude the agreements.

(c) The agreements did not contravene Regulations 3(1)(*e*) and 10(1)(*c*), consequently they are not null and void.'

The court, however, made no determination in respect of the appellant's plea to FirstRand's counterclaim, although the parties seemed to have been in agreement that the answers to the questions would be dispositive of the matter.

[6] The appellant appealed to this court against the trial court's decision. The appeal was unsuccessful. On 7 April 2010 (19 months after this court had dismissed the appellant's appeal) the appellant delivered a notice of intention to amend her plea to FirstRand's counterclaim. FirstRand objected to the intended amendment, but leave was subsequently granted to the appellant by the North Gauteng High Court (Goodey AJ) to amend her plea accordingly. It was, in essence, pleaded in the amended plea to the counterclaim, that FirstRand had devised and implemented the transactions on behalf of the appellant with the intention of circumventing regulation 10(1)(*c*) and that, consequently, the agreements, including the loan agreement, were illegal and thus null and void. In this regard, it was alleged that FirstRand, as authorised dealer, was required, in terms of ruling E5(A)(i)((*a*)[7] of the Exchange Control Rulings, to scrutinise the securities related to the transactions to which the appellant was a party, to ensure

[7] The ruling, in essence, draws the attention of authorised dealers to regulation 10(1)(*c*) and requires them to carefully scrutinise all securities related transactions between a resident and a non-resident whereby capital is directly or indirectly exported from the Republic in order to ensure that such transactions are concluded at arm's length and at market-related prices.

that they were concluded at arm's length and at a market-related price. The transaction for the sale of the shares, so it was alleged, 'comprised part of a composite transaction which constituted a loop structure which, to the knowledge of [FirstRand], was prohibited in terms of the [regulations] and Rulings as applied in practice'. In the alternative, it was alleged that FirstRand had exceeded its authority as an authorised dealer to remit the proceeds of the sale of the 70 per cent shareholding in the company through normal banking channels, in that it knew that the transaction was not at arm's length and that the sale of the shares was not at market-related value. The result was that the transaction occurred without the necessary permission of Treasury. Consequently, so it was pleaded, the agreements, including the loan agreement, were illegal and thus invalid.

[7] FirstRand replicated to the amended plea, contending that the issues raised by the appellant were *res judicata*. Once again issues were separated in the matter and the court below (Fabricius J) was asked to adjudicate on the question whether the issues raised in the amended plea to the respondent's counterclaim were *res judicata*. The court below upheld the plea of *res judicata*, with costs, and declared that 'the question of the validity of the loan agreement, in the context of Regulation 10(1)(*c*)' had already been determined by two courts (the trial court and this court). This appeal is with the leave of the court below.

[8] It is well to state at this stage that as regards a plea of *res judicata* the enquiry is not whether the judgment, which is relied upon as having decided an issue that has been raised in subsequent proceedings, is right or wrong, but simply whether there is a judgment.[8] In *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) it was said that the 'underlying *ratio* of the *exceptio rei judicatae 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

[8] See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-D.

party to proceed against the other on the same cause of action should not be permitted'.[9] The *exceptio* may therefore be raised successfully by one party in a later suit against another who is demanding the same relief on the same cause of action, or where the 'same issue' had been adjudicated upon, which really comes to the same thing.[10] The fundamental question in this appeal is, therefore, whether the same issue was involved in the appellant's amended plea to FirstRand's counterclaim as was the case in the main action, which was dismissed by the trial court in a decision that was later confirmed by this court.

[9] In my view, the answer must be in the affirmative. In *African Farms* Steyn CJ said the following:

'The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings. Where, for instance, the *causa* or *quaestio* is ownership, the claimant, if his case is that he has the ownership through inheritance, would not, according to *Dig.* 44.2.11 para. 5, be instituting a new claim by alleging donation, for no matter in what way he may have acquired the ownership, his right to it would be finally disposed of in the first action.'[11]

In the present matter the real *causa* or *quaestio* is the validity of the agreement. However, I am prepared to accept, for present purposes, the argument advanced by counsel for the appellant, that the issue in the previous hearing (before the trial court) was whether or not FirstRand had permission to conclude and implement the agreement with the appellant. That FirstRand did, as a fact, have such permission and that therefore regulation 10(1)(*c*) had not been contravened was established before the trial court. This was done through the evidence of Mr Andreas Ribbens, an official in charge of exchange control at FirstRand and with whom the general manager in the Exchange Control Department of the Reserve

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[9] Para 21.
[10] *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA), per Olivier JA at 239 para 2 and the cases there cited.
[11] At 562D-E.

Bank liaised in relation to any issue not dealt with through the normal day-to-day structures of their respective banks.

[10] Although the order sought by the appellant in her amended plea to FirstRand's counterclaim was a dismissal of the counterclaim, the basis for that order was set out as follows in the penultimate paragraph of the amended plea:

'The plaintiff reiterates and confirms that the loan agreement, as amended, was illegal and was and is, at all times, null and void for one or more or all of the reasons pleaded in paragraph 2 of the plaintiff's Plea to [FirstRand's] Claim in Reconvention.'[12]

In my view, this clearly shows that the appellant, in her amended plea, sought a determination on the validity of the agreement, which was an issue that had already been decided by the trial court and by this court on appeal. Counsel for the appellant submitted, however, that the appellant's new defence to FirstRand's counterclaim was different to the cause of action that was contained in her main claim. The new defence was that FirstRand, represented by one of its employees, Mr Martin Versfeld (Versfeld), with the intention of circumventing the provisions of regulation 10(1)(*c*), devised and implemented the transactions (agreement) on behalf of the appellant with the knowledge that the sale of the shares was not at arm's length; was not at market-related value and constituted a loop structure that was prohibited under the regulations. FirstRand had therefore acted fraudulently, so counsel argued. Thus, whereas the issue before the trial court was the absence or otherwise of permission for FirstRand to conclude and implement the agreement, the issue before the court below was FirstRand's fraudulent act in the whole scheme. For this reason, counsel urged us to extend the ambit of the *exceptio rei judicata* by relaxing the common law requirements necessary for its invocation.

[11] It is now settled that in an appropriate case the strict requirements of the *exceptio*, especially those of the 'same relief' and the 'same cause of action' may

[12] Paragraph 2 of the amended plea contains the allegations that the transaction for the sale of the shares in the company was not at arm's length; was not market-related and constituted a prohibited loop structure.

be relaxed, in which event the term 'issue estoppel' has been adopted. In *Smith v Porritt* 2008 (6) SA 303 (SCA) this court explained the position as follows:

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and the relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'[13]

[12] Counsel for the appellant submitted that there is no commonality between the issue (of permission) which the trial court was called upon to determine and the issue of fraud, upon which the court below was required to adjudicate. Accordingly, so the argument continued, FirstRand could not rely on the defence of *res judicata* in the form of issue estoppel, since the issue of fraud had never been decided by the trial court, or this court.

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[13] Para 10.

[13] Before the court below counsel sought to lead the evidence of the appellant and one Mr Alexander Bruce-Brand, a former general manager of the Reserve Bank. Counsel informed the court that the appellant's testimony would relate to the circumstances surrounding the introduction of the amendment and 'to other questions of fairness and equity' which were to be taken into account in determining whether she ought to be permitted to introduce the new defence. That would entail the question as to what occurred before the trial court; why the issue was not introduced earlier and the consequences to the appellant if she was not permitted to proceed with the litigation.

[14] As to Mr Bruce-Brand, counsel informed the court that his testimony would be limited to assisting the court to understand the ambit of the new issue, which was intended to be introduced. Mr Bruce-Brand would also be asked about the loop structure and 'how that would affect the pleaded case'. Further, he would explain what was entailed in the loop structure averment and, on a hypothetical basis, explain what the attitude of the regulator of the Reserve Bank would be in a situation where a party 'had knowledge and deliberately set out to contravene exchange control [regulations]'. Mr Bruce-Brand would also corroborate the appellant on the timing of his availability as her witness. It may be mentioned that a rule 36(9)(*b*)[14] notice was filed in respect of expert evidence that would be tendered by Mr Bruce-Brand. It was indicated in the notice that Mr Bruce-Brand would differ with certain aspects of the evidence of Mr Ribbens, which had stood uncontested at the trial.

[15] The court below refused to allow the evidence sought to be led. It said the following in this regard (at para 9 of the judgment):

'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

[14] Rule 36(9)(*b*) of the Uniform Rules of Court.

evidence in the original proceedings 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 at this stage of the proceedings . . . .'

I can find no fault with the views expressed by the court below. Counsel for the appellant, however, contended that if the appellant were not to be allowed to litigate further – in the sense of not being permitted to lead the evidence she sought to place before the court below – this court will be giving its *imprimatur* to a fraudulent transaction.

[16] The essence of Mr Ribbens's uncontested evidence was that at the relevant time FirstRand had the necessary permission to conclude and implement the agreement with the appellant. Despite the fact that the appellant and his legal team were given advance notice of the nature of the evidence to be given by Mr Ribbens at the trial, Mr Ribbens was not cross-examined and the appellant did not testify. On the strength of the testimony of Mr Ribbens and the contents of available documentation the trial court came to the following conclusion (at para 143 of the judgment):

'In my view the plaintiff has not proven on a balance of probabilities that [FirstRand] knew that the amount of R25 000 000 significantly exceeded the fair value of the 70% shareholding held by Fast Track Trust in [the company] by adducing expert evidence to that effect. Consequently the valuation report submitted by the Third Party commissioned by the plaintiff validates and authenticates the value of the sale transaction of the 70 % shareholding by Fast Track Trust to Classy Living as reasonable and fair, and certifies that the transaction was concluded at arm's length, and at a market related price as contemplated in Exchange Control Regulation Ruling E5(A)(i)(a).'

[17] As has been indicated above, the trial court's order was the subject of an appeal to this court, where counsel's argument on these issues appears in the following passage from the judgment of Heher JA:

'But Mr Puckrin submitted that [FirstRand] had fallen short of the requirements [in ruling E5(A)(i)(*a*)] by failing to scrutinise the transactions carefully and have sight of the documentary evidence in order to ensure that the agreements were concluded at arm's length (which, he submitted, they were not) and at market-related prices (which he likewise submitted was not the case).'[15]

This court did not interfere with the findings of the trial court that the sale of the shares was at arm's length and at a market-related price, but held that it could not, on a fair reading of Mr Ribbens's evidence, 'conclude that the measure of [FirstRand's] scrutiny of or insight into documents fell short of what the Reserve Bank regarded as sufficient'.

[18] With these findings it is difficult to understand how it could still be alleged in the appellant's amended plea to FirstRand's counterclaim that FirstRand had knowledge of the fact that the sale of the shares was not at arm's length and not at a market-related price. But, in any event, even if that were so, the appellant would have been party to the alleged devising of the transactions, by FirstRand, represented by Versfeld, with the intention of circumventing the provisions of regulation 10(1)(*c*). The fact of FirstRand's knowledge of the alleged fraudulent conduct was therefore at the appellant's disposal at the time that she instituted action seeking an order declaring the agreement to be invalid, and when her original plea to FirstRand's counterclaim was formulated. She failed to raise it as a defence to the counterclaim when she could, and ought to, have done so. Her attempt to introduce the defence by way of the amendment at issue violates the so-called 'once-and-for-all' rule, which is to the effect that '[t]he law requires a party with a single cause of action to claim in one and the same action whatever remedy the law accords him upon such cause'. The reason for the rule is precisely to 'prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings'.[16] The appellant ultimately seeks a finding that the

[15] Para 19.
[16] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E.

agreement is null and void and therefore invalid, while there is an existing order that it is not invalid.

[19] The question of the loop structure is also but a red herring. Assuming that the transactions constituted a loop structure (which was denied by FirstRand), the evidence that was sought to be led through Mr Bruce-Brand would in any event not have proved that the agreement was illegal. In the rule 36(9)(*b*) notice it was stated that the evidence would be that where an authorised dealer came across a loop structure it was obliged to report the matter to the Reserve Bank, which would then give directions on how the loop structure was to be unwound and, if applicable, the Reserve Bank would impose a penalty. There was therefore no indication that Mr Bruce-Brand would testify that an agreement such as the one in issue and which involves a loop structure is invalid.

[20] Counsel for the appellant conceded during argument that the aim in the appellant seeking to introduce the new defence was for an opportunity to show that through its alleged fraudulent conduct, which would have been in contravention of the provisions of regulation 10(1)(*c*), FirstRand could never have had permission to export the proceeds of the sale of the shares in the company. Thus, what would be the essential element in the further litigation were the appellant to be permitted to introduce her new defence, namely the absence or otherwise of permission to export the proceeds of the sale, has already been decided by the trial court, whose judgment was confirmed by this court. As was said in *African Farms*, what the appellant proposes to do 'is to obtain a reversal of the decision of the same question by advancing different reasons; but different reasons leading to a different conclusion cannot affect the identity of the question to be decided'.[17] It follows that the court below was correct in refusing to allow the appellant to lead the evidence she sought to place before it on the basis that it was irrelevant. The court was also correct in declaring that the question of the validity

[17] At p 563C-D.

of the loan agreement, in the context of regulation 10(1)(*c*), had been finally decided and was thus *res judicata*.

[21] Since the parties had agreed before the trial court that the question of the validity of the agreement would be dispositive of the matter, the trial court should have found for FirstRand on the counterclaim. The matter should then have proceeded to trial on the quantum of FirstRand's counterclaim. One can only hope that that is the direction the parties will now follow.

[22] In the result, the appeal is dismissed with costs, which shall include the costs of two counsel where employed.

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L MPATI
PRESIDENT

APPEARANCES

For appellant	L N Harris (with him A D Steyn)
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	Kramer, Weihmann & Joubert Inc, Bloemfontein
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