IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No.: 2016/33936

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

11/8/2017
DATE

SIGNATURE

In the matter between:

STANDARD CHARTERED BANK, JOHANNESBURG BRANCH First Applicant

AFRICAN BANKING CORPORATION OF ZAMBIA LIMITED Second Applicant

AFRICAN BANKING CORPORATION OF BOTSWANA LIMITED Third Applicant

STANDARD CHARTERED BANK BOTSWANA LIMITED Fourth Applicant

and

MAPULA SOLUTIONS (PTY) LIMITED Respondent

In Re:

MAPULA SOLUTIONS (PTY) LIMITED	Plaintiff
and	
AFRICAN BANKING CORPORATION OF ZAMBIA LIMITED	First Defendant
AFRICAN BANKING CORPORATION OF BOTSWANA LIMITED	Second Defendant
STANDARD CHARTERED BANK LIMITED, JOHANNESBURG BRANCH	Third Defendant
STANDARD CHARTERED BANK BOTSWANA LIMITED	Fourth Defendant

JUDGMENT

WEINER, J:

INTRODUCTION

[1] The applicants apply for rescission of a default judgment granted on 12 December 2016 in favour of the respondent, Mapula Solutions (Pty) Ltd (Mapula) for payment of an amount of R163 million in damages.

[2] The grounds of the applicants' application are that:

2.1 The respondent served the summonses and particulars of claim on a person who was not employed by, and who is unknown to the applicants.

2.2 The service took place at a *domicilium* address which is not an address applicable to the parties in this matter. It was also not served on the person who is referred to in the *domicilium* clause, in the agreement.

2.3 The court did not have jurisdiction over the second, third and fourth applicants as they are *peregrini*. No prior order to found or confirm jurisdiction existed.

2.4 No cause of action exists on the case as pleaded and the particulars of claim are excipiable.

2.5 There is pending litigation which affects the present matter.

[3] The application was initially brought as a matter of urgency on 28 February 2017. The parties however agreed to postpone the matter and to argue urgency at this hearing. This aspect will be dealt with below as, in effect, it relates only to the question of costs.

BACKGROUND

The Debt Rescheduling Agreement (DRA)

[4] In 2011 TNF Corporate Services South Africa (Pty) Ltd (TNF) was appointed to act as the representative of a lenders' committee established in

terms of the DRA entered into between Blue Financial Services Ltd (Blue), the lenders and borrowers, and the Mayibuye Group (Mayibuye).

[5] The applicants who were lenders as defined in the DRA will be referred to as ABC Zambia, ABC Botswana, SCB and SCB Botswana respectively.

[6] The DRA was concluded in August/September 2010 with a subsequent amendment in December 2010. The DRA dealt with an arrangement to financially rescue Blue.

[7] It is common cause that:

7.1 The Blue Group of companies was insolvent in 2010.

7.2 The DRA would provide for an agreement with certain creditors, including the applicants, in terms whereof Mayibuye would invest R163 million into Blue.

7.3 The 51% equity in Blue was issued to Mayibuye on 10 December 2010 and he paid the agreed R163 million on the same date.

JURISDICTION

[8] Prior to dealing with the actual rescission application, it is necessary to decide whether or not the Court had the necessary jurisdiction to grant the order on 12 December 2016. The applicants contend that jurisdiction is lacking as the second and third applicants are foreign *peregrini*. They state that it is an essential requirement, in order to establish a court's jurisdiction, that the assets of the applicants be attached to found or confirm jurisdiction, for the purposes of effectiveness.

[9] In *Bid Industrial Holdings v Strang*[1] Howie P held that the principle of effectiveness of judgments (in the sense of those judgments being enforceable in foreign jurisdiction) has been substantially eroded. Howie P in dealing with this principle stated that courts have sought to avoid trying cases when their judgment could prove hollow because of the absence of meaningful execution in the plaintiff's jurisdiction. He went on to state:

> *"[55]... The responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff ... and if the plaintiff decides in favour of suing here, it is open to the defendant to contest, among other things, whether the South African court is the forum conveniens and whether there are sufficient links between the suit in this country to render litigation appropriate here rather than in the court of the defendant's domicile.*
>
> *[56] In my view it would suffice to empower the Court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were adequate connection between the suit and the area of jurisdiction of the South African Court concerned from the point of view of the appropriateness and convenience of its being decided by that*

[1] 2008 (3) SA 355 (SCA)

> *Court. ..... Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction. [emphasis added]*
>
> ...

[10] In *Multi Links Communications Limited v Africa Prepaid Services Nigeria Limited*[2] Fabricius J concluded that the principle referred to was also of application to corporate entities. He held:

> *"[23] The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the court would look at all the connecting factors including the background facts, convenience, experts, the law governing the relevant transactional action, the place where the parties reside or carry on business etc."*

[11] The respondents contend that the DRA is the foundation of their claim and that the second, third and fourth applicants are parties thereto. The DRA was concluded at Randburg and is governed by the laws of the Republic of South Africa. Furthermore, the *domicilium* chosen by the applicants is in South Africa.

[12] In my view, there is sufficient connection to find that this Court had jurisdiction to hear the matter. There does not appear to be a more appropriate *forum conveniens* in which this matter could be heard.

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[2] 2014 (3) SA 265 (GP)

The alleged repudiation

[13] The respondent contends that the DRA provided that, in the event of a breach by the borrowers, the applicants were obliged to convert their debt to equity in Blue. The respondent contends further that the applicants deliberately attempted to avoid the conversion of its debt into equity in Blue and that this constitutes a repudiation of the DRA. In addition, a further ground of repudiation is that the applicants instituted proceedings against several companies within the Blue Group i.e:

13.1 ABC Zambia launched proceedings in February 2014 in Zambia.

13.2 ABC Botswana launched proceedings in March 2014 in Botswana.

13.3 SCB launched proceedings in June 2014 in the above court under Case Number 20442/2014.

13.4 SCB Botswana sent a letter of demand in Botswana in January 2014.

[14] The respondent accordingly pleaded, in its particulars of claim that, as a direct and foreseeable consequence of the repudiation, the sum of R163 million invested by Mayibuye in Blue was rendered worthless. Blue did not return to solvency and this was the basis upon which Mayibuye agreed to invest. It therefore claimed that the loss of its contribution of R163 million is the damages suffered by Mayibuye.

The cession

[15] On 29 August 2016, Mayibuye concluded a written sale and cession agreement with Mapula in terms whereof Mayibuye sold to Mapula all of its rights, title and interest in and to its claim of whatsoever nature against the applicants (the cession).

[16] Mayibuye had resolved to institute action against the DRA lenders (which includes the four applicants) for the damages suffered by Mayibuye as a consequence of the breach or repudiation of the provisions of the DRA. The relevant terms of the cession were:

> *"3.1 Mayibuye hereby sells and Mapula hereby purchases the Mayibuye claim for the purchase consideration as set out in clause 4 of the agreement.*
>
> *3.2 The parties agree and consent to the cession of the Mayibuye claim from Mayibuye to Mapula with effect from the effective date.*
>
> *3.3 As a result of the abovementioned sale and cession, the DRA lenders will no longer be indebted to Mayibuye in respect of the Mayibuye claim and all of the rights and obligations in terms of the Mayibuye claim will vest in Mapula as from the effective date (being 14 September 2016)."* [emphasis added.

[17] The applicants contend that the cession does not give Mapula the right to utilise the domicilium clause in the DRA for the purposes of effecting service on the applicants and therefore such service was improper. This will be dealt with below.

LEGAL PRINCIPLES APPLICABLE TO A RESCISSION APPLICATION

[18] The application is brought in terms of Rule 31(2)(b) which provides:

> "*Defendant may, within 20 days after he or she has knowledge of such judgment, apply to court upon notice to plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.*"

[19] The applicants contend that they only became aware of the default judgment (granted on 12 December 2016) on 2 February 2017, when the Sheriff sought to attach the first applicant's movable assets. This application was launched on 10 February 2017 within the 20 days envisaged by the Rule.

[20] The applicants further contend that the default judgment was obtained only because of their lack of knowledge that the summonses had been issued against and purportedly served on them. It would otherwise have resisted the claim.

[21] The applicants must show good cause for the rescission, an absence of wilfulness, a reasonable explanation for the default, that the application is *bona fide* and not made with the intention to delay the plaintiff's claim. They must also show that they have a *bona fide* defence to the plaintiff's claim[3].

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[3] *Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 at352; see also Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd 1980 (4) SA 570 (W) at 575 – 576.*

Wilful default / reason for the default

[22] The applicants also contend that, in any event, the cession does not entitle the respondent to rely on the *domicilium* address. They contend that the *domicilium* address provided in the DRA can only be used by the parties to the DRA to serve notices (and not legal processes), and not by a person such as Mapula who is a cessionary of a damages claim. Applicants further submit that where a *domiciium* in a contract is stipulated, that clause must contain a double construction which specifies that it is also the *domicilium* for the purposes of legal process[4].

[23] The respondents however, argue that, in terms of Clause 22.1 of the DRA, the applicants chose as their *domicillium citandi et executandi* "*for all purposes arising out of or in connection with this agreement, at which address all processes and notices arising out of an in connection with this agreement, its breach or termination may validly be served upon or delivered to the parties at c/o Brendan Harmse of TMF Corporate Services South Africa (Pty) Ltd, 6th Floor, Park Corner Greenpark Corner West Road South and Lower Road, Sandton*". [emphasis added]

[24] The respondent also submits that the cession was of all of the rights and obligations attaching to the Mayibuye claim. Such rights include the right to rely on the *domicilium* clause, which was transferred to the respondent. Accordingly the respondent contends that it was entitled to utilise the

[4] *Armcoal Collieries v Truter* 1990 (1) SA 1 (A) at 5J-6E.

domicilium address for service. This appears to be correct having regard to the terms of the cession and in particular clause 3.3 and the provisions of clause 22.1 of the DRA (referred to above).

[25] The question therefore arises whether the service of the summonses and particulars of claim was served at the *domicilium* address.

[26] Applicants contend that the service of the summonses does not comply with Rule 4 of the Uniform Rules of Court. It is common cause that copies of the summonses were served on a Mrs Trytsman (Trytsman) at the address of TMF. The applicants contend that Trytsman is not and has never been an employee of TMF. On investigation, she does not appear to be an employee of another business in the building. Accordingly, it is submitted that service on her does not constitute service on the *domicilium* address that the applicants chose in the DRA.

[27] As set out above, the *domicilium* address was c/o Brendan Harmse of TMF Corporate Services South Africa (Pty) Ltd, 6th Floor, Park Corner, Greenpark Corner, West Road South and Lower Road, Sandton.

[28] The summonses were served upon Trytsman described as a manager, a responsible person apparently not less than 16 years of age. The applicants deny that Trytsman has ever been an employee of TMF, let alone, a manager and the applicants submit that service on her does not constitute service either on TMF or on Harmse which is the *domicilium* address.

[29] The respondents argue that despite the service on Trytsman, it is common cause that Harmse subsequently received the documents. Harmse stated in his affidavit that, although he noticed they had a case number, he assumed that they related to different legal proceedings involving the applicants and certain borrowers arising out of the DRA.

[30] The respondents rely on clause 22.4 of the DRA which reads:

> "*Notwithstanding anything to the contrary contained or implied in this agreement a written notice or communication actually received by one of the parties from another including by way of facsimile transmission shall be adequate written notice or communication to such party.*"

[31] It must be noted that this particular clause is different to clause 22.1 which provides for a *domicilium* at which "*all processes*" may be served. Clause 22.4 refers only to a written notice or communication. Accordingly despite Harmse receiving the summonses, this would not constitute proper service.

[32] In addition, the applicants contend that the fact that Harmse did not notify the applicants that the summonses had been served does not mean that the applicants are in wilful default. They contend that, even if service was proper, the fact that Harmse failed to notify the applicants of such proceedings shows that the applicants themselves are not in wilful default in respect of entering an appearance to defend. The default was caused by Harmse's failure to pass on the documents to the applicants. The respondent does not

allege that the applicants themselves were in wilful default, only that, as their representative received the documents, his default must be attributed to them. This cannot be a valid submission. Accordingly, I am of the view that the service was irregular and that the applicants were not in wilful default. This would justify the judgment being rescinded in terms of Rule 42[5]. However, *ex abudante cautela,* I will deal with the other requirements for rescission in terms of Rule 31 (2) (b).

THE DEFENCE / BONA FIDE

[33] On 12 September 2016, Maleka AJ granted the default judgment against the applicants. It appears that the matter was previously postponed by Yacoob AJ, who acquired proof, by way of affidavit, as to how the quantum of the damages claim was arrived at.

[34] The applicants contend that the affidavit then filed does not make out a proper case as to how the quantum of the damages claim was arrived at and that, on this ground alone, judgment should not have been granted.

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[5] "**Variation and rescission of orders**

(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 or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
   (c) An order or judgment granted as the result of a mistake common to the parties.
(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[35] In demonstrating that they have a *bona fide* defence to the respondent's claim the applicants contend that:

35.1 Blue was insolvent when the investment of Mayibuye was made and thus the allegation that the failure of the applicants to participate in the DRA scheme, by converting the loan to equity, caused reputational damage to Mayibuye, does not constitute a valid cause of action. They submit that reputational damage to a company that was, in any event, insolvent cannot, on its own, sustain the cause of action. They further submit that Blue's reputation, prior to the alleged breach/repudiation, has not been pleaded nor was evidence led on affidavit to prove same, which would be a necessary prerequisite to such cause of action.

35.2 The applicants also contend that there are clauses in the DRA which contemplate the situation where the applicants did not take up the shares. It is not necessary to detail them here. The respondent did not in the summonses deal with the various clauses relevant to the conversion of the loan to equity. It is not a simple consequence i.e if there is a breach by the borrowers, the lenders only option is to convert the loan to equity. These issues are central to the issues which have yet to be determined in the pending legal proceedings, brought by the applicants, against companies within the Blue Group as referred to above and in the defence to the present claim.

35.3 The applicants state that there was a fraud perpetrated by one Bekker which the applicants contend contributed to the financial demise of Blue. This, they submit must be a contributing factor to the value of the shares acquired by Mayibuye being diminished. The alleged damages cannot only be as a result of the applicants failure to convert the loan to equity and by launching proceedings against companies in the Blue Group. The applicants contend that there is no factual *nexus* between the launch of the proceedings in the other jurisdictions and in South Africa and the value of the shares being rendered worthless.

35.4 The applicants further contend that there is an existing dispute between the applicants and Mayibuye, in regard to the distribution plan dated 29 October 2015. This dispute, applicants contend, should have been dealt with in terms of the dispute resolution provisions in the DRA.

35.5 On 11 November 2015, TMF wrote to Mayibuye advising it that it disputed the distribution plan. Mayibuye replied contending that the distribution plan was valid and that the dispute process needed further input from TMF to begin. Mayibuye then changed its mind and stated that it did not recognise the dispute notice previously issued by TMF.

35.6 TMF replied to both letters and pointed out that Mayibuye could not rely on the DRA in circumstances where it delivered a distribution plan that did not conform with the DRA.

35.7 Mayibuye replied to this letter and asserted that it was entitled to proceed in terms of the DRA and unilaterally determined that the matter was now closed.

35.8 The applicants accordingly submit that the claim of Mayibuye (ceded to Mapula) is the subject of a live dispute between the parties, which requires compliance with the dispute resolution process. Rescission should be granted so that the matter can proceed to trial and evidence be led on the issue as to the exact obligations and procedures that need to be followed. The dispute resolution mechanisms also need to be determined.

35.9 Accordingly, in my view, the applicants have shown that they have a bona fide defence to the respondent's claim.

THE URGENT APPLICATION.

[36] The applicants contend that the matter was inherently urgent when originally launched. They are financial institutions which service large sections of their populations. They conduct business on behalf of third parties.

The attachment of any account, either belonging to any of the applicants or held by them on behalf of third parties, would obviously cause prejudice to the applicants, their clients, and the financial services sectors of three countries. Allowing Mapula to execute on the judgment would cause significant prejudice, some of which would be irreparable.

[37] The parties subsequently agreed dates for filing and the only issue is whether the applicant is entitled to the costs incurred for the launching and hearing of the urgent application.

[38] It is, for these purposes, necessary to traverse the conduct of the parties prior to and during the launch of these proceedings.

[39] During late September 2016, Harmse received a call from Schalkwyk Van der Merwe (Van der Merwe), the senior legal advisor of Blue Ltd and Chief Legal Advisor to Mapula. Van der Merwe requested Harmse to confirm the correct address details of TMF in order for Van der Merwe to deliver certain documents. Van der Merwe did not advise Harmse that it was a summons that was being served. Harmse confirmed the address.

[40] Harmse thereafter received a further call from Van der Merwe, who enquired whether Harmse had received documents. Harmse advised that he had not. Again, no reference was made to a summons.

[41] On 2 February 2017, the Sheriff of the Court attended the offices of SCB to execute the default judgment. This was the first time that the

applicants became aware of the action instituted against by Mapula against them.

[42] Only on 3 February 2017, when Harmse was discussing matters with the applicants' attorneys of record, Andrew Strachan (Strachan), and Strachan mentioned the events of the previous day, did Harmse realise that the documents he received were summonses. He had no knowledge that a default judgment had been obtained by Mapula.

[43] Applicant submits that Van der Merwe was aware of the pending litigation between the applicants and Blue Ltd. Van der Merwe, in fact, deposed to the affidavit in opposition to the pending litigation. They also contend that both Van der Merwe and Johan Meiring (Meiring), Mapula's attorney of record were aware that Strachan was representing the applicants. Neither contacted Strachan prior to the application for default judgment, other than to confirm Harmse's address, but without explaining the reason therefor. Being aware of the pending litigation, they should have been aware that the applicant for judgment in the sum of R163 million, would in all probabilities, be opposed. The service on an address, not in accordance with the *domicilium* address, should have been brought to the judge's attention. In addition, Van der Merwe and/or Meiring should have contacted Harmse again, bearing in mind, that Harmse had informed Strachan (after service) that he had not received the documents. The conduct of the respondent deserves censure.

[44] On 3 February 2017, Strachan addressed an email to Meiring. Strachan proposing that the execution of the default judgment be stayed

pending the launch of the present application. Meiring accepted the proposal on condition that the papers would be served on his offices by 14h00 on 10 February 2017. Meiring further requested that the attached assets would not be alienated. Strachan responded to Meiring's email accepting his deadline. He also confirmed that assets would not be alienated.

[45] On 7 February 2017, and contrary to Meiring's previous undertaking, Strachan received a telephone call from the Sheriff who advised that he was instructed by Meiring to attach the bank accounts of SCB on 8 February 2017.

[46] Strachan immediately addressed a letter to Meiring. Meiring contended that the attachment was necessary as no details of the accounts were furnished and he "suspected" that SCB had been trading on the accounts which had been attached. Strachan stated that the terms of the undertaking given on SCB's behalf that the accounts would not be alienated in order to frustrate the judgment debt, implied that they would continue to be used in the ordinary course of business. As a bank, it was impermissible for SCB to allow monies it holds, both in its name and in the name of clients, to be frozen to satisfy a default judgment, which was in the process of rescission.

[47] Strachan stated that SCB was under a legal obligation not to divulge details of the accounts to third parties. It is not clear from the instructions to the Sheriff whether the Sheriff was instructed to attach the accounts held by SCB, the accounts used by SCB, or accounts of their clients. SCB submitted that the attachment of the bank accounts was unlawful and warranted urgent

relief. Strachan demanded that Meiring instruct the Sheriff not to continue with execution of the default judgment as per Meiring's undertaking.

[48] On 8 February 2017, Meiring responded to Strachan's letter. A further undertaking was given that the previous instruction given to the Sheriff to execute on the judgment would not be carried out.

[49] On 9 February 2017, Meiring responded to Strachan's letter and rejected Strachan's contention that the bank accounts were not properly attached. The undertaking not to execute pending the service of the present application was reiterated. The application was delivered on 10 February.

[50] On 14 February 2017, Meiring wrote to Strachan asking for an extension for delivery of the answering affidavit, as his counsel was unavailable. For the first time, Meiring undertook not execute on the judgment pending the rescission application being determined. Strachan refused to accede to the request for the extension, thus the undertaking appeared to fall away.

[51] Strachan submitted that he did not trust Meiring as he had reneged on previous undertakings given to the applicants. SCB could not take the chance of Meiring reneging again. In my view, the way in which the matter had been handled by both Mayibuye and Mapula and their attorneys, gave SCB the reason to believe that the relief sought was urgent. The lack of openness surrounding the service of the proceedings, the reliance on service on a party

not contemplated in the DRA domicilium clause, the failure to disclose this to the judge, the communications with the applicants representatives, without disclosing that summonses had been served and that default judgment was being sought, all point to the necessity to urgently obtain relief to prevent execution of the judgment granted. The wasted costs of such application will accordingly follow this finding.

CONCLUSION

[52] The applicants have, in my view, demonstrated that they have satisfied the requirements for rescission of the default judgment. The applicants were not in wilful default as they had no knowledge that the summons had been issued against and served on them. On the common cause facts, the processes were not served on Harmse as the representative at the *domicilium* address. He did, however, later receive the documents. Mapula was however not aware of this. The fact that Harmse later received the documents and failed to notify the applicants cannot render the applicants' default wilful. The explanation for the default is reasonable. The applicants have also shown that they have a *bona fide* defence to the plaintiff's claim. Accordingly, they have shown good cause why the judgment should be rescinded.

[53] I am of the view that, having regard to these factors, the opposition to this application was unreasonable. Further, in view of the conduct of the respondents, I am of the view that a punitive costs order is warranted.

An order will accordingly be made in the following terms:

1. The default judgment granted against the applicants on 12 December 2016 is rescinded.
2. The Respondent is to pay the costs, including the costs of the application on 28 February 2017, on the attorney and client scale.

S WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:
For the Applicant: J P Daniels SC and K Premhid
Instructed by Norton Rose Fullbright SA
For the Respondent: A Mundell SC
Instructed by Meiring and Partners INC
Date of Hearing: 13 June 2017
Date of judgment: 11 August 2017