

REPUBLIC OF SOUTH AFRICA



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

CASE: 38275/2015

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~ /NO
(3)	REVISED.
15/09/17..... Date	
<i>[Signature]</i> M L TWALA	

In the matter between:

RENNIES TRAVEL (PTY) LIMITD

PLAINTIFF

AND

**NATIONAL AFRICAN FEDERATED
CHAMBER OF COMMERCE t/a NAFCOC**

FIRST DEFENDANT

MATODZI LIPHOZA

SECOND DEFENDANT

**NATIONAL AFRICAN FEDERATED
CHAMBER OF COMMERCE t/a NAFCOC**

THIRD PARTY

JUDGMENT

TWALA J

- [1] The plaintiff sued the defendants out of this Court for the sum of R518 733.30 being for services rendered by the plaintiff to the first defend. On the 3rd March 2016 judgment by default was entered against the first defendant in favour of the plaintiff for payment of the sum of R518 733.30 including interest at the rate of 2% per annum above the prime overdraft rate charged by the plaintiff's bankers from time to time calculated from 23 April 2015 to date of final payment plus costs.
- [2] The plaintiff now seeks to obtain judgment against the second defendant based on a written agreement entered into between the plaintiff and the first defendant which agreement was signed by the second defendant on the 2nd July 2013 in its representative capacity as the Chief Executive Officer (CEO) of the first defendant.
- [3] At the beginning of the hearing, the parties brought an application for separation of the issues which application was granted. The parties therefore came with a statement of agreed facts. The issue that remained for determination by the Court is whether the terms of the written agreement entered into between the plaintiff and the first defendant and the standard terms of business extend liability to the second defendant for the services which it ordered and the first defendant has not paid for such services.

- [4] It is common cause that the plaintiff concluded a written agreement with the first defendant for a credit facility in favour of the first defendant. It is further not in dispute that the second defendant was the CEO of the first defendant and was authorised by resolution of the board or members to sign the agreement on behalf of the first defendant. It is not in dispute that the plaintiff has rendered services to the first defendant in the sum of R518 733.30. The first defendant has ceased to exist and that the sum of R518 733.30 remains unpaid.
- [5] Clause 3 of the plaintiff's standard terms of business which were part of the credit application signed by the second defendant on behalf of the first defendant reads as follows:
- "Notwithstanding the fact that an employee of the customer has incurred any charges in the course and scope of his employment with the customer, and that the customer is liable for such charges, the employee shall remain personally liable for such charges until payment has been made in full."*
- [6] It is trite law that where a person acts or concludes a juristic act on behalf of another person, (act in a representative capacity), he creates rights and obligations for the person he represents and not for himself. An agent concludes a juristic act on behalf of his principal and not for himself.
- [7] In the present case, the CEO signed the credit application in his capacity as a representative of the customer, who is NAFCOC, having been duly authorised by a resolution of the board. The CEO signed the credit application as an agent of his principal, NAFCOC. He accepted on behalf of his principal the standard terms of business of the agreement which he acknowledged to have been brought to his attention.

- [8] I agree with counsel for the second defendant that it could not have been the intention of the parties for the CEO to bind himself in this agreement as he was acting in his representative capacity. However, in terms of clause 3 of the standard terms of business of the plaintiff, the employees of the customer (NAFCOC) are personally liable for the charges they incur in the course and scope of their employment by the customer until payment is made in full by the customer. This term, the CEO acknowledged by his signature on the agreement.
- [9] In my view clause 3 of the agreement is applicable where an employee of the customer personally incur charges in the course and scope of his employment with the customer, that is, where the employee access' the services of the plaintiff in his own name but in the execution of his duties and/or in the course and scope of his employment by the customer.
- [10] The CEO is head of the management of a company or organisation and reports directly to the board. In my view, he is therefore an employee of the company or organisation he represents. Therefore, the standard terms of business of the agreement extend liability to the second defendant as an employee of the first defendant for charges he incurred which remain unpaid.
- [11] It is contended on behalf of the second defendant that the plaintiff has obtained judgment by default against the first defendant for the full amount of the debt and therefore the second defendant raises a special plea of *res judicata* against the claim of the plaintiff. It is further contended that the second defendant is a party to the action in which the plaintiff obtained the default judgment against the first defendant and that judgment is valid until it is set aside. The plaintiff would be ceased with two judgments of the same amount if judgment is

granted against the second defendant and should therefore be estopped from receiving double benefit for the same thing.

- [12] It is further contended that, should the Court find that the second defendant is liable in terms of clause 3 of the standard terms of business of the plaintiff, the second defendant then admits having incurred charges in the course and scope of his employment with the first defendant in the sum of R11 932.45.
- [13] It is trite law that for the plea of *res judicata* to succeed, the parties concerned in both sets of proceedings must be the same individuals, same course of action and the same relief must be sought.
- [14] In the case of **Royal Sechaba Holdings (Pty) Ltd v Coote and Another 2014 (5) SA (SCA) 562** the Supreme Court of Appeal reiterated the requirements of a successful plea of *res judicata* as follows:
- “that there had to be the same cause of action, the same relief and the same parties in the first and second proceedings. It also reiterated that in appropriate circumstances the plea could be upheld where the cause and relief were dissimilar, but where there was a common issue of fact or law (the form of the plea known as issue estoppel). The Court added that in appropriate circumstances the requirement that the parties had to be the same could also be dispensed with.”*
- [15] In the case of **Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297** which case was quote with approval by the Supreme Court of Appeal in Royal Sechaba above, the Court stated the following:
- “In our common law the requirements for res iudicata are three fold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold*

requirement. But our Courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue. Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties."

[16] I am unable to agree with counsel for the second defendant. In casu the plaintiff has sued the defendants jointly and severally, the one paying and the other to be absolve. Therefore, the plaintiff is entitled to pursue its claim against the second defendant although it has obtained judgment by default against the first defendant as long as that judgment remains unsatisfied.

[17] It is not in dispute that the second defendant is cited as a party in the same proceedings wherein the plaintiff obtain judgment by default against the first defendant. However, it is my respectful view that the distinguishing factor in the second defendant's case is that the course of action is different from that against the first defendant. The second defendant is sued on the basis of clause 3 of the standard terms of business of the plaintiff enunciated *supra* whereas the first defendant is sued on the basis of a contract between itself and the plaintiff.

[18] It is my considered view therefore that there are still issues between the plaintiff and second defendant which were not adjudicated upon in the proceedings between the plaintiff and the first defendant. The default judgment entered against the first defendant is for the whole sum of R518 733.30 arising

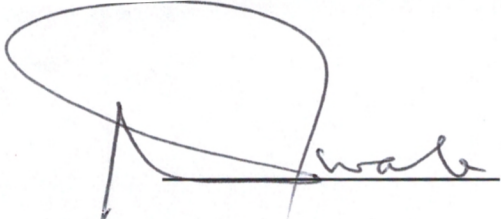
from a contract between itself and the plaintiff for all the charges incurred by its employees in the course and scope of their employment by it. On the other hand, the liability extend to the second defendant only for the charges incurred by it in the course and scope of its employment by the first defendant. In my view, there is a triable issue between the plaintiff and the second defendant and therefore the pleas of *res judicata* and *issue estoppel* falls to be dismissed.

[19] Costs will ordinarily follow the result. However, this Court was called upon to determine whether the liability extend to the second defendant based on the credit application and standard terms of business of the plaintiff for services which were ordered by him and remain unpaid by the first defendant. The issue of quantum has not been settled between the parties although the second defendant has conceded to be liable to the sum of R11 932.45.

[20] I am therefore of the view that it would not be in accordance with justice if I were to order the second defendant to pay the costs of the plaintiff on the Supreme Court scale when the quantum of the matter is within the jurisdiction of the Magistrate's Court.

[21] In the circumstances, I make the following order:

- I. The second defendant is liable to pay the plaintiff only for charges incurred by it which remains unpaid by the first defendant.
- II. The second defendant is liable to pay the costs of the plaintiff on the Magistrate Court's scale.



TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 22 August 2017

Date of Judgment: 15 September 2017

For the Appellant: Advocate: P. Strathern SC

For the Respondent: Advocate: K. Lengane