THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 934/2019

In the matter between:

INGOSSTRAKH	**APPELLANT**

and

GLOBAL AVIATION INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
GLOBAL AVIATION INVESTMENTS GROUP (BVI) LTD	**SECOND RESPONDENT**
GLOBAL AVIATION OPERATIONS (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021] ZASCA 69 (4 June 2021)

Coram: MBHA, DAMBUZA and MAKGOKA JJA and MABINDLA-BOQWANA and UNTERHALTER AJJA

Heard: 22 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 4th day of June 2021.

Summary: Civil Procedure – default judgment – appellant under bar – whether good cause shown for upliftment thereof.

Contract – jurisdiction – where a foreign peregrinus defendant submits to jurisdiction of a South African court at the suit of a foreign peregrinus plaintiff, such submission and a ground of jurisdiction that links the court to the subject matter of the litigation, sufficient for a South African court to assume jurisdiction.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Moshidi J sitting as court of first instance):

1 The appeal is dismissed with costs, including costs of two counsel where so employed.

2 The cross-appeal is upheld with costs, including costs of two counsel where so employed.

3 The order of the high court is set aside and replaced with the following:

a) Default judgment is granted against the respondent in favour of the applicants in the sum of US$ 2 500 000;

b) Interest on the above amount at the prescribed rate from 13 November 2012 to date of payment;

c) Costs of the suit.

JUDGMENT

Makgoka JA (Mbha, Dambuza JJA and Mabindla-Boqwana and Unterhalter AJJA concurring):

[1] This appeal concerns a decision of the court a quo, the Gauteng Division of the High Court, dismissing, respectively, the respondents' application for default judgment and the appellant's (Ingosstrakh) application for condonation of the late filing of its plea. In the court a quo, the respondents, Global Aviation Investments (Pty) Ltd; Global Aviation Investments Group (Pty) Ltd; and Global Aviation Operations (Pty) Ltd, were the applicants and Ingosstrakh the respondent. For the sake of convenience, I refer to the respondents collectively as 'Global', except where it is necessary to identify one of them specifically.

[2] The dispute arises from a written insurance policy (the policy) concluded in October 2012 between Global and associated companies, on the one hand, and Ingosstrakh, on the other. Ingosstrakh is a Russian company, with its registered address in Moscow. In terms of the policy, Ingosstrakh undertook to indemnify Global against all risks of loss or damage occasioned to certain specified aircraft, whilst in flight, taxiing or on the ground.

[3] Among the insured aircraft, was Global's MD82 aircraft with registration marks ZS-TOG (the aircraft), which was insured for the agreed sum of US $2 500 000. The policy provided, among other things, that in the event the cost of repair to damage caused to the aircraft exceed 75% of the insured value of the aircraft, Global would be entitled to regard the aircraft as a constructive total loss (CTL), and Ingosstrakh would be obliged to pay Global the full insured value of US$2 500 000. I shall return to the relevant clause of the policy.

[4] On 13 November 2012, whilst the policy was of full effect, the aircraft could not take-off from OR Tambo International Airport in Johannesburg, as the pilot received a cockpit warning of a landing gear anomaly. Both engines of the aircraft had ingested non-organic foreign matter while under full power, causing severe damage to the aircraft. The damage caused by the incident to the aircraft constituted a risk insured against in terms of the policy. Global declared the aircraft to be a CTL in terms of the policy. It notified Ingosstrakh of the incident and demanded payment of US $2 500 000. Ingosstrakh refused to pay on the basis that the aircraft was not a total loss.

[5] Consequently, on 15 August 2014 Global launched an application against Ingosstrakh seeking an order declaring Ingosstrakh to be liable to indemnify it in terms of the policy following the incident on 13 November 2012, and for payment of US $2 500 000. Ingosstrakh opposed the application. The application was eventually dismissed on 25 May 2015 on the basis that there were material disputes of fact on the papers. Although Global applied for leave to appeal that order, there is no clarity as to the status of that application.

[6] In terms of the policy, notices on Ingosstrakh were to be served on Steve Slatter Insurance Brokers (Pty) Ltd (Slatter) in Durban, South Africa. Thus, before Global issued summons against Ingosstrakh, it sought, and obtained, an order on 8 September 2015 in the court a quo authorising service of the summons on Ingosstrakh, care of Slatter.

[7] On 9 September 2015 Global issued summons against Ingosstrakh, which was served on Slatter by the sheriff on 10 September 2015.[1] On 30 September 2015, Ingosstrakh served its notice of intention to defend the action. However, Ingosstrakh failed to deliver its plea, and on 4 November 2015 Global served a notice of bar in terms of rule 26 of the Uniform Rules of Court, in terms of which Ingosstrakh was afforded five days to deliver its plea. That period would have expired on 11 November 2015. On 10 November 2015, Ingosstrakh, without delivering its plea, served an application in which it sought an order:

(a) Setting aside the order of 8 September 2015 authorising summons to be served on Slatter, as well as the subsequent service of the summons on Slatter on 9 September 2015; and

(b) Uplifting the notice of bar served on 4 November 2015.

[8] Global opposed the application, which was eventually dismissed on 2 September 2016. Ingosstrakh was ordered to pay Global's costs, including costs of two counsel, on the scale as between attorney and client. In the wake of that judgment, on 5 September 2016 Global's attorneys, via email, drew the attention of Ingosstrakh's attorneys to the fact that Ingosstrakh was *ipso facto* barred from delivering its plea, as the period for doing

[1] In addition to the US $2 500 000 referred to already, Global also claimed consequential damages (in respect only of the third respondent, Global Aviation Operations), for US $170 245.24. Global alleged that as a result of Ingosstrakh failing to make payment in respect of the total loss of the aircraft, the third respondent was unable to replace the aircraft with a substitute aircraft, and also lost income which would have been earned by the third respondent from such substitute aircraft. This claim was abandoned in the court a quo and accordingly is not in issue in this appeal.

so had expired on 11 November 2015 in terms of the notice of bar. It was enquired as to Ingosstrakh's intentions. There was no response to the email.

[9] On 27 September 2016 Global launched an application for default judgment against Ingosstrakh, which opposed the application. Ingosstrakh 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.' Alternatively, Ingosstrakh sought an order uplifting the notice of bar served on 4 November 2015, and condoning the late delivery of its plea.[2] Global opposed Ingosstrakh's counter-application.

[10] The applications were heard on 26 April 2018. In a judgment delivered on 31 July 2018, the court a quo considered it an 'unfair procedure' for Global 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 said that there were disputed issues, both of a factual and technical nature, which could only be resolved by expert evidence in a trial. Furthermore, the court mentioned that Global's 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.

[11] With regard to 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, the court summarily dismissed it, stating that it 'lacked any basis' and was 'misplaced' as, so the court reasoned, it did not 'have the requisite appellate/review jurisdiction to interfere therewith.' Accordingly, the court dismissed both applications. The parties are each aggrieved by the orders, and with the leave of the court a quo, they both appeal to this Court against the dismissal of their respective applications.

[2] An unsigned and undated version of Ingosstrakh's plea was served on 26 October 2016.

[12] There is a preliminary issue to consider. It is whether the order refusing Global's application for default judgment is appealable. Appealability of an order is determined by, amongst other considerations, whether it is final in effect. In *Zweni v Minister of Law and Order*[3] it was held that such an order has three attributes: first, it must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[13] In the present case, the practical effect of the court a quo's order is that the parties' respective applications are in limbo. In refusing to grant default judgment, the court a quo alluded to the fact that the issues between the parties needed to be ventilated in a trial. However, in the same breath, it dismissed Ingosstrakh's application for the upliftment of the bar, thus effectively closing any avenue for a trial. The result is that Ingosstrakh is unable to enter the main case, because it is under bar, while Global is unable to obtain default judgment against Ingosstrakh.

[14] If the court a quo's order that Ingosstrakh was not entitled to the upliftment of the bar is correct, logic dictates that Global's application for default judgment should have been considered. Conversely, if the court a quo was of the view that the issues warranted a trial, it should have granted Ingosstrakh's counter-application to uplift the bar. Viewed in this light, the court a quo's order suffers from an internal contradiction, resulting in an untenable position for both parties. The first duty of a court is to resolve the dispute before it. That was not done by the court a quo. The interests of justice require this court's intervention to resolve the impasse. On this basis, the matter is appealable. Furthermore,

[3] *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 536B. *Zweni* has undergone some modification over the years. See for example *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A); *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2010] 1 All SA 459 (SCA); 2010 (2) SA 573 (SCA); *Nova Property Group Holdings Limited v Cobbett and Others* [2016] ZASCA 63; [2016] 3 All SA 32 (SCA); 2016 (4) SA 317 (SCA). However, none of these find application in this case.

given the circuitous and the considerable length of time the case has taken, it is in the interest of justice that the litigation between the parties be brought to finality.

[15] Before Ingosstrakh's contentions are considered, it has to contend with the fact that it is under bar from delivering its plea. As stated already, Global's notice of bar was served on 4 November 2015, affording Ingosstrakh five days in which to file its plea. The last day for it to do so was 11 November 2015. It did not do so. Instead, it launched the application to set aside the service of summons. As a result, as from 11 November 2015, Ingosstrakh has been under bar. The effect thereof is that unless and until the bar is uplifted, Ingosstrakh has no right to deliver its plea. Its application for the upliftment of the bar was dismissed on 2 September 2016. There is no appeal against that order.

[16] It was submitted before us on behalf of Ingosstrakh that the court a quo in its judgment of 2 September 2016 did not consider its prayer to uplift the bar. It is so that the court did not expressly address the prayer for upliftment of the bar. But it is clear from a proper reading of the judgment as a whole that the court considered the totality of the application to be unmeritorious. What is clear, however, is that Ingosstrakh's prayer for the upliftment of the bar was dismissed. If Ingosstrakh was aggrieved with the order, the proper course was to appeal against it. It elected not to do so. The effect thereof is that Ingosstrakh remains barred from pleading.

[17] Global submitted that the question whether Ingosstrakh may competently file its plea has been finally disposed in the judgment of 2 September 2016, and is thus res judicata. A matter is res judicata if in the previous proceedings, the issue adjudicated upon was for the same cause, between the same parties and the same thing was demanded. See *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10 in which a flexible approach was adopted to the doctrine of res judicata. That approach was approved by the Constitutional Court in *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC) paras 22 and 23.

[18] To consider whether this threshold has been met in the present case, it is necessary to examine Ingosstrakh's applications of 10 November 2015 in respect of which this appeal pertains. Part of the relief in the November 2015 application (in prayer 3 of the notice of motion) was that '[T]he notice of bar served by [Global] on [Ingosstrakh] on 3 November 2015 be uplifted.' In its counter-application to Global's application for default judgment, Ingosstrakh sought (in prayer 2.1 of the notice of motion) an order '[u]plifting the notice of bar served by [Global] on [Ingosstrakh] on 3 November 2015'.

[19] It becomes immediately evident that the relief common in both the November 2015 application and the counter-application was for the same thing, namely, the upliftment of the notice of bar. It is irrelevant that in the counter-application, such relief was paired with a prayer for condonation of the late delivery of Ingosstrakh's plea. The true nature of the relief sought was not altered by pinning a new label on the counter-application. In both applications, the same reasons were advanced in support of the relief sought. During argument before us, counsel for Ingosstrakh fairly conceded that conceptually, the latter appellation would make no difference as the desired outcome is the same, ie to remove the impediment which prevents Ingosstrakh from delivering its plea.

[20] To sum up on this point, 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. It follows that Ingosstrakh was not entitled to seek the same relief under the rubric of 'condonation for the late delivery of its plea.' The court a quo was undoubtedly correct in dismissing the relief sought by Ingosstrakh for it to reconsider or supplement the judgment of 2 September 2016. The application was ill-advised and the relief sought was incompetent. In all 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. That should ordinarily be the end of the matter, and would entitle Global to have their application for default judgment adjudicated upon. However,

to put the matter beyond doubt I will consider, in Ingosstrakh's favour, whether it would be entitled to condonation for its failure to file a plea,[4] to which I now turn.

[21] Rule 27 of the uniform rules deals with the extension of time, removal of bar and condonation. In terms of rule 27(3) the court may, on good cause shown, condone any non-compliance with the rules. Thus, in order to succeed in this regard, Ingosstrakh would be expected to show good cause why condonation should be granted for its failure to deliver its plea. Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success.[5] Good cause requires a full explanation of the default so that the court may assess the explanation.[6] I consider each of the above requisites, in turn.

[22] With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh's failure to file its plea. With regard to the former, Ingosstrakh served its notice of intention to defend the action on 30 September 2015. It therefore had up to 28 October 2015 to file its plea. There is simply no explanation whatsoever why a plea was not filed during that period.

[23] As to the period after the notice of bar, it was submitted on behalf of Ingosstrakh that the delay in delivering the plea must not be calculated from 10 November 2015[7], but

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[4] This is in line with *S v Jordaan & Others (Sex Workers Education and Advocacy Task Force & Others as amici curiae,* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) para 21 where it was held that where a provision or decision is attacked on one ground that is considered decisive of the matter, the other grounds raised in the matter should nevertheless be ventilated and decided upon for the benefit of a court that may later have to hear an appeal arising from that matter.

[5] *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) para 11; *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 764J-765E.

[6] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 354A at 353A.

[7] Expiry of the period set in the notice of bar.

from a ‘reasonable period’ following the judgment of 2 September 2016, to allow it time to consider that judgment. This, it was contended, was because Ingosstrakh seriously pursued that application and had legitimate grounds for doing so. This is an untenable proposition. Ingosstrakh does not enjoy the latitude to decide when a properly filed notice of bar takes effect. The fact is, when Ingosstrakh took a conscious decision to ignore the notice of bar, and instead launched the application to set aside the service of summons, it did so at its peril. It should have known that if that application did not succeed, it would remain under bar. It took the risk of its procedural gamesmanship and must now live with the consequences of its decision.

[24] But even if one accepts its proposition, Ingosstrakh still falls short. There were only two options open to it post the judgment, namely to appeal against the order or to file its plea. It had 14 days from 2 September 2016 to seek leave to appeal. That period expired on 22 September 2016. Ingosstrakh did nothing in that regard. On expiry of that period, the only remaining option was to deliver a plea. The five-day period in the notice of bar would have commenced on 23 September, and expired on 29 September 2016. Similarly, Ingosstrakh did nothing in this regard, and there is no explanation for its inactivity. This is significant, considering that as early as 5 September 2016 Global, had enquired from Ingosstrakh what it intended to do, without any response.

[25] Ingosstrakh sought to rely on ‘without prejudice’ discussions between the respective legal representatives for its supine attitude. Such discussions and negotiations, however cannot, substitute the obligation to comply with set time frames for the exchange of pleadings, unless the parties have agreed to suspend the relevant time periods. There was no such agreement in the present case. It is also significant that until Global applied for default judgment, Ingosstrakh was content to sit back and do nothing about filing its plea, for which there is no explanation. In sum, Ingosstrakh’s conduct in this matter shows inexcusable default and a failure to give a proper explanation therefor. I have demonstrated this in relation to its conduct both before and after the notice of bar was served. This calls into question its bona fides, an aspect to which I next turn.

[26] In the course of its judgment of 2 September 2016, the court made adverse findings against Ingosstrakh for its motive in bringing that application. Its true motive, the court found, was a disguised and contrived attempt to introduce prescription as a defence to the action, a fact expressly conceded by Ingosstrakh's counsel. The court said:

'The application was misconceived from the onset. The papers filed extend into almost 200 pages. Unsustainable arguments on behalf of Ingosstrakh were advanced. The proceedings undoubtedly are vexatious and constitute an abuse of process of court. The reprehensible conduct of Ingosstrakh to obtain an ulterior tactical advantage warrants this court's censure in ordering punitive costs [. . .]'

This put paid to any suggestion by Ingosstrakh that the application was pursued bona fide. Nothing more needs to be said about this.

[27] Lastly, under the rubric of 'good cause', I consider whether Ingosstrakh has disclosed a bona fide defence to Global's claim. I commence with what would be a special plea of jurisdiction, contained in its draft plea. Its premise is this. Both Global Aviation Operations (the second respondent) and Ingosstrakh are foreign peregrini, of the British Virgin Islands and Russia, respectively. Clause 8 of the policy provides that it is governed by the laws of the insured (Global Aviation Operation's) country of domicile (the British Virgin Islands) and each party agrees to submit to the exclusive jurisdiction of the courts of the insured's country of domicile in any dispute arising from the policy.

[28] It was thus submitted on behalf of Ingosstrakh that the court a quo did not have jurisdiction to determine the dispute as between the second respondent and Ingosstrakh. Global argued that Ingosstrakh had submitted to the court a quo's jurisdiction. Both parties being foreign peregrini, the leading authority is *Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A). The case concerned a dispute between an Italian company (a foreign peregrinus plaintiff) and a Transvaal company, a peregrinus of Natal, but an incola of the Transvaal (a local peregrinus). The defendant company had submitted to the jurisdiction of the Durban and Coast Local Division. This Court held that such submission did not suffice to clothe the Natal court with jurisdiction, as one or more of the traditional grounds of jurisdiction must also be present. As there

was no traditional ground of jurisdiction present, the submission of the defendant did not confer jurisdiction on the court. It was explained (at 894A-B):

'This dictum [in *The Owners, Master and Crew of the SS Humber v The Owners and Master of the SS Answald* 1912 AD 546 at 554] again emphasises the principle that in addition to the machinery of arrest (which, in the case of a local peregrinus, is dispensed with by law) something more is required before a Court can take cognizance of a matter in its area of jurisdiction. By prorogation a defendant subjects his person to the jurisdiction of the Court, but that is not enough. One or more of the traditional grounds of jurisdiction must also be present.'

[29] Following *Veneta,* the position is as follows: the submission of a local peregrinus defendant does not suffice, without more, to establish jurisdiction at the suit of a foreign peregrinus plaintiff. Since it is not competent to attach the property of a local peregrinus defendant, in addition to submission, what is required is a ground of jurisdiction that establishes a link between the court and the subject matter of the litigation. In a contractual claim sounding in money that link will be provided by the fact that the contract was concluded or performance is to be rendered within the area of jurisdiction of the court. In *Hay Management Consultants Ltd v P3 Management Consultants (Pty) Ltd* [2005] 3 All SA 119 (SCA) it was held, with reference to *American Flag,*[8] that submission to the jurisdiction of the court by a foreign peregrinus defendant in an action for money brought by an *incola* plaintiff was of itself sufficient for the court to assume jurisdiction. There was

[8] *American Flag plc v Great African T-Shirt Corporation CC; American Flag plc v Great African T-Shirt Corporation CC: In re Ex parte Great African T-Shirt Corporation CC* 2000 (1) SA 356 (W). There, a peregrine of the Republic instituted an action in a local division against a South African close corporation based on an acknowledgment of debt. The defendant defended the action and signalled its intention to institute a counterclaim against the plaintiff. It also applied for the attachment of the plaintiff's claim *ad fundandam jurisdictionem*. One of the issues was whether, despite the plaintiff's submission to the court's jurisdiction, in the absence of a *ratio jurisdictionis*, such submission was effective to confer jurisdiction on the Court. A specially constituted Full Bench embarked on a comprehensive survey of the authorities, and held that it had always been our law that actions by incolae against peregrine defendants could be entertained solely on the ground of the defendant's submission to the jurisdiction of the court (at 449). The court distinguished *Veneta* on the basis that case there was no link at all between the Court and the matter, since both parties were peregrini and the cause of action did not arise within the court's area of jurisdiction. The court concluded that since American Flag had consented to the jurisdiction of the court, attachment was neither necessary nor permissible.

no need for the *incola* plaintiff to attach the property of the foreign peregrinus defendant to found jurisdiction.

[30] In the present matter, a foreign peregrinus plaintiff (the second respondent) brought proceedings against a foreign peregrinus defendant (Ingosstrakh). Here, unlike the position in *Veneta,* it would have been competent to attach the property of Ingosstrakh, but is such attachment necessary for the court to enjoy jurisdiction? In my view, if a foreign peregrinus defendant submits to the jurisdiction of the court, and a ground of jurisdiction is established that links the court to the subject matter of the litigation, that will suffice for the court to assume jurisdiction. This is so because once a foreign peregrinus defendant has submitted to jurisdiction, an effective basis is established to enforce a judgment that might issue against such a defendant. This follows because submission is universally recognised as the basis upon which the courts of one country recognise the judgments of another. Attachment in these circumstances is unnecessary.

[31] There are forceful arguments reflected in the academic literature that would recognise submission alone by the defendant in a suit between a foreign peregrinus plaintiff and a foreign peregrinus defendant as sufficient for the court to assume jurisdiction.[9] However, it is not necessary for us to express a firm view on this matter. In the present case, unlike the position in *Veneta,* apart from the issue of submission, there is a ground of jurisdiction that links the subject matter of the litigation to the court a quo – the insurance policy was concluded in Johannesburg.

[32] It follows that, if Ingosstrakh submitted to the jurisdiction of the court a quo, that court enjoyed jurisdiction because, in addition to submission, the contract of insurance

[9] See for example Forsyth, *Private International Law*, 4 ed 215-6, cited with approval in *Hay Management* para 17, and an article by the same author in (2006) 18 SA Merc LJ. See also John Peter 'Consent Confusion but no Effect' in (1993) 110 *SALJ* 15 at 20.

was concluded within its area of jurisdiction. On this basis, Ingosstrakh's defence, at least as between Ingosstrakh and the second respondent, must fail as a matter of law.

[33] What remains to be determined is whether Ingosstrakh submitted to the court a quo's jurisdiction. This is a factual question in which the court considers whether the cumulative effect of the proved facts established submission on a balance of probabilities. See *Hay Management* para 13. In the present case, I consider that Ingosstrakh had selected a domicilium for service of process in this country. In *Beverley Building Society v De Courcy and Another* 1964 (4) SA 264 (SR) at 270 C-E and *Standard Bank v Butlin* 1981 (4) SA 158 (D (at 164D-F) this was recognised as a significant factor leaning towards submission, although in the latter case, it was held on the specific facts of that case that the defendant had not submitted to the jurisdiction.

[34] In addition, Ingosstrakh has been involved in at least three substantive applications in the court a quo in respect of the policy in issue. In two of those it was the respondent, and filed a counter-application in one of them. Not once did Ingosstrakh object to the jurisdiction of the court a quo. The third application, the one to set aside the order authorising service on Slatter, was at Ingosstrakh's instance. On these facts, I consider Ingosstrakh to have submitted to the jurisdiction of the court a quo.

[35] It is also important to consider the business relationship between the parties, as well as the convenience of a South African court hearing and determining this matter. The second respondent's associated companies, ie the first and third respondents, are incolae. In *Estate Agent Board v Lek* 1979 (3) SA 1048 (A) it was held that 'convenience and common sense' are, are among others, valid considerations in determining whether a particular division has jurisdiction to hear and determine a particular case.

[36] In the leading English case of *The Eleftheria* [1969] 2 All ER 641 the court listed number of factors as relevant when considering whether an English court should hear a matter, among which is whether a defendant genuinely desires a trial in the foreign country, or is only seeking procedural advantages. In this case, it must be borne in mind

that Ingosstrakh has already been found in the court a quo to have sought improperly to gain a tactical advantage, as fully explained in para 26 above. It is definitely not raising the question of jurisdiction to have the matter decided in the British Virgin Islands. For all these considerations, Ingosstrakh's jurisdiction point has no merit.

[37] Ingosstrakh set much store by the judgment of 26 May 2015, referred to more fully earlier in para 5. It was contended that the judgment rendered certain issues *res judicata* between the parties. To consider this issue, it is helpful to delineate the issues which occupied the court's mind in that case. The court was concerned with the proper interpretation of clause 3(b) and in particular, Global's assertion that it, as the insured, was exclusively entitled to declare the aircraft a total loss once the aircraft was damaged (paras 11, 12 and 17). The court found that the clause did not preclude Ingosstrakh from also providing estimates of what the cost of repair would be. The court also dealt with Global's contention that only Global Maintenance was entitled to provide a quote for the cost of repair to the aircraft, as it had the necessary accreditation at the time when the aircraft was damaged. The court rejected this argument and accepted that Ingosstrakh was entitled to obtain a quote from an AMO which had only obtained accreditation after the event (at para 13).

[38] The court thereafter dealt with the issue of compromise. Global had contended that its claim had been compromised. It had relied on a paragraph in the affidavit of Mr Van der Merwe, an aviation surveyor appointed by Ingosstrakh to assist in the evaluation of the damage and to investigate further. In the final paragraph of his report dated 28 December 2012, he stated the following:

'Subject to the underwriter's agreement we recommend a loss reserve be established on the basis of a constructive total loss. We additionally recommend a fee reserve of £8 000. We trust the above and aforementioned is found to be in order and look forward to receiving underwriter's return comments accordingly. In the mean-time our investigations continue with further reports to follow.'

Suffice it to say that Global's contention was rejected, it is not necessary to delve into the court's reasons for that conclusion.

[39] Lastly, the court considered whether there was a dispute of fact. It concluded (at para 25) that given Global's assertion that Ingosstrakh's AMO or expert had not actually inspected the aircraft meant 'that it would be impossible on *these papers as they stand* to make a finding that the aircraft was in fact a CTL and therefore exceeded the seventy five percent of the agreed value between the parties.' (emphasis added.)

[40] It must be clear from this overview of the court's judgment that it considered totally different issues to those in the present application. The only issue which Global asserted in both applications is one of compromise. I am prepared to assume, without deciding, that that issue is indeed res judicata. But that does not assist Ingosstrakh. We do not decide the appeal on the basis of that issue.

[41] The ruling by a court that there is a material dispute of fact is a procedural issue. It does not finally resolve any substantive issues between the parties. It can therefore not form the basis of a res judicata defence. In any event, as I pointed out earlier, the main reason for that ruling was Global's assertion that Ingosstrakh's expert had not inspected the aircraft. The court understandably, and correctly took a view that it could not resolve that issue on the papers. Global makes no such assertion in the present application.

[42] Viewed in the light of the above considerations, the court's judgment of 26 May 2015 poses no hurdle for this Court to decide the substantive issues between the parties. None of the substantive issues in this judgment were considered in that judgment. Ingosstrakh's reliance on that judgment is misplaced.

[43] I turn now to the basis of Ingosstrakh's refusal to pay the full insured amount. The starting point in this enquiry is clause 3(b) of the policy, which provides:

'A total loss may be declared under this insurance, at the option of the insured, in the event that the cost of repair of the damage together with the cost of salvage and/or transport from the place of accident to the place of repair and return to the service be estimated at 75% or more of the agreed value. This provision shall not, however, preclude the declaration of a total loss following the agreement between the insurers and the insured in the event that such costs be estimated at

less than 75% of the agreed value. In such event the insurers will pay the agreed value of the aircraft. However, any increase in the agreed value of the aircraft concerned, as provided in clause 11 of this section, shall not be taken into account in the application of this provision.'

[44] The issue in dispute is whether on a proper consideration of the various repair costs relied on by the parties, such costs do or do not exceed the 75% threshold referred to above. Global contends they do, while Ingosstrakh submits the contrary. This issue, in turn, depends on the extent of damage to the aircraft. The aircraft had two engines and according to Global, both engines were damaged. It was common cause between the parties that the incident had resulted in damage to the structure of the engines.

[45] Global relies on a quotation by Global Aviation Maintenance Limited (Global Maintenance), its associated company, of which it is common cause, that it is a duly accredited Aircraft Maintenance Organisation (AMO). Global Maintenance reflects the fair and reasonable costs of repair as being US$2 891 028.14, well in excess of the US$1 875 000, ie 75% threshold. This includes the cost of repairs of both engines in the amount of US$1 133 863. This amount is based on a report dated 1 July 2013 by Bonus Aerospace,[10] which deals with the work scope and quotations to repair the engines, and shows that the cost to repair the two engines are US$516 301.04 and US$617 562.84, respectively.

[46] Ingosstrakh's stance, on the other hand, is that only one engine (the left one) was damaged. It relies on a quotation by Phoebus Apollo (Phoebus). Although there is a dispute whether Phoebus was an accredited category 'B' AMO, I assume, for present purposes, that it had the necessary accreditation. In terms of Phoebus' quotation, the necessary repair work to the structural damage on the aircraft could be done for a cost below the 75% threshold. Its estimation of the repair cost is US$1 139 000, which does not include the engine repair cost. It also does not include the cost for non-routine repair work should such be necessary with additional findings, nor for any engineering. The

[10] The Bonus Aerospace referred to in the letter is a USA facility certified by South African Airways with the capabilities and reputation in the industry for its high-quality work.

quotation which Ingosstrakh furnished in respect of the engines was prepared by FJ Turbine for US$ 119 600. However, it does not include costs for: parts and components; additional work resulting from exposure to areas not quoted; exposure resulting from rejection of flow checks, bench checks, missing components, etc.

[47] This dispute as to whether both engines or one were damaged, need not unduly detain us. Deference should be given to a neutral and authoritative view of the South African Civil Aviation Association (SACAA). In terms of the Civil Aviation Act 13 of 2009, this is the supreme authority in the country over all aircraft and related matters, including the regulation of how repairs to aircraft are done. The aircraft in issue was registered with SACAA. According to SACAA's regulations, repairs can only be carried out by an approved AMO holding a category B accreditation from SACAA. This is for quality assurance purposes. In other words, SACAA would issue the necessary certificate airworthiness only if the repairs were carried out by an approved AMO. It follows that any quotation for repairs provided by an organisation which is not an approved AMO would be of little value.

[48] Moreover, SACAA's view in respect of the necessary repairs to the aircraft in issue, is set out in its letter to Global dated 5 August 2013. It said, among other things, the following:

'As per previous correspondence for Airworthiness department, we confirm that the minimum work scope acceptable to return JT8D-217A engines bearing serial numbers P726370 AND P708515 to service is the ESV-2 work scope detailed in the reports from Bonus Aerospace dated 1 July 2013 and FJ Turbine Power dated 28 June 2013 that were submitted to this department.'

[49] From the above, it is clear that SACAA requires that for the aircraft to return to airworthiness, both engines need to be repaired. The scope of works decreed by SACAA is ESV-2. According to an extract from Pratt & Whitney's Maintenance Planning Guide[11] this involves heavy maintenance, which requires a full overhaul of the engines. As stated

[11] Pratt & Whitney is an American aerospace manufacturer with global service operation. It is said to be a world leader in the design, manufacture and service of aircraft engines and auxiliary power units.

already, there is also a report from Bonus Aerospace in which it is estimated that the cost of repairing the two engines were US$617 562.84 and US$516 301.04, respectively. Thus, from all the available evidence, including SACAA's letter dated 5 August 2013, it must be accepted that both engines were damaged in the incident and that SACAA directed that both engines must be overhauled. It is therefore not open to Ingosstrakh, without more, to assert that only one engine was damaged.

[50] In Ingosstrakh's replying affidavit in the counter application, the deponent, Mr van der Merwe, an aviation surveyor and assessor of insurance claims in the aviation industry, contended that all of SACAA's correspondence relied upon by Global referenced but one engine. But that is plainly not so, given the contents of SACAA's letter of 5 August 2013. Although, Mr van der Merwe references this letter, he does not explain how it can be read to refer to but one engine. His critique of the letter is that it relies upon quotes that were premised on instructions from Global, and hence were inflated. This, contends Mr van der Merwe, gives rise to a triable issue.

[51] In my view that is not the case. SACAA had determined that both engines had to be repaired and the scope of works required to do so. SACAA is an independent authority. It had made a decision as to what was required to return the aircraft to service. Mr van der Merwe's skepticism as to the basis upon which SACAA made its decision does not displace that decision or cause it to be set aside. In the face of SACAA's decision, it is hard to imagine a trial court reaching a different outcome. There is not a genuinely triable issue on this score.

[52] Once this is accepted, the CTL threshold is exceeded, when one takes into account that the only quotation which deals with SACAA's requirement, and the scope of repairs regarding the engines, is by Bonus Aerospace dated 1 July 2013. As stated already, according to that quotation the cost to repair both engines amounted to US$1 133 863.88. Phoebus' quotation for the airframe, it should be recalled, is US$ 1 139 000. If one were to add this amount to the Bonus Aerospace quotation, the CTL

threshold has clearly been exceeded. Seen in this light, Ingosstrakh simply does not have a bona fide defence to Globals' claim.

[53] To sum up, Ingosstrakh is under bar from delivering its plea. Even if one were to be generous and consider it to be in the interests of justice to ignore this procedural impediment, Ingosstrakh has failed to show good cause for its failure to file its plea. There is no acceptable explanation therefor, and it has not demonstrated a bona fide defence to Global's claim. It follows that the court a quo erred in dismissing Global's application for default judgment. It should have been granted and Ingosstrakh's counter-application dismissed.

[54] In the result the following order is made:

1 The appeal is dismissed with costs, including costs of two counsel where so employed.
2 The cross-appeal is upheld with costs, including costs of two counsel where so employed.
3 The order of the high court is set aside and replaced with the following:
    a) Default judgment is granted against the respondent in favour of the applicants in the sum of US$ 2 500 000;
    b) Interest on the above amount at the prescribed rate from 13 November 2012 to date of payment;
    c) Costs of the suit.

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T Makgoka
Judge of Appeal

APPEARANCES:

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