



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

Case No: H264/2019

In the matter between:

OUTENIQUA SKYDIVERS CC

Plaintiff

(Registration number: 1998/063054/23)

and

STEPHANUS PETRUS HARTZER

First Defendant

**STARLITE AVIATION TRAINING ACADEMY
(PTY) LTD**

Second Defendant

(Registration number: 2006/015328/07)

**JUDGMENT *RE* SECOND DEFENDANT'S SPECIAL PLEA OF *RES JUDICATA*
DELIVERED ELECTRONICALLY: 7 FEBRUARY 2022**

MANGCU-LOCKWOOD, J

I. INTRODUCTION

[1] The second defendant (“*Starlite*”) has raised a special plea of *res judicata*, alternatively *res judicata* in the form of issue estoppel, against the plaintiff’s (“*Outeniqua*”) particulars of claim.

[2] In the particulars of claim *Outeniqua*, relying on an agreement between it (as represented by Hendrik Cornelis Van Wyk (“*Van Wyk*”)) and the first defendant (“*Hartzer*”), seeks an order directing *Hartzer* to effect transfer of rights to occupy hangar spaces A11 and A12 of the Mossel Bay Airfield (“*the hangars*”), to *Outeniqua*.

[3] *Starlite*’s special plea is to the effect that the factual and/or legal issue that arises from *Outeniqua*’s claim has already been determined by this Court in an order of 2 February 2021 per Wille, J involving *Starlite*, *Hartzer* and *Fairoak Investment Holdings* (“*Fairoak*”). The relief sought in the special plea is that the Court should extend or relax the ‘same persons’ requirement of *res judicata* on the grounds of fairness, equity, public policy considerations, avoidance of multiplicity of litigation and conflicting judgments on the same issue.

[4] I made a ruling that the issue raised in the special plea should be separated and determined first, before proceeding into the main trial because if the special plea was upheld that might obviate the need to determine the main dispute.

II. BACKGROUND

[5] The order granted on 2 February 2021 was the culmination of an action launched by *Starlite* under case number 10739/2018 (“*the action*”). *Fairoak* and *Hartzer* were cited as first and second defendants, respectively. The relief sought by *Starlite* was firstly declaratory relief that, in terms of an agreement between it and *Fairoak* as represented by *Hartzer* (“*the Fairoak agreement*”), it was entitled to the transfer of the hangars because it had bought the rights to occupy the hangars from

Hartzer. However, it was pleaded that, contrary to that agreement Hartzer sought to sell the hangars to Van Wyk. Secondly, the relief sought in the action was that Fairoak and Hartzer be directed to abide by the terms of the agreement and to pay the costs of the action.

[6] Outeniqua brought an application to intervene in the action, which was opposed by Starlite, but subsequently formally withdrew the application before a determination could be made on it. Then, although Hartzer and Fairoak initially opposed the action brought by Starlite, they subsequently formally withdrew their opposition. As a result, the Court Order of 2 February 2021 was obtained by default, and ordered as follows:

- “1. *It is declared that [Starlite] is entitled to the transfer of the hangars described as A11 and A12 at the Mossel Bay Airfield, Mossel Bay, Western Cape.*
2. *The first and second defendants are directed to:*
 - 2.1 *abide by the terms of the parties’ agreement;*
 - 2.2 *Furnish a copy of this order to the Mossel Bay Aero Club within 5 business days of judgment being granted.”*

III. THE SPECIAL PLEA

[7] Similar to the particulars of claim in the action, Starlite relies on the existence of the Fairoak agreement in the special plea, stating that it was initially an oral agreement concluded on 23 April 2018, and was eventually reduced into writing on 11 May 2018. These allegations are denied in the replication delivered on behalf of Outeniqua, and the second defendant is put to the proof thereof.

[8] The second defendant did not call any witnesses for the determination of the special plea. The plaintiff called one witness, Van Wyk. His evidence was firstly regarding the circumstances of the coming into existence of the agreement between Outeniqua and Hartzer. The oral agreement in this regard was reached between Van Wyk and Hartzer at a meeting on 21 April 2018. At that meeting the ‘purchase price’

for the right to occupy the hangars was agreed, although the amount was later modified by agreement in order to accommodate other costs and expenses not previously accounted for in the initial amount. He testified that Hartzer was not sure whether the agreement would be in his (Hartzer) name or in the name of one of his entities, and although the initial agreement was in the name of Fair Oak, it was later changed to Hartzer's. He also testified that when it emerged that Starlite was laying claim to the hangars due to an alleged agreement with Hartzer, the latter assured him that Starlite's claim was unfounded, including by forwarding him an apparently expired right of first refusal. Hartzer's assurances continued well into the action that was instituted by Starlite, and included assurances that the matter was being opposed. He was not informed that Fair Oak and Hartzer had withdrawn their opposition to the action, and only discovered that much later. The evidence of Van Wyk was not seriously disputed.

IV. THE APPLICABLE LAW

[9] It is trite that the expression *res judicata* means that the dispute raised for adjudication has already been finally decided. In terms of the common law, the three requisites of *res judicata* are: that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause.¹ This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground"²; or which comes to the same thing, "on the same cause for the same relief".³

[10] With time, the common law requirements were relaxed, giving rise to the expression *issue estoppel*, which describes instances where a party can successfully

¹ Voet 42.1.1; *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* 2001 (2) SA 232 (SCA).

² *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 A.

³ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A - B; see also the discussion in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 664 C - E; or which also comes to the same thing, whether the "same issue" had been adjudicated upon (see *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 179 A - H).

plead that the matter at issue has already been finally decided even though the common law requirements of *res judicata* have not all been met.⁴ This relaxation of the common law requirements was explained as follows in *Smith v Porritt & others*:

“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 inquiry 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 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”.’

[11] In *Molaudzi v S*⁵ the Constitutional Court affirmed the development away from the strict application of common law *res judicata*, and stated as follows:

‘Since res judicata is a common-law principle, it follows that this court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 [of the

⁴ *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 10; *Smith v Porritt & others* 2008 (6) SA 303 (SCA) para 10.

⁵ *Molaudzi v S* 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015) at paras [14]–[16].

Constitution] does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.”

V. EVALUATION

[12] Much of the argument advanced by Mr Coetsee on behalf of Outeniqua concerned the fact that the judgment of Wille J is a default judgment which was not preceded by the leading of evidence. It was argued that this means that the judgment of 2 February 2021 cannot be considered a final decision on the facts and law in issue for purposes of *res judicata*. The case law does not support this argument. In *Jacobson v Havinga t/a Havengas*⁶ it was held that a default judgment is binding until it is rescinded and a plea of *res judicata* may be raised successfully. The Court *Jacobson v Havinga t/a Havengas* held that it is irrelevant whether evidence was led or not, and a default judgment remains a judgment even if erroneously obtained irrespective whether it was granted by the Clerk of the Court, a Magistrate or Judge. The *ratio* in *Jacobson v Havinga t/a Havengas* has been applied in numerous successive judgments, and remains law⁷. There is therefore no merit in the plaintiff’s argument that the second defendant is precluded from raising a special plea of *res judicata* based on the judgment of Wille J simply because no evidence was led and that it was granted by default.

[13] The next question is whether the same parties are involved in the two matters. The parties to the judgment in the action were Starlite as plaintiff, and Hartzer and Fair oak as first and second defendants. In this matter, the parties are Outeniqua as plaintiff, with Fair oak, Hartzer and Starlite as first, second and third defendants. Thus, the additional party who is not party to both matters is Outeniqua.

⁶ *Jacobson v Havenga t/a Havengas* 2001 (2) SA 177 (T) at 179 H-I and 182 B.

⁷ *Liberty Group Limited v Bezuidenhout* (4072/2010) [2014] ZAKZPHC 16 (4 March 2014) paras 8 – 9; *Shackleton Credit Management (Pty) Ltd v Grobler and Another* (2009) JOL 23599 (GNP) at 11.

[14] However, as I have already indicated, Outeniqua applied to intervene in the action, but withdrew its application before a determination could be made regarding that application. On the basis of the fact that Outeniqua clearly had an opportunity to participate in the action but resolved not to, Starlite argues that the ‘same parties’ requirement of *res judicata* should be relaxed so that Outeniqua is considered to have been a party for purposes of issue estoppel.

[15] It has now been accepted that there will be circumstances where the ‘same parties’ requirement of *res judicata*, may be relaxed, similar to the relaxation of the requirements of ‘same cause of action’ and ‘same relief’. As the Supreme Court of Appeal stated in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others*⁸:

‘[I]t may be that the requirement of “the same person” is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.’

[16] It is correct that Outeniqua had a fair opportunity to participate in the initial litigation. It was fully aware that the issues raised in that litigation had a direct impact on its alleged contract with Hartzler. This much was acknowledged in the founding affidavit supporting the application to intervene which was deposed by Van Wyk, where it was stated that Outeniqua had a direct and substantial interest in the hangars which interest would be prejudicially affected if Starlite were to succeed in the action.

⁸ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* (741/12) [2013] ZASCA 129; 2013 (6) SA 499 (SCA) at para [43].

[17] However, it is also correct that the issues that were to be raised by Outeniqua, namely the determination of the circumstances of its alleged contract with Hartzer, were not fully raised or considered in the action. This much was one of the reasons for Starlite's opposition to Outeniqua's application to intervene, where it was stated that Outeniqua had failed to fully set out the circumstances of its alleged oral agreement with Hartzer. As a result, it is difficult to conclude that what is being sought in this action is, in the words of the SCA in *Caaserstone*, "*that the same issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome*".⁹

[18] The fact that Outeniqua's alleged contract with Hartzer was not considered in the action is relevant for another enquiry in the determination of the requirements of *res judicata* and issue estoppel, namely whether the same issue is involved in the two actions, or as the Supreme Court of Appeal put it in *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited*¹⁰, whether it "*is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause*".

[19] It cannot be denied that the subject-matter of the action and of the current claim is the same. It is the right to occupy the hangars known as A11 and A12 of the Mossel Bay Aero Club. This is relevant because it goes to the heart of the public policy basis for the doctrine of *res judicata*, namely that litigation and the requirements of good faith do not permit of "*the same thing being demanded more than once*".¹¹ Or, as stated in *Evins v Shield Insurance Co Ltd*¹², to prevent the possibility of conflicting decisions by different courts on the same issue.

⁹ At para [43].

¹⁰ *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (A) (28 November 2000) at para [3].

¹¹ See *Molaudzi v S* 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015) para [15]; *Bertram v Wood* (1893) 10 SC 177.

¹² *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835G.

[20] Furthermore, the same relief is sought in both matters, though with some variation, namely that in the action, the specific performance was coupled with a declaratory order. However, fundamentally, in each matter the plaintiff seeks an order directing Hartzer to comply with an agreement by transferring the rights to occupy the hangars to them.

[21] However, as I have already mentioned, the parties rely on different contracts. That issue is equally significant. In other words, there is an issue of fact and of law, namely the contract relied upon by Outeniqua, which was not considered in the previous judgment, and which has not been finally disposed of. In the words of the judgment of *Boshoff v Union Government*¹³, the judgment of 2 February 2021 does not necessarily involve a judicial determination of the same question of law or issue of fact because the judgment of 2 February 2021 did not at the same time, and in the same breath determine the question of the contract between Outeniqua and Hartzer. That judgment did not automatically declare, or effectively make a determination regarding Outeniqua's alleged contract with Hartzer.

[22] It is correct that proceeding to trial in this matter has the potential of creating a duplication of conflicting judgments regarding the same hangars. However, in the peculiar circumstances of this case, that is an issue for consideration by the trial court when granting relief, and should not operate as an impediment to Outeniqua pursuing a claim against Hartzer. In this regard I am mindful that the decision of whether or not to grant the relief sought in the current proceedings, namely specific performance, is a matter that lies within a court's discretion, which discretion must be exercised judicially.¹⁴ There are no rules that govern the exercise of the court's discretion to order specific performance but a court must tread carefully to prevent an injustice resulting, and to consider whether such order may operate unduly harshly on the defendant or may not produce the desired effect as required by the plaintiff.

¹³ At 350 - 351.

¹⁴ *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) at 378.

[23] One complication occasioned by the manner in which the parties have conducted the litigation, is that in neither claim has a party sought to juxtapose the two competing contracts against each other. That issue is raised by the second defendant in the special plea, charging that Outeniqua should have rather sought to consolidate the two actions since it is common cause that it (Outeniqua) has sought to institute the current claim as far back as when it sought to intervene in the action. I do not need to make a finding on that issue. What is relevant is that all the parties were aware of the competing contracts by the time that Outeniqua sought to intervene in the action. This is borne out by the fact that, soon after the launching of the action (on 6 July 2018 per Gamble, J under a different case number, 11299/18) a Court Order was taken between Starlite, Fair oak, Hartzer, Van Wyk and the Mossel Bay Aero Club (*“the Aero Club”*), the terms of which were that pending the final determination of the action, Fair oak was interdicted and restrained from selling the hangars to Van Wyk or to any other third party; and the Aero Club was interdicted and restrained from approving the alleged sale to Van Wyk. Then, after the Order of Wille J was granted on 2 February 2021, Outeniqua launched urgent proceedings and obtained an interim interdict prohibiting Starlite, Fair oak, Hartzer and the Aero Club from executing the default judgment pending the final determination of these proceedings. It is clear that all the parties have always been aware of the issues arising in this special plea but none of them have ever sought a consolidation of the proceedings with a view to determining which of the agreements is to have legal advantage. All these issues were live as far back as Outeniqua’s intervention application, and were pertinently raised in the answering affidavit deposed on behalf of Starlite to oppose that application.

[24] For the reasons discussed in the preceding paragraph, I am of the view that, although the special plea is not upheld, each party should pay its own costs.

VI. ORDER

[25] In the result, the following order is made:

- a. The second defendant's plea of *res judicata*, including the alternative claim of issue estoppel, is dismissed.
- b. Each party is to pay its own costs in the special plea.

N. MANGCU-LOCKWOOD

Judge of the High Court

APPEARANCES

For the Plaintiff	:	Adv D J Coetsee
Instructed by	:	Mr N Marais
		Oosthuizen Marais & Pretorius Attorneys
For the First Defendant	:	Adv J W Kloek
Instructed by	:	Mr JJ Badenhorst
		J J Badenhorst & Associates Inc.
For the Second Defendant	:	Adv S Fergus
Instructed by	:	Ms M Lutchman
		Lutchman Attorneys