



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
Sitting at DURBAN**

Appeal Case No: AR 114/17

Case No. in court a quo: 19605/2011

In the matter between

CTP LIMITED T/A AMANZIMTOTI PRINTING & PUBLISHING

Appellant

and

D & V SAFETY MANAGEMENT

First Respondent

BRAINWAVE PROJECTS 877 CC

Second Respondent

JUDGMENT

Delivered 23 February 2018

Order

- 1 The appeal succeeds.
- 2 The judgment by the court a quo is set aside.
- 3 The first respondent is directed to pay the costs of appeal.

Moodley J :

[1] This is an appeal against a judgment upholding a plea that that the subject matter of the application in terms of Rule 54(6) of the Magistrates Court Act 32 of 1944 was *res judicata*.

Factual Matrix

[2] The appellant instituted an action in the Magistrates' Court, Durban under case number 19605/2011 against the first respondent for the recovery of payment for advertising services rendered by it to the first respondent. The appellant's cause of action was the breach of an agreement concluded by the appellant with first respondent, which was represented by one Caroline Naidoo, who also signed the agreement on behalf of the first respondent.

[3] The appellant's attorney caused the summons to be served on the first respondent, together with a Notice in terms of Rule 54 of the Rules of the Magistrate Courts Act which provides:

'54 Actions by and against partners, a person carrying on business in a name or style other than his or her own name, an unincorporated company, syndicate or association

1(a) Any two or more persons claiming or being sued as co-partners may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action.

(b) In any case referred to in paragraph (a) any party may by notice require from the party so suing or sued a statement of the names and places of residence of the persons who were at the time of the accruing of the cause of action co-partners in any such firm.

(2) A party receiving a notice in terms of sub-rule(1)(a) shall, within 10 days after receipt thereof, deliver the statement required.'

[4] The first respondent did not defend the action or respond to the Rule 54 Notice. The appellant consequently sought default judgment as prayed for in the summons, which was granted on 22 October 2014. Execution of the judgment was

attempted, but the attached goods were released when an interpleader affidavit was filed.

[5] The appellant then launched an application in terms of Rule 54 (6) ('the first application'), which provides:

'When action has been instituted by or against a firm or by or against a person carrying on business in a name or style other than his own name or by or against an unincorporated company, syndicate or association in the name of the firm or in such name or style or in the name of the company, syndicate or association, as the case may be, the court may on the application of the other party to the action made at any time either before or after judgment on notice to a person alleged to be a partner in such firm or the person so carrying on business, or a member of such company, syndicate or association, declare such person to be a partner, the person so carrying on business or a member, as the case may be, and on the making of such order the provisions of sub-rule (3) shall apply as if the name of such person had been declared in a statement delivered as provided in sub-rule (2).'

[6] The first respondent opposed the first application and filed an answering affidavit. In the replying affidavit filed by the appellant, the deponent referred to the content of a tracing agent's report that had come to hand, which did not form part of the founding affidavit. At the hearing of the first application on 3 March 2016, the first respondent's attorney raised a point *in limine* in respect of the offending material in the replying affidavit.

[7] Argument was then presented and the presiding magistrate delivered judgment and granted an order upholding the point *in limine*.

[8] On 23 March 2016 the appellant launched a second application in terms of Rule 54(6) ('the second application'), including the allegations that were ruled offending in the previous application. The first respondent opposed the second application, raising a plea of *res judicata*. The learned magistrate presiding over the application ruled in favour of the first respondent and dismissed the second application. It is that judgment that forms the subject of this appeal.

Res Judicata : relevant legal principles

[9] The thrust of the judgment appealed against is premised on the principle of 'res judicata', which is well established in our law.

[10] In *Prinsloo No and Others v Goldex 15 (Pty) Ltd and Another*¹ Brand J held:

'[10] The expression 'res iudicata' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between **the same parties, for the same relief on the same ground or on the same cause** (*idem actor, idem res et eadem causa petendi*).' *(my emphasis).*

[11] The learned judge also warned that:

'[26]deviation from the threefold requirements of res iudicata should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings. That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution.' *(footnotes omitted)*

[12] In *Smith v Porritt and Others*² Scott JA confirmed that the common-law requirement that applied when a defence of res judicata is raised, is 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.

[13] Further as pertinently pointed out in *Vleissentraal v Dittmar*³ by Van Heerden R:

'Granting that the dismissal of an application can have the effect of a final order, the answer to the question whether a second application, which in substance is made with the object of obtaining the same relief as a first dismissed application, is acceptable depends not so much on the form of the order given in the first application as on the dispute in respect whereof the order is made.'

¹ 2014 (5) SA 297 (SCA)

² 2008 (6) SA 303 (SCA) at page 308

³ 1980 (1) SA 918 (O)

[14] Van Heerden R found in the *Vleissentraal* case that the magistrate did not consider the merits of the application for rescission but dismissed it by reason of the fact that the application had not been timeously set down, and accordingly held that the dismissal of the application was a final order in regard to the question whether the application was brought timeously, but not in regard to any other issue.

The proceedings in the court a quo

[15] I accordingly turn to the first application. A perusal of the record is instructive as to the exact nature of the point taken *in limine*, the legal issue before the court hearing the first application and the relief granted, and therefore the relevant portions deserve to be quoted in full.

[16] At the commencement of the proceedings, the first respondent's attorney Ms Subajan explains the point *in limine* taken by her as follows:

Miss Subajan: ...*Our point in limine is that the applicant has filed its answering affidavit and, in it, the applicant traverses new evidence not cited in its founding affidavit. The applicant admits in its answering affidavit that it has indeed traversed new evidence and invites the respondent to file a supplementary reply.*

Now, the respondent rejects the applicant's answering affidavit and asks that it be struck from the record on the basis that the respondent will be prejudiced in the conduct of its defence in, inter alia, the following ways. Now averments have been made by the applicant that the new evidence now included in its answering (?) affidavit was not available at the time that the founding affidavit was filed.

...They have alleged that evidence and you can see from the dates on the annexures that they were available at the time the founding affidavit was compiled. So there is no reason why it shouldn't have been included in the founding affidavit.

...We submit that the applicant's application supported by its founding affidavit is defective in that the reasons as traversed in our opposing affidavit, it does not establish a case on the merits for the defendant and the respondent to be declared as one and the same.

The applicant had its opportunity to bring its application comprehensively and failed to do so or, alternatively, chose not to do so. The respondent, whilst being afforded

the opportunity by the applicants to file supplementary papers, is aware that the rules, in particular Rule 55, do not allow for the filing of supplementary papers without the express leave of the Court.’⁴

[17] At the commencement of his address Mr Roland, who represented the appellant asked the presiding magistrate, Ms Mewalal, whether he should deal with the whole matter, to which she responded:

Court: *No just the point in limine. Obviously, if I rule on the point in limine, depending which way I proceed, it may not be necessary to proceed to hear the arguments on the merits.*⁵

[18] It is therefore apparent that Ms Mewalal was only determining the issue of the new material in the replying affidavit objected to by Ms Subajan. This is confirmed when Ms Mewalal later reiterated:

‘The point in limine is that you have not done what should have been done in the founding papers. You have tried to make out a case in your replying papers.’⁶

[19] Mr Roland then specifically addressed her on ‘the new evidence’ which he described as ‘evidence to confirm the tracing agent’s report.’⁷

[20] At the commencement of her judgment on the point *in limine* Ms Mewalal stated as follows:

Prior to the consideration in terms of the merits of the matter is concerned, in particular to the various affidavits that have been filed in respect of the application in this matter, the respondent, Brainwave Projects 877 CC, raised a point in limine essentially to the effect that the further affidavit of the applicant in this matter, which is described as an answering affidavit, is in fact irregular and contrary to the requirements of the Rules and, as such, should be struck out.

The applicant in the matter was given the opportunity to consider the point in limine...⁸

⁴ Record I12 page 42 – I18 page 43

⁵ Record I25 page 44 – I2 page 45

⁶ Record I 23 -25 page 53

⁷ Record I 6-8 page 45

⁸ Record I7-15 page 58

[21] In the course of her judgment Ms Mewalal identified the offending paragraphs dealing with the tracing agent's report as paragraphs 18, 19, 20 and 21, but proceeded to identify other allegations in the replying affidavit which, in her view, should have been in the founding affidavit. But, although she moved out of the ambit of the new material admitted by the appellant, she nevertheless did not consider the merits of the application in doing so; her deliberations were still related to whether these allegations ought to have formed part of the founding affidavit. She then summed up by stating :

'All the information that was relied upon in the answering affidavit by the applicant was information that was available at the time that the founding affidavit was deposed to. So, to make that point clear, the information that is contained in the answering affidavit should have been included in the founding affidavit by virtue of the fact that that information was readily available.'

Sorry, I just want to read out one more issue which is on page 15 of Rule 55:

"As has been pointed out, all the essential averments which the applicant must allege must be in the founding affidavit in support of his application. He cannot supplement his case by adducing facts in his replying affidavit which should have been in the original affidavit and, if it does so, such facts will, as a general rule, be struck out."

...Having said that, it is clear to the Court that, as far as the answering affidavit of the applicant is concerned, it was an irregular procedure for the applicant to depose to issues which should have been in his founding affidavit and accordingly the point in limine raised by the respondent in this matter is UPHELD WITH COSTS.⁹

[22] A more appropriate order would have been an order striking out the offending paragraphs, which would have pre-empted any ambiguity of the effect of her order. Nevertheless, irrespective of the merits of her reasoning, it is clear that the import of Ms Mewalal's order related only to the issue of the new allegations in the appellant's replying affidavit which, in her view, ought to have been included in the founding affidavit, and it is on this issue that she found in favour of the first respondent. She did not consider the merits of the first application in the light of the relief sought in terms of Rule 54(6), namely the declaration that the second respondent was a

⁹ Record I7 page 63- I4 page 64

proprietor of the first respondent when the cause arose. Therefore neither the cause of action on which she adjudicated cannot be said to be the same as the cause of action relied on to found the Rule 54(6) application, nor was the relief sought or granted the same as in the second application.

[23] Consequently the appellant was at liberty to attempt to amend his application, alternatively to launch a new application, as he did.

[24] In the introduction to the Rule 51(1) response dated 24 November 2016 furnished by Magistrate AS Jansen Van Vuuren, who determined the second application, it is noted that the first respondent in raising *res judicata* argued 'that the applicant has traversed the very same facts as that of its Answering Affidavit in its previous application'. Apart from the error of referring to the replying affidavit as an 'answering affidavit' being perpetuated, this argument cannot found a proper resistance to the relief sought in the application: a mere traversing of the same facts is insufficient.¹⁰

[25] What was relevant is whether the cause of action is the same, and whether the cause of action had been finally adjudicated on in the previous proceedings before Ms Mewalal, and the relief granted was effectively the same as the relief subsequently sought in the second application. As stated in *Horowitz V Brock And Others*¹¹ the requisites of a valid defence of *res judicata* in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties, and the same thing must have been demanded. What Ms Subujan sought in the first application was the striking out of portions of the appellant's replying affidavit, which was neither the same as or fatal to the cause of action in the Rule 54(6) applications.

[26] Therefore although the learned magistrate referred to the relevant authorities on the principle of *res judicata*, the conclusion reached is patently wrong:

'The court needed to decide whether Ms Mewalal's judgment was a final judgment in the application to declare the respondent the proprietor of the defendant. Having considered Ms Mewalal's judgment the court found that she did consider the merits

¹⁰ See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A)

¹¹ 1988 (2) SA 160 (A)

of the matter in the first application, and by upholding the point in limine she gave a final judgment on the merits. The court found that the matter was therefore res judicata.'¹²

[27] In my view, had Ms Mewalal granted an order striking out the offending portions of the replying affidavit in the first application, the appellant may have realised that the proper procedure would be to withdraw the first application and then launch the second application in order to incorporate the relevant allegations in his founding affidavit. It is noted that the first application was only withdrawn on 11 April 2017.

[28] However as it stands this court must decide on the appeal against the judgment on the second application, which I have already found to be incorrect.

[29] In the premises, the following order is issued :

- 4 The appeal succeeds.
- 5 The judgment by the court a quo is set aside.
- 6 The first respondent is directed to pay the costs of appeal.

Moodley J

Chetty J

¹² Record page 107

APPEARANCES

For the Applicants

Advocate S L Campbell

Instructed by

MILLAR & REARDON ATTORNEYS

13th FLOOR, 85 ON FIELD

85 FIELD (JOE SLOVO) STREET

DURBAN

TEL: (031) 304 2931

FAX: (031) 305 6680

REF: 06A045250/COLLS/KR

For Respondents

Instructed by

SUBAJAN & COMPANY

REF: KASSY SUBAJAN/N18

TEL: (031) 464 8329

FAX: 086 775 1191

C/O RODNEY REDDY & ASSOCIATES

RUCHIDA HOUSE

26/28 CYPRESS AVENUE

STAMFORDHILL

DURBAN