IN THE HIGH COURT OF SOUTH AFRICA **Not Reportable**

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 1291/13

Heard on: 23/03/2015

Delivered on: 16/04/2015

In the matter between:

EDGE TO EDGE 1199 CC **Plaintiff**

and

THA-MHLE ESTATES (PTY) LTD **Defendant**

JUDGMENT ON SPECIAL PLEAS

NHLANGULELA ADJP:

[1] This judgment concerns the sustainability of special pleas raised against the particulars of claim; namely that the particulars of claim do not disclose a cause of action, the plaintiff's claim is *res judicata* and, therefore, the proceedings brought by the plaintiff are vexatious. On these bases the defendant contends that the plaintiff's particulars of claim must be dismissed with costs on attorney and client scale.

[2] The special pleas are legal objections which the defendant is entitled to raise as envisaged in Rule 22 (1) of the Rules of this Court. However, these pleas are different in nature. The special plea of *res judicata* is the peremptory or permanent in nature in that it has as its object the quashing of the action altogether. It can be raised in *initio litis* or after *litis contestation*. Corbett JA, as he was then, had the following to say about such a plea in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835F-G:

> "Closely allied to the "once and for all" rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions (Caney *Law of Novation* 2nd ed at 70)…"

[3] In *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) Friedman JP, in elucidating the application of the phrases: "the same cause of action" and "the same subject matter", stated as follows at 566B-E:

> "I find that the essentials of the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa)*, (3) with respect to the same subject-matter, or thing *(de eadem re*). Requirements (2) and (3) are not immutable requirements of *res judicata.* The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.
>
> However, where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed.
>
> A court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions."

[4] Further, the following was said by Van Winsen AJA in the case of *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B:

> "The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an *exception rei judicatae vel litis finitae.* The reason for this rule is given by *Voet*, 44.2.1, (*Gane's* translation, vol, 6 p. 553) as being "to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings."

[5] The cause of action referred to in this case may be explained in terms of the *dictum* of Farlam AJA, as he then was, in the case of *Tradax Ocean Transportation SA v MV Silvergate Properly Described As MV Astyanax And Others* 1999 (4) SA 405 (SCA) where he stated as follows at 417:

> "[54] In my view, this summary of the legal position in relation to the doctrine of *res judicata* can be accepted provided that the phrase 'the cause of action' in (d) above is understood as referring not the cause of action in the strict sense but to 'the same matter in issue': see *Voet* 44.2.4; *Boshoff v Union Government* 1932 TPD 345 and

Kommissaris van Binnelandse Inkomste v ABSA Bank 1995 (1) SA 653 (A)."

[6] It is in this light of the *Tradax* case that the legal objection that the plaintiff's particulars of claim do not disclose a cause of action must be seen.

[7] *Mr Vutula*, the legal representative who appeared on behalf of the defendant (the excipient), brought the case of *Brandt v Spies* 1960 (4) 14 (E) 16H- 17A to the attention of the Court. This case is authority for the proposition, *inter alia,* that all the essential terms of the contract of sale of immovable property agreed upon must be in writing and encapsulated in the contract itself.

[8] Similarly, the objection that the plaintiff's claim is vexatious must be considered in the context of the authoritative statements on *res judicata* in the cases already referred to in preceding paragraphs.

[9] In my view the real issue to be decided by this Court is whether plaintiff's action is *res judicata*. If it is found that the action is *res judicata* it must be quashed without any further ado.

[10] The meaning of the plaintiff's cause of action must be understood duly guided by the requirements as set out in Rule 18 (4), that every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim with sufficient particularly to enable the opposite party to reply thereto. This is what the obligations of the plaintiff entails in this case. The plaintiff pleaded at the outset, in paragraph 4 of the particulars of claim, that during or about March 2012 the parties concluded a "verbal contract" based on the following facts:

> "5. The material and/or implied terms were *inter alia* the following:
>
> 5.1 the Defendant sells and will transfer to the Plaintiff the property described as Erf 2452 located at the corner of York Road and Nelson Mandela Drive in Mthatha and held under deed of Transfer T411/1989 ("the property");
>
> 5.2 the Plaintiff purchases and will take transfer of the property upon payment of the amount of R12 million in the following manner, R8 million to be paid in cash and R4 million to be paid through a bank guarantee;
>
> 5.3 the parties, in order to comply with statutory requirements contained in Section 2 of the alienation of Land Act – No 68 of 1981 ("the Act") in sales

> involving the sale of land, agreed that Defendant would instruct its attorney to draw a Deed of Sale which it would sign and provide to the Plaintiff for its signature;
>
> 5.4 the Defendant will not sell and transfer the property to any other entity but the Plaintiff;
>
> 5.5 the Defendant would not renew the lease agreement with its tenant Shell South Africa (Pty) Ltd which was due to end sometime in June 2012."

[11] In paragraph 7 of the particulars of claim breach of the contract is alleged in the following terms:

> "Defendant breach *(sic)* the contract by failing or refusing to provide for the Plaintiff with the written Deed of Sale, signed, for the Plaintiff to sign in order for the sale and transfer of the property to the Plaintiff to be effected in terms of the agreement."

It is important to note that the alleged breach has no origin in the pleaded verbal contract. That is, the verbal contract of sale does not stipulate breach clause.

[12] In paragraph 10 of the particulars of claim the plaintiff went on to allege damages suffered due to breach in the sum of R9 741 150,00 comprising disbursements paid to an architect and loss of prospective rentals.

[13] In court, it was submitted by *Mr Kubukeli*, who appeared on behalf of the plaintiff, that the plaintiff's action is not about the enforcement of any of the terms of the oral agreement, but it is a claim for damages arising from breach of that agreement. Counsel relied on the case of *National Sorghum Breweries Ltd (t/a Vivo Africa Breweries) v International Liquor Distributors (Pty) Limited* 2001 (2) SA 232 (SCA) contending, based on the statements made in that case, that this Court must distinguish the present case from the previous case between the parties in Case No. 961/2012.

[14] The oral agreement that is alleged in the particulars of claim was a subject of litigation in this Court between the same parties under Case No 961/2012 where Sangoni JP held, in a well-reasoned judgment, that the applicant (the plaintiff in this case) for a relief based on specific performance of the oral agreement of sale of immovable property is not entitled to that relief as sought against the respondent (the defendant in this case). The ratio for the decision of the learned JP was that an

oral agreement of sale violated the provisions of s 2 (1) of the Alienation of Land Act 68 of 1981 (the Act), which read:

> "No alienation of land after the commencement of this section shall, subject to provisions of Section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto, or by their agents acting on their written authority."

[15] In the case of *National Sorghum Breweries, supra,* the appellant concluded three written agreements in terms of which the respondent had obtained the right to distribute appellant's product for a sum of R150 000,00. In a dispute that followed, the respondent instituted action in the Magistrate's court claiming re-payment of R150 000,00 (the restitutionary claim), and it was successful. The respondent brought a second action in the High Court against the appellant claiming damages suffered as a result of an alleged breach of contract. In a special plea of *res judicata,* the appellant contended that the second action had been disposed off in the magistrates' court. The special plea was dismissed on the ground that the claims of restitution and damages were two separate causes of action. In the present matter *Mr Kubukeli* submitted, similarly, that the special plea of *res judicata* must fail because the plaintiff's claim for damages is based on a separate cause of action.

[16] *Mr Kubukeli* did not make the point quite clearly if the claim for damages is based on the pleaded verbal contract. I say this because the pleaded contract is one of sale of immovable property. Nevertheless, if reliance was meant to be an initial contract to conclude the agreement of sale as deciphered from the line that appears in paragraph 5.3 of the particulars of claim namely: "the parties in order to comply with statutory requirements contained in section 2 of the Alienation of Land Act No 68 of 1981 (the Act) in sales involving the sale of land, agreed that Defendant would instruct its attorney to draw a Deed of Sale which it would sign and provide to the Plaintiff for its signature" the case of *Hirschowitz v Moolman And Others* 1985 (3) SA 739 (A) is the answer.

[17] The reading of the *Hirschowitz* case, *supra,* shows that the initial agreement of the kind as referred to by *Mr Kubukeli* is classified as a *pactum de contrahendo*, defined in law as an agreement to make a contract in the future. In *Hirschowitz* the Appellate Division had to deal with enforceability of the tenant's right of occupation which was incorporated in the agreement of lease. The following statement of law was made at 766C-D (per Corbett JA):

> "In my view the grant of a right of pre-emption also constitutes a kind of *pactum de contrahendo,* the conclusion of the "second" contract being dependant on the contingencies mentioned above. In general a *pactum de*

> *contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties bound themselves; *Montrose Diamond Mining Co v Dyer* 1912 TPD 1 at 5."

[18] Corbett JA then said, in the *Hirschowitz* case, *supra,* at 767G-H"

> "It seems to me that in order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor failing to recognise or honour his right, to claim specific performance against the grantor (assuming that he has such a right), the right o pre-emption itself should comply with the Formalities Act (Act 71 of 1969]".

[19] The case of *Horschowitz* is in all fours with the present case on the law. There the court dealt with the provisions of s 1 (1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969, the precursor to s 2 (1) of Act 68 of 1981. The two statutes are identical in terms. Section 1 (1) of the Formalities Act reads as follows:

> "(1) No contract of sale of land or any interest in land (other than lease, myripacht or mining claim or stand) shall

> be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents, acting on their written authority."

[20] In my view the first or initial contract would be hit by the provisions of s 2 (1) of Act 68 of 1981 to the extent that an unwritten contract of sale of immovable property is unenforceable as already decided by Sangoni JP. The provisions of s 2 (1) of Act 68 of 1981 are, in my view, a superable obstacle in the path of the plaintiff's claim.

[21] I must again refer to the statement of the learned JP which I consider to be holding firm for the purposes of deciding the present matter. The learned JP stated as follows in his judgment at para. [18]:

> "The most significant point is that in the instant case it is a statutory provision that has not been fulfilled. The effect of non-compliance with the requirement of section 2 (1) is that the contract shall not be "of any force or effect".

[22] The cause of action for damages, and its substantive relationship to the cause of action for specific performance, requires a closer examination so as to be understood properly. To succeed in the second litigation, the current action for damages, the plaintiff must allege and prove the following elements of the delict:

(a) existence of a [written] contract of sale,

(b) breach of that contract,

(c) that the claimant has suffered damages,

(d) a causal link between the breach and damages,

(f) that the loss was not too remote.

See Harms: *Amler's Precedents of Pleadings,* 6th Edition at page 101.

[23] Elements (a) and (b) above are identical to those for the cause of action in the first litigation. In the second litigation the pleaded case in paragraphs 4 and 5 of the plaintiff's particulars of claim refers. It will be seen that elements (a) and (b) of the cause of action for damages have already been decided by Sangoni JP in Case No. 961/2012. In particular element (a) is the gateway to an investigation of the claim for damages; and without which it cannot avail the plaintiff to say that the particulars of claim disclose a cause of action in law. Elements (b), (c), (d) and (e) for the claim of damages cannot swing an absence of element (a).

[24] To the extent that the Honourable Judge President has already given a final judgment between the parties on the subject matter of enforceability of the oral contract as alleged by the plaintiff, the present case is *res judicata*.

[25] The view I hold is that the present case is a repeat of litigation that was finalised under Case No. 961/2012, and such unwarranted repeated action constitutes an abuse of court process and harassment of the defendant. Although harassed, the plaintiff's action did not call upon the defendant to engage into extra-ordinary defensive action. A costs order based on a scale of attorney and his own client is not an ordinary remedy. An ordinary costs order seems to be an appropriate costs order, and it will be so ordered.

[26] I was asked by the parties to decide the costs of the defendant's application to compel the plaintiff to discover documents in terms of Rule 35. That application was brought on 11 July 2014. The plaintiff opposed the relief sought but it neither filed an opposing affidavit nor heads of argument. The *ex-gracia* opportunity given to *Mr Kubukeli* to argue the merits and costs issues of that application happened by error in that the Court was misled into believing that the application had been seriously opposed. In any event, I am satisfied that the application to compel has merit. But no substantive order will be granted in light of the outcome

of the application for exception. The costs of that application must be decided in favour of the defendant.

[27] In the result the following order shall issue:

1. **The defendant's exception succeeds with costs.**

2. **The plaintiff to pay the costs of the application to compel discovery, including all reserved costs.**

Z. M. NHLANGULELA
ACTING DEPUTY JUDGE PRESIDENT

Counsel for the plaintiff	:	Adv. L. P. Kubukeli
Instructed by	:	V.V. Msindo & Associates
		MTHATHA.

Attorney for the defendant	:	Mr S. C. Vutula
	:	c/o S.C. Vutula & Co
		MTHATHA.