

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 10662/2009

In the matter between:

MARK MERLYN KRUGER

PLAINTIFF

and

BASIL THOMPSON

DEFENDANT

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] In defence to an action for damages for personal injuries sustained in a jet-ski accident, the defendant raised a special plea that 'the plaintiff's present claim was finally adjudicated upon by a court of competent jurisdiction.' The 'court of competent jurisdiction' to which the special plea refers, is, in this instance, the Durban Magistrates' court which gave judgment on an action for damages to the plaintiff's jet ski under case number 10088/07. This judgment concerns the merits of the special plea, which was dealt with *in limine* by agreement between the parties.

BACKGROUND:

[2] The plaintiff avers that on or about 17 December 2006 at Hazelmere Dam the defendant while riding his jet ski, collided with the plaintiff's jet-ski, alternatively with the plaintiff. The collision is ascribed solely to the defendant's recklessness and negligence,

as he *inter alia*:

- (a) failed to exercise due care, diligence and skill in riding his jet/ski;
- (b) failed to adhere to the rules and regulations regulating the use of jet skis at Hazelmere dam thereby causing his jet ski to collide into the plaintiff's jet ski, alternatively, the plaintiff;
- (c) rode his jet ski at an excessive speed without due regard for other dam users, more particularly, the plaintiff;
- (d) performed unauthorized stunts with his jet ski, including spinning his jet ski in a dangerous manner in close proximity to the plaintiff and without due regard of the plaintiff;
- (e) generally riding his jet ski in a dangerous manner.¹

[3] Arising from the said collision the plaintiff on 5 March 2007 instituted proceedings against the defendant in the Magistrates' Court for Durban for the damage to his jet ski, in the sum of R18 914.45, interest and costs.²

[4] On 11 September 2009 the magistrate in a written judgment, a copy whereof is annexure 'X1' to the special plea, concluded with the following order:

¹ Para 5 of the plaintiff's particulars of claim.

² The averments in the Magistrates' court were similar to those in the present action and included:

'4.

On or about the 17 December 2006 and at Hazelmere dam, the defendant who at all material times was commandeering and steering a jet ski collided with and damaged the damaged jet ski.

5.

The sole cause of the collision was due to the reckless and/or negligent driving of the defendant in that he:

- 5.1 Failed to exercise due care, diligence and skill in the commandeering of the jet ski;
- 5.2 Caused his jet ski to collide into the left side of the plaintiff's jet ski;
- 5.3 Failed to adhere to the operating rules and regulations of the Park's Board in control of the said dam;
- 5.4 Operated the jet ski at an excessive speed without regard of other users of jet skis at the dam.'

- '1. Defendant is ordered to pay plaintiff all of his proven damages.
2. The issue of quantum is held over for later determination.
3. The defendant is ordered to pay plaintiff's costs of action on a party and party basis as taxed or agreed.
4. The defendant's counter claim is hereby dismissed with costs.'

[5] Arising from the same collision, the plaintiff on 8 December 2009 instituted the present proceedings for damages in the sum of R1 880 000.00 comprising:

- (a) R50 000.00 in respect of past medical expenses;
- (b) R200 000.00 in respect of general damages;
- (c) R200 000.00 in respect of past loss of income;
- (d) R1 380 000.00 in respect of future loss of income;
- (e) R50 000.00 in respect of future medical expenses.³

[6] It is in defence to that claim that the special plea was raised. It provides as follows:

- '1. On 5 March 2007 the plaintiff issued a summons out of the Durban Magistrates' court under case no. 10088/07 against the defendant.
2. The plaintiff's cause of action under case no. 10088/07 was based on the negligent driving of the defendant which it was alleged caused a collision between the plaintiff's jet ski and the defendant's jet ski. The plaintiff accordingly claimed damages in the sum of R 18 914,45 being the reasonable cost of repairs to his jet ski.
3. On 11 September 2009, magistrate S Hlatswayo delivered judgment in favour of the plaintiff under case no. 10088/07. A copy of the order is annexed hereto marked "X1".
4. On 8 December 2009 the plaintiff instituted the present action which is once again based on the negligent driving of the defendant which it is alleged caused the collision referred to in paragraph 2 above. The plaintiff now claims damages for personal injuries sustained by him as a result of the collision in the sum of R1 880 000.00.
5. The plaintiff's current claim arises from the same facts as those in the action under case no. 10088/07, is based on the same cause of action and is against the same party.
6. The defendant accordingly pleads that the plaintiff's present claim was finally adjudicated upon by a court of competent jurisdiction.
WHEREFORE the defendant prays that the plaintiff's claim be dismissed with

³ Para 9 of the plaintiff's particulars of claim.

costs.'

- [7] For the purpose of determining this special plea, the following was agreed:
- (a) The pleadings in the magistrate's court, which became exhibit "A";
 - (b) The magistrate's judgment, annexed as annexure "X1" to the special plea;
 - (c) That subsequent to the magistrate's judgment, the parties agreed the quantum of the plaintiff's damages in respect of damage to his jet ski, which amount was finally paid during January 2012.

DISCUSSION:

[8] As pleaded, the formulation of the special plea suggests that it is the *exceptio rei judicata* (*res judicata*).

[9] The requirements for successful reliance on the *exceptio* were, and are *idem actor*, *idem reus*, *eadem res* and *eadem causu petendi*. 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'⁴; or which comes to the same thing, 'on the same cause for the same relief'⁵; or which also comes to the same thing, whether the 'same issue' had been adjudicated upon⁶ – see *National Sorghum Breweries v International Liquor Distributors*.⁷

[10] As pointed out by Brand JA in *Prinsloo NO and Others v Goldex Fifteen (Pty) Limited and Another*,⁸ '[i]n time, the requirements were, however, relaxed in situations

4 Per Steyn CJ in *African Farms and Townships Limited v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 (A).

5 Per Van Winsen AJA in *Custom Credit Corporation (Pty) Limited v Shembe* 1972 (3) SA 462 (A) at 472 A-B; see also the discussion in *Kommasaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 664 C-E.

6 see *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 179 A-H.

7 2001 (2) SA 232 (SCA) at 239 para [2] per Olivier JA with whom Hefer ADCJ, Vivier JA and Plewman JA concurred, did not share the views of the Acting Chief Justice and who gave a separate judgment 'relating to the availability of the defences of *res judicata*' or the 'once and for all' rule.

8 [2012] ZASCA 28.

which give rise to what became known as issue estoppel’.

[11] Issue estoppel is really a narrower application of the principles of *res judicata* not to the relief claimed, but to an issue arising in an action. The matter was succinctly explained by Scott JA in *Smith v Porrit*⁹ (supra) as follows:

‘Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res 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 at the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an enquiry 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 communality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669 (D), 667 J – 671 B, 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 (*Kommasaris van Binnelandse Inkomste v Absa* (supra) at 67 E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others.’

[12] In argument, Mr de Wet SC on behalf of the defendant made it clear¹⁰ that the defendant’s special plea more specifically raises what Harms in *Amler’s Precedents of Pleadings*¹¹ has referred to as a ‘related rule’ to *res judicata*, namely that a party with a single cause of action is obliged to claim in one and the same action whatever remedies

9 2008 (6) SA 303 (SCA) para 10.

10 Hence my qualification in paragraph 8 above as to what the special plea might at first suggest.

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the law accords upon that cause.¹²

[13] Mr Jorgensen, for the plaintiff, appears to have treated the matter more as one of issue estoppel, judged by his reliance primarily on the judgment in *Prinsloo NO v Goldex* (supra). Whether there is any fundamental and philosophical difference between the two approaches adopted by counsel, is in my view unnecessary to decide. In my view the same principles as apply to issue estoppel generally apply to the once and for all rule, or at least underlie the application of that rule.¹³

THE 'ONCE AND FOR ALL' RULE:

[14] This rule, derived from English law, requires that all claims generated by or from the same cause of action, be instituted in one action.¹⁴

[15] In *Custom Credit Corporation v Shembe* (supra), usually referred to as the *locus classicus* on the rule, Van Winsen AJA held:¹⁵

'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 the 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 *exceptio rei judicatae vel litis finitae*. The reason for this rule is given by Voet 44.2.1 (*Gane's* translation, volume 6, p553) 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"...The rule has its origin in considerations of public policy which require that there should be a term set to litigation and that an accused or a defendant should not be twice harassed upon the same cause'.

¹² With reference to the authority of *Custom Credit Corporation (Pty) Limited v Shembe* (supra) at 472.

¹³ However *res judicata* and the once and for all rule have at times been treated as separate issues and dismissed separately, as for example in *National Sorgham Breweries v International Liquor Distributors* (supra).

¹⁴ See *National Sorgham Breweries v International Liquor Distributors* (supra) at 241 D-E para [10].

¹⁵ At 472A-E.

[16] The difficulty with the rule does not lie in stating what it seeks to achieve, but with its application to specific circumstances.

[17] In some instances its application would appear to be clearly inappropriate. Hence in *Prinsloo NO v Goldex* (supra), the relief claimed in an urgent application on notice of motion was to enforce an agreement. The subsequent action by the respondents to which issue estoppel was sought to be invoked, was for damages for fraudulent misrepresentation, a remedy the respondents could in any event not have pursued in the motion proceedings. On appeal, the plea of *res judicata* in the form of issue estoppel was dismissed with costs. In *National Sorgham Breweries* (supra) it was held that a claim for restitution in the form of repayment of the purchase price, was not a claim for damages and separate and distinct from the subsequent claim for damages. As it was put at page 241 para [10]:

‘The rule cannot bring about that contractual claims and claims for damages must be brought in the same action.’ In the claim for restitution the conclusion of the contract, the breach thereof, the payment of the purchase price and the cancellation of the contract were necessary allegations. In the second the respondent was required to plead and prove the conclusion of the contract, the breach and the cancellation thereof, the damages were suffered and the causal chain between the breach and the damages and the quantum of damages’.

At page 240 C-D para [5] it was stated that:

‘[t]he mere fact there are common elements in the allegations made in the two suits does not justify the *exceptio* – one must look at the claim in its entirety and compare it with the first claim in its entirety. If this is done in the present case, the differences are so wide and obvious that one simply cannot say that the same thing was claimed in both suits or that the claims were brought on the same grounds.’

[18] The basis on which the decision in *Custom and Credit Corporation v Shembe* was distinguished and explained¹⁶ by Olivier JA in *National Sorgham Breweries v International Liquor Distributors* (supra) is instructive. The *raison d’être* for the decision was said to be found in the damages suffered by the creditor. Olivier JA said:

‘To emphasize the point: In order to reduce the amount of the forfeiture, the actual

¹⁶ From para 6.

prejudice suffered by the creditor must be proved by the debtor ... It follows that, although a claim for forfeiture arises *ex contractu*, its essence and function is to compensate the creditor for prejudice (including damage) suffered by it. From this it would follow that, if a creditor relies in an action on a forfeiture clause, it cannot again in a later action claim damages: the “thing” claimed and the cause of action for both claims are similar and has already been finalized. Thus viewed, *Shembe’s* case is plainly distinguishable’.¹⁷

[19] In *Prinsloo NO and Others v Goldex and Another* Brand JA distilled the following principles that find application¹⁸ and stated as follows:

[23] In our common law the requirements for *res judicata* are threefold: (a) same parties; (b) same cause of action; (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this three fold requirement. But our courts have come to realize that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res judicate*. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see e.g. *Evins v Shield Insurance Co. Ltd.* 1980 (2) SA 815 (A) at 835 G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.

[24] At the same time, however, our courts have realized that relaxation of the strict requirements of *res judicata* in issue estoppel situations creates the potential of causing iniquity and unfairness that would not arise upon application of all three requirements. That potential is explained by Lord Reid in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd No (2)* [1966] (2) ALL ER 536 (HL) at 554 G-H when he said:

“The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves one party’s proof of facts which would be expensive and troublesome, and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought?”

[20] In my view similar considerations apply to the application of the once and for all rule, having regard to the rationale for its existence. Indeed Mr Jorgensen has stressed the considerations of fairness and equity referred to in *Prinsloo No and Others v Goldex* in urging me dismiss the special plea.

¹⁷ At para 8 and 9.

¹⁸ This was in the context of issue estoppel.

[21] Mr de Wet however stressed that although the damages now sought to be recovered were damages arising from personal injury to the plaintiff, as opposed to the patrimonial damages previously recovered in respect of his jet-ski, they are nevertheless damages (*damnum*) sought to be recovered in respect of the same incident and by the same legal remedy, namely the *lex Aquilia*. He referred to Boberg,¹⁹ where the learned author states that:

‘A single wrongful act gives rise to a single cause of action for all the damage – past and future – that it causes. This means that a plaintiff cannot claim compensation piece meal for his various losses as they occur: he must sue ‘once and for all’ for the whole of his damage, seeking redress not only for the harm he has already suffered (actual or accrued loss) but also for the harm he expects to suffer in the future (prospective loss).’

[22] He also referred to *Evins v Shield Insurance Company Limited*²⁰ where it was said that:

‘[t]he principle of *res judicata*, taken together with the ‘once and for all’ rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e. loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action.’

[23] The decision in *Evins v Shield Insurance Company Limited* (supra) is not decisive because the question remains one whether the relief claimed in the present proceedings are simply ‘additional damages in respect of further loss suffered’ by the plaintiff i.e. ‘the same relief’, or ‘different relief.’

[24] More in point is the judgment in *Green v Coetzer*.²¹ The plaintiff’s motor cycle and

¹⁹ *The Law of Delict* (1984) at page 476.

²⁰ 1980 (2) SA 814 (A) at 835

²¹ 1958 (2) SA 697 (W).

the vehicle driven by the defendant were involved in a collision. In the magistrates' court the plaintiff claimed for the damage to his motor cycle. Subsequently, and in the High Court, the same plaintiff claimed against the same defendant for damages arising out of personal injuries which he suffered in the same collision dealt within the magistrates' court. It was held that²²:

'[i]t seems to me to follow that damages claimable under the *lex aquilia* as extended cannot be divided into two separate causes of action, one for damages to property and the other for bodily injury to the persons.'

[25] *Green v Coetzer* was approved of in *Union Wine Limited v E Snell and Co Ltd*²³ where the following was said:

'Although it is not clear from the cases whether the "once and for all" rule is just a manifestation of the *exceptio res judicatae* or whether it has a wider range than the latter, it is settled practice in South Africa that where a cause of action give rise to more than one remedy a plaintiff who pursues one of those remedies and has obtained judgment thereupon can be met with a plea of *res judicata* if he should institute a second action to pursue one of the other remedies.'

[26] The learned authors Visser, Potgieter *et al*²⁴ support the decision in *Green v Coetzer* and comment:

'Onses insiens kan die aard van die regskenking of die tipe skade nie gebruik word om volgens die *facta probanda* – toets meerdere eisoorake te konstrueer nie... die klem val hier op die een onregmatige handeling en nie op verskille in die gevolge nie.'

[27] The court in *Green v Coetzer* declined to follow the decision in the English law of *Brunsdon v Humphrey* (1884) QBD 141 for reasons which I endorse.

[28] I prefer the reasoning in *Green v Coetzer*, even although the motivation in the

22 At page 420.

23 1990 (2) SA 189 C at 196D-F.

24 *Skadevergoedingsreg* 2ed (2003) at para 7.5.3 page 152.

judgment may at times be subjected to criticism, as Van der Walt²⁵ indicates.

[29] Ultimately, regard must be had to the rationale underlying the existence of the rule and the motivation for its existence in the first place, namely, to avoid a multiplicity of actions, possible contradictory judgments, and to ensure that a defendant is not harassed by repeated legal proceedings which he has to face.

[30] I am also very alive to the considerations of equity referred to in the context of issue estoppel in *Prinsloo NO and Others v Goldex and Another*. *In casu* there is no reason why the plaintiff could not have pursued a single action based on the *lex aquilia* for all his damages in one action. He was wanting to recover *damnum* i.e. damages. The damages he seeks to recover are not different forms of relief. But even if they were different types of relief i.e. if damages for patrimonial loss and damages for bodily injury, were to qualify as different kinds of relief, it arises from the same cause of action. The reference to different causes of action and different relief in *Credit Corporation v Shembe*, must be construed in the context of that case. As referred to earlier, the rationale for that decision as explained by Olivier JA in *National Sorghum Beer* demonstrates that in *Credit Corporation v Shembe* the two actions both dealt with damages and the quantification of damages, as also in *Green v Coetzer* and *in casu*.

[31] No justification was advanced why in law, or equity, or fairness²⁶ the plaintiff could not have pursued his claim for damages in one action.

[32] In my view the special plea must succeed.²⁷

25 Sommeskadeleer 381 – See Visser en Potgieter *Skadevergoedingsreg* page 152.

26 Other than a plea *ad miseraccordiam* that the plaintiff would be denied the right to recover damages arising from his bodily injuries. There is no reason why advanced why he could not have claimed all his damages arising from the jet-ski accident in one action.

27 The position of the plaintiff must not be confused with that in an ordinary motor collision where a claim for damages to a plaintiff's vehicle against a particular wrongdoer might be pursued in one action and a claim by the same plaintiff in another action for his injuries against the Road Accident Fund. The parties to the two actions are clearly not the same, but in any event, the claim for personal injury is partly

THE ORDER:

[33] The special plea is upheld and the plaintiff's claim dismissed with costs.

statutorily based.

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