REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CONSOLIDATED CASE NUMBERS: 21041/2009

17893/2011

(1)	REPORTABLE: YES
(2)	OF INTEREST TO THE JUDGES: YES
(3)	REVISED.

.....	.....
DATE	SIGNATURE

In the matter between:

DERBIGUM MANUFACTURING (PTY) LTD	**PLAINTIFF**
AND	
VINCENZO CALLEGARO	**1ST DEFENDANT**
CORNELIA JACOBA CALLEGARO	**2ND DEFENDANT**
POLYTENO TRADE CC	**3RD DEFENDANT**

JUDGMENT

Windell AJ:

Introduction.

[1] The issue before me is whether a plea of *res judicata* should succeed with the result that the action be dismissed. This issue is decided separately in terms of Rule 33(4) of the Uniform Rules of Court.

Background

[2] The plaintiff company is a manufacturer and distributor of waterproofing systems. The first defendant (Callegaro) was the managing director of the plaintiff company and as such owed the plaintiff fiduciary duties to act in its best interest. Callegaro, whilst employed by the plaintiff, established the third defendant, a Close Corporation, by the name of Polyteno Trade CC (Polyteno). He was the sole member of Polyteno until 2005 when his wife (second defendant) became the sole member.

[3] Polyteno purchased raw materials and products required by the plaintiff from plaintiff's existing and new suppliers and sold it to the plaintiff at an increased price and at a profit. It is common cause that this conduct constituted a breach of Callegaro's fiduciary duties to the plaintiff. Callegaro resigned as director of the Company in November 2008.

[4] The plaintiff only obtained knowledge about Polyteno after Callegaro's resignation. The plaintiff then investigated the connection between Callegaro and Polyteno and tried to assess the profits Callegaro have received and the losses that the plaintiff had suffered. After its investigation the plaintiff estimated the secret profit to be between R 10 million and R 30 million.

[5] The plaintiff then instituted an action (the first action) against Callegaro in May 2009, claiming a statement and debatement of the account and payment of all amounts found to be due by Callegaro. Callegaro initially denied that he had a fiduciary duty towards the plaintiff and that Polyteno made a profit at the expense of the plaintiff. At the pre-trial conference Callegaro however admitted that Polyteno had sold raw materials to the plaintiff at a profit and on the day of the trial, Callegaro also conceded to the relief sought against him. A Court Order (the court order) was granted against him wherein the Court ordered Callegaro to

render an account, supported by vouchers, of all the income and profits derived by him as a result of his interest in Polyteno during the period 13 July 2000 until 30 November 2009.

[6] Callegaro complied with the court order and rendered an account consisting of cheque payments made by Polyteno to Callegaro amounting to R 1,113,466.84. The plaintiff was not satisfied with this account and subsequently brought a contempt of court application. The reason furnished was that the particulars of claim was clear in that the plaintiff not only wanted a schedule of payments made directly to Callegaro, but also sought proof of the secret profits received by Callegaro **through the use of Polyteno as an alter ego**. *(my emphasis)* .

[7] The plaintiff also brought, as an alternative, an application to amplify the court order in the event of it not succeeding with the contempt of court application. In this application plaintiff requested the Court to add the words *"under the name and guise of the third respondent Polyteno"* to the court order so that it should read:

" the defendant is to render an account, supported by vouchers, of all the income and profits derived under the name and guise of Polyteno CC during the period 13 July 2000 until 30 November 2009."

[8] Both applications were opposed by Callegaro. In his answering affidavit he submitted that he had complied with the court order in that he was obliged to account to the plaintiff for the secret profit **he** made and to render an account supported by vouchers of all profits derived by **him** as a result of his interest in Polyteno. He also submitted that his interest in Polyteno came to an end in March 2005 when his wife became the sole member. *(my emphasis)*

[9] The contempt of court application as well as the alternative application to amplify the court order was dismissed on 29 October 2010. Blieden J found that the court order was clear and unambiguous and only referred to the first defendant's interest as a **member** in Polyteno.

[10] The plaintiff then instituted the second action in May 2011 against Callegaro, his wife and Polyteno as joint wrongdoers for damages. It is in this second action that Callegaro raised the plea of *res judicata*.

The pleadings

[11] In the first action the plaintiff set out its case in paragraphs 10 -15 of the particulars of claim. Therein the plaintiff alleged that Callegaro breached his contractual obligations and fiduciary duty to the plaintiff by making a secret profit at the expense of the plaintiff through his interest in Polyteno. Callegaro is therefore obliged to account to the plaintiff the secret profit made by him and to pay the plaintiff the amount of the secret profit.

[12] In the particulars of claim of the second action the plaintiff set out the details of the first action, the details of the court order obtained in the first action and the subsequent contempt of court application. In paragraph 14 the plaintiff stated that the secret profits made at the plaintiff's expense were not limited to the payments made by Polyteno to Callegaro and accounted for in terms of the order. It was alleged in consequence of the fraudulent stratagem devised by Callegaro and his wife (set out in paragraphs 6 and 15 of the particulars of claim), the plaintiff sustained estimated damages in the sum of R14 million. This amount consisted of the mark-up levied by Polyteno on the supply of raw materials and products utilised by the plaintiff during the period 13 July 2000 to January 2009. The precise quantification of the damages sustained can only be determined on a full and proper discovery, which the plaintiff will seek to enforce in terms of the rules of court.

[13] In the second action the plaintiff seeks an order for payment of R 14 million, or such amount as may be found to be due, against all three defendants as joint or several wrongdoers. The plaintiff also has an alternative claim against Callegaro only, based on his contract of employment and fiduciary duty owed to the plaintiff. The relief plaintiff seeks against Callegaro is to render a full account, supported by vouchers, of all the business activities conducted by Polyteno, detailing all secret profits made pursuant to the on-selling of products and raw materials from suppliers by Polyteno to the plaintiff, a debatement of such account and payment of whatever amount is found to be due to plaintiff. The plaintiff stated that it will not apply for the relief in the first action set out in prayers (c) and (d). (payment of the amount found to be due and interest) .

Arguments

[14] Counsel for Callegaro submitted that the first action that was instituted against him was based upon the breach of his fiduciary duty and was for disgorgement of profits. The second action is founded in delict and is a claim for damages which is also based on the breach of the fiduciary duties. It is submitted that a director's breach of his fiduciary duty can give rise to either a claim of disgorgement of profit or to a claim of damages. The plaintiff is not entitled to claim both.

[15] Counsel for plaintiff submitted that the cause of action in the first action was based on the breach of Callegaro's contractual obligations and fiduciary duty to the plaintiff. The second action is based on a fraudulent concealment of the unlawful activities of the three defendants and the unlawful inducement of the suppliers to supply material to Polyteno thereby enabling Polyteno to sell it to plaintiff at a profit. In addition the relief sought in these actions is different. In the second action the secret profits made by the defendants were not those limited to the payments

made by Polyteno to Callegaro. Plaintiff seeks a full account of all the business activities conducted by Polyteno detailing all the secret profits made by selling the raw materials and products to the plaintiff.

Res judicata

[16] It is trite that a party relying on a defence of *res judicata* must prove that a final and definite judgment has been granted by a competent court, on the same cause of action, with respect to the same subject matter, or thing, as between the same parties.

[17] In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA)* damages and restitution was claimed in two separate actions, resulting from the breach of one contract. The court found that damages and restitution was two distinguishable concepts and that the same thing was not claimed nor was the same cause of action relied upon. At page 239 I and page 240 D Olivier J.A , said:

> *"The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action"*

[18] In *Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A)* the plea of *res judicata* was upheld. The seller obtained an order for cancellation of the agreement, repossession of the bus sold and forfeiture of all payments made by the purchaser. The forfeiture was claimed by virtue of a specific forfeiture clause in the contract. Later, after obtaining possession of the bus, the seller claimed, in a second action, damages in the form of the difference between the balance of the purchase price owing at the time of cancellation and the value of the bus after its return to the seller. The question was whether it was competent for the seller to recover the said damages. The Court, per Van Winsen AJA, held that it

was not, because as soon as the plaintiff made an election in terms of the contract (in this case either forfeiture or damages), and he chooses forfeiture, it would be unfair to the defendant if he is subsequently faced with a second action for damages. The court further reiterated that 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, (the once and for all rule). The plaintiff was also prohibited by the provisions of sec. 2 (1) of the Conventional Penalties Act, 15 of 1962, from granting an award of damages.

[19] In studying the cases that deals with *res judicata* it became clear that because the circumstances of each case differs, the applicability of this defence has to be developed to provide for the demands of our modern society. In *Janse van Rensburg and Others NNO v Steenkamp and Another; Janse van Rensburg and Others NNO v Myburgh and Others 2010(1) SA 649 (SCA)* it was stated by Heher JA on page 658 that:

> *"Each case must be decided according to its own facts. It is not practical to try to formulate guidelines in abstract terms which can be made applicable to all situations. For example, one of the facts in Boshoff v Union Government was that default judgment was taken in the previous case. From a passing remark of Greenberg J at 351 it appears that that fact was not raised by the plaintiff in answer to the defence of res judicata. In a future case it may well be necessary to consider whether it is advisable to recognise an extended application of the defence in such circumstances".*

[20] In *Smith v Porritt 2008 (6) SA 303 (SCA)* Scott JA summarized it as follows:

> *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 Bpk (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'."*

[21] It is common cause that both actions are against the same party, Callegaro. It is also common cause that both actions are founded on the same factual circumstances and that the witnesses in both actions are the same. The first action is for disgorgement of funds and the second action is for damages. Both are based on *inter alia* the breach of the director's fiduciary duty towards the plaintiff. The "threefold test" was applied in the case of *Mitford's Executor v Ebdens Executors 1917 AD 682 at 686* where Maasdorp JA found:

> *"To determine that action it will be necessary to enquire whether that judgment was given in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties."*

[22] If the court strictly applied the threefold test *in casu*, an argument could certainly be made out that the causes of action differ in various aspects and *res judicata* is not applicable. The issue is not that simplistic. The first order of business in deciding the issue of *res judicata* is to compare the particulars of claim in both actions and to establish what the cause of action is in both these actions.

Cause of action

[23] The relationship between a company director and his company is one of the well established examples of commercial fiduciary relationships accepted in South African Law. It is also an established principle in our law and had been recognized on our courts, that where a director obtains a secret profit, the company could claim such profit from him without alleging fault. In *Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168* Solomon JA noted that the Appellate Division held that the action was neither one for breach of contract nor for damages arising from a delict or a breach of contract. At page 242 he stated:

> *"The action indeed is, as the Judges in the Court below held, one sui generis. . . ."*

[24] This nature of the claim was reiterated in the matter of *Du Plessis v Phelps 1995(4) SA 165 (C)* where Friedman JP stated the following on page 171:

> *"In my judgment it is correct to state that a breach of fiduciary duties does not necessarily involve fault. For example, if a director were to obtain a secret profit, the company could claim such profit from him without alleging fault. An action of that kind could be described as sui generis. The claim would arise merely by virtue of the fact that the director, in breach of his fiduciary duty, obtained for himself a secret profit which he should have obtained for the company."*

[25] A company can also institute a delictual claim against the director based on the *lex Aquiliae*, based on the breach of the director's duty of care and skill. In *Du Plessis NO v Phelps supra* on page 170 B-D it was stated that:

> *"Liability in the event of a director failing to take reasonable care in the management of the company's affairs is based upon the principles of the lex Aquilia. The basic requisite for liability under the lex Aquilia is fault (dolus or culpa), which results in loss to the claimant. Liability for a breach by a director of his fiduciary duties, on the other hand, does not necessarily involve dolus or culpa. Nor does such breach necessarily involve a right of recourse by the company against its director - the breach may simply render the transaction voidable at the instance of the company."*

[26] This issue was examined in great detail in *Symington and Others v Pretoria- Oos Privaat Hospitaal Bedryfs (Pty) Ltd 2005 (5) SA 550 (SCA)* on page 564 where Brand JA stated the following:

> *"It was also accepted by all parties that a director's breach of fiduciary duty can in principle give rise either to a claim for disgorgement of profits or to a claim for damages. Again I think the assumption was rightly made. It is directly supported by the judgment of Friedman JP (Van Zyl J concurring) in Du Plessis NO v Phelps 1995 (4) SA 165 (C) at 171 and, in the absence of any*

argument to the contrary, I can think of no reason why this principle should not be accepted. Though the common element of the two actions would be a breach of fiduciary duty, the other requirements would, of course, be quite different. While, for example, it is not a requirement of a claim for disgorgement of profits that the company suffer any damages, such damages would by its very nature be the central requirement of a damages claim. On the other hand, while the question whether the director had received any profit from the breach of his fiduciary duty would be of no consequence in a claim for damages, this would be the essential requirement in a disgorgement of profits claim".

[27] There is no precedent for the facts *in casu*. At first glance the question before me seems therefore quite complexed. Can a company claim from a director disgorgement of funds in one action and then claim for damages in a second action. It is trite that disgorgement of funds is *sui generis* and plaintiff need not proof fault. A claim for damages on the other hand is based on the *lex Aquiliae* and one needs to prove fault and a nexus between the wrongful act and the damages.

[28] In *African Farms & Townships v Cape Town Municipality 1963 (2) SA 555 (A)* the old Roman Dutch and Roman Law authorities were consulted and Steyn CJ noted on page 562 as follows:

"In regard to the requirement that the ground of the demand must be the same, the authorities refer to the causa petendi or origo petitionis. According to Voet, 44.2.4, it is not the form of action which determines the sameness of the causa petendi, but the identity of the question which is again raised or set in motion. (Cf. Vinnius, Inst. 4.13.5). That was also the Roman law. (Dig. 44.2.3; 44.2.7 paras. 1 and 4). Huber, Praelectiones 44.2.6, indicates that, if the merits of the action (meritum actionis) which is instituted, were not examined in previous proceedings, that may be an answer to the judicati exceptio,"

[29] I find that the question that should be asked in the circumstances of the case *in casu* should rather be: Has the same issue now before the court been finally disposed of in the first action? See *National Sorghum*

Breweries v International Liquor Distributors supra. The answer does not lie in whether a claim for disgorgement of profits and a claim for damages are the same cause of action but the identity of the question which is again raised or set in motion.

[30] In *Bafokeng Tribe v Impala Platinum Ltd 1995(1) SA 653 (SCA)* it was found that some of the essentials of the *exeptio res judicata* are not requirements set in stone. If there is likelihood that a litigant will be denied access to the courts in a second action, it could be necessary that all the requirements for *res judicata* should be met. Conversely, in order to ensure fairness the requirements especially the requirement that it should be the same subject matter and based on the same ground may be relaxed.

[31] In the first action no evidence was led. Callegaro conceded to the relief that was claimed and the court order was granted. The contempt of court application was dismissed as Blieden J found that Callegaro had complied with the court order. Blieden J did not go into the merits of the first action but was asked to interpret the court order as it stands. He compared the particulars of claim and the relief that was claimed with the court order and in effect found that Callegaro complied with the order (and the relief claimed) by disclosing only the cheque payments received from Polyteno. The result of Blieden's judgment is that it was found by the court that the plaintiff's claim in the first action did not cover the payments Callegaro received under the guise of Polyteno. The plaintiff is not intending to claim in the second action that which they omitted to claim in the first action. They claim in the second action that which a court found was not the cause of the complaint in the first action.

[32] In the first action Callegaro disclosed the total amount that he received by way of direct payment (in the form of cheques) from Polyteno, as an amount of R 1 113 486.84. The only issue outstanding in

the first action is the debatement of such account. In the second action the plaintiff is not claiming this amount, but claims the profits that were realized through the guise of Polyteno by calculating the difference between the prices paid by Polyteno for the raw materials and the prices at which the raw materials was sold to the plaintiff. The plaintiff alleges that the difference is in the vicinity of R 14 million. The calculation of the amounts owed differs in the two actions.

[33] I find that the case was not finally disposed of in the first action. As was stated in the matter of *National Sorghum Breweries v National Liquor Distributors supra* in paragraph 5:

> *"The mere fact that 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."*

[34] Although some of the factual issues to be determined in these actions overlap, I cannot find that the same thing is claimed in the respective suits plea should be upheld. If the particulars of claim are compared, it is clear that the issue now under consideration has not been finally laid to rest. What remains, thus, is whether or not it is appropriate in the exercise of a judicial discretion that the claim should be allowed to stand or plea should be upheld. This discretion does exist and is discussed in *Scott v Porrit supra* where it was held that the discretion involves considerations of fairness and equity. In light of the above and the fact that the merits of the first action was never examined, mindful of the fact that a litigant should not be denied access to courts, the plea of *res judicata* cannot stand.

[35] In *Bafokeng Tribe v Impala Platinum supra* on page 567 Friedman JP noted:

> *"In evaluating the exceptio res judicata and issue estoppel the courts are involved in a process and a search for a just juridic interpretation and decision. It is an open-ended process of elucidation and commentary, which explores, derives, reads into, and gives significance to the essentials referred to. It causes one to think in terms of grays. It is not an unchanging closed process"*

Estoppel.

[36] The issue of estoppel and the "once and for all" rule was briefly mentioned by counsel for defendant during argument. The courts had accepted that issue estoppel is useful in those cases which do not strictly conform to the threefold requirements of *res judicata*. In the *Bafokeng supra* on page 566 it was stated:

> *"Issue estoppel is also founded on public policy to avoid a multiplicity of actions in order 'inter alia to conserve the resources of the courts and litigants'. There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case by case foundation without rigidity and the overriding or paramount consideration being overall fairness and equity."*

[37] I have found that there is a difference between the issues to be determined in the two actions. In these circumstances the plea of issue estoppel must also fail.

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

1. The plea of *res judicata* is dismissed.
2. Cost is awarded to plaintiff that includes the costs of senior and junior counsel.

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L WINDELL
ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff	***Adv JG Wasserman SC***
	Adv GJ Nel
Counsel for the Defendant	***Adv JF Steyn***
Date of hearing	***8 March 2013***
Date of judgment	***17 May 2013***