REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25981/2011

(1) REPORTABLE: Yes / ~~No~~
(2) OF INTEREST TO OTHER JUDGES: Yes

7/10/ 2019 **RT SUTHERLAND**

In the matter between:-

ILIMA PROJECTS (PTY) LTD **PLAINTIFF**

and

MEC: GAUTENG DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT **DEFENDANT**

JUDGMENT

SUTHERLAND J:

Introduction

[1] This is a case about Issue Estoppel. A stated case has been formulated on the question, separated from other issues, as contemplated in Rule 33. The facts are peculiar and novel.

[2] The Plaintiff (Ilima) was contracted to the defendant to undertake a construction project for the "completion" of the building of a hospital. The initial building work had been aborted when the joint venture contracted to undertake the project collapsed. Ilima was formerly a partner in that joint venture. Ilima sues for specific performance of this "completion" contract and, in particular, for payment of R21.5m which defendant was obliged to pay to Ilima to reset-up or "remobilize" its site operations. Before the date upon which the sum was due to be paid to Ilima, defendant cancelled the contract. Ilima contends this was unlawful. Defendant contends the cancellation was lawful and relies on several alleged breaches by Ilima of the contract to justify the decision to cancel. The defences of the defendant to the claim that it is liable to pay Ilima the 21.5m do not rely solely on a lawfully cancelled contract, but these other defences, eg whether a right accrued to receive payment regardless of the status of the cancellation, are not part of the enquiry in this leg of the case and this judgment does not address them.

[3] Ilima replicated to that part of the plea concerning the cancellation of the contract and averred that defendant is estopped from averring that the contract was lawfully cancelled. Whether or not defendant should be estopped is the crux of this leg of the case.

[4] The basis for alleging the estoppel is that in other litigation in which Country Cloud Trading CC (Country Cloud) sued the defendant, the defendant was held to have unlawfully cancelled this very contract. Thus, Ilima contends, the question whether or not this contract was unlawfully cancelled is *res judicata.*

[5] How did it happen that Country Cloud came to sue defendant and a contract between Ilima and the defendant become implicated? The explanation originates in Ilima being cash-strapped at the time the contract was being negotiated with the defendant. Country Cloud advanced R12m to Ilima and required R20.5m to be repaid, including a fee. This was to be repaid to Country Cloud from the advance of 21.5m to be paid by defendant to Ilima. All three parties were fully informed about all of these intertwined arrangements. When the contract was cancelled, Ilima could not repay Country Cloud. Ilima was liquidated. Country Cloud was out of pocket.

[6] Aggrieved by these developments, Country Cloud sued defendant in delict. The case was premised on defendant being aware that a cancellation would cause harm to Country Cloud and that the cancellation was unlawful. Defendant defended the case by alleging that no wrongfulness towards Country Cloud existed by reason of defendant's actions, and also by averring that the contract was lawfully cancelled, based on breaches of contract by Ilima. The breaches alleged were that the tax clearance certificate presented by Ilima was irregular and that the procurement procedures were not observed. One other ground was initially alleged but abandoned.

[7] The case went through three courts.[1] In the trial Court it was held the contract was lawfully cancelled because the procurement procedure was violated. The Tax issue was not addressed. The claim was dismissed because wrongfulness was not established. On appeal to the Supreme Court of Appeal the finding that the procurement requirements were not met and the contract was thus irregular, was reversed. In respect of the tax issue, the SCA held that no irregularity was proven. Hence, no lawful cancellation was proven. Again, the claim was ultimately dismissed on the grounds that no wrongfulness towards Country Cloud had been proven. On a further appeal to the Constitutional Court, the defendant relied solely on the absence of wrongfulness to resist the appeal. Ultimately it was on that point that the appeal by Ilima was dismissed. However, the Constitutional Court made findings that the contract was unlawfully cancelled.

[8] It bears emphasis that the debate about wrongfulness could not have been conducted in the absence of the specification of an alleged wrongful act. The alleged wrongful act was the unlawful cancellation of the contract. Therefore, a finding that the cancellation was or was not unlawful was a necessary finding in that litigation. It may be noted that the submissions to the contrary are simply not cogent; no divorce of the wrongfulness issue and the unlawful cancellation of the contract is possible.

[9] Accordingly, in such circumstances, is defendant estopped from requiring the court to revisit the question of whether it had unlawfully cancelled the contract between itself and Ilima?

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[1] Reported as: *Country Cloud Trading CC v MEC Department of Infrastructure Development [2012] 4 ALL SA 555 (GSJ); Country Cloud Trading CC MEC, department of Infrastructure Development 2014 (2) SA 214 (SCA) ; Country Cloud Trading Cc v MEC, Department of Infrastructure development 2015 (1) SA 1 (CC)*

The Law

[10] The concept of *res judicata* is well established in our law; it has three requirements: the same parties, the same cause of action and the same relief. As it obvious, in this case, not one of the three elements is satisfied in the classic sense. Under the rubric of issue estoppel these requirements can be relaxed.

10.1 The cause of action in the Country Cloud case was delictual, in that defendant wrongfully caused it harm; in this case the cause of action is specific performance of a contract. However, as alluded to below, the plea in both cases relies on the same averment that the contract was lawfully cancelled.

10.2 The relief is different: Country Cloud sued for damages, initially computed at R20.5m, later merely the R12m, the value of disbursement, whereas Ilima sues for R21.5m owed in terms of the contract. However, realistically, the battle in both cases is after the same notional pile of cash.

10.3 One of the parties is plainly different. However the two plaintiffs have such an identity of interests in respect of the cancellation issue that the requirement of the same party in its broad sense is met. This aspect is addressed hereafter. Moreover, plainly, the defendant is the same person and at the heart of the controversy is the same defence: ie, that a particular contract has been unlawfully cancelled.

[11] The scope of the relaxation of *Res Judicata* requirements is the subject matter of the court's consideration in *Prinsloo NO & Others v Goldex 15(Pty) Ltd & Another* 2014 (5) SA 297 (SCA) at [22] – [26]. (Goldex). There it was held that the critical approach is on a case by case basis and, thus, fact-specific, in order to achieve outcomes consistent with sound public policy in litigation. Brand JA held:

> "[22] The respondents' objection must be evaluated with reference to the principles that govern the defence of res iudicata in general and issue estoppel in particular. I have already referred to some of these principles. They have in any event been discussed extensively in a number of reported decisions (see eg *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) ([1995] 1 All SA 517); *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B) (1998 (11) BCLR 1373); *Holtzhausen and Another v Gore NO and Others* 2002 (2) SA 141 (C); *Smith v Porritt and Others* supra). Repetition of the discussion will serve little, if any, purpose. Suffice it therefore to distil from these authorities those principles that I find of pertinent application in this case.
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> [23] In our common law the requirements for res iudicata 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 threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in *(b)* and *(c)* may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, is to prevent the repetition of lawsuits 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 eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835G). 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.
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> [24] At the same time, however, our courts have realised that relaxation of the strict requirements of res iudicata in issue estoppel situations creates the potential of causing inequity 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 & Keeler Ltd* [1966] 2 All ER 536 (HL) at 554G – H when he said:
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> > 'The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party 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?'
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> [25] One can also imagine a situation where a purchaser seeks confirmation of his or her purported cancellation of the sale in motion proceedings. The seller may decide that the expensive and time-consuming game is not worth the candle and thus decide not to oppose. But if the purchaser were then to sue for substantial damages the application of issue estoppel in the second case may cause clear inequity. The same situation will not arise in the case where all the requirements of res iudicata are satisfied. In that event the relief sought in both cases will be the same. The seller will have to decide whether to speak up in the first case or hold his or her peace in the second.

> [26] Hence, our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that 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 (see eg *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* supra at 676B – E; *Smith v Porritt* supra para 10)."
> That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution."

[12] These passages in *Goldex* substantiate the proposition that the avoidance of unfairness is the focus of the enquiry; ie, unfairness to either litigant.[2] If this is the proper approach, it is also appropriate to weigh the liberality with which the relaxation should take place. The relaxation must serve the aim of inhibiting grasshopper litigation but without inhibiting the Constitution's section 34 rights of access to a court to resolve a dispute. It seems to me to be an exercising in balancing legitimate interests.

[13] An invitation was, in effect, extended to the court to import certain ideas from English law about "collateral attacks" on earlier judgments. This idea is said to stem from *Hunter v Chief Constable West Midlands* (1981) 3 All E 727 (HL). The facts there were that persons convicted of crimes on the basis of their confessions, sought to pursue a civil remedy for the alleged assaults perpetrated by police on them to make the confessions. The court denied them the chance to make out such a case because it would mean that a judgment of the earlier court that the confessions were freely made, was wrong, an outcome with which the English law, apparently, would not put up. Several decisions in similar vein have followed. The point made in these cases is simple: a judgment of a court is sacrosanct save only when an appeal overturns it.

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[2] See too, more recently: *Sithembe Valencia Mkhize NO v Premier, Province of Kwazulu – Natal* 2018 ZACC 50 at [37]

[14] I am not sure that we need this approach; at least not when *res judicata* or issue estoppel can apply to the circumstances. The reason for that is that *Goldex* offers South African jurisprudence a more fundamental premise for resolving such contestations without regimented rules inhibiting a fair result. The *Hunter* approach seems to be, on my reading, a reaction to a clear abuse of the process. However, as an abuse is always a fact-specific event, the wisdom of a general rule is not apparent to me. I may add, that speaking for myself, I find the English approach as exemplified in *Hunter* rather jarring and I am by no means sure that it is consonant with South African sensibilities about the undoing of earlier allegedly wrong judicial decisions, least of all when the *lis* is about allegedly forced confessions.

[15] Thus, I approach this case squarely on the footing enunciated in *Goldex*.

Evaluation

[16] Is it fair to allow defendant to re-flight a failed defence? The place to begin this enquiry is the pleadings in each case.

[17] What failed in the Country Cloud case was the defence based on the two alleged breaches; ie the tax issue and the procurement irregularity issue. On these two questions a court has spoken, and indeed, spoken directly to defendant. In my view, there is merit in suggesting that a second bite at these particular cherries by the defendant is inappropriate. In short, defendant has excused the potential of these grounds and, surely, no re-visitation is appropriate. This is especially the case where the human representatives of Ilima were the source of the

evidence challenging the grounds relied upon by defendant and defendant's witnesses would again be marshalled to give the same testimony. The practical outcome would, in this fact-specific situation, be that the identical grounds would be contested by the identical witnesses on the identical facts. It is this factor which serves to demonstrate the commonality of interests between the two plaintiffs.[3]

[18] To the extent that defendant seeks to revisit the tax status issue or the procurement irregularity issue there are sound policy reason to deny it the opportunity to do so.

[19] A more profound question is whether *any challenge* to the notion that the contract was unlawfully cancelled can, *on any premise,* now be advanced. Defendant has pleaded "new" defences. On the assumption that they are genuinely new and do not require a re-visiting of any aspect of what has been disposed of in the Country Cloud case, why should it be inappropriate to do so?

[20] It is argued that the 'Once and for all rule' should apply.[4] I am unconvinced that the 'Once and for all rule', an equitable doctrine, was conceived to apply to circumstances such as this. The aim of the 'Once and for all rule' was to prevent grasshopper litigation that harasses a party. Usually it is a plaintiff who is able to choose to act in a harassing way. Less often, a defendant has the opportunity to raise repeatedly a failed defence. However such examples do exist, although more usually on legal issues; for example, a bank that uses a standard form contract cannot perpetually challenge an interpretation of it. An exception to that would be a

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[3] See, eg: *Caeserstone SDot- Yam Ltd v world of Marble and Granite 2000 CC* 2013(6) SA 499 (SCA) at [43]; *Aon South Africa (Pty) Ltd Corne van den Heever NO & Others* 2017 ZASCA 66 at [26] –[27].

[4] See: *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD) at 472 A – E on the function of the once and for all rule being premised on preventing a litigant from being harassed.

bona fide attempt to argue the earlier decision was clearly wrong or to facilitate an appeal on the point, a once off affair. The present case, which is about a factual finding, is more akin the scenario that might play out in a major construction contract, where the employer having been held to have breached the main contract cannot resist other claims by nominated sub-contractors or by strangers to the contract as to the findings of that court. But these considerations lead back to the point already made in the previous paragraph; ie, the defendant is in such circumstances inhibited from resurrecting the grounds which were not upheld in the earlier litigation.[5]

[21] These parties, however, being different, are in contestation about different interests. No question of harassment arises. The plaintiff does not seek to overturn a victory achieved by the defendant but rather to rely on the defendant's defeat on a specific issue. Moreover, the defendant does not seek to harass the plaintiff, who was not the victor in the earlier litigation. In my view, it is difficult to discern a *mala fide* motivation for the defendant's stance and absent that or an unfair result, by reason of that stance, there can be no room to construe defendant's conduct as an abuse of the process.

[22] What are the new defences? They are:

22.1 No entitlement to payment of the fee of 21.5m arose before cancellation, as due date had yet to occur. (Plea 7.7 - 7.9)

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[5] Contrast: *Royal Sechaba Holdings (Pty) Ltd v Coote and another* 2014 (5) SA 562 (SCA). The plaintiff had lost in an arbitration against an agent, Jones, who had sued for commission. The issue was whether the payments were due. The plaintiff fired Coote and Engelbrecht, employees responsible for making the payments. Plaintiff then sued the ex-employees alleging breach of fidiciary duty, in order to recover the sum of the commission. A res judicata plea was dismissed.

22.2 Defendant rescinded the contract which Ilima did not dispute, hence no claim for payment can arise. (Plea 9.7)

22.3 The certificate issued for the payment of the sum was premature.

22.4 The agent issuing the certificate for payment had no authority to do so. (Plea 7.1)

22.5 No payment could become due because no guarantee or bill of quantities had been given. (Plea 9.1.A.1 and 9.1 A.2)

22.6 No payment is due because Ilima failed to commence the work and did not tender to do so. (Plea 4.9 and 9.1.A.3)

22.7 Ilima's failure to give the guarantee of security entitled defendant to cancel the contract. (Plea 4.7 and 9.8.A)

[23] Plainly, *prima facie,* none of these grounds replicate the grounds which failed in Country Cloud. It is less plain from a reading of the pleadings alone, to what extent some of them might require a different finding on the unlawfulness of the cancellation *per se.*

[24] A contention advanced by the defendant is that in defending the Country Cloud claim not all defences relevant to the Ilima claim were relevant to the Country Cloud claim. This is a distinction that warrants interrogation. The Country cloud claim rested on the idea that an unlawful cancellation of the contract in the full knowledge of the knock-on effect that would have on the prospects of recovery of the R20.5m debt owed by Ilima, was wrongful as regards Country Cloud. Therefore anything that pertains to the cancellation must have been relevant. At least the plea that Ilima's failure to give the guarantee of security entitled defendant to cancel the contract was relevant. On the other hand, if liability to pay the sum can be resisted on the terms of the contract *per se,* such defences would indeed be irrelevant to Country Cloud's claim.

[25] I turn now to the critical question whether it is unfair if defendant offers grounds now which were not offered in the Country Cloud Case? Another way of putting it is this: is it really unfair to Ilima if Ilima cannot take advantage of Country Cloud's success on this point? If Country Cloud had never sued the defendant, and Ilima must now prove an unlawful cancellation, what unfairness results? The true function of blocking the revisit of the issue is to prevent defendant coming with a better ground to justify cancellation than it had advanced earlier against Country Cloud. If defendant has a better ground than invoked earlier, why is it unfair that it alleges that ground now against a different plaintiff? Such a case would not fall foul of a re-litigating of grounds disposed of earlier. New grounds means new facts and if the people who testified earlier must testify again it will not be regurgitation.

[26] The notion that different proceedings can yield different results and do so legitimately has been squarely recognized. In *Goldex* a finding of fraud on motion proceedings was held to have been suspect and a defence of *res judicata* was denied. In *Hyprop Investments Ltd & Others v NSC Carriers and Forwarding CC & Others* 2014 (5) SA 406 (SCA), a case between the identical parties where a finding of fraud had been made in motion proceedings was held not to inhibit a re-ventilation of the underlying issue on trial. In the English case of *Bragg v Oceanos Underwriting Association (Bermuda)* [1982] 2 Lloyds reports 132 (CA) at [139] it was held that a relevant factor could be simply that the initial litigation was not between the two most appropriate parties. That could certainly be said of the circumstances in this matter.

[27] It is argued, in effect, by Ilima, that a party must throw all its eggs into the first basket and cannot add more eggs to a second basket. This is the notion that a party "could and should"

articulate all the possible grounds to support its case in the first round. Such a stance enjoys the endorsement of *Phipson On Evidence.*[6] The proposition is articulated thus:

> "If an issue was necessarily determined by a previous decision, however, it does not matter that the question was in fact not the subject of any dispute or argument. The *res judicata* estoppels extend also to preclude reliance on points that could and should have been raised in previous proceedings, unless special circumstances exist. Thus, if a party in previous litigation expressly or impliedly conceded a fundamental issue he may be prevented from re-opening that issue in subsequent litigation. The circumstances of the concession may be highly relevant, however, to the question whether special circumstances exist which would justify permitting the issue to be re-opened. It seems that in future the factors which influenced the House of Lords' promotion of a cautious approach to the determination of the issues decided will instead be regarded as matters relevant to the question whether special circumstances exist.
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> It follows from the general proposition that only issues upon which the first decision ultimately depends can found a *res judicata* estoppel that a decision of fact or law against the party who was successful in the first suit on other grounds cannot found an estoppel, because the result cannot have been affected by the decision on this part of the case." (Underlining supplied)

[28] Plainly, caution is required in thinking through these perspectives. As already articulated in the citation by Brand JA in *Goldex* of the remarks of Lord Reid in *Carl Zeiss Stiftung v Raymer & Keeler Ltd,* the reasons why a party takes up a stance must be interrogated. It is in this context, for example, that the decision by defendant not to pursue an argument before the Constitutional Court on the unlawfulness of the cancellation carries no weight. On the probabilities, the defendant's omission of contentions on that score was dictated by a strategic decision to rely only on the wrongfulness issue on which success was achieved. The omission cannot be elevated into a concession. The mortal blow on the two grounds was delivered by the judgment in the SCA, thereafter confirmed by the Constitutional Court.[7]

[29] In my view, this illustrates that what failed in the earlier litigation was the case propped up on the two grounds referred to. To adopt an approach which disallows in principle, without

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[6] I have had the 16th edition (2005) available to me: para 44-32, page 1355.
[7] See, supra: at [33] and [35] of the judgment of the Constitutional Court.

more, an opportunity to challenge the unlawfulness of the cancellation issue, on further and supposedly better grounds, is too mechanical an approach for South African jurisprudence.

[30] In my view, this notion must yield to a more fundamental equitable approach as articulated in *Goldex*.

Conclusions

[31] In my view:

31.1 The circumstances warrant a relaxation of the *res judicata* requirements because a fact specific analysis reveals that the defence, common to both cases, warrants recognition and also the concomitant identity of interests between Ilima and Country Cloud in that regard.

31.2 The grounds of defence to the allegation of an unlawful cancellation of the contract raised in the Country Cloud Case cannot be revisited because the consequence would be a literal re-litigation involving the same *persona* testifying on the same facts.

31.3 The grounds which were not ventilated in the Country Cloud Case may be ventilated in pleading a defence to Ilima's claim because these grounds have not been the subject matter of judicial pronouncement.

31.4 To apply the once and for all rule would be inappropriate in the circumstances because the mischief for which that rule exists is, on these facts, absent.

31.5 To apply the "Could and Should" doctrine is mechanical and inconsistent with the dictum in *Goldex* that these matters cannot be straitjacketed to "fixed principles or even guidelines".

The costs

[32] As the outcome of this application has been only partly successful, in my view the costs should be in the cause of the main action. This includes the costs of two counsel.

[33] **The order**

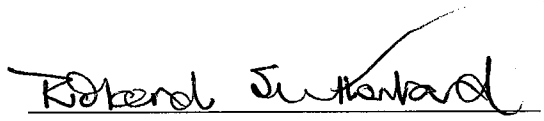
(1) The defendant is estopped from making any averments in its plea that a ground for a lawful cancellation of the contract was the irregular tax status of the plaintiff.

(2) The defendant is estopped from making any averments in its plea that a ground for a lawful cancellation of the contract is that an irregular procurement process was undertaken by the defendant in respect of the award of the contract.

(3) The defendant shall, within 60 days of the date of this judgment, cause amendments to its plea in conformity with this judgment and order.

(4) After further pleadings are complete, the parties shall in conformity with the Commercial Court rules of the Gauteng Division of the High Court of South Africa forthwith apply for resumption of a judicial case management conference.

(5) The costs of the application are costs in the cause of the main action.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 6 August 2019

Date of judgment: 9 October2019

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With him, Adv A Kruger and Adv K Ramarumo

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