IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

16/5/2016.

CASE NUMBER: 34312/2010

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

16 May 2016
DATE

SIGNATURE

In the matter between:

MINERAL-LOY (PTY) LTD Plaintiff

and

HIGHVELD STEEL & VANADIUM CORPORATION LTD First Defendant

TRANSALLOYS (PTY) LTD Second Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The issue to be determined is whether two pleas raised by the second defendant, subsequent to an amendment to the plaintiff's particulars of claim, are *res judicata*.

[2] The litigation between the parties has somewhat of a history and will be summarised *infra* insofar as it pertains to the issues to be determined herein.

BACKGROUND

[3] The plaintiff issued summons against the first defendant on an alleged breach of its obligations in terms of a distribution agreement entered into between the plaintiff and the first defendant's Transalloys Division in October 1985.

[4] The plaintiff's claim against the second defendant is based on a purchase and sale agreement between the first and second defendants, in terms of which the first defendant sold its Transalloys Division to the second defendant. The plaintiff alleges that, in terms of the aforesaid agreement, the second defendant assumed the rights and obligations of the first defendant on 1 July 2007 *alternatively* 1 April 2008. In the result, the plaintiff avers that the second defendant became obliged to comply with the terms of the distribution agreement.

[5] According to the plaintiff, the second defendant failed to do so which resulted in the plaintiff cancelling the agreement and instituting this claim for damages against the second defendant.

[6] In order to facilitate the resolution of the disputes, the parties agreed to separate some of the issues in dispute and to this end an order was granted by Fabricius J setting out the issues to be determined. A trial on these issues was subsequently conducted by Bertelsmann J.

[7] In order to determine whether the pleas introduced by the second defendant in its amended plea are *res judicata*, it is necessary to

examine the orders granted by Fabricius and Bertelsmann JJ in some detail.

Order Fabricius J

[8] On 14 March 2013, Fabricius J issued an order in terms of which 27 issues were separated from the remaining issues between the parties. The issues relevant to the matter under consideration are:

> *"1.1. Whether the Plaintiff and First Defendant concluded theagreement referred to in paragraph 4 and 5 of the particulars of claim ("the agreement");*
>
> *1.2 What precisely were the terms and conditions of the agreement;*
>
> *1.3 Whether the Plaintiff and the First Defendant concluded the amendment of the agreement as referred to in paragraph 8 of the particulars of claim;*
>
> *1.4 Whether the Plaintiff continued rendering distribution and support services in terms of the agreement to the First Defendant during the period July 2007 to March 2008;*
>
> *1.5 Whether the Plaintiff continued invoicing the First Defendant for the aforesaid distribution and support services and whether such invoices were duly paid by the Frist Defendant;*
>
> *1.6 Whether the Plaintiff during the month of April 2008 rendered the aforesaid services to the First Defendant;*
>
> *1.7 Whether during April 2008, the First Defendant furnished the Plaintiff with the value of sales of both m/c ferromanganese and silico-manganese during month of April 2008 and the amount of commission payable to the Plaintiff in terms of the aforesaid April 2008 sales;*
>
> *1.8 Whether the Plaintiff invoiced the First Defendant in respect of the amount of commission referred above;*
>
> *1.9 Whether during May 2008, the Plaintiff was notified by Claudine Wait, acting on behalf of the First Defendant alternatively the Second Defendant or both, that the Plaintiff was required to re-issue the invoice issued to the First Defendant for commission payable to the Plaintiff for the month of April 2008, to the Second Defendant;*

1.10 *All further invoices for commission were to be issued by the Plaintiff to the Second Defendant;*

1.11 *Whether during the months of May to September 2008 the Plaintiff rendered the distribution and support services in accordance with the agreement;*

1.12 *Whether during the months of May to September 2008 the Plaintiff was informed at the end of every month by W Nkosi, of the value of sales by the Second Defendant of both the m/c ferromanganese and silico-manganese during the relevant month and the amount of commission payable to the Plaintiff;*

1.13. *Whether the Second Defendant failed to make payment of the commissions for the months of August and September 2008;*

1.14 *Whether with effect from 1 July 2007 alternatively with effect from or about 1 April 2008 the Second Defendant assumed the rights and obligations of the First Defendant under and in terms of the agreement; (whether the agreement was assigned)*

1.15 *Whether with effect from 1 July 2007 alternatively with effect from or about 1 April 2008 the Second Defendant became obliged to comply with and give effect to the terms of the agreement as pleaded in paragraph 18.2 of the particulars of claim;*

1.16 *Whether at or about the end of October 2008 the Second Defendant refused to disclose either the value of direct silico-manganese sales effected by the Second Defendant during the month of October 2008 or the amount of commission due to the Plaintiff in terms of the agreement;*

1.17 *Whether at or about the end of October 2008 the Second Defendant refused to pay any commission to the Plaintiff for the month of October 2008;*

1.18 *Whether the Second Defendant's conduct referred to in paragraph 19 of the particulars of claim evidenced an intention to no longer be bound by the agreement and as such whether such conduct constituted a repudiation of the agreement;*

1.19 *Whether the Plaintiff elected to accept the repudiation and cancel the agreement;*

.....

1.23 *Whether payments made by the Second Defendant to the Plaintiff were made in the bona fide and reasonable but mistaken belief that they were due to the Plaintiff;*

1.24 *Whether such payments were not due to the Plaintiff by the Second Defendant;*

1.25 *Whether the Second Defendant derived the benefits of the distribution and support services rendered by the Plaintiff during the period of April 2008 to July 2008;*

1.26 *Whether the Plaintiff has been enriched at the Second Defendant's expense in the amount of R560 219.76;*

1.27 *Whether the Second Defendant was impoverished by the amount of R560 219.76."*

[9] I pause to mention, that the second defendant's plea at the time was, safe for admitting the conclusion of the sale and purchase agreement, a bare denial.

Judgment Bertelsmann J

[10] On 3 June 2013, Bertelsmann J, made the following order:

1. *Plaintiff succeeds against the second defendant in respect of each and every issue identified in the Order of this Court on the 14th March 2013 in paragraphs 1.1 to and including 1.19 with costs, such costs to include the costs of the earlier postponement;*

2. *The issues identified in paragraphs 1.23 and including 1.27 are decided against the second defendant in favour of the plaintiff; with costs, including the costs of the earlier postponement;*

3. *The issues recorded in par 1.20 fall away;*

4. *The issues identified in par 1.21.1 to 1.21.4 are decided in favour of the first defendant with costs, such costs to include the costs of the earlier postponement."*

PLEADINGS

Plaintiff's amendment

[11] Subsequent to the judgment, the plaintiff effected the following amendments to its particulars of claim:

i. the amount claimed for damages consequent upon the repudiation of the distribution agreement was increased from R 1 195 403, 76 to R 5 237 121,00 on the basis that the average amount of the monthly invoices issued by the plaintiff during the 12 month period preceding the repudiation is R 436 426, 75 and not R 99 616, 98 as initially averred;

ii. introducing two further claims for damages due to the breach of the distribution agreement by the second defendant, to wit :

a. the conclusion of a tolling agreement with a potential client (Afro Minerals Trading AG) (ATM) of the plaintiff, which resulted in a loss of profit in the amount of R 15 071 485, 04;

b. by selling and distributing products directly to the plaintiff's clients and by failing to disclose all sales to customers on which sales the plaintiff was entitled to a commission, which resulted in damages in the amount of R 5 093 663, 00.

Second defendant's amendment

[12] In turn, the second defendant amended its plea, by alleging a further amendment of the distribution agreement *alternatively* a waiver of the terms of the agreement. The amendment reads as follows:

"9. ***Ad paragraph 8 (including the sub-paragraphs)***

9.1. The second defendant admits these paragraphs only insofar as they accord with the express findings of the judgment. Save as aforesaid every allegation contained in these paragraphs is denied.

9.2. In addition to the above:

9.2.1. On or about 21 December 2006 and at Witbank, alternatively *Johannesburg, the first defendant, represented by a duly authorised representative and the plaintiff represented by Mr Simon van Niekerk, orally,* alternatively, *partly in writing and partly tacitly further alternatively, tacitly agreed to vary the terms of the distribution agreement (as amended)* ***("the variation").***

9.2.2. A copy of the written portion of the variation is annexed hereto marked ***P1****.*

9.3. The material express, alternatively *tacit, further* alternatively *implied terms of the variation (and with the written portion properly construed) are as follows:*

9.3.1. The plaintiff was appointed as the first defendant's agent for local sales;

9.3.2. the first defendant would pay to the plaintiff a commission of 2% for sales to:

9.3.2.1. Boksburg Foundry;

9.3.2.2. Cape Gate;

9.3.2.3. Dimbaza Foundry;

9.3.2.4. Ozz Foundries;

9.3.2.5 . Prima Industrial Holdings.

("the closed list of customers")

9.3.3. Any clients of the first defendant visited by the plaintiff would be issued with a referral number, to be used when the client places an order with the first defendant;

9.3.4. *Orders placed with the first defendant without a referral number would not be included for commission payable to the plaintiff;*

9.3.5. *the plaintiff was obliged to submit a monthly visitation report to the first and/or second defendant detailing the clients visited during the month with the referral number that has been issued;*

9.3.6. *For market development, the plaintiff would consult with the first defendant prior to visiting a new client to ensure that the client is not already a direct client of the defendant.*

9.4. *In the alternative to what is pleaded in paragraphs 9.2 and 9.3 above, the second defendant pleads that at all material times the plaintiff was fully aware of its rights in terms of the distribution agreement (as amended) and in and during December 2006 and at all times thereafter the plaintiff was fully aware of its rights in terms of the distribution agreement (as amended) and in and during December 2006 and at all times thereafter the plaintiff waived its rights to and in respect of the obligations by the first and/or second defendant in terms of the distribution agreement (as amended), inter alia, by:*

9.4.1. *receiving the memorandum annexed hereto as* ***P1*** *("the memorandum")*

9.4.2. *not challenging and/or disputing the contents of the memorandum; and*

9.4.3 *conducting itself in a manner that is consistent only with having accepted the terms and obligations as contained in the memorandum and pleaded in paragraph 9.3.1 to 9.3.6 above."*

Plaintiff's replication

[13] The aforesaid amendment gave rise to the issue to be determined herein, which issue is set out in the plaintiff's replication as follows:

"8. *The issue regarding the precise terms and conditions of the agreement having been determined and being* res judicata *between the Plaintiff and the Second Defendant, the Second Defendant is therefore not entitled to rely on any purported*

variation to the agreement which is not in accordance with the terms and conditions of the agreement as determined by His Lordship Mr Justice Bertelsmann."

and

"16. *Furthermore a finding that the Plaintiff has waived its rights in the distribution agreement would be contrary to the findings of His Lordship Mr Justice Bertelsmann that the terms and condition as pleaded by the Plaintiff regulated the relationship between the parties until the repudiation of the agreement by the Second Defendant and in particular the finding in favour of the Plaintiff in paragraph 1.4 of the separation order that the Plaintiff continued rendering distribution and support services in terms of the agreement and this issue has by implication been finally adjudicated and is therefore* res judicata."

RES JUDICATA

[14] The principle of *res judicata*, has been the subject of judicial scrutiny over centuries and was once again revisited in *African Farms Townships v Cape Town Municipality* 1963 (2) SA 555 AD. At 564 C – E, *res judicata* is defined as follows:

"In regard to res judicata *the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment. (Dig. 36.1.65 para. 2;* Z Hber, supra; *Sande;* De Diversis Regulis ad L. *207;* Voet, *44.2.1). Referring to the rule in* Dig. *50.17.207, De Villiers, C.J., in* Bertram v Wood, supra *at p. 180, held the following:*

"The meaning of the rule is that the authority of res judicata *induces a presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption, being* juris et de jure, *excluded every proof to the contrary. The presumption is founded on public policy which requires that litigation should not be endless and upon the*

requirements of good faith which, as said by Gaius *(*Dig. *50.17.57), does not permit of the same thing being demanded more than once."*

[15] In essence the principle prevents a party from having a proverbial *"second bite at the cherry".*

[16] In the present matter, the extended application of *res judicata,* to wit issue estoppel applies. Issue estoppel has been explained by the Supreme Court of Appeal in *Hyprop Investments Ltd v NSC Carriers & Forwarding CC* 2014 (5) SA 406 (SCA) at para [14] as follows:

" *Brand JA pointed out that the plea of res judicata - that the matter has already been decided – was available where the dispute was between the same parties, for the same relief or on the same cause (in Voet's words,* idem actor, idem res et eadem causa petendi*). The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel – borrowing the term from English law. The relaxation and the application of issue estoppel effectively started in the* Boshoff *matter where Greenberg J referred to Spencer-Bower's work on* Res Judicata. *In* Smith v Porritt *Scott JA explained the evolution of the defence as follows:*

> *'Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the* exceptio rei 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 that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry 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 commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue of estoppel. But, as was stressed by Botha JA in* Kommissaris van Binnelandse Inkomste v Absa Bank Bpk *1995*

(1) SA 653 (A) at 669D, 670J – 671B, this is not 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...Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others...."*

DISCUSSON

December 2006 amendment

[17] It is clear from the order granted by Bertelsmann J that the issue pertaining to the precise terms of the agreement was finally adjudicated. Following the aforesaid finding, the court further held that the second defendant breached the terms of the agreement and by its conduct repudiated the agreement. This led to a finding that the plaintiff was entitled to cancel the agreement and claim damages.

[18] In seeking the amendment, the second defendant, endeavours to revisit all of the findings *supra*.

[19] In justifying the introduction of the December 2006 amendment belatedly, the second defendant relies on two grounds, to wit:

i. firstly, that Bertelsmann J in reaching a finding on the precise terms of the distribution agreement, did not consider the issue in respect of the December 2006 amendment and consequently, the issue is not *res judicata.*

ii. secondly, the amount of damages claimed initially did not justify the proof of the December 2006 amendment. By virtue of the new breaches relied upon by the plaintiff and the vast amount of damages claimed, it has however, now become important to raise this defence.

[20] In respect of the second defendant's first submission and although the 2006 amendment was not in issue in the trial before Bertelsmann J, the issue did find its way into evidence as appears from the following extracts from the judgment:

In respect of the evidence of Mr van Niekerk, a formal general manager of the first defendant's Transalloys division

i. *""40. On the 21st December 2006, the first defendant's Transalloys division's sales department addressed a memorandum to the witness detailing the clients in respect of whom the plaintiff was entitled to a 2% commission and laying down the procedure to be followed in preparing invoices together with monthly visitation reports to the first defendant's clients.*

41. The witness did not know whether the memorandum had been presented to the plaintiff, but underlined that he had never had any problems with the services the plaintiff provided."

ii. Noteworthy is the fact that, although the second defendant opted to cross-examined Mr van Niekerk, no questions were asked in respect of the 2006 memorandum relied upon by the second defendant in its amendment and referred to by Mr van Niekerk in his evidence.

In respect of the evidence of Mr Duff, plaintiff's executive director, during cross-examination by second defendant

i. *"59. The clients on the so-called exclusion list who received their purchases of ferromanganese directly from the first or second defendant did not always remain the same as the list was adapted from time to time. It was put to the witness that plaintiff was not the sole distributor appointed by the first defendant, which he denied.*

.....

61. He also had no knowledge of a tolling agreement allegedly entered by second defendant with another company, Afro Minerals Trading AG (AMT), which was said to provide that second defendant would sell its entire ore production to this company. This agreement, it was put to Mr Duff, was effective as from the 1st July 2008. Although the witness had no knowledge of this agreement, ***he had no doubt about the fact that plaintiff's rights would be infringed if second defendant bound itself in this fashion and ceased to supply the plaintiff without proper notice of termination of the existing agreement.*** *As the AMT agreement falls outside the issues the court has been requested to determine, no further reference is necessary to its terms and its potential effect upon the relationship between the plaintiff and the defendant."* (own emphasis)

ii. The second defendant, despite being made aware of the plaintiff's stance that the agreement with ATM was in breach of the terms of the distribution agreement, did not dispute this portion of Mr Duff's evidence.

[21] It is therefore clear that, although the second defendant was alive to the importance of the December 2006 amendment, it chose not to raise it as a defence to the plaintiff's claim.

[22] Should the defence have been raised at the appropriate time, it would have been considered by Bertelsmann J.

[23] Is the second defendant's failure to raise the December 2006 amendment at the appropriate time fatal?

[24] Mr Swart SC, counsel for the plaintiff, correctly pointed out that the underlying principle of *res judicata* is precisely to avoid a party from raising different defences *ad infinitum*. Mr Swart SC relied on the

following extract form the *Nestlé (SA) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 SCA decision in support of this principle:

"[16] The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally."

[25] Mr Daniels, counsel for the second defendant, however, submitted that the finding by Bertelsmann J did not pertain to the whole duration of the agreement and consequently does not excluded evidence in respect of the December 2006 amendment. I do not agree. The following findings pertain to the period after December 2006:

"3. Plaintiff continued delivering its services [in terms of the agreement] *to the first defendant from July 2007 to March 2008; invoiced the first defendant and was paid by the latter – although the latter was then acting as manager of the business that belonged to the second defendant;*

4. Plaintiff similarly rendered services in April 2008 to first defendant and invoiced first defendant as usual and after having been advised of the sales figure as usual;

.....

5. Plaintiff rendered services [in terms of the agreement] *to second defendant from May to September 2008;*

15.....This terminated the agreement and may, depending on further evidence, entitle plaintiff to damages." [own insertion]

[26] These findings pertain to the terms of the agreement until September 2008, the month before the second defendant's repudiation of the agreement. It is final in respect of the whole term of the agreement between the parties. Should the second defendant be allowed to rely on the December 2006 amendment, all these findings will have to be revisited by another court. This is precisely the type of situation in which the principle of *res judicata* in issue estoppel finds application.

[27] The second defendant's failure to raise the December 2006 amendment at the time, for whatever reason, has consequences. In the words of the Supreme Court of Appeal in *Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 (2) SA 365 SCA at para [31]:

".....If it did not do so and then failed in its defence to the action it would be precluded from thereafter seeking to attack the 'once for all' rule and the principles of res judicata....."

[28] In the premises, I am of the view that the first ground of justification cannot succeed.

[29] In developing the second ground of justification, Mr Daniels relied, *inter alia*, on the decision in *Prinsloo NO and Another v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 SCA at para [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 554 G – H when he said:*

> *The difficulty which I will see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it*

involves for one party to proof 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?

.....

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 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 Porrit* supra *para 10). That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution."*

[30] It is difficult to follow the argument that the introduction of the December 2006 amendment in the trial conducted by Bertelsmann J, would have been *"expensive and troublesome"*. All role players testified, mention was made of the December 2006 memorandum and the second defendant actively participated in the trial by cross-examining Mr van Niekerk, the very person who could shed light on the alleged amendment. It would, to the contrary, have been less expensive and troublesome to introduce the December 2006 amendment at the time.

[31] Finally, Mr Daniels echoed the warning emulated in the *Prinsloo* matter, *supra*, that the application of *res judicata* in issue estoppel situations, may create the potential of causing inequitability and unfairness. I do not think this probability is applicable to the second defendant. To the

contrary, it would be inequitable and unfair to the plaintiff to embark on a further trial in respect of the precise terms of the distribution agreement. The cost involved in a further trial on the issue is another factor that militates against the second defendant's endeavour to raise this defence, belatedly.

[32] Similarly, I am not convinced that the second ground of justification assists the second defendant.

Waiver

[33] Mr Swart SC submitted that on an analysis of the plea of waiver it emerges that the plea is nothing other than the opposite side of the coin of a tacit agreement.

[34] In order to succeed in its plea of waiver, a court must find that the December 2006 amendment was concluded. This would entail that another court must make a finding on an issue that was finally determined by Bertelsmann J to wit, the precise terms of the distribution agreement.

[35] The same reasoning in finding that *res judicata* in issue estoppel is applicable to the December 2006 amendment applies to the plea of waiver.

[36] The second defendant, at its own peril, chose to proceed to trial on issues that called for final determination, without raising all its defences to these issues.

ORDER

In the premises, I grant the following order:

1. The defence raised by the second defendant in paragraph 9, 17 and 22 of its amended plea is *res judicata*;

2. The second defendant is not entitled to the raise the defence of waiver as set out in paragraph 9.2 and 9.3 of its amended plea.
3. The second defendant is ordered to pay the cost of suit.

Nieuwenhuizen

JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Plaintiff	:	Advocate Swart SC
Instructed by	:	Andrew Duf Attorneys
Counsel for the Defendant	:	Advocate J P Daniels
Assisted by	:	Advocate C T Vetter
Instructed by	:	T A BACKS Attorneys