REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(FUNCTIONING AS THE MPUMALANGA CIRCUIT COURT, MBOMBELA)

CASE NO: 3442/2016

14/3/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

MAHSILO LAMBRECHT ARCHITECTS

(Applicant in the application for leave to appeal) **PLAINTIFF**

and

THE PREMIER OF THE EXECUTIVE OF MPUMALANGA

(Respondent in the application for leave to appeal)

FIRST EXCIPIENT/ 1ST DEFENDANT

MEMBERS OF THE EXECUTIVE COUNCIL

FOR THE DEPARTMENT OF PUBLIC WORKS,

ROADS AND TRANSPORT OF THE

PROVINCIAL GOVERNMENT OF MPUMALANGA

(Respondent in the application for leave to appeal)

SECOND EXCIPIENT/2ND DEFENDANT

JUDGMENT

(APPLICATION FOR LEAVE TO APPEAL)

AC BASSON, J

First summons

[1] The applicant in the application for leave to appeal (the plaintiff - Mashilo Lambrecths Architects) instituted action against the excipients (the defendants) for payment of interest which allegedly accrued as a result of the failure of the Department of Public Works, Roads & Transport – "the Department"). I will continue to refer to the parties as the "plaintiff" and the "defendant".

[2] On 4 May 2015 Preller, J ordered the defendants to pay the amounts owned in terms of three invoices. The said order – attached to the Particulars of Claim as "Annexure A" - reads as follows:

> "1. First and second respondents [the defendants in this application] are hereby jointly and severally, the one complying the other to be absolved, to pay invoices number 546A, 546BB and 593 which the applicant [Mashilo Lambrechts Architects] rendered to the first and second respondents for professional services rendered to the first and second respondents.
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> 2. Costs of this application."

[3] Preller, J did not order the defendants to pay any interest in respect of the three invoices**.**

[4] The defendants paid the amounts (R1 682 592.44) in compliance with the court order in July 2015 (approximately 2 months after that order) and in compliance with the amounts claimed in terms of the three invoices.

Second summons

[5] The plaintiff now, for the second time and in terms of a further summons, instituted action against the defendants for payment of interest which allegedly accrued as a result of the defendant's failure to timely pay the three invoices which formed the subject matter of the order made by Preller, J. The plaintiff now claims that, because the Department defaulted in making timeous payment of the three invoices in terms of the contract between the parties, they are now entitled to *mora* interest. In essence the plaintiff claims that they are entitled to institute a further summons to claim the interest payable on the amount that was awarded to them in terms of the order of Preller, J. In the Particulars of Claim (against which the defendants excepted), the plaintiff records that it had obtained an order against the Department for payment in respect of the three invoices (referred to in the order) but that the defendants were obliged to make payment within 14 days after the rendering of the invoice by the plaintiff. In paragraph 6.3 the following is now claimed:

> "In the premises therefore, Defendant became liable to pay the Plaintiff *more* interest at a rate as is prescribed by the Prescribed Rate of Interest Act, 55 of 1957, as from the date of the default…"

[6] The defendants excepted against the Particulars of Claim and submitted that any *mora* interest payable by the defendants to the plaintiff was a remedy that was available to the plaintiff in respect of the defendants' then failure to effect timeous payment of the amount due. That remedy was available at the time when the first summons was instituted. The claim for payment in terms of the first summons and the claim for *mora* interest in terms of the second summons thus form part of one cause of action which is the cause of action that served before Preller, J. The plaintiff was therefore, according to the defendants,

compelled to pursue all its claims in the proceedings which led to the order granted by Preller, J.

[7] This court agreed with the defendants and made the following order:

(i) The defendants' exception succeeds.

(ii) The plaintiff is afforded a period of twenty days from the date of this order to amend its particulars of claim, if so advised.

(iii) The plaintiff to pay the costs.

[8] The plaintiff filed an application for leave to appeal arguing that there exists a reasonable possibility that a different court might come to a different finding than the one this court arrived at.

[9] Counsel on behalf of the plaintiff submitted that the claim of interest is a distinct and self-contained claim with reference to, *inter alia*, the following two cases. *Dunn v Road Accident Fund*[1] and *Wedge Steel (Pty) Ltd v Wepener*.[2] Neither of these cases assists the plaintiff. In *Dunn* the issue before the Court was interest on a judgment debt. The bone of contention in those proceedings was the date from which interests had to be calculated: Was it from the date of judgment or was it from the date of payment of the lump sum due to the applicant in terms of the judgment order. The issue relating to interests on a judgment debt is thus vastly different from what is in issue in this matter. In *Wedge Steel* the court held in the context of a provisional sentence claim that the liquidity of a claim for interests in provisional sentence proceedings had to be determined apart from the determination of the liquidity of the principal debt. In *Wedge* the court was in a position to grant provisional sentence in respect of the capital sum as that constituted a liquid document. However, in respect of the claim for interests on the capital sum, the court in *Wedge* had reservations in respect of the certificates that were issued as to the dates on which the defendant's indebtedness arose. Because of this uncertainty, the court in *Wedge* was not satisfied that the interest calculation was objective nor that the certificate established its accuracy. In those circumstances, the court postponed the proceedings for provisional sentence on the interest adjunct to the capital to allow the plaintiff to furnish certain dates to the court necessary in

[1] 2019 (1) SA 237 (KZD).
[2] 1991 (3) SA 444 (W).

order to determine the interest calculation. The facts and legal issue in the present matter differ vastly from what was before the court in *Wedge Steel*.

[10] Returning to the present matter: The question which arises in this matter is whether the plaintiff is entitled to institute the present proceedings if regard is had to the order previously made by Preller, J. In this regard counsel on behalf of the defendants submitted that a plaintiff may only claim damages once and for all in one action based on a single cause of action and which flow from that cause of action. In support of this contention, the court was referred to the decision in *Custom Credit Corporation (Pty) Ltd v Shembe*[3] where the court said:

> "It is accordingly not a matter for surprise that the learned Judge *a quo* was unable to find any precedent for such a procedure where the 'double-barrelled' remedy had been adopted by a plaintiff. The reason or this is not far to seek. The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*. The reason for this rule is given by *Voet*, 44.2.1, (*Gane's* translation, vol 6, p. 553) as being
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> > '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'.
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> This rule is part of the very foundation of our law and is of equal application to the criminal law - in support of a plea of *autrefois acquit* (see, e.g., *Rex v Manasewitz*, 1933 AD 165 at pp. 168, 176, 184 - 187) - as it is to civil claims for damages resulting from negligent acts (see, e.g., *Cape Town Council v Jacobs*, 1917 AD 615 at p. 620; *Oslo Land Co. Ltd*. v *The Union Government*, 1938 AD 584 at p. 591) and to claims arising out of a breach of contract (see, e.g., Kantor v Welldone Upholsterers, 1944 CPD 388 at p. 391; *Boshoff v Union Government*, 1932 t.p.d. 345). 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."

[3] 1972 (3) SA 462 (A) at 471H-472D.

[11] In amplification counsel on behalf of the defendants submitted that this means that, in a claim for damages arising from the breach of contract, a plaintiff may claim damages for all the damage flowing from the cause of action but should do so in a single action. Such a party may not bring a further action for any further damages he or she may discover after the date when he or she obtained judgment. The rationale for this rule is explained by the court in *Symington and Others v Pretoria -Oos Privaat Hospitaal Bedryfs (Pty) Ltd*[4]

> "[26]… I think this assumption was fairly made. It would be in accordance with the so-called 'once and for all' rule. This rule is based on the principle that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such cause. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. As explained by Corbett JA in *Evins v Shield* B *Insurance Co* Ltd 1980 (2) SA 814 (A) at 835 the effect of the rule on claims for damages, both in contract and in delict, is that a plaintiff is generally required to claim in one action all damages, both already sustained and prospective, flowing from the same cause of action."

[12] The defendants further relied on *Janse Van Rensburg and Others NNO v Steenkamp and Another; Janse van Rensburg and Others NNO v Myburgh and Others*[5] where the court explained the application of the "once and for all" rule as follows:

> '[27] The scope of the 'once and for all' rule was said in the *National Sorghum* case at 241D - E to require that all claims generated by the same cause of action be instituted in one action. As I have already found that the respective sections do not create the same cause of action, even in the extended sense, it is difficult to justify the applicability of the rule to the facts of these appeals was, however, persuaded by a dictum from *Henderson v Henderson* (1843) 3 Hare 100 ([1843 - 1860] All ER Rep 378) at 114 - 115 (at 381 - 382 All ER) (and the full court in case No 18109/2005 agreed with him), as follows:
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> > 'In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except

[4] 2005 (5) SA 550 (SCA) at para [26].
[5] 2010 (1) SA 649 (SCA) at para [27]-[29].

under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.'

[28] Murphy J expressed the view (in concurrence with that of Blignaut J in *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2)*2005 (6) SA 23 (C) ([2004] 1 All SA 1) at 46H) that 'the Henderson principle' is not in conflict with the approach of Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* (supra) and that 'logic and equity will justify its application in appropriate cases'. While that may be so, I think that any such application must depend on an understanding of its true foundations.

[29] In *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 (HL) at 48j Lord Keith pointed out that, although *Henderson*'s was a case of action estoppel, the statement of the law has been held to be applicable also to issue estoppel. The learned Law Lord had earlier referred (at 48e) to *Brisbane City Council v Attorney-General for Queensland* [1978] 3 All ER 30 (PC) ([1979] AC 411) at 35 - 36 (at 425 AC), where Lord Wilberforce said:

'The second defence is one of *res judicata*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising ina subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100, [1843 - 60] All ER Rep 378 and its existence has been reaffirmed by this Board in *Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56. A recent application of it is to be found in the decision of the Board in *Yat Tung Co v Dao Heng Bank* [1975] AC 581. It was, in the judgment of the Board, there described in these words (at 590): ". . . there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. This reference to "abuse of process"

had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'"

[13] Counsel on behalf of the plaintiff took issue with the defendants' reliance on the "once and for all rule". More in particular it did so on the basis that the defendants failed to refer to the following pivotal part in the *Van Rensburg*-decision:[6]

> "[30]… But what is to be noted from both the *Henderson* and *Brisbane City Council* cases is the additional emphasis on the facts of each matter, for how else should a court determine whether the conduct of a party has reached the level of being an abuse? That being so it is for the party who relies on the application of the rule pertinently to plead such reliance and lay a foundation in fact which would enable the opposing parties to deal with such reliance."

[14] It was further submitted on behalf of the plaintiff that should the defendants wish to rely on the once and for all rule, it had to plead the reliance and lay a foundation in fact which would enable the respondent to deal with such reliance. Counsel submitted that the defendants are relying on facts outside of the allegations of the current Particulars of Claim.

[15] I fail to see how this submission and the quoted passage from the *Van Rensburg* judgment relied upon by the plaintiff assist the plaintiff in this matter. The plaintiff relies on the terms of the letter of appointment dated 28 March 2002 and in terms of which the defendants were obliged to make payments to the plaintiff within 14 days after the rendering of the invoice by the plaintiff. This cause of action formed the basis of the proceedings which culminated in an order granted by Preller, J. In my view this matter falls squarely within the ambit of the "once and for all rule" in terms of which it is required that all claims generated by the same cause of action be instituted in one action. This the plaintiff did not do.

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[6] *Supra*.

[16] The upholding of an exception does not dispose of the plaintiff's action - it merely disposes of the pleading against which the exception was taken. The plaintiff was granted leave to amend its pleadings.

[17] I have considered the submissions on behalf of the plaintiff in the application for leave to appeal. I am not for the reasons set out hereinabove persuaded that the intended appeal has reasonable prospects of success.

[18] In the event the following order is made:

The application for leave to appeal is dismissed with costs.

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AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:	Adv. P Sieberhagen
Instructed by:	Du Toit, Swanepoel, Steyn & Sprut Attorneys
For the defendant:	Adv TP Krüger SC
Instructed by:	Adendorff Theron Incorporated