THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 49/11

In the matter between:

G. LIVIERO & SON BUILDING (PTY) LTD **APPELLANT**

and

SUNDOWNER PROPERTY DEVELOPMENT (PTY) LTD **RESPONDENT**

Neutral citation: *Liviero v Sundowner Property Development* (49/11) [2011] ZASCA 217 (29 November 2011)

Coram: CLOETE, HEHER, CACHALIA, SHONGWE JJA and PLASKET AJA

Heard: 8 November 2011

Delivered: 29 November 2011

Updated:

Summary: *Res judicata* – issue estoppel – no commonality of issues between those necessary to decide present proceedings and those part of *ratio decidendi* of judgment in earlier proceedings.

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ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Hellens AJ sitting as court of first instance):

1. The appeal succeeds in part.
2. The respondent is to pay the costs of the appeal.
3. The order of the court a quo is set aside and replaced with the following:

'1. The defendant's special plea to the plaintiff's particulars of claim is dismissed.

2. The defendant is to pay the wasted costs occasioned by its reliance on the special plea.

3. The plaintiff's special plea to the defendant's conditional counterclaim is dismissed save to the extent that its special plea to prayer 2 is upheld and the relief claimed in that prayer is dismissed.

4. The plaintiff is to pay the costs wasted by its reliance on the special plea to the counterclaim.'

JUDGMENT

HEHER JA (CLOETE, CACHALIA, SHONGWE JJA AND PLASKET AJA concurring):

[1] This is an appeal from a judgment of Hellens AJ sitting in the South Gauteng High Court. The learned judge:

1. dismissed the defendant's special plea to the plaintiff's particulars of claim with costs;
2. upheld paragraphs 1 to 12 of the plaintiff's special plea to the defendant's conditional counterclaim and dismissed that counterclaim with costs.

The appeal is before us with leave granted by the court a quo.

[2] The defendant, now the appellant (Liviero), is a building contractor. The plaintiff, now the respondent (Sundowner), is a property developer. In September 2004 the parties entered into a written contract (The Principal Building Agreement, JBCC[1] Series 2000, Fourth Edition, hereinafter referred to as 'the agreement'). Liviero undertook to

1 Joint Building Contracts Committee

construct 231 sectional title units in phases on the property of Sundowner, as employer, being Erven 992 and 993 Sundowner Ext 37, Gauteng, for a contract price of R52 268 174.42 inclusive of VAT. Phuhlisa Development Solutions (Pty) Ltd carries on business as a building project manager and its director, Mr F Grobler, was nominated in the agreement as the principal agent.

[3] On 14 September 2004 the building site was handed over to Liviero, which duly commenced the construction of the works.

[4] A series of variation orders was issued under the agreement which had the effect of extending the agreed practical completion dates. The last date for such completion was 28 February 2006 (in relation to Blocks G to L of the development). In the application proceedings to which I shall shortly refer it was common cause that Liviero failed to achieve practical completion by the extended completion date.

[5] On 26 September 2006 Liviero purported to cancel the agreement, relying on clause 38 thereof, due to Sundowner's failure to pay an amount of R474 487.18 which had been certified for payment by Grobler.

[6] Sundowner paid the said amount to Liviero on 27 September 2006. It regarded Liviero's purported cancellation as a repudiation of the agreement because Liviero was at the time in breach of its obligation to achieve timeous practical completion. After taking legal advice it communicated an election to accept the repudiation and terminate the agreement.

[7] Liviero remained in possession of the site pending payment or the issue of a certificate of practical completion, purporting to do so on the strength of a contractual lien.

[8] In November 2006 Sundowner applied urgently to the South Gauteng High Court for orders ejecting Liviero from occupation of the property and declaring that Liviero's purported cancellation of the agreement on 26 September 2006 was invalid.[2]

2 Phuhlisa Development Solutions was joined as a nominal second respondent.

[9] Sundowner relied in the ejectment proceedings both on its ownership of the property and its cancellation of the agreement pursuant to the acceptance of Liviero's alleged repudiation. The facts that I have set out earlier in this judgment were common cause in the application.

[10] Liviero opposed the relief claimed by Sundowner. It raised as a point in limine an arbitration clause in the agreement that, so it contended, obliged Sundowner to refer the disputes between the parties to arbitration.

[11] Liviero justified its continued occupation of the property by reliance on clause 24.7 of the agreement, contending that Sundowner was only entitled to possession of the works upon issue by the agent of a certificate of practical completion, that by the date of its cancellation of the agreement it had achieved practical completion and was due an amount of R7 411 960.38 for work done under the agreement and was entitled to retain possession until paid in full. It maintained its original position that the cancellation was lawful because Sundowner had failed to pay timeously on certificates issued by Grobler.

[12] The application was heard by Louw AJ. He delivered judgment on 23 March 2007, concluding with the following orders:

'1. The first respondent is to be ejected from the property known as Erf 1276 Sundowner Extension 37, situated on the corner of Meteor and Northumberland Roads, Sundowner.

2. It is declared that the purported cancellation on 26 September 2006 by the first respondent of the written contract, annexure 'FA3' to the applicant's founding affidavit, was invalid.'

Liviero was ordered to pay the costs of the application.

[13] Liviero applied for leave to appeal. Louw AJ delivered a reasoned judgment dismissing that application with costs on 1 October 2007.

[14] In November 2008 Sundowner instituted action against Liviero claiming:

1. Contractual penalties for delay in performance – R4 947 600.00;

2. Damages for the cost of completing incomplete work under the agreement – R178 454.70;

3. Damages for defective performance – R5 144 922.15; and

4. Damages in the form of interest paid because of late transfer of units – R1 706 852.88.

[15] Liviero filed a special plea in bar based on the arbitration clause in the agreement and pleaded over on the merits denying liability. It also filed a counterclaim conditional on the court refusing to stay the proceedings as sought in the special plea.

[16] Sundowner replied to Liviero's special plea and pleaded to its conditional counterclaim seeking its dismissal with costs.

[17] In a supplementary pre-trial minute dated 1 March 2010 the parties agreed to separate the following issues for preliminary adjudication by the trial court:

'2.2.1 The Defendant's special plea of arbitration as pleaded in paragraphs 1 to 3 of the Defendant's special plea to the Plaintiff's particulars of claim;

2.2.2 The Plaintiff's replication of *res judicata* as set out in paragraphs 1 to 5 of the Plaintiff's replication to such special plea; and

2.2.3 The Plaintiff's special plea of *res judicata* to the Defendant's counterclaim as set out in paragraphs 1 to 12 of the Plaintiff's special plea to the Defendant's counterclaim.'

[18] The trial came before Hellens AJ. Neither party elected to adduce evidence in support of the separated issues. The file in the application proceedings, the judgment of Louw AJ, the application for leave to appeal and the judgment refusing that application were placed before the learned judge by consent. After hearing argument he made the orders I have referred to in the first paragraph of this judgment and against which the present appeal is directed.

[19] In order properly to understand the issues in the appeal it will be necessary to quote, first, the relevant paragraphs of Liviero's special plea to Sundowner's particulars of claim and Sundowner's replication to the special plea, and, second, Sundowner's special plea to Liviero's conditional counterclaim.

Liviero's special plea

[20] Liviero's special plea reads as follows:

'1. Annexure "K" to the principal building agreement, Annexure "A" to the Plaintiff's Particulars of Claim, provides that:

1.1 the parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to this agreement;

1.2 any dispute not resolved by the principal agent as per clause 40 shall be submitted by either party to arbitration in terms of clause 40 and as below.

2. The claims reflected in the Plaintiff's Particulars of Claim constitute a dispute or claim arising out of or relating to the agreement.

2.1 The Plaintiff failed to negotiate in good faith with a view to settling the disputes contained in its Particulars of Claim prior to instituting this action;

2.2 The plaintiff failed to submit the disputes to arbitration in terms of clause 40 of Annexure "A" and Annexure "K" thereto.

3. Pursuant to the provisions of Section 6(1) of the Arbitration Act 42 of 1965, the Defendant is entitled to a stay of these proceedings pending determination of the disputes between the parties by arbitration as provide for in the agreement between them.

WHEREFORE the Plaintiff claims that an order be issued staying these proceedings pending a determination of the dispute in terms of the arbitration agreement between them.'

Sundowner's replication to the special plea

[21] Sundowner replicated to Liviero's special plea as follows:

'1. On 23 March 2007 the above Honourable Court adjudicated the Defendant's alleged right *vis-a-vis* the Plaintiff to insist on arbitration in terms of the Principal Building Agreement read with annexure "K" thereto, and dismissed such alleged right.

2. A copy of the above Honourable Court's judgment is annexed hereto marked "A", the contents whereof the Plaintiff prays be herein incorporated as if specifically recorded.

3. The Defendant's present plea of arbitration is a plea as to the same subject matter on the same grounds against the same party.

4. The Plaintiff accordingly pleads that the Defendant's present plea of arbitration was finally adjudicated upon by a Court of competent jurisdiction, rendering the subject matter thereof *res judicata*.

5. Wherefore the Plaintiff persists in its claim and prays that the Defendant's special plea be dismissed with costs.'

Liviero's conditional counterclaim

[22] The conditional counterclaims – apparently – combine eight separate causes of action (which I shall summarise below). The prayers for relief (which are not expressly tied to any particular causes of action) do not follow the pleading of individual causes but are lumped together at the end as follows:

'WHEREFORE the Defendant claims:

1. An order that the dates for the completion of the works be revised and extended to the dates set out in Annexure "DEF2";
2. An order that the Defendant lawfully cancelled the agreement in terms of clause 38 of the principal building agreement;
3. An order that the plaintiff instructs its principal agent to issue certificates of practical and works completion to the Defendant;
4. Payment of the sum of R7 411 960,38 alternatively payment of the sum of R7 233 505,68;
5. Interest on the aforesaid amount calculated on the ruling interest rates from the 4th August 2006 to date of judgement;
6. Interest on the aforesaid amounts at 160% of the bank rate applicable from time to time to registered banks when borrowing money from the Central or Reserve Bank on the 1st of each month from the date of judgement to date of payment.
7. Alternatively to prayers 5 and 6; interest at 15,5% per annum a tempore morae.'

This manner of pleading is undesirable and confusing and may have misled both the counsel who settled the plea to the counterclaim and Hellens AJ, who set aside the whole counterclaim, including causes not sought to be struck down by the terms of the plea.

[23] The structure of the counterclaim is a group of paragraphs preceded by a heading intended to identify the subject-matter of the cause addressed in those paragraphs. Thus the divisions are:

1. Paras 5 to 16: 'Revision of the dates for practical completion, a cause based on clause 29 of the agreement.

2. Paras 17 to 58: ‘Payments’, divided as follows:

(i) paras 17-19 which deal with the contract sum, the amount of Preliminaries and the obligation to issue certificates; these paragraphs do not embody a separate cause of action, which may explain why there is no reference to them in the special plea to the counterclaim;

(ii) paras 20-23: ‘Contract instructions’; this cause relates to adjustments to the contract value in accordance with clause 32 of the agreement, amounting to R2 540 990,00. Here also there is no special plea to these paragraphs, more surprisingly;

(iii) paras 24-30: ‘Preliminaries’; this is a cause based on clause 41.5.5 of the agreement, the basis appears to be an entitlement to a revision of the construction period, an allegedly agreed additional sum of R885 000,00 in respect of preliminaries in consequence, and an agreed revision of the contract period in respect thereof, plus a further adjustment of the contract sum in an amount of R2 540 990,00. To these paragraphs also no special plea is raised;

(iv) para 31: ‘Escalation’; a cause based on clause 31.5.3 of the agreement requiring payment of R1 080 854,75. To this paragraph there is no special plea raised;

(v) paras 32-34: ‘Default interest’; this cause is founded on clause 31.11 of the agreement and embodies a claim for payment of R210 116,05. There is no special plea to these paragraphs;

(vi) paras 35-40: ‘Compensatory interest’; this cause arises from alleged practical and works completion and late payments in respect of moneys due for such work; such interest is said to total R7 411 960,38;

(vii) paras 41-49: ’Cancellation’. This cause, founded on clause 38.2 and 38.5 of the agreement, appears to depend on an allegation (in para 46) that, on 26 September 2006, the contractor gave notice of cancellation to the employer and the agent ‘as it was entitled to do in terms of clause 38.2 of [the contract]’. An amount of R7 411 960,38 is said to be due in consequence;

(viii) paras 50-57: ‘Practical completion’, a cause based on clause 24.3.1 of the agreement and a claim for payment in the same amount as in relation to the previous two causes;

(ix) para 58: a cause as an alternative, based on failure to reach practical or works completion but alleging material completion, utilisation of the works by the employer,

and impossibility of performance caused by the eviction of the contractor from the property;

(x) para 59: an alternative cause based on work incomplete and defects unremedied, impossibility of performance; and a tender to complete such incomplete work and rectify the defects. As no relief was claimed based on this paragraph it seems that it was intended to be read as supplementary to paragraph 58.

Sundowner's special plea to the conditional counterclaim

[24] The special plea reads:

'1. In paragraphs 41 to 46 of its conditional counterclaim, the Defendant alleges-

1.1 an entitlement to have cancelled the agreement because of the Plaintiff allegedly having been in material breach thereof on 7 September 2006; and

1.2 that the Defendant accordingly on 26 September 2006 cancelled the agreement,

and that it is accordingly entitled to prayer 2 of the conditional counterclaim, i.e. that the above Honourable Court should order that the Defendant lawfully cancelled the agreement.

2. In paragraphs 50 to 59 of its conditional counterclaim, the Defendant alleges-

2.1 that it substantially completed the works, obliging the principal agent to have issued a certificate of works and practical completion;

alternatively,

2.2 that it materially completed the works, but that the Plaintiff made completion and/or rectification of the works impossible in that it evicted the Defendant from the property, entitling the Defendant to payment by the Plaintiff of the sum of R7 411 960.38 alternatively such sum less R178 454,70;

further alternatively,

2.3 that the Plaintiff made it impossible for the Defendant to execute the work in that it evicted the Defendant from the property, on account whereof the Defendant tenders to complete any incomplete work and rectify any defects,

and that it is accordingly entitled to prayer 3 of the conditional counterclaim, i.e. that the above Honourable Court should order an instruction to the principal agent to issue certificates of practical and works completion to the Defendant, and that it is accordingly also entitled to prayer 4 of the conditional counterclaim, i.e. that the above Honourable Court should order payment of the sum of R7 411 960,38 alternatively R7 233 505,68 by the Plaintiff to the Defendant.

3. In paragraphs 5 to 16 of its conditional counterclaim, the Defendant alleges-

3.1 that it became entitled to a revision of the dates for completion of the building works as set out in annexure “DEF2” thereto;

3.2 that the principal agent on 31 August 2006, despite the Defendant’s aforesaid entitlement, did not so revise the dates for practical completion of the works, but only to the extent set out in annexure “DEF3” to the conditional counterclaim,

and that it is accordingly entitled to prayer 1 of the conditional counterclaim, i.e. that the above Honourable Court should order that the dates for the completion of the works be revised and extended to the dates set out in annexure “DEF2” thereto.

4. In paragraphs 35 to 37 of its conditional counterclaim, the Defendant moreover alleges-

4.1 that it executed the building works according to the contract and brought the works to practical completion and works completion;

4.2 that the Defendant became entitled to payment of the full contract price plus interest, less amounts paid to the Defendant, and that accordingly the Defendant is entitled to payment of the sum of R7 411 960,38 as calculated in annexure “DEF4” to the Defendant’s conditional counterclaim,

and that it is accordingly entitled to prayer 4 of the conditional counterclaim, i.e. that the Plaintiff should be ordered by the above Honourable Court to pay to the Defendant the sum of R7 411 960.38 alternatively the sum of R7 233 505,68.

5. None of such prayers 1 to 4 (and accordingly also none of prayers 5 to 7 being for interest on the aforesaid amounts) is competent, *inter alia* for the reasons which follow.

6. On 23 March 2007 the above Honourable Court has already adjudicated the issues now being raised by the Defendant, and pronounced a judicial determination of the questions of law and issues of fact pertaining thereto.

7. A copy of the above Honourable Court’s written judgment and order aforesaid, is annexed hereto marked “A”, the contents whereof the Plaintiff prays be herein incorporated as if specifically recorded.

8. Particular determinations made by the above Honourable Court were-

8.1 that the Defendant did not reach practical completion of the works by 28 February 2006 as it was obliged to do in terms of the agreement;

8.2 that the Plaintiff on 27 September 2006 did pay the sum of R474 487,18 being in respect of the balance outstanding of certificates which had been rendered by the principal agent;

8.3 that the principal agent, dealing on 31 August 2006 with the Defendant’s claim for an extension of time dated 3 August 2006, granted no extension;

8.4 that the Defendant forfeited the right to claim an extension of time to complete the works by failing to trigger an arbitration within the time limit prescribed by the agreement;

8.5 that at the date the Defendant purported to cancel the agreement, i.e. 26 September 2006, the Defendant had itself been in default and in material breach of the agreement, which disentitled the Defendant to cancel the agreement as provided in clause 38 of the agreement;

8.6 that the Defendant's aforesaid purported cancellation of the agreement was invalid;

8.7 that the Defendant did not have a right to continued possession of the property after the Plaintiff's cancellation of the agreement on 10 October 2006 by means of acceptance of the Defendant's aforesaid repudiation;

8.8 that the Defendant accordingly was to be ejected from the property by order of Court.

9. The Defendant's present conditional counterclaim is based upon the very same subject matter already determined as between the parties to this action, and the prior judgment of the above Honourable Court referred to above, being annexure "A" hereto, is a judgment in proceedings to which the principal agent was a party.

10. The Plaintiff accordingly pleads that the factual and legal allegations made by the Defendant in its conditional counterclaim cannot again be raised as the Defendant is prevented from disputing such issues already determined by the above Honourable Court.

11. Annexure "A" hereto, being the judgment and order of the above Honourable Court containing findings of fact and law, constitutes a judicial determination concerning the same subject matter presently pleaded by the Defendant in its conditional counterclaim which it directed against the same party.

12. The Plaintiff accordingly pleads that the factual and legal basis of the Defendant's present conditional counterclaim was finally adjudicated upon by a Court of competent jurisdiction, rendering the subject matter thereof *res judicata*, disentitling the Defendant to once again revisit such factual and legal issues in its conditional counterclaim.'

[25] Hellens AJ properly considered the law in relation to a plea of *res judicata*. He referred to *Yellow Star 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at 586, *National Sorghum Breweries Limited (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239-240; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562D and *Horowitz v Brock & others* 1988 (2) SA 160 (A) at 179H-180A. It is unnecessary to repeat the legal principles; in so far as I differ from the learned judge it is only in relation to the *ratio decidendi* of the judgment of Louw AJ concerning the eviction order.

[26] The learned judge summarised the judgment of Louw AJ in relation to clause 40 (the arbitration clause) and Annexure K to the agreement (which deals with the reference of a dispute to arbitration) as follows:

'4.1 It is not any kind of difference between the parties that may be referred to arbitration – it is a dispute as meant in clauses 40.1 to 40.3, namely, one that can arise only after the principal agent has decided on a disagreement.

4.2 A dispute can follow only upon an unsatisfactory decision by the principal agent on a disagreement between the contractor and the employer.

4.3 Only the contractor has the right to request the principal agent to determine a disagreement. It is only once the contractor has decided to request the determination that the principal agent is clothed with the power to deal with a disagreement. If there is no "disagreement" as meant in clause 40.1, there can be no "dispute" which can be referred to arbitration in terms of clause 40. At the heart of the whole arbitration process provided for in clause 40 lies a voluntary act of the contractor: the contractor, and the contractor alone, can request the principal agent to decide on a disagreement and so put into motion the dispute resolution process which can follow only once a disagreement has turned into a dispute. This means that an employer cannot trigger the process and it further means that nothing bars an employer from approaching the High Court for relief.

4.4 Sub-clauses 40.1 to 40.3 are clear and unambiguous in their meaning and they must be given effect to.

4.5 Annexure "K" is not a self-contained arbitral provision that effectively supplanted clause 40. It is only a dispute or claim arising from the contract not resolved by the principal agent as per clause 40 which may be submitted by either party to arbitration. If a proceeding is not triggered through the contractor referring a disagreement to the principal agent, annexure "K" can simply not find any application.

4.6 The employer is accordingly not bound by the arbitration agreement. The Court dealing with the urgent application in giving judgment on an application for leave to appeal held the following:

"The essence of my judgment on the arbitration point is that the contractor, and only the contractor, had the right to trigger the dispute resolution process that could lead to arbitration. The employer did not have the right to trigger the process. The employer is thus free to sue in court. It is only where the contractor triggered dispute settlement procedures and the initial process has failed, that 'either party' or 'any party' to that process could refer the dispute to arbitration. I did not have to refer to the phrases 'either party' or 'any party' in my judgment as those phrases do not detract from what I clearly found to be the proper interpretation of the

contract insofar as the arbitration issues are concerned and I do not believe that there is a reasonable prospect that another court may come to a conclusion different from mine on this issue."'

I agree with this summary. I also agree that the same issue of fact, ie whether the employer can initiate arbitration in terms of clause 40 of the agreement, that was finally decided by Louw AJ, was essentially the determinative issue raised by the special plea to the particulars of claim and the replication to the special plea. That one arose in the context of a point *in limine* to an application involving the relationship of parties to the building contract, while the other was raised in the context of an action for monetary relief by way of penalties and damages, is not in my view sufficient to avoid the application of the rule.

[27] In both cases the future conduct of the proceedings required the same question to be answered: Do the provisions of clause 40 of the agreement read with Annexure K permit the employer to approach a court for final relief to resolve a dispute arising out of or concerning that agreement or is the employer obliged to resort to arbitration? Decision of that question requires an interpretation of the contractual provisions, an exercise that Louw AJ carried out and resolved conclusively in favour of the employer. In my view the contractor was in the proceedings under appeal bound by that finding. This was a clear instance of an issue estoppel. To hold otherwise would make nonsense of a considered and binding judgment on an issue that is raised for a second time in direct contradiction of that judgment.

[28] I therefore agree with Hellens AJ that the special plea of arbitration was not well taken and that the replication to the special plea had to be upheld.

[29] Turning to the *res judicata* relied on in the plea to the counterclaim, the first task in any exercise of this nature is to determine what was finally decided by the court whose decision is said to have created the bar. In this regard whether the court was right or wrong in its decision is beside the point. Leave to appeal this order was refused and its effect was final.

[30] Louw AJ was faced with a notice of motion in which the relief claimed by the

employer was twofold:

1. An order for the ejectment of the contractor; and

2. A declaration that the purported cancellation of the building contract by the contractor on 26 September 2006 was invalid.

[31] The learned judge fixed the field of his enquiry in these words:

'There are two main issues in this application. The first concerns the correct construction of an arbitration clause. . . The second is whether the contractor is entitled to exercise a builder's lien over the property of [the employer].'

[32] As to the ejectment claim the learned judge proceeded as follows:

'I must highlight that the employer's cause of action is essentially a *rei vindicatio*. Ownership being admitted, the contractor is burdened to prove that it has a right of possession through the lien. In so far as the contractor relies on a lien as answer to the employer's *rei vindicatio*, the onus rests on the contractor to prove the right to exercise a lien on a balance of probabilities. This includes having to prove that the contractor had the right to cancel the agreement and that the contractor cancelled it, as this is the substratum of its lien claim.'

[33] The learned judge, in determining the proven facts, found that

a) Liviero had breached the building contract by failing to attain practical completion by the agreed (extended) date of 28 February 2006;

b) as at the date of its purported cancellation of the agreement on 26 September 2006 the breach had not been overcome (or remedied) by a successful application for extension of the date for practical completion the agent having considered but not granted such an application on 31 August 2006;

c) clause 38.6 of the agreement set 'a fixed and undisputable yardstick: if the contractor is in default on the day that the contractor wants to cancel, the contractor simply cannot cancel. Leaving materiality aside the provision allows for no interpretation to the effect that although the contractor might technically be in breach, in fact it is not in breach if it is in a process of attempting to rectify the breach'.

[34] Having concluded, further, that failure to reach timeous practical completion was a breach of a material term, the learned judge found that 'on a conspectus of all the

facts, the contractor has not satisfied the burden of proof which rests on it'. He accordingly granted orders for ejectment and the declaration sought by the employer.

[35] It may be noted that the learned judge referred to a variety of other matters in his judgment, but given the parameters that he had set and the terms of his conclusion it cannot be said that any of these was necessary for his decision. They include the following:

1. By the end of September 2006 practical completion had not yet been reached.
2. The purported cancellation was a repudiation which Sundowner accepted, resulting in the cancellation of the contract.
3. It had to be deemed that the agent had refused Liviero's claim for more time on 31 August 2006. (The learned judge also held that, in terms of clause 29.6 the contractor then had 20 days within which to trigger an arbitration and failed to do so. However, in his judgment refusing leave to appeal, he made it clear that this was a remark made *per incuriam* not bearing on the ratio of his judgment, which ratio he identified as being the 'undisputable yardstick' passage quoted above. Counsel for Sundowner conceded in argument before us that the remark was indeed *obiter*.)

[36] The second task is to take the identified essential findings of the first judgment and to decide whether any is also an essential element of the impugned claim or defence.

[37] Save for the cause embodied in paras 41 to 49 ('Cancellation') the basis for the counterclaims seems to be this: after the last date for practical completion had passed the agreement remained alive and was given effect to by Liviero in the various respects set out in the counterclaim; Liviero was, for the reasons specified therein, entitled to extensions of time for performance and adjustments to the basis of payment, all of which the agent had been or was obliged to grant and in consequence of which Liviero became entitled to payment in terms of the various provisions of the agreement on which it relies in the counterclaim. The foundation of the special plea to the counterclaim in regard to these causes is first that reliance on them involves the pursuit of contractual remedies which are barred to the contractor because Louw AJ had decided that the contract came to an end on 27 September 2006 when the employer

accepted the repudiation by the contractor. As I have explained earlier the learned judge made no such finding as part of the ratio of his judgment, nor did the relief that he granted to the employer carry with it such an implied finding. Second, as earlier noted, Louw AJ did not reach a definitive conclusion that Liviero had forfeited the right to claim an extension of time for practical completion.

[38] That being so, there can be no question of applying the principles of *res judicata* to the conditional counterclaim on the ground that it was no longer open to Liviero to enforce its contractual rights, as Liviero's counsel would have us find. This is because none of the issues raised by the counterclaim is an issue which has been adjudicated upon (to adopt the language of *Horowitz v Brock* at 179A-H).

[39] Paragraphs 41-49 of the conditional claim fall into a different category. Louw AJ decided finally, unambiguously and pertinently (in relation to the claim for a declaratory order) that the contractor had not lawfully cancelled the contract on 26 September 2006. The allegation in para 46 that the contractor had cancelled 'as it was entitled to do in terms of clause 38.2' is a direct challenge to that finding which flies in the face of the rule. Only the quoted words give offence in that sense. It is those words on which prayer 2 to the counterclaim is reliant for its justification. The appropriate order, in the circumstances, would be to treat the special plea to paragraphs 41 to 49 as a special plea to that prayer and to uphold it accordingly.

[40] In the result the appellant has been successful in maintaining the substantial integrity of its conditional counterclaim and hence its ability to fight another day on the grounds set out in it. The respondent has achieved success to the extent that it has succeeding in defending the judgment in its favour that eliminated reliance on the arbitration bar (although that success might prove to be a poisoned chalice when it comes to fight the merits of the building dispute before the High Court) and in disposing of the cause set up in clauses 41 to 49 of the counterclaim.

[41] In my view Liviero's measure of success on appeal is substantial for the simple reason that preservation of the counterclaim offers, potentially, a complete counter to the reliance by Sundowner on its claim for penalties. By comparison, the merits can

hardly be impacted by the exclusion of paras 41 to 49 and the shutting out of arbitration is in essence a victory of procedure. I therefore consider it fair that Liviero should have its costs of appeal.

[42] As to the appropriate costs order in the court below I think a division of costs according to the result would meet the case. Both parties were partially successful in relation to the objections arising from the pleadings.

[43] The following order is made:

1. The appeal succeeds in part.
2. The respondent is to pay the costs of the appeal.
3. The order of the court a quo is set aside and replaced with the following:

'1. The defendant's special plea to the plaintiff's particulars of claim is dismissed.

2. The defendant is to pay the wasted costs occasioned by its reliance on the special plea.

3. The plaintiff's special plea to the defendant's conditional counterclaim is dismissed save to the extent that its special plea to prayer 2 is upheld and the relief claimed in that prayer is dismissed.

4. The plaintiff is to pay the costs wasted by its reliance on the special plea to the counterclaim.'

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J A Heher
Judge of Appeal

APPEARANCES

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