THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 638/15

Not Reportable

In the matter between:

HIBISCUS COAST MUNICIPALITY **APPELLANT**

and

HUME HOUSING **RESPONDENT**

Neutral citation: *Hibiscus Coast Municipality v Hume Housing* (638/15) [2016] ZASCA 71 (23 May 2016)

Coram: Majiedt, Seriti and Zondi JJA and Victor and Kathree-Setiloane AJJA

Heard: 6 May 2016

Delivered: 23 May 2016

Summary: Res judicata – appeal against decision of full court dismissed – full court correct in upholding appeal against decision of court of first instance which had wrongly found matter to be res judicata.

ORDER

On appeal from: KwaZulu-Natal Division, Pietermaritzburg (Kruger, Madondo and Chili JJ, sitting as court of appeal):

1 The appeal is dismissed with costs.

JUDGMENT

Majiedt JA (Seriti and Zondi JJA and Victor and Kathree-Setiloane AJJA concurring):

[1] The appellant, the Hibiscus Coast Municipality (the municipality), succeeded in the KwaZulu-Natal Local Division, Durban, before Steyn J with a plea of res judicata. The respondent, Hume Housing (Hume), however, successfully appealed against that finding to the full court of that division in Pietermaritzburg (per Chili J, Kruger and Madondo JJ concurring). This appeal is with the special leave of this court.

[2] The central issue is whether the action in the court of first instance before Steyn J is the same cause of action relied upon by Hume in an earlier application to have an agreement between the parties to be bound by a valuation undertaken by an agreed expert, made an order of court. That application had been heard by Koen J.

[3] The material facts are as follows. The parties had been engaged in protracted litigation concerning compensation payable in respect of properties acquired by the municipality from Hume (which is a property developer). A number of illegal invaders had unlawfully occupied Hume’s properties in the

Gamalakhe township, situated within the municipality's jurisdiction. Hume launched an eviction application in the KwaZulu-Natal Local Division and joined the municipality on the basis that it had aided or, at least, permitted the illegal invaders to occupy Hume's land. Hume sought an order, in the alternative and in the event that it was not able to get the invaders ejected, that the municipality be directed to acquire the properties, alternatively to pay constitutional damages to Hume. The parties settled the matter and Vahed AJ recorded that settlement, inter alia, as follows in a court order:

'That the 1st Respondent [the municipality] will acquire the properties referred to in the application, which are owned by the Applicant [Hume], once compensation determined as set out below has been paid. The 1st Respondent shall be entitled to effect transfer into its own name or into the name of its nominee(s).

That the compensation will be determined in accordance with section 12(1), 12(2) and 12(3) of the Expropriation Act 63 of 1975.

That the applicant will deliver a summons and particulars of claim within 10 days. The 1st respondent will deliver a plea and counterclaim, if any within 10 days thereafter, and the applicant a plea in reconvention and replication, if any, within a further 10 days.'

[4] Thereafter Hume, as required in terms of the order of Vahed AJ, instituted action to have the amount of compensation determined. The parties reached an agreement on the appointment of the property valuers, Mills Fitchet (Natal) (Pty) Ltd (Mills Fitchet) to act as the expert valuer. They agreed further that the Mills Fitchet valuation would be binding upon the parties and that either party could apply to have it made an order of court. The agreement was reached in an exchange of letters between the parties' respective attorneys, Mr Donovan Avenant for Hume, and Mr Mfuniselwa Elijah Nkosi for the municipality. Mills Fitchet duly prepared a valuation report in respect of the properties, which concluded that the total value of compensation payable is the amount of R6 045 000 together with VAT and interest thereon. That amount comprised a valuation of R2 200 000 for the land, R3 790 000 in respect of improvements on the properties and R55 000 for solatium.

[5] The municipality's failure to pay the compensation resulted in Hume approaching the court again by way of application for an order in the following terms (amongst others):

'1. That the valuation report compiled by Mills Fitchet . . . be made an order of court.

2. That judgment be granted in favour of [Hume] in the sum of R6 045 000 (six million and forty five thousand rand).'

[6] The municipality opposed the application on the basis that the valuation was not in accordance with the court order. Koen J dismissed the application with costs. The learned judge held that, absent any consensus between the parties concerning what would be valued to determine the compensation payable, the valuation by Mills Fitchet cannot stand as an agreed final and binding valuation. Ultimately, Koen J held that Hume had not succeeded in discharging the onus of proving that the parties had agreed to be bound by the Mills Fitchet valuation, whatever its final conclusions.

[7] The appellant thereafter pursued action proceedings for payment of the said sum. Steyn J upheld with costs the municipality's special plea of res judicata. The learned judge held that Koen J had not only applied his mind to the calculation of the compensation which was payable but had also, in the course of his underlying reasoning, pertinently dealt with s 12(5) of the Expropriation Act 63 of 1975 (the Act), and had found that the properties had been used for unlawful purposes and that the improvements on the properties consequently had to be disregarded in the valuation. The latter part of that finding, held Steyn J, was not obiter dictum, but part and parcel of the *ratio decidendi*. The learned judge thus upheld the special plea of res judicata.

[8] On appeal, the full court reversed this finding and held that Koen J had only been seized with the issue of whether there had been consensus between the parties regarding the appointment of Mills Fitchet. The full court also held that 'upholding the plea *rei judicata* in the present action would be tantamount to denying [Hume] the opportunity to prove compensation [in the] amount as claimed'. For the reasons that follow I agree with the full court's findings.

[9] Central to a proper determination of the appeal, is to discern precisely what the essential issue before Koen J was, and what his finding on that issue is. It bears repetition that what Hume had in essence sought before Koen J was the judicial enforcement of the Mills Fitchet valuation, and a concomitant judgment for payment of the amount reflected as being due and payable in terms of that valuation. And Hume's case was premised on that basis in its papers as I will presently demonstrate. Hume did not, and had no reason to, engage in an interpretation of what the order of Vahed AJ meant insofar as the compensation payable was concerned. The municipality's contention that Koen J had decided not only the question of whether there had been consensus between the parties concerning the Mills Fitchet valuation, but also what was meant by Vahed AJ in his order, is without merit. It is necessary to refer fairly extensively to the papers in this regard. It bears emphasis that what Koen J had before him was an interlocutory application. When that application was launched, summons had already been issued by Hume for payment of the compensation.

[10] Hume's short founding affidavit was deposed to by Mr Avenant of the firm of attorneys representing Hume. Mr Avenant set out very briefly the history of the dispute, the parties' exchange of correspondence which culminated in an agreement to appoint Mills Fitchet as valuer, to accept its valuation as binding and to have it made an order of court. Lastly, Mr Avenant alluded to the conclusions in the completed valuation report and to the municipality's failure to pay.

[11] In answer the municipality's attorney, Mr Nkosi, admitted the agreement on Mills Fitchet's appointment, but disputed that compensation was payable for improvements on the properties. This denial must be understood in its proper context, as it is the primary bone of contention. The denial did not create a second justiciable issue (ie over and above the issue of whether the parties were fully ad idem in relation to the appointment and the terms of the mandate of Mills Fitchet) before Koen J. It was made to amplify and motivate the municipality's contention that the parties had lacked

consensus on precisely what Mills Fitchet had to value. Thus Mr Nkosi stated as follows in the answering affidavit:

'14. . . . For the reasons given above, I always understood that the only compensation which the applicant [Hume] claimed, the only compensation to which it was entitled to, and what the applicant meant in annexure "A2" [its letter to the municipality proposing the appointment of Mills Fitchet] was compensation for vacant, unimproved land.

15. The applicant and its attorneys must reasonably have been aware of my understanding, and could not reasonably have believed that I agreed, on behalf of the respondent [the municipality], to compensation being paid for structures or improvements which were not made by the applicant, and in respect of which compensation had not previously been claimed.

16. Accordingly, what the respondent agreed to in annexure "A3" [the municipality's response to Hume's letter, annexure A2] was that Mills Fitchet value unimproved land, excluding top structures or improvements (which were not effected by the applicant), and determine compensation according to the value of the unimproved land.'

[12] In the replying affidavit, Mr Avenant contested this alleged misunderstanding advanced by Mr Nkosi. Mr Avenant alluded to the 'trite legal principle' that an immovable property includes structures of a permanent nature which ex lege accede to that land (*superficies solo cedit*). In contending that there could not have been any misunderstanding on exactly what Mills Fitchet's mandate was, Mr Avenant said, inter alia, the following:

'4.6. The order also provides for the land to be valued in accordance with particular sections of the Expropriation Act, ie sections 12(1), 12(2) and 12(3) . . .

4.7. This did not convert this case into an expropriation matter, for the land was never expropriated. It was simply a mechanism to define on what basis the properties must be valued.'

And later on he continued:

'5.1. The question must be decided with reference to an interpretation of the court order, and not with reference to extraneous factors now introduced by the respondent . . .

20. . . . Accordingly, particularly in the light of the fact that the answering affidavit does not in fact disclose any legal defence, and that a simple interpretation of the

court order is all that is required . . . the court will . . . be requested. . . to make an order in terms of the notice of motion . . . .'

[13] In making reference to how the court order of Vahed AJ was to be interpreted, Hume was simply seeking to counter the municipality's allegation of a mistaken belief on its part. In effect, what it was attempting to do was to negate an iustus error defence on the part of the municipality. It is necessary, in this regard, to reiterate some of the well-known basic principles of the law of contract. One of the material elements of consensus in the formation of a valid and binding agreement is that the parties to the agreement must agree on the legal obligations they wish to create.[1] An excusable mistake (iustus error) negates consent – a typical example is where one party labours under a mistaken belief regarding the contents of its performance under a contract.[2] Therefore, when Mr Nkosi had embarked on an extensive discussion regarding his understanding of the meaning of the Vahed AJ order on what compensation would be payable, he was laying a basis for the municipality's contention that the error was objectively reasonable, or excusable. Mr Avenant, in turn, had sought to counter this in the replying affidavit by attempting to demonstrate that there was no objectively reasonable basis for a mistaken belief in view of the contents of the court order. The argument therefore that Hume had, in reply, expanded its cause of action to include an interpretation of the Vahed AJ order, is devoid of merit.

[14] It is plain from the judgment of Koen J that the learned judge understood fully that the sole issue before him was whether there had in fact been a meeting of the parties' minds on the exact terms of Mills Fitchet's mandate. In the end he found for the municipality on this issue. There are numerous passages in his judgment which demonstrate that Koen J was aware of this sole issue, and that that is the only issue which he had determined. First, the learned judge commenced by referring to the trite principle that '[t]he [a]pplicant [Hume] bears the onus of proving the

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[1] *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* [2002] ZASCA 25; 2002 (4) SA 681 (SCA) at 699B.
[2] *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G-H.

agreement it contends for'. Implicit in that statement is that Hume had to prove all the requisite elements, including consensus. He then postulated that it appeared that the attorneys had sought to reach agreement so as 'to avoid a court case to determine the compensation which was to be paid in terms of the order as they each interpreted it'. In doing so, said the learned judge, the attorneys had not been aware that they were harbouring different interpretations of the court order, not conveyed to each other. Furthermore the learned judge stated that: '[i]t is in regard to what was to be valued, ie raw land with enhancements or raw land without any enhancements, or, differently stated perhaps, "land not illegally occupied and enhanced," or land with enhancements thereon, that the attorneys (and hence the parties) were not *ad idem.*' He continued : '. . . it cannot be said that the attorneys were *ad idem* as to what was meant by "properties" in the order to be valued . . . [a]ccordingly the very appointment of Mills Fitchet is tainted'. All these statements point unequivocally to the fact that Koen J was aware that the only issue he had to decide upon was whether there was consensus between the parties.

[15] My finding in this regard is buttressed by the following. As stated, in disputing the municipality's alleged misunderstanding, Hume pertinently made the point that the alleged lack of consensus had to be decided with reference to an interpretation of the court order and not by taking into account extraneous factors (such as the fact that the land had been illegally occupied and that the invaders, and not Hume, had erected the top structures on the land) as the municipality was seeking to do. As Koen J stated, he could not, absent any additional evidence, have attempted to interpret the court order. Thus, not surprisingly, Koen J said this:

'In my prima facie view, the discussions between the parties which was made an order of court by Vahed AJ was, with respect, ambiguous in the context of the allegations in the papers in that application, *probably justifying a resort to extrinsic evidence*' (own emphasis).

Consequently and understandably so, Koen J did not seek to interpret the court order.

[16] In argument before us, the municipality emphasised the following passage in the judgment of Koen J:

'Even if I was incorrect in my above reasoning, I nevertheless believe that the application cannot succeed also on the following basis. The amount of the compensation was to be determined in accordance with s 12(1), (2) and (3) of the Act. It seems clear to me that such compensation could not be calculated other than by taking into account also the prescripts referred to in inter alia the remainder of the provisions in s 12, notably s 12(5). Section 12(5) expressly refers to factors which need to be taken into account "in calculating the compensation payable in terms of the Act". Although the properties were not actually being expropriated, by fixing of a "date of expropriation" in paragraph 8 of the order, and by prescribing that the compensation was to be determined in accordance with *inter* alia s 12(1), (2) and (3) of the Act, provisions such as s 12(5) which would normally apply to a determination of the amount of compensation, particularly subsection (c) thereof, were clearly intended to apply.'

It was submitted, on behalf of the municipality, that this formed part of the court's ratio decidendi and that Koen J had added this as a second reason for dismissing Hume's interlocutory application. If that submission is sound, it is correct that this ratio decidendi would, absent any appeal, be binding upon Hume and would, as Steyn J found, mean that the matter was indeed res judicata. Where a court furnishes more than one basis for its determination of an issue, each such basis being dispositive, the second and further bases remain ratio decidendi and do not become obiter dictum merely because the first basis is dispositive of the case.[3] But, as I see it, the passage cited above does not signify a second separate and selfstanding basis for the learned judge's decision. It is merely part of his reasoning for his finding that there was no consensus between the parties concerning what precisely was to be valued by Mills Fitchet. Koen J was discussing how compensation would have had to be determined, not in the context of an interpretation of the court order, but as further motivation for his finding that there had in fact been no consensus. At best for the municipality, if the statements cited were in fact meant to express a view on what the court order means (which, as I have

[3] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC) para 62.

shown, is not the case), then they are merely obiter dictum and not binding.[4] The municipality's reliance on the passage is therefore misplaced.

[17] There is one final aspect which requires consideration. It was submitted on behalf of Hume that this is really a matter of issue estoppel and not res judicata. After some debate, counsel correctly conceded that it does not really matter in this case what appellation one accords to the legal principle we are dealing with. While that is an issue which may arise in further proceedings (and then more so for the municipality than for Hume), given the outcome in this case, it has no bearing on the result. It would suffice to point out that it is well established in this court's dicta that issue estoppel is not a separately recognised defence in our law; the defence remains one of res judicata,[5] of which issue estoppel is one species.[6] However, issue estoppel may have an effect on the question of prejudice that Hume may suffer[7]. I, therefore, agree with the full court's observation that upholding the special plea of res judicata may lead to unfair consequences for Hume. I choose to say nothing further on this aspect, since the matter has to be remitted for trial.

[18] To conclude: The full court was correct in upholding the appeal against the judgment of Steyn J, who had held that the matter was res judicata as Koen J had already decided the issue of how the order of Vahed AJ, concerning compensation payable, was to be interpreted. The appeal therefore lacks merit.

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[4] Ibid para 61.
[5] A full description of this defence is *exceptio rei judicatae vel litis finitae*.
[6] See: *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 144; 1995 (1) SA 653 (A) at 676C-D; *Smith v Porritt* & others [2007] ZASCA 19, 2008 (6) SA 303 (SCA) para 10; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* [2009] ZASCA 25; 2009 (3) SA 577 (SCA) para 22. *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* [2012] ZASCA 28, 2014 (5) SA 297 (SCA) para 10.
[7] *Prinsloo NO and other v Goldex 15 (Pty) Ltd and another*, supra, para 26.

[19] I issue the following order:

The appeal is dismissed with costs.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

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