Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 1153/2005

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

BURGER & WALLACE CONSTRUCTION (PTY) LTD Plaintiff

And

BALLPROP TEN (PTY) LTD Defendant

JUDGMENT DELIVERED ON 9 DECEMBER 2014

BINNS-WARD J:

[1] Proceedings in this matter commenced when the summons was issued at the beginning of 2005. The plaintiff claimed an amount of R461 335,25 from the defendant for services rendered. The defendant admitted the claim, but pleaded a claim in reconvention against the plaintiff in the amount of over R98 million.

[2] The claim in reconvention was founded on an alleged breach of contract. It was the defendant's case that the parties had concluded a joint venture agreement in April 2001 to develop certain land in the Muizenberg area (erven 159848 and 159850) referred to as 'the Ogden erven'. The 'relevant terms' of the joint venture agreement were pleaded in paragraph 3 of the defendant's claim in reconvention in the following manner:

> 3. The relevant terms of the joint venture agreement between the Defendant and the Plaintiff were *inter alia* as follows:
>
> 3.1 the Defendant would attend to the rezoning, subdivision and other

issues concerning the development of the relevant erven with the intention to subdivide and develop approximately 600 erven in total and to sell these by plot and plan;

3.2 the Plaintiff would obtain and/or arrange the necessary finance for the project and furthermore see to the site services for each plot for which service the Plaintiff was to be paid a market-related fee for its services rendered;

3.3 the Defendant would act as building contractor and build the dwellings for the plot and plan purchasers;

3.4 the Defendant and the Plaintiff would each be entitled to half of the profit generated by the sale of these plots to purchasers;

3.5 the Defendant would be entitled to all profit for the building work done in accordance with the agreement of the parties;

3.6 the joint venture agreement would be undertaken in the name of a company to be nominated as the purchaser of the Ogden erven.

The defendant alleged that the plaintiff had reneged on the agreement by contracting with third parties to develop the erven. In its plea in reconvention, the plaintiff denied the conclusion of a joint venture agreement, as alleged. In the alternative, and to the extent that the court might hold that the agreement had been concluded, the plaintiff pleaded that:

3.1 In and during June or July 2001 and with the knowledge of the Plaintiff, Defendant caused a company, Defacto Investments 12 (Pty) ltd (**"Defacto"**) to be nominated as the purchaser of the Ogden properties in terms of an agreement of sale which Defendant, as purchaser, had previously concluded with the owner of those properties;

3.2 On 19 July 2001 New Invest 212 (Pty) Ltd (**"New Invest"**) purchased the entire shareholding of Defacto and pursuant to such transaction Defendant (again, with the knowledge of the Plaintiff) caused; alternatively acquiesced in the transfer of the entire shareholding of that company to New Invest;

3.3 In the premises the Defendant's conduct, as set out above, constituted; alternatively entailed a waiver and/or abandonment of all rights against the Plaintiff in terms of the joint venture agreement.

[3] After the pleadings had closed the parties decided that there should be a separation of issues within the meaning of rule 33(4) of the Uniform Rules. To that end they took an order by agreement on 27 August 2008 before S. Olivier AJ in the following terms:

BY OOREENKOMS TUSSEN DIE PARTYE: word 'n bevel in die volgende terme gelas:

1. Dat in terme van Hooggeregshofreël 33(4) gelas word dat die meriete van die teeneis wat onder bovermelde saaknommer ingestel is, geskei word van kwantum en dat slegs die meriete van vermelde teeneis by die verhoor wat op 4 September 2008 begin, bereg en afgehandel word;
2. Dat die aanhoor van getuienis ten opsigte van die kwantum opgeskort word tot tyd en wyl die meriete van die saak beslis is; en

   Dat koste oorstaan vir latere beregting.

The order did not define what precisely was comprehended by 'the merits' ('die meriete'). Considered as a whole, however, it seems reasonably clear from the context, more particularly the provisions of paragraph 2 of the order, that the term was intended to cover all the issues in the case except the extent of the defendant's alleged damages in the sense discussed in paragraph [12], below.[1] It certainly comprehended the issues of whether or not the joint venture agreement had been concluded, whether it had been reneged on, as alleged, and whether there had been a waiver or abandonment by the defendant of its rights, as alleged by the plaintiff in the alternative to its denial of the conclusion of the agreement. The issue of waiver or abandonment of contractual rights advanced in terms of the plaintiff's plea in reconvention was necessarily, and indeed expressly, predicated on the existence of a legally valid contract.

[4] The 'merits' went to trial before Saldanha J. The learned judge handed down a comprehensive judgment running to 61 pages on 26 April 2010. It was recorded in paragraph 1 of the judgment that the trial had been preceded by several interlocutory applications, which included 'various applications for the amendment of the pleadings'. The pleadings were also amended during the course of the trial. The learned judge also recorded that '[a]fter the delivery of argument on the merits the defendant brought a further application for the amendment of its claim in reconvention. The application was opposed and was aborted at the hearing thereof'. The judgment held that the defendant had established on a balance of probability that the joint venture agreement had been concluded and that it had been breached by the plaintiff in the manner alleged.[2] The trial court found 'no merit in the plaintiff's alternative plea to the defendant's claim in reconvention that the defendant had

[1] Cf. *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) at 77D-E.
[2] Paragraph 102 of the trial court's judgment.

waived or abandoned its claim to the rights under the joint venture agreement'.[3] It made an order in the following terms: 'The defendant's claim [in reconvention] is upheld with costs save for the costs of the aborted application for amendment'. The effect of that determination in the context of the separation of issues ordered by Olivier AJ would appear to leave only the matter of the defendant's damages to be decided in the action.

[5] The judgment of the trial court was taken on appeal to the Supreme Court of Appeal. The judgment on appeal, *Burger & Wallace Construction (Pty) Ltd v Ballprop Ten (Pty) Ltd* [2011] ZASCA 136 (23 September 2011), has been published on the SAFLII website.[4] The appeal was dismissed. The appeal court's judgment confirmed the trial court's finding as to the conclusion of the joint venture agreement. That court held that what had been described in the trial court's judgment as a breach of the agreement had in fact been a repudiation. It also held that the defendant's claim in reconvention, properly construed, had indeed alleged a repudiation of the agreement rather than a breach.[5]

[6] The matter currently before the court is an application by the plaintiff to amend its plea in reconvention by substituting it with a pleading that would contain the following allegations in response to the indicated paragraphs of the defendant's amended claim in reconvention:

AD PARAGRAPHS 3 AND 4 THEREOF

2. It was one of the *naturalia*, *alternatively*, a tacit or implied term, of the joint venture agreement that its common object was to make a profit (**"common object"**).
3. The joint venture agreement was concluded subject to the tacit, *alternatively*, implied, resolutive condition that it would have been reasonably possible to obtain subdivision of erven 159848 and 159850 into approximately 600 single residential erven suitable for a "plot and plan" development in accordance with the applicable planning and environment laws;
4. It was never reasonably possible to obtain subdivision in accordance with the applicable planning and environmental laws of erven 159848 and 159850 into single residential erven suitable for a "plot and plan" development at all;
5. Alternatively, if it were possible to obtain such subdivision at all, it was never possible in respect of approximately 600 such erven;
6. In the premises the joint venture agreement was void, and of no force or effect;

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[3] Paragraph 101 of the trial court's judgment.
[4] http://www.saflii.org/za/cases/ZASCA/2011/136.html .
[5] As to the distinction between repudiation and breach, see e.g. RH Christie and GB Bradfield *The Law of Contract in South Africa* 6ed. at pp. 538-540.

7. Subject to the aforegoing, these paragraphs are admitted.

AD PARAGRAPH 5 THEREOF

8. The joint venture agreement was void for the reasons set forth above.
9. It is admitted that the defendant contracted with third parties to do a development on the said erven.
10. In the premises the plaintiff's breach of the joint venture agreement was irrelevant.

AD PARAGRAPH 6 THEREOF

11. The joint venture agreement was void for the reasons set forth above.
12. Alternatively, had sub-division of erven 159848 into single erven suitable for a "plot and plan" development have been possible at all, then:
    12.1 subject to detailed design, the final erf sizes employed and the final efficiencies of layout, the maximum number of single residential erven which could have been developed for sale by plot and plan on erven 159848 and 159850 together would have been approximately 300; and
    12.2 undertaking a **"plot and plan"** development on approximately 300 erven would not have been profitable, and the common object of the joint venture would not have been achieved thereby.
13. In the premises, the joint venture would have terminated due to the impossibility of achieving its common object for reasons beyond the control and not due to the fault of either party, alternatively, it would have been lawfully terminated by agreement, further alternatively, it would have been law fully terminated by the plaintiff.
14. In the premises, the defendant would never have derived any profit from the joint venture agreement.
15. In the circumstances, all the allegations contained herein are denied.

AD PARAGRAPH 7 THEREOF

16. For the reasons set out above, the plaintiff denies that a total of 600 units could or would have been developed on erven 159848 and 159850.
17. The plaintiff has no knowledge of the manner in which the defendant's alleged damages have been calculated, made up and arrived at, and denies all the allegations in that regard.

AD PARAGRAPHS 8 AND 9 THEREOF

18. Save for admitting demand, all of the remaining allegations are denied.

[7] The defendant objected to the proposed amendment. It contended in its notice of objection that:

1. The proposed amendments contained in paragraphs 2 to 11 of the plaintiff's contemplated substitute plea relate to the merits of the counterclaim which have already been finally determined and that this court thus lacks the power to try the matters they purport to raise for determination.

2. The proposed amendments contained in paragraphs 12-14 of the contemplated substitute plea are premised on the alleged additional terms which may not now be introduced following the determination of the counterclaim, and are in any event inconsistent with the finding already made that the joint venture agreement existed and was breached.

3. The proposed amendments in paragraphs 15 and 16 of the contemplated substitute plea are objectionable to the extent of the words 'in the circumstances', which predicate its content on that of the preceding paragraphs which are objectionable for the reasons set out in 1 and 2, above.

[8] The proposed substitute plea essentially seeks to raise the issue of initial impossibility of performance. The allegation in paragraphs 6, 8 and 11 that the joint venture agreement was void, read with the allegations in para 13, were plainly formulated with regard to the principles applicable to the determination of the voidness of ostensibly concluded contracts on the basis of impossibility of performance (as to which see, for example, RH Christie and GB Bradfield *The Law of Contract in South Africa* 6ed. at pp. 97-99). The plaintiff's counsel, quite correctly, did not suggest that the judgment of Saldanha J did not finally determine the issues in the action sent to trial before the learned judge pursuant to the ruling in terms of rule 33(4) by Olivier AJ. They argued that the issue sought to be introduced by means of the substitute plea had not been considered in the trial and to allow its introduction would not 'undermine' the judgments of either the trial or the appeal court. As to the finding by Saldanha J, confirmed on appeal, that a binding joint venture agreement, as alleged in the claim in reconvention, had been concluded, the plaintiff's counsel referred to the treatment of the subject of initial impossibility in AJ Kerr *The Principles of Contract* 6ed. at pp. 237-238, where the learned author states 'In addition there are cases where performance is not impossible, but where, if the result sought is to be achieved, the form of performance which is possible is so different from that which was contemplated as not to be within the scope of the contract. In these cases, <u>just as in those on absolute impossibility, there is nothing wrong with the contract</u>: but it does not come into existence (if the necessary circumstances do not exist at the time agreement is reached), or….' (underlining supplied for emphasis). They contended that the allegations sought to be introduced concerning impossibility of performance did not imply that there had been anything 'wrong with the contract'

and thus did not bring the intended plea into conflict with what the trial court had determined and the appeal court had confirmed when upholding the defendant's allegation concerning the conclusion of the joint venture agreement.

[9] I do not agree that the issue of initial impossibility of performance that the plaintiff seeks to introduce in the second stage trial of the action does not conflict with the determinations already made. The trial and appeal courts also found that the agreement had been repudiated and that the defendant had not waived or abandoned its rights under the contract. Necessarily implicit in the latter two findings was a determination that there had been a legally binding agreement in place. It is impossible to repudiate non-existent obligations, or to obtain contractual rights capable of waiver or abandonment from a contract that is legally a nullity. The allegations concerning initial impossibility that the plaintiff now seeks to introduce thus come down, in essence, to a withdrawal of concessions or admissions that were implied in the formulation of its plea when the merits went to trial.

[10] In my judgment the argument advanced on behalf of the plaintiff in any event proceeded on an incorrect premise. It essentially ignored the effect of the order made in terms of rule 33(4). Its effect was to direct that the issues on the pleadings were to be decided in two separate and self-contained trials. Saldanha J was charged with determining 'the merits' in a first stage trial. I have already treated, in paragraph [3] above, of the meaning of the term in the context of the ruling made by Olivier AJ. Any defence that the plaintiff wished to raise concerning the existence of the agreement had to be raised as part of 'the merits'. The defence now sought to be advanced that the agreement was void for initial impossibility of performance certainly does not fall within the meaning of 'quantum', being the aspect of the claim stood over for the trial of the remaining issues in the action. Trying it would entail re-opening 'the merits'.

[11] It seems to me that what the plaintiff is seeking to do by introducing at this stage the allegation that the contract was void is essentially equivalent to that which the defendant sought unsuccessfully to do in *David Hersch Organisation (Pty) Ltd and Another v Absa Insurance Brokers (Pty) Ltd* 1998 (4) SA 783 (T). That matter also concerned a contractual claim. In its plea the defendant denied that an agreement had been entered into and accordingly denied that there had been a breach of the agreement and that the plaintiffs had suffered damages as a result of the breaches

alleged.[6] The plaintiffs obtained an order in terms of rule 33(4) that the issues formulated in the pleadings be decided separately. The order provided:

(1) In terms of Rule 33(4) all the issues other than those referred to in para 2 below shall be determined during the hearing which is to commence on 23 April 1997.

(2) The issue of the quantum of the plaintiffs' damages as formulated in para 14 of the particulars of claim shall stand over for determination at a later stage.

(3) The order does not preclude the parties from canvassing the issue of what damages were in the contemplation of the parties at any material time.[7]

The first stage hearing took place before Sutherland AJ, who found, amongst other matters, that a contract, as alleged, had been concluded. Before the matter went to trial on the reserved question of the quantum of the plaintiff's damages, the defendant applied to amend its plea to allege that the contract had been cancelled. The application was refused by Southwood J. At 787C-H, the learned judge reasoned as follows:

> The effect of the order made in terms of Rule 33(4) was that the issues on the pleadings would be resolved in two separate and self-contained trials. See *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 408H--I and 408B-C. The order made by Sutherland AJ after the hearing on the issues other than quantum was a final decision (ie it could not be corrected or altered or set aside by the trial Judge at a later stage of the trial) and it was (or should have been) definitive of the rights of the parties. See *SA Eagle Versekeringsmaatskappy Bpk v Harford* (supra at 789B and 792C-H); *Marsay v Dilley* 1992 (3) SA 944 (A) at 962C-H; *Schmidt Plant Hire (Pty) Ltd v Pedrelli* (supra at 407A-D). As a final decision the order was appealable. See *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 583H--I; *SA Eagle Versekeringsmaatskappy Bpk v Harford* (supra at 792H); *Marsay v Dilley* (supra at 962C-E). A Court which has given such a final decision is *functus officio* and cannot thereafter grant an amendment of the relevant pleadings. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G; *Govender v Hassim* 1994 (1) SA 304 (D) at 305G-H; *Randfontein Estates Ltd v Robinson* 1921 AD 515 at 519.
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> In *Schmidt Plant Hire (Pty) Ltd v Pedrelli* (supra) where a separation of issues had been ordered in terms of Rule 33(4) and the Court had given judgment on the question of liability it refused to allow an amendment of the pleadings relating to the question of liability. The Court considered that the grant of the amendment would bring about a re-opening of the issues which had already been finalised at the earlier hearing and found that it had no power to grant such an amendment (at 407A--D). I respectfully agree with the reasoning and conclusion of the Court on that issue.

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[6] *David Hersch* at 784 I.
[7] *David Hersch* at 784J-785B.

The approach adopted by Southwood J appears to me to be correct, with respect. It is directly in point in the current matter.

[12] The judgment thus far disposes of the application adversely to the plaintiff insofar as paragraphs 2 to 11 of the proposed substitute plea in reconvention is concerned. The plaintiff's counsel submitted that even were I to arrive at the conclusion I have reached in respect of those paragraphs, paragraphs 12 to 17 nevertheless go to quantum and plead issues that are triable in the second stage trial contemplated by the order in terms of rule 33(4). I agree. The observations about 'quantum' made by Van Zyl J (Schoeman and Dambuza JJ concurring) in delivering the judgment of the Full Court in *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG), at para 37, albeit in the context of separation of the issues of liability and quantum in a road accident compensation claim, are pertinent in this respect in my view. The learned judge stated:

> …..the statement in *Tolstrup* [*Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W)] that the issue of 'quantum' or 'damages' pertains to 'how much' is payable, creates the impression that the enquiry at the trial relating to damages must always be confined to a simple numerical assessment of the damages in terms of money. To do so is to limit the words 'quantum' and its equivalent 'damages', as these terms are used interchangeably in the context of a separation of issues, to the narrow legal definition thereof, namely the monetary equivalent of loss or damage 'awarded to a person with the object of eliminating as fully as possible his past as well as future damage'. This approach loses sight of the fact that where on the pleadings the allegation that the plaintiff has suffered damage or loss is in dispute, the enquiry relating to damages in the context of a separation of issues into merits and quantum consists of two facets, namely the existence of loss or damage, and the assessment of the amount thereof. …
> As Grosskopf JA in *Santam Insurance Co Ltd v Fourie* [1997 (1) SA 611 (A), at 614F] correctly remarked, 'before coming to the computation of loss one must first ascertain whether any loss at all has in fact been suffered'. The words 'damages' and 'quantum' would accordingly bear a wider meaning in this context than simply the computation of loss or damage which has been found to exist'. (Footnotes omitted.)

[13] The defendant's counsel did not dispute that the feasibility of earning a profit out of the joint venture agreement was a relevant aspect of the quantum stage of the trial. They submitted, however, that the manner in which this issue was proposed to be pleaded by the plaintiff in its proposed substitute plea was inextricably bound up with its allegations of voidness for impossibility of performance. In this regard they pointed to the employment in the paragraphs of the proposed plea directed at quantum of expressions such as 'In the premises…', 'In the circumstances…' and 'For the

reasons set out above,..' Their argument was that the plaintiff should, if it wished to persist with the allegation that a profit could not have been made from the joint venture agreement, reformulate its substitute plea to advance the point shorn of any implication that the agreement was void. Their contention in this regard seems to me to be sound.

[14] I do not think it is appropriate for the court to reformulate paragraphs 12 to 16 of the proposed substitute plea in reconvention to meet the findings of the court on the objections raised by the defendant to the plaintiff's proposed amendments. The more appropriate course would be to refuse the application and leave it to the plaintiff, if so advised, to devise any reformulation of its plea in reconvention it might wish to advance its defences on the 'quantum' issue in a manner that would be permissible.

[15] In the result the application is dismissed with costs. The parties were agreed that the costs of two counsel were reasonably incurred. I share that view. It is directed that the costs shall include the fees of two counsel.

A.G. BINNS-WARD

Judge of the High Court

Date of hearing:	**4 December 2014**
Date of judgment	**9 December 2014**
Plaintiff's counsel:	**W.R.E. Duminy SC**
	R.J. Howie
Defendant's counsel:	**M.W. Janisch**
	Coriaan De Villiers
Plaintiff's attorneys:	**Hogan Lovells (SA) incorporated as Routledge Modise Inc.**
Defendant's attorneys:	**Werksmans Attorneys (Tyger Valley)**