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

Case No: 5288/2020

In the matter between:

TECHNICAL SYSTEMS (PTY) LTD	Plaintiff/Respondent
and	
RTS INDUSTRIES	First Defendant/Excipient
C QUIPTECH (PTY) LTD	Second Defendant/Excipient
CGC INDUSTRIES (PTY) LTD	Third Defendant/Excipient
CHRISTIAAN ARNOLDUS KURTZ	Fourth Defendant/Excipient
CARL WILLIAM RICHTER	Fifth Defendant/Excipient

Coram: Justice J I Cloete

Heard: 25 January 2021

Delivered electronically: 1 March 2021

JUDGMENT

CLOETE J:

[1] This is an exception brought by all 5 defendants to the plaintiff's particulars of claim. The claims advanced by the plaintiff fall broadly into 3 categories, namely interdictory relief, damages and contempt of court.

[2] The exception is directed at those pertaining to interdictory relief and damages and is formulated in the following terms:

> *'1. In paragraph 12 of its particulars of claim, Plaintiff pleads that during 2014 it instituted application proceedings against the first, third, fourth and fifth defendants under case number 17470/14 for interdictory relief, based upon the misappropriation, by such defendants, of its confidential information concerning the manufacture of auger.*
>
> *2. In paragraph 13 of its particulars of claim, Plaintiff pleads that its application as aforesaid was amended to also include relief based on the infringement of copyright in its drawings.*
>
> *3. In paragraph 14 of its particulars of claim, Plaintiff pleads that it obtained an order in relation to such application ("**the 2015 Order**") and a copy of such order is annexed to its particulars of claim as "**POC 1**" thereto.*
>
> *4. In paragraph 1 of the 2015 Order it is stated that, and in any event, the 2015 Order is in full and final settlement of the aforesaid application and all matters between Plaintiff and Defendants, arising from the issues in dispute in such application.*
>
> *5. Plaintiff's present claim as set out in, and* ex facie*, the particulars of claim is, (except insofar as it relates to allegations of contempt in relation to the 2015 Order and the relief sought in relation to such allegations of contempt) a claim for the same relief on the same grounds and against the same parties as was determined in the application and the 2015 Order.*

> 6. *In the circumstances Plaintiff's present claim (except insofar as it relates to allegations of contempt in relation to the 2015 Order and the relief sought in relation to such allegations of contempt) was finally adjudicated upon by a court of competent jurisdiction and has accordingly been rendered* res judicata*.*
>
> ***WHEREFORE*** *Defendants plead that Plaintiff's claim against Defendants (except insofar as it relates to allegations of contempt in relation to the 2015 Order and the relief sought in relation to such allegations of contempt) be dismissed with costs, including the costs of two counsel.'*

[3] Nowhere in the exception itself is there any allegation that the particulars of claim ("the pleading") is either vague and embarrassing or lacks averments necessary to sustain an action as required by uniform rule 23(1). No prior notice was given to the plaintiff to remove the cause of complaint as stipulated in the aforementioned sub-rule, and it can therefore be safely accepted that the defendants do not suggest the pleading is vague and embarrassing in any respect.

[4] Also absent is any prayer that the exception be upheld. Instead an order is sought dismissing the plaintiff's claims on the merits (save insofar as they relate to contempt).

[5] In heads of argument filed on behalf of the defendants the issue for determination was formulated as follows:

> *'The question for adjudication is whether or not, apparent from the pleadings* [sic]*, the interdictory relief and damages claims set out in Plaintiff's particulars of claim are prohibited on the basis of the principles of res judicata.'*

[6] In *Lowrey v Steedman*[1] the plaintiff excepted to a plea on two grounds, only one of which is relevant for present purposes, namely that it was impermissible for the defendant to plead a verbal agreement where a court had already decided on an earlier exception that such a plea was incompetent. The trial court allowed the later exception without hearing any evidence. On appeal it was held that this particular exception was in reality a special plea of *res judicata* in support of which it was necessary for evidence to be led. In the absence of such evidence the appeal had to be upheld.

[7] At 539 Solomon JA found as follows:

> *'…Now the first exception is really a special plea of* res judicata *in support of which it would be necessary to call evidence. There is no such evidence, however, on the record, and none apparently was taken. Moreover we are informed by Mr.* Burne*, who appeared for the appellant, and who also argued the case for him in the court below, that not only were the pleadings and the judgment in the previous case, which is referred to in the so called exception, not put in but that no argument was heard upon the point. The Judge apparently himself had knowledge of the previous decision, and held that it precluded him from considering the question again. But, whether that is so or not, it is clear that the special plea of* res judicata *could not be decided in favour of the respondent except upon evidence in the court below to substantiate it, and as there is no such evidence in the record, the decision of the court below allowing the first exception must be set aside.'* [emphasis supplied]

[1] 1914 AD 532.

[8] In Amler's Precedents of Pleadings[2] the author, citing *Lowrey* as authority, states that as a matter of procedure *'although known at common law as an* exceptio*, the defence cannot be raised by way of exception but must be raised in a plea or special plea'.*

[9] *Lowrey* was followed in *Blaikie-Johnstone v P. Hollingsworth (Pty) Ltd:*[3]

> *'In the ordinary case, of course, the defence of* res judicata *must be specifically pleaded and supported by evidence of the previous judgment, and if it is not pleaded the defendant is taken to have waived it. (See* Voet*, 42.1.47 and 44.2.2;* Hoffmann*,* op. cit*. at p. 241;* Caney*,* op. cit. *at p. 101;* Lowrey v. Steedman*, 1914 A.D. 532 at p. 539)...'*

[10] It was also followed in *Hochfeld Commodities (Pty) Ltd v Theron*:[4]

> *'Die verweer van* res judicata *moet gepleit en bewys word. Isaacs* Beck's Theory and Principles of Pleadings in Civil Actions *5de uitg op bl 164;* Lowrey v Steedman *1914 AD 532 op 539.'*

[11] In *Al-Kharafi & Sons v Pema*[5] it was held as follows:

> *'To determine whether a matter is* res judicata *the judgment, order and pleadings must be examined to determine whether a final decision has been made. It is only when the same issue has been decided that it can be said that the matter is* res judicata*. An "issue" can only be said to have been finally*

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2 9ed at 315.
3 1974 (3) SA 392 (DCLD) at 395C-D.
4 2000 (1) SA 551 (OPA) at 566J-567A. See also *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1963 (1) SA 737 (SR) at 739H.
5 2010 (2) SA 360 (WLD) at para [43], citing *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 46A-47H; *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 179H-181I; *Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 (C) at 74Hff.

and definitively determined when it has been fully canvassed by both parties in the expectation of the court pronouncing upon it…' [emphasis supplied]

[12] In the instant matter the plaintiff has annexed two orders to its particulars of claim. The one upon which the defendants rely is an order by agreement granted on 2 June 2015 in this Division under case number 17470/14 ("the 2015 Order"), arising from opposed motion proceedings between the plaintiff as first applicant, an entity known as Lavirco Beleggings (Pty) Ltd as second applicant, the first defendant as first respondent, the third defendant as second respondent, the fourth defendant as third respondent, and the fifth defendant as sixth respondent. It is common cause that no judgment was delivered in relation to the 2015 Order which could be examined by this court.

[13] The second defendant was not a party to those proceedings although the terms of that order purported to be *'in full and final settlement of this application and all matters between* [the parties thereto]*, including C Quiptech (Pty) Ltd, arising from the issues in dispute herein'.* Moreover Mr Gary Colenbrander was cited therein as fourth respondent and Mr Neil Theunissen as fifth respondent. As with Lavirco Beleggings (Pty) Ltd, neither Colenbrander nor Theunissen are parties to the current action on which the defendants' exception is founded.

[14] The 2015 Order is detailed and wide ranging, comprising of 28 numbered paragraphs and 11 typed pages. In certain portions obligations are imposed upon all the respondents thereto (thus including those who are not parties to

the current action); in others, obligations are only imposed on the first respondent (the first defendant in the present action). Similarly, there is reference at times to the rights and obligations of both applicants in those proceedings, and at other times only to those of the first applicant (or plaintiff in the current proceedings).

[15] It is trite that the onus rests upon the party relying on *res judicata* to prove it. It is equally trite that the requirements for proof are (a) a final and definitive prior judgment or order; (b) given in litigation to which the current parties or their privies were parties; and (c) the cause of action in both cases must be the same, and the same relief must, or may, have been claimed in both cases.

[16] In the instant case, *ex facie* the particulars of claim, one of the parties (the second defendant) was not a party, properly construed, to the previous motion proceedings culminating in the 2015 Order. It is not possible to discern from the 2015 Order how the second defendant fitted into that litigation. The allegation in paragraph 5 of the pleading that the fourth defendant is the sole director of the second defendant and *'…was at all times relevant to the issues in these particulars of claim'* one of its directing minds, takes it no further.

[17] In paragraph 12 of the pleading it is alleged that during 2014 the plaintiff instituted application proceedings against the first, third, fourth and fifth defendants under case number 17470/14 *'…for interdictory relief, based on the misappropriation, by the defendants, of its confidential information…'*. The precise nature of that information (which is highly technical) is not apparent

from the pleading or the 2015 Order. The technical nature of the information is demonstrated in the following paragraph of that Order:

> *'4. The Respondents recognise that First Applicant has a confidential production process for the production of augers consisting of an inline process for the making of a high-tensile, flat steel wire from flexible steel rod, wherein the steel rod is ex-mill, as-rolled, non-annealed and non-pickled and wherein the flat steel wire has a fine martensitic structure with inclusion of scale originating from the steel rod.'*[6]

[18] It is further alleged in paragraph 12 of the pleading that during the course of that litigation the plaintiff established the defendants were in possession of a large number of its technical drawings, which they were using for their own nefarious purposes, and which resulted in the plaintiff extending the ambit of the relief it then sought to include that *'…based on the infringement of the copyright in its drawings'.*

[19] Paragraph 10 of the 2015 Order interdicted and restrained the respondents from infringing the plaintiff's copyright in its artistic works *'…comprising of its technical drawings as described the definition of the Works in annexure "SA15" to Applicants' Founding Affidavit in the Application for Amendment and as discovered under the heading Part 1 B: Confidential Discovery Document Items 1 to 1179 ("the copyrighted works")…'*. It is similarly not possible to discern from the pleading and the 2015 Order precisely what technical drawings fell within the ambit of that paragraph. This would of course be clear

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[6] The "CONFIDENTIAL ADDENDUM: THE CONFIDENTIAL PROCESS" annexed to the pleading is similarly technical in nature.

from the papers filed in the prior motion proceedings, none of which (save for the 2015 Order) are before me.

[20] Accordingly therefore this Court is not in a position to ascertain from the pleading itself whether the previous cause of action is the same as the present, and the same applies to the precise nature of the relief sought.

[21] Moreover the pleading goes further, and deals in paragraph 16 with events which only came to the knowledge of the plaintiff in September/October 2018, after it successfully obtained a preservation (Anton Piller) order on 27 March 2017 (this is the second order annexed to the pleading). Although some of the plaintiff's knowledge obtained subsequent to the 2015 Order pertains, *ex facie* the pleading, to events pre-dating it, as a matter of logic the relief currently sought in respect thereof could never have been the cause of action (or part of it) in the previous motion proceedings. The plaintiff also alleges that other facts upon which it relies (as pleaded), i.e. a large number of the infringing works, only came into existence after the 2015 Order.

[22] It is therefore apparent, *ex facie* the pleading, that the subject matter of the claims in issue (i.e. interdictory relief and damages) is different from those with which the 2015 Order was concerned.

[23] To my mind however, since the defendants have adopted the incorrect procedure, it would be inappropriate and premature to make any findings in this regard. The defendants are at liberty to raise a special plea of *res judicata*

in due course, and the matter can then be fully canvassed through discovery and the leading of evidence.

[24] The plaintiff seeks a punitive costs order. In the exercise of my discretion I do not believe that such an order is appropriate. The pleading under scrutiny is not a simple, straightforward one and it is possible that the defendants have misread it. While there may be merit in the plaintiff's contention that the exception was deliberately brought to delay the matter and/or avoid discovery and evidence on the issue of *res judicata*, I simply do not have enough before me to warrant a conclusion that the approach adopted by the defendants is an abuse of the court process.

[25] **The following order is made:**

"The defendants' exception is dismissed with costs on the scale as between party and party as taxed or agreed, including the costs of two (2) counsel as well as any reserved costs orders."

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J I CLOETE