

SOUTH AFRICA / JUDGMENT

**Leeuwinplase (Pty) Ltd t/a Leeuwin Plase v
Die Vier Winden Property Holdings (Pty) Ltd
(6796/12) [2012] ZAWCHC 250 (1 January 2012)
[2012] ZAWCHC 250**

COURT

Western Cape High Court, Cape Town

BEFORE

LM Olivier

CASE / FILE NUMBER

6796/12

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Republic
of South Africa
IN
THE HIGH COURT OF
SOUTH
AFRICA
(WESTERN
CAPE HIGH
COURT, CAPE TOWN)
Case
Number 6796/12
In

the matter between:

LEEWINPLASE
(PTY) LTD t/a LEEUWIM PLASE
.....Plaintiff
DE
VIER WINDEN PROPERTY HOLDINGS (PTY)
LTDDefendant

JUDGMENT

LM OLIVIER, AJ:

1. On 27 September 2011, Plaintiff and Defendant entered into a written agreement of sale (the "sale agreement"), pursuant whereunto Plaintiff sold dairy stock to Defendant. Defendant drew five postdated cheques of R400 000,00 each in favour of Plaintiff in payment of the purchase price of R2m.
2. The first cheque was not presented for payment, as Defendant paid the amount to Plaintiff by means of electronic transfers on 11 and 12 October 2011.
3. When the second cheque was presented for payment on 11 November 2011, it was returned, marked "Payment Stopped", Plaintiff applied for provisional sentence (the "first application"). The parties filed answering and replying affidavits.
4. After argument, the Court granted provisional sentence in favour of Plaintiff. Pursuant to the provisional order, Defendant paid

Plaintiff. Security was demanded, but not provided, due to what appears to be administrative problems, none whereof were of the

making of Defendant.

5. In terms of Rule 8(10), Defendant therefore had the right to enter into the principal case, as Plaintiff had failed to furnish due security on demand. Defendant did not deliver a notice of its intention to enter into the principal case and the provisional

sentence ipso facto became a final judgment pursuant to the provisions of Rule 8(11).

6. As the further cheques were returned marked "Payment Stopped", Plaintiff again applied for provisional sentence on the three unpaid cheques. This is the present application which is opposed by Respondent (the "present application").
7. As the judgment on the first application had become final, the parties were requested to present argument on the applicability of issue estoppel, as the defences raised in the present application are in essence the same, albeit now elaborated upon and fleshed out, as in the first application wherein judgment had become final. Could the Court *mero meto* raise issue estoppel and what are the consequences of Plaintiffs failure to rely on issue estoppel in its replying affidavit?
8. Defendant submitted that it had at all times intended to enter into the principal case and had not done so due to Plaintiffs failure to provide the requested security on demand. The provisional sentence judgment, on this submission, therefore did not become final and, if it did, Defendant could and would apply for a rescission thereof.

9. I cannot agree. It is because Plaintiff failed to provide security on demand that Defendant was entitled to enter into the principal case. The failure to provide security did not relieve Defendant of its obligation to deliver a notice of its intention to enter into the principal case, or its right to apply for an extension of time wherein to do so. It is common cause that no such notice, or application to extend the time period, was delivered, The judgment therefore became final by the operation of the provisions of the Rule.
10. Defendant contends that issue estoppel is not applicable, as each cheque constitutes a separate cause of action founded on a liquid document and the same thing is therefore not claimed on the same ground.
11. In *Horowitz v Brock*¹, it was stated that the doctrine of issue estoppel does not require that the same thing must have been demanded. It is the lack of this element that distinguishes it from *res judicata*.
12. In *Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk*², it was stated that issue estoppel is a useful expression to describe those cases which do not, strictly speaking, conform to the traditional requirements of *res judicata*.
13. Under the circumstances, I do not agree with Defendant's contention above, as issue estoppel arises where the same thing is not claimed on the same ground in the subsequent proceedings.
14. *Res judicata* must ordinarily be specifically pleaded and be supported by evidence of the previous judgment.³ I can see no reason why this should not hold true for issue estoppel, which is a rule of *res judicata*⁴, as estoppel is not odious, but must be applied so as to work justice and not injustice, which is the overriding consideration when the principle of issue estoppel is applied.⁵ It would in the circumstances of the present matter be manifestly unjust to apply the principles of issue estoppel. Had Defendant been afforded an opportunity to respond to any reliance thereon, it would no doubt then have applied for the rescission of the judgment, which had, by the operation of Rule 8(10) and without any final pronouncement on the merits, become final in effect. Such an application for rescission is competent.⁶
15. In my view the Court cannot raise issue estoppel *mero mo* to and Plaintiff is not, without pleading same, entitled to rely on the principles of issue estoppel.
16. In motion proceedings, the affidavits do not only take the place of the pleadings, but also of the essential evidence which would be led at the trial.⁷ A party is entitled to make any legal contention open from the facts as they appear in the affidavits.⁸ A respondent cannot in answer to a claim, based on contract, treat the contract as both existing and as cancelled ⁹.
17. Defendant admits that each cheque bears the signature of its authorised agent, Mr Smith, and accepted that the onus rests on

Defendant to show that the probabilities in the principal case are in its favour.

18. Defendant relies substantially on an alleged counterclaim for damages, which it contends is inextricably linked to the transaction

underlying the cheques and which is in excess of the value of the unpaid cheques.

19. Prior to the sale agreement and during April 2011, Plaintiff and Defendant had, according to Defendant, concluded a silage agreement,

in terms whereof Plaintiff agreed to silage oats grown on Defendant's farm for the purposes of making bunker oats feed for Defendant's

dairy stock.

20. Defendant contends that the cheques sued upon, form part of a larger transaction, namely the silage contract, and Defendant has a valid claim for the cancellation of such contract and a claim for damages against Plaintiff. The real cause of action is said to be the silage agreement.

21. In the answering affidavit in the first application, Defendant relied on the defences that:

21.1. the signing of the cheques was induced by misrepresentation. Plaintiff represented that it would make bunker silage from the

entire crop of oats on Defendant's farm, which representation was false, material and induced the sale agreement;

21.2. at the time of the conclusion of the sale agreement, the common understanding of the parties, which was the basis of the sale, was that, without silage, the farm could not sustain the stock sold by Plaintiff. The cheques were issued on the basis of this common understanding and hence common assumption. Consensus was reached on the basis of this common assumption. The common assumption failed and the sale agreement fell away;

21.3. in the alternative to subparagraph 21.2, it was a condition or implied term of the sale agreement that Plaintiff would timeously

comply with its obligations under the silage agreement, failing which Defendant would not purchase the livestock being sold. Plaintiff did not perform timeously or at all and the sale agreement therefore lapsed;

21.4. the alleged counterclaim for damages for losses incurred as a result of Plaintiff's failure to make bunker silage and breach of the silage agreement

22. In the present answering affidavit, Defendant does not contend that Plaintiff breached the sale agreement, but says that it arrived at the conclusion that Plaintiff never had the intention of not performing in terms of the silage agreement, but as a result of unforeseen circumstances that presented themselves, which circumstances were beyond Plaintiff's control, Plaintiff was left with

no alternative but to make certain tough decisions to solve the problem which Plaintiff now, unintentionally, found itself in, with the consequence that Plaintiff could not perform in terms of the silage agreement. Plaintiff realised that it could play Defendant and could solve the unforeseen problem by misrepresenting the ripeness of the crops and the timing as to the cutting of the silage. Defendant had called Plaintiff every day between 5 and 17 October 2011, as Defendant had begun to fear that Plaintiff would not be able to fulfill its obligations arising from the silage agreement. On 17 October 2011, Defendant contacted three persons who independently advised it not to continue with the silage process and Defendant advised Plaintiff to suspend the silage process.

23. On 19 October 2011, Defendant had sent a letter to Plaintiff wherein no reference was made to the sale agreement. Defendant records that, as from mid-August, Defendant began requesting Plaintiff to start making silage by the end of August 2011. At the beginning of September 2011, Defendant repeatedly requested Plaintiff to commence with the silage process.
24. On 20 September 2011, Plaintiff had commenced the silage process and departed on 22 September 2011. After further requests, Plaintiff returned to the site on 2 October 2011 and departed on 5 October
2011. Defendant says that it became apparent when Plaintiff did not return by 5 October 2011 (sic) that the risk of not fulfilling the contract became a real possibility.
25. On or about 11 November 2011, Plaintiff had presented the second cheque for payment. On 16 November 2011, and in response to a complaint by Plaintiff in regard to the cheque not being paid, Defendant had sent an e-mail to Plaintiff, wherein Defendant informed

it that the cheque had been stopped on the instruction of the financial institution and investors in Defendant "resulting from Leeuwan Plase/John Groenewald's failure to honour the silage contract". Again, not a word was said about the sale agreement

26. It is convenient to now deal with Defendant's contention that the real cause of action is the silage agreement, or that the silage and sale agreements form part of one larger transaction. Defendant never contended for such a state of affairs in the correspondence that was exchanged. Defendant expressly stated that payment of the cheques was stopped, resulting from the failure to honour the silage agreement.
27. The counterclaim for damages arises from the alleged breach of the silage agreement. There is no link between the silage and sale agreements. The silage agreement was not even referred to in the sale agreement. The silage agreement was concluded long before the sale

agreement and was not affected by the conclusion thereof or not. The dates on which payments in respect of the sale agreement fell due, are recorded in the cheques and nowhere is there an indication that the obligations of Defendant are reciprocal to the obligations of Plaintiff in terms of the silage agreement. The cheques were issued pursuant to the sale agreement and not the silage agreement. In the circumstances, this contention is without merit.

28. There are five observations to be made arising from the stance adopted by Defendant in the present application, i.e. that Plaintiff

unintentionally could not perform due to unforeseen circumstances, as set out in paragraph 22 above. Firstly, there could, under such circumstances, have been no misrepresentation by Plaintiff when the sale agreement was concluded. Secondly, any misrepresentation in regard to the ripeness of the crop and timing of the cutting could have had no influence on the sale agreement, as it was made after the conclusion of that agreement. Thirdly, the alleged misrepresentation did not induce the conclusion of any of the agreements and is in fact not even a misrepresentation at all, but, at best for Defendant, a failure to perform timeously and properly in accordance with the terms of the silage agreement. Fourthly, the misrepresentation did not induce the signing of the cheques, as alleged by Defendant. Fifthly, Defendant contradicts itself in regard to the misrepresentation which was allegedly made. In the circumstances, the defence of misrepresentation is rejected.

29. In its heads of argument Defendant submitted that its opposition to the claim was predicated on an assumption that Plaintiff agreed to silage the crop Defendant had planted, as Plaintiff had done in the previous year and that Plaintiff would silage as and when parts of the crop were ripe for silaging; alternatively a representation to that effect.
30. During oral argument, Defendant, as I understood, all but abandoned any reliance on this as a separate ground of defence. It appears that Defendant changed tack from the alleged failure of the common assumption in regard to future facts when faced with *Van Reenen Steel (Pty) Ltd v Smith NO & Another*, 2002(4) SA 264(SCA), relied on by Plaintiff. A tacit term or condition was relied upon as a defence and not, as was stated by Defendant in its affidavit, a failure of a common assumption.
31. As the sale agreement does not contain any such term or resolutive condition, Defendant has, for this defence to succeed, to rely on a tacit term or condition.
32. During argument, Counsel for Defendant was requested to formulate the tacit term or condition. It was then submitted that Defendant relied on a tacit resolutive condition, being that Plaintiff would silage the oats to feed the cows and, if Plaintiff failed to do so, the sale would fall through.
33. In the opposing affidavits no mention is made of such a tacit resolutive condition, or the wording thereof. As an affidavit in motion proceedings fulfils the dual function set out above, it is not open for Defendant to rely on such an alleged tacit resolutive

condition.

34 In any event, the term or condition that Defendant seeks to rely on is not necessary in the business sense to give efficacy to the sale agreement. It is unlikely that the parties would have been unanimous on both the need for and content of a term not expressed when such term is not necessary to render the contract fully functional.¹⁰

35. The sale agreement is fully functional without the tacit term or condition contended for. The implementation of the alleged tacit term or condition would have the consequence that Plaintiff would lose the milk produced by the herd, without any compensation, save maybe for such interest as it may have earned on the portion of the purchase price which had by then been paid. The alleged tacit term or condition is, in my view, unusual and not one of which could confidently be said that the parties would have been in agreement on when the sale agreement was entered into.
36. In any event, Defendant did not rely on the existence of a tacit term and the breach thereof, or the fulfillment of a resolutive condition, as a reason for the instruction to the bank not to pay the cheques. It was the alleged breach of the silage agreement which was relied on. Defendant sold some of the cows purchased subsequent to the alleged breach, which clearly illustrates that it did not then consider the sale agreement to be subject to a resolutive condition as Defendant now seeks to proclaim.
37. Defendant contends that it has a counterclaim for damages in a sum greater than the amount owing on the sale agreement. The damages are said to represent the loss in milk production as a result of the dairy cows eating grain and straw as opposed to silage.
38. This is where Defendant's various defences create insurmountable obstacles. On Defendant's version, the sale agreement had lapsed due to the non-fulfilment of a resolutive condition. If the sale agreement had lapsed, Defendant would have been obliged to return the herd bought (and not be entitled to sell off cows as Defendant has) and would consequently not have been able to produce any milk; let alone realise a loss from the herd after 17 October 2011, being the date when Defendant advised Plaintiff to suspend the silage process. Defendant seeks to treat the sale agreement as both existing and cancelled, which it cannot do, as is set out in paragraph 16 above.
39. Defendant's counterclaim would only arise should its other defences, set out hereinabove, fail. The counterclaim arises from the alleged breach of the separate and distinct silage agreement. No breach of the sale agreement or the terms of the cheques, on which the claims for provisional sentence are based, is alleged.
40. Plaintiff denies that Defendant has a claim for damages and contends that the silage agreement was not breached,

41. It is common cause that Defendant instructed Plaintiff on 17 October 2011 not to proceed with silage. Defendant had been advised by experts that the oats was too dry. Mr Smith did not possess the expertise to make such determination. A potential finding of liability would therefore to a large extent rest upon the correctness of this advice.
42. In order to prove damages, Defendant would have to present expert evidence: not only in regard to the findings upon which its instruction to Plaintiff aforesaid was based, but in respect of the quantification of such damages, which Mr Smith says amount to between R1 072 968,00 and, at worst, R2 318 882,00.
43. When the fact that not one of the reports of the experts, annexed to the opposing affidavit, were confirmed under oath was raised by the Court, Counsel for Defendant submitted that the Court is obliged to accept as evidence reports and statements of experts, although not so confirmed as Plaintiff did not attack the validity of the reports and statements. The failure of a party to object to the factual findings and observations contained in such reports or statements, does not, in my view, render same admissible. Plaintiff denies any breach of the silage agreement and such breach can only be shown by expert evidence, which evidence is not before me.
44. Defendant has not shown that the probabilities in the principal case are in its favour. In fact, the counterclaim does not relate to the principal case at all. In my view, Defendant has failed to meet the lowest threshold, being an even balance of prospects of success of its counterclaim.
45. In the circumstances, provisional sentence is granted against Defendant for Plaintiff in terms of claims 1.1, 1.2 and 1.3 of the provisional sentence summons, with costs; such costs to include the costs of the postponement on 23 May 2012.

L M OLIVIER AJ

11988(2) SA 160(A) at 179(A).

21995(1) SA 653(A) at 671A-B. See further *Smith v Porrit & Others*, 2008(6) SA 303(SCA) at 308B- E.

3*Blaikie-Johnstone v P Hollingsworth (Pty) Ltd*, 1974(3) SA 392(D) at 395C-D.

4*Richtersveld Community v Alexker Ltd & Another*, 2000(1) SA 337(LCC) at 342C-D.

5*Re State of Norway's Application (No2) f 1989J I All ER 701(CA)* at 714.

6*FO Kolberg (Pty) Ltd v Atkinson's Motors Ltd*, 1970(1) SA 660(C). See further *Mahabro Investments (Pty) Ltd v Kara*, 1980(2) SA 772(D).

7*Herbstein & Van Winsen: The Civil Practice of High Courts of South Africa (5th Edition) Volume I*, page 439 ("Civil Practice").

80 *Civil Practice*, page 443.

9Civil Practice, page 595.

10Wilkins NO v Voges, 1994(3) SA 130(A) at 137B-C.

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