

SOUTH AFRICA / JUDGMENT

Steenkamp NO and Another v Mossel Bay Municipality (21583/2011) [2016] ZAWCHC 127 (22 August 2016)

[2016] ZAWCHC 127

COURT

Western Cape High Court, Cape Town

BEFORE

Davis

CASE / FILE NUMBER

21583/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 21583/2011

DATE: 22 AUGUST 2016

In the matter between:

JAN KASPER GERHARD STEENKAMP NO.....1st Plaintiff

STEPHANUS JOHANNES STEENKAMP NO.....2nd Plaintiff

And

MOSEL BAY MUNICIPALITY.....Applicant

J U D G M E N T

DAVIS, J:

In this matter the plaintiffs have sought to apply for leave to amend their particulars of claim as is set out in a notice of intention to amend 31 March 2016. The application is opposed by the defendant. Briefly, the background to this matter can be set out thus: during the period 2007 to 2008 defendant invited interested parties to submit bids for certain development rights in the municipal area of Mossel Bay.

On 19 December 2008 it appears that plaintiff was awarded certain rights subject to the conclusion of a land availability agreement between defendants and the plaintiffs to be signed in due cause. This was confirmed in a letter of 5 February 2009 in which Mr Du Plessis, the acting municipal manager of defendant, wrote to the plaintiffs as follows:

“This is to notify you that your bid for the development rights for purposes of establishing affordable housing in terms of the above

mentioned tender has been accepted subject to the successful negotiation in signing of a land availability agreement. No

objection received from other bidders within the 21... day objection period. You will be contacted shortly by an official from the municipality regarding the negotiation signing of a land availability agreement as well as a service agreement.”

It appears that attached thereto was a land availability agreement in draft form. Thereafter a competing tender, ASLA, took the award of the tender to plaintiffs on review which was opposed by plaintiffs. The hearing of the review in August 2009 was converted into internal appeal proceedings. ASLA, the defendant and plaintiffs were all party to these internal appeal proceedings. On 21 October 2009 at a pre-trial conference held in Mossel Bay regarding the impending internal appeal proceedings, the parties agreed that these proceedings should be converted into arbitration proceedings. The arbitration was ultimately set down for hearing in Mossel Bay at the end of January 2010. At the hearing of the arbitration the internal appeal was settled between all the parties (according to plaintiffs’ version) on the basis that the development right were to be awarded to both ASLA and the plaintiff on a shared basis.

A settlement agreement was entered into and to the extent relevant reads thus:

“Settlement agreement between appellant (ASLA) and third and fourth respondents on behalf of Stone Trade Trust (STTC) (the third and fourth respondents were the trustees of the trust).”

The agreement continues:

“Whereas the Mossel Bay Municipality (the Municipality) accepted STTC’s bid for the development rights in respect of land in Heiderand, D’Almeida and Kwanonqaba (the development rights) in accordance with the letter dated 5 February 2009 ... STTC abandons the development rights granted to it in respect of land in Heiderand and undertakes not to object to the award of rights to land in Heiderand to ASLA by the municipality. ASLA withdraws its appeal against the award insofar as it relates to the land in D’Almeida and Kwanonqaba and undertakes not to object to the award of such rights to STTC. This agreement is subject to:

3.1 the parties obtaining a legal opinion confirming that the aforementioned agreement may be implemented by the municipality in accordance with a call for proposals in respect of the development; and the municipality through its duly authorised agent concluding land availability agreements with both.

3.2.1 ASLA in respect of ASLA's proposal submit to the municipality in respect of the land in Heiderand and;

3.2.2 STTC in respect of the land in D'Almeida and Kwanonqaba."

Plaintiffs' summons in the matter was issued during October 2011. During January 2012 defendant filed a plea in the matter in respect of which essentially it contended that;

The award of the tender was always "subject to the successful negotiation and signing of land availability agreement" and that as such the agreement contended for by the plaintiffs was inchoate and unenforceable.

The plaintiffs as prospective tenderers were under a legal duty to fully disclose to the defendant all facts relevant to their financial ability to complete the tender.

Certain facts pertaining to the plaintiffs financial position were not disclosed to the defendant at the time of the submission of the plaintiffs bid and;

The defendant was therefore entitled to cancel whatever contractual relationship had come into existence between the parties upon the discovery of these facts.

During May 2015 the defendant amended its plea. It has filed further notice of intention to amend its plea on an extensive basis and as a result of this proposed amendment, the trial which had been set down for hearing during August 2015 could not proceed. As part of the defendant's amended plea, numerous additional defences were introduced to which I shall not pay particular attention at this stage. The parties subsequently agreed to separate certain legal issues arising from this amended plea and the plaintiffs' replication followed in October 2015.

Plaintiffs, according to Mr Huisamen, who appeared on behalf of the plaintiffs, were advised to amend their particulars of claim extensively to introduce a more comprehensive factual matrix within which the alleged repudiation on the part of the defendant took place. This notice of intention to amend, as I have indicated, took place on 31 March 2016. Plaintiffs' attempt to amend its particulars of claim was then met with a comprehensive objection by the defendant as of 11 April 2016. In essence the objections were based on the following grounds:

The plaintiffs were seeking to introduce a new cause of action which already had prescribed.

The amendment would render the particulars of claim excipiable for a series of reasons set out in this objection including that the defendant was not a contractual party to the settlement agreement referred to in the papers as annexure "POC4".

The participation of ASLA was necessary for the continued validity of POC4.

POC4 had lapsed due to the failure by the parties to conclude a land availability agreement prior to May 1, 2010 which was a suspensive condition of the settlement.

POC4 was legally invalid due to an alleged non-compliance of relevant legislation.

The inconsistencies between POC4 and other documentation annexed in the pleadings and relief sought namely that the annexure POC2 which was the draft land availability agreement to which I have made reference earlier and which was part of the original particulars of claim, was inconsistent with a further annexure POC5 to the notice of amendment which annexure were signed by or on behalf of the plaintiffs.

POC4 was inconsistent with the relief sought in terms of the particulars of claim which relief was in respect of all the land in question as opposed to a portion thereof to which I have already made reference.

Mr Huisamen submitted that plaintiffs case before and after the amendment had been and always was that the defendant had repudiated

the development contract concluded between the parties (in terms of the letter of 5 February 2009), that the plaintiffs had declined to accept the defendant's repudiation and were entitled to an order of specific performance, alternatively damages. In the alternative, plaintiffs accepted the repudiation and claimed damages arising from the defendant's repudiation of the contract.

The critical question which was raised in the debate about whether the amendment should be permitted was whether there was now a new cause of action.

A NEW CAUSE OF ACTION:

Before dealing with the facts of this matter, it is important to examine the law which underpins the arguments placed before this Court is of great relevance to the present dispute and therefore to defendant's arguments as to whether there is a new cause of action.

THE QUESTION OF PRESCRIPTION.

Section 10(1) of the Prescription Act 68 of 1969 ("the Act") provides, subject to the provisions of this Chapter and of Chapter 4, that a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

Section 15(1) of the Act provides that the running of prescription, subject to the provisions of subsection (2) is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

Mr Huisamen contended that, when the Act refers to a debt, it, in effect, refers more generally to a claim and not to a cause of

action. There is, in his view, a material difference between the concept of a cause of action and a right of action, the latter being equivalent to a claim or a debt.

In this connection he referred to the decision in *Rustenberg Platinum Mines v Industrial Maintenance Painting Services* 2009 (1) ALLSA 275 (SCA) where this issue was fully canvassed. In this case, in terms of an agreement between the parties, the respondent had

undertaken certain work for the appellant and supplied certain materials in relation to such work. Appellant had paid for the work based on invoices supplied by the respondent. However, it averred that subsequently it discovered that some of the claims paid were not valid and, based on unjust enrichment demanded repayment from the respondent. Only part of the amount was repaid leading to the action between the parties. When the trial commenced appellant sought to amend its particulars of claim.

In short, after three witnesses testified on its behalf, plaintiff sought to amend its particulars of claim by adding two alternatives

to its cause of action as pleaded, allegedly so as to accord with the evidence already tendered.

Defendants objected to the proposed amendment and this dispute proceeded all the way to the Supreme Court of Appeal. Of relevance are the following passages from the judgment of Mpati P at para 13:

“An amendment is no doubt permissible provided that the debt which is claimed by way of the amendment is the same or substantially the same debt as originally claimed. In order to decide the defendants’ objection based on prescription in this matter, that is whether the debt claimed in proposed amendment has become prescribed, it is necessary to identify the debt or as Harms, JA put it in Drennan .. one must ascertain ‘what the claim was in the broad sense of the meaning of that word’. As has been mentioned above it is common cause between the parties that when the excess amount was paid to defendant, there was no causa for the payment – no work had as yet been done and no materials supplied. It is that excess amount (“the debt”) as embraced in the original cause of action which plaintiff seeks to recover. It is true that the proposed amendment sets out a cause of action which is different from that contained in the particulars of claim. The proposed amendment seeks to introduce as alternative causes of action, contractual obligations arising from agreements between the parties in terms of which the defendant tacitly agreed to repay the excess amount to plaintiff. The question however is whether the proposed amendment introduces a new claim or debt.”

Mpati P then referred to the decision in *Evins v Shield Insurance* where Corbett, JA (as he then was) said the following:

“Where the plaintiff seeks by way of amendment to argument his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or an addition of a further item of damages.” Cited at para 14.

Mpatip, JP then continues:

“According to Corbett, JA if an amendment introduces a new ‘claim’ or ‘debt’ which is based on a new cause of action, such amendment will be susceptible to a special plea of prescription if the prescriptive period has run. Put differently, if the new cause of action i.e. the material facts which must be proved for a plaintiff to succeed, sought to be introduced by the amendment gives rise to a different ‘right of action’ or ‘debt’ to the one originally claimed, that plaintiff will be precluded from effecting the

amendment if the relevant prescriptive period has run. But as I understand the extract from the judgment of Trollip, JA it does not follow that a new cause of action sought to be introduced by an amendment will necessarily give rise to a 'claim' or 'debt'."

At para 19 the learned President continues:

"At the risk of repetition ... Jones, AJA said in deciding whether a summons interrupts prescription, it is necessary to compare the allegations and relief claimed in the summons with the allegations of the relief claimed in the amendment to see if the debt is subsequently the same .. When this test is applied to the facts of the present matter, the result seems to me to be that the plaintiff seeks throughout to recover the same debt .. It is so as I have mentioned above, that the allegations of 'cause of action' upon which the relief claimed is based in the amendment differs from the allegations of 'cause of action' set out in the particulars of claim but the relief claimed i.e. the 'debt' is, in my view, the same."

In the matter to which Mpati, P referred, that is CJU Insurance Limited v Rumdell Construction (Pty) Ltd 2004 (2) SA 622 (SCA) at para 5, the Court held:

"The defendants' argument is by introducing a new contract the plaintiff has introduced a new cause of action, but it does not follow that by curing a defective cause of action by introducing the contract upon which it really relies the plaintiffs, summons

necessarily claims a different debt. Indeed it is settled law, that a summons which sets out an excipiable cause of action can interrupt the running of prescription provided that the debt is cognisable in the summons and is identifiable as substantially the same debt as the debt in the subsequent amendment."

On the strength of this authority, Mr Huisamen contended that the plaintiff's cause of action was that they were entitled to certain development rights awarded to them as part of a tender process. The defendant had unlawfully repudiated its contractual obligations which flowed therefrom and accordingly plaintiffs were entitled to certain specified relief. In his view, the debt which was claimed by the plaintiffs had remained exactly the same. Plaintiffs were either entitled to specific performance, alternatively to damages. All that the plaintiffs were now seeking to introduce by way of the amendment was, in effect, to consolidate the range of pleadings which had grown from the initial summons; that is, to ensure that the comprehensive factual matrix, including the effect of the agreement of settlement in the internal appeal proceedings, within which the defendant's

repudiation is contractual obligation took place, was incorporated into the pleadings.

The settlement reached between the parties following the internal appeal process was purely incidental to the entire matter. While plaintiffs' cause of action might have been varied and / or expanded by the agreement of settlement or indeed limited thereby, the claim was in essence the same claim as initially had been instituted.

DEFENDANTS ARGUMENTS:

Mr Van Riet, on behalf of the defendant, contended that plaintiffs' cause of action as formulated in the particulars of claim of 30 September 2011 was based entirely on the following set of averments:

The alleged acceptance by defendant during February 2009 of the plaintiffs bid for the award of the development rights (low income housing).

As a consequence of the acceptance 'a contract (the development contract)' was duly concluded between the parties as at February 2009.

Defendant unlawfully repudiated the said development contract on the basis set out in the particulars of claim.

Plaintiff had declined to accept the alleged repudiation and its main claim was for specific performance by defendant of its obligations which flowed in terms of the "development contract".

Turning to the nature and effect of the proposed amendment to which defendant had objected so strenuously, Mr Van Riet contended that the intention was clearly to delete the existing particulars of claim in its entirety and to substitute therefore a new set of allegations which were contained in the notice of intention to amend. In his view, plaintiffs had now omitted all reference to the development contract and relied on the alleged settlement agreement concluded between plaintiffs and a co-bidder, being ASLA on 29 January 2010.

The proposed particulars of claim record that a legal dispute arose between the parties and ASLA, a competitive bidder, which took

defendants award of the bid on review to Court. This dispute was subsequently converted to defendant's internal dispute

resolution procedure and later to arbitration before Melunsky, J. On the first day of the arbitration "ASLA and the Trust resolved to settle the internal appeal (now arbitration)". The agreement reached between the parties (contained in POC4) at the arbitration proceedings furthermore finally disposed of all prior issues that may have existed in relation to the award of the tender to the Trust, the review proceedings brought by ASLA and the internal appeal proceedings with all the parties including the defendant, in other words the legal disputes were novated by agreement.

Although, according to Mr Van Riet, defendant was not a signatory to this agreement (POC4), the plaintiffs now sought to make defendant a party thereto on the basis of the series of ungrounded allegations:

ASLA and the Trust resolved to settle the arbitration 'with the express participation approval and consent of the defendants'

(para 27 of the notice of intention to amend).

Prior to the conclusion of the settlement agreement, defendant “indicated that it would be agreeable to award the development rights to both ASLA and the Trust on a shared basis subject to inter alia the condition that a legal opinion be obtained from counsel confirming that it would be lawful to do so”.

The said settlement agreement (POC4) was negotiated together with and expressly approved by the defendant.

Although POC4 was not signed by the defendant, the latter was a party thereto and bound by the provisions thereof.

Defendant at all material times represented and the parties at all material times accepted that the conclusion of a land availability agreement or development agreement between defendant and plaintiff would not constitute the basis for the defendant to frustrate the implementation of the development question.

Mr Van Riet further referred to paragraph 38 of the notice of intention to amend where the following allegation appeared:

“The defendant accepted and reached agreement on the terms of the said settlement agreement and / or acquiesced therein subject to only one proviso namely that a legal opinion be obtained confirming that the defendant was duly authorised to implement the settlement.”

In terms of paragraph 37 of the notice of intention to amend the following appears:

“In all circumstances the terms of the agreement which forms the plaintiffs cause of action in this matter, was therefore recorded in annexure POC1, read with the Trust bid document as amplified and / or amended by the agreement of settlement of 29 January 2010 (POC4)”.

In Mr Van Riet’s view therefore, it was clear that the conclusion and enforceability of the settlement agreement (POC4) between three parties, being plaintiffs, ASLA and defendant was an essential link in the new cause of action. It followed that the settlement agreement was therefore a novation of the development contract. In short, the defendant adopts the view that the settlement agreement was a compromise and that it had extinguished any prior claim of the plaintiff.

Mr Van Riet sought to support defendant’s case on the basis of an exposition of the law of compromise. Compromise unquestionably

extinguishes any legal relationship that may previously exist between the parties. It brings legal proceedings already instituted to an end and prevents further legal proceedings in respect of the original disputed cause of action. See for example *Western Assurance Company v Caldwell’s Trustee* 1918 AD 262 at 270-271. *Gollach and Gompers (1967) (Pty) Ltd v Universal Mills and Produce Company (Pty) Ltd* 1978 (1) SA 914 (A) at 922. On this basis and because a compromise does not depend on an original cause of action, a party sued in a compromise cannot then go

behind the agreement and raise defences to the original cause of action.

The extent to which a disputed cause of action is affected by a compromise depends on the intention of the parties. The compromise may be concluded, subject to either a suspensive or resolute condition. Much of Mr Van Riet's argument was based on the decision in *Van Zyl v Niemann* 1964 (4) SA 661 (A) where Botha, JA said at 668D-F:

“Die bespreking het uiteindelik uitloop op ’n skikkingsooreenkoms waarvolgens respondent die reeds betaalde bedrae behou en appellant ’n verdere R72 aan respondent as ’n toewysing van sy kant betaal het. Dit was volgens appellant ooreengekom dat respondent op geen verdere betaling van die reeds gedane boorwerk geregtig sou wees nie en dat indien respondent op enige verdere betaling ten opsigte van bedoelde boorwerk sou aandring, appellant geregtig sou wees om sekere betalings wat hy reeds aan respondent gedoen het met inbegrip van die laaste bedrag van R72 van hom terug te vorder. Respondent het hom egter by hierdie ooreenkoms nie gehou nie want op 21 Desember 1962 het hy appellant laat aanskryf vir betaling van ’n verdere bedrag van R241 ten opsigte van dieselfde boorwerk.”

At 669F Botha, JA said the following:

“Dat hier met die conditio sine causa ageer is dus duidelik. Uit appellant se eie getuienis blyk dit egter dat hy met die skikkingsooreenkoms van 3 November 1959 afstand gedoen het van sy reg op terugbetaling van die bedrae deur hom voorgeskiet op die kontrakprys op grond van respondent se beweerde repudiasie van die boorkontrak.”

EVALUATION:

The key question is whether the proposed amendment provides plaintiff with an entirely new cause of action in the place of one which was set out in the initial claim; in particular that not only is an attempt being made to join defendant as a contracting party to the new contract between plaintiffs and another party, but that the whole cause of action is in essence now based on this agreement (POC4). Furthermore, the question arises as to whether the proposed amendment is not one which merely introduces fresh and alternative averments supporting the original right of action as set out in the particulars of claim, but replaces the old one and therefore introduces a new cause of action which is based entirely on POC4.

Stripped to its essentials it appears to me that plaintiffs cause of action is the following:

They were awarded development rights for the project in question.

The award was not set aside on review and to an extent therefore stands.

What transpired after the award of the tender to the plaintiffs was that a competing tender (ASLA) had attempted to set aside the plaintiffs appointment on review which attempt failed.

ASLA thereafter sought to set aside the award of the tender by way of an internal appeal.

This attempt culminated in the conclusion of the agreement of settlement referred to throughout this judgment as POC4.

ASLA subsequently withdrew from the project, notwithstanding that a settlement had been reached between the parties in the internal

appeal proceedings.

The effect of the withdrawal was that the award of the tender to the plaintiffs stands either completely or at best for the defendant in respect of the limited areas allocated to the plaintiff as part of the agreement of settlement.

The proper approach to this application must therefore be that which was set out by Caney, J in *Trans Drakensberg Bank Ltd (under JM) v Combined Engineering (Pty) Ltd* 1967 (4) SA 632 (D) at 638:

“The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them so that justice may be done. Overall however is the vital consideration that no amendment will be relied in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and where appropriate a postponement ... These observations make it clear I consider that the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and where appropriate a postponement.”

Returning to the amended plea, paras 36 and 37 are critical and read thus:

“The aforesaid agreement (settlement agreement) reached between the parties at the arbitration proceedings furthermore finally disposed

of all possible prior issues that might have existed in relation to the award of the tender to the Trust. The review proceedings

brought by ASLA and the internal appeal proceedings of all the parties, including the defendant, agreeing that the development

rights which were the subject matter of the tender would be divided between the Trust and ASLA as set out in annexure POC4. In all the circumstances the terms of the agreement which forms the plaintiffs cause of action in this matter are therefore recorded in annexure POC1 read with the Trust bid document as amplified and / or amended by the agreement of settlement on 29 January 2010 (POC4).”

The core claim, when one reads these two key passages from the settlement agreement, is that which was based on the letter of 5 February 2009, read admittedly with the settlement agreement. This agreement purported, at best for the defendant, to remove one portion of the land from the subject matter of the tender which was accepted by the defendant. But at its core, the cause of action was predicated on the averment of an award of the tender as set out in the letter of 5 February 2009.

The settlement agreement if it is abstracted from the letter, makes no sense as a separate cause of action. The two must be read together and the primary basis upon which the cause of action is predicated remains the factual matrix, as amended, admittedly including that which was contained in the initial particulars of claim. This is not a case similar to a compromise. Ironically, in this matter defendant stoutly resists the idea that it was a party to the settlement agreement. Therefore the law relating to compromise can hardly be invoked in the same fashion in this case as it was in the law on compromise which I have cited earlier.

In summary, this case is not on all fours with the cases which were cited by defendant's counsel in support of the argument that a compromise has trumped any initial cause of action.

For all these reasons therefore, it is my view that the proposed amendments do not serve to introduce a completely new cause of action but rather to stand to be classified in the fashion set out by Mpati, P in the Rustenberg Platinum Mines case supra.

ACCORDINGLY THE DEFENDANT'S OBJECTIONS TO THE APPLICATION FOR AMENDMENT ARE DISMISSED AND THE PLAINTIFF IS ALLOWED TO AMEND ITS PARTICULARS OF CLAIM IN ACCORDANCE WITH ITS NOTICE OF INTENTION TO AMEND OF 31 MARCH

2016. THE DEFENDANT IS ORDERED TO PAY PLAINT'S COSTS.

DAVIS, J

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