

SOUTH AFRICA / JUDGMENT

Tshiki and Another v Buffalo City Metro Municipality and Another (CA302/2017) [2018] ZAECHGHC 122 (15 November 2018)

[2018] ZAECHGHC 122

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Lowe, Pickering, Nqumse

CASE / FILE NUMBER

CA302/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: CA302/2017

Date

heard:

05

November 2018

Date

delivered:

15

November 2018

In

the matter between:

MPELEKI

TSHIKI

First Appellant

TSHIKI

& SONS

INCORPORATED

Second

Appellant

and

BUFFALO

CITY METRO

MUNICIPALITY

First Respondent

WEST

RESTITUTION ASSOCIATION (PTY) LTD
Second
Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] This is an appeal in case number EL766/2014 (ECD1666/201), with the leave of the Supreme Court of Appeal (14 July 2017), against the judgment of the Court a quo (Ntlama AJ) given on 24 February 2017.
- [2] Due to the nature of the Appeal and the issues raised in argument it is necessary, unusually, to set out the litigation history preceding the action proceedings, the subject matter of this Appeal. The reasons for this is Mr Buchanan SC's (appearing for First and Second Respondents) main argument (not included in the heads) that the matter before Ntlama AJ was in fact *res iudicata* and that the Appeal must accordingly fail. In doing so I will refer to the parties as they are in this Appeal and where appropriate as to the trial action as they were referred to therein, Appellants having been Plaintiffs and First and Second Respondents, being First and Second Defendants.

CASE NO.: ECD 2224/11 – THE URGENT APPLICATION: HARTLE J

- [3] Under case number EL1687/2011 (ECD2224/2011), and on 30 September 2011, Appellants herein launched an Urgent Application against First Respondent only calling for a rule nisi to be issued directing First Respondent to show cause by 18 October 2011 as to why it should not pay R95,592 to Applicant for conveyancing fees due in terms of Invoice 30 of August 2011. It appears that a Rule was indeed granted, in the absence of First Respondent, in the terms sought, on 4 October 2011. Oddly enough payment of the sum claimed was ordered to be made with immediate effect. The return day was 18 October 2011.
- [4] The cause of action, in this First Application, was based on an alleged “verbal contract of service”, First Respondent (herein) allegedly giving instructions to “the Applicants, in our capacities as conveyancers” to attend to conveyancing work in respect of members of a “certain community of West Bank” by their association called “West Restitution Association individually into the names of members of the said community”. This application was limited to Invoice 30. In answer, First Respondent (the only Respondent in the Application) alleged that whilst Second Applicant was awarded a contract to establish a Township register (by the West Restitution Association) there was no instruction relevant to conveyancing work for the transfer of erven. Non-joinder of the West Restitution Association was pleaded.

THE SECOND APPLICATION: SCHOEMAN J

- [5] On 14 October 2011 and in the midst of the above, Applicants issued a Second Application (purportedly under Rule 6(11)) on the short form (impermissibly) seeking final relief against First Respondent herein (again being the only Respondent and with the same case number) making a claim for final relief being payment of Applicants' conveyancing fees in respect of Invoices 30 "A" to 47 for R3,945,000.00 in respect of conveyancing fees. After the exchange of papers the matter was argued before Schoeman J, as also the remaining issues in the rule nisi in the First Urgent Application referred to above.
- [6] Once again the cause of action relied on identical allegations as per the Urgent Application amplified by the inclusion of a so-called "instruction letter" from First Respondent addressed to Second Applicant alone. This, so it is pleaded, resulted in conveyancing work being done by Applicants, it being alleged that Applicants were entitled to payment of their reasonable fees therefore as per the invoices.

The same response as had previously been advanced, was set out in First Respondent's answering affidavits, the contract being denied.

- [7] Schoeman J, quite correctly in her judgment relevant to the above, found this second so-called "interlocutory application" (Rule 6(11)), to be a self-standing substantive application entirely distinct from the earlier Urgent Application and moreover not properly before her as it was not issued (by any means) in terms of the time limits and Rules of Court. This was her main finding. She found also however that in the event that she was wrong in the above regard, she would nevertheless deal with a further issue raised that there were irresolvable disputes of fact on the papers – and if so whether these should be referred for oral evidence.
- [8] Finding there were indeed irresolvable disputes of fact, including whether the agreement alleged had been concluded, she commented that this ought to have been foreseen and Applicants ought to have proceeded by action, not motion proceedings. She referred to the "belated" attempt by Applicants to have the dispute referred to oral evidence and refused same. She discharged the earlier rule nisi, ordering Applicants to repay to First Respondent the sum of R95,592.00, dismissing the Second Application.

[9] In point of fact thus Schoeman J:

[9.1] Found primarily that the Second Application was not a proper Application and was not properly before her (this was the fundamental reason for dismissal though probably in fact justified only that the Application be struck from the Roll).

[9.2] In the Second Application, found that had the Application been properly before her (which it was not) there were foreseeable disputes of fact and that as a consequence in any event these should not be referred to oral evidence.

[9.3] In point of fact thus made no findings on the disputed facts at all.

[9.4] Commented that the denial of a contract for conveyancing services was a dispute not capable of resolution on the papers.

[9.5] Made no finding at all (correctly) on the disputes between the parties all of which were fundamental to the relief sought.

[9.6] Found that there had not been proper service of the “Urgent Application”, which was in fact ex parte, and that there were material non-disclosures therein, but went on to find that no prima facie right had been established, discharging the Rule. (Again this did not constitute any finding on the real disputes as to inter alia the contract conclusion as alleged.)

[10] There was most certainly no determination by Schoeman J of whether there had been a contract concluded for conveyancing by Applicants, or either of them, with First Respondent nor was locus standi determined.

[11] Both Applications were dismissed on procedural grounds and indeed, in respect of the Urgent Application, Schoeman J again correctly found that there was a suitable alternative remedy of an action that Applicants could pursue.

[12] Interestingly however in the Second Application and having been challenged as to the existence of the alleged contract, and in respect of First Respondent’s allegation that First Applicant lacked locus standi, First Applicant deposed under oath to the following:

“LOCUS STANDI

1. The 2nd applicant, at the time the letter of instructions annexure “MT1” was written and conveyed to the applicants, had been deregistered and possessed no corporate legal personality separate from the 1st applicant. It was no more than just a firm of attorneys of which the 1st applicant was one. The deregistration thereof was corrected only this year.
2. The 1st applicant is a conveyancer and the 2nd applicant becomes a conveyancer only through the 1st applicant.
3. The 1st applicant therefore does have a legal interest to be party to these proceedings.”

(The allegation that de-registration “was corrected” was never further pursued and did not feature as an issue in the subsequent trial action, save being raised in the cross-examination of First Appellant, he claiming that he had been mistaken as to his general allegation made above.)

[13] However all this notwithstanding the Applications were at no time determined as the merits of the issues raised but primarily were dealt with as to procedure notwithstanding the belts and braces approach by Schoeman J. In my view, the findings and order of Schoeman J do not qualify as judgments on the merits of the cause of action (contract and locus standi). They were interlocutory on the one hand, and on the other, dismissed the main application primarily for procedural reasons.

RES IUDICATA AS TO THE SECOND APPLICATION

[14] If an application is dismissed this can only justify a res iudicata finding in subsequent proceedings where the import of the order is such that the issues raised were dealt with and determined, on the merits, against Applicant.

Purchase v Purchase [1960] 3 All SA 363 (A); 1960 (3) SA 383 (D) 385A-B; African Farms Township United v Cape Town Municipality 1963

(2) SA 555 (A) 562C-D – 563E-F; United Enterprise Corp v STX Pans Ocean Company Ltd [2008] ZASCA 21; 2008

(3) SA 585 (SCA) [9]

It is not the form of the order that is crucial, it is the issue as to whether the merits were decided or effectively (as in these matters) absolution granted. As per United Enterprises (supra).

[15] Whilst it is true that in the Application for Leave to Appeal in respect of the Second Application Schoeman J dealt with the locus standi of First Applicant (instructions having been given to Second Applicant) and found that Second Applicant was de-registered when the Application was launched, this does not change the above.

THE THIRD APPLICATION ECD64/2012: SMITH J

[16] In due course undeterred hereby Applicants again launched an Application ECD64/2012 (364/2012) compelling First Respondent to pay Applicant R7.8 million for conveyancy fees, as also an interlocutory application compelling First Respondent to pay interim payment of conveyancing fees. These Applications in addition also cited the West Restitution Association (Pty) Ltd and the Land Claim

Commissioners but no relief was sought in this regard against them. The matter came before Smith J who prefaced his judgment as follows (it is important to set this out fully for a proper understanding of the matter as the Application papers were not before us in the Appeal):

“[1] The Applicants instituted motion proceedings for an order, Inter alia; compelling the Buffalo City Municipality (the First Respondent) to pay them some R7.8 million in respect of conveyancing fees for the transfer of erven; cancelling the contract entered into between them and First Respondent; and declaring the First Respondent’s cancellation of the contract to be “unfair, unreasonable, unconstitutional and invalid”. The Applicants have also brought an “interlocutory application” wherein they seek an interim order compelling the First Respondent to make interim payments in respect of their conveyancing and registration fees.

[2] The First Applicant, Mpeleki Tshiki, is an attorney practicing under the name and style of Tshiki and Sons Incorporated (the Second Applicant) in East London.

Factual Background

- [3] During December 2000 the National Department of Land Affairs, the First Respondent, and the Nongqongqo Claimants Committee entered into an agreement which regulated the administration of funds set aside for the settlement of the land claims of several claimants represented by the Nongqongqo Claimant's Committee.
- [4] The Department had subsequently set aside land in East London for development for the benefit of the 2026 individual claimants. The envisaged development included the establishment of a township; subdivision of the land into residential and commercial areas; the provision of bulk and internal services; and construction of dwellings and related community facilities.
- [5] The claimants had thereafter established the West Restitution Association (Pty) Ltd (the Second Respondent), a company registered in terms of s. 21 of the Companies Act, 61 of 1973, for the purposes of developing the land.
- [6] In terms of the agreement the First Respondent would manage and administer the project funds "to ensure that they are used for the sole purpose of the management and implementation of the project".
- [7] The funds included a "restitution discretionary grant" of R3 000 per claimant, to assist them to take transfer and occupation of land for residential purposes, and a "settlement planning grant" of R1 440 for each claimant to provide for "planning and development assistance".
- [8] The agreement also compelled the Second Respondent to comply with the prescribed tender procedures when procuring goods and services. It provides as follows in this regards:
- "7. To ensure that only reasonable and acceptable charges incurred for the Development, the Developer will develop tender and procurement processes that comply with the tender and procurement procedures prescribed by the department and which are transparent and will ensure competitive pricing. This will be recorded in a policy document to be approved by the Interim Steering Committee or Board of the Developer, before the Developer contracts with parties for any constructive and/or for the provision of professional, consultant or any other service. The Developer will provide the ELM with full details of the tender and procurement processes that will be utilised by the Developer."*

(Emphasis mine)

- [9] During 2008 the Second Applicant submitted a tender to the Second Respondent for the establishment of a township register. The Second Respondent accepted the tender, and the Second Applicant had in due course duly performed in terms of the tender specifications and conditions.
- [10] The Applicants aver that the First Respondent subsequently appointed the Second Applicant to attend to the transfers of the individual erven in terms of an undated letter from the office of First Respondent's director of Planning and Economic Affairs, Nonceba Mbali-Majeng. That letter, which was addressed to the Second Applicant, reads as follows:

"Dear Sirs

WEST RESTITUTION INDIVIDUAL TRANSFERS

Subsequent to our consultation on the 10TH May 2012 and agreement with Mr Ngqandu of Eastern Cape Regional Land Claims Commissioner, kindly commence with the individual transfers in respect of West Restitution Association.

It will be appreciated if progress can be made on this regard.

Hoping this is in order.

Yours faithfully

NONCEBA MBALI-MAJENG

DIRECTOR OF PLANNING AND ECONOMIC DEVELOPMENT”

The letter was signed by one N C Mbongo on behalf of Ms Mbali-Majeng.

- [11] The Applicant has further averred that the instructions to transfer the individual erven were pursuant to a provision in the terms of reference applicable to the original tender, which reads as follows:

“Good performance in the initial stage of the Township Registration might land the Conveyancer the contractor for further work during the individual transfers. However, no guarantees will be given to date”.

- [12] They aver that the First Respondent has since purported to cancel the agreement during 2011, and has refused to pay any of their invoices for work done in respect of the transfers.

- [13] During September 2011 the Applicants instituted application proceedings against the First Respondent for an order compelling it to pay them an amount of R95 592.00, being their fees in respect of the transfer of 18 of the erven.

- [14] That matter was eventually argued before Schoeman J, who had subsequently made an order dismissing the application with costs. I deal later on with the relevance of that judgment.

- [15] The Applicants have relied on averments made by the First Respondents in that matter for their assertion that the First Respondent had repudiated the agreement. When they launched the application the Applicants were no doubt aware that the Respondents would deny the existence of the alleged agreement. This much is, inter alia, apparent from the following statement in the First Applicants founding affidavit:

“It is in the said affidavit that the 1st respondent evinced a clear intention not to be bound by the contract concluded with us and to avoid it at all cost by denying that it concluded such contract with us despite annexure “MT3” referred to above and its performance of the contract as adumbrated above thereby now unlawfully repudiating the said contract and acting in breach thereof.”

- [16] As expected the Respondents have introduced massive disputes of fact in their answering papers. They deny that the Applicants had been appointed to attend to the transfer of the individual erven. They aver further that while the Applicants have been appointed to register the township in pursuance of a lawful and public tender procedure, there has not been any such tender in respect of the transfers of the individual erven, and the Applicants could therefore not have been lawfully appointed to proceed with the transfers. Insofar as the Applicants rely on the actions of the First and Second Respondents in claiming that they have been appointed, such appointment would be null and void because it was not in terms of the approved tender and procurement procedures.
- [17] They assert further that in the event, Mbongo had no explicit or implied authority to conclude contracts on behalf of the municipality. Furthermore, Mbali- Majeng has denied any knowledge of the letter. In addition they aver that the contract, being in excess of R4 million, would, in terms of its supply chain management policy, have been subject to approval of the municipal manager, acting on recommendations of the Supply Chain Management Unit. Any instructions issued by Mbongo would therefore be ultra vires and void ab initio.
- [18] They also took the point that the Applicants had brought a similar application under case number EL 168/2011 (which I have referred to above), on identical factual and legal bases. They averred that in that matter Schoeman J had found that the disputes of fact were of such a nature that the Applicant had known of the disputes before launching the application. It was therefore not the type of matter that should be referred for oral hearing, as the Applicant should have proceeded by way of action proceedings. The Applicants were therefore estopped from bringing this application in the face of Schoeman J's findings.

Submissions by counsel

- [19] Mr Tshiki (the First Applicant), who appeared personally in the matter, submitted that the First Respondent should be estopped from relying on the fact that Mbongo did not have authority to issue the letter. He submitted that it was clear that the municipal functionaries, including Mbongo, have at all times acted in accordance with an understanding that the Applicants had been validly appointed to attend to the transfer of the individual erven.
- [20] He submitted furthermore that there is no merit in the First Respondent's assertion that the instruction to attend to the individual erven had not been given in pursuance of a lawful tender procedure. He argued that the terms of reference applicable to the original tender in respect of the opening of the township register, clearly envisaged that the appointed service provider would, if it performed satisfactorily, be appointed to transfer the individual erven. He submitted that the Applicants were legitimately appointed by the Second Respondent in terms of that provision.
- [21] Mr Swartbooi, who appeared for the Respondents, submitted that:

- (a) The matter is *res iudicata*. He argued that the judgment of Schoeman J was predicated on facts and legal issues which are identical to those which had been raised in the present application. The application should therefore be dismissed for this reason alone.
- (b) The Applicants have, in their founding papers, foreshadowed comprehensive disputes of fact, they should therefore not have brought the matter by way of application proceedings, and should instead have proceeded by way of action. He submitted that the matter should therefore not be referred for oral evidence and that in accordance with the principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C, should be decided on the basis of the facts averred by the Respondent.
- (c) Even if the Applicants had established that Mbongo had the necessary authority to instruct them to proceed with the transfer of the individual erven, such instruction would have been invalid because it was not issued pursuant to an approved tender, and was not procured in terms of the procurement policies prescribed by the First Respondent or the National Government.
- [22] I agree with Mr Swartbooie that the Applicants face various insurmountable obstacles in their attempt to obtain relief ordinarily sought by way of action. The application was in my view clearly ill-conceived and must fail for the following reasons.”
- [17] *Res iudicata* was raised and dealt with by Smith J as follows:
- “[23] A litigant seeking to rely on the *exceptio rei iudicatae vel litis finitae* (*res iudicata*) must establish that judgment had been given: (a) with respect to the same subject matter; (b) based on the same grounds; and
- (c) between the same parties. (LAWSA Second Edition Vol 9 para. 624) The object of this principle is to prevent repetitive lawsuits, the harassment of a defendant by multiplicity of lawsuits, and the possibility of conflicting decisions. (*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A))
- [24] The facts which had been presented to Schoeman J in case number EL 1687/2011, and the legal arguments advanced during the hearing in that matter, are identical to those with which I am seized with in this matter, and satisfy the abovementioned criteria for the application of the exception. Mr Tshiki has submitted that the fundamental difference between these matters is that in the present case he had relied on the repudiation of the agreement by the First Respondent, whereas in the previous matter that issue had not been raised. In my view there is no merit in this argument. It is apparent from the excerpt from the founding papers, which I have referred to above, that the averments contained in the Respondent’s opposing affidavits in that matter, clearly amounted to a repudiation of the contract. I agree with Mr Swartbooie that the application should fail for this reason alone.”

[18.1] Effectively Smith J relied on the defence of *res iudicata* and did not consider the merits of the issues raised thus relying on the findings of Schoeman J which, being procedural, cannot (as pointed out above) in fact lay a basis for the exception.

[18.2] Secondly, Smith J, effectively in the alternative, found that Applicants were aware of the disputes of fact that would be raised, and that for this reason too, the Application must fail. Although the disputes had been raised in two applications the merits had yet to be determined (this with no criticism) and thus in fact cannot lay a basis for *res iudicata*, as appears below.

[18.3] *Res iudicata*, quite apart from the Respondents' difficulty referred to above, is a special defence which must be pleaded and proved by the party raising same. As will also be seen the issue of *res iudicata* can hardly be said to have been properly raised on the pleadings relevant to this Appeal. Whilst a judgment on any claim is presumed to be correct that judgment, as we have seen, must be one final and definitive on the merits of the dispute. *United Enterprise Corp (supra)*. In this matter it is clear that there was no merits decision, in the sense required, prior to the action which came before Ntlama AJ.

[18.4] In my view this argument may not go to so-called issue estoppel / nor was same argued by Mr Buchanan SC. However it is important to note that even issue estoppel is not an absolute defence but depends on the equities and fairness of the facts of a particular case.

Prinsloo NO v Goldex 15 (Pty) Ltd and Another 2014

(5) SA 297 (SCA); *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* 2014

(5) SA 406 (SCA).

[18.5] Lastly it simply cannot be said that prior to the action, the subject of this Appeal, any of the main disputed issues between the parties had been determined on their own merits let alone finally adjudicated. That is the end of the matter, on several grounds, as to *res iudicata*, and to hold otherwise would offend against the principles of fairness and equity.

THE ISSUES ON APPEAL

[19] Turning then to the issues raised in the Appeal on the merits. The issues on the pleadings were the following as to their crux:

[19.1] Plaintiffs (Appellants) claimed judgment for payment of R8,819,016.00, as damages, against First and Second Defendants (First and Second Respondents herein) jointly and severally, with ancillary relief.

[19.2] The cause of this was premised upon the allegation that between February 2008 and May 2010 and at East London Plaintiffs, (First Plaintiff representing Second Plaintiff) and First and Second Defendants, concluded a partly written partly oral agreement of mandate in respect of the West Restitution Project as follows (I set this out in full as the pleading is unfocused and confusing):

“8.1 The plaintiffs, in writing, made a conveyancing proposal to the 2nd defendant through the 3rd defendant proposing to do conveyancing work for the 2nd defendant.

8.1.1 The conveyancing proposal made by the plaintiffs was for registration of the township followed by registration of individual erven displayed in general plans prepared in respect of that township for the 2nd defendant.

8.1.1.1 A copy of the conveyancing proposal made by the plaintiffs is annexed hereto marked “MT1”.

8.1.2 The written terms of reference for the said conveyancing proposal stipulated by the 3rd defendant representing the 2nd defendant included the following:-

8.1.2.1 The registration of the township by a conveyancer.

8.1.2.2 The registration by a conveyancer of transfer of individual erven displayed in the general plans prepared in respect of the township to be registered.

8.1.2.3 The conveyancer would attend to the registration of transfer of individual erven on acquitting himself in the township registration.

8.1.2.4 The said terms of reference were contained in a document entitled “Nongqongqo Restitution Conveyancing Project Terms of Reference”. A copy of the said document is annexed hereto marked “MT2”.

8.2 The said proposal was accepted verbally by the 3rd defendant in East London and in 2008 through its authorized agent acting on behalf of the 2nd defendant.

8.3 Pursuant to the acceptance of the said proposal as stated above, the 2nd defendant, by letter, appointed the plaintiffs as conveyancers in the said project. A letter of acceptance of this appointment, which the plaintiffs have presently mislaid, was delivered to the 2nd respondent in 2009.

8.3.1 A copy of the said letter by 2nd defendant appointing the plaintiffs as its conveyancers in the project in question is annexed hereto marked “MT3”.

8.4 Pursuant to the appointment of the plaintiffs as conveyancers in the said project, the 1st defendant in terms of a written letter of instructions communicated with the plaintiffs with instructions to the plaintiffs to attend to the opening of a township register and registration of the general plans in respect of the township in question.

8.4.1 The plaintiffs are not in possession of the said letter of instructions written by the 1st defendant.

8.4.2 The said letter of instructions, mysteriously, went missing from the plaintiffs’ office file.

8.5 Pursuant to the said letters of instructions issued by the 1st defendant to the plaintiffs, the 1st defendant, through its authorized agent, gave the 1st plaintiff a power of attorney authorizing the 1st plaintiff to appear before the Registrar of deeds in King William's Town and attend to the transfer of the property, over which the township aforesaid was to be registered into the names of the 2nd defendant.

8.5.1 A copy of the power of attorney aforesaid is annexed hereto marked "MT4".

8.6 Upon registration of the township about October 2008, after a pause of just over a year and in May 2010, the 1st defendant by means of a further letter of instructions communicated with the plaintiffs giving the plaintiffs instructions to attend to registration of individual erven in the West Restitution Project.

8.6.1 A copy of the said letter of instructions is annexed hereto marked "MT5".

8.7 Pursuant to the said letter of instructions annexure "MT5", and by means of signing 693 powers of attorney which were signed by the Chief Executive Officer of the 2nd defendant, the plaintiffs, through the 1st plaintiff, were authorized by the 2nd defendant to appear before the Registrar of deeds in King William's Town and attend to the registration of transfer of 693 erven into the names of 693 members of the 2nd defendant.

8.7.1 A copy of one of the 693 powers of attorney referred to in paragraph 8.7 above, as an example to prevent prolixity avoiding to annex 693 powers of attorney, giving the plaintiffs through the 1st plaintiff instructions to appear before the Registrar of deeds in King William's Town for registration of transfer of the 693 erven into the names of the members of the said community is annexed hereto marked "MT6".

8.7.2 The rest of the said powers of attorney will be presented before court at the trial of this action.

8.8 The plaintiffs, the 1st and 2nd defendants represented as aforesaid agreed verbally that:-

8.8.1 The plaintiffs would upon completion of the registration aforesaid present their statements of account to the 1st defendant for payment.

8.2 The 1st defendant would upon receipt of the statements of account pay the plaintiffs.

8.9 Indeed during the process of attending to the registration of the township, the plaintiffs from time to time presented invoices to the 1st defendant for payment for work done and the 1st defendant settled all the plaintiffs' invoices for registration of the township."

[19.3] Whilst confusing it seems now to be alleged that Second Defendant (Second Respondent) appointed Plaintiffs (Appellants) as its conveyancers.

[19.4] MT3 is unsigned but relied upon and reads as follows:

"West Restitution Association

(Association Incorporated under Section “21”)

P.O. BOX 587, EAST LONDON 5200

Enquiries: Ayanda Ngqandu

Date: 09 November 2009

To: Tshiki & Sons Attorney

Attention: Mr M Thsiki (sic)

Dear Sir

Re: West Restitutuion Association Conveyancing

Dear Sir,

This serves to confirm that your proposal for rendering the above Services has been approved by the Directors of the above company representing the entire community of the West Bank. We will await your letter of acceptance for this appointment.

Regards,

(Unsigned)

.....

Mr M Ngwane

Chairperson, West Restitution Association

(Association Incorporated under Section 21)”

[19.5] Plaintiffs however appear to allege further that in May 2010 First Defendant gave conveyancing instructions to Plaintiffs as per MT5, which reads as follows:

“Buffalo City Municipality

Directorate: Planning and

East London • Bisho • King William’s Town Economic Development

Province of the Eastern Cape

PO Box 81 • East London • 5200

South Africa

49 Oxford Street • East London • 5201

Website: www.buffalocity.gov.za

Tel: 043 705 3361

Fax: 043 722 2066

LAND ADMINISTRATION DIVISION

Our ref.: 11542/LA Enq.: MR N. MBONGO Your ref.:

Ifayile yethu: 15/8/1/2 Imibuzo:043 705 3363 Ifayile yakho:

Messrs Tshiki & Sons Incorporated

14B Fursternburg Terrace

Macgregor Road

EAST LONDON

5200

Dear Sirs

WEST RESTITUTION INDIVIDUAL TRANSFER

Subsequent to our conversation on the 10th May 2010 and agreement with Mr Ngqandu of Eastern Cape Regional Land Claims Commissioner, kindly commence with the individual transfers in respect of West Restitution Association.

It will be appreciated if progress can be made in this regard.

Hoping this is in order.

Yours faithfully

(Signed)

NONCEBA MBALI-MAJENG

DIRECTOR OF PLANNING AND ECONOMIC DEVELOPMENT

ENCL.

NN/mar.

190510”

[19.6] Finally there is the allegation of a further verbal agreement with First and Second Defendants that Plaintiffs would account to First Defendant which would make payment to them.

[19.7] Oddly much later and in paragraph 14 of the Particulars of Claim Plaintiffs alleged finally that between February 2008 to May 2010, Plaintiffs on the one hand, and First and Second Defendants on the other, concluded a contract of “mandate” for the conveyancing work referred to above.

[19.8] There was also a reliance on MT7 on the spurious basis of “Administrative Action”.

[19.9] The cause of action however, differed from the Application claims, and relied on breach of contract and repudiation of the mandate alleged as at October 2011, First and Second Defendants having denied that a contract existed (this being so-called “unlawful administrative action”) and Plaintiff claiming consequentially, the difference between the fees earned and paid for in respect of the 693 erven transferred and the fees that would have been earned on the full number of erven to be transferred, being 1337 erven yet to be transferred at R6,252.00 per erf.

[19.10] Against this confused pleading the First and Second Defendants alleged that Second Plaintiff had been appointed by Second Defendant to open a township register and that:

“8.3 The first and second defendants (hereinafter referred to as “the defendants”) deny that the Plaintiffs were lawfully appointed as conveyancers to do individual transfer of erven to the land restitution beneficiaries.

8.4 The appointment of the Second Plaintiff to do any conveyancing work for individual transfers of erven as alleged contravened section 217 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), Preferential Procurement Policy Framework Act, Act 5 of 2000 (“PPPF”), its regulations, the Public Finance Management Act, Act 29 of 1999 its regulations in so far as such appointment is purported have been done by 2nd to the 4th Defendant, and, where it is purported that such appointment was done by the First Defendant, the said appointment contravened the Constitution, the PPPF and its regulations and the Municipal Finance Management Act, Act 56 of 2003, its regulations and the Supply Chain Management policy approved in July 2009.”

[19.11] This is vague to say the least and seems a reluctant admission that Second Plaintiff was indeed so appointed but not “lawfully”.

[19.12] There followed at paragraph 10 of the Plea the allegation that “Plaintiffs” were appointed to open a Township Register but then a denial, in terms, that Plaintiffs had been appointed to do “individual transfers of erven”.

[19.13] It is then pleaded that Second Plaintiff was “non-existent” having been deregistered at the time of the conclusion of the alleged contract (May 2010).

[19.14] First and Second Defendants pleaded that MT5 did not authorise Plaintiffs to register 693 Erven and in doing so Plaintiffs acted “unlawfully”.

[19.15] The remaining allegations are denied including the pleaded verbal agreement that First Defendant would pay Plaintiffs on invoice.

[19.16] Payment having been made of fees for transfers by Plaintiffs on behalf of First Defendant is admitted but it is alleged that this was under mistaken “belief that they (Plaintiff) were lawfully appointed” and that the price was reasonable, Plaintiffs having been instructed to stop such conveyancing as a result.

[19.17] Breach of any contract is denied.

[19.18] Paragraph 32 pleads:

“AD PARAGRAPHS 27 AND 28 THEREOF

The plaintiffs are not entitled to payment for the transfer of the 18 erven. This issue has already been determined by the above Honourable Court when the rule nisi was discharged and the plaintiffs were ordered to pay back the sum of R92 000.00 plus interest at the legal rate to the first defendant.”

[19.19] This is the closest the Plea comes to alleging res iudicata and is entirely insufficient to form a basis for such a finding.

[20] The pleadings are (on both sides) unfocused and far from ideal which has at least partially led to the difficulties encountered subsequently.

[21] It is however relevant to note that Second Plaintiff’s status is not admitted, although locus standi to claim not being specifically addressed, save that Second Defendant was alleged not to have been in existence in May 2010.

[22] The Replication raises estoppel only and does not plead to the above denial of Second Defendant’s existence in May 2010.

[23] A pre-trial conference took the matter little further bar setting out that there would be no separation of issues and that at the trial “each document would be what it purported to be unless specifically challenged”.

THE TRIAL

[24] At trial (and opposed by Plaintiffs) the Defendants argued for and were granted separation of what was referred to as “merits vis-a-vis damages” and that “the order was to the effect that the issues raised as to the existence of the contract and other ancillary issues be determined and that” damages stand over.

[25] Appellants’ attack on this separation order on appeal has no merit whatsoever and need be dealt with no further.

[26] The trial Judge, in her judgment held that First Plaintiff had acted as a director of Second Plaintiff and that Second Plaintiff had been deregistered on 3 March 2015 – this being, she found “decisive of the matter”. In essence the trial Judge concluded that having been so deregistered in March 2015, and not reinstated subsequently, it was unnecessary to consider the existence or otherwise of a “legitimate contract of mandate” or any other issue as follows:

“[15] Accordingly, I come at the conclusion that the first Plaintiff does not have capacity to act on behalf of a non-existing entity (second Plaintiff) and recover a debt which may be found to be owing to the second Plaintiff. Further, the second Plaintiff does not have legal capacity to recover debts that were owing to it prior to its deregistration, in the absence of an order as envisaged in section 83(4) of the Companies Act.”

[27] Ntlama AJ made no pronouncement as to the First Plaintiff’s claim that he also contracted, or on his joint and several claim for damages, deciding simply that Second Defendant had no locus standi to claim.

[28] On appeal Appellants made extensive criticism of the judgment, order and reasoning of the trial Judge. Whilst, as already intimated, Respondents rely on res iudicata and further support the judgment and reasoning underlying same.

[29] For the reasons already set out above the submission concerning res iudicata are without merit.

[30] It is however certainly so, contrary to Appellants’ submission, that the only real issues on appeal are the following:

[30.1] Was a contract concluded with First Appellant and/or Second Appellant?

[30.2] If so:

[30.2.1] Was that contract concluded by Second Appellant at a time that it was registered as a corporate entity?

[30.2.2] Did Second Appellant have locus standi to claim damages at times relevant as to its registration status as a corporate entity?

[30.3] In the above regard if Second Appellant in fact contracted, when was it deregistered and the consequences thereof?

[31] Whilst Nltama AJ failed to decide the first issue, there is no reason why we should not do so, relevant to First Appellant, on the evidence. Whilst in respect of Second Appellant, whether or not it contracted at all becomes irrelevant if it has no locus standi to claim, having been and remaining deregistered. Thus before us the fundamental issues on appeal are:

[31.1] Did First Plaintiff contract as alleged.

[31.2] Assuming Second Appellant did contract as alleged, then whether in the trial action it had locus standi to sue for the damages alleged.

[31.3] If Second Appellant had locus standi to sue then the issue as to whether it in fact contracted as alleged – if not, then the contract issue falls away.

[32] Did First Defendant Contract at all?

[32.1] Ntlama AJ did not deal with this issue though, on the pleadings this was a purported basis for the action and relief claimed.

[32.2] This issue was clearly a live issue in the trial and accordingly I must deal with same, albeit shortly.

[32.3] In the heads of argument for Appellants, and in argument, this issue was hardly pursued, it simply being alleged that there was “overwhelming proof not only of conclusion of the contract in question by the parties to this Appeal...” and that First Appellant being separate from Second Appellant’s company, the issue of whether or not he contracted, being a matter of fact and evidence. First Appellant contended that a contract with First Appellant was not “denied” – as demonstrated above this is simply not correct.

[32.4] The heads of argument for Appellants failed to traverse the relevant facts and evidence in this regard.

[32.5] On the pleadings MT1 was clearly addressed to Second Appellant – there being no mention of or reference to First Appellant.

[32.6] The so-called letter alleged to have appointed First and Second Appellants, MT3, similarly made no mention of any party other than Second Appellant (“for attention Mr M Tshiki”).

[32.7] The further alleged letter of instructions to Appellants was not attached or produced at any stage.

[32.8] The Powers of Attorney appointing First Appellant obviously take the matter no further as Second Appellant is a firm of Attorneys and not an individual, could clearly not have been so appointed in a Power of Attorney, but only its representative conveyancer being First Appellant. This does not indicate in any way at all that First Appellant was a contracting party.

[32.9] The further “letter of instruction” relied on, MT5, crucially dated 19 May 2010, relevant to conveyancing instruction was again addressed to Second Appellant only, without mention at all of First Appellant.

[33] In point of fact there is not a single document, correctly viewed, which supports the argument that First Appellant was a party to the alleged contract.

[34] This is wholly unsurprising as had it been so this would have gone against the obvious probability that the attorney company (Second Appellant) was the relevant entity as to contract for work to be done and most certainly not its directors or employees. This excludes First Appellant on the probabilities.

[35] The evidence led for Appellants in this regard (such as it was) took the matter no further at all.

[36] It is thus unsurprising that there were no real, let alone, persuasive argument on appeal put up by First Appellant in this respect – save reference to the powers of attorney which take the matter no further.

[37] In my view there is nothing whatsoever on the documentation, or oral evidence, which supports the allegation that First Appellant contracted, and this allegation falls to be rejected.

THE STATUS OF SECOND APPELLANT

[38] The next issue sequentially is whether, if a contract was concluded with Second Appellant (or assuming for argument that it was):

[38.1] Second Appellant existed as a corporate entity at the time of the conclusion thereof and;

[38.2] That corporate entity (Second Appellant) existed, and was registered as such, at times relevant to the action with locus standi to claim damages arising from breach of contract.

[39] Ntlama AJ dealt with the issue of registration as the central issue, having carefully set out the legal position of deregistered companies. On the facts she concluded that Second Appellant had no locus standi, as it had since 1 November 2009 failed to file annual returns and was finally deregistered on 3 March 2015 as envisaged in Section 82(3) of the Companies Act 71 of 2008. She did not accordingly consider whether a contract for conveyancing services had been entered into with Second Appellant.

[40] Appellants at no time argued or contended that the trial Judge erred in her analysis of the legal position relevant to deregistration and its consequences but argued that she was wrong on the facts, had incorrectly had regard to a CIPC document relevant, and finally had impermissibly sought further information from Appellants, post trial, as to re-registration whilst judgment was pending.

[41] I am of the view that as to her conclusion relevant to the legal position that a deregistered corporate entity has no locus standi to either contract or sue for damages, Ntlana AJ was perfectly correct – indeed the contrary argument has not been advanced.

[42] In terms of Section 82(3) of the Companies Act the Registrar may remove a company from the register inter alia if it has failed to file an annual return in terms of Section 33 for two or more years in succession, and has on demand failed to give satisfactory reason for this failure, or shown satisfactory cause to remain registered. In terms of Section 82(4) an interested party may apply for re-registration.

[43] If re-registered the effect is such that the company is regarded as never having been de-registered. If re-registered this would retrospectively validate all acts done since de-registration which may even go so far as to include the institution of legal

proceedings, as discussed in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012

(4) SA 484 (WCC) at [23]. It is unnecessary on the facts of this matter to comment any further hereon. Section 83 clearly provides for the removal of a de-registered companies name from the register after compliance with the prescribed criteria (Regulation 40(8)) and inevitable consequence that the corporate entity has in such circumstances no locus standi to sue.

[44] Clearly then a de-registered company cannot contract or bring legal proceedings to claim a debt or damages, at least until re-registered

– as concluded by Ntlama AJ. In the event that Second Appellant was a close corporation the position is no different.

[45] The citation of Second Appellant in the Particulars of Claim was not admitted and later it was pleaded that it did not exist at the time of contracting (having been de-registered).

[46] Ntlama AJ in concluding that Second Appellant was finally de-registered in March 2015 relied upon a CIPC document relevant to Second Appellant which First Appellant (who conducted the trial for First and Second Appellants as their attorney) handed to the Court during cross-examination. He indeed said on record as follows:

“MR TSHIKI: ... Your Ladyship will recall the debate between myself and Mr Swartbooi regarding the de-registration of the Second Plaintiff.”

There was a dispute about the dates, they contend that as at the time of the contract from 2008 to May 2010 the Second Plaintiff had been de-registered and we disagreed. We said that Second Plaintiff was provisionally de-registered in October 2010 and finally during

2015. We have taken the effort to obtain the document from CIPRA M’Lady. I beg leave to hand up this document it will be Exhibit 7 in the proceedings.

COURT: Exhibit 8.

MR TSHIKI: Exhibit 8 I’m sorry M’Lady.

CIPRA REPORT HANDED UP AND MARKED EXHIBIT 8

MR SWARTBOOI: As M’Lady pleases. I want to state M’Lady we reserve our rights with regards to this particular document. I have tried to be of assistance which was not much assistance M’Lady. We do not know on what basis Mr Tshiki [inaudible] the document, whether he will be able to enlighten us or let me put it the other way, whether Mr Tshiki is competent to make a comment on the document on which he’s not the author of.

MR TSHIKI: If I may respond M’Lady. I am submitting this document for what it purports to be. And the parties agreed in the Rule 37 Conference that documents will be submitted in copies for what they purport to be, but any party is free to challenge the document so submitted.”

[47] The CIPC documents relating to Second Appellant sets out inter alia the following:

“Certificate issued by the Commissioner of Companies & Intellectual

Property Commission on Monday, December 5, 2016 at 19:08

Companies and Intellectual

Property Commission

a member of the dti group

Disclosure Certificate: Companies and Close Corporations

Registration Number: 1995 / 060092 / 21

Enterprise Name: TSHIKI AND SONS

2009-10-19 Accounting Officer Change on 06/09/1995

DATA RESTORATION: MISSING DATA

2009-10-19 Member Change on 30/04/2001.

Change Record

Surname = TSHIKI

First Names = PHAKAMISA WASHINGTON

Status = Resigned

2010-10-18 Status changed to Unknown

DEREGISTRATION FOR ANNUAL RETURN NON COMPLIANCE REGISRATION MONTH = 9 – AR
NON COMPLIANCE DATE = 01/11/2009 – 6 MONTHS AFTER = 04/07/2010

2011-02-24 Status changed to Unknown

FINAL DEREGISRATION FOR ANNUAL RETURN NON COMPLIANCE

2011-05-25 Status changed to Unknown

Annual Return Non-Compliance Restoration

2013-01-12 Status changed to Unknown

Annual Return Non Compliance – In Process of Deregistration No Payment have been made

2015-03-02 Status changed to Unknown

Annual Return Non Compliance AR Final Deregistration”

[48] On the face of it the final re-registration of Second Appellant occurred in March 2015,
though it would seem it existed as a registered entity at the alleged time of contracting.

[49] In an attempt to avoid the inevitable conclusion drawn by Ntlama AJ it was contended for Appellants, in an extraordinary argument, that when handed in (by or for Appellants) the document had not been categorised or identified and that there was an objection by Respondents as to admissibility. Indeed it was argued on Appeal that the Court was not entitled to rely on the document which it was argued was hearsay. In point of fact the Appellants handed this document in to prove registration at time of contracting – failing to appreciate that whilst this was so the remaining part of the document as to deregistration in March 2015 removed the Second Appellant’s ability to litigate for damages. This opportunistic argument on appeal cannot succeed, and ignores the effect of the agreement in the R37 Minute as to the status of documents being what they purport to be; the common law; the status of “public documents” which prove themselves and moreover the purpose and effect of the Civil Proceedings Evidence Act 35 of 1965.

[50] As to the so-called “irregularity”, the trial Judge through the Registrar having sought clarity post-trial on this issue of re-registration from Appellants only, whilst most certainly undesirable being apparently addressed only to Appellants and not Respondents takes the matter no further and falls to be ignored. There was at no time relevant to this Appeal any reliable suggestion or evidence that Second Appellant had been re-registered.

[51] In the result the remaining arguments for Appellants take the matter no further and need not be analysed or pronounced upon, the locus standi issue as to Second Appellant and contracting issue as to First Appellant being decisive.

[52] In the result:

The Appeal is dismissed with costs, such costs to include the costs of two counsel where utilised.

M.J. LOWE

JUDGE OF THE HIGH COURT

PICKERING J:

I agree.

J.D. PICKERING

NQUMSE AJ:

V M NQUMSE

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Obo the Appellants: Mr Tshiki of Tshiki & Sons Incorporated, East London

Obo the First and Second Respondents: Adv Buchanan SC and Adv Swartbooi

Instructed by: Mgangatho Attorneys, Grahamstown c/o Makhanya Incorporated, East London

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