REPUBLIC OF NAMIBIA

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE AND SPECIAL PLEAS

REPORTABLE

CASE NO. I 2055/2013

In the matter between:

OKORUSU FLUORSPAR (PTY) LTD **PLAINTIFF**

And

TANAKA TRADING CC **1ST DEFENDANT**

EDWIN MURODZIKWA **2ND DEFENDANT**

Neutral citation: *Okorusu Fluorspar (Pty) Ltd & Another v Tanaka Trading CC and Another (I 2055/2013) [2016] NAHCMD 16 (05 February 2016)*

CORAM: **MASUKU J:**

Heard: 07, 08, 17 September and 07 December 2015

Delivered: 05 February 2015

Flynote: CIVIL PROCEDURE – Test for absolution from the instance revisited – Special plea of prescription considered – Special plea of proliferation of actions considered – COMPANY LAW – Provisions of section 64 of the Close Corporations Act relating to reckless trading considered and discussed.

Summary: The plaintiff sued the 2nd defendant for payment of N$ 741 949-54 as a result of alleged reckless trading by the 2nd defendant in his capacity as a member of the 1st defendant, a close corporation. At the close of the case for the plaintiff, the 2nd defendant moved an application for absolution from the instance on the grounds that there was no evidence led to the effect that the 2nd defendant had traded recklessly within the meaning of s.64. *Held* – the plaintiff had in its statement on oath made allegations of reckless trading by the 2nd defendant and which were not challenged in cross-examination. *Held further* – that some questions and objective facts apparent from the plaintiff's witness point to elements of reckless trading requiring an answer from the 2nd defendant. Application for absolution dismissed with costs.

PRESCRIPTION – It was argued that the plaintiff sought to amend its particulars of claim during a period when the period of three years had elapsed and that the amended claim had for that reason prescribed. *Held* – the amendment did not serve to introduce a new cause of action and that the claim, which had only been expatiated upon on amendment had not prescribed. *Held further* – the issuance of the summons in the first instance had served to interrupt the running of prescription. The special plea of prescription was therefor dismissed.

PROLIFERATION OF ACTIONS – It was argued that by initially suing the 1st defendant and obtaining judgment against it, the plaintiff was guilty of proliferating actions by suing the 2nd defendant for substantially the same relief. *Held* – the plaintiff had sued both defendants at the same time and for the same relief albeit on different grounds. *Held further* – that the proliferation of trials must be unwarranted in the circumstances of the case. *Held* - The claim against the 2nd defendant did not amount to a proliferation of actions and the actions instituted were rendered necessary by the actions of the defendants. The special plea was accordingly dismissed.

ORDER

---

1. The application for absolution from the instance is dismissed.
2. The special plea of prescription is dismissed.
3. The special plea of proliferation of action is dismissed.
4. The 2nd defendant is ordered to pay the costs.
5. The court shall, in consultation with the parties' representatives set dates for the continuation of trial.

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE AND SPECIAL PLEAS

MASUKU J:

[1] This is an application for absolution from the instance in respect of a claim instituted by the plaintiff against the 2nd defendant for payment of N$ 741 949-54, interest thereon and costs of suit. The 2nd defendant further raised two special pleas at the same time as the application for absolution, namely one of prescription and that there has been a proliferation of actions by the plaintiff against the 2nd defendant.

[2] The facts which give rise to the above proceedings are largely common cause and they acuminate to this: The plaintiff, a company duly incorporated in terms of the company laws of this Republic entered into a written agreement dated 11 March 2009 with the 1st defendant. I will, for ease of reference refer to the plaintiff as such or as 'Okorusu' and to the 1st defendant as 'Tanaka'. The 2nd defendant shall be referred to as such or just as 'Mr. Muradzikwa.'

[3] Tanaka, at its prime, ran what appears to have been a thriving public transport business. It tendered for and was awarded a contract to transport Okorusu's employees from their homes to work and vice versa. In order to assist Tanaka carry out its aforesaid obligations, Okorusu took up an agreement of suretyship with Standard Bank of Namibia (Standard Bank) which granted a loan through an instalment sale agreement for Tanaka to purchase a bus described as a Nissan Model 2009 UD 95, referred to as 'the bus.'

[4] In terms of the suretyship agreement, Okorusu was to pay to Standard Bank any amount claimed as the outstanding balance from the instalment sale agreement in case of default by Tanaka of its obligations to Standard Bank for the loan. By letter dated 13 July 2011, Standard Bank demanded from Okorusu payment of the sum of N$ 741 949-54 as the outstanding balance from Tanaka in terms of the instalment sale agreement after it was alleged that Tanaka had not made good on its obligations to Standard Bank. Okorusu, as bound by the suretyship agreement, made good the amount claimed by Standard Bank from it and in turn sought to take ownership of the bus and later to recover from Tanaka and Mr. Muradzikwa the said amount with interest and costs. It is the latter claim that is pending before this court and it is the subject of this determination.

[5] It should perhaps be pointed out that in terms of the written agreement between the parties, i.e. Tanaka and Okorusu, in the event that Tanaka defaulted on its obligations to Okorusu and the latter made good the amount of the default, Tanaka undertook to transfer ownership of and to deliver the bus to Okorusu at its own expense[1]. It was further agreed that should the bus be transferred to Okorusu as envisaged in the previous sentence, all instalments, excluding bank charges already paid by Tanaka would be reimbursed to Tanaka by Okorusu subject to the bus being

[1] Clause 2.1 of the Agreement inter partes.

found to be in a good condition relative to its kilometres travelled at the time of change of ownership.[2]

[6] It is common cause that on 20 August 2013, Okorusu obtained judgment from this court in the amount claimed against Tanaka, together with interest and costs. This amount, it is alleged, Tanaka has refused and continues to refuse to pay. The instant claim has been lodged against the 2nd defendant in his capacity as a sole member of Tanaka who was involved in all the dealings with Okorusu.

The pleadings

[7] In its particulars of claim, Okorusu claims that the 2nd defendant was aware of the obligation to deliver the bus to it in terms of the agreement and was in a position to do so but failed or neglected to do so and that he caused the removal of the bus from Namibia to Zimbabwe and refused to have same returned to Namibia from Zimbabwe. It is further averred that although aware of Tanaka's inability to pay its debts to Okorusu at least for the value of the bus in the event it was not delivered, the 2nd defendant caused Tanaka to trade recklessly, alternatively with gross negligence in the incurring of the debt claimed and further failing to return the bus in terms of the agreement.

[8] In the alternative, it is claimed that the 2nd defendant acted fraudulently in incurring the debt with no intention to repay the debt and could have avoided the debt being incurred by Tanaka by returning the bus to Namibia to be dealt with in terms of the agreement signed *inter partes.* Okorusu, in the circumstances claims an order in terms of s. 64 of the Close Corporations Act of 1988 for a declarator that the 2nd defendant is personally liable for the payment of the amount claimed.

[2] Clause 2,2.

[9] In their defence, the defendants claimed that the debt claimed arose as a result of Okorusu terminating the agreement unlawfully and that the said termination rendered Tanaka unable to continue servicing its debt to Standard Bank. The defendants further deny being made aware of the demand for the delivery of the bus to Okorusu and that they never failed or refused to deliver the bus. They further aver that the bus came into a state of disrepair and dysfunction whilst in Zimbabwe and could not be driven or transported back to this jurisdiction. The 2nd defendant, for his part denied having acted recklessly nor with gross negligence nor fraudulently as a member or manager of Tanaka but that he did all that within his powers to explore alternative means to generate income for the business.

The evidence

[10] Okorusu called a single witness to testify on its behalf and closed its evidence thereafter. The said witness was Mr. Mark Dawe. I will not, except if necessary, chronicle and/or analyse his evidence. For present purposes, it is important to point out that the 2nd defendant, at the end of the plaintiff's case, moved an application for absolution from the instance, together with the two special pleas referred to in para [1] above.

Application for absolution from the instance

[11] At the close of the case for the plaintiff, the 2nd defendant moved an application for absolution from the instance. The test which the court applies for such applications has been authoritatively stated in various judgments of the courts of South Africa and adopted by this court and our Supreme Court. One of the leading cases normally referred to in this regard is *Claude Neon Lights (SA) Ltd v Daniel*[3] where Miller AJA propounded the applicable test in the following terms:

[3] 1976 (4) SA 403 (A) at 408 G-H.

'. . . when absolution is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff.' See also *Gascoyne v Paul and Hunter,*[4] and *Ruto Flour Mills (Pty) Ltd v Adelson (2),*[5]

[12] In *Gordon Lloyd Page and Associates v Rivera and Another*[6]*,* Harms J.A., after quoting from the *Claude Neon Lights* judgment above, stated the following at G-J:

'This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution from the instance because without such evidence, no court could find for the plaintiff. . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one. . . The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff. . . – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury. . . Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court.'

[13] I am in agreement that the formulation of the test that has previously been applied in such matters has at times couched in terms which appear to have been influenced by the approach adopted in jury trials which do not form part of our civil procedure and do not seem to have been part for a considerably long time, unlike in England and the United States of America. In my view, it is appropriate to adopt the test as propounded by Harms J.A. in the *Clause Neon Lights* case (*supra)* and for exactly the same reasons. The court trying the matter ought to bring its own judgment to bear

[4] 1017 TPD 170 at p173.
[5] 1985 (4) SA 307 (T).
[6] 2001 (1) SA 88 (SCA) at 93.

on the evidence thus far adduced and not base its judgment on the opinion of some fictitious reasonable man who may, in some cases be unable to correctly apply the requisite standard and test in matters considering that in some cases the issues for determination are highly complicated and at times technical even for what might be referred to as a reasonable man to fully appreciate or comprehend, let alone decide.

[14] This test, as advocated for by Harms J.A., appears to be in sync with that applied for instance by Gubbay C.J. in the Zimbabwean Supreme Court in *United Air Carriers (Pvt) Ltd v Jarman*[7]. There, the learned Chief Justice said the following regarding an application for absolution from the instance:

> 'A plaintiff will successfully withstand such an application if, at the close of his case there is evidence upon which a court, directing its mind reasonably to such evidence, could, or might (not should or ought) to find for him.' See also *TWK Agriculture Limited v Swaziland Meat Industries and Another.*[8]

[15] My task, at this juncture, is to consider whether a court, reasonably directed might find for the plaintiff in the light of the evidence led by the plaintiff's sole witness. In order to do so, it is imperative to have due regard to the issues and criticisms levelled by the defendant at the evidence led by the plaintiff. It would seem to me that there is one are two principal basis for the attack. It is that the plaintiff has failed to adduce *prima facie* evidence to show or suggest the application of the provisions of s. 64 of the Close Corporation Act.[9]

[16] Part of the reasoning employed was that when the judgment against the 1st defendant was obtained, the 2nd defendant was out of the country and was therefor unaware of the grant of same. It was also argued that for the provisions of s.64 to apply,

[7] 1994 (2) ZLR 341 (SC).
[8] (4263/05) [2009] SZHC 162 (10 June 2009).
[9] Act No. 26 of 1998

there must be evidence that the 2nd defendant in the instant matter acted recklessly, fraudulently or with gross negligence. It was also contended that the 2nd defendant's actions were inconsistent with a person who allowed the close corporation to trade recklessly and this is evidenced by the fact that the 2nd defendant took the bus to Zimbabwe to operate there where the population is larger than it is in Namibia and that was in a bid to save the close corporation from becoming moribund and to ensure that it is able to keep its head above water as it were and capable of servicing its debts.

[17] In his statement made under oath and which served as his evidence-in-chief, Mr. Mark Dawe stated that the 2nd defendant did not deliver the bus after Okorusu had paid off the amount owing by Tanaka to Standard Bank and requests to return the bus in terms of an order of court were not complied with by the 2nd defendant. The 2nd defendant in fact refused to comply with the court order to that effect.[10] He also averred that the 2nd defendant did not act as a reasonable member by allowing the 1st defendant to continue incurring debts after it had stopped trading.[11]

[18] In cross-examination, from my notes, it does not appear that there were any questions asked relating to the provisions of s. 64. What transpired is that it was put to Mr. Dawe that the 2nd defendant took the bus to Zimbabwe in the best interests of the close corporation, a suggestion that was thrown out with both hands by Mr. Dawe, he arguing that Zimbabwe was not the best destination in which to do business as the Zimbabwean Dollar was at the material time worth nothing. It was also put to him that the bus succumbed to the roads in Zimbabwe which were in a bad state of repair.

[19] Crucially, it was also put to Mr. Dawe that the 1st defendant did not always make money from the transport business as the 2nd defendant very often allowed members of the South West African Peoples Organisation (SWAPO), to ride in the buses for free, a suggestion that Mr. Dawe refused to believe. Mr. Dawe's evidence was that he went out

[10] Para 24 of the witness' statement.
[11] Para 26 of the witness' statement.

of his way to assist the 2nd defendant in the running of the business by preparing the business plan and in many other ways as his ambition was to see Tanaka make it although it was a small company relatively speaking. His unchallenged evidence was that he and the 2nd defendant were on very good terms.

[20] In view of the foregoing, I am of the view that there is no basis on which to properly apply for absolution from the instance in relation to the requirements of the provisions of s. 64. I say so for the reason that no questions were ever put to Mr. Dawe regarding the said requirements. It was never put, for instance that the 2nd defendant did not act recklessly in the running of the business nor that he never acted fraudulently or in any manner of the epithets used to describe impugnable conduct under the said section.

[21] If anything, what was put to Mr. Dawe, to the effect that the 2nd defendant allowed members of SWAPO free use of the bus is *prima facie* viewed, a pointer to reckless conduct but which the 2nd defendant may well explain away once afforded the opportunity to place his defence before the court. As it is, the statement made by Mr. Dawe that the 2nd defendant did not act as a reasonable member of the close corporation would have done remains unhinged. These issues, in my considered view do call for an explanation from the 2nd defendant and it is after he has adduced his evidence and that of any other witnesses, if he is so advised, that the court may be well placed to decide whether or not on the evidence led as a whole it has been proved that the provisions of s.64 should apply in relation to the 2nd defendant.

[22] The standard to be met in cases where the provisions of s.64 are sought to be invoked has been the subject of a judgment of this court in *Peter A. De Villers v Axiz Namibia (Pty) Ltd.*[12] In that case, Hinrichsen A.J. referred to the provisions of the South

[12] Case No. A 330/2008 at p.16 para [48] to p 18 para [50].

African Act, particularly s. 424. At para [48], the learned Judge quoted from *S v Goertz*[13] where Fagan J confirmed the test in the following terms:

> 'There is no need to prove dishonesty on the part of the wrongdoers. The test for recklessness being objective and not subjective, it suffices that the offence was committed by reason of appellant's blind faith in his own ability to pull the company straight.'

He proceeded to opine that recklessness includes negligence in relation to the conduct of a reasonable man, again applying the objective test.[14]

[23] At page 19 para [54], the learned Judge said the following:

> 'The court in *Phlotex* pointed out that recklessness should not be found lightly. The provision was a punitive one and directors could be held personally liable for liabilities of the company irrespective of the causal connection between their conduct and their liabilities. "Recklessly" means 'grossly careless', the important point being that there is "the involvement of risk, whether or not the doer realized it". Although each case would require a value judgment around its own particular facts, "when credit was incurred [and] there was, objectively regarded, a very strong chance, falling short of a virtual certainty, that creditors would not be paid, [this should] also involve the mischief which the section was intended to combat'.

[24] The question, in the light of the foregoing, is whether regard had to the application of the section in question, the evidence led, including the cross-examination of Mr. Dawe, it can be said that there is no evidence on which a court, acting carefully can find for the plaintiff? I am of the view that there is *prima facie* evidence and for that reason, this is, in my considered view, a proper case in which the application for absolution from the instance ought to be dismissed as I hereby do.

---

[13] 1980 (1) SA 269 (C).
[14] *Ibid* at para 50, p. 17.

Prescription

[25] The point of attack herein is that the plaintiff's claim is prescribed for the reason that the plaintiff's amended particulars of claim are dated 23 October 2014 and in the main introduced a new cause of action based on the provisions of s. 64 of the Close Corporation Act (*supra*). It is contended that taking into account the entire period, from when the claim arose, the claim is prescribed in terms of the Prescription Act.[15] It is important, in the circumstances, to have regard to the relevant provisions of the Prescription Act in so far as they may have bearing on this matter.

[26] It was argued on behalf of the defendant that the claim in question was known to the plaintiff and that the latter was not in any way prevented from knowing that the claim was due. For it's part, the plaintiff claims that the amended claim was not a new claim altogether but a mere elaboration of the initial claim. It was accordingly prayed that the special plea of prescription should be dismissed with costs.

[27] In order to attempt to untie the proverbial Gordian Knot, I must have regard to the provisions of the Prescription Act. The relevant provisions in the instant case are those to be found in s. 11. Headed 'Periods of prescription of debts'. It provides the following:

> 'The periods of prescription of debts shall be the following:
>
> (a) thirty years in respect of –
>
> (i) any debt secured by mortgage bond;
>
> (ii) any judgment debt;
>
> (iii) any debt in respect of any taxation imposed or levied by or under any law;

[15] Act No. 68 of 1969.

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt'.

[28] It would appear that in the instant case, the period applicable for prescription is to be found in s. 11 (d). I say so for the reason that the debt in issue does not fall under any of the other categories. The instant debt appears, from all indications to be one to be properly regarded as 'any other debt'. I will therefore proceed to deal with the matter from the premise that the debt prescribes after a period of three years. I did not understand the parties to take any different position in this regard. To the contrary, both argued on the very same premise.

[29] Section 12 deals with the commencement of the running of prescription. It provides in subsection (1) in the main, that prescription begins to run as soon as the debt becomes due. The rest of the subsections deal with instances where prescription begins to run in instances where there is a delay in the debtor becoming aware that the debt is due. Neither subsection appears to be relevant in the instant case and I shall, for that reason, have no regard to either.

[30] Mr. Kamanja for the 2nd defendant, argued that having regard to the summons issued initially, namely on 5 July 2013 and the amendment of same on 23 October 2014. It was contended that the amendment introduced a new cause of action and that

at the time this happened, the claim had prescribed considering that the claim arose in or about July 2011, a period in the excess of three years. For his part, Mr. Vlieghe argued that the plaintiff did not, as submitted by the 2nd defendant introduce a new cause of action by the amendment but that it merely sought to expatiate the claim.

[31] I am in full agreement with Mr. Vlieghe in this regard that the amendment did not seek to introduce a totally new cause of action that was hitherto not canvassed at all in the particulars of claim before the amendment. A reading of the contents of para 13 of the initial particulars of claim ineluctably show that it was alleged therein that the 2nd defendant 'as member of the First Defendant, failed to carry out the business of the First Defendant and to act with a degree of care and skill that may reasonable (*sic*) be expected from a person of such member's knowledge and experience and expertise and failed to comply with the memorandum of agreement entered into between the Plaintiff and the First Defendant.'

[32] The amendment, it will be seen, gave flesh to what may be regarded as bony allegations in the initial particulars of claim. The amendment introduced in particular, the provisions of s.64 of the Act and further expatiated on the particulars of the 2nd defendant's alleged reckless behaviour. This, to my mind does not amount, even with the greatest benevolence, to the plaintiff mounting a new cause of action. The amendment must be seen in the correct light, namely doing no more than expanding and giving flesh to what may be regarded as skeletal allegations in the initial plea.

[33] In *Alfred McAlpine & Son (Pty} Ltd v Transvaal Provincial Administration*[16] Trengove J made the following remarks in relation to an amendment of the particulars of claim, which as in this case did not introduce a new cause of action:

[16] 1977 (4) SA 310 (T) 343 C-D.

'The particulars have been amended and are different in respects already indicated, but that is all it is. The right which the plaintiff is seeking to enforce is still the same, the relief sought is substantially the same, the facts on which the claim is based are the same and, in my view, the cause of action is still substantially the same.'

It is clear that the reasoning in that case applies equally to the instant case and is in my view compelling and I accordingly adopt it as sound and based on sound principle. See also *Advocate Frederick Allan Lange* ***NO*** *(In his capacity as the appointed* ***curator ad litem*** *for Dirk Jacobus Loubser v De Beers Marine Namibia (Pty) Ltd*.[17]

[34] There is yet another reason to throw out the special plea with both hands and it is this: the initial summons issued served to interrupt the running of prescription. In this regard, the learned author Saner[18] discusses the case of *Rooskrans v Minister van Polisie*[19] where the plaintiff issued a summons which was adjudged excipiable by the court, necessitating an amendment of the particulars of claim, which was sanctioned by the court. The defendant filed a special plea in bar in which it raised the issue of prescription. The court, whilst admitting that the summons was however excipiable, held that the special plea stood to be dismissed because the issuance of the summons, excipiable as it was, served to interrupt the running of prescription and accordingly dismissed the special plea. I follow the same reasoning *in casu*.

[35] For the above reasons, I am of the view that it would be incorrect, in the circumstances, to hold that the 'cause of action' introduced by the amendment had been prescribed at the time the amendment was effected. I accordingly dismiss the special plea of prescription as unmeritorious in the circumstances.

Proliferation of actions

[17] Case No. I 341/2008 [2013] NAHCMD 382 (26 September 2013).
[18] Prescription in South African Law, Lexis Nexis, 1996 at p3-22.
[19] 1973 (1) SA 273 (T).

[36] The next prong of attack by the 2nd defendant was also couched as a special plea and related to what was referred to as the proliferation of actions. As I understood Mr. Kamanja, his argument was that the plaintiff had instituted a claim against both defendants which was granted as undefended and which the 2nd defendant successfully rescinded in so far as it related to him. It was accordingly claimed that the plaintiff is proliferating actions by suing in respect of a claim in which it has already obtained judgment against the 1st defendant, something that the law seriously frowns upon.

[37] The principle of proliferation of actions must, for the reason that it has been raised be revisited. The one case I was able to find and which deals with the principle is that of *Socratous v Grindstone Investments*[20] where the Supreme Court of Appeal in South Africa had to grapple with a case involving a disputed lease agreement and in which there was a multiplicity of suits between the parties both at the High Court in Mthatha and in a Magistrate's Court. In the High Court alone, there were a number of proceedings involving the same parties and the same cause of action, resulting in one instance in the plea of *lis alibi pendens* being raised by the appellant unsuccessfully.

[38] At page 3 para [16], Navsa JA, writing for the majority of the court made the following pertinent remarks which were critical of the approach and decision of the High Court:

'Courts are public institutions under severe pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation. The court below erred in not holding that against Grindstone when it dismissed the defence of *lis alibi pendens* without due regard to the facts and on wrong principle. The court below ought not to have proceeded to consider the merits. Furthermore, in my view, Grindstone's failure to disclose in its founding papers that it had despoiled Mr. S and to fully disclose all of the other litigation referred to above was deserving of censure, at least to the extent of a punitive costs

[20] 2011 (6) SA 325 (SCA).

order (see *Trakman NO v Livshitz and Others*). It had come to court with unclean hands. The court below ought to have taken a dim view of that fact.'

I will come to the reasoning of the court in this matter, and the applicability of the principle enunciated therein in a moment.

[39] Another case that dealt with a matter akin to the issue of proliferation of disputes is the judgment of Corbett JA (as he then was) in *Evins v Shield Insurance Co Ltd.*[21] There, the court dealt at length with the pleas of *lis alibi pendens a*nd *res judicata* the effect both principles may have on the finalization of cases. At p385 the learned Judge of Appeal said:

'The object of this principle (*res judicata*) is to prevent repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. (Caney *Law of Novation* 2nd ed at p 70). The principle of *res judicata,* taken together with the "once and for all", means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (ie loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action. . . The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter. Similarly, *lis pendens* is designed to prevent the institution of a second action between the same parties in respect of the same subject matter and based on the same cause of action while another such action is already pending (see *Wolff NO v Solomon* (189) 15 SC 298).

[21] 1980 (2) SA 814 (A).

[40] I must pertinently observe that in the instant case, neither the pleas *res judicata* nor *lis alibi pendens* were raised by the 2nd defendant, leading to the inescapable conclusion that neither of these principles were applicable to the case. Had the situation been otherwise, I am confident that Mr. Kamanja, studious as he is, would have not hesitated and would have not spared any effort in placing before court pleas that would serve his client's interests.

[41] The question is whether in the instant case there was a repetition of suits which would have amounted to what was referred to in *Evins* (*supra*) as harassment of the defendant. In order to arrive at an appropriate conclusion in this regard, it is important to have regard to the history of the litigation between the parties in the instant matter. The history of the present dispute has to some extent been dealt with in the preceding paragraphs. What may be mentioned at this juncture, is that as a result of the agreement between the parties and as a result of the defendants' default and the plaintiff having to pay in terms of its obligations as surety with Standard Bank, the plaintiff applied in terms of the agreement for an order confirming it as the owner of the bus.[22] This action was not defended and judgment was granted by this court by default on 27 January 2012.[23]

[42] When the said order was sought to be executed, it came to light that the bus had been removed from this court's jurisdiction by the 2nd defendant and as it turned out, it was taken to Zimbabwe for reasons which have been dealt with above. This development necessitated that the plaintiff then sue the defendants for payment of the amount of N$ 741, 949.54. Judgment was again granted by default on 20 August 2013. The 2nd defendant successfully filed a rescission application which culminated in the present proceedings.

[22] High Court Case No. I 3526/2011.
[23] See index bundle at p. 97.

[43] The record also reveals that there were also proceedings before the Otjiwarongo Magistrate's Court under case No. 45/2012. These proceedings were launched by the 1st defendant against the plaintiff for payment of an amount of N$ 3 306 528-00 for an alleged breach of contract. The basis of this claim was that the 1st defendant claimed that the plaintiff had unlawfully terminated the agreement relating to transporting the plaintiff's workers as alluded to earlier. The proceedings were defended and intimations were made to withdraw that case from the Magistrate's Court and to have same consolidated with the present action. It is unclear what happened in that regard from my reading of the documents filed of record.

[44] The question that looms large in one's mind, given the above chronicle of events, is whether it can be said correctly and with justification that the plaintiff has instituted a multiplicity of actions against the 2nd defendant to harass him and thereby being guilty of unwarranted proliferated actions. I am of the view that the above chronicle does not bear out such a conclusion. It would seem to me, if anything, that it was the defendants who invited the actions. First, there was the action for confirmation of the plaintiff as the owner of the bus and delivery of same in terms of the agreement. The defendants removed the bus from this court's jurisdiction in violation of the agreement and the plaintiff was forced to lick its wounds as it were and to apply for the monetary claim. Both claims, it must also be mentioned, were not defended by the defendants, with the latter default judgment being rescinded at the instance of the 2nd defendant as stated earlier.

[45] The other action, as clearly stated was launched by the 1st defendant in the Magistrate's Court and the plaintiff could not be expected to fold its arms idly. It defended the action. I am of the view that the conduct of the plaintiff cannot, in the circumstances be regarded as an unwarranted proliferation of actions. The word unwarranted, in my view is significant. It is defined in the Oxford Advanced Learner's Dictionary as 'not reasonable or necessary; not appropriate, unjustified'. On an entire conspectus of the facts stated above, the question is whether the plaintiff, by launching the proceedings that it did before this court should properly attract the criticism that its

actions were unreasonable, inappropriate, unnecessary unjustified or any other fitting epithet? I think not. As indicated above, all the actions instituted by the plaintiff were necessary and were influenced by the actions of the defendants who appear to have acted contrary to the memorial of the agreement *inter partes.*

[46] Contrasting the events in the instant case and that in the *Socratous* case (*supra*), it would appear that in that case, there were a lot of unnecessary and repetitive legal skirmishes in terms of applications and actions in different *fora,* in some cases claiming the same relief and most were at the instance of the respondent on appeal, coupled with non-disclosure of pertinent information to the court. The Supreme Court of Appeal employed an interesting phrase to describe the pandemonium created thereby. It described it as a 'litigation cocktail' that had a 'dizzying effect'. Would it be correct to ascribe such a description to the plaintiff's conduct in the instant case? I think not and I say so based on what I have recounted above. If this was at all a cocktail, I would say it was the defendant, from the *prima facie* evidence before court, who brewed it.

[47] I am not even certain that it would be the appropriate route to uphold a plea such as the present by dismissing the plaintiff's claim. I do not have any authority in hand supporting such a course. What the Supreme Court of Appeal alluded to as having been the proper course in the *Socratous* matter, was for the High Court to have censured the respondent by mulcting it with punitive costs. It may well be that authority exists for such a course but I have not been able to lay my hands on any and in any event, this is not a case, in my judgment where it can properly be said there was an unwarranted proliferation of actions by the plaintiff. This special plea must fail.

[48] In the premises, I issue the following order:

1. The application for absolution from the instance is dismissed.

2. The special plea of prescription is dismissed.

3. The special plea of proliferation of actions is dismissed.

4. The 2nd defendant is ordered to pay the costs.

5. The court shall, in consultation with the parties' representatives, set dates for the continuation of the trial.

_____

TS Masuku

Judge

APPEARANCES:

PLAINTIFF:	S. Vlieghe Instructed by Koep & Partners
2ND DEFENDANT:	A. Kamanja Instructed by Amupanda Kamanja Inc.