REPORTABLE

CASE NO.: SA 08/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FISH ORANGE MINING CONSORTIUM (PTY) LTD	**Appellant**

and

GHANDY GERSON !GOASEB	**First Respondent**
JOSE N SHIPEPE	**Second Respondent**
EMINENT MINING HOLDING (PTY) LTD	**Third Respondent**
MINISTER OF MINES AND ENERGY	**Fourth Respondent**

Coram: SHIVUTE CJ, MARITZ JA and MAINGA JA

Heard: **28 June 2013**

Delivered: **28 March 2014**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and MARITZ JA concurring):

[1] This is an appeal against the whole judgment and order of the High Court upholding with costs the special plea of *res judicata* raised by the Minister of Mines and Energy (the Minister) against the appellant company.[1]

[2] On 8 August 2008 the appellant launched an application in the High Court[2] against the current respondents (Mr !Goaseb, Mr Shipepe, Eminent Mining Holding (Pty) Ltd and the Minister, cited in that order both in the application and in this appeal) and two others, the Mining Commissioner and the Attorney-General, who were cited as fifth and sixth respondents respectively (the first suit), seeking the following relief:

> '1. Declaring as unlawful and setting aside, the endorsement transferring Exclusive Prospecting Licence No 3484 from First Applicant to Third Respondent.
>
> 2. Ordering the Fourth and/or Fifth Respondent to cause the endorsement transferring the Exclusive Prospecting Licence No 3484 from Third Applicant to Third Respondent to be cancelled.
>
> 3. Costs of suit against First, Second and Third Respondent jointly and severally on a scale as between Legal Practitioner and its own client.
>
> 4. Costs of suit against the Fourth, Fifth and/or Sixth Respondents, only in the event of any or all of them opposing this Application.

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[1] See *Fish Orange Mining Consortium (Pty) Ltd v Ghandy Gerson !Goaseb and 3 Others*, Case No I 828/2010 judgment of the High Court delivered on 23 January 2012.

[2] See *Fish Orange Mining Consortium (Pty) Ltd v Ghandy Gerson !Goaseb and 5 Others*, Case No A 209/2008 judgment of the High Court delivered on 2 December 2009.

5. Further and/or alternative relief.'

[3] The appellant is a private company registered in accordance with the laws of Namibia. Its main asset was an Exclusive Prospecting Licence, No 3484 (the EPL), which is the subject matter of the dispute between the parties. Its shareholders at all times comprised of Henriette Trust (68%), the first and second respondents (15% and 7% respectively) and a director of the appellant, one Lourens le Grange (10%). The EPL was issued by the Minister to the appellant on 22 May 2006 for a period of 3 years, i.e. until 21 May 2009. On 20 February 2008 the first respondent, who was one of the directors of the appellant at the time, applied to the Minister on behalf of the appellant to transfer the EPL to the third respondent. In support of the application he attached a document, purporting to be a resolution dated 13 November 2007 of the appellant, authorising the transfer of the EPL to the third respondent, Eminent Mining. The document, purporting to evidence the appellant's resolution, was signed by the first respondent only. On 19 March 2008 the Mining Commissioner, who is not a party to the appeal, granted the application and on the same day the EPL was endorsed as having been transferred from the appellant to the third respondent. The appellant alleged that the application to transfer the EPL was lodged by first respondent in complicity with the second respondent with intent to defraud the appellant as no valid resolution by the appellant authorising such a transfer had been passed. Therefore, it claimed, the approval and endorsement of the transfer was *ultra vires,* unlawful, null and void as contemplated by s 228 read with s 34 of the Companies Act, 61 of 1973.

[4] The application was opposed by first and second respondents on the ground that the relief being sought was vague and embarrassing because the appellant was seeking a declaratory order without also bringing a review application. The first respondent, who deposed to an affidavit on his own behalf and on behalf of the third respondent, stated that while the application was seeking an order setting aside an endorsement made in respect of the EPL, it was at variance with the relief sought. He denied the fraudulent transfer of the EPL and stated that the transfer had been authorised by the appellant.

[5] The application was heard by Parker J a year and 3 months later, on 9 November 2009.

[6] On 2 December 2009 Parker J dismissed the application, with costs holding that:

(a) appellant failed to establish that its rights under the EPL existed when the application was launched or when hearing commenced and, therefore, that it had rights which could be protected by the declaration sought; and

(b) the conduct which the appellant had moved the court to declare unlawful were not acts of the first, second and third respondents, consequently, no declaratory order could be made against those respondents.

[7] The appellant noted an appeal to this court under case number SA 45/2009 against the judgment of Parker J but the appeal was not prosecuted for the reason that no record was lodged nor security provided. In terms of rule 5(6)(*b*) of this court the appeal lapsed.

[8] On 29 March 2010 the appellant - as plaintiff - issued summons in the High Court against the respondents in this appeal (cited in the second suit as first to fourth defendants respectively) claiming an order in the following terms:

> ‘20.1 An order declaring that the plaintiff is the owner of Exclusive Prospecting Licence 3484.
>
> 20.2 That the fourth defendant corrects its records to reflect the plaintiff as the owner of EPL 3484.
>
> 20.3 In the alternative to prayers 20.1 and 20.2 above, that the first to third defendants, jointly and severally, the one to pay the other to be absolved, pay the plaintiff an amount of N$ 5 million.
>
> 20.4 That the defendants jointly and severally, the one to pay the other to be absolved, pay the costs of this matter.
>
> 20.5 Further and/or alternative relief.’

[9] Aside from pleading to the merits of the appellant’s claim, the respondents raised special pleas of *lis pendens* and/or *res judicata* in that the appellant had earlier launched an application on motion under Case No A 209/2008 (the High Court decision per Parker J) and, thereafter, had appealed under Case No SA 45/2009 against Parker J’s judgment in that case. Respondents alleged that the

appellant was seeking more or less the same relief as in the first suit and, hence, it was not entitled to resuscitate and litigate the same issue. They all prayed for the appellant's case to be dismissed with costs on the basis of their special pleas.

[10] The parties agreed to set down and argue the special pleas. The special pleas were argued on 31 October 2011 before Unengu AJ. In the course of the hearing it became apparent that the appeal under case number SA 45/2009 had lapsed. As a result, the special plea of *lis pendens* was abandoned. The parties agreed to proceed with the plea of *res judicata* raised by the fourth respondent.

[11] On 23 January 2012 Unengu AJ upheld the special plea of *res judicata.* His order reads as follows:

> '[18] In the result, I make the following order:
>
> 1. That now that the appeal in the Supreme Court of Namibia against the ruling of Parker J in the matter of *Fish Orange Mining Consortium (Pty) Ltd v Ghandy Gerson !Goaseb and Others* case no A 209/2008 (appeal case no SA 45/2009) has lapsed, the special plea of *lis pendens* has fallen away;
>
> 2. The special plea of *res judicata* succeeds;
>
> 3. The plaintiff pays the costs of fourth defendant on the scale of party and party.'

[12] The judgment that concluded with these orders, is the subject of this appeal. Unfortunately, as is far too often the case, I must first deal with a condonation application before I can turn to the substance of the appeal.

[13] The appellant lodged the notice of appeal against the judgment of Unengu AJ in time (21 February 2012) but the appeal record was filed out of time. It should have been lodged on 23 April 2012 but, instead, it was lodged seventeen days later, on 18 May 2012. Before lodging with the Registrar copies of the record, appellant also failed to enter into good and sufficient security for the respondents' costs of appeal as provided for by rule 8(2). Appellant, however, timeously sought condonation for the non-compliance with rule 5(5) of this court but omitted to seek similar relief for its failure to comply with rule 8(2). While the first to third respondents did not give notice of their intention to oppose the application for condonation for the non-compliance with rules 5(5) and 8(2), they expressed opposition to the granting of condonation in their heads of argument. Counsel for first to third respondents' main focus was the failure of the appellant to seek condonation for the non-compliance with rule 8(2). He submitted that the appellant's application for condonation in respect of its non-compliance with rule 5(5) was pointless and moot as the failure to comply with rule 8(2) in any event had the result that the appellant's appeal lapsed. In my view correctly so, as counsel for the appellant was under the misapprehension that appellant's application for condonation for the non-compliance with rule 5(5) was also good for its failure to comply with rule 8(2). When it became apparent that that line of argument was misplaced, counsel sought an amendment to paragraph 1 of the notice of motion to insert 'and rule 8(2) and (3)' in the prayer for condonation

sought. Notwithstanding opposition to the application by the first to third respondents the court granted the amendment.

[14] We reserved judgment on the condonation application. In my view the application should succeed. The explanation proffered for the late filing of the record and the failure to have entered into good and sufficient security for the respondents' costs on appeal is reasonable. The appellant, having lost the previous case, sought a second opinion on the prospects of success on appeal from counsel other than the one who had argued its case before Unengu AJ. That basically caused the delay. It is clear from the affidavit supporting the condonation application that appellant intended to prosecute the appeal without delay. The failure to furnish security as contemplated by rule 8(2) is also explained in the affidavit. In my view that explanation shows that the misapprehension harboured by counsel for the appellant that the application for condonation for the non-compliance with rule 5(5) was also good for the non-compliance with rule 8(2) is genuine. On 26 March 2012, a little less than a month before the record should have been filed on 23 April 2012, the appellant's legal practitioners of record caused a letter to be written to counsel for the first to third respondents suggesting that security should be fixed at N$40 000,00. No response was received. The letter was followed by an email on 3 May 2012, which was also copied to the Government Attorney, counsel for the Minister. On 10 May 2012, the appellant's legal practitioners collected the record from the transcribers. Counsel for the first to third respondents was telephonically contacted and requested to respond to the letter and the email message about the security to be fixed. Counsel for the first to third respondents promised to respond immediately. He responded on 11 May

2012 demanding security of N$70 000,00. By 11 May 2012 counsel for the Minister had not yet responded to the issue of security. An attempt to contact him telephonically on 11 May 2012 was to no avail as he was on leave until 14 May 2012. On or about 14 May 2012 he was contacted and agreement was reached that the appellant should furnish security of N$50 000,00 subject to the approval of first to third respondents. On or about the same day counsel for the first to third respondents was contacted again and, after further negotiations, he approved that security should be set at N$50 000,00. The appellant was informed accordingly and on 16 May 2012 it made funds available in the trust account of the appellant's legal practitioners of record. On the same day, the record and security for the costs were delivered to the respondents' lawyers and, on 18 May 2012, lodged at this court.

[15] As already stated, there was no substantive opposition to the application for condonation and reinstatement of the appeal and the evidence presented on behalf of the appellant in support of the application was not gainsaid. The explanation is reasonable. I do not find any prejudice attendant to the appellant's non-compliance with rules 5(5) and 8(2). It was also not seriously contended that the appeal would not have reasonable prospects of success. The condonation and reinstatement application should succeed but, inasmuch as the appellant sought an indulgence for its non-compliance and the respondent's opposition to it was not unreasonable, I propose to make an order that it should bear the costs occasioned by the application, including the amendment thereof.

[16] I now turn to the principal issue before court, the special plea of *res judicata*. The respondents' submission was that Parker J had already decided the claims brought by the appellant before Unengu AJ and that, that judgment was final or definitive of those claims. The appellant's submission was to the contrary. Counsel for the appellant submitted that the causes of action in the motion and action proceedings were not the same because the declaratory relief based on the common law review grounds was sought in the application proceedings in order to protect the appellant's 'ownership' of the EPL which had lapsed at the time the judgment of Parker J was handed down, whereas the action proceedings were based on the unlawful actions of the respondents which resulted in the appellant being divested of it rights under the EPL and the patrimonial consequences thereof. He contended that it was, in essence, an action for damages based on the unlawfulness of the conduct in question that had not been dealt with in the judgment of Parker J. Alternatively, if it were to be found that the basis of the claim was the same, counsel submitted that the earlier judgment disposed of the application on procedural grounds and was not final on the merits of the alleged unlawful conduct. Therefore, the court *a quo* misdirected itself when it upheld the special plea. Counsel conceded that, had the appellant persisted with prayers 20.1 and 20.2 of the amended particulars of claim, the defence of *res judicata* vis-à-vis the fourth respondent could have been successful, it being common cause that the EPL lapsed.

[17] In *African Farms and Townships Ltd v Cape Town Municipality*[3], Steyn CJ succinctly stated the rule as follows:

> 'The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.'

[18] In *The State v Moodie*[4] Hoexter ACJ said:

> '. . . I am of the opinion that in our common law the *exceptio rei judicatae* cannot succeed unless it is based on a final judgment on the merits.'

[19] Thus a judgment or order which does not have the effect of settling or disposing of the dispute between the parties with finality cannot found the *exceptio rei judicatae*.[5]

[20] The effect of the final judgment on a party's cause of action has been described as follows:

> 'The effect of a final judgment on a claim is to render the claimant's cause of action *res judicata*. If therefore a party with a single cause of action giving rise to a single claim obtains a final judgment on part of his claim, the judgment puts an end to his whole cause of action, with the result that a subsequent claim for the balance of what is his cause of action entitled him to claim in the first instance can be met

[3]1963 (2) SA 555 (A) at 562C-D. See also *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 178H-J and *Union Wine Ltd v E Snell and Co Ltd* 1990 (2) SA 189 (C) at 195F-H.

[4] 1962 (1) SA 587 (A) at 596E-F. See also *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) 462 (A) 472A-E.

[5]*Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 at 75H.

> with a plea of *res judicata.* When a cause of action gives rise to more than one remedy, a plaintiff who pursues one of those remedies and obtains a judgment thereon can be met with a plea of *res judicata* if he should subsequently seek to pursue one of the other remedies, the reason being that the final judgment on part of one's cause of action puts an end to the whole of such cause of action.'[6]

[21] The judgment and order of Parker J is of central importance in deciding the special plea. The judgment and order has to be carefully construed so as to determine whether or not they finally or definitely disposed of the issue later raised in the appellant's particulars of claim as Unengu AJ found.

[22] In *Firestone South Africa (Pty) Ltd v Genticuro AG*[7], Trollip JA gave guidance how a court's judgment and order is to be interpreted when he said:

> 'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules.'

[23] With these principles in mind I turn to consider the judgment and order of Parker J. The order was clear and unambiguous and nothing need be said about it. The court ordered that the appellant's application be dismissed and it further directed that the appellant pay the costs of the first, second and third respondents.

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[6] Davis J referring to the Honourable P J Rabie in Joubert (ed), *The Law of South Africa*, Vol 9, 1st re-issue at para 443 and in *Signature Design Workshop CC v Eskom Pension and Provident Fund and Others* 2002 (2) SA 488 (C) at 492E-F.

[7] 1977 (4) SA 298 (A) at 304D-E, see also *Administrator, Cape, and Another Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715F-716C, footnote 5 above at 75A-G.

The judgment of Parker J is embodied in fifteen paragraphs. The first and second paragraphs are introductory in nature. In the third paragraph the court isolated the main purpose of the application that was before it, namely, that the appellant was seeking an order declaring unlawful the exercise of a discretion conferred in terms of the Mineral (Prospecting and Mining) Act, 1992 (Act 33 of 1992) on the Minister and the Mining Commissioner. In the two paragraphs that followed (fourth and fifth) the court found that the appellant failed to furnish cogent legal basis why it should declare unlawful the exercise of statutory discretionary power by the Minister and the Mining Commissioner. The court further expounded on the principles on which an administrative action against a Government official would be founded. In the sixth paragraph the court repeated what it had stated in paragraph three and held that the appellant's application was directed at undoing or setting aside an endorsement made in respect of the EPL by the Minister and/or the Mining Commissioner and therefore the first, second and third respondents have been cited merely because they had an interest in the outcome of the application and no relief can in law or in logic be claimed from them. On that score the application was found to fail against the first, second and third respondents.

[24] In the remaining paragraphs the court spent its time answering the question which it had framed as follows:

> 'Has the applicant successfully established the common law or constitutional ground of review on which the applicant relies to contend that the fourth and fifth respondents acted unlawfully in the exercise of their discretionary power purportedly under Act No 33 of 1992.'

[25] This question the court answered in the negative. It emphasised that the appellant had not brought an application to review and set aside that act or to review, set aside and correct that act. The court found that the Minister, the Mining Commissioner and the Attorney-General did not file papers in opposition to the application. It found that what the appellant had moved was a declarator as against the respondents. Relying on s 16 of the High Court Act, 16 of 1990, the court found that the High Court was not entitled to protect a non-existent right by way of a declaratory order as at the time the application was launched the right the appellant might have had to the EPL was no longer in existence and therefore there was no right to protect. Accordingly the application was dismissed. I interpose here to note that the restatement of the essence of Parker J's reasoning without comment should not be understood as an endorsement thereof by this court.

[26] The facts on which appellant's claims were founded in the application before Parker J were that the application to transfer the EPL by first respondent in complicity with the second respondent were carried out with intent to defraud the appellant as no valid resolution by appellant authorising such transfer was in existence and therefore the approval and endorsement of the transfer by the Minister and/or the Mining Commissioner was *ultra vires*, unlawful and null and void as contemplated by s 228 read with s 34 of the Companies Act, 61 of 1973. To this the first respondent who deposed to an affidavit on his and that of the third respondent's behalf denied the fraudulent transfer of the EPL and stated that the transfer was duly authorised by the appellant. The Minister, the Mining Commissioner and the Attorney-General did not oppose the application at the

time. The Mining Commissioner and the Attorney-General were not parties to the proceedings before Unengu AJ.

[27] In the action that served before Unengu AJ the appellant alleged wrongfulness without lawful *causa* on the part of the first and second respondents, acting on behalf of the third respondent, when they appropriated the EPL by having the Minister approve transfer of the EPL from the appellant to the third respondent. In the alternative, the appellant alleged misrepresentation on the part of the first and second respondents when they represented to the Minister that an agreement had been concluded between the appellant and the third respondent in terms of which registration and possession of the EPL had passed from the appellant to the third respondent; that first and second respondents knew that the said misrepresentation was false; that it was made with the intention to mislead the Minister and to defraud the appellant, alternatively, that the misrepresentation was made in order for third respondent to steal the EPL from the appellant; that as a result of the misrepresentation the Minister endorsed the EPL, in effect passing 'ownership' to the third respondent that in so endorsing the EPL the Minister acted unlawfully as he did so without any *causa* whatsoever, and acted *mala fide,* alternatively, grossly negligent that the actions of the Minister caused the appellant to suffer damages in the amount of N$5 million, for at about 20 February 2008 the value of the EPL was N$5 million; that despite demand, the Minister had failed and/or refused to correct the official records to reflect the appellant as the owner of the EPL; that after the actions of the first and second respondents, the EPL was registered in the name of the third respondent who had possession of the EPL ever since, when at all relevant times the first to third respondents knew that the

appellant was the owner of the EPL and that notwithstanding the said knowledge, the first to the third respondents on or about June 2009 allowed the EPL to lapse (the reference to the 2011 in the particulars of claim, I shall assume, was made in error).

[28] I must interpose here to mention that the heads of argument for the parties on the special plea before the court *a quo* were made available to us and we were referred to paragraph 9 of the appellant's (plaintiff then) heads of argument where it is apparent that prayers 20.1 and 20.2 of the amended particulars of claim had been abandoned. Counsel who represented the appellant in the High Court went on to state:

> 'The Exclusive Prospecting Licence has in fact lapsed. It lapsed after the claim was instituted. Only the claims for damages and costs are proceeded with. The claims for damages are against all four defendants.'

Counsel for the appellant conceded in this court that, had appellant persisted with the two prayers (20.1 and 20.2 as per the amended particulars of claim) the defence of *res judicata* vis-à-vis the Minister would have been successful, it being common cause that the EPL had lapsed. What remained was the alternative claim of damages as against the first, second and third respondents in the amount of N$5 million and a claim for costs as against all four respondents.

[29] This notwithstanding, counsel for the first, second and third respondents maintained that the appellant was arguing its appeal on an erroneous premise that prayers 20.1 and 20.2 in its amended particulars of claim had been abandoned in

the court *a quo.* He contended that the premise was not supported by the appeal record and the court *a quo*'s judgment. Unengu AJ's judgment was rendered taking into consideration the abandoned prayers 20.1 and 20.2, so argued counsel. Counsel went on to contend that the appeal should be decided in favour of the respondents for the reason of the concession made by counsel for the appellant that had claims 20.1 and 20.2 not been abandoned, the special plea of *res judicata* would have succeeded.

[30] I am unable to agree. As already stated, the heads of argument for the appellant and the Minister on the special plea in the court *a quo* were provided to this court at the hearing of this appeal and it is apparent from the record of proceedings that the prayers in question had been expressly abandoned in the court below.

[31] Counsel for the Minister also acknowledged that abandonment in paragraph 5 of his heads of argument. The following is recorded:

> 'It is also worthy of note that as per paragraph 9 of the plaintiff's heads of argument; prayers 1 and 2 are abandoned by plaintiff. Plaintiff therefore no longer seeks a declaration as the owner of the fated EPL 3484 but proceeds with the alternative claim for damages and costs. The effect of this shall be dealt with herein.'

[32] As a result of the abandonment of prayers 20.1 and 20.2, counsel for the Minister structured his heads of argument in two separate sections, namely, the 'no cause of action' argument which, in my opinion, was an argument on the merits of the claims and the *res judicata* argument in which counsel conceded that the

abandonment of prayers 20.1 and 20.2 'effectively meant to defeat the special plea of *res judicata'.*

[33] Counsel for the Minister continued to say:

> 'It is conceded that; that is its effect, however plaintiff ought to be burdened with costs for such late abandonment as it has been aware of the special plea since the same was filed. In any event, such abandonment amounts to a withdrawal of that particular relief and ought to have come with a tender of costs as the matter was already set down.'

[34] Notwithstanding the concession above, counsel for the Minister still contended that the matter before Unengu AJ was *res judicata* when he submitted that:

> '. . . prior to the abandonment, the claim for transfer of the EPL, was based on the same grounds as the current action, it concerned the same subject matter and had been dealt with finally hence plaintiff's abandonment of the same to defeat the special plea.'

[35] He was apparently fortified in that submission by what Parker J had said:

> 'When applicant launched the present application, any right the applicant might have had no longer existed . . . '

[36] The fact that the EPL had lapsed at the time Parker J heard the appellant's application did not preclude the appellant from claiming damages. A plaintiff is

entitled to recover from the wrongdoer the amount by which the plaintiff's patrimony was diminished as a result of the wrongdoer's conduct.[8]

[37] In *Union Government (Minister of Railways and Harbours) v Warneke*[9] the following appears:

> 'And we are at once faced with the fact that it was essential to a claim under the *Lex Aquilia* that there should have been actual *damnum* in the sense of loss to the property of the injured person by the act complained of (*Grueber*, p. 233). In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between that *universitas* as it was after the act of damage, and as it would have been if the act had not been committed (*Grueber*, p. 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.'

[38] The court *a quo* correctly identified the question before it, namely, whether the judgment in *Fish Orange Mining Consortium (Pty) Ltd v Ghandy Gerson ! Goaseb and Others*, delivered by Parker J rendered the case before it *res judicata*. That court further correctly made reference to the requisites of a plea of *res judicata,* namely, that the matter being adjudicated upon must have been based on the same cause between the parties and the same thing must have been demanded. The court *a quo* then adumbrated the claims sought before Parker J as per paragraph 2 above and the conclusion arrived at, that there was no right to

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[8] LTC Harms, *Amlers Precedents of Pleadings*, 7th ed at 155. See also *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) 917A-F and *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496G.

[9] 1911 (AD) 657 at 665.

protect as the EPL had lapsed. That court proceeded to compare the prayers before it, but significantly, disregarded the fact that prayers 20.1 and 20.2, which were more or less the same prayers raised in the proceedings before Parker J, had been abandoned. It then concluded that the requisites of a plea of *res judicata* were present and upheld the special plea.

[39] In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*[10] Olivier JA encapsulated the *res judicata* principles when he said:

> '[2] The requirements for a successful reliance on the *exceptio* were, and still are: *idem actor, idem reus, eadem res* and *eadem causa petendi*. This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground" (per Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, "on the same cause for the same relief" (*per* Van Winsen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B; see also the discussion in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664C-E); or which also comes to the same thing, whether the "same issue" had been adjudicated upon (see *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 179A-H).'

[40] The fact that the court *a quo* considered the appellant's claim in whole as per the amended particulars of claim, disregarding the fact that prayers 20.1 and 20.2 had been abandoned before the hearing, in my opinion strengthens the appellant's contention that that court misdirected itself on that point. The appellant did not have to file a substantive application to abandon the prayers it did, as

[10] 2001 (2) SA 232 (SCA) at 239G-H.

counsel for the first to third respondents contended, it was sufficient to abandon the prayers in the form it did.

[41] Once the two prayers were abandoned and there remained a claim for damages only, the fundamental question which should have arisen and which is before us for determination is whether the 'same issue' is involved in the two actions: in other words, is the same thing demanded on the same ground or, which comes to the same thing, is the same relief claimed on the same cause, or to put it more succinctly has the issue now before the court been finally disposed of in the first action – to paraphrase the *ratio* in the *National Sorghum Breweries*-case.[11]

[42] In my opinion the question should be answered in the negative. It is very clear on the papers before us that Parker J was saddled with the issue of declaring the conduct of the Minister endorsing the transfer of the EPL from the appellant to the third respondent unlawful and declaring the endorsement to be cancelled and set aside. This was essentially a claim for the restoration of ownership of the EPL to the appellant. He, among other things, found that the claims did not relate to the first, second and third respondents and that no relief in law or logic had been claimed from them. Parker J did not consider the merits in support of the appellant's complaint against the three respondents.

[43] In the suit before the court *a quo* damages were claimed. The appellant accepted that the EPL had lapsed and it sought to be compensated for the patrimonial loss suffered as a result of the misappropriation and loss of its rights

[11]Note 10 above, at 239I.

under the EPL. The cause of the action was founded on fraud, alternatively misrepresentation in the further alternative theft as against the first, second and third respondents, and *mala fide*, alternatively, gross negligence as against the Minister. The appellant did not seek damages against the Minister, only costs. In the first suit the declaratory order was sought against the Minister and the Mining Commissioner and costs against the first, second and third respondents.

[44] The parties to the two suits were the same and the factual background to sustain the relief sought in the respective suits were the same but it cannot be said that the same thing was claimed in the respective suits, nor was reliance placed on the same cause of action. As was correctly stated in the *National Sorghum Breweries* case above, the mere fact that there are common elements in the allegations made in the two suits does not justify the *exceptio* – one must look at the claim in its entirety and compare it with the first claim in its entirety. If this is done in the present case, the differences are so wide and obvious that one simply cannot say that the same thing was claimed in both suits or that the claims were brought on the same cause of action. Moreover, as already stated, Parker J did not consider the merits of the alleged fraudulent or dishonest conduct relied on by the appellant; the *exceptio* cannot succeed unless it is based on a final judgment on the merits. It follows that *exceptio res judicata* should not have been allowed to dislodge the appellant's claim for damages. The appeal should succeed.

[45] A brief word on the costs. When this matter was called on 19 June 2013, the appellant's counsel had to withdraw due to her earlier engagement in the matter in a different capacity. As a result, The matter had to be postponed to 28

June 2013 for the appellant to secure the services of another counsel to argue the matter. As a result, the appellant should pay the costs occasioned by that postponement. As for the balance of the costs in this appeal, they should follow the result. The Minister did not participate in this appeal and the costs sought against him cannot be granted.

[46] Accordingly I make the following order:

1. The appellant's failure to lodge the record of appeal within the time period prescribed in rule 5(5) and to enter into good and sufficient security for the respondents' costs within the time period prescribed by rule 8(2) is condoned and the appeal is reinstated.

2. The appeal is allowed.

3. The order of the High Court upholding the special plea with costs on 23 January 2012 is set aside and the following order is substituted:

> 'The special plea is dismissed with costs, such costs to be paid by the fourth defendant.'

4. The matter is remitted to the High Court to adjudicate the merits of the appellant's claim.

5. The appellant is to pay the costs occasioned by the postponement of this matter on 19 June 2013 and the costs of the application for condonation and reinstatement of the appeal, which costs shall include the costs of one instructing and one instructed counsel.

6. The first, second and third respondents are ordered to pay the costs of this appeal jointly and severally the one paying the others to be absolved. Such costs shall include costs of one instructing and one instructed counsel.

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MAINGA JA

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SHIVUTE CJ

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MARITZ JA

APPEARANCE

APPELLANT:	N Bassingthwaighte
	Instructed by Koep & Partners
1ST to 3RD RESPONDENTS:	S Namandje
	Instructed by Sisa Namandje & Co Inc