REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 10083/2012

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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DATE SIGNATURE

In the matter between

MONYETLA PROPERTY HOLDINGS **PLAINTIFF**

and

IMM GRADUATE SCHOOL OF MARKETING (PTY) LTD **FIRST DEFENDANT**

TATTERSALL, NIGEL COLIN **SECOND DEFENDANT**

Coram: WEPENER J

Heard: **26 August 2013**

Delivered: **28 August 2013**

Summary: Action for damages – previous action in which damages claimed – same cause of action – once and for all rule applicable to second claim – cannot again claim damages on a second or third occasion

Prescription – commences to run upon cancellation of agreement when breached.

J U D G M E N T

WEPENER J:

[1] The plaintiff instituted an action against the first defendant in which action it claims damages arising out of the breach and consequent cancellation of a lease agreement. The second defendant is sued as surety and I need say no more about the second defendant in that capacity by virtue of the conclusion reached by me herein.

[2] The defendants pleaded two special pleas – the first that the claim had become prescribed and the second, that the plaintiff has already successfully claimed damages from the first defendant and that the plaintiff is consequently precluded by the once and for all rule from claiming further damages on the same cause of action, i.e. the breach of the lease agreement and its subsequent cancellation.

[3] Prior to the trial commencing the defendants served an application pursuant to Uniform rule 33(4) in which the defendants' special pleas were sought to be disposed of separately from all other issues. Although the plaintiff initially opposed such separation, the parties agreed that no evidence would be necessary in order to determine these two issues and that reference by them to a limited number of documents would suffice in order for a court to determine the two special pleas. As a result, and having been of the view that the two issues could indeed be conveniently dealt with separately, I granted an order that the special pleas be heard separately.

[4] The claim for damages arose against the first defendant, who was a tenant in a building, pursuant to a written lease agreement.

[5] It is common cause that the lease agreement was cancelled by the plaintiff on 6 March 2009 due to a breach of the agreement by the first defendant. This cancellation occurred more than three years before the service of the summons in this matter and this fact forms the basis of the first special plea that the plaintiff's claim has become prescribed.

[6] Of further relevance is the fact that the plaintiff brought an application against the first defendant during 2009, which application was based on the same lease agreement between the parties and the plaintiff relied on the breach and cancellation of the lease which occurred on 6 March 2009. The plaintiff claimed arrear rental up and until the date of such cancellation and also claimed damages for holding over on the basis that the first defendant remained in occupation of the premises subsequent to the cancellation of the lease agreement. The plaintiff also sought ejectment of the first defendant from the premises. The plaintiff succeeded with all its aforesaid claims and judgment in its favour was delivered on 24 March 2010. Shortly thereafter the first defendant vacated the premises.

[7] It is common cause that a portion of the claim was for damages for holding over by the first defendant. The plaintiff claimed an amount 'being the amount owing in respect of damages suffered by the applicant [plaintiff] as a result of the first respondent's [first defendant's] unlawful holding over of the leased premises…' I refer to this litigation as the first application.

[8] Thereafter, and during April 2010, the plaintiff launched a second application (the second application) in which the it sought payment of

damages from the first defendant for a further period during which it was alleged that the defendant was holding over the premises until it vacated the premises. The second application was settled and the first defendant agreed to make payment to the plaintiff. The terms of the settlement agreement included the following:

'Nothing contained in this agreement shall preclude the applicant or the first respondent from instituting proceedings against the other in respect of any other claims that either party may have against the other arising out of or relating to the first respondent's occupation of Block A and B, Richmond Forum, Corner Napier Avenue and Cedar Road, Richmond.'

[9] The present action is the third proceeding instituted by the plaintiff against the defendants in which it now claims payment of 'contractual damages' suffered by it in respect of the period from the date of vacation of the premises by the first defendant until the date upon which the lease would have expired but for the cancellation thereof by virtue of the first defendant's breach of thereof. The claim, as formulated, gave rise to the second special plea.

[10] The defendants' second special plea is based on the fact that despite already having claimed damages in the previous applications the plaintiff again claims further damages arising out of the cancellation of the agreement, which it is not entitled to do.

[11] The plaintiff replicated to these special pleas, relying on the provisions of clauses 26.2. to 26.4 of the lease agreement in an attempt to avoid both special pleas. In order to deal with the breach clause contained in the agreement I need to set out the relevant portions thereof.

'26. Breach

26.1 Should the Lessee:

26.1.1 fail to pay any amount due by it in terms of this lease to the Lessor on due date or within 7 (seven) days of that due date; or

26.1.2 commit any other breach of any term of this lease, whether such breach goes to the root of the lease or not, and fail to remedy that breach within a period of 7 (seven) days after the giving of written notice to that effect by the Lessor; or

26.1.3 breach any of the terms of this lease and the thereafter again breach any term of this lease (whether the same term which was breached on the previous occasion or otherwise) within a period of 12 (twelve) months after the earlier breach aforesaid; or

26.1.4 commit any act of or akin to the act of insolvency as contemplated in the Insolvency Act, 1936(Act 24 of 1936);

then and in any such event the Lessor shall be entitled, without prejudice to any other rights which it may have under this lease or at common law:

26.1.5 to cancel this lease on written notice thereof to the Lessee and claim immediate repossession of the Premises; and

26.1.6 to claim all damages (including consequential damages) which the Lessor may suffer together with the interest thereon at the rate referred to in clause 26.5; or

26.1.7 …

26.1.8 …

26.2 While the Lessee remains in occupation of the Premises and irrespective of any dispute between the parties, including, but not being restricted to a dispute as to the Lessor's rights to terminate this leas the –

26.2.1 Lessee shall continue to pay all amounts due to the Lessor in terms of this lease on the due dates;

26.2.2 Lessor shall be entitled to recover and accept such payments;

26.2.3 acceptance by the Lessor of such payments shall be without prejudice to and shall not in any manner whatsoever affect the Lessor's right to terminate this lease or to claim any damages whatsoever.

26.3 Should the dispute between the Lessor and the Lessee be determined in favour of the Lessor, the payments made to the Lessor in terms of this clause 26 shall be regarded as amounts paid by the Lessee in respect any loss and/or damages sustained by the Lessor as a result of the breach.'

[12] In particular, it is the plaintiff's case that the two previous proceedings did not prevent the present claim because in the first application it sought arrear rental and charges that had fallen due prior to the date of a cancellation and it sought payment of amounts that had fallen due from month to month in terms of clause 26.2.1 of the lease agreement from date of cancellation of the agreement until September 2009. In the second application it also sought payment of the amounts that had fallen due for payment from month to month under clause 26.2.1 for the period October 2009 until April 2010.

[13] The plaintiff argues that in the present action it claims payment of contractual damages suffered by it in respect of the period from the date on which the defendant vacated the premises until the date on which the lease would have expired but for the cancellation of the lease. It was further argued that this claim for these contractual damages only arose when the first defendant vacated the premises and that the claim has thus not become prescribed.

[14] In essence, counsel for the plaintiff argued that the claim for the contractual damages is something different from the relief claimed in the previous litigation.

[15] To test this proposition one has to consider the provisions of clause 26 of the agreement. The approach to be adopted when interpreting a contract is well settled in our law. In *Coopers and Lybrand and Others v Braynt* 1995 (3) SA 761 (AD) Joubert JA said at 768A-E:

'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. Delmas Milling Co Ltd v Du Plessis1955 (3) SA 447 (A) {dicta at 454G-H & 455A-C appl} at 454G-H; Van Rensburg en Andere v Taute en Andere1975 (1) SA 279 (A) {dicta at 303A-C & 305C-E appl} at 305C-E; Swart's case supra at 200E-201A & 202C; Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others1994 (2) SA 172 (C) {dictum at 180I-J apply} at 180I-J;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. Delmas Milling case at 455A-C, Van Rensburg's case at 303A-C, Swart's case at 201B, Total South Africa (Pty) Ltd v Bekker NO1992 (1) SA 617 (A) {dictum at 624G appl} at 624G, Pritchard Properties (Pty) Ltd v Koulis1986 (2) SA 1 (A) {dictum at 10C-D appl} at 10C-D.'

Paragraphs 2 and 3 of Joubert JA's summary are not applicable as there are no surrounding circumstances nor for that matter anything that is ambiguous in the clause nor did either party argue that there is ambiguity in clause 26. However, seen in its context, clause 26.2 is an interim measure to protect the lessor during the time that a dispute may exist between the parties. It provides for damages to be paid for holding over by the lessee.

[16] Clause 26 of the lease agreement is headed 'Breach' and what follows in that clause is relevant to a breach of the lease agreement. Summarised, clause 26.1 provides that 'should the Lessee (breach the agreement) then…the Lessor shall be entitled…to cancel this lease agreement…and to claim all damages (including consequential damages) which the Lessor may suffer…' The parties are ad idem that the provisions of clause 26.1.7 and 26.1.8 are not applicable to the dispute.

[17] So far the clause gives no difficulty and none was argued to exist. However, counsel for the plaintiff argued that after the cancellation of the agreement the plaintiff was by virtue of the provisions of clause 26.2 obliged to sue the first defendant for monthly amounts whilst the first defendant remained in occupation. Counsel for the plaintiff went further and argued that

the provisions of clause 26.2 precluded the plaintiff from instituting action against the defendant for consequential damages until the first defendant vacated the premises.

[18] These arguments are premised on an incorrect reading of clause 26 in general and clause 26.2 in particular. Clauses 26.1.5 and 26.1.6 specifically provide that the plaintiff's right to recover all damages, including consequential damages, arises upon cancellation of the agreement. That is the date when the debt becomes due and claimable. That date is not extended by virtue of the provisions of clause 26.2 of the agreement. Clause 26.2 provides that the plaintiff was entitled to accept interim payments whilst the defendant remained in occupation. It was not obliged to do so. It was also not prevented from instituting action for all its damages as provided for in clause 26.1.6 of the agreement.

[19] I am of the view that provisions of clause 26.2 were inserted as an interim measure to provide for payment whilst the parties are in a dispute regarding, inter alia, the plaintiff's right to terminate the lease. This in fact happened in the first application in that the defendant disputed the right of the plaintiff to terminate the agreement. Clause 26.2 then provides for interim payments pending the outcome of such a dispute. The amounts so paid would eventually be taken into account in determining any damages suffered by the plaintiff should the dispute be determined in favour of the plaintiff. Clause 26.3 provides that such amounts should be regarded as amounts paid by the lessee in respect of any loss or damages suffered by the plaintiff. Interim payments would, no doubt, reduce any claim for damages which the plaintiff may have.

[20] The argument that the plaintiff was obliged to recover damages on a monthly basis whilst the defendant was in possession of the property and thus

the plaintiff was prevented from instituting action for its contractual damages, cannot be sustained. Damages for holding over is nothing other than damages ex contractu. See *Matz v Simmonds' Assignees* 1915 CPD 34; *Du Toit v Vorster* 1928 TPD 385 at 389; *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) at para 21. See also the discussion in Cooper: Landlord and Tenant 2nd Ed p233-234.

[21] In the circumstances the first application as well as the second application included claims for amounts for damages pursuant clause 26.2 which amounts were awarded by the court, and in the second application agreed between the parties, as a result of the damages which the plaintiff suffered due to the first defendant's holding over of the premises.

[22] The question that arises from the above is whether the plaintiff is entitled to institute these proceedings if regard is had to the provisions of clause 26 and more specifically the provisions of clauses 26.1.5, 25.1.6 and 26.2 as read with 26.3. This question arises by virtue of the once and for all rule.

[23] This rule has the effect that a plaintiff may only claim damages once for all damages based on a single cause of action. A party with a single cause of action must claim damages which flow from that cause of action in one action. Van Winsen AJA (as he then was) said in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E:

'The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio that underlines the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause of action for the same relief can be met by an exception rei judicatae vel litis finitae. The reason for this rule is given by Voet, 44.2.1 (Gane's translations, Vol 6, p553) as being "to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in difference judicial proceedings." This rule is part of the very

foundation of our law and is of equal application to the criminal law – in support of a plea of autrefois acquit (see, eg, Rex v Manasewitz, 1933 AD 165 at pp. 168, 176, 184-187) – as it is to civil claims for damages resulting from negligent acts (see, eg, Cape Town Council v Jacobs, 1917 AD 615 at p. 620; Oslo Land Company Limited v the Union Government 1938 AD 584 at p. 591) and to claims arising out of a breach of contract (see, eg, Kantor v Welldone Upholsters, 1944 CPD 388 at p.39; Boshoff v Union Government, 1932 TPD 345). The rule has its origins in considerations of public policy which require that there should be a term set to litigation and that an accused or defendant should not be twice harassed upon the same cause.'

[24] Apart from this rule, there is a further requirement that a plaintiff pursuing his remedies upon the basis of the termination of a contract, must at one and the same time sue for all the relief which he claims to be due to him. In dealing with this further aspect, after having stated the aforesaid once and for all principle, Van Winsen AJA said the following in *Custom Credit Corporation (Pty) Ltd v Shembe* supra at 472E-F:

'Apart from these considerations – which are of equal application in the circumstances present – there are others which underscore the requirements that the plaintiff-seller, pursuing his remedies upon the basis of the termination of the agreement, must at one and the same time sue for all the relief which he claims to be due to him.'

[25] A cause of action exists if all of its requirements or elements (the facta probanda) are present. At this stage, prescription commences to run (see *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909.

[26] In a claim for damages arising out the breach of contract, the plaintiff may claim damages for all the damage flowing from the cause of action. He or she must claim, in a single action, compensation for all the damage he or she has already suffered and the prospective loss which he reasonably expects to suffer in the future. In *Coetzee v SA Railways & Harbours* 1933 CPD 565, Gardner JP (with whom Watermeyer J concurred) examined the English cases and said:

'The cases, as far as I have ascertained, go only to this extent, that is a person who sues for accrued damages, must also claim prospective damages, or forfeit them.'

Such a party cannot bring a further action for any further damage he or she may discover after the date when he or she obtained judgment. *Kantor v Welldone Upholsters* 1944 CPD 388 at 391.

[27] A plaintiff is not permitted to bring more than one action for damages on the same cause of action (i.e. he cannot 'take two bites at the same cherry'). The reason of this rule was stated by Brand JA in *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs* (Pty) Ltd 2005 (5) SA 550 (SCA) at 563:

'This rule is based on the principle that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such case. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.'

[28] The key to deciding whether the rule applies in a particular case is the concept of a 'cause of action.' In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A), Corbett JA examined the concept by saying at 845A-B:

'The concept of a cause of action – and the question whether claims constitute parts of a single cause of action or separate causes of action – are of particular significance in regard to the application of the so-called "once and for all" rule and also in connection with the related questions of res judicata and prescription.'

[29] The amount of R750,298.04 claimed in the first application was for damages for holding over owing to the plaintiff by the first defendant in terms clause 26.2 of the lease agreement, which had become due after cancellation of the lease on 6 March 2009 until September 2009. The second application sought damages for holding over from October 2009 to the end of April 2010 when the first defendant vacated the premises. These amounts did constitute damages arising from the cancellation of the lease as provided for in the lease agreement.

[30] The once and for all rule was extensively discussed and explained in *Janse van Rensburg & Others NNO v Steenkamp & Another* 2010 (1) SA 649 (SCA) at paras 27-29. Heher JA quoted at 660-661, with approval, from the judgment in *Brisbane City Council v Attorney-General from Queensland* [1978] 3 ALL ER 30 (PC) ([1979] AC 411) at 425AC as follows:

'…the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in Henderson v Henderson (1843) 3 Hare 100, … It was, in the judgment of the Board (a reference to the judgment in Yat Tung Co. v Dao Heng Bank [1975] AC 581), there described in these words (at 590): "…there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. This reference to 'abuses of process' had previously been made … and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."'

[31] At para 30, Heher JA said:

'The identification with abuse of the process accords with the policy expressed in the maxim *nemo debet bis vexari pro una et eadem causa* which underlies the principle of res judicata. As was said in the National Sorghum 17 case (at 241D-E) the abuse arises when the same cause of action is raised *against a defendant* a second time.'

The defendant in this matter is indeed subjected to a damages claim for a third time and the rule prevents such further claim, both as a result of the fact that multiple actions should be disallowed and the fact that all damages, also prospective damages, should have been claimed in one action as was held in *Custom Credit Corporation (Pty) Ltd v Shembe* supra.

[32] Counsel for the plaintiff argued that the cause of action in the two previous applications was entirely different to the cause of action in the present matter in that in the former applications it had enforced its rights in terms of clause 26.2 of the lease agreement as it was entitled and obliged to. In the present action, so it was argued, the plaintiff seeks to recover its common law contractual damages suffered as a result of the first defendant's

breach of the lease agreement. I have already indicated that both the previous proceedings and these proceedings are based on the breach of the lease agreement and its consequent cancellation. It is the same cause of action in each of the proceedings upon which the plaintiff relies to claim damages ex contractu.

[33] Thus, the right to claim damages accrued on cancellation for a breach. A plaintiff is entitled to claim all damages, prospective or otherwise, which arise from the breach and cancellation. An innocent party must make a decision whether to claim such damages as have accrued or are apparent, or wait and see whether further damages arise. If the innocent party decides to wait and see, he or she must be careful not to allow the period of prescription to run out. But he or she can protect himself or herself against this danger by bringing an action for a declaration of rights (See *Cape Town Municipality v Allianz Insurance Company Limited* 1990 (1) SA 311 (C)) to interrupt the running of prescription. An action for a declaration of rights and the subsequent action for damages are not the same cause of action. (See Christie: The Law of Contract in South Africa 6th Ed at p574.)

[34] The once and for all rule relieves the defendant of the hardship of not knowing how many times he will be sued for damages (or other relief) arising from his one breach of contract. It imposes on the plaintiff the obligation of having to decide whether to claim prospective damages or to wait and see whether further damages become apparent before claiming. He cannot, however, claim in one proceeding certain of the relief arising out of the cause of action in question and then come back in another proceeding to claim further relief arising out of the same cause of action.

[35] In this case, as at the date of cancellation, the plaintiff was in a position to claim the very damages it now claims, being the amounts due pursuant to the cancellation of the lease agreement. Accordingly, the damages were due

as at that date and commenced running in terms of section 12 of the Prescription Act No 68 of 1969 on 6 March 2009.

[36] In the circumstances the plaintiff's claim arose and became enforceable on 6 March 2009 upon cancellation of the agreement. The summons was served more than three years later. The plaintiff's claim against the defendant is unenforceable by virtue of it having become prescribed as well as the plaintiff having elected to institute action for damages in the previous litigation between the parties. It cannot again claim damages from the defendant.

[37] The plaintiff argued that the defendant did not raise this plea in the second application and indeed the settlement agreement foreshadows further litigation between the parties by virtue of the reservation of rights by the plaintiff. Counsel for the plaintiff did not go so far as to argue that the defendants have waived, or are estopped from, the raising of the legal issue of prescription and the bar pursuant to the once and for all rule. There could, in my view, also be no basis for such an argument.

[38] In the circumstances both the special pleas of the defendants are upheld and the plaintiff's claim is dismissed with costs, such costs to include the costs incurred in relation to the application in terms of Uniform rule 33(4).

W L WEPENER

Judge

APPEARANCES

PLAINTIFF:	*J Both SC* *Instructed by Kokinis Inc*
FIRST and SECOND DEFENDANTS:	*D Fisher SC* *Instructed by Blakes Maphanga Inc*