MOSES MAX KUDZANAI CHIKIWA

Versus

RAGIN KASSIM

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 28 May 2024
Judgment delivered on 6 September 2024

Plaintiff; in person
C Ndlovu; for the defendant

Opposed application: special plea

ZISENGWE J: The once and for all rule is principle based on public policy. It provides that in claims for compensation or satisfaction arising out of delict, breach of contract or other cause, the plaintiff must claim once for all, damages allegedly sustained or expected in so far as they are based on a single cause of action. This principle requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him or her upon that cause. The rationale being to prevent inextricable difficulties arising from discordant or conflicting decisions due or the same suit being aired more than once in different proceedings. See *Mmabasotho Christinah Olesithe NO* v *The Minister of Police* (470/2021) [2022] ZASCA 9 (15 June 2022). The case of *Dube* v *Banana* 1998(2) ZLR 92 affirms that the once and for all rule is part of our law. See also *Robson Makoni* v *The Cold Chain (Pvt) (Ltd) t/a Sea Harvest* HH-197-15.

The implications of this rule to the present matter and its interface with the special plea of *res judicata* will be discussed later in this judgment. It suffices, however, to say that if only the

plaintiff in this present matter was aware this rule (or if he was, if he had heeded to it), he would not have been in the position that he finds himself in today.

The plaintiff seeks to recover the following damages stemming from an alleged breach of contract:

a) US$ 31 100 (or its equivalent in ZIG) being general damages arising from the defendant's breach of contract.
b) US$ 101 861, 90 (or its equivalent in ZIG) being special damages arising from the defendant's breach of contract.
c) Interest at the prescribed rate of 5 percent per annum calculated from date of summons to date of full payment.

This present claim was however preceded by another brought by the plaintiff against the defendant, which claim arose basically from the same set of facts. Those facts are as follows:

Sometime in January 2017 the parties entered into a joint chrome mining venture. Pursuant to that agreement the appellant deposited the sum of $10 000 into the respondent's Banc ABC Account. The agreement did not turn out as anticipated prompting the plaintiff to sue out summons from the Magistrates Court sitting at Masvingo seeking to recover the US$10 000 which he deposited into the respondent's bank account.

That claim, as with the present, was based on breach of contract. The breach being the failure on the part of the respondent to honour the terms upon which the agreement had been entered, namely the production of 400 tonnes of chrome ore. That claim was successful (albeit after a long and arduous legal tussle as between the parties) and the court under case Number MSVPCG 457/23 ordered, the defendant to pay back to the plaintiff the US$10 000 invested by the plaintiff into the venture.

In the wake of, and perhaps buoyed by his success in recovering his $10 000, the plaintiff mounted the current suit claiming the sums stated earlier.

The defendant entered appearance to defend and soon thereafter filed his plea. In the latter regard the defendant took three special pleas, although the third ought properly have been raised by way of exception. Be that as it may, the pleas in abatement were the following:

a) Res Judicata
b) Prescription; and

c) Absence of cause of action (cognisable at law)

Res Judicata

Under this rubric, the defendant's position is basically that the plaintiff's claim for damages was the subject matter of litigation in the following cases Mashava C01/18 (The Mashava case) (the High Court appeal case) Supreme Court SC 456/23, SC515/23 (The Supreme Court appeal case) and the Masvingo Magistrates MSVPCG 457/23 (the trial de novo).

Prescription

Under the head, it is the defendant's contention is that if the court finds that the matter is not *res judicata*, then the defendant's cause of action has since prescribed given that it arose in 2017 when the breach allegedly took place.

No Cause of Action

This objection relates to plaintiff's claim for costs in previous litigation between the parties. According to the defendant, there was no legal basis for the plaintiff to claim costs in the Mashava and the High Court appeal matters given that the High Court allowed the defendant's appeal with plaintiff being ordered to meet his (i.e. defendant's) costs.

As for the two Supreme Court appeals, it is the defendant's contention that there is no legally cognisable basis for plaintiff to claim costs given that under SC 456/23 the plaintiff was ordered to pay the defendant's costs and under SC515/23 it was ordered that each party was to bear its own costs.

In his replication the plaintiff stuck to his guns. He insisted that the matter is not *res judicata* for two reasons. Firstly, that the decision of the Magistrates court under MSVPCG 475/23 was the subject matter of appeal to this court rendering it exempt from the defence of *res judicata*.

Secondly, as far as he is concerned, the claim for damages had not been determined by any other court.

As far as the special plea of prescription is concerned, it is the plaintiff's position that his claim was based on what he termed a "subsidiary debt" i.e. one which was dependent upon the principal debt in MSVPCG 457/24. Further, according to him the principal debt being a judgment debt only prescribes after 30 years in terms of Section 15(1) (ii) of the Prescription Act [*Chapter*

8:11]. The principal debt, so the reasoning goes, not having prescribed, the subsidiary debt cannot be deemed to have expired.

Finally, the plaintiff scoffed at the defendant's contention that his claim disclose no cause of action. He labelled it a bald and unsubstantiated assertion which was raised only to obfuscate issues. He asserted that costs being in the discretion of the court, he was at liberty to claim the same.

Whether the claim is res judicata

The special plea of res judicata was explained in Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th edition at p 609 in the following terms:

> "A defendant may plead res judicata as a defence to a claim that raises an issue disposed of by a judgment in rem and also as a defence based upon a Judgment in *personam* delivered in a prior action between the same parties, concerning the same subject matter and founded upon the same cause of action."

In *Lifort* v *Vodge Investments (Pvt) Ltd & Ors* SC 15-2017 the court referred with approval the case of *Chimponda & Anor* v *Muvami* 2007 (2) ZLR 326 where MAKARAU JP (as she then was) at pp 329G to 330 C stated:

> "The requirements for the plea of *res judicata* are settled. Our law recognizes that once a dispute between the same parties has been exhausted by a competent court it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute.
>
> For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties, by making a finding in law and / or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or to defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment."

To summarise therefore the special plea of *res judicata* applies when the matter or certain issues raised by the other party were heard and decided upon by a competent court and for it to succeed the following pre-requisites must be satisfied:

a) The action in respect of which judgment has been given must be between the same parties.
b) The prior judgment must be a final and definitive judgment.
c) The action or judgment must involve the same subject matter
d) The action in which judgment is given must be founded on the same cause of action or complaint.

See also *Betram v Wood* (1893) 10 SC 177 AT 180, *Wolfenden v Jackson* 1985 (2) ZLR 313 (S); *Kashiri v Muvirimi* 1988 (1) ZLR 270 SC; *Kawondera v Mandebvu* SC 12/06.

In the present matter, save for the fact that the parties are the same all the other requirements are contested. Each of the remaining requirements will be dealt with in turn.

Whether there is a prior judgment which was a final and definitive.

This particular requirement needs nor detain anyone. The judgment under MSVP 475/23 was by a competent court (the Magistrates court sitting at Masvingo), and the judgment rendered was neither interlocutory nor provisional- it was a final and definitive judgment. Therein the court found that the defendant had breached the terms of the agreement and ordered him to reimburse the plaintiff the sum of money which the latter had injected into the joint mining venture.

The plaintiff in the present matter appears to suggest that the prior judgment is neither final nor definitive solely on the basis that consequent to the judgment by the Magistrates Court in MSVP 475/23, he (i.e., the plaintiff) had appealed against that decision. What he conveniently omitted to mention was that his appeal only related to the currency in which the defendant was ordered to pay that amount, namely Zimbabwe currency. He argued in that appeal that the Magistrates Court had erred in its interpretation of the relevant fiscal legislation governing the question of currency and its application to the facts in question. The appeal was not in the least an attack on that court's finding on the foundation of the defendant's liability for breach of contract. In any event that appeal has since been disposed of through judgment HMA 27/24 wherein the appeal court ordered that the amount payable was to be denominated in United States dollars.

The plaintiff's contention, therefore that the prior judgment was neither final nor definitive in nature lacks merit.

Whether the same point was in issue

The question of whether the same point is in issue is not without its difficulties and different formulations of the test have been supplied. In Erasmus, Superior court practice, 2nd edition at page D1-287 a conspectus of the various formulations is given. The following is stated:

> **The same point in issue.** This requirement has been differently stated in a number of the leading cases on the subject. Thus, it has been said that the same point must have been in issue and the same thing must have been demanded, that the action must have been based on the same ground and with respect to the same subject matter, that it must have concerned the same subject matter and must have been founded of the same cause of complaint; that the action must have been on the same cause for the same relief. Again, it has been said that where a court has come to a decision on the merits of a question in issue, that question, as a cause patendi of the same thing between the same parties, cannot be resuscitated in subsequent proceedings"

The case of *Bafokeng Tribe v Impala Platinum* Ltd 1999 (3) SA 517 BH Friedman JP simplifies the test. He stated as follows:

> From the aforegoing analysis I find that the essentials of the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject-matter, or thing (*de eadem re*).
>
> Requirements (2) and (3) are not immutable requirements of *res judicata*. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However, where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed.
>
> A court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated

Whether the two claims are based on the same subject matter.

It can hardly be disputed that the claim under MSVPC 475/23 and the present are predicated on the same subject matter namely the agreement entered into between the parties in2017. Following that agreement the plaintiff deposited the sum of US$10 000 into the defendant's BANC ABC Account for purposes of a chrome mining venture. It was the fall-out

stemming from the breach of that agreement committed by the defendant which birthed both the claim under MSVPC 475/23 and the present one. This particular requirement is therefore satisfied.

Whether the claims are both based on the same cause of action

To determine whether the two claims are based on the same cause of action it is necessary to briefly revisit the meaning of that term. The term cause of action was defined in *Mckenzie* v *Farmers' Cooperative Industries Ltd* AD 16 as:

> "every fact which it would be necessary for the plaintiff, if traversed in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"

Similarly, *Abrahams & sons* v *SA Railways & Harbours* 1933 CPD 626 at 637, the following was stated:

> "The proper meaning of the expression cause of action is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose cause of action"

Undoubtedly both claims are based on the same cause of action, namely breach of contract. This type of breach being generally referred to as *mora debitoris.* The element of conduct in respect of *mora* by the defendant being an omission to perform as agreed in that he failed he render performance as he was obliged to do.

The only difference between the present claim and the one under MSVP475/23 being the relief sought. Under MSVPC 475/23 the claim was essentially one for the rescission of the contract. He sought to be restored to the position that he would have been had the contract not been concluded. This is often referred to as *restitutio in integrum.* In the present case on the other hand, he seeks damages arising from the breach of contract.

I reiterate here for purposes of emphasis that both claims are based on the same cause of action namely the breach committed by the defendant in failing to honour the terms of their agreement. When the plaintiff sued out the first summons in Mashava under case No. C01/18, the plaintiff had at his disposal all the relevant facts required to sustain a claim for breach of contract.

While it is trite that a claim for the rescission of a contract does not preclude a claim for damages, the plaintiff needed to claim for both rescission and damages under action.

This position finds support from the learned authors Van Der Merwe *et al* in their work Contract: General Principles 4th edition at page 327 where they have this to say in this regard:

> "A litigant cannot exercise his remedies based on a single cause of action by way of different claims but must sue all the relief to which he lays claim in one and the same action"

This is the one and for all rule which I referred to in the opening paragraphs of this judgment. See also *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A).

Writing in the South African Law Journal 2003 vol 120 No.3 accessed online on 16 August 2024 at https:// open. Uct.ac.za Professor Christie in an article entitled "*The once and for all rule and Contractual damages*," Professor RH Christie locates the confluence of the once and for all rule and the special plea of *res judicata*. He posits:

> 'The (once and for all) rule is intended to put a limit on litigation and avoid the difficulties that would arise if two courts reached different conclusions on the same thinking that lies behind the res judicata rule, pithily expressed by Ulpian D50 17 207 *Res judicata pro veritate accipitur*- whose a matter has been decided, it is considered as true- and explained by Paul D 44 23 (tr Gane) adds:
>
> > "It has very reasonably been held that one action is sufficient for settlement of a single controversy, and one judgment for the termination of a case otherwise, litigation would be enormously increased, and would be productive of insurmountable difficulties, especially where conflicting decisions have been rendered. It is therefore very common to introduce an exception on the ground of res judicata"

Similarly, In *Robson Makoni* v *The Cold Chain (Pvt) (Ltd) t/a Sea Harvest (supra)* CHIGUMBA J referred to the case of *Union Wine Ltd* v *Snell and Co Ltd* 1990 (2) SA 189 at 196 on the relationship between the plea of *res judicata* and the once and for all rule where the following was said:

> "Although it is not clear from the cases whether the 'once and for all' rule is just a manifestation of the *exception rei judicatae* or whether it has a wider range than the latter, it is settled practice in South Africa that where a cause of action gives rise to more than one remedy a plaintiff who pursues one of those remedies and has obtained a judgment thereupon can be met with a plea of *res judicata* if he should institute a second action to pursue one of the other remedies".

To conclude this segment therefore, what the plaintiff needed to do was to make his claim damages alongside the claim for rescission given that they were based on the same cause of action namely breach of the same contract. Failure to do so rendered the claim *res judicata*. To find otherwise is to inevitably invite another court to revisit the same question of breach-it being a fundamental requirement for an award of damages. This inevitably carries the risk of a conflicting finding, which is what the defence of *res judicata* is in part aimed at avoiding.

Lest I be misunderstood, the outcome of this particular issue is dependent not on the once and for all rule (an issue which was raised by neither party) but squarely on the *excepio rei judicata*. I only ventured to deliberate on the former given its inter-relatedness with the latter.

Ultimately therefore it is clear therefore that all the requirements for the special plea of *res judicata* are satisfied and is therefore upheld.

Prescription

Even if the special plea of res judicata had not succeeded, the claim would still have failed on the basis of the plea of prescription. The present claim has undoubtedly prescribed. The alleged breach occurred in 2017 when all the acts complained of by the defendant took place.

The plaintiff did not have to wait for success in his claim for the rescission of the agreement for him to institute a claim for damages. Put differently, his claim for the rescission of the agreement did not interrupt the running of prescription. While waiting to ascertain the extent of his damages arising from the breach, the plaintiff had to keep one eye on the clock, figuratively speaking.

The averment that the present claim is based on a judgment debt is so misplaced that it merits not much discussion. His claim is undoubtedly based on breach of contract and not a judgment debt. It is apparent the plaintiff has scant appreciation of what is meant by a judgment debt in the context of Subsection 14 and 15 of the Prescription Act. A perusal of plaintiff's declaration *in casu* reveals that the bulk of his claim is based on what could have been realised if the chrome mining (and marketing) venture had been duly performed and certainly not on his judgment debt i.e. the restitution of his US$10 000 which he obtained in January 2024.

Finally, there is the question of the claim for costs awarded in the prior litigation between the parties. Both parties are to some extent guilty of a breach of the rules of procedure. As stated earlier, where a claim is defective for want of disclosing a cause of action, the appropriate course

of action is to raise an exception thereto, yet the defendant opted to raise a special plea. This was an error.

The plaintiff on the other hand in his summons and prayer as captured in his declaration does not claim those costs as a substantive cause of action. In both instances such costs are lumped under the rubric of "general damages arising from defendant's breach of contract". Surely a claim for the recovery of legal costs incurred in prior litigation hardly falls under the ambit of "general damages arising from breach of contract". If however what is meant by plaintiff is that it had the defendant not breached the contract, then he would not have been unnecessarily put out of pocket by the ensuing litigation, then his claim in that regard would suffer the same fate under the special plea of res judicata discussed earlier.

Costs

The general rule is that the substantially successful party which the defendant has been) is entitled to his or her costs.

Accordingly, the following order is hereby made:

The special plea of *res judicata* is hereby upheld and the claim is hereby dismissed with costs.

ZISENGWE J

Ndlovu & Hwacha; Defendant's legal practitioners