**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE – GRAHAMSTOWN)**

**Case No. 3248/10**
**Date Heard: 26/11/13**
**Date Delivered: 9/1/14**
**Reportable**

**In the matter between:**

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| **IVO HUISMAN** | **First Plaintiff** |
| **IVO HUISMAN & ASSOCIATES CC** | **Second Plaintiff** |

**and**

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| **BRUCE RICHARD LAKIE** | **First Defendant** |
| **GRAAFF-REINET ADVERTISER (PTY) LTD** | **Second Defendant** |
| **GROUP EDITORS COMPANY (PTY) LTD** | **Third Defendant** |

**Special plea of prescription and replication that issue of prescription *res judicata* – requirements for *res judicata* – requirements for *res judicata* in form of issue estoppel established – no unfairness would result from application of *res judicata* – special plea of prescription dismissed with costs.**

**JUDGMENT**

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**PLASKET, J:**

[1] I am required to determine a limited issue, namely whether a special plea of prescription may be taken by the second and third defendants or whether that issue is *res judicata* as a result of a judgment in which the plaintiffs had been granted leave to amend their summons and particulars of claim, and in which the question whether the plaintiffs' claims against the second and third defendants had prescribed was canvassed. I shall set out the background to the issue, discuss the judgment in question and examine the applicable law before making my conclusions.

The background

[2] On 21 December 2007, a letter written by the first defendant, Dr. Bruce Lakie, was published in the *Graaff-Reinet Advertiser*, a newspaper that circulates in Graaff-Reinet and its surrounds. Aggrieved by the contents of the letter, the first plaintiff, Mr. Ivo Huisman, and the second plaintiff, Ivo Huisman and Associates CC (of which Huisman is the sole member) issued summons against Lakie and two other defendants in which they alleged that they had been defamed and claimed damages as a result. Summons was issued on 7 December 2010, two weeks short of three years from the publication of the letter.

[3] More than three years after the publication of the letter, on 5 July 2011, the plaintiffs gave notice of their intention to amend the summons and particulars of claim. They wished to delete references to the Graaff-Reinet Advertiser and Group Editors Co (Pty) Ltd, which they had cited as the second defendant, and substitute it with the Graaff-Reinet Advertiser (Pty) Ltd; and to delete references to Caxton and CTP Publishers and Printers Ltd, which they had cited as the third defendant, and substitute it with Group Editors Company (Pty) Ltd.

[4] The prospective second and third defendants ('the Advertiser' and 'Group Editors' respectively) objected to the proposed amendment. As a result, an application was brought by the plaintiffs for leave to amend their summons and particulars of claim. It was opposed by the Advertiser and Group Editors. The application was argued before Makaula J who granted the plaintiffs leave to amend, with the result that the Advertiser and Group Editors became the second and third defendants respectively.

[5] Subsequent to the amendment they filed their plea in which they took a special plea of prescription. The special plea reads:

'1.1 The plaintiffs' claims against the second and third defendants are based on the publication of a letter in the Graaff-Reinet Advertiser on 21 December 2007. Any claims which the plaintiffs might have had against the second and third defendants pursuant to such publication would have become prescribed on 20 December 2010.

1.2 The second and third defendants were introduced as parties to the action in terms of an order of this Honourable Court granted on 6 September 2012.

1.3 The amended summons in which the second and third defendants are cited for the first time, was only served on the second and third defendants on 17 September 2012, that is more than three years after the publication of the letter which forms the basis of the plaintiffs' claim.

1.4 In the premises, the plaintiffs' claims against the second and third defendants became prescribed in terms of the provisions of the Prescription Act of 1969 (Act No 68 of 1969).'

[6] The plaintiffs replicated to the special plea on two bases. In the first place, they pleaded:

'1. The second and third defendants plead specially that the plaintiffs' claims against the second and third defendants have become prescribed in terms of provisions of the Prescription Act 68 of 1969.

2. That very issue has already been decided against the second and third defendants and in favour of the plaintiffs in this action by his Lordship Mr Justice Makaula in his judgment delivered on 6 September 2012 in which it was held that the plaintiffs' claims against the second and third defendants have not become prescribed.

3. The second and third defendants are accordingly estopped from pleading prescription.'

[7] In the second place, they pleaded:

'**In the alternative**, and only in the event that it is held that the second and third defendants are not estopped from pleading prescription, the plaintiffs replicate as follows:

4. By consent, the plaintiffs served the combined summons commencing this action on the attorneys representing the second and third defendants, alternatively the second defendant, further alternatively the third defendant, on 15 December 2010.

5. Notwithstanding any error in the citation of the second and third defendants, the second defendant as the owner, publisher and distributor of the Graaff-Reinet Advertiser newspaper fully appreciated that it was a target of the action which was the subject matter of the summons and that it was therefore a defendant in such action.

6. Notwithstanding any error in the citation of the second and third defendants, the third defendant as a distributor of the Graaff-Reinet Advertiser newspaper fully

appreciated that it was a target of the action which was the subject matter of the summons and that therefore it was a defendant in such action.

7. In the light of the aforegoing, and as a matter of law, the running of prescription was interrupted, in terms of section 15(1) of the Prescription Act 68 of 1969, on 15 December 2010.

8. The plaintiffs' claims against the second and third defendants have accordingly not become prescribed.

9. The plaintiffs join issue with all the remaining allegations in the second and third defendant's plea.'

[8] On 3 October 2013, Pickering J granted an order that 'the issues arising from the Special Plea of Prescription, as pleaded in paragraph 1 of the Second and Third Defendants' Plea dated 24 October 2012 and paragraphs 1 to 8 of the Plaintiffs' Replication dated 6 November 2012, be and are hereby separated from all other issues'; that the separated issues only would be dealt with at the trial of the matter (which was to, and did, commence on 26 November 2013); and that the costs of the separation application would be costs in the cause of the issues to be decided on that date.

[9] It was agreed between the parties that the second and third defendants would begin. The evidence of Mr. Jan Marais, their attorney, was led. He was not cross-examined. The defendants and the plaintiffs then both closed their respective cases and the matter was argued. The evidence given by Marais concerned the nature and business of the second and third defendants and the circumstances leading up to the service of summons on him.

[10] A letter of demand concerning Lakie's letter, dated 9 November 2010, written by the plaintiffs' attorneys, Rushmere Noach Inc in Port Elizabeth, and addressed to the editor of the *Graaff-Reinet Advertiser*, the 'Graaff-Reinet Advertiser and Group Editors Co (Pty) Ltd', Caxtons and Lakie was forwarded to Marais for his response. He responded on 10 November 2010. He wrote that he was taking instructions and would revert to the plaintiffs' attorneys as soon as possible. He concluded his letter by saying:

‘Meanwhile, please note that the owner, publisher and distributor of the Graaff-Reinet Advertiser is Group Editors Company (Pty) Ltd and not Caxtons.’

[11] On 14 December 2010 Marais spoke on the telephone to a person by the name of Greeff, apparently an attorney at Rushmere Noach. His file note records that he was asked by Greeff ‘whether they must serve on Caxtons’ and that he explained ‘again’ the situation of Caxtons ‘as well as company names’. By this he meant that he had explained to Greeff that there were two companies involved – the Graaff-Reinet Advertiser (Pty) Ltd and Group Editors Co (Pty) Ltd – and that Rushmere Noach could serve the summons on him on behalf of these two entities: ‘both against GR Adv. and GEd’ as he recorded in his file note.

[12] Marais then received a telephone call from a local attorney by the name of Lamprecht who had been instructed by Rushmere Noach. He confirmed that he would accept services of the summons. On 15 December 2010 he wrote to Lamprecht, having already had the summons served on him. The letter referred to the second and third defendants as they were cited in the summons – namely, the Graaff-Reinet Advertiser and Group Editors Co (Pty) Ltd and Caxton and CTP Publishers and Printers Limited. He stated in the letter:

‘Ons bevestig dat ons u meegedeel het dat ons namens beide die tweede en derde verweerders in bogemelde saak optree en dat ons bereid is om betekening van die dagvaarding namens die tweede en derde verweerders te aanvaar.’

[13] In a plea filed on behalf of Caxtons (in response to the original, unamended summons and particulars of claim) the existence of the second defendant was denied but it was stated that the Graaff-Reinet Advertiser (Pty) Ltd and Group Editors Company (Pty) Ltd did exist. Caxtons also denied that it published or distributed the *Graaff-Reinet Advertiser*. This plea, it seems, had the effect of bringing about the notice of intention to amend, which resulted ultimately in Makaula J’s judgment.

Makaula J’s judgment

[14] The plaintiff's application was one in terms of rule 28(4) of the uniform rules.[1] Makaula J noted in his judgment[2] that the application for leave to amend was opposed on two grounds, namely that the proposed amendments would result in 'introducing two new separate entities in the place of a non-existent entity' and that the claims against the correctly cited second and third defendants had prescribed.[3]

[15] He stated that the plaintiffs had argued that the amendment did not seek to create a right of action against two new entities but would have done no more than correct 'an erroneous citation . . . of a single party by introducing the correct citation'.[4] They also argued that prescription had been interrupted by the service of summons on Marais, notwithstanding the defective citation of the second and third defendants, because both could not have been in any doubt that the summons was intended for them – that they were the 'targets' of the action.[5]

[16] The judgment records that the second and third defendants had argued that they could not be joined as defendants because the claims against them had prescribed[6] and that the court had 'no discretion, wide or otherwise, to allow an amendment by means of which two legal entities, which had not been cited before, were introduced to an action by way of an amendment under circumstances where a claim against them has already become prescribed'.[7]

[17] Makaula J then turned to the law. He referred[8] to Heher JA's judgment in *Blaauwberg Meat Wholesalers* where the learned judge of appeal had held that an incorrectly cited defendant was to be dealt with differently from an incorrectly cited plaintiff where the point of prescription is taken to an application for leave to amend because 'the true debtor will invariably recognise its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its

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[1] Rule 28(4) states: 'If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.'
[2] *Huisman & another v Lakie & others* ECG 6 September 2012 (case no. 3248/10) unreported.
[3] Para 2.
[4] Para 8.
[5] Para 9. See too *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA); *Embling & another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C).
[6] Para 14.
[7] Para 15.
[8] Paras 21-22.

own citation' and that, as a result, service on 'a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that person was the true debtor'.[9]

[18] The crux of Makaula J's judgment comes after he stated that the second and third defendants had argued that the matter did not involve correction of the misnomer, but the introduction of two new parties that had not been cited before.[10] He proceeded to say:[11]

'[24] I disagree with the submission by the respondents. To me, it is apparent that the name of the second defendant is an amalgam of the second and third respondents. Even if I am wrong in that regard, it is true that the summons [was] served on both the second and third respondents' attorneys at their instance. On receipt of a letter of demand which spelt out who the defendants were and the reason for the demand, the respondents appreciated even at that stage that they were the target of the demand. Further, what is of interest, is that in their response to the letter of demand as referred to in paragraph 4 above, the respondents' attorneys cited the second defendant in its heading and asked that summons be served on their offices.

[25] It has not been gainsaid that when the letter of demand and the summons were received by the respondents, they immediately appreciated their connection with the claim, notwithstanding that a non-existent party had been cited. Service of the summons was effected on the respondents' attorneys as per arrangement in circumstances explained above. Therefore, the summons was served on the true debtor. In light thereof, it cannot avail the respondents that prescription had not been interrupted when summons was served on them as true debtors. Furthermore, I cannot see how the respondents would be prejudiced by the amendment.'

*Res judicata*

[19] In strict terms, a plea of *res judicata* may be raised when, one dispute having been terminated (by an order that is final in effect), another is set in motion and both involve the same parties, concern the same thing and the same cause of action. In

[9] Note 5 para 18.
[10] Para 23.
[11] Paras 24-25.

*Prinsloo NO & others v Goldex 15 (Pty) Ltd & another*,[12] Brand JA set out the position thus:

'The expression "*res judicata*" literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side has been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi*).'

[20] Those requirements are sometimes relaxed to an extent. This development had its genesis in Greenberg J's judgment in *Boshoff v Union Government*,[13] in which the 'same cause of action' requirement was relaxed to allow for the successful application of *res judicata*. Although the application of *res judicata* in this way has often been referred to as issue estoppel, it has been made clear that it remains the Roman-Dutch law doctrine of *res judicata* rather than the English law doctrine of issue estoppel: one is dealing with the development of our common law, rather than a deviation from it.[14]

[21] The present position was summarised by Scott JA in *Smith v Porritt & others*:[15]

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue

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[12] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* (243/11) [2012] ZASCA 28 (28 March 2012) para 10. See too *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562C-D; S *v Moodie* 1962 (1) SA 587 (A) at 596E-F.
[13] *Boshoff v Union Government* 1932 TPD 345.
[14] *Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk* 1995 (1) SA 653 (A) at 669F-G.
[15] *Smith v Porritt & others* 2008 (6) SA 303 (SCA) para 10.

estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'

[22] In *Prinsloo's* case, Brand JA, in affirming the position set out by Scott JA, spoke of a recognition on the part of the courts that a rigid adherence to the threefold requirements of *res judicata* could, in some cases, defeat its very purpose. That purpose is 'to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue'. As a result of these considerations, *res judicata* in the form of issue estoppel 'allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties'.[16]

[23] Brand JA warned, however, that the relaxation of the requirements of *res judicata* in this way 'creates the potential of causing inequity and unfairness that would not arise upon an application of all three requirements'.[17] The learned judge of appeal continued to say:[18]

'Hence, our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of *res iudicata* should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent

[16] Note 12 para 23.
[17] Note 12 para 24.
[18] Note 12 para 26.

proceedings . . . That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution.'

[24] I turn now to consider whether the requirements of *res judicata*, either in the strict sense or in the form of issue estoppel, are present in this matter, and I do so mindful of the fact that any relaxation of the requirements relating to the relief claimed and the cause of action may only be relaxed if that relaxation causes no unfairness.

[25] In the first place, the application for leave to amend and the adjudication of the special plea of prescription involved the same parties. The two proceedings did not, however, involve the same cause of action – a case for amendment of pleadings, in the one, and a defence to a damages claim in the other – and the same relief – the granting an amendment, in the one, and the dismissal of the claims, in the other.

[26] Whether the two proceedings concerned the same issue raises two questions that require to be answered: first, was the determination of whether or not the claims against the second and third defendants had prescribed an essential element of the judgment of Makaula J;[19] and secondly, did the application for leave to amend decide finally the issue of whether or not the claims against the second and third defendants had prescribed?[20] If both of these questions are answered affirmatively, then the question of fairness arises.

[27] In order to determine whether to grant the application for leave to amend, Makaula J had to decide whether the claims against the second and third defendants had prescribed. This was raised squarely by the second and third defendants and, broad as the discretion to grant an amendment may be, an amendment will not be granted in circumstances in which it would defeat a good plea of prescription.[21]

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[19] *Smith v Porritt & others* (note 15) para 10.
[20] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* (note 12) para 23.
[21] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279A-B; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) para 9.

[28] In order to decide whether the claims had prescribed three elements had to be considered: whether the debts were claimed in a process (as defined); whether the process had been served on the debtors; and whether it was the creditors who claimed the debts by means of the process that had been served on the debtors.[22] While the first element may 'in part be a matter of interpretation', the second and third are matters of 'hard fact'.[23]

[29] The facts upon which Makaula J decided this aspect of the application for leave to amend are common cause and are the same facts that have been placed before me. No question of interpretation arose before him: the only issue he had to decide was the 'hard fact' issue of whether the summons had been served on the second and third defendants prior to the plaintiffs' claims against them prescribing. He found, as I have explained, that as the amendment only sought to correct a misnomer, the summons had, in fact, been served on the second and third defendants and that this had occurred prior to the claims prescribing: service of the summons on Marais on 15 December 2010 had the effect of interrupting prescription insofar as the correctly cited second and third defendants were concerned.

[30] Counsel for both the plaintiffs and the second and third defendants were in agreement that the order of Makaula J was final in effect. In my view they are correct in this regard.

[31] I conclude then that the issue that had to be determined by Makaula J – whether the claims had prescribed – is the same issue that is raised in the special plea and, because Makaula J's order was final, the requirements for *res judicata* in the form of issue estoppel have been met. All that remains for me to decide is whether, despite this, it would be inequitable to apply *res judicata* in the circumstances of this case.

[32] As I understand the argument of counsel for the second and third defendants, it would be unfair to apply *res judicata* in the form of issue estoppel for three reasons: first, the question whether the claims against his clients had prescribed had

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[22] *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) para 17.
[23] *Four Tower Investments* (note 22) para 18.

not been ventilated fully before Makaula J; secondly, the onus in the amendment application and in these proceedings was different; and thirdly, Makaula J's order is not appealable.

[33] I do not agree that the prescription issue was not fully ventilated in the amendment application. It was central to the ultimate issue that Makaula J had to decide, and was decided on facts that were common cause. Essentially the same evidence was placed before me and was not challenged by the plaintiffs. Secondly, I cannot see how the onus has a bearing in this case: the facts were common cause and the onus was not decisive of the outcome.

[34] The third issue is the appealability of Makaula J's order. Both counsel appeared to accept that the order was not appealable because it was interlocutory in nature but both accepted that it was final in its effect. I agree that Makaula J's order was final in its effect: to decide whether to exercise his discretion to grant or refuse the amendment Makaula J had to decide at the outset whether the claims against the second and third defendants had prescribed. His decision in that respect was definitive of the rights of the parties in respect of that issue: Makaula J, in other words, disposed of the issue when he held that the claims had not prescribed. In this way it disposed of a substantial portion of the second and third defendants' defences – that the claims against them had prescribed – on all of the evidence that there was on this issue. I am of the view that despite counsels' views to the contrary, Makaula J's order was appealable.[24] I am fortified in my conclusion by the fact that, in *President Insurance Co Ltd v Yu Kwam*,[25] the Appellate Division treated the granting of an amendment, in circumstances in which a prescription point arose in circumstances similar to the present case, as appealable without question.[26]

[35] I am accordingly not persuaded that the application of *res judicata* in the form of issue estoppel will lead to the unfairness contended for by counsel for the second

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[24] See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J. See too, in the context of an (unsuccessful) application for leave to appeal against the granting of an amendment (in circumstances distinguishable on the facts from the present case), *Webber Wentzel v Batstone & another* 1994 (4) SA 334 (T) at 334H-335E.

[25] *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A).

[26] For a fuller and clearer exposition of the facts and issues, see the judgment of the court below, *Yu Kwam v President Insurance Co Ltd* 1966 (1) SA 66 (T) at 67F-69B

and third defendants. On the other hand, the issue having been fully ventilated before Makaula J and decided upon finally by him, to allow the second and third defendants to raise it again would create precisely the type of prejudice the *res judicata* principle is intended to prevent: in the words of Voet 'inexplicable difficulties' can be created by 'discordant' or 'mutually contradictory judgments, on account of one and the same matter in dispute being again and again brought forward in different actions' or, in the words of Phipson (which are to much the same effect), speaking of the English law, the public interest requires that there be finality in litigation and that a party should not be subjected to hardship by being 'vexed twice for the same cause' (quoted in *Boshoff*[27]).

Conclusion

[36] My conclusion is that the issue raised in the special plea, namely that the claims against the second and third defendants have prescribed, are *res judicata* because it has already been decided against them by Makaula J in the application for leave to amend. That being so, the special plea cannot succeed.

[37] I make the following order.

The second and third plaintiffs' special plea is dismissed with costs.

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C Plasket

Judge of the High Court

APPEARANCES

Plaintiffs: S Rorke SC instructed by Rushmere Noach Inc, Port Elizabeth and Netteltons, Grahamstown

First defendant: No appearance

Second and third defendants: D J Coetsee instructed by J S Marais & Co, George and Neville Borman and Botha, Grahamstown

[27] Note 13 at 350.