THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 935/12

In the matter between:

HYPROP INVESTMENTS LIMITED	**FIRST APPELLANT**
ABLAND (PTY) LTD	**SECOND APPELLANT**
FRANSIE GOUWS	**THIRD APPELLANT**
NICOLE MARY GREENSTONE	**FOURTH APPELLANT**

and

NSC CARRIERS AND FORWARDING CC	**FIRST RESPONDENT**
NORBERTO JOSE DOS SANTOS COSTA	**SECOND RESPONDENT**
NUEVO LATINA RESTAURANTS CC	**THIRD RESPONDENT**
COSTA AND PANICCO CC	**FOURTH RESPONDENT**

Neutral citation: *Hyprop Invesments v NSC Carriers* (935/12) [2013] ZASCA 169 (27 November 2013)

Coram: Lewis, Theron, Willis JJA and Van der Merwe and Meyer AJJA

Heard: **13 November 2013**

Delivered: **27 November 2013**

Summary: The three requirements of the exceptio rei judicata will not be relaxed so as to allow a plea of issue estoppel where that would result in inequity.

ORDER

On appeal from South Gauteng High Court, Johannesburg (Sutherland J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Theron and Willis JJA and Van der Merwe and Meyer AJJA concurring):

[1] Hyprop Investments Ltd (Hyprop), the first appellant, is a property developer specializing in the construction and running of shopping centres. Together with the second appellant, Abland (Pty) Ltd (I shall refer to them both as Hyprop), it entered into two agreements of lease with the first two respondents, NSC Carriers and Forwarding CC (NSC), and Norberto Costa, who is also the representative of NSC and a member of it, in respect of two shops in a shopping centre that was not yet completed – Stoneridge Centre, Modderfontein. The third and fourth respondents, also close corporations connected with Costa, proposed to run an ‘upmarket’ Portuguese restaurant in the one shop, and a gift shop and tobacconist in the second. Costa bound himself as surety in respect of both leases.

[2] NSC took occupation of the premises in September 2008, but did not pay the rent or other charges. It did, however, effect improvements to the shops, fitting them as a restaurant and gift shop respectively. A term of the leases precluded it from recovering

compensation for improvements. On 3 February 2009 Hyprop cancelled the leases because of NSC's failure to pay rental. On 23 March 2009 Hyprop applied to the South Gauteng High Court for an order confirming the cancellation of the leases, ejectment of NSC and payment of rental in the sums of R711 208 and R88 794 for the two shops. The high court (Mokgoatlheng J) rejected the various defences raised by NSC and Costa and granted the orders sought in April 2009. It also refused leave to appeal against its judgment. NSC and Costa applied for leave to appeal to this court, which also refused leave, in September 2010.

[3] In April 2011 NSC and Costa, together with the third and fourth respondents, instituted action against Hyprop and two of its employees (the third and fourth appellants) claiming damages for fraudulent misrepresentation. Hyprop and the other respondents raised four special pleas: that the cause of action pleaded had been adjudicated by the high court in the application for ejectment – a plea of res judicata; that the third and fourth respondents had not been party to either of the lease agreements; that the third and fourth appellants, employees of Hyprop, had not represented it when concluding the lease agreements and did not owe NSC and Costa a 'duty of care'; and that if any of those pleas should fail, then NSC should be barred from claiming since it had not yet satisfied the judgment against them.

[4] By agreement between the parties the high court (Sutherland J) ruled, pursuant to rule 33(4), that the special pleas be adjudicated separately. The high court rejected each of these, but gave leave to appeal against its orders to this court. I shall deal principally with the plea of res judicata since Hyprop concedes that the orders in respect of the second and fourth pleas are not final and therefore not appealable. (I shall deal with the general question of appealability briefly later.)

[5] Sutherland J held that the plea of res judicata was in effect issue estoppel, since in the application what had been sought was an order confirming cancellation, payment of arrear rental and ejectment, defended on the basis of alleged misrepresentations made by the appellants, whereas the relief sought in the action was damages for fraudulent representation. The same issues arose, however, in the action. There is no

doubt that issue estoppel as a variant of res judicata is now firmly embedded in our law,[1] and that the court apprised of it has a discretion whether to allow the plea to preclude the later claim. Before turning to the principles in respect of issue estoppel, I shall deal first with the defences raised by NSC and Costa in the application and the basis for granting it advanced by Mokgoatlheng J.

[6] The claims for ejectment and arrear rental and other charges were opposed by NSC and Costa. They asserted that the leases had been induced by the misrepresentations of representatives of Hyprop and that Hyprop was in breach of the leases in a number of respects. During discussions with them, they had represented to Costa, inter alia, that Stoneridge would be an 'upmarket' shopping centre with upmarket tenants and was almost fully let. These representations had turned out to be false. A brochure for Stoneridge and plans, he said, induced NSC into signing the lease agreements. These documents indicated that the centre would be entirely roofed which turned out not to be the case. The building did not reflect the plans, which, said Costa, were deliberately used to induce him to sign the leases on behalf of NSC. Costa also alleged a number of breaches of tacit terms of the leases, in particular that Hyprop had obtained consent for the building plans of Stoneridge and an occupational certificate in respect of the premises.

[7] Costa annexed the brochure and the plans as well as the report of an architect to demonstrate that Stoneridge as built did not live up to the representations in the brochure and to demonstrate the breaches of the leases of which Hyprop was guilty. He also annexed copies of correspondence between himself and Hyprop employees that showed that his complaints about the building preceded taking occupation of the premises, and that he could not open the restaurant because the gas supply had not been provided timeously.

[8] Costa concluded by stating that he had (through his attorneys) cancelled the lease, that the suretyship he had signed was accordingly also invalid and that he would be claiming damages. The attorney's letter, attached to Costa's affidavit, did indeed

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[1] *Boshoff v Union Government* 1932 TPD 345 and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A).

state that the client, the third respondent, had elected to cancel the lease because of Hyprop's breaches and misrepresentations and that it claimed damages for breach in the sum of approximately R8.5 million in respect of 'damages suffered'. It did not specify whether the damages arose from breach of contract or as a result of the fraudulent misrepresentations made.

[9] Hyprop denied that the defences had any legal validity. It relied on various clauses in the leases that precluded NSC and Costa's claims: in particular a clause that recorded that the written agreements constituted the entire contract and that there were no prior representations or warranties made that induced the contracts, and another that exempted Hyprop from liability for representations.

[10] Mokgoatlheng J confirmed the cancellation of the leases (as all parties were agreed that they had been cancelled) and ordered NSC to vacate the shops. He also ordered payment of the amounts claimed by Hyprop in respect of arrear rentals and charges. The learned judge found that the terms of the leases precluded reliance on the misrepresentations alleged. And that the fraudulent misrepresentations were 'a patent recent fabrication . . . a chimera, a mirage and proffered as a last refuge by the respondents in order to salvage a lost cause'. Moreover, said the learned judge, 'prior representations, warranty, promises, or the like do not and cannot bind the applicants [Hyprop]' being 'extraneous the lease agreement'.

[11] This finding is of course erroneous. A misrepresentation by its nature is extraneous to the contract that it induces. Unless incorporated as a term of the contract (a warranty) it does not become a part of the contract. That does not mean that it is not actionable as a misrepresentation. And since NSC and Costa alleged fraudulent misrepresentation the terms of the contract could not exempt the maker of the fraudulent misrepresentations from liability. The principle, explained many decades ago by Innes CJ in *Wells v South African Alumenite Company*,[2] is that, in the absence of fraud, exemptions from liability for misrepresentations are binding. Misrepresentations made fraudulently are actionable in delict. The learned Chief Justice said:

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[2] *Wells v South African Alumenite Company* 1927 AD 69 at 72 and 73.

'On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud.'

[12] The high court did not consider the disputes of fact that arose on the papers. It assumed that the averments made by NSC and Costa were groundless. Nonetheless the orders that it made for ejectment and payment of arrear rentals were not incorrect: NSC and Costa claimed themselves to have cancelled the leases, and were thus not able to defend the claims for ejectment nor for arrear rentals and charges. And that, no doubt, is why this court refused the application for leave to appeal against the judgment of Mokgoatlheng J.

[13] The trial court in the action for damages characterized the first special plea of Hyprop as 'issue estoppel' and the parties do not question that, although of course Hyprop maintains that it operates to preclude the action for damages whereas NSC and Costa argue that it does not. This court has most recently confirmed the application of issue estoppel in *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another*.[3]

[14] Brand JA pointed out that the plea of res judicata – that the matter has already been decided – was available where the dispute was between the same parties, for the same relief or on the same cause (in Voet's[4] words *idem actor, idem res et eadem causa petendi*). The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel – borrowing the term from English law. The relaxation and the application of issue estoppel effectively started in the *Boshoff* matter where Greenberg J referred to Spencer-Bower's work on *Res Judicata*.[5] In *Smith v Porritt*[6] Scott JA explained the evolution of the defence as follows:

'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

[3] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28. See also *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* [2013] ZASCA 129 paras 20-22.
[4] 42.1.1.
[5] Now Spencer-Bower and Handley *Res Iudicata* 4 ed.
[6] *Smith v Porritt* 2008 (6) SA 303 (SCA) para 10, quoted also in *Prinsloo v Goldtex* para 10.

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 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. . . . Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others . . . .'

[15] The facts in *Prinsloo* are instructive for this matter is largely similar. In October 2004, a trust, represented inter alios by Prinsloo, sold a farm in the Limpopo province for R2.6 million to Goldex, represented by one Scheepers. In February 2005 Goldex cancelled the sale on the basis that Prinsloo had fraudulently represented to Scheepers that there had been no claims for the restitution of land in terms of the Restitution of Land Rights Act 22 of 1994 in respect of the farm. This was a matter of considerable importance to Goldex and had actually been recorded in the deed of sale, a clause of which stipulated that the seller was not aware of any claim in respect of the farm. There had in fact been a claim made by a community and Goldex maintained that Prinsloo must have been aware of this.

[16] The trust brought an application for an order compelling Goldex to pay the purchase price and take transfer of the farm. Scheepers, in his answering affidavit filed on behalf of Goldex, stated that Goldex was entitled to cancel the sale because he had told Prinsloo prior to concluding the contract that he would not be interested in buying the farm if a land claim in respect of the farm had been lodged. Prinsloo had assured

him that he was not aware of any claim. In reply, Prinsloo admitted that there had indeed been a claim lodged but asserted that he had not been aware of it.

[17] The high court before which the application served found as a fact on the papers that Prinsloo had had full knowledge of the land claim, and had thus acted fraudulently. The application was accordingly dismissed. Leave to appeal against that judgment was refused by the high court and also by this court. Goldex subsequently sued the trust for damages suffered as a result of the fraudulent conduct of Prinsloo. The trust raised as a defence the lack of knowledge on the part of Prinsloo of the land claim. Goldex raised the exceptio rei judicata in a replication. The defence was adjudicated by the high court determining the action proceedings. It upheld the defence, and the trust, again represented by Prinsloo, appealed against that judgment.

[18] Brand JA, on appeal to this court, considered that the matter turned on issue estoppel. The application had presupposed the validity of the sale whereas the action was based on the supposition that the sale no longer existed. Yet the issue was the same: did Prinsloo know there was a land claim in respect of the farm when he gave Scheepers an assurance to the contrary? Thus, said the learned judge, 'this gives rise to a classic case of potential issue estoppel in the same mould as in *Boshoff v Union Government . . .*'.[7]

[19] Prinsloo argued in that matter that the application of issue estoppel would result in unfairness for two reasons: it was not necessary for the high court to determine the question of fraud in order to dismiss the application, and, secondly, that the disputed fraud should not have been determined in motion proceedings without the benefit of cross-examination and the discovery of documents. Brand JA considered both reasons to be sound. In essence he found that it was inappropriate to determine the question of fraud against Prinsloo on the basis of untested allegations on paper.

[20] This court in *Prinsloo* decided that where relaxation of the three requirements of res judicata would lead to inequity, issue estoppel should not preclude a later claim that arises from the same issues. Brand JA concluded that the high court in that matter had

[7] Para 11.

erred in allowing issue estoppel to preclude Goldex's action for damages. He did warn, however, that each case is fact-specific: 'its application cannot be governed by fixed principles or even by guidelines'. Thus 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 proceedings'.[8]

[21] In the court a quo in this matter Sutherland J considered that Mokgoatlheng J in the application proceedings had made a finding of fact on the fraud alleged by NSC and Costa, and that he was unable to conclude that it was wrong. He did not accept the argument raised by Hyprop that that judgment was confirmed when this court refused leave to appeal against it. That view is correct. The mere fact that an appeal court does not grant leave to appeal to it does not mean that it necessarily confirms the correctness of the judgment in the court below. The court that refuses leave has not heard debate on the issues and does not give a fully reasoned judgment as to why there are no real prospects of success on appeal.[9] Moreover, the appeal lies against the order and not against the reasoning.

[22] In *Prinsloo*, on the other hand, Brand JA did regard the finding of the court on the allegation of fraud as incorrectly made. Although Sutherland J in this case considered that there were no disputes of fact and the case made for fraudulent misrepresentation was not made out, the prospect of unsuiting NSC and Costa on the papers alone, where a trial might yield a different result, was a substantial factor to be taken into account in deciding not to relax the requirements of the plea of res judicata. The learned judge considered that he had to exercise a discretion in this regard and that the fact that the question of fraud had been determined on the papers alone was sufficient to justify the dismissal of the special plea. He added, however, that he was not laying down a general principle that whenever a trial action follows upon an application a res judicata plea would fail.

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[8] Para 26.
[9] See *Independent Outdoor Media & others v The City of Cape Town* [2012] ZASCA 46 paras 7 and 8.

[23] In my view, Sutherland J exercised his discretion not to apply issue estoppel judicially. Mokgoatlheng J not only made a finding on the absence of fraud where the evidence had not been properly tested: he also considered that reliance on fraudulent misrepresentations was precluded by the terms of the contract. If that were to bind NSC and Costa, and prevent them from suing for loss suffered as a result of the misrepresentations, issue estoppel would operate most inequitably. The statement that the allegations of fraud were an afterthought and not supported by any evidence is not supported by what Sutherland J referred to as the 'mountain of paper' that NSC and Costa produced in support of their allegations of fraudulent misrepresentations. And the fact that they elected to abide by the lease agreements had no bearing on whether they were entitled to sue for damages in delict. Hyprop could not, as I have said, exempt itself from liability for fraud. It would be inequitable, in my view, if NSC and Costa were not entitled to have their claims in delict adjudicated in terms of the correct principles of law. As Brand JA said in *Prinsloo* 'it would be patently inequitable and unfair to hold the appellants bound to' inappropriate findings in another forum.[10] I therefore agree with Sutherland J that the special plea of res judicata has to fail.

[24] In so far as the remaining special plea in issue on appeal is concerned – that the third and fourth appellants (employees of Hyprop) were not properly joined – that too is a question that must be determined in favour of the respondents. The argument of Hyprop was that these respondents were not parties to the contract and owed no duty of care to NSC, Costa or the other respondents. That plea also raised res judicata in the sense that Hyprop argued that the issue of fraudulent misrepresentation had been adjudicated in the application. It too must fail for the reasons given. The other basis for the plea – that the employees of Hyprop were not parties to the contracts, only representatives – also cannot be sustained since no contractual claim was in issue as between the parties in the action. If NSC and Costa can prove that they acted fraudulently then a claim against them in delict for fraudulent misrepresentation might well be proved.

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[10] Para 27.

[25] That brings me to the question of appealability. This court raised with the parties the question whether the appeal should be heard given that there were issues still to be ventilated between them, and the principle that there should not be a piecemeal approach to litigation. In the ordinary course the trial would have proceeded and the decisions made there would possibly be appealed against in due course. The question thus is whether the hearing of this appeal would lead to a just and reasonably prompt resolution of the issues between the parties.[11]

[26] All parties argued at the hearing of the appeal that because the issues decided by Sutherland J had been separated at the commencement of the trial and ruled upon separately, it was convenient for those issues to be determined before the trial resumed. In particular, if the appeal against the plea of res judicata were to succeed, then, at least as against Hyprop, the trial would not proceed. The balance of convenience thus favours an appeal, at least on the question of res judicata, and no argument was advanced against it by the parties. The third special plea falls to be dealt with on the same basis and the remaining pleas and findings of the high court in respect of them, as I have said, were conceded to be unappealable.

[27] Since I have determined that res judicata (issue estoppel) does not bar the action brought by NSC and the other respondents they may proceed to trial.

[28] The appeal is dismissed with costs.

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C H LEWIS

JUDGE OF APPEAL

[11] *Health Professions Council v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) paras 15 to 22 and the cases there cited.

APPEARANCES:

For the Appellant: A Subel SC (with him M Nowitz)

Instructed by:

Nowitz Attorneys, Johannesburg

Honey Attorneys, Bloemfontein

For the Respondent: G Kairinos

Instructed by:

E DA C Luiz Attorneys, Johannesburg

Hugo & Bruwer Attorneys, Bloemfontein