THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 781/2016

In the matter between:

TRANSALLOYS (PTY) LTD **APPELLANT**

and

MINERAL-LOY (PTY) LTD **RESPONDENT**

Neutral Citation: *Transalloys v Mineral-Loy* (781/2016) [2017] ZASCA 95 (15 June 2017)

Coram: Navsa, Theron, Wallis, Petse and Zondi JJA

Heard: 11 May 2017

Delivered: 15 June 2017

Summary: Requirements for *res judicata* and issue estoppel: When appropriate to separate issues.

ORDER

On appeal from Gauteng Division, Pretoria, of the High Court, (Janse van Nieuwenhuizen J sitting as court of first instance):

1 The order of the high court is set aside and replaced with the following order:

'1 The replication of *res judicata* is upheld and paras 9.2 to 9.4, 17.2 and 22.2.1 of the amended plea are struck out.

2 The second defendant is ordered to pay costs of the separate determination of the issues raised by the replication.'

2 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Zondi JA (Navsa, Theron, Wallis and Petse JJA concurring):

Introduction

[1] The respondent, Mineral-Loy (Pty) Ltd, instituted an action against Highveld Steel and Vanadium Corporation Limited (Highveld) and the appellant, Transalloys (Pty) Ltd, as first and second defendants respectively, in the Gauteng Division, Pretoria, of the High Court, claiming payment of commission due to it for services rendered on behalf of the appellant pursuant to a distribution and service agreement allegedly concluded by the parties. The respondent based its claim on two invoices for August 2008 and September 2008. It also claimed damages for the loss of profit allegedly resulting from the repudiation of the distribution and service agreement. Highveld and the appellant disputed liability. When the matter came before Fabricius J on 14 March 2013 in the court below, the parties sought and obtained an order that 27 issues, inter alia, relating to the existence of the

agreement, its precise terms and conditions and its repudiation be determined separately before any other issues.

[2] In due course Bertelsmann J heard the separated issues and on 3 June 2013 delivered a judgment and determined them in favour of the respondent. Following upon Bertelsmann J's judgment the respondent amended its particulars of claim, inter alia, by relying on new breaches of the distribution and service agreement and by increasing the quantum of its claim for damages.

[3] In turn, the appellant amended its plea by pleading that on or about 21 December 2006 the parties varied the terms of the agreement. The appellant alleged that in terms of the agreement as varied the respondent had to meet certain contractual prerequisites to qualify for the payment of commission. The appellant contended further that the respondent failed to meet those prerequisites and that it was therefore not entitled to be paid commission. In the alternative, the appellant alleged that the respondent had waived its rights under the agreement and was therefore not entitled to be paid any commission.

[4] The respondent replicated and pleaded that the issues sought to be introduced by means of the amended plea were *res judicata*. It contended that the appellant should be precluded from raising and relying on those issues.

[5] At the hearing of this matter we were advised by counsel that Janse van Nieuwenhuizen J had on 14 July 2016, and by agreement between the parties, granted an order that the special plea of *res judicata* be adjudicated separately, before any other issues. Janse van Nieuwenhuizen J made no formal ruling to that effect, but the matter proceeded in accordance with the agreement and ultimately, she upheld the respondent's special plea of *res judicata* with costs. The appellant appeals against that judgment with leave of the court below.

[6] Before dealing with the merits of the appeal, it is necessary to make a few remarks about separating issues. The purpose of rule 33(4) of the Uniform Rules of Court - entitling a court to try issues separately in appropriate circumstances - is to facilitate the convenient and expeditious disposal of litigation. But that result is not always achieved. It may not be appropriate to deal with the matter on separated basis where the issues are inextricably linked and not discrete. This court in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3 held that even where the issues are discrete, the expeditious disposal of the litigation is often best achieved by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the proceedings. In other words, careful thought must be given to the anticipated course of the litigation as a whole, before a decision to separate the issues is taken. The trial court must be satisfied that it is proper to order a separation as it has a duty to ensure that the issues to be tried are clearly circumscribed with clarity and precision, so as to avoid confusion. These guiding principles were not observed when a separation order was sought and obtained in this matter.

[7] Careful thought was not given to the anticipated course of litigation as a whole before on each occasion a decision to separate the issues was taken. The issues have been adjudicated on a separated basis twice in this matter resulting in a delay in the determination of the real issues. The history of litigation in this matter makes it clear that separation was ordered without first ensuring that the issues to be tried were clearly circumscribed. That was particularly the case with the separation order on the first occasion, which purported to state 27 separate issues for determination and led Bertelsmann J to issue an order declaring that: ‘Plaintiff succeeds against the second defendant on every issue identified in [the separation order]’. The indeterminate nature of that order led to much of the confusion in the present proceedings.

[8] Back to the merits of this appeal, the question is whether a replication of *res judicata* was rightly upheld. In other words, the broad question is whether all the issues raised in the appellant’s amended plea are the same as

those that were before and finally adjudicated by Bertelsmann J on 3 June 2013. In this regard the pleadings and the judgment of Bertelsmann J must be carefully analysed.

Original claim

[9] The dispute between the parties has its genesis in the distribution agreement the respondent concluded with Highveld, the appellant's predecessor, in October 1985 and amended in October 1994. A dispute arose between the parties regarding payments allegedly due to the respondent under the agreement. That led to the institution of the action against Highveld.

[10] The respondent's original claim had two components; one for the payment of two invoices issued in August 2008 and September 2008 for commissions in the amount of R168 712.56 and R114 316.69 respectively (invoice claims). The other was for damages in the sum of R1 195 403.76 representing the respondent's loss of profit for a 12 month period as a result of Highveld's repudiation of the agreement and alleged failure to give reasonable notice of termination (damages claim).

[11] The respondent's cause of action was based on the terms and conditions of the distribution agreement and the assignment of that agreement by Highveld to the appellant. It pleaded as follows:

11.1. The respondent alleged that it was appointed by Highveld as its sole distributor of ferromanganese, and later silico-manganese, in the Republic of South Africa and would purchase such products from Highveld and on-sell the products at a profit to various customers.

11.2. Certain customers were excluded and Highveld would supply such excluded customers directly with the products. The respondent alleged that it was expected to visit the excluded customers and do market surveys and other services for Highveld in respect of such excluded customers and that Highveld agreed to pay the respondent a commission on all Highveld's sales to them.

11.3. Highveld would on a monthly basis furnish the respondent with values of sales of ferromanganese by Highveld to excluded customers and of

commission payable to the respondent to enable the respondent to invoice Highveld.

11.4. The respondent further alleged that it invoiced the appellant for commission on sales effected in August 2008 and September 2008 and that the appellant refused to pay such invoices.

11.5. Highveld sold the business in question to the appellant and assigned its rights and obligations under the agreement to the appellant with effect from either 1 July 2007 or April 2008, after which latter date the respondent invoiced the appellant for its commission.

11.6. As regards the claim for damages for loss of profit, the respondent alleged that after the agreement was assigned to the appellant, the appellant in repudiation of the agreement refused to furnish the respondent with monthly values of sales of the products sold by the appellant or of the amount of commission payable to the respondent.

[12] Highveld and the appellant defended the action. Not only did they deny liability to the respondent, but they disputed the terms of the agreement as pleaded by the respondent. When the matter came before Fabricius J in the court below, the parties agreed on the 27 issues upon which the court hearing the matter would be required to adjudicate. In the main, the separated issues related to the existence of the agreement on which the respondent relied; its precise terms; whether during the months of May to September 2008 the respondent rendered the distribution and support services in accordance with the agreement; whether the appellant failed to make payment of the commission for the months of August and September 2008; whether it was repudiated and whether the rights and obligations of Highveld under and in terms of the agreement were assigned to the appellant.

[13] The separated issues went on trial before Bertelsmann J and he determined them in favour of the respondent. In short, the effect of the findings on the separated issues was that the appellant had assumed the obligations of Highveld in terms of the 1985 agreement as amended in 1994; and its refusal to provide calculations to determine commission due and to make payment, constituted repudiation.

[14] The respondent and Highveld subsequently concluded a settlement agreement and the respondent withdrew its claims against Highveld. With that Highveld fell out of the picture.

The amended claim

[15] During the trial before Bertelsmann J it became apparent to the respondent that the appellant and/or Highveld had sold the relevant products to customers who were not excluded customers in terms of the distribution agreement and to whom only the respondent was entitled to sell such products. Furthermore the respondent became aware that the appellant and/or Highveld had during the period July 2007 to 30 September 2008 effected sales to customers on the excluded list without disclosing the values of those sales and the amount of commission payable to the respondent. Arising from these facts, the respondent amended its particulars of claim.

[16] In the amended particulars of claim the respondent retained its claim for payment of the commission on the two invoices it issued to the appellant in August 2008 and September 2008. What was amended was the following:

16.1. The amount claimed for damages consequent upon the repudiation of the distribution agreement was increased from R1 195 403.76 to R5 237 121 on the basis that the average amount of the monthly invoices issued by the respondent during the 12 month period preceding the repudiation was R436 426.75 and not R99 616.98 as initially averred.

16.2. Two further claims for damages due to the breach of the distribution agreement were introduced, namely:

16.2.1 A claim for damages for loss of profit in the amount of R15 071 485.04 arising from sales of the relevant products to Afro Mineral Trading AG (AMT); a non-excluded customer, in terms of the tolling agreement (AMT claim); and

16.2.2 A claim for damages for loss of profit of 5 per cent on sales and distribution by the appellant of silico-manganese and ferro-manganese to non-excluded customers during the period July 2007 to 30 September 2008 and a claim of 2 per cent commission on sales and distribution of ferro-manganese

effected by the appellant to customers on the excluded list (undisclosed sales). The amount claimed was R5 093 663.

Appellant's amended plea

[17] In response to the respondent's amended particulars of claim the appellant amended its plea by pleading in para 9.2 that the distribution agreement was varied in terms of a memorandum of 21 December 2006 (variation defence), alternatively that the respondent waived its rights under the distribution agreement (waiver defence). The appellant contended in para 17 of its amended plea that the respondent was not entitled to be paid commission on the ground that in breach of its obligations in terms of the agreement as varied, it inter alia, failed to submit valid claims for commission in respect of the excluded customers; procure orders with a referral number issued by Highveld and/or the appellant; and submit monthly visitation reports. This defence related only to the claim on the two invoices and not to the original damages claim based on the repudiation of the distribution agreement.

[18] The allegations underlying the appellant's variation defence are pleaded in para 9.3 of its amended plea as follows:

18.1. The respondent was appointed as Highveld's agent for local sales;

18.2. Highveld would pay to the respondent a commission of 2 per cent for sales to the excluded customers;

18.3. Any clients of Highveld visited by the respondent would be issued with a referral number to be used when the client concerned placed an order with Highveld;

18.4. Orders placed with Highveld without a referral number would not be included for commission payable to the respondent;

18.5. The respondent was obliged to submit a monthly visitation report to Highveld and/or the appellant detailing the clients visited during the month with the relevant referral number that had been issued;

18.6. For market development, the respondent would consult with Highveld prior to visiting a new client to ensure that the client was not already a direct client of Highveld and the appellant.

[19] As regards the respondent's AMT claim, the appellant in para 22 of its amended plea denied that the respondent was entitled to be paid the commission for the sales to AMT. In addition, the appellant alleged that AMT was registered in Switzerland, that sales to it would have been foreign sales and that it was not a potential customer that the respondent would have approached.

[20] The appellant's waiver defence, which is in the alternative to what is pleaded in paras 9.2 and 9.3, is set out in para 9.4 of its amended plea. The appellant contended that, whilst fully aware of its rights under the distribution agreement, as amended in December 2006 and at all times thereafter, the respondent waived its rights to obligations by Highveld and/or the appellant in terms of the distribution agreement, inter alia, by:

20.1. receiving the memorandum;

20.2. not challenging and/or disputing the contents of the memorandum; and

20.3. conducting itself in a manner that was consistent only with having accepted the terms and obligations as contained in the memorandum.

[21] This gave rise to a replication by the respondent that in light of the earlier judgment by Bertelsmann J, the appellant was precluded from relying on variation, alternatively waiver, by the *exceptio rei judicata*. As alluded to above, this contention was upheld by Janse van Nieuwenhuizen J. The issue on appeal is whether Janse van Nieuwenhuizen J was correct. The parties agreed that the matter concerns the application of the extended *res judicata* in the form of issue estoppel.

[22] For *res judicata* to operate it must be shown that the earlier judgment relied upon was a final judgment, and that there must be identity of parties and of the subject-matter in the former and in the present litigation. This court in *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) described the *res judicata* and the issue estoppel as follows:

'[10] The expression "res iudicata" 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 had 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*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) ([2001] 1 All SA 417) at 239F – H and the cases there cited). In time the requirements were, however, relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10:

"Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res iudicata* 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 iudicata* 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, 667J – 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 iudicata*. 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* (supra) at 670E – F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others. . . ."'

(See also *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) paras 21 and 22.)

[23] The main thrust of the appellant's argument was that in the circumstances of the matter, where the respondent has introduced new causes of action for further breaches of the same agreement between the parties (which breaches were only discovered during the course of evidence in the first hearing), it would be inequitable and unfair to prevent the appellant from relying on a variation of the agreement, alternatively a waiver of certain rights therein as a defence to the new claims by the application of issue estoppel and that the appellant did not have a duty to rely on the variation or waiver in the first hearing.

[24] In contrast, the respondent's contention was that it was incumbent upon the appellant to have pleaded such defences to the claims as they existed on the pleadings at the first hearing. It argued that insofar as the variation of the agreement would give rise to defences to its initial claims – something that is not wholly apparent on a reading of the memorandum and the pleaded terms of the variation – those defences should have been raised to the initial claims.

[25] It is clear that the issues now raised by the appellant form part of the issues that Bertelsmann J was called upon to determine, namely whether the respondent and Highveld (the appellant's predecessor) had concluded the agreement; what were the precise terms and conditions of the agreement and whether the parties had concluded the amendment of the agreement so that it covered sales of silico-manganese. As I have pointed out by way of introduction, Bertelsmann J finally determined those issues in favour of the respondent. It is therefore not open to the appellant to seek to avoid liability under the distribution agreement by contending that the agreement was varied in the respects now alleged, alternatively that respondent waived its rights to obligations by the appellant. The 'once and for all rule' requires that all claims generated by the same cause of action, be instituted in one action.[1] Similarly, once the merits of a claim have been finally determined in favour of

[1] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A); *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) para 10; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-D

a party it is not permissible for the defendant to seek to raise fresh defences not raised initially. What is sauce for the plaintiff goose, is also sauce for the defendant gander. It was therefore incumbent upon the appellant to have pleaded the variation and waiver defences to the original claims as they existed on the pleadings at the first hearing in so far as they constituted defences to those claims.

[26] The object of the defence of *res judicata* is based on two grounds: the one public policy, that is to say, it is in the interest of justice that there should be an end to litigation, and the other, the hardship to a litigant, that he should not be vexed twice for the same cause.[2] To allow the appellant's new defences in relation to the respondent's claims for payment of the two unpaid invoices and the claim for damages arising from repudiation would defeat the whole object of the defence of *res judicata.* The two defences which are now sought to be advanced would require reconsideration of the findings of Bertelsmann J on issues that were before him. Bertelsmann J concluded that an agreement on the terms and conditions alleged by the respondent had been established and that the appellant had repudiated the agreement. These findings will have to be revisited and will be disturbed were the issues sought to be introduced by the appellant to be allowed. The appellant had a fair opportunity to participate in the initial litigation, where the issues relating to the existence of the agreement, its precise terms and conditions and whether it was breached, were fully ventilated and decided. The amounts claimed by the respondent in the initial litigation in respect of the commission and for damages were not so insignificant to justify his failure to raise these two defences in the initial litigation.

[27] In relation to the respondent's claim for commission on the two invoices and the claim for damages the appellant's defences of variation and waiver are *res judicata* and the appellant is therefore precluded from raising them again. In the circumstances the replication of *res judicata* in relation to para 17.2, read with paras 9.2; 9.3 and 9.4, of the amended plea, was correctly

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[2] *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd & others* (No 2) [1966] 2 All ER 536 at 549.

upheld, but the order requires amendment by striking out the offending paragraphs.

[28] The AMT claim, however, stands on a different footing. I agree with the appellant's submission that the court below erred in finding that the issue relating to the AMT claim was considered by Bertelsmann J and is therefore *res judicata*. Bertelsmann J, in para 61 of his judgment, made it clear that the AMT agreement fell outside the issues he was called upon to decide and therefore it was not necessary for him to deal with it. The fact that the appellant had concluded a tolling agreement with AMT, in terms of which the appellant would sell its entire ore production to AMT, arose during the cross-examination of Mr Duff by the appellant's counsel in the proceedings before Bertelsmann J. But other than that it never enjoyed any further attention in the initial proceedings. It featured for the first time when the respondent amended its particulars of claim during 2015 to introduce a fresh claim of some R15 million.

[29] Although the AMT agreement was referred to in the appellant's amended plea and counterclaim, but not as giving rise to a separate claim, the parties did not want it to form part of the issues in respect of which a separation order was granted. That this is the approach adopted by the parties finds support in para 36 of Bertelsmann J's judgment in which the following is stated:

'Prior to the commencement of the hearing the parties argued a proposed limitation of the issues for decision by this court. Fabricius J issued an order limiting the present disputes for decision to all those relating to the merits of the disputes as set out above, but excluding any consideration of what would constitute a reasonable notice period for the termination of plaintiff's agreement with the first defendant, (if any), and any potential damages suffered by plaintiff if its factual averments were to be accepted. Any reference to the tolling agreement was also excluded.'

[30] If the alleged amendment or waiver pleaded in para 9 of the amended plea constituted a defence to the AMT claim, this would have posed a dilemma. The appellant would be facing a fresh claim in excess of R15 million

to which it had not been required to respond during the hearing before Bertelsmann J and it would be precluded from raising that defence by the fact that it could and should have raised this in relation to a claim of less than R1 million on the invoices. In those circumstances it would have been necessary for us to consider whether this would give rise to injustice. However, although the amended plea to the AMT claim purports to incorporate a reference to the amendment of the agreement, nothing in the amendment impinges on the defence actually pleaded as summarised in para 19 above. The reference to the amendment is simply surplsage. In the circumstances, the allegation in this regard in para 22.2.1 of the amended plea can be struck out, without affecting the defence actually raised that AMT was a foreign company and the respondent would not have sought to make sales to it.

The order

[31] In the result the following order is made:

1 The order of the high court is set aside and replaced with the following order:

‘1 The replication of *res judicata* is upheld and paras 9.2 to 9.4, 17.2 and 22.2.1 of the amended plea are struck out.

2 The second defendant is ordered to pay costs of the separate determination of the issues raised by the replication.’

2 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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D H Zondi
Judge of Appeal

Appearances

For the Appellant:	J Daniels (with him C T Vetter)
	Instructed by:
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