IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: ✓

....
SIGNATURE **DATE**

CASE NO: 5531/2016

In the matter between:

THE SOCIAL HOUSING REGULATORY AUTHORITY **APPLICANT**

and

CAMEL ROCK SOCIAL HOUSING INSTITUTION NPC **RESPONDENT**

In re

CAMEL ROCK SOCIAL HOUSING INSTITUTION NPC **PLAINTIFF**

and

THE SOCIAL HOUSING REGULATORY AUTHORITY **DEFENDANT**

JUDGMENT

THOBANE AJ,

Introduction

[1] This is an application wherein the applicant seeks the following relief;

1.1. That the respondents summons and particulars of claim in the above mentioned case number are dismissed alternatively set aside with costs as between attorney and client including the costs of two counsel.

1.2. Alternatively, that the respondent is ordered to pay security for the legal costs of the applicant in defending the action in the form, amount and manner as directed by the registrar.

1.3. That the respondent pay the costs of this application on a scale as between attorney and client and including the cost of two counsel

[2] The application is opposed by the respondent.

Background

[3] To place the issues for determination into better perspective it is necessary to briefly set out the background facts;

3.1. The parties hereto have a history of litigation spanning a few years.

3.2. The respondent was, at the hearing of the application, the only remaining party to litigation which originated from the High

Court in Grahamstown, the other co-litigants having fallen off owing to an amendment to the summons and particulars of claim under circumstances which I will briefly touch on below.

3.3. The respondent together with three others issued summons against the applicant seeking payment in the amount of R 248 957649-32 (two hundred and forty eight million nine hundred and fifty seven thousand six hundred and forty nine rand thirty two cents).

3.4. The cause of action was an alleged breach of a restructuring capital grant agreement which resulted in damages, mentioned above, that the plaintiffs purportedly suffered.

3.5. The breach centered around the freezing of the respondent's bank account following payment of the sum of R61 373 600-00 by the applicant into the respondent's bank account, or to the so called Imprest account.

3.6. The applicant defended the action and in turn noted a number of exceptions, nine in total, against the plaintiffs' particulars of claim.

3.7. Following the exception, the particulars of claim were amended with the result that, *inter alia,* the respondent was left as the only plaintiff.

3.8. Believing that the amended particulars of claim were still excipiable, the applicant noted another exception thereto. Those proceedings appear to be pending.

[4] The applicant and the respondent on 27 March 2013 concluded a "Restructuring Capital Grant Agreement". As I understand it, the agreement was meant to manage relations between the parties in relation to a social housing project that was to be undertaken, with a huge capital outlay. The total value of the project was R195.4 million. There were certain conditions attendant to the award of the project to the respondent.

[5] It is not in dispute that on 28 March 2014, pursuant to the agreement, a sum of R61.3 million was paid by the applicant into the Imprest account of the respondent held at ABSA bank. No sooner had the initial payment been made a sum of R4.8 million was transferred out of the account of the respondent. The transfer resulted in the freezing of the account.

[6] Investigations were undertaken by National Treasury, the South African Police Services and the National Director of Public Prosecutions. Litigation ensued and on 20 June 2013 the National Director of Public Prosecutions obtained a preservation order in the Eastern Cape Division of the High Court, Grahamstown. When this order expired, after 90 days, the NDPP obtained another one.

[7] Eventually, the NDPP applied for a forfeiture order which was argued in full before Revelas J, in the High Court in Grahamstown. On 27 October 2014 she handed down a judgment in terms of which certain listed properties were forfeited to the state. In the judgment, Revelas J makes certain findings which were a subject of debate before me.

Issues

[8] There are two issues for determination in this application which are in my view interconnected, namely;

8.1. Whether the main action is *res judicata;*

8.2. Whether the suspensive conditions of the agreement were fulfilled. This is the entire basis of the respondent's case in the main action.

Conditions precedent

[9] It is convenient that I start with the agreement particularly the suspensive conditions thereof as the second issue, *res judicata,* flows from them. The agreement itself refers to "conditions precedent". These conditions precedent traverse briefly the following in-exhaustive issues;

9.1. Submission of respondent's certificate of accreditation as well as a letter of good standing by the applicant;

9.2. Passing of requisite resolutions;

9.3. Approval of business plans by the applicant;

9.4. Submission of market analysis;

9.5. Authority to access the respondent's bank account;

9.6. The submission of numerous reports and instruments that enable the applicant to fulfill its duties;

9.7. The breakdown of funding arrangements from financiers ;

9.8. Proof of rights to land on which the project was to be implemented, together with information and documents as to town planning;

9.9. All other documents and information necessary for the fulfillment of the conditions precedent.

[10] Paragraph 3.7. of the Restructuring Capital Grant Agreement reads as follows;

> *"It is expressly recorded that SHRA may, in its discretion, transfer funds into the Imprest Bank Account prior to the fulfillment of all the Conditions Precedent. Notwithstanding the aforesaid, the applicant shall not be entitled to utilize any funds paid by SHRA into the Imprest Bank Account prior to the fulfillment of the Conditions Precedent, until all the Conditions Precedent have been fulfilled or waived in writing by SHRA, as provided in this agreement, and only upon such terms and conditions for draw downs as provided in this agreement, and/ or pursuant to this agreement."*

[11] In the amended particulars of claim, the respondent contends that it has *"fulfilled the provisions of the agreement..... and has complied with all the requirements in respect of providing documents to the defendant, as was required in terms of clause 3.7. of the agreement."*. It is precisely this contention that the applicant disputes. Incidentally, it is these "Conditions Precedent" that Revelas J had occasion to deal with in her judgment and it is these that the applicant argues were not fulfilled. The respondent further pleaded that the freezing of its account and the subsequent payment of the money to National Treasury constitutes a breach of the agreement.

[12] The respondent was a party to the forfeiture application at the High Court in Grahamstown where damning findings and adverse comments were made by Revelas J in her judgment against, inter alia, the respondent. It was found that the payment of R61 million to the respondent and its subsequent disbursement was unlawful and was premised on lies. It was common cause before her, that the respondent had failed to reach what was referred to as "pre-accreditation", as respondent had failed on two previous occasions to demonstrate that minimum requirements for that status were met. Eventually, when correspondence confirming pre accreditation status was sent out, it was tainted by further irregularity. In a lengthy and well reasoned judgment, it was found *inter alia* that;

- An investment manager of the applicant was unduly pressured into writing an inaccurate letter in which there was confirmation that the respondent

had attained *"conditional qualification status, as if it had met eighty percent of the requirements, whereas he knew for a fact that the first respondent had only reached the basic minimum of fifty percent"*,

- The grant of status was unprocedurally done,
- The respondent was not assessed for conditional qualification in accordance with procedures and regulations,
- The respondent did not qualify to receive conditional qualifying status as it had been in existence for a period of a year as opposed to two years as per qualifying standards,
- The respondent, as per a report by an independent specialist, never achieved pre-qualifying status,
- Section 34 of the Social Housing Regulations and the Social Housing Act 18 of 2008 was contravened,
- Transfer of money, done just on the last day of the financial year was illegal.

[13] Further, as part of the case mounted against the respondent and others with the view to forfeiture, was an affidavit by Ms Z Ebrahim who was at the time the chairperson of the applicant's Council. She had in her affidavit referred to the fact that the Restructuring Capital Grant Agreement between the parties, which embodies the conditions precedent that the respondent contends in the main action had been met, had not been effected and that the agreement was of no force and effect.

[14] The court found that the following conditions precedent, had not been met and therefore that the grant agreement had lapsed and was no longer of any force or effect;

(a) Obtaining in principle long term financing as required in the grant agreement;

(b) Providing;

(i) a full breakdown of project in the contract;

(ii) a valid record of decision of environmental authorization issued by the provincial department or local authority;

(iii) a letter from the local authority confirming available capacity in respect of water, sewer, roads and storm water as contemplated in the contract as well as the value of the bulk contributions payable in respect of the aforesaid;

(iv) copies of the service scheme reports by an electrical engineer and the designs of the link/connector services in respect of the bulk services approved by the local authority.

[15] Having found that the conditions precedent were not fulfilled, the court went on to pass certain damning remarks for example, *"all these payments were unlawful as they are not provided for by the regulations and the grant agreement", "payment of management fees was unlawful both in terms of the regulations of the Social Housing Act and the grant agreement signed between SHRA and first respondent", "none of the aforesaid payments were*

permissible in terms of the grant agreement", "accordingly, the second respondent had no business in transferring the money out of the Imprest account, and therefore all the subsequent transfers were also unlawful", "the actual transfers and the use of the money were without the authorization of Spence, the independent review councilor", "the first respondent never qualified for the grant" and lastly, *"In addition, the first respondent was shown to be ineligible for grant qualifying status because it was not financially viable or project ready".*

[16] In light of the findings of Revelas J, whose judgment I was informed was not appealed and therefore stands to this day, the assets which were forfeited to the state, were purchased with money unlawfully paid to the respondents in that matter. The initial grant money paid to the respondent was paid in unlawful circumstances. The circumstances were unlawful because the respondent failed to fulfill the conditions precedent. The fact that the respondent, in the main action avers that the conditions precedent were fulfilled, in the circumstances which I have sketched above and which have been uplifted from the proceedings in the High Court in the Eastern Cape Division, call into question the motives of the respondent. I shall revisit the question of motive later.

[17] From the above, I find, by parity of reasoning, that the conditions precedent had not been met hence the forfeiture order.

Res judicata

[18] The requirements for *res judicata* are trite. For it to operate it must be shown that the earlier judgment relied upon was a final judgment, and that (a) the same parties were involved, (b) the subject matter was the same and (c) the same relief. The SCA 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 thus;

> *"[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. . ....*"

[19] In the main action the respondent relies on the fact that on its part, the conditions precedent were fulfilled. This is however seriously disputed. Before deciding whether the respondent is correct in its contention, it must be mentioned that the same parties in *casu* are the same as those in the matter that was adjudicated by Revelas J. For purposes of meeting the requirement that parties ought to be same, it is my view that the requirement has been met.

[20] The proceedings were forfeiture proceedings launched by the NDPP. The relief sought is different to the one in the main action. In the prayer of the amended particulars of claim, the relief sought by the respondent is the following;

(a) payment of R195 414 000-00, alternatively R61 373 660-00, plus continuation of the project to finality;

(b) interest thereon at the applicable legal rate from date of demand to date of final payment;

(c) costs of suit on attorney and client scale.

The subject matter was however the same, the Restructuring Capital Grant Agreement. The court in the Eastern Cape matter found that payments were unlawfully made by reason of the fact that the respondent had failed to fulfill suspensive conditions.

[21] ***Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others [2013] ZASCA 129; 2013 (6) SA 499 (SCA)***, the SCA had to grapple with the conundrum where the parties, cause of action and the relief, were not strictly speaking exactly the same. I find the following paragraphs in the judgment particularly useful in putting the matter to rest;

> *"[20] Although not referred to by him,* ***Boshoff v Union Government****, provided authority for Milne J's view in regard to the application of res judicata. Boshoff claimed damages from the government arising from the allegedly wrongful cancellation of a lease and his ejectment from a farm owned by the defendant. The plea of res judicata was based on proceedings for Boshoff's ejectment, founded on the lawful termination of his lease. After considering the authorities on what is meant by the 'same cause of action' Greenberg J concluded that this requirement would be satisfied in the circumstances described in the following passage from Spencer-Bower's Res Judicata:*
>
> > *'Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or*

issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms ...'" (emphasis added)

[22] The court continued;

> *"[21] On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case."*

[23] Although the issue in the Eastern Cape was forfeiture of assets, same could only have been granted if the court made a finding on the legality or validity of the agreement between the parties. A finding by that court that the grant agreement had lapsed and therefore no longer of any force or effect, presents an insurmountable challenge for the respondent, in that it is the same agreement on which the main action is founded. As a further point of argument counsel for the applicant submitted that the court would not be

acting out of sync were it to relax the requirements of same cause of action and same relief. The reason for that contention is self evident. It would be undesirable and would lead to repetitive litigation on the same issues, were this court to revisit the conditions precedent. Issue estoppel therefore, so he argued, was competent. For that proposition he referred this court to ***Prinsloo NO & others v Goldex*** (*supra*) in particular paragraph 23 where the following dicta is contained;

> *[23] In our common law the requirements for res iudicata are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, 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 (see eg* ***Evins v Shield Insurance Co Ltd 1980 (2) SA 815 (A)*** *at 835G). Issue estoppel therefore 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.*

There is therefore an overarching warning on a court which considers applying issue estoppel. It relates to possible iniquitous and unfair outcomes for a litigant, hence the caution that its application should be on a case by case basis.

[24] In argument before me I debated with counsel for the respondent whether any rights can flow from an agreement held to be of no force or effect. It is telling that no answer was forthcoming. I find that the plaintiff in the main action mounts a case premised on fulfillment of conditions precedent in an agreement found to have been of no force or effect, an issue which the judgment of Revelas J emphatically dealt with. In light of the aforementioned principles adjudicating the main action would give rise to *res judicata.*

[25] It is my view that a consideration of the alternative remedy, that of a security for costs is, in light of the facts of this case, unnecessary. The application must therefore succeed.

Costs

[26] The applicant has asked that punitive costs be awarded in both this application as well as the main application by reason of the fact that the respondent dragged the applicant to court on an unsustainable claim based on an unlawful and invalid agreement, tainted by irregularity and on which

another court has expressed itself. The respondent also seeks a punitive costs order.

[27] Costs are a matter for the discretion of the court. As a general rule the successful party is entitled to his costs. Attorney and client costs are mostly awarded under extraordinary circumstances or if they form part of the parties' agreement. For a party to be mulcted with an order of costs on attorney and client scale, such a party would most probably have acted or conducted itself *mala fide* and/or misconducted itself in one way or another during the litigation process. Normally, such a party would have been vexatious or brazen in its approach to the litigation process. (See ***Sentrachem Ltd v Prinsloo [1996] ZASCA 133; 1997 (2) SA 1 (A)*** at 22.)

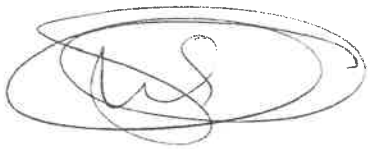
[28] I believe a punitive costs order is warranted for the reasons that follow. Firstly, the issues that the respondent litigated on in the main action were ventilated and decided upon by another court. The judgment of that court was a final judgment and stands to this day. Secondly, the insistence of the respondent that the conditions precedent were complied with in circumstances when on its own version they were not, is a clear indication that the respondent did not institute the proceedings in good faith. I say this having evaluated the affidavit of Thanduxolo Gilbert Zuka, who on one hand states that the suspensive conditions were never fulfilled (page 200 para 15) while on the other stating that the failure to fulfill those conditions was justified

(page 202 para 23). The respondent denies that there was no accreditation and in support refers to a letter which the judgment of Revelas J found was obtained under undue pressure amid threats to discipline the author. The same approach is followed in dealing with conditional accreditation. In paragraph 41.5. The deponent to the affidavit states, with reference to a letter, that "it is proof that some of the conditions allegedly not fulfilled were actually fulfilled....". Similar allegations which point to failure to fulfill conditions precedent are dealt with in paragraphs, 52, 62, 63 and 65.

[29] In paragraph 66 the respondent places reliance on the agreement as if it was not a tainted agreement on whose validity another court has already made a finding. The respondent persists (page 214 para70) that it was entitled to payment. This court expresses its displeasure at how the respondent sought, by way of the main action, to revisit issues that were dealt with by another court. In the circumstances a punitive costs order is warranted.

[30] I make the following order;

1. The respondent's summons and particulars of claim in the above mentioned case number are dismissed with costs;
2. The respondent is directed to pay the costs of this application on a scale as between attorney and client which shall include costs consequent upon the employment of two counsel, where so employed.



SA THOBANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16/05531

In the matter between:

THE SOCIAL HOUSING REGULATORY AUTHORITY Applicant

and

CAMEL ROCK SOCIAL HOUSING INSTITUTION NPC Respondent

In re:

CAMEL ROCK SOCIAL HOUSING INSTITUTION Plaintiff

and

SOCIAL HOUSING REGULATORY AUTHORITY Defendant

RESPONDENT'S PRACTICE NOTE

1.	Date of Set Down		:	16 October 2017
2.	Names of Parties	& Case Number	:	As per above
3.	Number on the Roll		:	Unknown at this stage

4.	Applicant's Counsel	:	Adv H van Eeden SC Maisels Group Tel: 011 – 535 0800 vaneeden@law.co.za Adv Chris Carelse Maisels Group Tel: 011 – 535 0800 carelse@law.co.za
5.	Applicant's Attorneys	:	Cliffe Dekker Hofmeyr Inc Mrr Byron O'Connor Tel: 011 – 562 1140 Byron.oconnor@ecdhlegal.com
6.	Respondent's Counsel	:	Adv SX Mapoma Bhisho Bar, East London 0834528418 sxmapoma@law.co.za Adv DV Pitt Bhisho Bar, East London 0724469599 donovanpitt@yahoo.com

7. Respondent's Attorneys : Hexana Attorneys

c/o Majavu Inc

Ms Thuso Makuta

Tel: 011 – 941 1525

thuto@majavuattorneys.co.za

8. Nature of Relief sought:

Application for dismissal of action proceedings against Applicant, alternatively that the Respondent pay security for costs.

9. Main Issues:

Whether the main action is res judicata and whether the suspensive conditions of the agreement between the parties were fulfilled.

Respondent contends that the res judicata requirements were not met and further contends that the suspensive conditions were met;

Respondent further contends that the application is defective on the basis of the Plascon Evans principle;

that the founding affidavit is based on hearsay; and
that no case has been made for payment of security for costs.

10. Relevant authorities:

Referred to as per the list attached to the Respondent's heads of argument.

11. Probable duration: 3 – 4 hours

12. Not urgent

13. Reading of Papers:

    The amended particulars of claim;
    The affidavits in the application.

14. Counsel for Respondent is not briefed on any other matter for the day.

DATED AT EAST LONDON ON THIS 3RD DAY OF AUGUST 2017

Counsel for Respondent

SX Mapoma

DV Pitt