Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 65 /05
Date heard: 15 & 18/05/2006
Date delivered: 26/ 05/ 2006

In the matter between:

WESSEL KRUGER First Plaintiff

GROOT GARIEP WINKEL CC Second Plaintiff

and

SHOPRITE CHECKERS (PTY) LIMITED First Defendant

HONEY & ASSOCIATES ATTORNEYS Second Defendant

JUDGMENT

TLALETSI J:

INTRODUCTION

[1] The first plaintiff is cited in the particulars of claim as an adult business man of Orange Verspreiders, Ferros Street, Keetmanshoop Industrial Area, Namibia. The second plaintiff is Groot Gariep Winkel CC, a Close Corporation duly incorporated in terms of the laws of the Republic of South Africa, with its main place of business and registered address at 30 Voortrekker Street, Kakamas, Northern

Cape. It is not disputed that the first plaintiff ("Kruger") is a member of the second plaintiff ("the close corporation").

2] The first defendant is Shoprite Checkers (Pty) Ltd a company incorporated and registered in terms of the company Law of the Republic of South Africa with its main place of business at corner of Old Paarl Road and William Dabs Street, Brackenfell, Western Cape. The second defendant is Honey & Partners Incorporated a firm of attorneys of Waterval Sentrum, Aliwal Street, Bloemfontein.

3] The plaintiffs have jointly instituted action against the defendants on 25 January 2005. They are seeking an order against the first defendant on the following terms:-

"Derhalwe vorder die eerste eiser, alternatiewelik die tweede eiser, vonnis teen die eerste verweerder in die volgende terme:

1. Betaling van die bedrag vna R189 929-36;
2. Rente a tempore morae op die bedrag van R 189 929-36;
3. Koste van die geding; en
4. Alternatiewe regshulp."

It is not necessary to set out the prayers sought against the second defendant as the plaintiffs withdrew their claim against the first defendant by Notice on 16 November 2005 and tendered party and party costs.

4] At the inception of the trial Adv Jordaan SC, who appeared on behalf of the first defendant raised a point *in limine* of *res judicata*. He contended that the parties' dispute was determined at the interpleader proceedings which were instituted under case no: 1017/04 and which were finalised on 29 October 2004 before **Musi AJ**, as he then was. The file relating to these proceedings was made

available to me at the hearing of this matter. It is appropriate to briefly deal with the issues at the interpleader proceedings.

INTERPLEADER PROCEEDINGS.

5] The applicant in those proceedings was the second defendant. The first claimant was the second plaintiff in *casu,* and the second claimant was the first defendant in the present proceedings. The court was called upon to decide to whom of the two claimants should the sheriff of the court should pay an amount of R 192 735-33, and who should be responsible for the payment of the applicant's costs.

6] The deponent to the founding affidavit was Rudolf Johannes Britz, ("Britz"), a practicing attorney at the applicant firm of attorneys. They were also the attorneys for the second claimant in the negotiations pertaining to the dealings between the parties. In the founding affidavit, Britz stated *inter alia*, that the first claimant had paid into the applicant's trust account, an amount of R 192 735-33. The money was kept in an interest bearing account. That, both claimants, he continued, laid adverse claims demanding payment of the money.

7] According to the Sheriff's return of service the interpleader Notice and supporting affidavit was served on 21 September 2004 on Louw Coetzee attorneys, who were first claimant's attorneys of record, as well as on the second claimant at its main business address. Only the second claimant filed an affidavit deposed to by Jacobus Barnard ("Barnard") in support of its claim.

8] In the affidavit Barnard states as follows in the paragraphs that are relevant for the purposes of the present proceedings:-

"2. Op die 6de April 2004 en te Kakamas het die aanspraakmakers 'n ooreenkoms gesluit waarkragtens 'n sekere Mnr Wessel Kruger in sy hoedanigheid as Direkteur van Oranje Verspreiders (Namibië) die besigheid genaamd OK Foods Kakamas aankoop en word 'n afskrif van die hoofde van ooreenkoms hierby aangeheg soos dit deur die partye onderteken was op die 6de April 2004 as aanhangsel "JB1".

7. Op die 26ste April 2004 was daar verdere onderhandelinge tussen die partye gewees en was 'n mondelinge ooreenkoms bereik gewees dat die tweede aanspreekmaker se prokureur 'n bedrag van R500 000,00 sal inbetaal op die 26ste April 2004 en op 30 April 2004 'n verdere R500 000,00. Ek heg hierby aan as Bylae "JB5" 'n skrywe van Honey Prokureurs.

13.1 Ek bestig die Agbare Hof se aandag eerbiediglik daarop dat die eerste aanspraakmaker in besit van die besigheid was vanaf die 8ste April 2004 tot en met die 12de Mei 2004 en gehandel het met die voorraad.

13.2 Daar was toe reëlings getref gewees dat die tweede aanspraakmaker herbesit van die besigheid sal geneem het op die 12de Mei 2004 en was daar inderdaad 'n vergadering gehou gewees te die besigheidspersele te Kakamas op die 12de Mei 2004.

13.3 Daar was teenwoordig gewees namens die eerste aanspraakmaker Mnr Wessel Kruger, Mnr J Conradie die bestuurder in diens van die eerste aanspraakmaker en ander personeel van die eerste aanspraakmaker wie se name nie bekend aan my was nie. Namens die tweede aanspraakmaker was ekself teenwoordig gewees, Mnr R J Britz van die firma Honey Prokureurs, Mnr Francois Koen, die streekbestuurder van tweede aanspraakmaker en personeellede van die tweede aanspraakmaker. Die eerste aanspraakmaker was verteenwoordig gewees deur Prokureur Le Roux van die firma Le Roux en Gennote Ing, Kakamas.

13.4 Tydens hierdie samespreking te die besigheidsperseel het die eerste aanspraakmaker bylae “JB13” laat toekom aan my synde dokumentasie wat die eerste aanspraakmaker voorberei het om aan te toon die verkope van die voorraad en aankope van voorraad tydens die handelsperiode van die eerste aanspraakmaker soos hierbo uiteengesit.

13.5 Volgens bylae “BJ13” het die teoretiese balans van die voorraad op die 12de Mei 2004 die bedrag van R1 299 652,56 beloop en na sekere afskrywing die werklike voorraad van R1 183 263,48. Volgens bylae “JB13” het die eerste aanspraakmaker toe op daardie stadium ‘n kredietsaldo gehad in die bank van R146 600,88 en was dit die eerste aanspraakmaker se houding tydens die vergadering gewees aanvanklik dat tweede aanspraakmaker die bedrag van R146 600,88 moet aanvaar tesame met die voorraad soos aangetoon op bylae “JB13”

14.1 Ek was hoegenaamd nie bereid gewees om bylae “JB13” se korrektheid te aanvaar nie en het aangedring dat ‘n fisiese voorraad opname gedoen word om fisies vas te stel wat die voorraad op die 12de Mei 2004 beloop het.

14.2 Na onderhandelinge tussen die partye soos hierbo uiteengesit was daar toe ‘n ooreenkoms bereik gewees dat die partye ‘n fisiese voorraad opname sal doen om die werklike voorraad vas te stel.

14.3 Die ooreenkoms was voorts gewees dat die eerste aanspraakmaker die verskil tussen R1 427 016,70 synde die aanvangswaarde van die voorraad soos uitgeengesit in Bylae “JB2” en die werklike waarde van die voorraad wat terug oorhandig word aan tweede aanspraakmaker sal betaal.

14.4 Die was voorts ook ooreengekom gewees dat die personeel van tweede aanspraakmaker in samewerking met Mnr Jack Conradie en Cobus Malan wie die eerste aanspraakmaker verteenwoordig het, ‘n fisiese voorraadopname sal gedoen het.

14.5 Die ooreenkoms het verder behels dat die eerste aanspraakmaker dan aan die tweede aanspraakmaker sal betaal die verskil tussen die

aanvangswaarde van die voorraad en die voorraad wat dan terugbesorg word aan tweede aanspraakmaker en dat die deponent Britz dan die afhandeling doen van die R500 000,00 wat op trust gehou word deur hom.

17. Ek heg ook hierby aan as Bylae "JB17" 'n skrywe van Honey Prokureurs aan Le Roux en Gennote ter bevestiging van die ooreenkoms wat bereik was op die 12de Mei 2004. Die ooreenkoms wat aangegaan was op die 12de Mei 2004 het behels dat met die R500 000,00 wat op trust gehou word deur Honey Prokureurs gehandel sal word na die bepalinge van die voorraad opname en dat die tekort dan daaruit aangesuiwer sal word."

9] In conclusion Barnard request the court to order that the second claimant is entitled to the amount held by the sheriff and that the first claimant be ordered to pay the costs of the proceedings. Britz also filed a replying affidavit in terms whereof he confirmed the averments made by Barnard about him as well as the contents of the letters exchanged between his office and the claimant's attorneys office as correct.

10] I have not been referred to any written or transcribed record of the reasons for the order by the learned Judge. However, the order that he made was after he read all the papers filed of record as well as the submissions by Mr Pretoruis on behalf of the applicant and Mr Van der Merwe who appeared on behalf of second claimant. The learned judge had to consider the undisputed evidence on the papers and ordered that second claimant is entitled to the amount held by the Registrar. The order reads:-

"<u>WORD GELAS</u>:

1. DAT die 1ste Aanspraakmaker se aanspraak en enige een wat deur hom eis se aanspraak verval het teenoor die applikant vir

die bedrag van R 192 735.33.

2. Dat die Griffier die bedrag van R 192 735.33 aan die 2de Aanspraakmaker betaal.
3. DAT die 1ste Aanspraakmaker die koste van die applikant en die 2de Aanspraakmaker ten opsigte van die Tussenpleit geding betaal."

It is significant to note that the claim by the first claimant, as well as any person claiming through him against the applicant is being declined.

THE PRESENT ACTION

11] It is convenient, for the better understanding of the plaintiffs claim to refer to the following relevant experts from the particulars of claim. At paragraph 5:-

"5.1 Op 6 April 2004 en te Kakamas het die eerste eiser, handeldrywende as "Oranje Verspreiders" en handelende in persoon, en die eerste verweerder, verteenwoordig deur Mnr Gabriel Gerhardus Kriel ("Kriel"), `n skriftelike ooreenkoms gesluit ("die eerste ooreenkoms")."

At paragraph 11 and 12:

"11.4 die eerste eiser sal die koopprys van die voorraad van R 1,427,016.76 (BTW uitgesluit) minus vervalle en onbruikbare voorraad aan die eerste verweerder betaal in twee paaimente van R 500,000.00 elk, betaalbaar op onderskeidelik 26 April 2004 en 30 April 2004, en die balans in vier gelyke paaimente oor vier maande plus rente teen prima rentekoers; en

12. Op 26 April 2004 het die eerste eiser die eerste bedrag van R 500,000 soos beoog in paragraaf 11.4 hierbo aan die eerste verweerder, verteenwoordig deur die tweede verweerder, betaal."

And further on:

”15. Op 12 Mei 2004 het die eerste eiser die bates en oorblywende voorraad aan die eerste verweerder terug oorhandig.

16. Alternatiewelik tot die eerste eiser se eis, of 12 Mei 2004 is die tweede eser geÔnkorporeer en is die tweede eiser mondelings, alternatiewelik stilswyend, deur die eerste eiser genomineer as nuwe kontrakparty tot die tweed ooreenkoms in die plek van die eerste verweerder, vertenwoordig deur Kriel, aanvaar is.

17. Enige verwysing hieroner na “eerste eiser” is `n verwysing na die “eerste eiser, alternatiewelik die tweede eiser.”

At paragraph 18.2 and further on:

“18.2 dat die eerste verweerder die bedrag vna R 146 600.88 in die geoormerkte rekening by Standard Bank van Suid Afrika Bpk, Kakamas tak, waar die netto opbrengs van die verkope vanaf 13 April 2004 tot 12 Mei 2004 inbetaal is, aan die eerste verweerder oorbetaal; en

19. Die eerste verweerder het die ooreenkoms nie nagekom nie deur die weier om die bedrag van R 500,000.00 aan die eerste eiser terug te betaal, en slegs die bedrag van R 163,469.76 of 3 Junie 2004 aan die eerste eiser terugbetaal.

20. In die vooropstelling het die eerste eiser skade gely in die bedrag van R 189,929.36, bereken as die bedrag van R 500,000.00 minus die gedeeltelike betaling van R 163,469.76 minus die bedrag wat die eerste eiser aan die eerste verweerder moes terugbetaal van R 146,600.88.

21. Nieteenstaande aanmaning weier die eerste verweerder om die bedrag van R 189,929.36,of enige gedeelte daarvan, aan die eerste eiser terug te betaal.”

12] In its plea the first defendant admits that the first plaintiff was substituted by the close corporation and as a result the latter became the 'purchaser' in terms of the initial agreement. It is also admitted that an amount of R 500 000-00 was paid as a deposit on or about 26 April 2004 to second defendant for and on behalf of the first defendant and that the second defendant paid an amount of R 163 469-76 to the plaintiffs on behalf of first defendant on or about 3 June 2004. This latter amount represented the difference between the original amount of R 500 000-00 held in trust by second defendant plus an amount of R 2 805-97 representing the interest accrued on the original amount less the amount of R 339 336-31 owed by first and second plaintiffs. In substantiation of its plea, first defendant refers to and incorporates the plea entered on behalf of the second defendant. In this plea the second defendant refers to the interpleader proceedings and the order made in those proceedings. How the amount of R 192 735-33 is arrived at, the plea states:-

> "19.2.4 Die bedrag van ***R 192 735,33*** *is as volg bereken: Die aan vanklike deposito her die bedrag van* ***R 500 000,00*** *beloop waarby rente gevoeg moes word in die bedrag van* ***R 2 805.97****. Uit daardie bedrag is die bedrag van* ***R 146 600,88*** *(vermeld in paragraaf 18.2 van die Besonderhede van Vordering) namens en ten behoewe van eerste en/of tweede eisers aan eerste verweerder betaal, latende `n balans van* ***R 192 735,33****."*

This computation is the same as the one provided by the first defendant.

THE ISSUES.

13] The issue to be decided is whether the point *in limine* has merit. Both parties are in agreement that should the defendant succeed

with the *res judicata* point *in limine*, plaintiff's action will be brought to an end. It will therefore not be necessary to traverse the merits. It is therefore logical to deal with the point *in limine* first and avoid exposing the parties to an unnecessary protracted trial which may proof not necessary.

THE LAW.

14] It is a trite principle of our law that it is for the defendant to allege and prove all the elements underlying the defence of *exceptio res iudicata*. (See: ***Hochfeld Commodities (Pty) Ltd v Theron*** 2000(1) SA 551 (O) at 566-567 and the authorities therein cited). In ***Consol Ltd t/a Consol Glass v Twee Jonge Gezellen*** (2) 2005 (6) SA 23 (CPD) at 45D-F Blignault J, correctly held that:

"The gist of the defence of *res iudicata* is that the matter or question which is being raised by one's adversary has previously been finally adjudicated upon in proceedings between the parties and that it cannot be raised again. A classic formulation of the requirements for the defence of *res iudicata* in our law is that of **Maasdorp JA** in **Mitford's Executor v Ebden's Executors and Others** 1917 AD 682 at 686:

> "Are the first defendants entitled to set up that decision as *res judicata* in the present action? To determine that question, it will be necessary to enquire whether that judgment was given in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties."

The judgment or order relied upon must be a final and definite judgment or order on the merits of the matter by a competent court. (See: ***African Wanderers Football Club (Pty) Ltd v Wandereres Football Club*** 1977(2) SA 38 (A) at 48H). Such judgment must be a judgment given in litigation to which the present parties or their privies were parties except in case of a

judgment *in rem*. The cause of action in both instances must be the same, and the same thing must have been claimed or may have been claimed in both cases. (See: **Amler's Precedents of Pleadings**: 6th Edition, LTC Harms, Butterworths at p302 – 303). I now proceed to consider whether on the circumstances of this particular case these requirements have been met.

IS IT THE SAME PARTIES?

15] It is common cause that the first plaintiff was not cited as a party in the interpleader proceedings. It was therefore contended on behalf of the plaintiff that for this reason, and for the fact that Kruger is not a *'legal predecessor'* to the second plaintiff, it cannot be found that the parties in the interpleader proceedings are the same as in *casu*. In order to decide this aspect, it was argued, it would be necessary to lead evidence pertaining to the relationship if any, between Kruger and second plaintiff. In ***MAN Truck and Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others*** 2004(1) SA 454 (WLD) at 472B-I it was held:

"The requirement of the *exceptio* that the prior action should have been between the 'same persons' does not mean only the identical individuals who were parties to the proceedings in which the judgment which is raised as *res iudicata*, was given. Joubert (ed) ***The Law of South Africa vol 9*** 1st re-issue at 274 para 434, refers to this issue of 'same persons' as follows:

'. . . (T)hey include persons who are in law identified with those who were parties in the proceedings. *Voet* gives various examples of persons who are identified with one another for the purpose of the *exceptio rei iudicatae*. Some of the examples given are: a deceased and his heir; a principal and his agent; a person under curatorship and his curator; a pupil and his tutor; a creditor and debtor in respect of a pledged article if the debtor gave the article in pledge after losing a suit in which a third party claimed it. (See also ***Voet's Commentarius***, 44.2.5; ***Amalgamated Engineering Union v Minister of Labour***, 1949 (3) SA 637 (A) at 654; ***Kethel v Kethel's Estate*** 1949 (3) SA 598 (A) at 603'.)

[34] A consideration of the authorities and especially the approach in

Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk (supra), makes it clear that the list of so-called privies should, however, not be limited only to those listed by *Voet*. The question as to whether a person should be so regarded, should depend upon the facts of each particular case and should not only apply to the specific person or persons against whom judgment had been obtained.
[35] Mr Mahlong (fifth defendant) and Mr Bonthuys (third defendant) were the sole members respectively of Dusbus and VTC (second defendant) who are both close corporations. The close corporation is a new and unique concept in our law (Joubert (ed) ***The Law of South Africa vol*** 4 1st re-issue vol 4 part 3 at 498 para 416). Close corporations differ from companies in certain material respects. Unlike companies, it is possible for close corporations to have only one member. Such a member would be both shareholder and director and unlike shareholders in a company, the shareholder of a close corporation owes a fiduciary duty to the corporation and to its creditors. Such a member of a close corporation is in greater control of, and more involved with, the business of the close corporation. Furthermore, a close corporation is not subject to the same financial control as companies. There exists, consequently, a much closer or more intimate relationship between the *persona* of the close corporation and the *persona* of its member or members.
In the present circumstances, both the first and second defendants are close corporations with only one member, being the third and fifth defendants respectively. These individual members are the controlling minds of their close corporations and the only persons empowered to act on its behalf."

16] In this case Kruger is the sole member of the close corporation. The interpleader summons were properly served on the close corporation. There can be no doubt that Kruger was aware of these interpleader proceedings. He did nothing to place his case or that of the close corporation before the court in the interpleader proceedings. His position is not distinguishable from the circumstances described in the ***Man Truck*** case (supra). He is a privy of the close corporation. One does not require evidence in trial to determine the position of Kruger in relation to close corporation. I is explicit form the pleadings themselves what his position at all material times was. It is evident from the pleadings that Kruger was, at al times, acting in his personal capacity and also on behalf of the close corporation. Furthermore, it is common cause that Kruger was substituted by the second plaintiff as a party to the agreement. He was at all times aware of the surrounding facts and circumstances of the proceedings, the allegations made by defendants, and the consequences of an order against his close corporation. The

following passage from **Man Truck case** (supra) at 474H-J is apposite:

"To permit them now, acting through the very same attorneys to deny that they are personally bound by the judgment against their close corporations of which they were the sole members, and in respect of which they were the sureties, would, in my view, allow them to abuse the separate juristic personality of their close corporations."

It is again significant to not that the firm of attorneys which accepted service of the interpleader proceedings papers on behalf of the close corporation is the same firm of attorneys through which the plaintiff have instituted the present proceedings. It is in fact the plaintiff(s) who instructed, through their attorneys by a letter, that service of the interpleader documents be served on their attorneys urgently and, failing which they (the plaintiffs) will proceed to issue summons themselves. They, however, failed to keep to their promise to defend the interpleader proceedings. In my view it does not, matter whether a judgment relied upon for a plea of *res indiatae,* was given in default of the relevant party. In the absence of a successful application for rescission of a judgment by default, such a judgment is enforceable and is binding and is capable of being executed. (See: ***Jacobson v Havinga t/a Hanvingas*** 2001(2) SA 177 (T) at 180A-C).

IS THE CAUSE OF ACTION THE SAME?

17] It was contended on behalf of the plaintiffS that although the cause of action in the interpleader proceedings is the same as in this action, the claims are not the same. The claim is differently formulated from that in the interpleader proceedings and, it was argued, evidence will have to be led to determine whether the claims are the same. From the extracts of the interpleader

proceedings and plaintiff's particulars of claim, it is abondantly clear that both proceedings pertain to the balance of R 500 000-00 which was paid into the trust account of the defendant's attorneys. It is the same balance for which the court granted judgment in the interpleader proceedings in favour of the first defendant, and in which the court declined the close corporation's claims as set out in the founding affidavit of the applicant. What make the amount claimed by the plaintiff's to be different and lesser from the one ordered in the interpleader proceedings, is that the plaintiffs have not added an amount of R 2 805-97 representing interest accrued to the amount which was held in the interest bearing account.

18] It is not necessary that the two proceedings should be identical. The issues to be decided in this action are substantially the same as those which were to be considered in the interpleader proceedings. (See: ***Consol Ltd t/a Consol Glass v Twee Jonge Gezellen*** (2) 2005 (6) SA 23 (CPD) at 46A – 47F). Mr Jordaan correctly submitted that it makes no difference whether at the time of the interpleader proceedings the plaintiffs' claim(s) were formulated. The claims already existed at the time and would have formed an integral part of the issues to be determined at the interpleader proceedings.

19] The plaintiffs, in my view, were too casual by not placing their claim(s) before the court during the interpleader proceedings. To now seek an order entitling them to the same thing that was claimed will be a disguised requesting for the reversal of the order made by the learned judge at the interpleader proceedings. It is not my understanding that the plaintiffs are challenging the authority of the interpleader proceedings. The order was in any case made by a competent court with jurisdiction. The position is put succinctly as follows in **Amler's Precedents of Pleadings**: (supra) page 302:-

"The *exceptio rei iudicatae* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. This presumption is founded on public policy, which requires that litigation should not be endless; and on the requirement of good faith, which does not permit of the same thing being demanded more than once."

20] I am satisfied that the plaintiff's claim is merely a relabelling of the claim that formed the subject matter of the interpleader proceedings. The first defendant has in my view satisfied the requirements for the *exceptio rei indicatae*. The point *in limine* should therefore succeed with costs.

ORDER

In the result, I order as follows:-

The point *in limine* is upheld with costs.

L P TLALETSI
JUDGE
(NORTHERN CAPE DIVISION)

Counsel for the Plaintiffs	**Adv. P.A Myburgh**
Instructed by	Elliott, Maris, Wilmans &Hay
Counsel for the First Defendants	**Adv. A.F Jordaan SC**
Instructed by	Van de Wall & Venote