REPORTABLE

Case Number : 72 / 99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

NATIONAL SORGHUM BREWERIES (PTY) LIMITED t/a VIVO AFRICA BREWERIES **Appellant**

and

INTERNATIONAL LIQUOR DISTRIBUTORS (PTY) LIMITED **Respondent**

Composition of the Court :	**VAN HEERDEN ACJ; HEFER ADCJ; VIVIER, OLIVIER and PLEWMAN JJA**
Date of hearing :	**9 NOVEMBER 2000**
Date of delivery :	**28 NOVEMBER 2000**

SUMMARY

Claims for restitution and damages in separate actions. *Exceptio rei judicatae* and the "once and for all" rule.

J U D G M E N T

PJJ OLIVIER

OLIVIER JA

[1] I have had the benefit of reading the judgment prepared by the acting Chief Justice. Unfortunately I do not share the views expressed therein relating to the availability of the defences of *res judicata* or the "once and for all" rule.

The *exceptio rei judicatae vel litis finitae*

[2] The requirements for a successful reliance on the *exceptio* were, and still are : *idem actor*, *idem reus*, *eadem res* and *eadem causa petendi.* This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground" (per Steyn CJ in ***African Farms and Townships Ltd v Cape Town Municipality*** 1963 (2) SA 555 (A) at 562 A); or which comes to the same thing, "on the same cause for the same relief" (per Van Winsen AJA in ***Custom Credit Corporation (Pty) Ltd v Shembe*** 1972 (3) SA 462 (A) at 472 A - B; see also the discussion in ***Kommissaris van Binnelandse Inkomste v Absa Bank Bpk*** 1995 (1) SA 653 (A) at 664 C - E); or which also comes to the same thing, whether the "same issue" had been adjudicated upon (see ***Horowitz v Brock and Others*** 1988 (2) SA 160 (A) at 179 A - H).

[3] The fundamental question in the appeal is whether the same issue

is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action?

[4] In my view, the answer must be in the negative. The same thing is not claimed in the respective suits, nor is reliance placed on the same ground or cause of action. What was claimed in the first suit was restitution in the form of repayment of the purchase price previously paid by the claimant. Such a claim is not one for damages but is a "distinct contractual remedy" (see Botha JA in ***Baker v Probert*** 1985 (3) 429 (A) at 439 A - B). In the second suit damages were claimed, which is in its very essence clearly distinguishable from restitution. The same thing is not claimed in the respective suits, the issue now under consideration has not been finally laid to rest.

[5] Nor are the respective claims based on the same grounds or same cause of action. In the first suit, the necessary allegations were the conclusion of the contract, the breach thereof, the payment of the purchase price, and the cancellation of the contract. In the second suit,

the respondent was required to plead and prove the conclusion of the contract, the breach and the cancellation thereof, that damage was suffered, the causal chain between the breach and the damage, and the *quantum* of the damage. The mere fact that there are common elements in the allegations made in the two suits, does not justify the *exceptio* - one must look at the claim in its entirety and compare it with the first claim in its entirety. If this is done in the present case, the differences are so wide and obvious that one simply cannot say that the same thing was claimed in both suits or that the claims were brought on the same grounds.

[6] Much reliance, however, was placed by counsel for the appellant on the decision of this Court in ***Custom Credit Corporation (Pty) Ltd v Shembe***, *supra.* In that case, the seller obtained an order for cancellation of the agreement, repossession of the bus sold, and forfeiture of all payments made by the purchaser. The forfeiture was claimed by virtue of a specific forfeiture clause in the contract. Later, after obtaining possession of the bus, the seller claimed, in a second action, damages in the form of the difference between the balance of the purchase price owing at the time of cancellation, and the value of the bus

after its return to the seller.

The question was whether it was competent for the seller to recover the said damages. This Court, per Van Winsen AJA, held that it was not because

(a) the "once and for all rule" stands in the seller's way (see 471 H - 472 E); and

(b) the provisions of the Conventional Penalties Act, 15 of 1962, prohibits claims for both a penalty (including a forfeiture) and damages in the case of a breach of contract.

[7] Since the introduction of the Conventional Penalties Act, 15 of 1962, a forfeiture clause, such as the one invoked by Custom Credit Corporation against Shembe, is correctly seen as a penalty clause - see subsection (1) read with section 4. Whatever the motive for the inclusion of such a clause in a contract may be - whether as a genuine pre-estimate of damages or *in terrorem* - the amount forfeited may not be more than the prejudice suffered by the creditor as a consequence of the debtor's breach of contract - see section 3. "Prejudice" in this section has a wide connotation, and includes all harm or hurt suffered by the creditor - se ***Van der Walt v Central SA Lands and Mines*** 1969 (4) SA 349 (W) at 352 - 3.

[8] It follows that although the forfeiture clause in ***Shembe*** arose, as it inevitably must, from the contract between the parties, its *raison d'etre* and validity are to be found in the damage suffered by the creditor. To emphasise the point : in order to reduce the amount of the forfeiture, the actual prejudice suffered by the creditor must be proved by the debtor - see ***Smith v Bester*** 1977 (4) SA 937 (A) at 942 H; ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis*** 1984 (4) SA 874 (A) at 906 E; ***Chrysafis and Others v Katsapas*** 1988 (4) SA 818 (A) at 828 I; and see A J Kerr, *The Principles of the Law of Contract* 4th edition, 602).

[9] It follows that although a claim for forfeiture arises *ex contractu*, its essence and function is to compensate the creditor for prejudice (including damage) suffered by it. From this it would follow that if a creditor relies in an action on a forfeiture clause, it cannot again in a later action claim damages: the "thing" claimed, and the cause of action for both claims, are similar and has already been finalised. Thus viewed, ***Shembe's*** case is plainly distinguishable.

The "once and for all rule"

[10] The rule, derived from English law, requires that all claims generated by the same cause of action, be instituted in one action. As shown above, the respective claims in this matter did not arise from one,

singular, cause of action. The rule cannot bring about that contractual claims and claims for damages must be brought in the same action.

[11] It follows that neither the *exceptio res judicatae* nor the "once and for all" rule can be relied on to thwart the respondent's claim.

[12] In the result, the appeal is dismissed with costs.

P J J OLIVIER JA

CONCURRING WITH OLIVIER JA :

HEFER ADCJ
VIVIER JA
PLEWMAN AJA