THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 532/13

In the matter between:

SAMANCOR CHROME LIMITED **APPELLANT**

and

RHAM EQUIPMENT (PTY) LTD **RESPONDENT**

Neutral citation:	*Samancor v Rham Eqiupment* (532/13) [2014] ZASCA 66 (19 May 2014)
Coram:	**Lewis, Ponnan and Shongwe JJA and Legodi and Mocumie AJJA**
Heard:	**09 May 2014**
Delivered:	**19 May 2014**
Summary:	**A statement in a judgment dismissing an application for the amendment of particulars that claims made arose from more than one contract is mere surplusage where there is no proof as to the nature of the contract or contracts and where the court is not called upon to make that finding. The statement thus did not render the question whether there was a single contract res judicata.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Baloyi AJ sitting as court of first instance).

1 The appeal is upheld with the costs of two counsel.

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

'The plaintiff's special plea of "res judicata" is dismissed with costs.'

JUDGMENT

Lewis JA (Ponnan and Shongwe JJA and Legodi and Mocumie AJJA concurring):

[1] This appeal turns on whether a judgment handed down by Blieden J in November 2009, refusing an application to amend the particulars of claim of the respondent, Rham Equipment (Pty) Ltd (Rham), in an action for damages for breach of contract, determined that the amendment introduced a new claim arising out of another contract (or a composite contract) despite the absence of any evidence as to the contracts or their terms. The issue arose because after the amendment was refused,

and several years later, Rham filed new particulars of claim, and the appellant, Samancor Chrome Ltd, filed an amended plea, asserting that there was but one indivisible contract (a 'maintenance lease' agreement) between the parties. Rham responded with a replication asserting that Blieden J's judgment had decided that there was more than one contract between the parties: the matter was thus res judicata and Samancor was precluded from asserting one indivisible contract.

[2] Rham applied for an order declaring that the issue was res judicata, and that the remaining issues in the trial be adjudicated once this was decided. Baloyi AJ in the South Gauteng High Court concluded that Blieden J had already decided that there was more than one contract between the parties, and that this rendered the defence raised by Samancor res judicata. The appeal against his decision is with Baloyi AJ's leave.

[3] Although framed as a defence based on res judicata by Rham, it is clear that, if Blieden J did in fact decide that there was more than one contract between the parties, the appropriate defence would have been issue estoppel since the relief sought in the respective proceedings was clearly different. See, most recently in this regard, *Smith v Porritt* 2008 (6) SA 303 (SCA) para 10; *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) paras 18 to 23 and *Hyprop Investments Ltd & others v NSC Carriers* [2013] ZASCA 169. However, nothing in this appeal turns on the distinction.

[4] The litigation between the parties has extended over at least ten years in a somewhat bewildering fashion. In June and July 2000 the parties entered into a contract in terms of which Rham supplied vehicular mining equipment for use in a Samancor mining operation. The precise nature of the contract is unclear. It has been alleged at various times that the equipment was sold to Samanor in terms of an instalment sale agreement, alternatively that it was hired by Samancor under an agreement of lease, and, in addition, that Rham undertook to maintain the equipment for a yearly fee. The contract was alleged to have been concluded partly in writing and partly orally, and was alleged to be for a fixed period of five years. It is undisputed that Rham delivered the equipment to Samancor which paid an agreed monthly sum over a period. According to

Samancor, it cancelled the contract in December 2002 as a result of Rham's breach. According to Rham, it cancelled the contract as a result of Samancor's breach. The details are not germane to the appeal.

[5] In October 2004 Rham instituted action against Samancor for damages in the sum of over R6 million, essentially in respect of the outstanding amount owed over the remainder of the period of the contract and expenses incurred in repairing damaged equipment, less the amount that it had recovered by selling the equipment to a third party.

[6] Samancor delivered its first plea some two years later in September 2006, denying liability, and alleging that the agreement was one of lease and that Rham had undertaken to maintain the equipment but had failed to do so. Almost three years later, in July 2009, Rham served notice of its intention to amend its particulars of claim. The proposed amended particulars alleged an instalment sale agreement in terms of which Rham undertook to maintain the equipment for the duration of the contract. It set out in detail the costs of maintaining the equipment for each year, and alleged a number of variations to the agreement in addition. It alleged breaches of the agreement by Samancor in failing to pay instalments and claimed damages not only as a result of that breach but also for damages suffered as a result of not continuing with the maintenance of the equipment in terms of the agreement. The latter claim was for over R3.6 million, in addition to the amount previously claimed.

[7] Samancor objected to the amendment, and opposed the application by Rham, brought on 5 August 2009, for the amendment. It was this application that Blieden J refused in November 2009. I shall return to the judgment refusing the application. Suffice it to say at this stage that the learned judge held that the claim for damages arising out of the maintenance agreement was a new claim that had become prescribed.

[8] As I have said, when Rham filed amended particulars of claim in December 2012 (in essentially the same form as its first set of particulars served in October 2004), Samancor pleaded, in response, that '[f]rom its inception and after its amendment on 22

March 2002 the contract was an indivisible full maintenance lease agreement'. It was this that Rham, in a replication, said was res judicata, since Blieden J had held that there were two agreements, or at least one composite agreement.

[9] Rham's replication averred that Blieden J had held that 'the claim embodied in the proposed amendment arose from a different agreement . . . or at best for the plaintiff [Rham], arose from a different distinct part of a composite agreement'. It continued: 'The refusal of the proposed amendment required judicial determination of the nature of the agreement asserted by the plaintiff.' Accordingly, said Rham, the court had found, 'as a matter of fact, that the agreement for the sale or lease of the machines to the defendant [Samancor] is separate and distinct from any agreement between the parties giving rise to an obligation on the part of the plaintiff to maintain the machines'. The replication continued:

'Consequently the defendant is estopped by the *exceptio rei judicatae* from asserting that the agreement between the parties is a "full maintenance lease contract" rather than agreements of sale or lease, on the one hand, and maintenance of the machines, on the other.'

This was the issue decided in favour of Rham by Baloyi AJ in the court below, the court having ordered a separation of issues in terms of rule 33(4) of the Uniform Rules of Court.

[10] The parties both argue that to determine whether the issue is res judicata this court must interpret Blieden J's judgment, in particular para 9, which read:

'It is clear that the relief claimed . . . is additional to that claimed in the existing particulars. It is added on top of the claim for the balance of the purchase price. It is not for an adjustment, recalculation or clarification of the claim for payment of the balance of such price. I agree with the defendant's counsel that the right to this relief rests on a *different agreement* to that relied on for the relief in the existing particulars of claim. Alternatively, and at best for the plaintiff, it rests on a *different distinct part of a composite agreement*.' (My emphasis.)

[11] Rham's argument on appeal is that Blieden J had to make this 'finding' in order to rule that the claim for damages for breach of the maintenance agreement was different from that of the claim for damages for breach of the sale (or lease) agreement.

Samancor argues, on the other hand, that the statements about there being two contracts or a composite contract with distinct parts were mere surplusage. I need not deal with these arguments in any detail. In my view, Blieden J was not able to make any finding on the nature of the parties' contractual arrangements. He was called on merely to determine whether the proposed amendment to Rham's claim should be permitted. There was no evidence led before him. And neither of the parties attempted to prove a contract or contracts on particular terms.

[12] Blieden J did no more than compare the two sets of particulars of claim, the one claiming damages for breach of a lease agreement and the other claiming in addition damages for breach of an obligation to maintain equipment. He held that the latter claim was distinct, and not simply a recalculation or adjustment of the claim for damages sustained as a result of the breach of the sale or lease agreement. Because it had been made more than three years after the elapse of the period of prescription, it had prescribed. Blieden J relied in this regard on *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) para 4, where this court said that where a summons is amended, the running of prescription will be interrupted 'provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons'. (See also the decisions referred to in para 4 of *Firstrand* as well as *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 5 and the authorities cited there.)

[13] Rham argued at the hearing of the appeal that the 'finding' as to the nature of the contract was necessary in order to reach the conclusion that the claim for damages in respect of the maintenance obligations was new and different from that in respect of the sale or lease obligations. If that were not so, the initial claim could have been amended even after the prescription period had elapsed. It relied in this regard on the judgment of Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836C-E where this court said:

'Another aspect of the concept of a single cause of action in the realm of prescription relates to the amendment of the plaintiff's claim as originally pleaded by him. Where the plaintiff seeks by

way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages . . . .'

[14] If, argued Rham, the proposed new claim had been no more than a fresh quantification of damages or part and parcel of the original claim, then Blieden J would have allowed the amendment. He must thus have decided that the cause of action was new, and implicit in that was the finding that there was more than one contract. It seems to me that this argument is to the effect that Blieden J was wrong to have refused the amendment, an argument that Rham does not advance. I do not see the logic in the argument. There is no reason why there cannot be separate and distinct claims arising from a single contract. Indeed such claims are commonplace. A contract may give rise to multiple obligations and a breach of two or more may give rise to different causes of action and thus different debts.

[15] In any event, in my view, Blieden J did not find as a matter of fact that there were two different contracts or two distinct parts of a composite contract. As I have said, he could not do so given that the issue was not before him and there was no evidence on which to make such a finding. The relief sought in the application for the amendment was quite different from the relief sought in the action. I consider that the sentences in his judgment suggesting that there was more than one contract or a composite contract (quoted above) were unnecessary for the decision that there were two distinct causes of action or claims under consideration. They were mere surplusage.

[16] As Samancor submitted, in determining what was decided by Blieden J, this court must have regard not just to the words in the judgment but to the actual relief sought and to what was placed before the court in the application – the context in which the judgment was delivered. There is no doubt that Blieden J was not asked to determine what the contractual arrangements between the parties were, and that he did not do so. In the circumstances the issue was not decided and a plea of issue estoppel (couched as res judicata) should have failed.

[17] In the circumstances:

1 The appeal is upheld with the costs of two counsel.

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

‘The plaintiff’s special plea of “res judicata” is dismissed with costs.’

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C H Lewis

Judge of Appeal

APPEARANCES:

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