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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Court *a quo* Case No: 134210/2008

Appeal Case No: A114/16

DATE: 16 AUGUST 2016

In the matter between:

ETIENNE PRINSLOO

(Plaintiff *a quo*)

And

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

JUDGMENT

BARNES AJ

Appellant

Respondent
(Defendant *a quo*)

1. This is an appeal against a judgment of the Pretoria Magistrate's Court which upheld a special plea of *res judicata* against the Appellant's claim for damages in the form of *mora* interest arising out of a contract for the sale of land concluded with the Respondent.
2. For convenience the parties will be referred to as they were in the Court *a quo*, viz the Appellant as the Plaintiff and the Respondent as the Defendant.
3. The facts giving rise to the dispute in this matter are common cause between the parties. They are the following:
 - 3.1 On 18 February 2007, the Plaintiff gave Stats Properties estate agent ("Stats") an exclusive mandate to find a purchaser for certain immovable property belonging to him, namely Plot 1....., a Portion of Portion 2 of the farm K..... 2.....JR ("the property").
 - 3.2 On 8 March 2007, Stats presented the Plaintiff with a written offer from the Defendant¹ to purchase the property for the sum of R2 500 000.00 (Two Million and Five Hundred Thousand Rands). The Plaintiff accepted the offer in writing on the same day.

¹ The Defendant was initially the Nokeng Tsa Taemane Local Municipality, represented by its Municipal Manager, Mr Mpho Raymond Mogale, but was later substituted by the City of Tshwane Metropolitan Municipality.

3.3 The Offer to Purchase stipulated *inter alia* that the purchase price was payable by 31 March 2007.

3.4 On 29 March 2007, the Defendant delivered a cheque for the purchase price to Stats. Stats informed the Plaintiff of this. Upon attempting to collect the cheque, the Plaintiff was advised that it had in fact been made out to Stats.

3.5 In the circumstances, the Plaintiff instructed Stats to deposit the cheque into an interest bearing call account and, once it had cleared, to pay the capital plus interest earned over to him. Stats responded that it had been instructed by the Defendant to invest the money in an interest bearing account until transfer of the property had been effected and to pay the interest so earned to the Defendant upon registration of transfer. The Plaintiff objected to this. Stats was unmoved.

3.6 Transfer of the property was effected on 3 July 2007. Thereafter, Stats paid the purchase price (less the estate agent's commission that it was entitled to) to the Plaintiff. The Plaintiff promptly claimed the interest that Stats had earned on the purchase price during the intervening three month period. This amounted to R 7 428.33.

3.7 Stats, faced with claims for the aforesaid amount by both the Plaintiff and the Defendant, instituted interpleader proceedings in the Pretoria Magistrate's Court. In those proceedings, the Plaintiff was cited as the First Claimant and the Defendant as the Second Claimant. Stats called upon both Claimants to state the nature and particulars of their claims against it

3.8 On 24 April 2008, the presiding Magistrate in the interpleader proceedings found in favour of the First Claimant and ordered that the interest on the purchase price that had accrued to Stats be paid to the First Claimant, viz the Plaintiff herein.

4. On 9 December 2008, the Plaintiff instituted action against the Defendant for damages in the form of *mora* interest arising from the contract of sale.

5. In his Particulars of Claim, the Plaintiff contended that he had been entitled to payment of the purchase price on 31 March 2007 and that he was accordingly entitled to interest thereon from 1 April 2007 to 2 July 2007 at the rate of 15.5% per annum in terms of the Prescribed Rate of Interest Act 55 of 1975.

6. The Plaintiff accordingly claimed from the Defendant the amount of R91 304.54 being interest on the purchase price at the rate of 15.5% per annum from 1 April 2007 to 2 July 2007 less the amount of R7 428.33

which the Plaintiff had received pursuant to the judgment in the interpleader proceedings.

7. In response, the Defendant *inter alia* raised the special plea of *res judicata*, contending that the dispute between the parties had been determined by the Pretoria Magistrate's Court in the interpleader proceedings.
8. On 12 May 2015 the parties held a pre-trial conference at which they agreed that the special plea of *res judicata* would be separated from the trial on the merits and adjudicated on first.
9. What was before the Court a *quo* for determination was accordingly the special plea of *res judicata* only. The Plaintiff gave evidence and was cross examined. The Defendant led no evidence. Both parties presented argument.
10. As stated above, it was common cause that the Offer to Purchase signed by the parties stipulated that the purchase price was to be paid by 31 March 2007. The Plaintiff contended that given this, and in the absence of any other applicable clause, the purchase price was required to be paid to him by the due date. The Defendant disputed this and contended that the Offer to Purchase was to be read differently and further that in terms of the provisions of the Alienation of Land Act 68 of 1981, the Plaintiff was

only entitled to receive the purchase price after registration of the property in the name of the Defendant. Whatever the relative merits of this dispute, it is one that goes to the heart of the Plaintiff's claim against the Defendant. It is not a dispute that is relevant to the special plea of *res judicata*. Despite this, the Court *a quo* entertained this dispute and ruled on it in the following terms:
"Defendant was justified in paying the purchase price to Stats Properties and not to the Plaintiff personally; and that Stats properties were also justified in refusing to pay the Plaintiff before registration of transfer of the property in the name of the Defendant."

11. The Court *a quo*'s above finding has no bearing on the question of *res judicata*.

Nevertheless, after making the above finding, and without further substantiation, the Court *a quo* concluded that "*Plaintiffs claim is based on the same facts, same cause of action and between same parties*" and upheld the special plea of *res judicata*.

12. The application of the test for *res judicata* to the common cause facts set out above does not bear out the Court *a quo*'s conclusion.

13. It is well established that in order for a party to succeed with a plea of *res judicata* by virtue of an earlier judgment, it must prove that:

13.1 there is a prior judgment;

13.2 between the same parties;

13.3 based on the same cause of action; and

13.4 the same relief was claimed in both cases.²

² *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 463 (A) at 472; *Trad ax Ocean Transportation SA v MV "Silvergate" properly described as MV "Astyanax"* 1994 (4) SA 4045 (SCA); *National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors*

14. In the present matter, apart from the fact that there is a prior judgment, none of the requirements for *res judicata* are met. The parties in the interpleader proceedings were not the same as those in the action in the Court a *quo*. In the interpleader proceedings, Stats as the interpleader instituted proceedings against the Plaintiff as the First Claimant and the Defendant as the Second Claimant. In the action in the Court a *quo*, the Plaintiff instituted action against the Defendant. Nor was the cause of action or the relief claimed the same. The cause of action in the interpleader proceedings was not in respect of damages as was claimed in the Court a *quo*, but was in respect of specific interest earned on Stat's trust account in respect of which Stats expected to be sued. In the Court a *quo* the Plaintiff claimed damages from the Defendant, in the form of *mora* interest, arising out of the contract of sale concluded between the parties.

15. The Court a *quo* accordingly erred in upholding the special plea of *res*

judicata.

16. In the circumstances, the following order is made:

1. The appeal is upheld with costs;
2. The Court a *quo*'s judgment is replaced with the following:

"1. The Defendant's special plea is dismissed with costs."

BARNES AJ

I agree and it is so ordered.
FABRICIUS J