

CLAIM YOUR LEGAL REMEDY “ONCE AND FOR ALL” OR FOREVER HOLD YOUR PEACE?

Introduction

Brett N.O and Others v Kushner (2020) ZAECGHC 86 (“the case”) concerns an appeal from the Port Elizabeth Regional Court (“the trial court”) to the High Court of South Africa, Eastern Cape Division, Grahamstown and delineates the application of the “once and for all” rule in our law.

The rule, derived from English law, requires that all claims generated by the same cause of action, be instituted in one action. The rule cannot bring about that contractual claims and claims for damages must be brought in the same action.

Facts of the matter

The parties to the case are the trustees, acting on behalf of the Alec Brett Property Trust (“the trustees”), and one Mr Kushner. The trust and Mr Kushner concluded a written contract of lease (“the agreement”) in respect of premises situated in Port Elizabeth (“the premises”) for the period 1 November 2010 to 31 October 2013. Mr Kushner fell into arrears with his rental payments in terms of the lease and the Alec Brett Property Trust subsequently cancelled the agreement in November 2011.

On 15 February 2012 the trustees sued Mr Kushner, claiming payment of arrear rental (“the first matter”). This matter was subsequently settled between the parties.

After cancellation of the agreement, Mr Kushner continued to occupy the premises in terms of an oral agreement between the parties. In terms of this agreement, he was permitted to occupy the premises until 24 February 2012. Mr Kushner paid the trust all amounts due for the continued period of occupation, including all arrears owing in terms of the agreement.

On 4 December 2012, the trustees sued Mr Kushner and, this time, claimed payment of damages in respect of the balance of the period of the lease, i.e. from March 2012, when Mr Kushner was no longer occupying the premises, to October 2013, when the agreement lapsed (“the second matter”).

The trial court dismissed the trustees' second matter with costs and held that the trustees' claim for damages was precluded by operation of the "once and for all rule".

Application of the Law

The court considered the "once and for all rule", which is established in the *Shembe*¹ case. The rule requires a party with a single cause of action to claim in one matter, once and for all, whatever remedies he, she or it has in terms of the law. A "cause of action" is a set of factual or legal circumstances that gives a person or an entity the right to seek a legal remedy against another.² The court held that the "once and for all" rule applies to damages for breach of contract, similarly as it applies to damages in delict.³

The question the court had to decide in this case was whether the matters pursued by the trustees in matter one and matter two, respectively, arose from one single cause of action, and, accordingly, whether the second matter was precluded by the operation of the "once and for all" rule.

The court concluded that—

1. the trial court failed to consider the *National Sorghum Breweries*⁴ case where it was held that the second matter (in that case) did not form part of the same subject matter of the first matter;
2. the agreement itself did not afford the trustees only a singular cause of action;
3. simply because there are common elements in the allegations made in the first matter and in the second matter does not mean that the matters arise from one cause of action; and
4. the differences between the claims in the first matter and the second matter are so wide and obvious that one cannot say that the same thing was claimed in both matters or that the claims were brought on the same grounds.

The court accordingly upheld the appeal with costs on the basis that the trustees' claim for damages in terms of the second matter is clearly a distinct and separate cause of action from the first matter, which was a claim for arrear rental. The trustees were therefore not obliged to pursue the claim for damages in the same action as the claim for arrear rental.

¹ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-D.

² Team, C., 2020. *Cause Of Action - Definition, Elements And Examples*. [online] Legal Dictionary. Available at: <<https://legaldictionary.net/cause-of-action/>> [Accessed 14 September 2020].

³ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 at 835B-C.

⁴ *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SA).

Conclusion

To summarise, in this case the court held that separate claims arising from different subject matter, such as a claim for damages and a claim for arrear rental, respectively, and which arise from a common element, such as a lease agreement, do not trigger the application of the “once and for all” rule in our law.

If you receive another summons from a person or entity which appears to deal with the same subject matter as a prior summons you received, speak to an attorney at SchoemanLaw to make sure that the “once and for all” rule does not preclude that person or entity from suing you again.

