

CLAIMING ARREAR RENTAL TODAY AND LOSS OF FUTURE RENTAL TOMORROW: THE “ONCE OFF RULE”

Brett N.O and Others v Kushner (CA 61/2019) [2020] ZAECGHC 86 (13 August 2020)

This judgment raises an interesting point. Our common law has a “once off rule” requiring, in essence, that where a claim arises as a result of a single reason (cause of action), then the claimant must exhaust his options once-off, and may not bring alternate actions in respect of the same cause of action in drips and drabs. In a lease agreement that was prematurely cancelled due to the tenant’s failure to pay the rental, would the “once off rule” prohibit the landlord to claim arrear rental and subsequently, in a new action, claim damages resulting from the future loss of rental? The judgment highlights how the court interprets the claims of the landlord in such instance.

The Judgment can be viewed [here](#).

FACTS

The trustees of the Alec Brett Property Trust (“the Trust”) had entered into a written lease agreement with Kushner. The lease was for a period of three years, commencing on 1 November 2010 and terminating on 31 October 2013.

In November 2011, the Trust cancelled the lease because Kushner was in arrears with his rental payments. After the cancellation, Kushner continued to occupy the premises in terms of an oral agreement between the parties which allowed for his continued occupation of the premises until 24 February 2012.

On 15 February 2012 the Trust instituted action against Kushner claiming payment of arrear rentals. This (first) action was settled between the parties. A consent order was issued by the first court and Kushner paid all amounts due.

In December 2012 the Trust instituted a new action against Kushner, this time claiming damages in respect of the balance of the period of the (initial, written) lease agreement i.e. the period between March 2012 and October 2013.

The action was dismissed on the grounds that it infringed the “once and for all” rule (which requires that a plaintiff must claim in one action *all* damages, both already sustained and prospective, flowing from one cause of action). The Trust appealed.

HELD

- Clause 12 of the lease dealt with default by the tenant and read as follows:

“DEFAULT

In the event of the Tenant failing to make payment of any one month’s rental on the due date thereof, or committing a breach of any other provision of the Lease and failing to remedy such breach within seven (7) days of receipt of a written notice from the Landlord or its Agent ... then ... the Landlord shall be entitled to cancel this Lease forthwith by giving written notice to that effect to the Tenant, and to retake possession of the leased premises without prejudice to any right of action for payment of arrear rent or any other remedy which it may have either at Common Law or in terms of this Lease.”

- Clause 12 clearly allows for the possibility of a claim for damages arising from a breach of the terms of the lease and its cancellation in light thereof.
- The lease did not contain any penalty or forfeiture provisions. The lease, in clause 4.4, provides for the

payment of a deposit, which “.....the Landlord shall be entitled to retain until all liability of the Tenant in terms of ... this Lease or any renewal thereof shall have been ... discharged, whereupon the deposit ... shall be repaid to the Tenant”, but this clause did not provide that the deposit would be forfeited as a penalty or a pre-estimate of damages.

- The significance of the distinction lies herein:
 - i. **The first action and the consent order in terms of which it was settled:** In terms of the particulars of claim in the first action, the Trust only sought confirmation of a rent interdict (which provides security for arrear rental) and payment of arrear rental. No claim was made for the payment of damages or for the enforcement of a penalty or forfeiture provision in terms of the lease. The consent order in terms of which the first action was settled provided only for the arrear rental that was initially sued for. The first action related to an accrued claim for arrear rental for the period up to the termination of Kushner’s occupation of the premises on 24 February 2012.
 - ii. **The second action:** The second action was premised on the averment that the Trust was unable to re-let the premises for the balance of the period of the lease, i.e. 1 March 2012 to 31 October 2013. It was further averred that, as a consequence, the Trust suffered damages in the sum of R936,666.32.

Legal principles

- The “once and for all” rule applies especially to common law actions for damages in delict, though it is also applied to claims for damages for breach of contract.
- In the context of a claim for damages for breach of contract, our law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been litigated between parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae* (an exception whereby the defendant can claim that the matter has already been judged upon and cannot be re-visited).
- This rule is part of the very foundation of our law and has its origin in considerations of public policy which require that there should be a term set to litigation and that an accused or defendant should not be twice harassed on the same cause; to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.
- The concept of a cause of action - and the question whether different claims constitute parts of a single cause of action or separate causes of action - are of particular significance in regard to the application of the ‘once and for all’ rule and also in connection with the related questions of res judicata and prescription. The question in this matter was therefore whether the claims pursued respectively in the first and second actions arose from one singular cause of action.
- The trial court found that they did because: (i) immediately upon cancellation of the lease, the Trust became entitled to claim damages from the date of breach to the date on which the lease was due to expire; (ii) on the date of cancellation everything had happened which would have entitled the Trust to institute a claim for damages; and (iii) when the Trust instituted the first action, “the cause of action relating to alleged damages had already arisen as did the claim for arrear rental” and therefore, in these circumstances the Trust’s action was non-suited due to the operation of the ‘once and for all’ rule.
- The conclusion of the Magistrate’s judgment was incorrect as it had recognised the existence of two distinct claims (one for arrear rental and one for damages) but nonetheless held that the Trust’s action could not

proceed because, on the date of cancellation of the lease, everything had happened that would have entitled the Trust to institute action and to claim judgment in respect of damages.

- The correct outcome would be to acknowledge that clause 12 of the lease did not afford the Trust a singular cause of action only. The claims instituted in the first and second action, respectively, are not based on the same grounds and did not arise from a singular cause of action. In the second action damages were claimed, which claim is in its essence clearly distinguishable from an accrued contractual claim for arrear rental that was claimed in the first action. Further, in the first action, the necessary allegations to succeed with the claim were: (i) the conclusion of the lease and (ii) the breach thereof by the failure to pay rent. In the second action the essential allegations were: (i) the conclusion of the lease; (ii) the breach and cancellation thereof; (iii) that the Trust was unable to let the premises to an alternative tenant over the balance of the lease period; (iv) the amount of damages suffered; and (v), the causal link between the breach and the damages.
- The mere fact that there are common elements in the allegations made in support of the two actions did not justify non-suiting the Trust on the basis of the “once and for all” rule.

CONCLUSION

The appeal was therefore upheld.