REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 130/2014

In the matter between:

ELIAS ANDREAS **PLAINTIFF**

And

JULIUS NAMUTENYA **DEFENDANT**

Neutral citation: *Elias Andreas v Namutenya* (I 130/2014) [2016] NAHCNLD 08 (12 February 2016).

Coram: CHEDA J

Heard: **30/01; 18/02; 02/03; 16/03; 13/04; 21/04; 06/07; 20/10; 23/11/2015; 28/01; 01/02/2016.**

Delivered: **12 February 2016**

Flynote: *Res judicata* can successfully be raised against plaintiff's claim – provided that defendant can prove that the new claim is based on the same facts, same cause of action and between the same parties. Where it is not proved – defendant can not succeed.

Summary: Plaintiff had issued summons at Ondangwa Magistrate Court against defendant in his official capacity as chairperson of Omaalala - Onambutu Local Water Committee and the matter was settled when plaintiff was paid a certain amount of money in final settlement. Plaintiff in this matter sued defendant for defamation and defendant applied for a special plea as *res judicata* on the basis that the matter was finalised at the magistrate court. Plaintiff argued that defendant was now being sued in his personal capacity. There being no evidence that indeed the matter was previously determined on the same fact, same cause of action and between the same parties. The special plea was dismissed.

ORDER

The special plea is and is hereby dismissed with costs.

JUDGMENT

CHEDA J:

[1] This is an application for a special plea which was raised by defendant being represented by Mr. Shakumu in this matter. The salient facts which are largely common cause are that plaintiff instituted an action against defendant on the 03 August 2012 under case no. I 130/2014 wherein, he claimed an amount of N$50000 as defamatory damages on the basis that defendant had unlawfully and wrongfully accused him of having failed to pay his water bills and being in arrears.

[2] Plaintiff had instituted an action in the Ondangwa Magistrate Court under case No. 106/2012 for unjustified enrichment against defendant in his capacity as the Chairperson of Omaalala – Onambutu Local Water Committee and had in that

capacity caused plaintiff's water supply to be suspended on the 15 July 2012. As a result of his unlawful action plaintiff had to pay an amount of N$8581-60 to have his water supply restored.

[3] The matter was settled by the parties as they reached an agreement and the said agreement was signed by the parties on the 19th and 22nd July 2013 and was thus finalised. The money was repaid to the plaintiff.

[4] It is plaintiff's argument, therefore, that the claim lodged in this court is not premised on the same facts, same cause of action and by the same parties.

[5] It is further his argument that:

a) the action instituted against defendant in this matter is against him in his personal capacity, whereas, at the magistrate court in Ondangwa was in his official capacity as chairperson of the Omaalala-Onambutu Local Water Committee.

[6] Mr. Shakumu for defendant argued that this action by plaintiff in this matter is *res judicata* hence this application for a special plea. He went further and argued that this matter is based on the same facts and arose from the same cause of action as the previous matter that was before the Magistrate Court Ondangwa and by the same parties and was thus dispensed with. In support of his argument he referred to the copy of the summons and a settlement agreement which refers to summons for unjustified (sic) enrichment and not defamation.

[7] In our law a special plea, if proved renders plaintiff's action *res judicata* and the end effect of a *res judicata* is final. In support of his argument Mr. Shakumu referred me to the matter of *Fish Orange Mining Construction (Pty) Ltd v Ghandy Gerson! Gerson & 3 others case no SA 2014 (2) NR 385 (SC) and African Farms & Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562 C-D* where Steyn CJ referring to the res judicata principle stated:

> "The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."

[8] Ms. Horn went further in her argument that it will be injustice to uphold the special plea as the truth of what transpired at the meeting which led to the settlement will not be known in the absence of a proper discovery and evidence from the legal practitioner testimonies as they were present. That is the gist of the argument.

[9] In order for the judgment in question to be *res judicata* which effectively renders it final and disqualifies it from resuscitation, it should have been on the same issue determined by the court based on the same facts and by the same parties.

[10] Ms. Horn has argued further that the court should consider that the legal suit in the magistrate court was against defendant in his official capacity whereas in c*asu*, he is being sued in his personal capacity. It was also her argument that plaintiff will be prejudiced if this matter is determined before proper discovery takes place and that there will be need for the legal practitioners who were present at the signing of the settlement agreement to testify as to what transpired.

[11] In this application, defendant relied on summons issued on the 15 October 2015. From the particulars of claim it is clear that at the time, plaintiff's suit was for a claim of unjust enrichment which he refers to as "unjustified enrichment."

[12] I have perused the said particulars of claim and I find no paragraph and/or claim which refers to defamation at all. In my view defamation was not considered and therefore was not settled for. I agree with Ms. Horn that the law suit at the magistrate court was for plaintiff's compensation and not defamation. There are different and contentions issues which need to dealt with by virtue of oral evidence in this matter and it will not be proper to stop these proceedings at this stage.

[13] In our law *res judicata* can be successfully raised as a defence to the main action and has the effect of disposing of the matter. It is a drastic measure which in essence has the danger of depriving a party with a legitimate claim from prosecuting its claim to finality, thereby falling to have its day in court. The courts in my view should be slow in leaning in favour of a defendant who hurriedly wants to resort to the *res judicata* principle where the facts are to say the least hazy or do not meet the requisite criteria for a *res judicata* principle.

[14] In Fish Orange Mining Construction (Pty) Ltd (supra) at 22 para 44 Mainga JA ably stated:

> "The parties to the two suits were the same and the factual background to sustain the relief sought in the respective suits were the same but it cannot be said that the same thing was claimed in the respective suits, nor was reliance placed on the same cause of action. As was correctly stated in the *National Sorghum Breweries* case above, the mere fact that there are common elements in the allegations made in the two suits does not justify the exception – 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 cause of action."

[16] In the above matter our Supreme Court made it clear that the court envisaged a broader approach in deciding whether the *res judicata* should be upheld. It was its view, which view I subscribe to that the disputed claim should be looked at holistically in comparison with the first claim. The fact that there are common elements in the allegations made in the two suits does not *per se* justify the exception.

[17] These courts are courts of justice and justice cannot be served where the court is deprived of an opportunity to delve into the disputed facts. In my view, this is a matter where plaintiff should be accorded an opportunity to ventilate its claim

through the courts. The door of a judicial stable should not be shut so easily. In our law special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration and these facts have to be established by evidence in the usual way, see *Vitjoen v Federated Trust 1971 (1) SA 750 (0) at 760 quoted from Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa, 3rd ed. Juta & Company Ltd 1979 at 324* where the learned author's described it as:

> "The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence which he raises on exception must appear from the declaration itself; he must accept as true the allegations contained therein and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration. If they did then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration and these facts have to be established by evidence in the usual way."

[18] Defendant had the hurdle of introducing facts which do not appear *ex facie* on the summons, but, failed to do so. The hurdle was not insurmountable. I need not interrogate this matter further suffice to say that plaintiff has laid down ground for his claim to remain live and its death is not imminent in the circumstances.

[19] Accordingly this is the order of the court:

> The special plea is and is hereby dismissed with costs.

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M Cheda
Judge

APPEARANCES

PLAINTIFF:	W. Horn Of W Horn Attorneys, Oshakati
DEFENDANT:	S.K Shakumu Of Kishi Shakumu & Co. Inc., Windhoek