

THE ONCE AND FOR ALL RULE AND CONTRACTUAL DAMAGES

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The once and for all rule as it applies to contractual damages is easy to state. A plaintiff is not permitted to bring more than one claim for damages on the same cause of action. He cannot take two bites at the cherry. But it is worth noting at the outset that the rule gives way to an express provision to the contrary in the contract, as in *Collins Submarine Pipelines Africa (Pty) Ltd v Durban City Council* 1968 (4) SA 763 (A) at 769A, where an engineering contract expressly provided for the deduction from time to time of liquidated damages for delay.

Professor Van der Walt in his 1977 doctoral thesis, ‘Die Sommeskadeleer en die “once and for all” reël’, calls the rule a thoroughbred Trojan horse introduced into our law of damages from English law, regards it as alien to our law, and recommends its abolition. I take a different view. Whatever the rule’s shortcomings might be in the context of delictual damages, it rests on sound Roman Dutch foundations and serves a useful purpose in the context of contractual damages.

The rule is intended to put a limit on litigation and avoid the difficulties that would arise if two courts reached different conclusions on the same cause of action. This is the same thinking that lies behind the *res judicata* rule, pithily expressed by Ulpian D 50 17 207: ‘*Res judicata pro veritate accipitur*’ — where a matter has been decided, it is considered as true — and explained by Paul D 44 2 6 (tr Scott):

‘It has very reasonably been held that one action is sufficient for the settlement of a single controversy, and one judgment for the termination of a case; otherwise, litigation would be enormously increased, and would be productive of insurmountable difficulties, especially where conflicting decisions have been rendered. It is therefore very common to introduce an exception on the ground of *res judicata*.’

To which Voet 44 2 3 (tr Gane) adds:

‘There is nevertheless no room for this exception unless a suit which has been brought to an end is set in motion afresh between the same persons, about the same matter and on the same cause for claiming [cause of action], so that the exception falls away if one of these three things is lacking.’

Grotius 3 49 2 and Huber *ad* D 44 2 are to the same effect.

It is therefore clear that the Roman Dutch writers accepted the thinking behind the Roman *exceptio rei judicatae*. In doing so they inevitably accepted that Voet’s same matter and same cause of action (*eadem res and eadem causa*) are not precisely defined concepts. This lack of precise definition is made more obvious by Ulpian D 44 2 7 4:

‘And, generally speaking (as Julianus says), an exception on the ground of *res judicata* will operate as a bar whenever the same question is brought up again in court between the same persons, or in a different kind of a case.’

Commenting on Ulpian’s use of the word *quaestio* in that passage, which seems to conflate the requirements of the same matter and the same cause of action, H F Jolowicz *Roman Foundations of Modern Law* (1957) 97 says:

‘*Quaestio* is indeed the word that commends itself most to modern ears. As in English law, it would seem, the same “question”, once decided, must not be raised again.’

At the time Voet was writing, the rule was introduced in England in a tort case, *Fetter v Beale* (1701) 91 ER 11, 1122, 1361. The plaintiff had recovered damages for assault and battery, and later brought another action for damages when, as the report expresses it, a piece of his skull came out as a result of the battery. His action failed, the court commenting unsympathetically: ‘And it is the plaintiff’s fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also’. This terse explanation for the decision is expanded by Holt CJ’s judgment:

‘If this matter had been given in evidence, as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it . . . for if the nature of the battery was such, as probably to produce this effect, the jury might give damages for it before it happened.’

This was a new doctrine, that because prospective damages may be recovered if sufficiently probable, therefore damages must be claimed once only; but it became clear that, in practice, it led to the same results as the doctrine of *res judicata*. For example in *Serrao v Nel* (1885) 15 QBD 549, where the plaintiff brought a second action for damages in a tort case,

Bowen LJ said at 559: ‘The principle is, that where there is but one cause of action, damages must be assessed once for all’. And Talbot J relied on this dictum in a breach of contract case, *Conquer v Boot* [1928] 2 KB 336, in allowing a plea of *res judicata*. At 345 he said: ‘The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same’.

In the South African law of contract, Voet’s threefold test of same persons, same thing and same cause of action for *res judicata* was applied in *Bertram v Wood* (1893) 10 SC 177. The magistrate had decided that he had no jurisdiction to hear an action for one month’s rent, because the defendant had denied the existence of the alleged five year lease and the magistrate considered that he was being asked to exceed his jurisdiction by deciding rights in the future. De Villiers CJ said at 180:

‘I cannot assent to the view that the action was one whereby rights in future could be bound. Such rights would only be bound in case a judgment in regard to one month’s rent could be pleaded in bar to an action for subsequent rent by means of the *exceptio rei judicatae*.’

He then examined the Roman and Roman Dutch authorities laying down the threefold test and concluded that

‘judgment upon a claim for twelve months’ interest would not be *res judicata* in an action for twelve subsequent months’ interest, nor would judgment upon a claim for one month’s rent necessarily be *res judicata* in an action for subsequent rent’.

The next *res judicata* case involving a breach of contract, *McCallum v Lubbe* 1908 EDC 58, also applied the threefold test and ascertained the thing and the cause of action, ‘the real matter in issue’, from the pleadings and not from the evidence in the prior case.

Neither of these *res judicata* cases involved a claim for damages, so it was not necessary to consider the once and for all rule, but this became necessary in *Kantor v Welldone Upholsterers* 1944 CPD 388, where a furniture manufacturer had previously recovered damages from the seller of beetle infested wood and then claimed further damages which had been ascertained since the previous case. The magistrate had dismissed the defendant’s objection to this second claim, and on appeal it was necessary to decide whether the objection was permissible under the Magistrates’ Court Rules. Davis J had no doubt that *res judicata*, one of the objections permitted by the Rules, ‘most closely covers an objection of this kind’, thus acknowledging the resemblance between the once and for all rule and *res judicata*. He then referred to two Appellate Division authorities on the once and for all rule in delict, *Jacobs v Cape Town Council* 1917 AD 615 at 620 and *Oslo Land Co Ltd v Union Government* 1938 AD 584, and continued:

‘I can draw no distinction between an action such as this on a contract and an action on tort. The cause of action in both cases is the unlawful act of the defendant together with the occurrence of some damage suffered by the plaintiff.’

Since *Kantor’s* case it has never been doubted that the once and for all rule applies in our law of contract, Malan J being able to say in *Saxe v Waite* 1947 (2) SA 350 (W) at 353:

'It is clear law that when action is instituted for the recovery of damages whether in contract or tort, the plaintiff must claim past, present and prospective damages, and that if he fails to do so he is debarred from making any further claim.'

But that does not mean we should give the rule no further thought. No legal system should blindly accept a rule which imposes a hardship on the innocent party in order to relieve the guilty party from hardship, which is exactly what the rule does. The problem of legal policy was well expressed by Davis J in *Kantor's* case at 392:

'It is a hardship perhaps on the plaintiff who does not know of some damages at the time that he brings his action not to be able to bring a subsequent action in respect of them. . . . But it is a hardship also on a defendant never to know when he is clear from the effects of his negligence or breach of contract or whatever it may be, and it is, in my opinion, a wise policy of the law that there must be an end of lawsuits that a man must not be constantly vexed in respect of the same matter. A defendant has a right to expect to be sued once and for all, and has a right to know that when he has paid what the Court has awarded against him, he is then free from further liability.'

Two further policy considerations may be thrown into the balance in favour of the rule. The first is that it avoids what Paul, in the passage quoted at the beginning of this paper, calls the insurmountable difficulty of conflicting decisions — if I claim damages against you and succeed, and then claim further damages and fail on a ground which would have defeated the first claim, where do we stand? The second policy consideration is that the rule enables the plaintiff, the innocent party, to mitigate his hardship to some extent by claiming prospective damages or by delaying his claim until it seems that the full extent of his loss has become apparent. As plaintiff or potential plaintiff he can plan his strategy, whereas the defendant cannot and relies on the rule to protect him from continuing uncertainty.

Nowadays we are more prepared than our ancestors to base decisions on public policy, and although almost everyone must feel some immediate sympathy for the furniture manufacturer in *Kantor's* case, can it be said that, on sober reflection, 'the general sense of justice of the community, the *boni mores*, manifested in public opinion', rejects the policy considerations outlined in the previous two paragraphs? Surely not. (Quoting from *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd*; *Lorimar Productions Inc v OK Hyperama Ltd*; *Lorimar Productions Inc v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152H per Van Dijkhorst J, cited with approval in *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 913H.)

In planning his strategy, a plaintiff or potential plaintiff needs to be aware of his right to mitigate the effect of the once and for all rule by claiming prospective damages. He may feel encouraged or discouraged by Lord Scarman's observation in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 182 that 'there is really only one certainty: the future will prove the award to be either too high or too low'.

Few would argue with that proposition, as the necessity of proving prospective damages on the preponderance of probability (illustrated by *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 148, where the probable amount of a dividend in an insolvent estate was taken into account) by no

means eliminates the gambling element inherent in a claim for prospective damages. But the gambling element is also reduced to some extent by the necessity of attaching the claim for prospective damages to a claim for accrued damages. It cannot stand alone, as pointed out by Gardiner JP in *Coetzee v S A Railways & Harbours* 1933 CPD 565 at 576:

‘The cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action.’

That is the general rule, but as an exception *Custom Credit Corp'n (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 475 allows a plaintiff to use the ‘double barrelled’ procedure of claiming specific performance together with damages conditionally on the defendant failing to comply with the order for specific performance.

A potential plaintiff who plans his strategy by waiting to see how much damage results or will probably result from the breach of contract cannot wait too long or his claim will become prescribed. But *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) gives him an extension of time by permitting a two stage procedure on the same cause of action, the first stage being an action for a declaration of rights to establish liability and the second stage being a separate action for payment. The extra expense to the defendant of the two stage procedure could be met by appropriate costs orders. The case concerned liability under an insurance policy, but Howie J’s careful reasoning would be equally applicable to damages for breach of contract. A dictum of Fieldsend CJ in *Syfin Holdings Ltd v Pickering* 1982 (2) SA 225 (ZS) at 229G that the action for a declaratory order would be for a different ‘debt’, and would therefore not interrupt prescription, gives no reasons and the question was not argued, so a potential plaintiff who does not yet know what damage he will suffer from the breach of contract will be justified in assuming that by claiming a declaration of rights he will be preserving his right to claim damages.

Howie J’s decision is in step with similar developments in England. In *Household Machines Ltd v Cosmos Exporters Ltd* [1947] KB 217 damages for breach were awarded together with a declaration that the plaintiff was entitled to recover such further damages as might become due in certain defined foreseeable circumstances. Commenting on this decision in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 (CA) at 303 Somervell LJ suggested that it might be

‘more satisfactory if there were liberty to apply for directions as to the determination of these issues, if any, and the quantification of damages under this head as between plaintiffs and defendants, should disputes arise’.

This suggestion was taken up by Phillips J in *Deeny v Gooda Walker Ltd* [1995] 4 All ER 289 after commenting that:

'The desirability of bringing an end to litigation will normally make it appropriate for the court to make a single award of damages which includes the best assessment possible of future loss. This will not always be the case, however.'

Finding special features in the nature of the loss, the difficulties of assessing the loss and the consequences of a once and for all assessment of damages, he took the 'exceptional course' of granting a postponement under RSC Ord 33 rr 3 and 4 of so much of the damages as represented losses from future claims. Rule 33(4) of our Uniform Rules is not substantially different, and could well be used for the same purpose, without the necessity of amending rule 34A on interim payments of damages to extend it from delictual to contractual claims.

The hardship imposed by the rule on the plaintiff is also mitigated by the possibility that, on the facts, a second claim for damages may not be based on the same cause of action. What do we mean by a cause of action? In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835A–B Corbett JA introduced his examination of the concept by saying:

'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 so-called "once and for all" rule and also in connection with the related questions of *res judicata* and prescription.'

At 838A–F he accepted Lord Esher MR's definition of cause of action in *Read v Brown* (1888) 22 QBD 131, which has regularly been adopted by our courts:

'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

On that definition there can be no doubt that *Kantor's* case is correct, since the facts necessary to prove the damages in the first and second actions were identical (customers asking for their money back), and it was only the evidence necessary to prove them that was different (names, dates and amounts). But if the damages in the second action had required proof of altogether different facts, such as contamination of other timber in the plaintiff's warehouse, the cause of action in the second action would have been different, it being well settled that a single wrongful act may give rise to more than one cause of action. This was recognized by Watermeyer JA in *Oslo Land Co Ltd v The Union Government* (supra) at 591–2.

It follows that in such circumstances the once and for all rule should not be applied and the second action should be allowed to proceed, because the cause of action in each case would be different. It is true that the rule is sometimes stated without reference to the requirement that the cause of action must be the same in both actions, as for example in the extract quoted from *Saxe v Waite* (supra); *Cape Town Council v Jacobs* (supra) at 620; *Coetzee v S A Railways & Harbours* (supra) at 576 and *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330. But none of these statements was in the context of investigating the cause of action in each action, so they offer no support for arguing that the once for all rule differs from the *res judicata* rule by not applying the accepted definition of cause of action to claims for damages. The two rules were correctly treated in *Kantor's* case and *Goldfields Laboratories*

(Pty) Ltd v Pomate Engineering (Pty) Ltd 1983 (3) SA 197 (W) as indistinguishable, and in *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C) Davis J recognized that the same policy considerations underlie both rules.

There are other circumstances relating to contractual damages in which the causes of action differ in successive claims, so the rule does not apply. One such circumstance is where the contract provides for regular payments of rent as in *African Share Agency Ltd v Scott Guthrie & Co* 1907 TS 410, payments against delivery from time to time as in *De la Koski v Bredell Brown & Co* 1911 TPD 114, or payment by instalments as in *Cohen v Sherman & Co* 1941 TPD 134. In all such cases, failure to make each payment gives rise to a separate cause of action on which a separate action may be brought, subject only to the possibility, as pointed out by De Villiers JP in *De la Koski* (supra), that the bringing of multiple actions might amount to abuse of the process of the court.

Another circumstance is a continuing breach of contract, which causes damages to accrue from day to day. *Symmonds v Rhodesia Railways Ltd* 1917 AD 582 was such a case, and at 588 Solomon JA said:

'But where there is a continuance of a wrongful act causing fresh damage from day to day, can it be said in such a case that there is only one cause of action and that therefore a plaintiff who has brought an action for the loss which he has suffered up to date, has therefore exhausted his remedy? In my opinion such a contention cannot be sustained: if it were, it might be productive of very great injustice.'

Hakos Cabinet Makers (Pty) Ltd v Pretoria City Council 1971 (4) SA 465 (T) at 468 conveniently lists the cases in which this principle has been accepted. As with the cases in the previous paragraph, the practical limit on the bringing of successive claims is that the plaintiff must not abuse the process of the court.

As remarked above, it is well settled that a single wrongful act may give rise to more than one cause of action, a principle that may be relevant in contractual claims beyond its relevance to different heads of damages. *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) shows how, in an engineering contract, a claim for extra payment under the contract and a claim for damages for breach, both arising from the same events, amount to different causes of action, and at 329 Botha J considers the possibility of different clauses of a contract giving rise to different forms of relief, and arrears as well as damages being claimable. The once and for all rule could clearly not be applied to prevent separate actions being brought in any of these circumstances.

Although it is generally true to say that one must look to the pleadings in the previous action in order to ascertain what was the cause of action, *Goldfields Laboratories (Pty) Ltd* (supra) shows that this is no more than a guide. The plaintiff issued a summons in the magistrates' court for arrear rentals and damages and obtained default judgment for the arrear rentals but did not press the claim for damages, which was not considered by the magistrate. Flemming J held (at 200E) that 'the proposition that relief cannot be claimed

in this Court simply because some relief was sought in the magistrate's court but not brought to any decision whatsoever by that court, is untenable'.

A similar rejection of mechanical thinking in order to avoid injustice can be found in *Signature Design Workshop CC v Eskom Pension and Provident Fund* (supra), where the plaintiff had sought an interdict to prohibit breach of contract, which was refused at first instance but granted on appeal two years later. Davis J held him entitled to claim damages which had accrued between the dismissal of the claim for an interdict and the successful appeal. If the interdict had been granted at first instance the damages would not have accrued, and to refuse the claim for damages because the claim for an interdict and the claim for damages were based on the same cause of action would have been manifestly unjust.

This short review of the authorities shows, I think, that in our law of contractual damages the once and for all rule has developed, and has the potential for developing further, in accordance with most people's idea of justice. Defendants are protected from harassment and plaintiffs are given a fair opportunity, in a variety of different circumstances, of recovering the damages they have suffered. The only plaintiff who cannot be assisted is the one who has recovered accrued damages, but not prospective damages because they are not probable, and then suffers further identical damages out of the blue. He cannot bring an action for these further damages because the cause of action would be the same. He is undoubtedly a victim of the rule, but it is difficult to argue that public policy requires the rule to be reversed so as to make the defendant the victim in such a case.