

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

CASE NO: 57471/07

DATE: 23/08/2010

In the matter between:

NASASA CELLULAR (PTY) LIMITED

Plaintiff

and

SOUTH AFRICAN POST OFFICE LIMITED

Defendant

JUDGMENT

MURPHY J

1. The plaintiff, NASASA Cellular (Pty) Ltd, ("NASASA") has instituted action against the defendant, the South African Post Office Limited ("SAPO") for damages in an amount of approximately R1,3 billion for breach of contract.
2. On 31 March 2010 NASASA launched an application seeking separation of a *res judicata* defence raised in its replication to be determined first and

before the other issues in this matter. It later amended the notice of motion seeking in the alternative to have the merits separated from *quantum*. SAPO opposes the separation application on the basis that neither separation is convenient or appropriate.

3. In addition, SAPO by way of notice of motion dated 16 July 2010 has made an interlocutory application to amend its rejoinder filed in answer to NASASA's replication. It wishes to add matter to the rejoinder to the replication of *res judicata*, the issue NASASA wants to separate. The amendment seeks to amplify and develop the denial of the estoppel raised by NASASA.
4. This judgment deals with both applications. Given the issues it is necessary to deal with the background and the history of the dispute between the parties in some detail.

The Contract

5. The contract between the parties is annexed as Annexure A to the particulars of claim. The agreement was signed in Pretoria on 13 September 2004. It was executed on behalf of NASASA by Mr Sothomela Ndukwana, the chairman of its board of directors, and on behalf of SAPO by its then Chief Executive Officer, Mr Maanda Manyatshe.

6. The objective of the agreement was for NASASA to supply certain products to SAPO for sale on its behalf to customers and for SAPO to collect payments in respect of such sales for and on behalf of NASASA. The products in question are telecommunications and cellular products, services and solutions, including: cellular contracts, cellphone handsets, starter packs, prepaid airtime and accessories. The envisaged scheme was one in which NASASA would supply the products to various SAPO outlets (there are approximately 1250 post offices nationwide) as and when required, from where they would be sold by SAPO employees to the public. SAPO undertook that its employees would, in the course of discharging their ordinary duties, sell the products from its various branches and would accept only cash payments from customers for products sold. NASASA in turn agreed to manage the stock levels of the products in the outlets, to advertise and market the products, to appoint staff to support SAPO in its handling of the products, train SAPO staff and to utilise the SAPO distribution network for the distribution of the products to the various outlets. In terms of clause 14.1, the stock-in trade in any outlet was to be at the sole risk and responsibility of NASASA, and SAPO was not to be responsible for any loss of or damage to the stock, unless such loss or damage was caused intentionally or negligently by SAPO or any of its employees, agents or representatives. As compensation for allowing NASASA to market the products out of SAPO branches, SAPO

would receive a stipulated commission on all products sold and in addition one third of NASASA's net profits after tax. In terms of clause 8.5, NASASA guaranteed that SAPO would receive an annual collection fee and profit of not less than R4 million as a consideration for the take over of the existing lines, being Vodacom, MTN, Telkom and Cell C virtual and physical pre-paid vouchers, starter packs and cellphones sold prior to the agreement by SAPO for and on behalf of the service provider of such existing lines.

7. The agreement was to endure for an initial period of not less than 5 years after which SAPO had an election to renew for a further period of not less than 2 years.
8. NASASA has submitted that it is clear from the language of the agreement that the contract imposed no financial obligations on SAPO (the significance of which will become apparent in due course). SAPO gave NASASA no indemnities, while, in terms of clause 6, NASASA indemnified SAPO against any claims that may be instituted by a third party arising from the services rendered by SAPO on behalf of NASASA, or as a result of a contravention of any law, policy or regulation, or the product or the purchase, or an act or omission by NASASA. Clause 6.1.2 provides a further indemnity against any damage or losses that may be suffered in any way by SAPO, a third party or the customer arising from SAPO's

performance in terms of the agreement, provided such damage or loss is not caused directly by SAPO. As I understand the position, the only financial obligations upon SAPO would be to supply staff and retail space, as well as to insure against risk (clause 6.2) for any negligent or intentional loss caused by its employees or agents.

The background and the main application

9. Prior to the institution of the action by summons on 11 December 2007, the agreement formed the basis of litigation between the parties before Sapire AJ in the guise of an application for declaratory relief and specific performance initiated on 23 January 2007 in respect of which judgment was delivered on 19 September 2007. That application has been referred to in these proceedings as “the main application”. I will stick with that nomenclature to distinguish it from the separation application and the amendment application.
10. The founding affidavit in the main application sets out the background to the conclusion of the agreement. That evidence was not contradicted or contested by SAPO in its answering affidavit in that proceeding. The following can therefore be taken to be common cause. NASASA is the vehicle for the implementation of a joint venture between GloCell (Pty) Ltd (“GloCell”) and NASASA Relations Company (Pty) Ltd (“NASASA

Relations”). The latter is a company which designs and delivers financial and other benefits for members of the National Stokvels Association of South Africa. Its members are community based savings and self assurance clubs known as stokvels and burial societies. GloCell is one of the largest suppliers of cellular products and services in South Africa. It is also the second largest direct response TV marketing company in South Africa. It distributes to 1000 retail outlets throughout the country, including to a number of its own company-owned stores and to franchise stores in most major retail chains. It is a company with significant marketing experience and has a wide-reaching advertising network. In certain respects GloCell is a distributor for the main cellular networks’ service providers. It competes through one of its subsidiaries as a service provider with Vodacom and other independent service providers for the other networks. It also competes with certain retail chain store distributors of cellphone products. It has approximately 550 franchise style retail stores which are referred to as “stores within stores”, where its products are not physically separated from other products in the stores. They are displayed in the stores of the franchisees along with other products of the franchisees. The staff employed by the franchisees to sell other products, are also trained by GloCell at its expense to sell its products. It has responsibility for training the sales staff, marketing and advertising. GloCell holds 50% of the shares in NASASA. Its business model forms the substratum of the agreement between NASASA and SAPO.

11. Prior to the negotiation of the agreement with NASASA, SAPO had been marketing a limited range of cellphone products in its various outlets on a loss-making basis. It acquired the products it sold in a straight purchase and was accordingly responsible to pay suppliers for the products whether or not the product was sold. Included in its stock were airtime vouchers. These items expire if not sold after a prescribed period of time, resulting in capital losses. There is evidence on record showing that during 2005 SAPO lost an amount of more than R5 million through stock obsolescence. The aim of the agreement between NASASA and SAPO was, in part, to address some of the issues. Also, given the fact that SAPO has outlets in remote rural areas, the opportunity exists to advance the social good by providing cellular access and connections to marginalised communities. Many of NASASA's individual stokvel members are resident in remote rural areas. NASASA believed that it could benefit its members by marketing GloCell products through SAPO outlets. Therefore it promoted the agreement to SAPO as a means of converting its previously loss-making cellphone business into a significant profit centre at no risk to SAPO with social benefits for poorer communities. It packaged the deal as "a no risk marketing tool with a guaranteed profit".
12. NASASA alleges that SAPO has wrongfully breached the contract by wholly failing to perform its obligations under the agreement. It maintains

that from signature of the agreement it attempted to engage with SAPO in an effort to launch its products in SAPO outlets without success. Various negotiations to implement the agreement have proven fruitless. The relationship between SAPO and the service providers of the existing lines may have been a complicating factor.

13. On 5 November 2004, about 6 weeks after the agreement was signed, the then recently appointed Acting CEO of SAPO, MS Motsoanetsi Lefoka, addressed a letter to one NASASA's directors which reads:-

"This is to advise that I have been appointed Acting Chief Executive Officer of the South African Post Office with effect from 16 October 2004.

I am privy to a contract that was signed on 13 September 2004 between the SAPO and NASASA Cellular. I note that Mr Maanda Manyatshe signed the agreement on behalf of the SAPO.

As I have just been appointed Acting CEO, I am in the process of reviewing the contents of the above agreement. As the SAPO is in charge of public assets some of which it has a monopoly over, onerous legal obligations have been placed on it by various laws and regulations. I am assessing the agreement with these obligations and nuances in mind. It thus follows that whilst this process is taking place, SAPO will not be able to act further on this agreement.

In addition, kindly also note that our failure to deal with any of the myriad issues that have been raised in the past by various parties should not be taken as

conceding to any of those points. In this regard, please note that our rights are specifically reserved.”

14. In the following months the parties engaged in discussions regarding the agreement. On 5 February 2005, Ms Lefoka addressed a further letter to NASASA which reads:-

“I refer to our various communications in the above matter, and more specifically, our meeting held on 20 January 2005.

In order to move the process forward, I advise that SAPO needs clarification and information on certain aspects of the transaction. More specifically, SAPO requires additional information on the following:

1. The structural relationship of NASASA, NASASA Cellular, GloCell, and other related parties and companies;
2. The detailed business model of NASASA Cellular. This should include more than just annexures ‘A’ and ‘B’ of the above agreement. In addition, without purporting to exhaust the list of relevant considerations under this head SAPO would like to see the projections on products to be sold, customer traffic, planned average rate per user, etc.
3. The marketing and sales plan relating to the products to be sold;
4. Information Technology integration and clarity on who is expected to ‘own’ the customer during the implementation of the agreement;

5. Details on the revenue sharing model;

I further advise that, as previously drawn to your attention, SAPO's participation in this (and other) joint ventures is subject to its legislative and policy framework. On the legislation front, I advise, *inter alia*, of the provisions of the Public Finance and Management Act. On the policy framework, I further advise that there will not be any exclusivity on the use of retail infrastructure.

I will be glad to receive the requested information by close of business on 10 February 2005..."

15. It is in this letter that the spectre of possible statutory illegality was raised for the first time.
16. NASASA construed the stance taken by SAPO at this stage as a repudiation of the contract but initially did not accept the repudiation. It furnished additional information to SAPO and engaged in further discussions. Eventually after numerous meetings and correspondence over a period of almost 2 years, NASASA initiated the main application in which it sought an order declaring the agreement valid and binding and a decree of specific performance. Prayers 1-3 of the notice of motion read:

"1. Declaring that the written agreement ("the agreement") between the Applicant and the Respondent dated 13 September 2004, a copy of

which is attached as Annexure FA2 to the founding affidavit, is a valid and binding agreement.

2. Declaring that the Respondent is in breach of its obligations under the agreement.
3. Ordering the Respondent to fulfill its obligations under the agreement and to assist the Applicant in the performance of its obligations under the agreement in so far as the Respondent is required to do so pursuant to the provisions of the agreement.”

Prayers 4 and 5 respectively define the obligations referred to in prayer 3 and seek an order declaring that the five year period of the agreement shall commence to run from the commencement of the roll out and implementation rather than the date of signature.

17. In the founding affidavit NASASA stated that it had at all times been willing and able to perform its obligations and tendered to do so. It alleged that SAPO was in breach, and preferred instead of damages to seek an order of specific performance. Accordingly, it is clear that it did not accept the alleged repudiation, elected to hold SAPO to the contract and sought specific performance.
18. In its brief answering affidavit, SAPO contended that NASASA was not entitled to the relief sought in the notice of motion because NASASA itself

had repudiated the agreement, which repudiation it accepted and opted to cancel the agreement. In its view NASASA's attempt to read in a tacit term extending the five year period where the roll-out was delayed as a consequence of one party's default, or factors beyond the control of the parties, amounted to a repudiation of the agreement entitling SAPO to resile from it. No reference is made in the answering affidavit to the possibility that the agreement, in the view of SAPO, might be tainted by illegality. In reply NASASA denied that it had exhibited a deliberate and unequivocal intention no longer to be bound by the agreement merely by postulating the tacit term regarding the extension of the period of the agreement.

19. In his judgment delivered on 19 September 2007, Sapire AJ declined to exercise his discretion in favour of granting an order of specific performance. Although he did not analyse the evidence in any detail, he did not mince his words in finding that SAPO had repudiated a valid and existing contract. At page 4-5 of the judgment, he found:

“...but it soon became apparent that the respondent was not negotiating in good faith and from a very early date has not had any intention of honouring its obligations under the agreement.

The respondent's counsel, when invited to do so was not able to dispel the strong perception that the respondent's behaviour was reprehensible and not in accordance with commercial morality. The respondent's conduct is a clear repudiation of the agreement. This gives the applicant a right to remedies in law

..... It is quite clear that there was an agreement and that the respondent is in breach thereof.”

The learned acting judge justified his refusal to grant specific performance on grounds of the difficulty posed by the delay in execution; the polycentric consequences for third parties who had contracted with SAPO in good faith; and the likely absence of a co-operative relationship of trust between the parties, which would be a requisite for proper performance and implementation of the contract. He concluded, alluding to the defence raised by SAPO, as follows:

“In this case, far from repudiating the agreement, the applicant has sought to enforce it and although it has asked more than it was entitled to this in itself is not a repudiation of the agreement. I find that there has been no repudiation of the agreement and that it exists. The argument advanced by the respondent is not an obstacle to making a declaration in terms of prayer 1 to the notice of motion.”

20. The finding of Sapire AJ in respect of the costs of the main application has assumed some significance. He held as follows:

“The last question which I have to address is the question of costs. Counsel for the applicant asked that the costs be awarded on an attorney and client basis. The applicant, as it will be seen, will have succeeded in as far as prayers 1 and 2 are concerned. While the relief sought in prayers 2, 4 and 5 did take up a lot of the time and it could be said that the applicant has not succeeded in its application *because the relief in prayers 1 and 2 was strictly not necessary* at the

time that the application was initiated. I have come to the conclusion, however, that the applicant is entitled to its costs and that these costs should be paid on the scale as between attorney and client. If the respondent had not opposed the granting of the relief in terms of prayers 1 and 2 the position may have been different but by arguing the point, to which I have just referred, it has clearly come to court on the basis that the agreement was repudiated by the applicant and the applicant is entitled to a ruling on that matter. The question of the scale on which the costs are to be paid is another matter which has to be given consideration. The respondent's behaviour in relation to the agreement and its disdainful repudiation and refusal to carry out its obligations is conduct lacking in commercial morality. In short, if you enter into a contract you ought to observe its terms not come to court and be unable to justify your conduct in any way, an order for attorney and client scale is justified in this matter." (emphasis supplied)

21. In the result, Sapire AJ granted an order in terms of prayers 1 and 2 of the notice of motion and costs on the attorney and client scale.

The pleadings in the action proceedings

22. As mentioned, the summons and particulars of claim in the action proceedings were served on SAPO on 11 December 2007. In paragraphs 5, 6 and 7 of the particulars of claim NASASA sets out the various alleged breaches of the contract. In paragraphs 8 and 9 it sets out the particulars of the main application. In paragraph 11 it avers that on or about 29 October 2007, and as a consequence of SAPO's repudiations and breaches of the agreement, it elected to cancel the agreement and had

notified SAPO of that election to cancel by a letter dated 29 October 2007 annexed to the particulars of claim as Annexure E. In short, having failed to obtain specific performance, NASASA opted to accept the alleged repudiation, cancelled the agreement and sued for damages.

23. NASASA's claim for damages, as set out in paragraphs 12 and 13 of the particulars of claim, and amplified in Annexure F thereto, comprises four distinct components. The first is an amount of R496 569 951, being the net profit before tax that it would have earned, after payment of SAPO's one third share, for the first five years of the agreement had it been implemented. The second amount is the sum of R114 million in respect of administration and management fees (set at R22,8 million per year) contractually incurred by NASASA over the five year period, notwithstanding that the agreement was not implemented. In paragraph 103 of its particulars for trial NASASA explained that this liability arises to its shareholders pursuant to the shareholders' agreement. The third element of the damages claim is an amount of R284 168 996 being the amount NASASA would have realised on the sale of the Vodacom subscriber base that NASASA would have built up had the agreement been implemented according to its terms. The amount is calculated upon the projected size of the subscriber base multiplied by the price per prepaid and contract subscriber. The fourth claim is for damages in the sum of R426 275 512 being the amount NASASA alleges it would have

earned between years 6 and 10 after the termination of the contract arising from the remaining subscriber base that it would have built up had the agreement been implemented. In terms of the various agreements which would have been in place with other contracting parties and service providers, NASASA as a retailer would have continued to receive ongoing revenue commissions on the sale of airtime to customers initiated by NASASA and/or GloCell in SAPO's outlets. The sale of the subscriber base would not have eliminated this source of revenue, it would however not have received the higher margin payable to the service provider. The total damages claimed, as stated earlier, thus exceeds R1,3 billion.

24. On 4 April 2008, nearly 6 months after the *dies* had expired, and after the suit for damages had been initiated, SAPO filed an application for condonation for the late filing of an application for leave to appeal against the judgment of Sapire AJ in the main application. SAPO indicated that if it obtained leave to appeal it would seek to lead further evidence to demonstrate that the agreement was void for non-compliance with sections 66 and 68 of the Public Management Finance Act 1 of 1999 ("PFMA"); section 54(2) of the PFMA and section 3 of the Post Office Act 44 of 1958 ("POA"). The particulars of claim in the action, in their original and unamended form, had alluded to the issue of validity and the allegation that SAPO was estopped from raising the question of illegality. In the founding affidavit in the condonation application Ms Lefoka stated:

"I am advised that if the judgment of Sapire AJ is not set aside, SAPO will be severely prejudiced if it is unable to raise the invalidity and non-binding nature of the agreement I am advised that the validity of the agreement is central and dispositive of these proceedings (on appeal) and if decided in favour of SAPO should also be dispositive of the action proceedings." (para 64-66)

25. The relevant parts of section 66 of the PFMA provide:

- "(1) An institution to which this Act applies may not ... enter into any other transaction that binds or may bind that institution ... to any future financial commitment, unless such borrowing, guarantee indemnity, security or other transaction:
 - (a) is authorised by this Act; and
 - (b) in the case of public entities, is also authorised by other legislation not in conflict with this Act ...

- (3) Public entities may only through the following persons borrow money ... or enter into any other transaction that binds or may bind that public entity to any future financial commitment:
 - (a) a public entity listed in schedule 2:
 - the accounting authority for that schedule 2 public entity."

Section 68 of the PFMA deals with the consequences of unauthorised transactions. It provides:

"If a person, otherwise than in accordance with section 66 lends money to an institution to which this Act applies or purports to issue on behalf of such an institution a guarantee, indemnity or security or ... enters into any other transaction which purports to bind such an institution to any future financial commitment, the State and that institution is not bound by the lending contract or the guarantee, indemnity, security or other transaction."

26. Section 54(2) of the PFMA provides *inter alia*:

"Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

- (a)
- (b) Participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;
- (e) Commencement or cessation of a significant business activity.

27. Section 3(4) of the POA provides:

"Each successor company

- (b) shall in its memorandum of association *inter alia* provide that the successor company and its subsidiaries -
 - (i)

- (ii) shall not have the power to perform the following acts without the approval of the Minister granted with the concurrence of the Minister of Finance, namely

....

- (dd) the merger of the company with another company or the entering into of a partnership or joint venture by the company.”

28. In the condonation application and the application for leave to appeal SAPO sought leave to appeal on the ground that the agreement was invalid and not enforceable because the agreement had been entered into without the necessary authoritative approval required in terms of these provisions of the PFMA and the POA and because the signatory to the agreement representing SAPO had not been authorised by its board so to do. In dismissing the application Sapire AJ observed:

“Clearly SAPO and its advisors were aware or should have been aware of the facts relating to the alleged invalidity of the agreement by reason of the lack of authority when preparing its answering affidavit. There appears to have been a deliberate decision not to raise the point.”

Later in the judgment the learned acting judge went on to say:

“The real point of these proceedings is that SAPO cannot in the exercise of its public functions be ordered to pay a large amount of what is after all public

money as damages for breach of a contract entered into without compliance with legislative provisions on which its enforceability depends.

This question was not decided in the main application and remains moot. SAPO is therefore not prevented by "issue estoppel" or *res judicata* from raising it in the action presently pending in which it faces a claim for damages.

There would be no purpose in proceeding to appeal where there has been no decision on the issues which applicant wishes to raise for the first time after judgment. These issues would require new evidence to be adduced upon which such issue could be argued. The appeal court at best for the applicant might be inclined to refer the matter back to the court of first instance for a further hearing and decision on affidavits and possibly replying affidavits to be filed. An appeal court should not be called upon to entertain appeals of such a nature when the issues can be canvassed as in this case in a court of first instance."

He accordingly dismissed the application for condonation and hence leave to appeal was not granted.

29. SAPO filed its plea in the action proceedings on 17 March 2009. In paragraph 3 it pleads that the agreement is illegal and null and void, alternatively not binding on SAPO. In paragraph 3.1 it pleads that SAPO is a public entity listed in Schedule 2 of the PFMA and that the relevant provisions of the statute apply. Paragraphs 3.2.1 - 3.2.5 contain the averments in relation to non-compliance with section 54(2). They read:

"3.2.1 The business activities anticipated in terms of the agreement and which now forms the basis of the plaintiff's claim against the defendant,

involves participation by the defendant in a significant partnership, trust, unincorporated joint venture or similar arrangement, as contemplated in s54(2)(b) of the PFMA.

3.2.2 The business activities anticipated to commence in terms of the agreement and which now form the basis of the plaintiff's claim against the defendant constitutes a significant business activity as contemplated in s54(2)(e) of the PFMA

3.2.3 In terms of section 1 (definitions) read with section 49(2)(a) of the PFMA and the Post Office Act, 44 of 1958, the accounting authority of the defendant for purposes of the PFMA is the defendant's board of directors.

3.2.4 The board of directors of the defendant did not inform the relevant treasury of the transaction, whether promptly or at all, before the agreement was concluded.

3.2.5 The board of directors of the defendant did not submit particulars of the transaction to the Minister of Communications (its executive authority), whether promptly or at all, before the agreement was concluded."

30. Paragraph 3.3 of the plea relates to section 66 and 68 and alleges that the agreement sought to create and bind the defendant to financial commitments. It is further pleaded that the authority to conclude the agreement was not delegated to Manyatshe by SAPO's board of directors with the written approval of the Minister of Finance. Section 66(6)

provides that delegation of this kind must be with the “prior written approval of the Minister”.

31. Paragraph 3.4. of the plea relates to the alleged contravention of the POA. Paragraphs 3.4.1-3.4.4 read:

“3.4.1 The company Memorandum of the defendant includes the provisions of section 3(4)(b)(ii)(dd) of the Post Office Act.

3.4.2 Despite the provisions of clause 23 thereof, the agreement is in truth a joint venture as contemplated in the Post Office Act and the defendant’s Memorandum.

3.4.3 The approval of the Minister of Communications had not been obtained by the parties prior to or after the conclusion of the agreement.

3.4.4 The concurrent approval of the Minister of Finance had not been obtained by the parties prior to or after the conclusion of the agreement.”

32. Paragraphs 4 to 7 of the plea raise the defence that through its election to seek specific performance in the main application, NASASA waived any right it may have had to rely on the alleged breaches or acts of repudiation as a basis on which to cancel the agreement. Accordingly, when NASASA purported to cancel on 29 October 2007, such constituted a repudiation which SAPO accepted on 28 February 2008.

33. In paragraph 8 of the plea SAPO denies any liability for damages on the ground that NASASA was obliged to claim for damages from the alleged acts of repudiation or breaches “once and for all” during the main application proceedings when it sought specific performance.
34. SAPO raises two further defences in paragraph 8, namely that because the CEO lacked authority to commit SAPO to any agreement for longer than 3 years, clause 19.1 of the agreement (providing for a duration of 5 years) was invalid and severable (in terms of clause 17) with the result that the agreement could be terminated by SAPO on reasonable notice. Further, clause 4.3.4 of the agreement which requires SAPO to deal exclusively with NASASA is in conflict with agreements with third parties giving those third parties similar rights to those provided to NASASA. This clause too, it maintains, falls to be severed in terms of clause 17 of the agreement with the significant consequence for determining *quantum* that NASASA would not have benefited from income earned by those third parties whose valid agreements remained in place during the contract period. Clause 17 provides *inter alia* that where any provision of the agreement is invalid or incapable of being enforced due to a conflict with any existing agreement with a third party that provision shall be severed.
35. In its replication NASASA pleaded that the judgment of Sapire AJ in the main application had finally determined that:

- i) the agreement was a valid and binding agreement;
- ii) SAPO breached its obligations under the agreement;
- iii) SAPO had by its conduct before and after the institution of proceedings repudiated the agreement; and
- iv) NASASA was entitled to accept the repudiation, cancel the agreement and claim damages.

And, hence, it pleaded further, SAPO is estopped from relying on the defences pleaded in paragraphs 3, 4, 7 and 8 of the plea because the issues were *res judicata*. In the alternative, it pleaded that SAPO is precluded from raising the defences because of SAPO's election to affirm an admission that the agreement was valid. In the further alternative NASASA pleaded over and put all the factual issues in relation to the questions of illegality in issue. It also relies on section 36 of the Companies Act 61 of 1973, claiming it is entitled to enforce the agreement even if SAPO lacked capacity or power to conclude the agreement and to assume in good faith that all acts of internal management necessary to grant the CEO authority had been performed.

36. In addition SAPO has filed a conditional counterclaim for cancellation to which there is a special plea, a plea and a replication. These pleadings have assumed no relevance in the present matter and can be ignored for present purposes.
37. SAPO's rejoinder to the replication is important in relation to both the separation application and the amendment application. In response particularly to the plea of *res judicata* SAPO refers to the portion of the judgment of Sapire AJ in the application for leave to appeal in which he stated that the question of illegality was not decided in the main application and therefore SAPO is "not prevented by "issue estoppel" or *res judicata* from raising it in the action presently pending in which it faces a claim for damages". The rejoinder is silent on the import of that finding and makes no explicit claim that the *res judicata* plea in respect of legality is itself *res judicata* or that NASASA is estopped from raising it. The proposed amendment (which I will deal with more fully later) amplifies on the rejoinder by setting out reasons why the judgment did not finally determine the issues in dispute. In its surrejoinder NASASA denies that the relevant passage of the judgment is conclusive and binding upon the parties.

The separation application: the averments and submissions of the parties

38. The notice of motion in the separation application originally sought an order in the following terms:

“1. An order that the following issues be separated from and determined prior to all other issues in terms of the provisions of Rule 33(4):

1.1 Whether the judgment (as pleaded in paragraphs 5-13 of the replication) and/or the Defendant's actions (as pleaded in paragraphs 4 and 14 of the replication) preclude the Defendant from relying upon the defences pleaded in paragraphs 3, 4, 7 and/or 8 of the Defendant's plea.

1.2 Whether the plaintiff was entitled to: (i) accept the Defendant's repudiation of the agreement by letter dated 29 October 2007 as alleged in paragraph 11 of the Plaintiff's particulars of claim; and (ii) thereafter institute the present action for damages.

39. During the course of the hearing Mr *Levenberg SC*, counsel for NASASA, informed the court that NASASA would no longer persist with the relief sought in prayer 1.2 and significantly narrowed the ambit of the relief in prayer 1.1 which was amended to read:

“1.1 Whether the judgment (as pleaded in paragraphs 5-13 of the replication) precludes the Defendant from relying upon the defences pleaded in paragraph 3 of the defendant’s plea.”

The upshot of that amendment is that the primary issue sought to be separated is simply whether the judgment of Sapire AJ in the main application precludes SAPO from relying upon the illegality defences, namely that by virtue of the provisions of sections 54, 66 and 68 of the PFMA and section 3 of the POA, SAPO is not bound by the provisions of the agreement.

40. On 19 July 2010 NASASA effected an amendment to the notice of motion in the separation application consequent on a notice of intention to amend delivered on 2 July 2010. The amendment introduces an alternative prayer in the following terms:

“Ordering that the issues of *quantum* and merits be tried separately; that is to say that the issues pleaded in paragraphs 12 to 14 of the plaintiff’s particulars of claim (“the *quantum* issues”) shall be tried from all other issues in the matter (“the issues on the merits”) and that the *quantum* issues should be tried only after resolution of the issues on the merits.”

41. In short, NASASA wants either a separation of the *res judicata* replication from all the other merits and *quantum* issues, or alternatively a separation of the merits (including the *res judicata* replication) from the *quantum*.

Paragraphs 12 and 14 of the particulars of claim deal with the question of causation and thus such issue would fall within the ambit of “*quantum* issues” as defined in the alternative prayer.

42. If the *res judicata* issue is resolved in favour of NASASA it will be dispositive of the some but not all of the merits issues, namely whether (i) the agreement is a “future financial commitment” as contemplated in section 66(1) of the PFMA and void if the transaction was not authorised by the board; (ii) the board consented to a future financial commitment; (iii) non-compliance with section 3 of the POA renders the agreement unenforceable; (iv) the agreement was indeed a joint venture as contemplated by the POA; and (v) there was non-compliance with section 54 of the PFMA and the effect thereof. In other words, the illegality defences. If *res judicata* these issues will not have to be decided. However, on account of the amendment to prayer 1.1 of the notice of motion, SAPO’s repudiation defence in paragraph 4 and the “once and for all” defence in paragraph 8 would still require determination. So would the defences that SAPO had the right to terminate on reasonable notice and the severability of the exclusivity clause with significant consequences for *quantum*.

43. Rule 33(4) of the Uniform Rule provides:

“If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any other party make such order unless it appears that the questions cannot be conveniently decided.”

Accordingly, where, as in this case, the question of separation is to be determined on application of one of the parties, the onus is on the party opposing the separation to demonstrate that it is inappropriate. The court is obliged to grant the application of a party for separation unless it appears that the question cannot be conveniently decided separately - *Edward L Bateman Limited v CA Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) 132C-D; *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No2)* 1997 (4) SA 921 (W) 927E.

44. The word “conveniently” within the context of the sub-rule is intended to connote the notion of facility or ease or expedience, as well as the notion of appropriateness and fairness. In *Berman and Fialkov v Lumb* 2003 (2) SA 674 (C) at para 17, Van Reenen J captured the essence of the requirement when he said:

“The convenience to be considered is primarily that of the Court and the litigants Convenience in the context does not only connote facility or ease or

expedience but also appropriateness in the sense that in all the circumstances it is fitting and fair to the parties concerned The Court's function is to assess to the best of its ability the nature and extent of the advantages and disadvantages that would result should the order that is being sought be granted ... Such an application will normally be granted if the advantages that will flow therefrom outweigh the disadvantages ..”

In a nutshell, the party opposing the separation must satisfy the court that the balance of convenience favours it and non-separation of the issues.

45. In *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 484-5 Nugent JA offered the following salutary note of caution:

“Rule 33(4) of the Uniform Rules is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that the result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though at first sight they appear to be discrete. And, even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.”

As Mr *Burger SC*, who appeared for SAPO, put it, the enquiry is a multi-faceted one. A court normally will not grant a separation where it is

apparent that the evidence required to prove any of the issues in relation to the proposed separated issue will also be required to be led when it comes to proving the remaining issues, be they issues of merits or *quantum*. Horn AJ (as he then was) also highlighted the need for caution in *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SEC) at 412H-J when he observed:

“... where it is not a straightforward matter, where the incidents of the *onus* could be complex or burdensome, whether the question of *onus* arises from the pleadings or from the evidence which may be required to be led by the plaintiff or the defendant, or where the evidence in respect of liability and *quantum* could quite conceivably overlap, where the matter is of such a nature that separation would seem inappropriate, unfair or unfitting, the court would be slow to exercise its discretion in favour of a separation.”

46. As explained earlier, NASASA in prayer 1 of the notice of motion as amended seeks separation in the first instance of the issue “whether the judgment precludes the Defendant from relying upon the defences pleaded in paragraph 3 of the Defendant’s plea”, raising essentially the question of whether by virtue of the provisions of section 54, 66 and 68 of the PFMA, and section 3 of the POA, the defendant is not bound by the terms of the agreement on grounds of illegality.

47. On 27 January 2010, NASASA's attorney addressed a letter to SAPO's attorney proposing separation of the issue (annexure FA5) and explaining why it believed separation would be convenient. Its reasons were:

- i) Resolution of the issue in terms of NASASA would result in disposal of most of the issues appertaining to the merits of the action, obviating the need to lead evidence and to traverse a number of issues raised on the pleadings.
- ii) If the court does not have to hear the illegality issues by reason of a successful plea of *res judicata* that will significantly curtail the duration of the trial on the merits of NASASA's claim.
- iii) Should the *res judicata* defence not be separated it would in any event have to be argued separately by way of an objection to SAPO at trial introducing any evidence in support of the issue of statutory invalidity.
- iv) Not adjudicating the *res judicata* defence before the illegality defences SAPO will effectively circumvent and frustrate the earlier judgment by introducing evidence on the issue of invalidity before the issue of *res judicata* has been decided.

That would deprive NASASA of the benefit of its judgment even before the court has determined whether NASASA is entitled to rely upon it.

48. SAPO was not prepared to agree to the proposed separation because it did not consider it to be convenient or likely to lead to an expeditious curtailment of the litigation. In paragraph 5 of her letter dated 15 February 2010 SAPO's attorney summarised SAPO's position as follows:

"Having considered the pleadings with your client's proposal, it seems that the separation proposed in your letter will not lead to an expeditious curtailment of the litigation for at least the following reasons:

- a. the issue to be determined is not dispositive of the case in any material respect;
- b. we anticipate, irrespective of which way the Court a quo decides the matter, the legal issues in question and the consequences of such determination are likely to be appealed by the unsuccessful party. The appeal process will involve significant cost and delay;
- c. even after the issue has been resolved on appeal, the vast majority of the available evidence will still have to be led. As there is a significant overlap between the evidence in relation to: on the one hand, the nature of the business contemplated in the agreement and the quantum of its alleged damages; and on the other hand, the characterization of the transaction as a "joint venture, future financial commitment etc." referred to in the relevant legislation. In our view, save for limited time dealing with evidence of "authority" and Ministerial approval etc, the only real

element of the trial that would be avoided by a preliminary round on the proposed separation, would be legal argument.”

The letter continues in paragraph 8 as follows:

“The agreement at the heart of this matter was signed in 2005. If an appeal process was to run and an allocation to be obtained thereafter, it is quite likely that seven to eight years may have elapsed before this matter is heard. Many of the personnel employed by our client at the time have already assumed employment elsewhere since 2005 and further, the tenure of many current directors and officers who were involved may expire during that period. Any assistance or input from the government departments relevant to the PFMA issues will also be reduced as time goes by, given the likely turnover of personnel in those departments. This being so, the preparation and presentation of our client’s case may well be prejudiced if the “main” trial is delayed as anticipated above.”

49. In the founding affidavit to the separation application, NASASA, referring to the prior correspondence, took issue with SAPO’s contentions on the appropriateness of separation in some detail. It submitted that the real reasons for refusing to agree to a separation are an attempt to pre-empt the *res judicata* defence, the intent to make the trial as difficult, expensive and complicated as possible, and a wish to cloud the real issues by leading evidence that would otherwise be irrelevant if the *res judicata* issue is decided in favour of NASASA. In regard to the concern that the litigation will be protracted and delayed if separation is granted, NASASA

submitted that SAPO is the cause of the earlier delays in these proceedings and in fairness should not be allowed to use its own laches as an excuse for not agreeing to a separation. Moreover, NASASA earlier advocated separation. In paragraphs 66-70 of the founding affidavit in the condonation application Ms Lefoka unequivocally stated that the validity of the agreement would be dispositive of the action proceedings. In urging for leave to appeal to be granted she maintained “an appeal on the crisp issue of whether the agreement was legal and binding should determine a core issue in the damages action”, with the advantage that the parties could be spared the inconvenience of a trial. NASASA obviously agrees with this.

50. The most contentious issue between the parties in this application is whether the illegality issues and the *quantum* issue overlap. The contention arises from the claim by SAPO that the agreement constitutes a “future financial commitment” or a “joint venture” as contemplated in the PFMA and POA. In a letter dated 22 March 2010 (Annexure FA 7.1) SAPO’s attorney stated:

“It is our client’s position that the financial commitment required by the agreement would emerge *inter alia* from the Plaintiff’s own evidence of the extent of the operations which the Plaintiff alleges it could or would have implemented at the Post Office and from which it would have drawn its profits. It is the Defendant’s

position that these two issues are inextricably linked and a separation of these issues would not only be inappropriate but unfair.”

51. On the face of it the assertion amounts to an argument that the issues of illegality and *quantum* are inseparable. It does not directly address the question of whether the *res judicata* issue should be decided before and separately from the other merits issues. NASASA spelt out its response to the argument in the founding affidavit. Its evidence in support of *quantum* will be evidence concerning the cost to it (not to SAPO) of maintaining and running its stores within stores at its own risk. Therefore, it argues, the cost to SAPO of complying with its obligations under the agreement is unrelated to its own costs of performing its obligations under the agreement. The evidence it will lead to prove its *quantum* will be evidence concerning the operations and operating profits of GloCell (its shareholder) which utilises the business model contemplated in the agreement. This evidence will be supplemented by other evidence concerning market conditions in the cellphone industry. NASASA says such evidence will be different from the evidence SAPO will need to lead concerning its own internal business structures and dealings to demonstrate the existence of a future financial commitment, joint venture, significant partnership or significant business activity. Accordingly, NASASA submits that the issues are not intertwined and further that SAPO cannot simply rely upon what it extracts in the cross-examination of

NASASA's witness to discharge its evidentiary burden that the agreement constitutes a "future financial commitment".

52. As I have just indicated, the dispute here, when unpacked, actually relates to the broader question of separating merits from *quantum*. At the time the founding affidavit was commissioned, NASASA was not seeking a separation of merits and *quantum*. It principally wanted to separate the *res judicata* issue from all other issues. Nonetheless it made the point in the founding affidavit that SAPO's contention that not even *quantum* can be separated from merits was unreasonable and revealed an intent to make the case "prohibitively difficult and expensive" for NASASA to prosecute.
53. In its answering affidavit SAPO reiterated the position it had taken in correspondence arguing that it was unnecessary and undesirable to hear the *res judicata* issue before the illegality issues. The defence remains on the pleadings and can be decided at the end of the trial once the court has heard all of the relevant evidence, which in argument it has submitted shall be that related to both the issues of illegality and *quantum* which it still considers to be intertwined.
54. SAPO submitted that a single hearing is the best way forward and that NASASA's stance is revealing of its tactical approach to the litigation,

aimed at avoiding the illegality issues that were never overtly examined or decided in the main application. Ventilating all of the issues at once, it contended, will lead to a quicker resolution than if different parts are decided before any of the issues that will bring finality. Dealing with the matter in a single hearing will avoid a substantial delay brought about if the party losing in the first round appeals that decision before returning for the second round. With regard to earlier delays, SAPO submitted, no benefit can be gained from disputing past time delays or that any negative inference can or should be drawn. I agree on this aspect.

55. SAPO avers that even if NASASA is successful in the *res judicata* defence, there would still be significant evidence to be led by NASASA and SAPO related to SAPO systems, structures, budgets and infrastructures in place during the relevant period. The averment lacks specificity regarding the purpose of such evidence. Clearly it would have relevance to *quantum*. Any relevance it might have had, if any, to the question of legality would lose force if the *res judicata* defence was sustained. Its only other relevance, I surmise, would be to the defence pleaded in paragraphs 8.2.4 and 8.2.5 of the plea alleging that the exclusivity clause in clause 4.3.4 of the agreement falls to be severed from the agreement by operation of clause 17 because of the existing arrangements with third parties, which will impact ultimately on the question of *quantum* if the defence is sustained on the evidence.

56. SAPO further contended that the true reason for NASASA seeking a separation was that it is not ready to proceed on *quantum*, and postulated that such does not justify a separation of the *res judicata* defence from the other issues on the merits; especially considering that at the time the answering affidavit was filed NASASA had not proposed a separation of merits and *quantum*. This averment no doubt contributed to the decision of NASASA to amend the notice of motion to include the alternative separation in prayer 2 by its notice of amendment dated 2 July 2010.
57. SAPO's initial position pertaining to separation of the *res judicata* defence was undeniably to some extent ill founded, because it confused the illegality issue with the *res judicata* issue and argued that the illegality and *quantum* issues were intertwined. The answering affidavit however posits an inextricable link between the illegality and the *res judicata* issues. On the premise that NASASA's *res judicata* defence is not a strict application of the *exceptio res judicata* but a plea of issue estoppel, involving a discretionary relaxation of the requirements of the *exceptio*, SAPO argues that evidence on illegality will be necessary before the relevant discretion can be properly exercised having regard to questions of equity, fairness and public policy. In exercising the discretion whether or not to grant relaxation the court will be required to consider the defence that NASASA seeks to preclude from determination and the impact such preclusion

would have on the parties and possibly, given the peculiarities of this case, the general public and the government of South Africa.

58. In reply NASASA notes that SAPO had not in its rejoinder sought to rely on the court's discretion to relax the requirements of the *exceptio res judicata* or pleaded any facts which would be relevant to a discretionary determination, and hence it would not be entitled to lead any evidence on the issue.
59. After the replying affidavit was filed two further developments occurred. Firstly, and perhaps predictably, SAPO filed a notice to amend the rejoinder on 23 June 2010 in which it sought to allege facts in support of a discretionary *res judicata*. The amendment has been objected to and is the subject of the application for amendment to be determined in this judgment. The second development was the issuing of a Practice Directive by the Deputy Judge President of this division on 8 June 2010, which deals specifically with the question of separating merits and *quantum* in all claims for damages, leading NASASA to contend in a supplementary affidavit that a merits and *quantum* separation should now be automatic.

60. SAPO responded to the supplementary affidavit and amendment seeking separation of the merits from *quantum* in a supplementary answering affidavit filed on 26 July 2010 to which NASASA replied in an affidavit handed in at the commencement of the hearing. SAPO's supplementary answering affidavit elaborates more fully on the link between the illegality issues and *quantum*. NASASA in its reply accuses SAPO of vagueness in its pleadings and failing to substantiate the plea of illegality in the hope of proving its case on illegality by cross-examining NASASA's witnesses on *quantum*. I will return to these arguments later when it comes to assessing and evaluating the prudence, convenience and necessity of separating merits from *quantum* in this case.

Separation: *res judicata* and illegality

61. The first question to be determined is whether the *res judicata* issue should be separated from the illegality issues.
62. As mentioned, SAPO has submitted that the ultimate determination of the applicability of the defence of *res judicata* and/or issue estoppel will require evidence relevant to the questions of equity, fairness and public policy. The proposed amendment to the rejoinder aims at particularising the debate. In this regard the validity of the contract may be a central consideration. Testimony may be necessary to explain why the defence

was not raised in the main application even though SAPO seems to have been aware of it. Such testimony may be relevant to whether the declarators were necessary for the principal relief sought in the main application and the possibility of a waiver by SAPO.

63. In Roman Dutch law the *exceptio res judicata* can only be employed when an action which has been once terminated is again set in motion by the same parties, about the same thing (*eadem res*) and based on the same cause of action (*eadem petendi causa*) - Voet (44.2.3); and *Boshoff v Union Government* 1932 TPD 34 at 349. In *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 635 (A) the Appellate Division held that the broader meaning of the term "*petendi causa*", and Voet's statement in 44.2.3 that a claim based on the *actio redhibitoria* may be raised to preclude the *actio quanti minoris*, mean that the cause of action need not be precisely the same in both actions, nor is it an immutable requirement that the same thing must be claimed. The result is similar to the situation in relation to issue estoppel in English law. At 669F-670C Botha JA explained the position as follows:

"The true meaning of *Boshoff v Union Government* is that the judgment has the effect that the strict requirements of the common-law for a defence of *res judicata* (in particular, *eadem res* and *eadem petendi causa*) should not be understood literally in all circumstances and applied as inflexible rules, but there is room for adaptation and extension, according to the basic requirement of *eadem quaestio*

and the *ratio* of the defence The unacceptable alternative would be to cling with literal formalism to propositions in the old authorities, which would be at odds with the vigorous development of the law to provide for the demands of novel factual situations Each case must be decided according to its own facts. It is not practical to try to formulate guidelines in abstract terms which can be made applicable to all situations.”

(Translation of Heher JA in *Janse van Rensburg NO and Others v Steenkamp and Another* 2010 (1) SA 649 (SCA) at 658).

64. In *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) at 307J Scott JA summarised the present state of our law:-

“[10] Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of

the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, 'unless, carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals'.

65. In appropriate cases therefore the traditional requirements of the *exceptio res judicata*, namely (1) the same parties (*idem actor*), (2) the same cause of action (*eadem petendi causa*) (3) the same thing demanded (*eadem res*), can be relaxed. However, there must always be a commonality of actors and issue. The parties must be the same (*idem actor*) and the same issue (*eadem quaestio*) must arise. Where there is no commonality of cause of action and relief claimed, we have a situation of issue estoppel involving an inquiry whether an issue of fact or law was an essential element of the judgment upon which reliance is placed. Whether such a defence should be upheld will depend on the facts of the case taking account of questions of equity and fairness not only to the parties themselves but also to others. In *Holtzhausen and Another v Gore NO and Others* 2002 (2) SA 141 (C) at 150-151 Thring J reasoned, correctly in

my respectful opinion, that in deciding whether or not, in a particular case, strict compliance with the requirements of *eadem petendi* and *eadem res* should be relaxed, a court must exercise an equitable discretion with the overriding or paramount consideration being overall fairness and equity and the avoidance of injustice.

66. The parties are in dispute about whether the facts give rise to a true *res judicata* or merely an issue estoppel. NASASA says that it does not rely on issue estoppel but a “classic” *res judicata*. It went to court and sought an order declaring the agreement to be valid and binding, which it obtained. SAPO counters that the elements of the current action for damages are significantly different from the main application for specific performance. In its view there are merely common elements in the allegations made in the two suits, but there is no commonality in the cause of action and the relief claimed and hence NASASA in fact has pleaded a defence of issue estoppel. In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) the respondent had obtained the right to distribute one of the appellant’s products for the sum of R150 000. The respondent alleging breach of contract instituted action against the appellant claiming repayment of the R150 000. The appellant failed to contest the action and the respondent was granted judgment by default. Some months later the respondent instituted a second action for damages. To this the appellant

filed a special plea of *res judicata*. In holding that the *exceptio res judicata* could not be relied on to thwart the claim for damages, Olivier JA reasoned:

- “(3) The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?
- (4) In my view, the answer must be in the negative. The same thing is not claimed in the respective suits, nor is reliance placed on the same ground or cause of action. What was claimed in the first suit was restitution in the form of repayment of the purchase price previously paid by the claimant. Such a claim is not one for damages but is a ‘distinct contractual remedy’ In the second suit damages were claimed, which is in its very essence clearly distinguishable from restitution. The same thing is not claimed in the respective suits, the issue now under consideration has not been finally laid to rest.
- (5) Nor are the respective claims based on the same grounds or same cause of action. In the first suit, the necessary allegations were the conclusion of the contract, the breach thereof, the payment of the purchase price and the cancellation of the contract. In the second suit, the respondent was required to plead and prove the conclusion of the contract, the breach and the cancellation thereof, that damage was suffered, the causal chain between the breach and the damage and the

quantum of damage. The mere fact that there are common elements in the allegations made in the two suits does not justify the *exceptio* - 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 grounds”.

67. SAPO similarly draws a distinction between a claim for specific performance and a claim for damages, albeit in respect of the same alleged breach. Unlike in the first suit, NASASA in order to succeed in the second suit will have to prove cancellation (which the pleadings place in issue), that damage was suffered, the causal chain and *quantum*. Nor has the defence of illegality been laid to rest.

68. It would be inappropriate for me at this point to pronounce upon whether NASASA’s defence raises a plea of *res judicata* in the full sense or an issue estoppel involving the relaxation of the requirements. Such is properly a matter for the court called upon to decide that issue. Nevertheless, there is no denying that the question is alive on the pleadings and should the court ultimately decide that there is no commonality in cause of action and relief claimed, it will be obliged to rule whether considerations of equity, fairness and public policy justify upholding a plea of issue estoppel. Evidence will be required for that purpose. That evidence would include evidence pertaining to the legality

of the contract. Hence, the issue of legality and *res judicata* are interlinked and it may be better to examine the issue of legality before deciding the plea of issue estoppel.

69. In his submissions, Mr *Levenberg* for NASASA challenged this line of argument on three principal bases. Firstly, he argued that the illegality of the contract and/or the correctness of the judgment of Sapire AJ would not be relevant in any decision to uphold or reject a plea of issue estoppel. A court adjudicating a plea of *res judicata* should not consider the merits of the prior decision as a factor in determining whether or not to uphold the plea. Secondly, on the pleadings as they stand, so he maintained, SAPO has not pleaded any facts that demonstrate that the issue of *res judicata* and the merits of the legal invalidity defence are inextricably interlinked, and the proposed amendment does not sufficiently rectify the deficiency. Thirdly, it was submitted that even if this is a case of “discretionary *res judicata*”, involving a plea of issue estoppel, it would be inappropriate as a matter of policy for a court to decide the very issue that NASASA maintains is *res judicata* in the process of determining whether or not to sustain the plea of *res judicata*.

70. Mr *Levenberg* referred to *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) in support of his proposition that the legality of the agreement and the correctness of the prior judgment are not

relevant. At issue in that case, *inter alia*, was the question whether the appellant should have been afforded the opportunity by way of the second suit of proving that certain evidence upon which the judgment in the first suit was predicated was wrong. Steyn CJ (at 564C-D) held the following:

“Accordingly to *Dig. 50.17.207*, *res judicata* is accepted as the truth. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to *res judicata* the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment It is quite clear, therefore, that a defendant is entitled to rely upon *res judicata* notwithstanding that the judgment is wrong.”

These *dicta* are founded on an earlier pronouncement of De Villiers CJ in *Bertram v Wood* 10 SC 177 at 180 where he held:

“The meaning of the rule is that the authority of *res judicata* induces a presumption that the judgment upon any claim submitted to a competent court is correct and this presumption being *juris et jure*, excluded every proof to the contrary. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirements of good faith which as said by *Gaius* (*Dig. 50.17.207*) does not permit of the same thing being demanded more than once.”

71. Both these decisions were decided some time before Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* (*supra*) cautioned against clinging with “literal formalism to propositions in the old

authorities, which would be at odds with the vigorous development of the law to provide for the demands of novel factual situations ...” That, perhaps, accounts for the more nuanced approach of Thring J in *Holtzhausen and Another v Gore N.O. and others (supra)* when faced with a similar proposition to the one made by counsel in this case. In *Holtzhausen* the applicant purchased a farm from the respondent at a public auction. When the applicant failed to furnish a guarantee despite demand, the respondent cancelled the sale and arranged for a second auction. The applicant launched an application for an urgent interim interdict restraining the respondent from proceeding with the second auction pending an action for specific performance. Pincus AJ dismissed the application on the ground that the applicant had failed to furnish the seller with a guarantee when required to do so and thus had not established a *prima facie* right to transfer. Nothing came of the auction. The respondent however sold the farm to a third party. The applicant launched fresh proceedings to interdict the transfer. Thring J was of the opinion that Pincus AJ in the first application had been wrong in finding that the condition of sale had fixed a time for the furnishing of the guarantee. Counsel, relying on *African Farms and Townships Ltd v Cape Town Municipality (supra)*, submitted that even if the decision of Pincus AJ was wrong, that would not preclude the respondents from relying on it for the purpose of *res judicata*. Thring J held (at 156A-D):

“This is, with respect, undoubtedly correct where all the requirements for the defence for *res judicata* have been strictly and fully met. However, on my findings as expressed above that is not the case here: in my view requirements (ii) (*eadum petendi causa*) and (iii) (*eadem res*) have not been strictly met; indeed I am asked ... to relax strict compliance with them insofar as may be necessary and to uphold the defence despite the absence of strict compliance.

It seems to me, however, that if I were to do that and non-suit the applicants I would be enabling the ... respondents to shelter, so to speak, behind a decision of this Court which I regard as wrong and unsupportable. That weighs very heavily with me in the exercise of my discretion in deciding whether or not I should relax the requirements. To me it seems clear that overall fairness and equity demand, in these circumstances, that I should exercise my discretion against the respondents and decline to relax the requirements, or I may be in danger of facilitating a “palpable reality of injustice”...”

72. Counsel has submitted that this finding is manifestly wrong in that it is contrary to the underlying principles and public policy of the doctrine of *res judicata*. I am unable to agree. The policy that there should be an end to litigation and that litigants should not be vexed twice by the same cause of action, as the learned judge intimated, applies where the requirements of *res judicata* have been strictly and fully met. Issue estoppel is another matter. Considering its potential to cause injustice, it involves the exercise of an equitable discretion structured upon principles of fairness taking into account a basket of legitimate considerations including the correctness of the prior judgment, and perhaps, as SAPO contends, the undesirability of enforcing a contract which is legally invalid. The policy underlying the

legal principle pronounced in *Bertram v Wood*, and in *African Farms and Townships Ltd v Cape Town Municipality*, remains undisturbed. It is qualified merely by the proposition that equity may demand departure from the principle in cases where the defence of *res judicata* in truth seeks to advance the broader defence of issue estoppel.

73. Support can be found for the thinking of Thring J in the recent decision of the Supreme Court of Appeal in *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at 587E where Leach AJA (as he then was) stated:

“... while the law indeed allows a party to rely upon such a defence even if the original judgment was incorrect, I have grave reservations about whether it is permissible to do so if the effect will be to enforce a contract which is legally invalid.”

Similar development of the law has occurred in English law. In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 (PC) the Privy Council held that a *res judicata* estoppel would not normally sanction the breach of a statute. Our own law regarding whether estoppel may be raised against a statutory body is equally instructive. Estoppel may be relied on when the defence raised is that the relevant internal arrangements or formalities were not complied with. But where the failure

by the statutory body relates to compliance with provisions which the legislature has prescribed for the validity of a specified transaction, such failure cannot be remedied by estoppel because that would give validity to a transaction which is unlawful. A state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel - *City of Tshwane Municipality v RPM Bricks* 2008 (3) SA 1 (SCA).

74. None of these issues falls to be decided by me in this matter. The questions of whether the defence is one of *res judicata* in the strict sense or one of issue estoppel, whether or not the judgment of Sapire AJ is correct, whether the agreement is legal or not, and if illegal whether it should be enforced indirectly through issue estoppel, are questions for the court determining the *res judicata* issue. Nevertheless, I am persuaded by the arguments advanced on behalf of SAPO that much of the evidence led with the aim of resisting the plea of issue estoppel will have to be reproduced in order to address the merits of the defence of statutory illegality. Convenience and cost dictate that the issues be explored simultaneously.
75. I therefore do not agree with Mr *Levenberg* that it will be inappropriate, as a matter of policy, for a court to decide the very issue (legality) that NASASA maintains is *res judicata* in the process of determining whether

to sustain the plea of *res judicata*. If NASASA establishes a strict *res judicata* the court will not need to decide the question of illegality, despite having examined it, or it may prefer to do so in the alternative lest it be mistaken, and thereby it will ventilate all the issues in a manner advantageous to the appeal court in the likely event of an appeal. Moreover, a separate and prior adjudication of the *res judicata* or issue estoppel defence would not be dispositive of the merits. The other defences of severability, the right to terminate by reasonable notice and the alleged repudiation by NASASA would still have to be adjudicated upon even if the court determines that SAPO is precluded from denying validity. I will deal more fully with the alleged lack of particularity on the question of illegality when discussing the amendment. Suffice it to say, in the context of the separation application, if the issues of legality and issue estoppel cannot be conveniently separated, as is the case, then cognisant of the possibility that an amendment can cure any deficiency, separation should not be ordered on grounds of lack of particularity.

76. In the result, therefore, I am satisfied that the question of *res judicata* cannot conveniently be decided separately from the other questions pertaining to the merits of the action and accordingly that the relief sought in prayer 1 of the notice of motion should be refused.

Separation: Merits and *quantum*

77. I turn now to the arguments in relation to the proposed separation of merits and *quantum*. As explained above, in its letter of 15 February 2010 SAPO's main argument against separation was that the issues of illegality and *quantum* overlapped and were inseparable. This did not address NASASA's request for separation of the *res judicata* issue from all other issues. Nevertheless, it prompted NASASA to address in its founding affidavit the question of whether illegality and *quantum* were indeed inseparable. It disputed whether evidence that the agreement constitutes a "future financial commitment" or a "significant joint venture" etc, or evidence concerning the cost of making staff and infrastructure available, would have any relation to or bearing upon the *quantum* of NASASA's damages.
78. In paragraphs 79-83 of the founding affidavit NASASA set out the broad scope of the evidence it proposes to lead to prove *quantum*. It intends to provide evidence concerning the operations and operating profits of its shareholder GloCell and its business model. As discussed earlier, GloCell has approximately 550 franchise style retail stores and supplies approximately 100 other dealers. The franchise retail stores are stores within stores and operate in the manner contemplated in the agreement

between NASASA and SAPO. The evidence in support of *quantum* will be evidence concerning the cost to NASASA of maintaining and running its stores within stores at its risk, and would be supplemented by evidence regarding market conditions and profitability. This, it argued, bore no relation to any evidence SAPO would have to lead to establish illegality. In the light of that, the refusal to agree to a separation of merits and *quantum* was unreasonable. In answer to this, SAPO pointed out that NASASA had not proposed such a formulation for separation. In its view good reasons exist why such a separation would be inconvenient and inappropriate. The answering affidavit was accordingly in the main confined to the question of separating *res judicata* from the illegality issues. It reiterated nonetheless that a separation of merits and *quantum* will not be convenient because “compliance with the relevant statutory provisions are influenced by the extent of the *quantum*”.

79. SAPO’s concerns are set out in paragraph 35.3 of the answering affidavit as follows:

“35.3 SAPO believes that the underlying reason for the plaintiff’s approach in this separation application is a tactical one:

35.3.1 As there was no roll-out of any operations under the disputed agreement; the damages claim pursued by the plaintiff in the action will need to be premised on assumptions of size, scope and extent of the operations it intended to roll out.

- 35.3.2 It appears from the founding affidavit that the plaintiff has not yet determined how it is going to prove the *quantum* and what the financial model is expected to look like.
- 35.3.3 This has recently been confirmed by the plaintiff in its first discovery affidavit (attached marked **ST2**) and in its reply to SAPO's request for further particulars for trial (attached marked **ST3**) which was delivered while this affidavit was being finalised. These documents make it clear that the plaintiff has not begun preparation on the evidential aspects of its case, especially the *quantum*.
- 35.3.4 Plaintiff wishes to resolve the statutory defences without having to reveal the size and the scope of the operations which it assumes, or will assume, in its *quantum* model. The size and the scope of the project that the plaintiff contends would have been rolled out pursuant to the agreement will not only inform the *quantum* of the claim that is made but will resonate distinctly when statutory concepts such as, *inter alia*, "future financial commitment", "joint venture" and the SAPO budgets are debated and decided.
- 35.3.5 The content of paragraph 26.1 when read with paragraphs 86 - 90 of the founding affidavit, evidence an attempt by NASASA to "keep its powder dry" on the size and scope of the intended project until the issue of *quantum* arises.

35.4 SAPO believes it is NASASA's intention, by adopting such an approach, to remain vague and uncommitted on the size and scope of intended operations when the issues of statutory compliance, "future financial commitment", etc are decided and then to motivate a large scope and roll out when its *quantum* is to be decided. Such a tactical approach would be severely prejudicial to SAPO, the public interest and the interest of justice.

35.5 The plaintiff's refusal to make proper discovery and to provide the particularity requested by SAPO, following its late application for separation, constitutes a blatant attempt to engineer a separation through its own default. Argument will be addressed that the approach adopted by the plaintiff should not be allowed to engineer a separation through its unilateral disregard for the Rules."

80. In paragraph 36.2 of the answering affidavit SAPO added that the evidence of the size and scope of the intended roll out and operation will be relevant in resolving the issue of *res judicata*. By that I understand it to mean that the court determining the *res judicata* issue, if it concludes that such determination involves an issue estoppel and discretionary relaxation of the *eadem petendi causa* and *eadem res* requirements, would need to be apprised of this evidence and information for the purpose of deciding whether fairness, equity and public policy justify upholding a plea of issue estoppel. In other words, the evidence on *quantum* is intertwined not only with the evidence on illegality, according to SAPO, but also with the

evidence on issue estoppel which, as I have found, is itself intertwined with that of illegality.

81. The new approach taken by SAPO in its answering affidavit, compared to its stance in earlier correspondence, and its refusal to be drawn on a clear separation of merits and *quantum* irked NASASA somewhat, causing it to complain that SAPO had not answered the allegations in the founding affidavit *ad seriatim* and sufficiently. I disagree. NASASA had not at that stage requested a separation of merits and *quantum*, and, in any event, SAPO set out its position quite clearly in paragraph 35.3 of the answering affidavit. NASASA's reply to paragraph 35.3 is concise. It disputed that it is uncertain about how it is going to prove *quantum* and maintained that its particulars of claim contain significant details reflecting the computation of *quantum*. Yet, in paragraph 29.9 of the replying affidavit it seems to acknowledge that it is indeed not ready to proceed on *quantum*. There it states that demonstrating the actual amount of *quantum* involves locating and determining the appropriateness of source documents within GloCell. Experts will also have to be engaged to formulate expert summaries, and it is concerned, understandably I might add, that the related costs will be wasted if it is unsuccessful on the merits. The reply does however not comment directly on the point made in paragraph 36.2 of the answering affidavit that NASASA's evidence regarding the size and scope of the intended roll out and operations will be relevant as well in deciding the

discretionary issues in relation to the plea of *res judicata* and issue estoppel.

82. Two additional points are made in reply, to which I have already alluded. The first is that the cost to SAPO of complying with its obligation, and thus the incurring of a future financial commitment, is unrelated to the cost of NASASA performing its obligations. That may be true, but the evidence of both cost structures may be needed to supplement the evidentiary basis upon which the discretion to relax the *res judicata* requirements may be exercised. Secondly, it was alleged that no facts were pleaded by SAPO that would justify the refusal of issue estoppel on fairness or policy grounds. The proposed amendment seeks to cure that defect and I leave consideration of the point to my discussion of that application.
83. A fuller case for separation of merits and *quantum* is made out in the three supplementary affidavits filed after NASASA filed its amendment to the notice of motion to include the alternative prayer. The founding supplementary affidavit, with reference to the changed stance of SAPO and the alleged failure of SAPO to make out a proper case against separation, repeats the assertion that there is no basis for refusing separation and draws attention to two further developments. The first is the practice directive of the Deputy Judge President. The second is that NASASA has made headway in responding to SAPO's request for

particulars and has made appropriate discovery appertaining to the issue of *quantum*.

84. The issue of *quantum* will undoubtedly be difficult and complex requiring a considerable amount of evidence for its resolution, and necessitating analysis of thousands of pages of documentary evidence and a parade of experts. The trial on *quantum* will be longer than the trial on merits and if NASASA is unsuccessful on the merits, *quantum* could be avoided. Success on separated merits could possibly have the advantage that *quantum* might be resolved through negotiation and settlement, though, in my opinion, considering the stance taken by SAPO thus far, such an eventuality is unlikely. A complex trial on *quantum* will inevitably follow. That consideration is a significant factor militating against separation especially when the merits, as in this case, will not involve much evidentiary complexity beyond the applicability to the merits of the financial aspects normally reserved when considering *quantum*.
85. SAPO contends that a trial on the merits without clear particulars of the extent of the operations would be unfair because there exists the danger, apparent from the pleadings and discovery, that the court will be faced with the prospect of evaluating the merits of the defences on a hypothetical financial model of the operation roll out and (if the defences are unsuccessful) determining the *quantum* of the case on a different

model. Because there will be a significant correlation between increasing sales and the increasing costs of making those sales, the scale of the operation could well be relevant to the application of the statutory provisions. There needs to be evidence about the location of the outlets, the products to be sold at each location and the *quantum* of sales at each outlet. This evidence will feed into the determination of materiality in relation to the existence of a future financial commitment, a significant business undertaking and a joint venture, which might lead, if not to invalidity, to the contract being voidable at the instance of SAPO.

86. In annexure F to the particulars of claim NASASA reflects that the *quantum* of its damages is based on the assumption that an equal number of products would be sold in each outlet. In its response to the request for further particulars it changes this assumption and alleges that sales predictions were done on an average sales per store basis and that average sales per store for pre-paid products were assumed to be the same as the average sales achieved by GloCell stores during the same period. SAPO claims the assumptions are wrong and take no account of the difference between the Post Office infrastructure and personnel and that of GloCell and hence the likely sales volume in each outlet. NASASA will probably have to amend its quantity schedule to take account of those differences. Hence, SAPO argues, the debates about legality, voidability, fairness and policy will best be served only once all the evidence about

the cost and scale of, and the variances in, the operational roll out are on record.

87. I agree with SAPO. The extent of the damages claimed (R1,3 billion), the parties involved, the status of the Post Office as a public entity and the issues of public policy and fairness that are infused in the defences of *res judicata*, illegality and unenforceability militate in favour of observing caution. This is especially the case when the possibility exists that the plaintiff might gain an undue tactical advantage in putting its version. The assessment of fairness and public policy will be difficult, even untenable, without a full appreciation of the business model upon which the roll out would have occurred across the different outlets. NASASA should be expected to commit to a model and a particular quantity schedule for the dual purpose of assessing the arguments on the merits and *quantum*. Separation poses a risk of variance in the versions put forward at the two different stages. Considering that SAPO may have the duty to begin in a separated trial on the merits of the defence, NASASA will have the tactical advantage of delaying the formulation of its *quantum* model with a view to adapting it to the evidence elicited in the merits hearing. Such a scenario undoubtedly will detract from the ability of the trial judge to do justice on the merits of the defences.

88. As regards the Practice Directive, it is not correct, as SAPO has submitted, that it will apply only to matters involving the Road Accident Fund. The Directive specifically states that it is applicable to “all claims for damages, whether delictual or contractual, and all matters where expert notices and summonses must be delivered”. The laudable purpose of the Directive is to compel meaningful negotiations to settle matters and delineate issues by appropriate pre-trial processes, in the hope of reducing the number of cases enrolled for trial. In terms of paragraph 5.3 of the Directive where a first pre-trial conference does not settle the merits, “there will be an automatic separation of merits and *quantum* in accordance with Rule 33(4) unless the parties agree that there will be no separation”. I do not read this provision to mean that except in those cases where the parties agree not to separate merits and *quantum*, a compulsory separation will be foisted upon the party resisting separation. There is no such thing as an automatic separation in accordance with Rule 33(4) in such a guise. The intention is rather that where there is a dispute about separation the parties must at that stage approach the court in terms of Rule 33(4) for a determination of whether it is convenient to separate before the matter will be processed further. The application will be decided in accordance with the substantive provisions of the rule with the party resisting separation bearing the onus of proving the convenience of separation. In any event, if I am wrong in my interpretation, the Directive, in terms of paragraph 9.2, is only applicable from 31 January

2011. The interpretation advanced by NASASA would be restrictive of SAPO's rights and I accordingly hesitate to apply it retrospectively in exercise of my discretion to determine separation with particular regard to the convenience of the court in contrast to the convenience of the parties.

89. In the result, therefore, I am not persuaded that the issue of *quantum* can be conveniently separated from the merits of the action. The application for separation accordingly should be dismissed. There is no reason why the costs should not follow the result. Taking account of the obvious complexity the use of two counsel was justified.

The application for amendment

90. It remains to deal with the application to amend the rejoinder. The application and the amendment seek to add matter to the rejoinder filed in answer to NASASA's replication of *res judicata* and/or issue estoppel. The amendment amplifies upon the reasons for SAPO's denial of the estoppel. In the rejoinder SAPO simply denied that Sapire AJ had decided the legality issue. The amendment identifies further matters for ventilation at trial and does not introduce a new dispute. It records elements which SAPO considers to be relevant for the determination of the *res judicata* and issue estoppel.

91. The amendment intends to amend the rejoinder by adding paragraph 3.3 after paragraph 3.2 of the rejoinder. It reads:

“3.3 For the following reasons the judgment by Sapire AJ did not finally determine any of the issues now in dispute between the parties, including those issues listed in paragraph 12 of the plaintiff’s replication:

- (a) It was unnecessary to decide whether there was a valid and binding agreement in view of the learned judge’s refusal of specific performance in the application proceedings; the validity of the agreement was accordingly not finally disposed of in the application.
- (b) None of the issues now raised in paragraph 3 of the plea herein were considered or decided by Sapire AJ, as the issues in the application were different from the issues now arising in this action; these issues would require new evidence to be adduced upon which such issues could be considered and decided.
- (c) Such new evidence will include evidence as to: whether the relationship between the plaintiff and the defendant was a significant partnership, trust, unincorporated joint venture or similar arrangement as referred to in section 54(2) of the PFMA; whether that relationship constituted a significant business activity as referred to in section 54(2)(e) of the PFMA; whether the board of directors of the defendant informed the relevant treasury of the agreement, promptly or at all, before the agreement was concluded; whether the board of directors of the

defendant submitted particulars of the transaction to the Minister of Communications (its executive authority), promptly or at all, before the agreement was concluded; whether the obligations arising for the defendant under the agreement constituted a future financial commitment as referred to in section 66(1) of the PFMA; the need for permission by defendant's accounting authority as required by section 66(3)(a) of the PFMA; whether Maanda Manyatshe had the necessary authority to conclude the agreement on behalf of the defendant; whether the agreement was in truth a joint venture as contemplated in the Post Office Act and defendant's Memorandum; whether the Minister of Communications had given approval prior to or after the conclusion of the agreement, and whether the concurrent approval of the Minister of Finance had been obtained prior to or after the conclusion of the agreement; whether the agreement was entered into by the defendant represented by its board of directors, or was approved by defendant's board of directors; the quantum of any damages which might be recovered by the plaintiff if the agreement is enforceable.

- (d) Considerations of fairness and equity, both to the parties and to the country as a whole dictates that *res judicata*/issue estoppel should not operate to prevent the defendant from raising these defences in these proceedings, especially as the defendant is an organ of state which is ultimately dependent on state funding, and which is subject to strict statutory controls before entering into commercial ventures with third parties such as that embodied in the agreement; the quantum of the damages

claimed by the plaintiff exceeds R1 billion and the defendant's resources are required to provide public services."

92. NASASA argues generally that the proposed amendment is premised on the wrong assumption that NASASA is relying upon an "issue estoppel in order to preclude reliance on the defence of legal invalidity". In its view there is in fact a commonality of cause of action and relief claimed and hence there is no question of relaxing the strict requirements of *res judicata*. As I explained when discussing the separation application, it will be for the trial judge to determine that question. NASASA will have to prove its allegation of strict *res judicata* at trial. SAPO has placed the question in issue and the pleadings allow for the possibility of issue estoppel. The proposed amendment amplifies the denial and introduces other factors which SAPO alleges are relevant. Likewise, the evidence to be admitted in deciding whether fairness and policy should permit an issue estoppel is a matter for the trial judge.
93. The primary concern in considering the amendment is to do justice between the parties by ensuring that the pleadings delineate the real issues between them. The party seeking the amendment must explain the reason for it and that it is *bona fide*. He must also show "*prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation" - *Trans-Drakensberg Bank Ltd (under judicial management) v*

Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (DCLD) at 64H-641A.

94. NASASA challenges the allegation contained in the proposed paragraph 3.3(a) as being at variance with the language of the judgment itself. NASASA did not go to court on the main application solely for the purpose of obtaining an order of specific performance. It also specifically claimed and obtained an order declaring that the agreement was valid and binding. Accordingly, NASASA argues that this paragraph of the proposed amendment is excipiable because it is unsustainable in the face of the judgment, the evidence upon which it was based and the order granted. SAPO did not petition the Supreme Court of Appeal after Sapire AJ refused leave to appeal and hence the issue has been finally decided.
95. At first glance there is compelling logic in NASASA's submission. However, as I read paragraph 3.3(a) the allegation aims at putting in issue the necessity of the finding relative to the order refusing specific performance and hence that the alleged lack of essentiality precludes reliance on *res judicata*. The allegation relies in part on a somewhat ambivalent statement in the judgment of Sapire AJ in the main application to the effect that the declaratory relief "was strictly not necessary at the time that the application was initiated". Despite that view, he concluded that the alleged repudiation by SAPO entitled NASASA to a ruling on the

question of repudiation. But instead of making a declarator only that repudiation had occurred he also granted an order declaring the contract valid. Moreover, in his judgment in the application for leave to appeal he pronounced that the question of statutory invalidity was not decided in the main application and remains moot, with the result, in his view, that SAPO is not prevented by issue estoppel or *res judicata* from raising it in the action. Whatever the merits of the allegation or the pronouncements of Sapire AJ, the allegation in my view, at the very least, is deserving of consideration and *prima facie* introduces a triable issue, namely whether the alleged lack of necessity and the issue of validity not raised or considered preclude the defence of *res judicata* or issue estoppel, in the latter instance on the grounds of unfairness or public policy. There will therefore be no harassment of, or prejudice to, NASASA by allowing this amendment.

96. The allegation in the proposed paragraph 3.3(b) is directed specifically to the fact that Sapire AJ did not decide the statutory invalidity issues, as he stated in the judgment in the application for leave to appeal. These issues, it is alleged, did not arise in the application. The issues in the application were different from the issues arising in the action; these issues would require new evidence to be adduced upon which such issues could be considered and decided. NASASA, besides denying the cogency of the defence of statutory invalidity, reiterates that these issues

were alive in the main application, despite the fact that Sapire AJ later said they were not.

97. Indeed, it is true, the question of legal validity appears to have been contemplated by Ms Lefoka when she wrote the letters of 5 November 2004 and 5 February 2005. I am not convinced, however, that NASASA pertinently raised the issue, as Mr *Levenberg* submitted, in its founding affidavit in the main application and that the absence of any *seriatim* response in the answering affidavit means in consequence that its allegations of statutory validity are deemed to be admitted and SAPO is prevented from now seeking to contest the allegations that the agreements were “not hit” by PFMA or POA. During argument I was not referred to any paragraph in the founding affidavit where any such allegation was made, and after careful perusal I have been unable to find one. In paragraphs 69 and 70 the deponent deals with Ms Lefoka’s letter of 5 February 2005 in which she alluded to the legislation (without making any precise claim that the contract was invalid), but there is no clear averment made that there had been no statutory contravention or that the contract was “not hit” by the legislation and hence valid. The point made in paragraph 70 is rather that the letter constituted a repudiation. Whether or not *res judicata* or issue estoppel will operate ultimately to prevent traversing the statutory defences is not of immediate concern. The pleading of the fact in the proposed paragraph 3.3(b) that they were not

traversed and would require additional evidence will be something deserving of consideration and a triable issue in deciding the *res judicata* defence.

98. Paragraphs 3.3(c) and 3.3 (d) furnish a synopsis of the issues that would be addressed by such new evidence precognising the court and NASASA of what SAPO considers relevant in determining *res judicata* and issue estoppel. It addresses the factors that will be relevant to the court exercising its discretion in weighing the competing public policy and public interest factors that arise from the facts of this case.
99. NASASA takes issue with these paragraphs on the grounds that insufficient factual basis is pleaded. The paragraphs fail to allege specific facts or surrounding circumstances that demonstrate the alleged illegality, and, so it submits, the paragraph is excipiable because it is vague and embarrassing in its failure to set up a factual basis to support the conclusory allegations set forth. As Mr *Levenberg* put it, the paragraphs are “an open sesame to almost any evidence at all and does not assist in defining the issues for trial”.
100. As a general rule, a pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the other party to know what they are - *Nasionale Aartappel Koöperasie Bpk v Price*

Waterhouse Coopers Ing 2001 (2) SA 790 (T) at 798F-799J. The material facts pertaining to the alleged illegality of the agreement are clearly and concisely stated in paragraph 3 of SAPO's plea, in which all the essential allegations in support of the claim of illegality are made. Therefore, the proposed paragraph 3.3(c) implicitly pleads the same facts and surrounding circumstances demonstrating the alleged illegality and lays down the "recipe" of the evidence that will be led in respect of the facts and conclusions already pleaded, which, as I have found, are intertwined with the *res judicata* defence. There was no exception taken to the plea and there is no need for SAPO to plead evidence when the material facts have already been pleaded. The *facta probanda* are stated concisely in the plea. Paragraph 3.3(c) of the proposed amendment alludes to the *facta probantia* that in the ultimate analysis will form the evidentiary substratum upon which a conclusion that the *facta probanda* have or have not been established will be based. SAPO seeks to introduce these issues to give notice of its intention to deal with them in the context of *res judicata* which is an issue on the pleadings and to avoid a debate whether the pleadings provide a basis for such evidence to be led. It is debatable, in light of the plea, whether it is necessary to go that far on the pleadings, but I see no basis for challenging the *bona fides* or legitimacy of the pleading which patently aims to elucidate the real issues in relation to *res judicata*. Accordingly, there is no merit in NASASA's objection that these paragraphs are irregular or excipiable for failing to plead a sufficient

factual basis.

101. The other objections raised by NASASA to the proposed paragraphs 3.3(c) and 3.3(d) are predicated upon its assertion that the *res judicata* defence it raises is one *stricto sensu* and not one of issue estoppel. As I have indicated more than once, such is an issue falling within the remit of the court called upon to decide the issue of *res judicata*, the central inquiry there being whether there is a commonality of cause of action and relief claimed in the main application and the action. If not, as NASASA contends, then issue estoppel arises on the pleadings. The debate about what issues are relevant, and whether a public entity on fairness and policy grounds may be granted leniency for neglecting to raise the defence of statutory invalidity earlier, are matters within the province of the trial court adjudicating *res judicata*. They are triable issues by virtue of the plea, replication and rejoinder. Allowing an amplification of these issues in the manner proposed in the amendment adds nothing to their merits or demerits, and will bring neither prejudice nor harassment to NASASA. The proposed amendment has adequate foundation in the plea and hence should be allowed.

102. While it is true that an amendment is an indulgence, the opposition to the amendment loses sight of the fact that it seeks primarily an amplification of an issue already on the pleadings and there being no need to plead evidence. For that reason, rather than ordering the costs of the

amendment to be costs in the cause, in this case costs should follow the result.

103. For the foregoing reasons, the following orders are issued:

- i) The application for separation of certain issues in terms of Rule 33(4) and in terms of the notice of motion dated 31 March 2010 as amended is dismissed.
- ii) The defendant is granted leave to amend its rejoinder in the manner and on the terms set out in its notice of intention to amend dated 23 June 2010.
- iii) The plaintiff is ordered to pay the costs of both applications, such costs to include the costs occasioned by the employment of two counsel.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 27 & 28 July 2010

For Applicant Adv P Levenberg SC, Adv G Kairinos, Johannesburg

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