



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 7793/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
26/08/2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

ATTORNEYS FIDELITY FUND BOARD

OF CONTROL

Applicant/First Respondent

and

RODNEY ADRIAN LOVE

First Respondent/Applicant

THE MINISTER OF JUSTICE OF THE

REPUBLIC OF SOUTH AFRICA

Second Respondent

THE LAW SOCIETY OF THE NORTHERN

PROVINCES PRETORIA

Third Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 26 August 2024.

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

S VAN NIEUWENHUIZEN AJ

[1] The parties will, for the sake of convenience, be referred to as follows:

1.1 the applicant as “the Fund” or “Board” as may be convenient; and

1.2 the first respondent as “Love.”

[2] The Fund applies for leave to appeal against the whole of my judgment and order in the above matter delivered on 18 January 2024. I point out that in its application for leave to appeal, I am referred to as “S Nieuwenhuizen AJ,” which is incorrect. I am actually “S van Nieuwenhuizen AJ.” The use of the initial has become necessary due to at least 2 other van Nieuwenhuizens’ also being appointed as acting judges from time to time.

[3] The orders subject to the appeal read as follows:

- "1 The period within which the Applicant had to lodge its claim with the Fund is herewith extended until 7 October 2013;*
- 2 The late filing of the Applicant's heads of argument is hereby condoned.*
- 3 The First Respondent is ordered to pay the Applicant's costs including the costs of 2 counsel where employed;*
- 4 No order of costs is made in respect of the Second Respondent's costs."*

[4] The Fund contends that there are reasonable prospects of success on appeal and another court may find that I erred in the following respects:

"(a) at paragraph 87.2 of the judgment that "the case concerns an application to, and the failure by, the Fund to extend the time period" in that on an objective assessment of the facts there was neither an application nor a failure";

(b) at paragraph 87.3 of the judgment that "Love's attorney requested the Fund to extend the period of notice...under section 48(2) of the [Attorneys] , since on an objective assessment of the facts, there was no such application";

(c) at paragraph 87.4 of the judgment that the letter concerned contained grounds in support of the extension application, since on an objective assessment of thereof , none of the contents related to such an extension being justified on the grounds that the notice concerned was lodged as soon as was practicable as required by section 48(2);

(d) in sub-paragraph 87.4.7 of the judgment that the Fund was "expressly requested to extend the time periods applicable to the filing of a claim" since there was no such express request";

(e) in sub-paragraph 87.4.8 of the judgment that there was a request for the Board to consider;

(f) in paragraph 90 of the judgment that the Board failed to exercise the discretion conferred upon it by section 48(2) of the Attorneys Act in that on an objective assessment of the facts the Board was not called upon to do so and

the jurisdictional facts for the exercise of such a discretion were not established;

(g) in paragraph 98 of the judgment that the purported failure of the Board to exercise a discretion in terms of section 48(2) of the Attorneys Act in this matter constituted any violation of PAJA;

(h) in paragraph 99 of the judgment that had the Board considered the purported request for an extension it would have had to grant the request for an extension;

(i) in paragraph 103 of the judgment that the claimant submitted his claim as soon as was practicable and, in doing so, ignoring the unanimous and express findings of fact of the SCA in SCA Appeal case no 170/2020 ((170/2020) [2021] ZASCA 44 (14 April 2021)) at paragraphs 29 to 33 thereof, which were as follows:

“[29] Having notified the Fund of his claim, he gave evidence on 24 July 2014 at an enquiry arranged by the Fund. In response to a question by the Fund’s representative he said that on 15 May 2012, the date on which Mr Pavoncelli undertook to pay the R10 million as well as Mr Love’s attorney and client costs in the action against Turnbull and Associates, it was quite clear to him that the R10 million was not in the trust account.

[30] At the Fund’s enquiry when asked to explain what the Fund suggested was a two year delay in making a claim against the Fund, he said that he relied on legal advice and that although he had suspicions that the R10 million had been stolen, it was only on receipt of Turnbull and Associates’ business bank statements that he had evidence of the theft. This was the tenor of his evidence at the trial. As appears hereafter this is a flawed explanation.

[31] Mr Love’s version is that the R10 million had to remain in the trust account until signature of the agreement for the purchase of shares in Sword Fern. By June 2011 negotiations had broken down. No written agreement was ever signed. A demand to repay the R10 million was ignored.

[32] On 31 October 2011, Mr Love sued Turnbull and Associates for the R10 million. It is clear from the particulars of claim that he knew that the R10 million was no longer in trust. In his alternative claim he alleged that the R10 million had been paid to Mr Pavoncelli. There is no evidence why these allegations were made at this point in time. On 15 May 2012 Mr Pavoncelli undertook to pay the R10 million to Mr Love. The only reasonable inference to be drawn from this undertaking is that Mr Pavoncelli had misappropriated the R10 million from the trust account. At his meeting with the Fund, Mr Love said that when he got the undertaking it was clear that the R10 million was not in the trust account. On 22 November 2012 Mr Love was given copies of the trust account which confirmed that the R10 million had been paid out of the trust

account in 2011. On 28 November 2012 and in the affidavit Mr Love signed in the provisional sentence proceedings he said that Mr Pavoncelli gave him the undertaking to pay the R10 million 'because he has personally misappropriated the R10 million as will appear from what is said hereunder'. At the trial Mr Love said that he gave no mandate to release the R10 million from the trust account, yet the money had been withdrawn in 2011. He also admitted that the R10 million was withdrawn from the trust account within a space of two months. This he knew from the trust account bank statements.

[33] There was no need for Mr Love to wait until September 2013 when he got the copies of the bank statements of Turnbull and Associates' business account before notifying the Fund of his claim. How the Trust money was spent is irrelevant to his claim. From what is set out above it is apparent that Mr Love knew in October 2011 or at the latest 28 November 2012 that there had been a wrongful dealing or appropriation by Turnbull and Associates, alternatively Mr Pavoncelli, of the money entrusted to them in the sense of them having been required by Mr Love to keep the money in the trust account until the happening of some known future event. This event did not occur. [my emphasis]

(j) In paragraph 106 of the judgment that Love did not know before 2 September 2013 that his monies had been stolen, a finding that is in direct conflict with the unanimous and express findings of five appeal court judges and was res judicata in this application;

(k)) In paragraph 112 of the judgment that it was objectively established that Love submitted [h]is claim as soon as was practicable;

(l) In paragraph 183 of the judgment that the learned judge was entitled to review the Board's purported failure to extend the time period for the submission of Love's claim and in ordering that the time period for the submission of Love's claim be extended to 7 October 2013, and

in effectively overturning the implied finding of the SCA that the Fund was not liable to Love in any amount."

[5] On a conspectus of all the grounds raised in the application for leave to appeal, it would appear to me that it is a fairly superficial attempt to deconstruct all the building blocks on which my judgment rests.

[6] Whether or not a section 48(2) application under the Attorney's Act was as a matter of fact before the Fund rests on a proper understanding and

interpretation of the application and my conclusions in this regard. I have dealt extensively in my judgment with the reasons why such a finding should follow and do not repeat same here.

- [7] A fundamental pillar to the application which, if correct, would also permit my judgment to be overturned, are the allegations that, in paragraphs 103 and 106 of my judgment, I made findings on matters the merits of which had already been considered by the Supreme Court of Appeal in effectively infringing on the principle that:

“....where a court has come to a decision on the merits of a question in issue, that question, at any rate as a causa petendi of the same thing between the same parties cannot be resuscitated in subsequent proceedings.”¹

- [8] It was contended in the heads of argument and in the argument itself that the SCA had already considered and determined the merits as to whether Love could not have submitted his claim within the three-month period stipulated in section 48(1) of the Attorneys Act 53 of 1979, and the SCA found that there was no reason for Love not to have lodged notice of his claim within that three-month period.

- [9] Although the SCA was not dealing at the time with section 48(2) of the Attorneys Act, it was submitted that the effect thereof is such that a notice was not lodged as soon as was practicable as required by section 48(2) of the Attorneys Act, which is the cause of action, I had to determine.

¹ *African Farms and Townships v Cape Town Municipality* 1963 (2) SA 555 (A), at 564; see also *Rail Commuters Action Group v Transnet* 2006 (6) SA 68 (C), at 74; *Molefe v Regent Insurance Company (Pty) Limited* [2008] 1 All SA 158 (W), at 160; *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* 5th ed, vol 1, pp 609–612

[10] Based on the aforesaid reasoning, it was argued that the issues and findings I made in the paragraphs specifically referred to conflict with the SCA decision and that I am bound by same.

[11] Reliance was placed on *Mineral-Loy (Pty) Ltd v Highveld Steel and Vanadium Corporation Limited*,² where the court opined as follows:³

"The principle of res judicata, has been the subject of judicial scrutiny over centuries and was once again revisited in African Farms Townships v Cape Town Municipality 1963 (2) SA 555 AD. At 564 C - E, res judicata is defined as follows:

"In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment. (Dig. 36. 1.65 para. 2; Z H[u]ber, supra; Sande; De Diversis Regulis ad L. 207; Voet, 44.2.1). Referring to the rule in Dig. 50.17.207, De Villiers, C.J., in Bertram v Wood, supra at p. 180, held the following:

'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 de 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. 50.17.57), does not permit of the same thing being demanded more than once.'

[15] In essence the principle prevents a party from having a proverbial "second bite at the cherry"

[16] In the present matter, the extended application of res judicata, to wit issue estoppel applies. Issue estoppel has been explained by the Supreme Court of Appeal in Hyprop Investments Ltd v NSC Carriers & Forwarding CC 2014 (5) SA 406 (SCA) at para [14] as follows:

"Brand JA pointed out that the plea of res judicata - that the matter has already been decided - was available where the dispute was between the same parties, for the same relief or on the same cause (in Voet's words, idem actor, idem res et eadem causa petendi). The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel -

² *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T), at 181; see also *Herbstein and Van Winsen*, *op cit* at 610–511

³ 2016 JDR 0936 (GP), at paragraphs 14–16

borrowing the term from English law. The relaxation and the application of issue estoppel effectively started in the Boshoff matter where Greenberg J referred to Spencer-Bower's work on Res Judicata. In Smith v Porritt Scott JA explained the evolution of the defence as follows:

'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 of 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 ...Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others'

- [12] It was further submitted by the Fund that, in the present matter, it does not matter whether the test as quoted above is the more relaxed test, known as the "issue estoppel approach" or the traditional approach to the concept of *res judicata*. It was specifically submitted that, even if the court were to find that there "is not an absolutely identity of relief in the cause of action," the issue of fact or law that was enquired into by the learned judge *a quo* "was an essential element of the judgment on which reliance was placed," i.e. the aforementioned judgment of the SCA. Hence, it was submitted that the issues referred to, already having been determined, there was no room for a finding on the same facts under the rubric of section 48(2) of the Attorneys Act. This was of course never expressly pleaded given that the factual defence raised

by the Fund was that at no stage a claim under section 48(2) of the Attorney's Act was lodged.

[13] It was further submitted that it would follow that I should not have found:

13.1 in paragraph 99 of my judgment, that, had the Fund considered the purported request for an extension, it would have had to grant the request for an extension, since clearly that would have had to entail a finding that the notice had been lodged as soon as was practicable, notwithstanding that it was lodged at a date significantly later;

13.2 in paragraph 112 of my judgment, that it was objectively established that Love submitted his claim as soon as was practicable; and

13.3 in paragraph 183 of my judgment, that I was entitled to review the Fund's purported failure to extend the time period for the submission of Love's claim in ordering that the time period for the extension of Love's claim be extended to 7 October 2013, since that necessarily entailed a finding that a notice had been lodged as soon as was practicable, notwithstanding that it was lodged at a date significantly later contrary to the findings of the SCA.

[14] Hence, it was submitted that, based on the aforesaid, there are reasonable prospects of success in an application for leave to appeal as contemplated in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 and that I should grant leave to appeal on the aforesaid grounds.

[15] Several other submissions follow from the Fund's heads of argument which I do not have to deal with given the conclusion I ultimately arrive at.

[16] Mr Marcus, appearing on behalf of Love, submitted that section 17(1)(a) of the Superior Courts Act imposes a higher standard for granting leave to appeal than under the previous statute. He relied on the well-known dictum in the SCA to the following effect:

*"[10] 'I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'"*⁴

[17] He submitted that the application for leave to appeal does not meet the aforesaid test inasmuch as the Fund made out no case whatsoever that there are any reasonable prospects of an appeal court overturning the following findings:

17.1 the Fund was subject to a statutory duty to exercise its discretion in terms of section 48(2) to consider

17.2 Love's request for an extension;

⁴ See *Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31_(31 March 2021)

17.3 the Fund failed to do so;

17.4 the failure was unlawful.

[18] He contended that the Fund's heads of argument addresses the matter in a most cursory fashion and without a sustainable basis.

[19] As to whether the matter was *res judicata*, he submitted that the SCA decided an entirely different cause of action, i.e. section 48(1) of the Attorneys Act.

[20] He countered the *res judicata*/issue estoppel argument with the majority decision in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*⁵ and relied on the following requirements for a plea of *res judicata* to succeed:

"[2] The requirements for a successful reliance on the exceptio were, and still are: idem actor, idem reus, eadem res and eadem causa petendi. This means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground' (per Steyn CJ in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, 'on the same cause for the same relief' (per Van Winsen AJA in Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472A - B; see also the discussion in Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A) at 664C - E); or which also comes to the same thing, whether the 'same issue' had been adjudicated upon (see Horowitz v Brock and Others 1988 (2) SA 160 (A) at 179A - H).

[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

⁵ 2001(2) SA 232 SCA

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' (see Botha JA in Baker v Probert 1985 (3) 429 (A) at 439A - B). 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. "

- [21] As to whether the doctrine relied upon is classified as *res judicata* or issue estoppel, Mr Marcus submitted that it is an essential requirement for the application that the same issue has been finally decided in previous litigation within the same parties. In substance, he submitted that in the present matter neither the cause of action nor the issue being decided were the same.
- [22] He sought to deconstruct the argument of the Fund on the basis that the SCA only dealt with section 48(1)(a) of the Attorneys Act and that the requirements for this cause of action are different from the requirements set out in section 48(2) of the Attorneys Act.
- [23] His strongest counter argument to the submissions put forward by the Fund was that, if the Fund's approach was correct, section 48(2) would have no purpose because it would never be possible for a claimant who has lodged a claim outside the time period of three months, after they became aware of the theft, to show that it was not reasonably practicable to lodge the claim within that time period. For this he relied on the fundamental concept of interpretation that every word must be given a meaning.⁶

⁶ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC), at para 99 (minority judgment of Cameron J, citing *Wellworths Bazaars Ltd v Chandlers Ltd and Another* 1947 (2) SA 37 (A), at 43, bearing in mind that the majority judgment does not differ on this point.)

[24] He also submitted that there is a fundamental difficulty with the Fund's approach inasmuch as the fact that it overlooks that, when I granted the order of substitution in terms of section 8 of PAJA and section 172 of the Constitution, I exercised a discretion in the true sense. He elaborated on this on the basis that, when a court exercises its remedial discretion under section 172 of the Constitution and grants an order of substitution, it exercises a discretion in the true sense. As explained by the Constitutional Court, it is a discretion that may only be interfered with on appeal if it is satisfied that the discretion was:

*“not exercised judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”*⁷

[25] He also relied on the more recent decision in the Constitutional Court in the *Central Energy Fund* matter, where Rogers J held that:

*“[P]ut simply, the appellants must show that the high court's remedial order is clearly at odds with the law.”*⁸

[26] He submitted that the Fund did not come close to meeting this test inasmuch as no error or misdirection on the part of the court was identified other than the contrary factual findings made by the SCA in deciding an entirely different cause of action and a different issue.

⁷ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC), para 88, as well as paras 30, 82, 88 and 92

⁸ *Central Energy Fund Soc Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA), para 43

[27] I am not persuaded that there are reasonable grounds for leave to appeal, given the unique facts underpinning my decision as well as the fact that the SCA decision deals with a different statutory cause of action. I am not persuaded that there is a prospect that another court could reasonably come to a different conclusion as to the various building blocks underpinning the judgment.

[28] Hence the following order is made:

28.1 The application for leave to appeal is dismissed with costs such costs to include the costs of senior counsel and junior counsel. For taxation purposes the scale of such costs as between part and party should in my view be scale "C".


S VAN NIEUWENHUIZEN AJ

Date application for leave to appeal heard: 2 May 2024.

Date judgment reserved: 2 May 2024

Date judgment delivered: 26 August 2024

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