



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **20541/2018**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 13 February 2025 SIGNATURE: _____

In the matter between:

NATIVA (PTY) LTD

Plaintiff

and

AUSTELL LABORATORIES (PTY) LTD

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

[1] This judgment pertains to two interlocutory applications, namely: an application brought by the plaintiff for the separation of issues in terms of Rule 33(4), and an application brought by the defendant for leave to amend its plea.

[2] In relation to the Rule 33(4) application, the Supreme Court of Appeal decision in *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA) aptly explains the purpose of the rule as follows:¹

“Rule 33(4) refers to a ‘question of fact or a question of law’ in a pending action. This must surely mean an issue which **arises on the pleadings**.” (own emphasis).

[3] In order to determine the issues raised in the pleadings, it follows logically that the defendants’ application for leave to amend its plea must first be considered.

Amendment

Background

[4] Prior to considering the application for leave to amend, it is apposite to succinctly set out the common cause facts on the pre-amended pleadings:

- 4.1 The plaintiff, Nativa (Pty) Ltd, is a pharmaceutical, marketing and sales company dealing in alternative and natural health products. The plaintiff’s OSTEOEZE GOLD joint care product forms the subject matter of the litigation between the parties. OSTEOEZE products contain, *inter alia*, glucosamine and chondroitin (the OSTEOEZE ingredients in issue).
- 4.2 The Defendant, Austell Laboratories (Pty) Ltd, is also a manufacturer, marketer and seller of alternative and natural health products. The defendant has a competing joint care product, PIASCLEDINE, which does not contain glucosamine and chondroitin.
- 4.3 During February and March 2018, the defendant advertised its PIASCLEDINE product by flighting an initial and a second advertisement through national television and other media. The plaintiff was of the view that the initial and second advertisement (the infringing advertisements) contained direct and indirect negative and untrue disparaging references

¹ *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA) at 305C.

to the plaintiff's OSTEOEZE products, specifically regarding the OSTEOEZE ingredients in issue.

- 4.4 The plaintiff brought an application for interdictory relief based on unlawful competition. This application was unsuccessful and was followed by an appeal to the Supreme Court of Appeal.
- 4.5 While the appeal was pending, in February 2019, the defendant flighted a further advertisement using the same words as in the infringing advertisements. This prompted the plaintiff to file a further application for interdictory relief on 27 August 2019. On this occasion, the plaintiff sought a final interdict. The application was opposed by the defendant.
- 4.6 On 19 March 2020, the Supreme Court of Appeal granted interim interlocutory relief against the defendant for unlawful competition concerning the infringing advertisements. The interdict was granted pending the finalisation of the present action.
- 4.7 Pursuant to the aforesaid judgment, on 21 April 2020, the defendant withdrew its opposition to prayer 1 of the application, and on 25 November 2021, a final interlocutory interdict was granted against the defendant in respect of the third infringing advertisement.
- 4.8 Prior to this, on 23 March 2021, an order was granted consolidating the damages claim in respect of the application with the damages claim in this action.

[5] During the hearing of the application, it became clear that the plaintiff only objected to two of the proposed amendments on the basis that these amendments sought to withdraw admissions.

Legal principles

[6] Where a proposed amendment involves the withdrawal of an admission, the court will require a full and satisfactory explanation of the circumstances under which the admission was made and the reasons for the party now seeking to withdraw it.

[7] This principle was confirmed in *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A). The explanation in the *Bellairs* decision was found wanting because:

“There is nothing to indicate that the admission that its liability was to Kok (not to the company owned by Kok) was made in error, for the pleadings show a clear appreciation of the separate identities of Kok and H. W. Kok (Edms.) Bpk” [p 1150H]”.

First amendment

[8] The defendant seeks to withdraw its admission that the only remaining issue in respect of the application under case number 64188/2019 is the issue for damages.

[9] The proposed amendment pertains to its plea to paragraphs 3A.2 to 3A.10 of the plaintiff's particulars of claim, to wit:

“3A.3. The wording used in the further infringing advertisement was as follows:

“Millions suffering from stiff and painful joints should not be taking glucosamine and chondroitin.

People with high blood pressure, diabetes, asthma, a shellfish allergy or those using blood thinners are at risk, check the package insert before taking glucosamine and chondroitin, they can affect your blood pressure and diabetes and trigger asthmatic or allergic reactions.

Fortunately, there is PIASCLEDENE, it does not contain glucosamine and chondroitin and is the only clinically proven osteoarthritis treatment that reduces pain, improves movement, slows disease progression, lessens your need for harmful anti-inflammatories, and is safe to use with other medicines.

PIASCLEDINE. No glucosamine, no chondroitin. The number one osteoarthritis treatment worldwide including in South Africa.”

- 3A.4. *The words bolded in the quotation above are those that also appeared in the infringing advertisements.*
- 3A.5. *On 27 August 2019, the Plaintiff brought an application in the above Honourable Court under case no. 64188/2019 for interdictory and ancillary relief relating to the further infringement advertisement based on unlawful competition (“the application”).*
- 3A.6 *Although the application was initially opposed by the Defendant, on 21 April 2020, pursuant to the SCA judgment being handed down, the Defendant withdrew its opposition to prayer 1 of the application and tendered the Plaintiff’s costs in relation thereto on a party and party scale up to 19 March 2020, being the date of the SCA judgment, including the costs consequent upon the employment of two counsel.*
- 3A.7 *In the light of the above, the only remaining issue in respect of the application is the issue of damages.*
- 3A.8 *The Plaintiff brought an application to consolidate the damages claim in respect of the application with the damages claim in this case.*
- 3A.9 *On 23 March 2021, an order was granted in the above Honourable Court consolidating the damages claim in respect of the application with the damages claim in the action. A copy of the court order is attached hereto marked as annexure “**POC4**”.*
- 3A.10. *On 25 November 2021, the above Honourable Court granted the interdictory relief sought in prayer 1 of the application and confirmed that the costs of the application up to 19 March 2020, including the costs of two counsel, would be paid by the Defendant. A copy of the court is attached hereto marked as annexure “**POC5**”.*

[10] In paragraph 18 of its plea, the defendant admitted these allegations.

[11] The relevant proposed amendment of paragraph 18 reads as follows:

“18.2 The Defendant denies that the remaining issue for determination in respect of the proceedings is damages.

18.3 The balance of the allegations contained in these paragraphs are admitted.”

[12] In an affidavit deposed to by Achen Engelbrecht, the head of marketing of the respondent, she explains the reason for the withdrawal of the admission as follows:

“28. The plaintiff alleges in paragraph 3A.7 that the only remaining issue in respect of its application is the issue of damages. These allegations are incorrectly admitted by the defendant in paragraph of the Plea.

29. Consequently; the defendant seeks to withdraw the above-mentioned admission and to insert, in its stead, denial by the defendant that the only remaining issue in respect of the application is the issue of damages.

30. The issues that remain for determination are properly articulated in the defendant’s plea and in this proposed amendment. Such issues have also been crystallised in the expert reports filed by the defendant. As such, the proposed amendment will align the defendant’s pleadings with its evidence.”

[13] The explanation presents some difficulties. Firstly, the allegations in paragraph 3A pertains only to the application that was brought under case no. 64188/19. Paragraph 18 of the plea is confined to these factual averments. Any further admissions and/or denials in the plea pertain to the case for damages flowing from the interim interdictory relief granted by the Supreme Court of Appeal.

[14] Secondly, the consolidation order granted on 23 March 2021 is clear in its terms, to wit:

*“That the enquiry into **damages** in respect of the above-mentioned matter under case number: 64188/2019 be consolidated with the claim for damages under case number: 20541/2018.”*

[15] Should one disregard the portion of the explanation that pertains to the admissions and denials in the main case, the only explanation that remains is that the admissions were incorrectly made. This amounts to no explanation at all.

[16] The defendant has failed to convince me, in fact and/or in law, that it made an error in admitting that the only remaining issue in the application under case no. 64188/2019 is the issue of damages. In the result, leave to effect the amendment is denied.

Second amendment

[17] In the second proposed amendment, the defendant seeks to withdraw its admission that the infringing advertisements are untrue.

[18] In paragraph 4.4 of the particulars of claim, the plaintiff averred the following:

“4.4 In particular, it is untrue that the OSTEOEZE GOLD product or products containing the OSTEOEXE ingredients in issue:

4.4.1 should not be taken by persons suffering from high blood pressure, diabetes or asthma;

4.4.2 are dangerous and/or harmful to persons suffering from high blood pressure, diabetes or asthma;

4.4.3 are unsafe for use by persons suffering from high blood pressure, diabetes or asthma; and/or

4.4.4 constitute health risks.”

[19] In paragraph 22, the defendant pleaded as follows to these averments:

“22.1 *The defendant pleads that there are products containing glucosamine and chondroitin that reflect warnings for or indicate special precaution should be taken by persons with inter alia high blood pressure, diabetes, or asthma.*

22.2 *Save as aforesaid, the allegations contained herein are admitted.”*

[20] The proposed amendment of paragraph 22 reads as follows:

“6. By inserting the following new sub-paragraphs 22.2 and 22.3, between the existing paragraph 22.1 and 23 –

‘22.2 The Defendant further pleads that:

22.2.1 the information contained in a professional information leaflet is accepted as evidence that there are safety concerns regarding particular medicine or precautions that need to be taken by patients consuming the particular medicine;

22.2.2 once warnings, contraindications and/or precautions are mentioned in professional information leaflets, credible research and clinical trials with valid, conclusive results are essential to remove the warnings, contraindications and/or precautions from the leaflets; and

22.2.3 unless and until the warnings, contraindications and/or precautions are removed from professional information leaflets pertaining to medicines containing glucosamine and/or chondroitin may give rise to the harm and/or side effects and/or are contraindicated in persons suffering from high blood pressure and/or diabetes and/or asthma.’

22.3 On the basis as pleaded above, the Defendant denies that it is untrue-or that it is in every instance untrue-that glucosamine and chondroitin:

22.3.1 should not be taken by persons suffering from high blood pressure, diabetes and asthma;

22.3.2 are potentially dangerous and/or harmful to persons suffering from high blood pressure, diabetes or asthma;

22.3.3 are potentially unsafe for use by persons suffering from high blood pressure, diabetes or asthma; and/or

22.3.4 constitute potential health risks.”

[21] Ms Engelbrecht explains the reason for the withdrawal of the admission as follows:

- “35. These proposed amendments are also intended to bring the pleaded position into line with the correct factual and legal position. The Plea, once amended, will accord with the expert evidence of Professor Greeff, whose report, as contemplated in Rule 36(9)(b) of the Uniform Rules of Court, has already been filed and who will be called to testify to these matters.*
- 36. I point out that the existence of the warnings in professional leaflets cannot be factually disputed as these documents exist in the public domain and copies of some have been discovered.*
- 37. The issue arising is essentially a legal and pharmacovigilance one. The court, when called upon to make a finding at the end of the trial, will benefit from the expert evidence that is to be tendered. For that purpose, the pleadings need to be adjusted so as to define this issue more accurately before the court.*
- 38. The need to amend this aspect of the Plea and the extent of the amendment required only became apparent from consultations with and after receipt of the final report of Professor Greeff.”*

[22] The proposed amendment also poses difficulties. As set out above, the defendant in paragraph 18 admits:

- a. the wording used in the further infringement advertisement that formed the subject matter of the application under case no. 64188/20;
- b. by implication, that the application was brought on the basis that the wording was untrue;
- c. that the application was based on claim of unlawful competition.

- d. it withdrew its opposition to prayer 1 of the application and as a result, the following final order was granted by this court:

“1. That the Respondent is interdicted and restrained from flighting the advertisement contained on the flash disk accompanying the founding affidavit and marked FA16 and/or any amended version or colourable imitation thereof, having formally withdrawn its opposition to the relief sought in prayer 1 of the notice of motion in the main application.”

[23] Should the proposed amendment be effected; it would entail that the defendant admits in paragraph 18 of its plea that the following statement in respect of OSTEOEZE is untrue:

“Millions suffering from stiff and painful joints should not be taking glucosamine and chondroitin.

People with high blood pressure, diabetes, asthma, a shellfish allergy or those using blood thinners are at risk, check the package insert before taking glucosamine and chondroitin, they can affect your blood pressure and diabetes and trigger asthmatic or allergic reactions.”

[24] The proposed sub-paragraphs 22.2 and 22.3 in effect withdraws the admission in paragraph 18 and denies that the statement is untrue. Should the amendment be granted, the plea would be vague and embarrassing in that, it contains contradictory averments. This is impermissible. [See: *Trope v South African Reserve Bank and Another and two other cases* 1992 (3) SA 208 (T) at 211E].

[25] On this basis, the second proposed amendment is also refused.

Costs

[26] Costs should follow the cause, including costs consequent upon the employment of two counsel on scale C.

Order

[27] In the result, I grant the following order:

1. The application for leave to amend is dismissed.
2. The defendant is ordered to pay the costs of the application, including costs consequent upon the employment of two counsel on scale C.

Rule 33(4) application

[28] The separation issue is defined in the plaintiff's notice in terms of Rule 33(4) as follows:

"1. Directing that the following issues ("separated issues) be separated and adjudicated upon, on 3 and 4 February 2025, prior to the trial"

"Whether , as a result of:

(i) the Respondent raising the defence of lis alibi pendens in the application between the parties under case no. 64188/2019 ("the Second High Court application");

(ii) the Respondent formally withdrawing its opposition to the interdictory relief in the second High Court application pursuant to judgment being handed down in favour of the Applicant in the Supreme Court of Appeal in case no. 1289/2018 on 19 March 2020;

(iii) the final interdict granted by Dreyer J in the second High Court Application; and

(iv) the consolidation order granted by Strydom J:

(a) the issue of whether the infringing advertisements which were flighted by the Respondent, as described in the particulars of claim were unlawful and were disparaging and untrue of the OSTEOEZE products and/or the

OSTEOEZE ingredients; particularly in the respects stated in paragraph 4.4 of the Particulars of Claim, is res iudicata, alternatively that issue estoppel is applicable thereto;

(b) if res judicata, alternatively issue estoppel applies, no further evidence in relation to the interdictory relief can be led by the parties and the evidence of Professor Oppel Greeff is irrelevant and inadmissible; and

(c) the only issue which remains for adjudication in the main action is the question of damages.”

[29] The defendant opposes the application on the basis that *res judicata* is not an issue on the pleadings.

[30] It is trite that, in order for the defence of *res judicata* to succeed, the following must be established that:

- a. the judgment relied on was a final or definitive decision;
- b. it emanated from a competent court;
- c. the judgment was between the same persons; and
- d. the cause of action was the same.

[See: *MV Silvergate; Tradax Ocean Transport SA v MV Silvergate Properly described as MV Astyanax and Others* 1999 (4) SA 405 SCA at para [53]]

[31] In this case, the plaintiff did not raise *res judicata* as a defence in its particulars of claim. One can hardly image an instance in which a defence is raised in a plaintiff's particulars of claim.

[32] Mr Leech SC, counsel for the defendant, submitted that the *res judicata* issue should have been raised by way of a replication filed to the defendant's plea. I tend to agree.

[33] Mr Puckrin SC, counsel for the plaintiff, submitted that the aforesaid approach is over formalistic and that the undisputed facts in the particulars of claim establish the requirements for a successful plea of *res judicata*.

[34] The pleadings as they stand, prove the following:

- a. the interdictory judgment granted by this court on 25 November 2021 is a final decision;
- b. the judgment emanated from a competent court;
- c. the judgment was between the same parties.

[35] The only outstanding issue is whether it was in respect of the same cause of action.

[36] In view of the above, I do not believe that dismissing the separation application, merely because the *res judicata* defence has been raised in a somewhat unorthodox manner would serve any useful purpose.

[37] The pleadings, as they stand, sufficiently crystallise the issue of *res judicata*, and counsel for both parties have adequately addressed me on the matter.

[38] The next question is whether the issue of *res judicata* can conveniently be decided separately from the question of damages. Although the concept of “*convenience*” for purposes of a separation application has been dealt with in many judgments, each case presents its own factual and legal matrix, and the concept of convenience should, to my mind, be dealt with accordingly.

[39] The plaintiff submitted that it will be convenient to separate the issues because should the court agree that *res judicata* is applicable, all that will remain in the main action is the quantum of damages that should be awarded to Nativia. This would, according to the plaintiff: (i) substantially limit the evidence that needs to be led by the parties; (ii) curtail the duration of the trial and save court resources; and (iii) ensure that the parties do not incur unnecessary costs in preparing and leading evidence which is entirely irrelevant and unnecessary.

[40] The defendant does not agree. The defendant allege that it will be necessary to have an evidential hearing into the separated issues, in other words that the *res judicata* issue cannot be determined on the pleadings without hearing oral evidence. I have dealt with the requirements that a party needs to prove in order to successfully raise *res judicata*. The requirements are satisfied with reference to facts, that either exist or not. It is incomprehensible that a witness would be able to give evidence as to whether a judgment is final in effect, was granted by a competent court between the same parties and on the same cause of action.

[41] I agree that, on the grounds advanced by the plaintiff, hearing the issue of *res judicata* separately would be convenient.

[42] In considering the issues to be separated and to create certainty in the future conduct of the trial, I have had regard to the definition of unlawful competition in *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another* 2016 (6) SA 1 (SCA) at para [16]:

“[16] I shall now turn to consider the appellant's primary contention, which, as I have said, is based on the general principles of unlawful competition. The argument advanced is that the respondent's use of the appellant's trade name as a Google keyword offends against the boni mores because it amounts to an improper filching of the appellant's skill and labour and thereby constitutes unlawful competition. According to Corbett J, '(i)t is well established that our common law recognises every person's right — liberty would, perhaps, be a more correct term — to carry on his trade without wrongful interference from others, including competitors' (Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd D 1968 (1) SA 209 (C) at 216B). As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on wrongfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an injuria for which the Aquilian action lies if it has directly resulted in loss. (See Schultz v Butt at 678G.)” (own emphasis).

[43] I pause to mention that the relief claimed by the plaintiff in prayer (b) of the separation application is, in my view, not competent to be granted in an application

under Rule 33(4). The order that follows will, in the result, only pertain to the separation of issues in terms of Rule 33(4).

Order

[44] Having carefully considered the issues in dispute between the parties as set out in the pleadings, I grant the following order:

1. The question whether the defendant's unlawful conduct, as averred in paragraph 3 of the particulars of claim, and the issue of unlawful competition, as averred in paragraph 4 of the particulars of claim, is *res judicata* is to be separated from the issue of whether the unlawful competition has caused direct loss (damages) to the plaintiff, as averred in paragraph 5 of the particulars of claim.
2. The issue pertaining to damages is postponed *sine die*.
3. Costs to be costs in the hearing on the separated issue of *res judicata*.

Res judicata – issue estoppel

[45] The requirements for a successful plea of *res judicata* and those established on the pleadings have been set out above. The only remaining requirement is whether the judgment was premised on the same cause of action or falls within the scope of issue estoppel. It is common cause between the parties that the cause of action in the application was unlawful competition. Insofar as issue of fact is concerned, the following paragraph in the founding affidavit is incisive:

“4.4 The latest infringing advertisement is the third unlawful advertisement that has been flighted and used by the Respondent in its unlawful marketing campaign. The other two advertisements, namely, the Respondent's PIASCLEDINE advertisement which came to the Applicant's notice early in the week of 26 February 2018 and was (according to the Respondent) flighted until 12 March 2018 (“the initial infringing advertisement”) and an advertisement for the Respondent's PIASCLEDINE product which replaced the initial infringing

advertisement (“the second infringing advertisement”) form the subject-matter of an urgent application referred to below which is now subject of the pending SCA appeal. Copies of the initial infringing advertisement and the second infringing advertisement are also contained on the flash disc marked as annexure “FA16”.

[46] The court order granted by Dreyer AJ interdicted and restrained the defendant from flighting the advertisement(s) on the disk accompanying the founding affidavit and marked “FA16”. It follows that the final interdictory order included the infringing advertisements that form the subject matter of this action.

[47] Even if the infringing advertisements herein were not specifically mentioned in the order, I am of the view that the plaintiff has established the issue estoppel concerning the infringing advertisements in question.

[48] In *Democratic Alliance v Brummer* (793/2021) [2022] ZASCA 151, the Supreme Court of Appeal addressed the issue estoppel principle at para [12] to [15] as follows:

“[12] The nature of a plea of issue estoppel has been explained by this court on numerous occasions. The explanation in Smith v Porritt [1] is worth reiterating.

‘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 common place 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 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'.

[13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (eadem quaestio) was not determined by the earlier court, an essential requirement for a plea of res judicata in the form of issue estoppel is not met. There is then no scope for upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That is so because the court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of res judicata. It must therefore, with reference to the facts of the case and considerations of fairness and equity, decide whether in that case, the defence should be upheld.^[2]

[14] This first component of the enquiry requires a careful examination of what issues of fact or law were decided by the first court. In Boshoff v Union Government^[3] (Boshoff), the following statement by Spencer-Bower in Res Judicata, was held to be a correct:

'Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.'

[15] Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid

to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made.[4] In Boshoff, for instance, the plaintiff had sued for damages arising from an unlawful cancellation of a lease and ejectment. The defendant raised a plea of res judicata on the basis that the defendant had, in a prior action, obtained a judgment for ejectment. The prior order was obtained by default judgment. The court found that an order for ejectment could not have been granted unless the court had found that the cancellation of the lease was lawful. The order that was granted was read against the backdrop of the case as pleaded.”

[49] In this regard, the averment in paragraph 3A.4 of the particulars of claim concerning the application advertisement, which was admitted by the defendant, is significant. To wit: ‘The words bolded in the quotation above are those that also appeared in the infringing agreements.’

[50] On the defendant’s own admission, the words in the advertisement application, which the court was called upon to determine in order to pronounce whether they were untrue and infringed upon the plaintiff’s right to lawful competition, are the same as those in the infringing advertisements. On this basis, I am satisfied that the plaintiff has established that the same issue of law and fact was finally pronounced upon in the application.

[51] In the result, the plaintiff was successful in establishing *res judicata* in respect of the issues averred in paragraph 3 (the defendant’s unlawful conduct) and paragraph 4 (unlawful competition) of the particulars of claim.

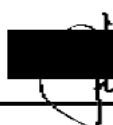
Costs

[52] The plaintiff was successful in establishing *res judicata* and is entitled to a cost order in its favour, including the costs consequent upon the employment of two counsel on scale C.

Order

[53] Wherefore, the following order is made:

1. The issue whether the defendant's unlawful conduct as averred in paragraph 3 of the particulars of claim and the issue of unlawful competition as averred in paragraph 4 of the particulars of claim is *res judicata*.
2. The defendant is ordered to pay the costs of the determination of the separated issue, including the costs consequent upon the employment of two counsel on scale C.


[REDACTED]

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

3 February 2025

DATE DELIVERED:

13 February 2025

APPEARANCES

Counsel for the Plaintiff: Puckrin SC
Kilmartin SC
Hussein-Yousuf

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Mutenga

Instructed by: Werksmans Attorneys