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

CASE NO; A6/2025

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 9 October 2025

SIGNATURE

In the matter between:

ANTON HAMMAN

Appellant

And

T[...] V[...] S[...]

Respondent

JUDGMENT: CIVIL APPEAL

(The matter was heard in open court on 31 July 2025. Judgment was reserved and uploaded onto the electronic file of the matter on CaseLines. The date of uploading onto CaseLines is deemed to be the date of the judgment).

BEFORE: HOLLAND-MUTER J (LENYAI J concurring):

[1] The appeal before the court has its origin in a settled divorce action between the respondent T[...] v[...] S[...], his divorced wife B[...] v[...] S[...] and the later appointed receiver and divider, Mr Anton Hamman. Hamman, a practising attorney was appointed in terms of the divorce order as receiver and divider to divide the net proceeds from the sale of the immovable property which belonged to the V[...] S[...].

The property had to be realised in terms of the divorce order and settlement and the net proceeds distributed between them.

[2] The settlement agreement made provision that Hamman divide the net proceeds of the sale of the property to be divided between the V[...] S[...] after making adjustments in respect of each party's contribution to the property in excess of what they were liable to contribute.

[3] Hamman produced his report after interviewing the parties. The respondent objected to the report and lodged a written objection against the report but Hamman stood by his original report.

[4] The respondent filed an application to have the report reviewed and set aside. The reason for the review was for failure by Hamman to correctly apply the law applicable and to execute his mandate as receiver and divider in a proper manner expected of a duly admitted attorney on officer of the court.

[5] The review was heard by Windell J and the report was subsequently reviewed and set aside. Windell J held that it was a foregone conclusion that it would be a waste of time to order the functionary to reconsider the matter. It was held that it would be unfair to require the applicant to submit the same issue to the functionary. Windell J heard the necessary submissions and substituted the division of the net proceeds of the sale of the property to be divided in accordance with its judgment.

[6] In arriving at her judgment, Windell J found that the appellant did not apply the *actio communi dividundo* correctly. She held that Hamman accepted, as a common cause fact, that Ms V[...] S[...] (the respondent's ex-wife) contributed an amount of R 845 825-60 but this acceptance was done without proper consideration of her alleged contributions and without considering the respondent's contributions and discounting same as amounting to maintenance obligations. Windell J made no ruling on breach of mandate, negligence or considered any arguments on the issue of costs. She ordered that each party is to pay its own costs after setting aside the report and substituting the division as made by Hamman with her own division of the

net profit of sale of the property. Windell J held that Hamman made a material error of law.

[7] The costs issue is the subject of the action instituted by the respondent in the Magistrate's Court for payment for damages (costs) incurred due to the appellant's breach of duty as receiver and divider and failure to execute his duty in a proper manner, alternatively failing to adhere to his duty of care towards the respondent.

[8] The appellant filed a special plea of ***res judicata including issue estoppel***. The contention was that the subject matter was already dealt with in the review finalised by Windell J on 1 February 2019 in the written judgment handed down.

[9] The learned Magistrate dismissed the special plea of ***res judicata and issue estoppel*** with costs and this forms the dispute on appeal before this court.

[10] The four grounds of appeal can be grouped in two components, the first three grounds aimed at the issue of ***res judicata*** and the fourth ground relates to the matter of ***issue estoppel***.

RES JUDICATA:

[11] The onus to prove rests on the party who raises ***res judicata*** and to prove all underlying elements. **Tradex Ocean Transportation SA v MV 'Silvergate' properly described as MV 'Astyanas** [1999] 3 All SA 175 (A); 1999(4)405 (SCA). The requirements were confirmed in **Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohne Corporation and Others** [2019] ZACC 41 at par 71 with reference to **Masera v Tsepong (Pty) Ltd** [2015] LSLC PAR 14. See **Harms Amler's Precedents of Pleading** 6th ed p 302-303. Also see **African Farms and Townships Ltd v Cape Town Municipality** 1963 (2) SA 555 (A) at 562-564.

[12] The requirements for a successful plea of *res judicata* are:

- *There must be a final judgment;
- *The judgment must be between the same parties;
- *The judgment must be based on the same cause of action; and

*The judgment must be concerning the same subject-matter or thing.

[13] The first and second requirements, i.e. that (i) there must be a previous final judgment by a competent court and (ii) that the dispute was between the same parties, is not in dispute. There is a final judgment by Windell J and the judgment was between the present parties.

[14] The third requirement is that the judgment must be based on the same cause of action. It was argued that the cause of action before Windell J was based on the incorrect application of the *actio communi dividundo* and before the court a quo in the Magistrate's Court was a civil claim for pure economic loss for damages suffered as the result of the appellant's breach of mandate and/or duty of care. It was further argued that the Magistrate correctly held that the cause of action before Windell J was materially different from the cause of action before the court a quo. The first cause of action was the incorrect application of the law while the second cause of action was about the breach of the duty to care. The two causes are different and the third requirement for *res judicata* is not met and the appeal cannot succeed.

[15] This court does not agree with the argument that there are two different causes of action when the Windell J judgment is compared with that of the Magistrate a quo. In our view it is an artificial way to argue around the prayer in the review judgment that each party is to pay its own costs.

[16] It was argued on behalf of the respondent that the incorrect application of the *actio communi dividundo* to set aside the report on review was a different cause of action from and that he claimed damages in the second litigation in the Magistrate's Court. The argument was that the incorrect application of the said *actio communi dividundo* caused the respondent to review the report which resulted in costs incurred. In the first case the incorrect division of the net proceeds of the sale of the property was addressed while in the second case the financial loss (coloured as damages) were the subject of litigation. See Magistrate's judgment *a quo* para 11 where the Magistrate held that "*In the review proceedings the High Court was not called upon to decide on whether or not there was a breach of mandate or negligent breach of a legal duty of care*".

[17] The judgment in **African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562-564** is cited as authority for the legal principle of res judicata particularly of issue preclusion, meaning a party cannot re-litigate issues already decided in a prior case between the same parties. The underlying in this matter is precisely that the respondent (plaintiff in the Magistrate's Court) is litigating to recover costs denied in the review application even if it is coloured as damages. The correct way for him was to approach the review court timeously for clarification of the costs issue or to appeal the cost order.

[18] It was held in **Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995(1) SA 653 (A) in par 53** the requirement for res judicata to be *idem actor; idem reus; eadam res* and *eadam causa petendi*. See **Van der Keessel Praelectiones GR 3.49.2** which is the four requirements in para [12] supra. The latter two requirements have been seen *as a demonstration on the same ground for the same thing and the same cause of relief*. If applied on the subject matter the only reasonable conclusion is that the same relief for costs, although somewhat disguised, is the underlying cause in both matters. See **Customs Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 a/b**.

[19] The judgment by Windell J was a final judgment and some speculation was made about the lapse of a considerable time and that no attempt was made to approach Windell J to clarify and/or address the costs issue. Issuing summons in the Magistrate's Court was primarily to recover the cost expense incurred (damages) as result of the review although Windell J ordered each party to pay its own costs. In this court's view this argument amounts to a rather artificial distinction to be made between the alleged two different causes regarding the costs issue.

[20] The Magistrate speculated on the prospects of success should the respondent have approached Windell J earlier to clarify the costs issue in the review judgment. Speculation as to the outcome of arguments before Windell J to clarify the costs issue does not take the matter further.

[21] The fourth requirement is that the judgment must be concerning the same subject-matter or thing. The Magistrate noted that ‘*Similarly, I observe that though the applicant in the review-application had prayed for costs, the court simply ruled that there be no order as to costs. There is nothing in the judgment of Windell J which suggests that the learned Judge considered submissions in relation to costs*’ (para 6 of judgment p 02-194)) and “*In the present matter it is apparent that the relief claimed by the Plaintiff in the review application is the same, at least as far as costs are concerned as the relief sought in the present proceedings*” (para 6 of the judgment p 02-193). This amounts to a contradiction by the Magistrate who held that the relief claimed in both cases are the same in particular as to the costs claimed but also that it is different apart. For the Magistrate to state that Windell J simply ruled that there be no cost order and that there was nothing in the judgment suggesting that Windell J did not consider any submissions regarding costs is simply without any foundation. If so, the cost order should have been appealed.

[22] The normal cost order involving an individual in a judicial or quasi-judicial capacity is that no cost order will be granted against such individual even if their opposition is unsuccessful. In **Coetzeestroom Estate & GM Co v Registrar of Deeds 1902 TS 216 at 223-4** it was held that in matters of practice a registrar of deeds should not be mulched in costs when his action or attitude, although mistaken, is bona fide. See **Herbstain & Van Winsen 4th Ed The Civil Practice of the Supreme Court of South Africa p 723-725**. The principle on which a court exercises such a discretion is that no undue obstacle should be placed in the way of a public officer or body who or which in the course of performing his/its duty considers it necessary to engage in litigation.

[23] It may however in different circumstances be that a cost order be granted against such individual in a separate suit. **MacLean v Haasbroek NO and Others 1957 (1) SA 464 (A); Lamb v Peters (1900) 17 SC 427**. There was no submissions made in this regard during the review to sway Windell J not to follow the normal directives in **Coetzeestroom** and **MacLean supra**.

[24] The underlying ratio in **Coetzeestroom** and **MacLean** for not mulching the individuals acting in a *quasi-judicial* capacity was whether they acted *bona fide*.

There are various examples where individuals acting in a quasi-judicial capacity should not be mulched with costs unless they acted in bad faith (not *bona fide*). See **Herbstein supra 724-725**.

[25] Returning to the requirement of finality of the review judgment, what the respondent (the plaintiff a quo) tries to achieve is to have the cost order as ruled upon by Windell J that each party should pay its own costs, overturned. Windell J addressed the issue of costs and it is part of the review order which all agree is a final order. This court as a court of first instance does not have the jurisdiction to overturn an order by a court of equal standing. What should have happened is that the respondent (plaintiff a quo) should have approached Windell J for a clarification of the cost order or appealed the order.

[26] As stated above, the argument that the relief in the review is different from that in the Magistrate's Court is a disguised attempt to circumvent an appeal thereof. This court is of the view that this argument cannot succeed. The real relief sought by the respondent (the plaintiff a quo) is to recover his costs incurred for the review from the appellant despite the ruling by Windell J that each part pay its own costs.

[27] The court deems it not necessary to address the aspect of *issue estoppel* in view of the above that the resort to res judicata is successful.

ORDER:

1. The appeal is upheld with costs, the costs on a party and party scale.
2. The order by the Magistrate that the special plea of res judicata and issue estoppel is dismissed with costs is replaced with the following: The special plea of res judicata and issue estoppel is upheld with costs.

HOLLAND-MUTER J

Judge of the Pretoria High Court

I agree.

LENYAI J

Judge of the Pretoria High Court

Appearances:

For the Appellant: Adv S F Sibisi

For Respondent: Adv K Fitzroy

Date argued: 31 July 2025

Judgment on: October 2025