



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE
SUPREME COURT OF APPEAL

29 September 2011

STATUS: Immediate

**ZIETSMAN V ELECTRONIC MEDIA NETWORK (771/2010) [2011]
ZASCA 169 (29 SEPTEMBER 2011)**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today dismissed an appeal with costs from the Court of the Commissioner of Patents, Pretoria.

The appellant, Zietsman, was previously ordered to furnish security for costs of the respondents, Electronic Media Network and Multichoice Africa in an action the appellant instituted against the respondents for alleged infringement of his South African patent number. The appellant's appeal against the order was upheld by the SCA in an earlier judgment on the basis that the respondents had not disclosed a defence and evidence relating to their prospects of success in the main action had not been tendered. The respondents again requested security for costs with statements indicating that the respondents had good prospects of success in their defence of the main action but the appellant refused to offer such security.

The issue on appeal was whether the second application for costs should have been refused because of the operation of *res judicata* or issue estoppel. The doctrine of *res judicata* provides that where a cause of action has been litigated to finality between the same parties before, another attempt by one party to proceed against the other party on the same cause of action should not be permitted.

The SCA stated that for the defence of *res judicata* to succeed, it must be shown that the earlier judicial decision on which reliance is placed was a decision on the merits. The SCA held that the earlier SCA judgment was based on the lack of insufficient evidence placed before the court and for that reason, the earlier judgment granted absolution from the instance and did not deal with the merits.

The SCA in dealing with whether the earlier judgment and the current appeal were the same cause of action for the plea of res judicata to succeed stated that the respondents relied on the same facts but tendered new evidence dealing with the respondents' prospects of success in the main action. Accordingly, the SCA held that the cause of action in the second application is different from the first application.

On the facts of the case, the SCA held that the respondents could rely on evidence they did not raise in their first application and on this basis, the doctrine of res judicata or issue estoppel was not applicable.