THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 243/11

In the matter between:

NICOLAAS MARTHINUS PRINSLOO NO	**FIRST APPELLANT**
JOHANNA JACOBA DE BRUIN NO	**SECOND APPELLANT**
NICOLAAS MARTHINUS PRINSLOO	**THIRD APPELLANT**

v

GOLDEX 15 (PTY) LTD	**FIRST RESPONDENT**
JACOBUS WYNAND SCHEEPERS	**SECOND RESPONDENT**

Neutral citation: *Prinsloo NO v Goldex 15* (243/11) [2012] ZASCA 28 (28 March 2012).

Coram: **Brand JA, Cachalia JA, Mhlantla JA, Wallis JA *et* Boruchowitz AJA**

Heard: **14 March 2011**

Delivered: **28 March 2011**

Summary: **Plea of *exceptio rei iudicata* in the form of issue estoppel – not allowed where prospect that it would deprive defendant of fair hearing in subsequent proceedings.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Pretorius J sitting as court of first instance) it is ordered that:

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and replaced with the following:

'The defendants' plea of *res iudicata* in the form of issue estoppel is dismissed with costs.'

JUDGMENT

BRAND JA (**CACHALIA JA, MHLANTLA JA, WALLIS JA *ET* BORUCHOWITZ AJA CONCURRING)**:

[1] The respondents instituted an action against the appellants in the North Gauteng High Court for damages allegedly resulting from a fraudulent misrepresentation made in connection with the sale of a farm. The appellants denied the allegations of fraud on which the respondents rested their claim. The respondents thereupon raised a plea of *res iudicata* in the form of what has become known as issue estoppel. When the matter came before Pretorius J in the court a quo, the parties sought and obtained an order from her that the special defence of *res iudicata* should be dealt with at the outset and before the hearing of any evidence. At the end of these preliminary proceedings, Pretorius J upheld the plea of *res iudicata* with costs. The present appeal against that judgment is with the leave of the court a quo.

[2] The appeal therefore turns on the question whether, in the light of the facts and circumstances of this case, the plea of *res iudicata* was rightly upheld.

For present purposes those facts and circumstances are not in dispute. Shorn of unnecessary detail, they are as follows. The first two appellants, Mr N M Prinsloo and Ms J J de Bruin NNO, appear in their representative capacities as trustees of the NM Prinsloo trust. The third appellant is the same Mr Prinsloo, this time in his personal capacity. The first respondent, Goldex 15 (Pty) Ltd, is a company of which the second respondent, Mr J W Scheepers, is the sole director and shareholder. For the sake of convenience, I shall refer to the trust represented by the first two appellants as 'the trust'; to the third appellant as 'Prinsloo'; to the appellants jointly as 'the appellants'; to the first respondent as 'Goldex'; to the second respondent as 'Scheepers'; and to the respondents jointly as 'the respondents'.

[3] Pursuant to a written deed of sale entered into on 4 October 2004, the trust sold the farm Rykdom in the Limpopo province to Goldex for R2,6 million. During the negotiations preceding the sale, the trust was represented by Prinsloo and Goldex by Scheepers. During February 2005 Scheepers purported to cancel the sale on behalf of Goldex, essentially on the basis of fraudulent representations allegedly made by Prinsloo on behalf of the trust during the negotiations preceding the sale.

[4] In reaction to Goldex's purported cancellation of the sale, the trust brought an urgent application in the North Gauteng High Court for an order compelling Goldex to take transfer of Rykdom against payment of the agreed purchase price. The answering affidavit on behalf of Goldex was deposed to by Scheepers. In broad outline, the alleged fraudulent misrepresentation he relied upon for cancellation of the sale amounted to the following. Prior to the sale, so Scheepers said, he made it clear to Prinsloo that he would not be interested in buying the farm if any claim had been lodged against it in terms of the Restitution of Land Rights Act, 22 of 1994, referred to for the sake of brevity, simply as 'land claims'. Prinsloo thereupon gave him the assurance that he was not aware of any such claim. So important was this representation, Scheepers contended, that the

parties specifically stipulated in clause 18 of the deed of sale, that the seller was not aware of any land claim against the property. Contrary to these assurances, so Scheepers said, it transpired after the sale that a land claim had indeed been lodged in respect of Rykdom by the Mapela community. Moreover, so Scheepers contended, the circumstances were such that Prinsloo must have been aware of this claim at the time and that his misrepresentation was therefore fraudulently made.

[5] In the replying affidavit by Prinsloo on behalf of the trust, he admitted that he gave Scheepers the assurance that there was no land claim against Rykdom and that this assurance subsequently proved to be erroneous. He denied, however, that he was aware of the land claim which had indeed been lodged against Rykdom when he gave Scheepers the assurance to the contrary. In the absence of fraud, so Prinsloo contended, Goldex was bound by an express provision in the deed of sale, not to rely on any representation by the seller with regard to the property sold which turned out to be untrue.

[6] In the event, the urgent application was dismissed by Webster J. In the course of his judgement he formulated the dispute for determination, as he saw it, thus:

'The issue between the parties is whether [Prinsloo] is guilty of having made a material fraudulent misrepresentation to the director of [Goldex] that no valid land claim had been made or was pending in relation to the property, when the agreement of sale was entered into by the parties.'

[7] In determining that issue, Webster J subjected the affidavits before him to a detailed analysis. This led him to the following finding:

'It is my considered view that [Prinsloo], when he entered into a written agreement of sale of the farm did so in the full knowledge that the farm was the subject of a land claim and that he deliberately withheld this information from Scheepers, the representative of [Goldex].'

[8] Following upon the dismissal of its urgent application, the trust unsuccessfully sought leave from Webster J to appeal against his judgment. A subsequent application by the trust to this court for leave to appeal, met with the same fate. This marked the end of the trust's endeavour to compel specific performance of the sale. However, as it turned out, it did not mark the end of litigation resulting from the sale. What then followed was the action by the respondents against the appellants for damages which eventually gave rise to this appeal.

[9] As I have indicated by way of introduction, the action by the respondents against the appellants, jointly and severally, was for delictual damages allegedly suffered by both Goldex and Scheepers as a result of Prinsloo's fraudulent misrepresentation on behalf of the trust. In their particulars of claim the appellants again relied on the allegation that, during the course of negotiations preceding the sale, Prinsloo represented to Scheepers that he was unaware of any land claim in respect of Rykdom, which representation turned out to be false in that, at the time, Prinsloo was indeed aware of the existence of such claim. These allegations were denied by the respondents in their plea. This gave rise to a replication by the respondents that, in the light of the earlier judgment by Webster J, the appellants were estopped from denying these allegations by the *exceptio rei iudicata.* This contention, as we now know, was upheld by Pretorius J in the court a quo. Hence the crisp issue on appeal is confined to whether that decision should be endorsed by this court.

[10] The expression '*res iudicata*' literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa*

petendi (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H and the cases there cited). In time, the requirements were, however, relaxed in situations which give rise to what became known as issue estoppel. This is explained as follows by Scott JA in *Smith v Porritt* 2008 (6) SA 303 (SCA) para 10:

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res iudicata* 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 iudicata* is raised in the absence of a communality 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, 667J-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 iudicata*. 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 (supra)* at 67E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others. . . . '

[11] In this case it is clear that the relief claimed by the trust in its urgent application was different from the relief claimed by the respondents in the action under consideration. In a sense, the one can be said to be the converse of the other. While the application by the trust presupposed the validity of the sale, the present action is based on the supposition that the sale no longer existed. Yet, the pertinent issue decided by Webster J is virtually the same as in this action, namely: did Prinsloo know there was a land claim against Rykdom when he gave

Scheepers the assurance to the contrary? As I see it, this gives rise to a classic case of potential issue estoppel in the same mould as in *Boshoff v Union Government (supra)* where the concept of issue estoppel was introduced by that name into our case law for the first time. What Greenberg J held in that case was essentially that the plaintiff's claim for damages arising from the alleged wrongful cancellation of a lease was precluded by an earlier finding in a successful application by the defendant for the plaintiff's ejectment, that the lease had been validly cancelled.

[12] The appellants' argument as to why the plea of *res iudicata* in the form of issue estoppel was wrongly upheld in this case, was essentially twofold. First, they contended that the 'same persons' requirement had not been met in that neither Prinsloo nor Scheepers were parties in the urgent application proceedings. Secondly, they relied on the proposition that it was unnecessary and inappropriate for Webster J to make findings of fraud on the basis of disputed allegations in motion proceedings, in order to dispose of the application. In the circumstances, so the appellants contended, it would be unjust and unfair to hold them bound by these unnecessary and inappropriate findings in the present case. I propose to deal with these two arguments in turn.

[13] As to the first argument, it appears that even at common law, the 'same persons' requirement was not taken literally to mean only the identical individuals concerned in both proceedings. As pointed out by this court in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 654:

'. . . Voet (44.2.5) . . . gives a list of parties who are regarded in law as being the same for the purpose of the rule that *res iudicata* can be pleaded only when the parties to the previous suit have been the same as in the present one. He mentions, inter alios, a deceased and his heir, principal and agent, a person under curatorship and his curator, a pupil and his tutor . . . '

(See also Joubert (ed) *the Law of South Africa* Vol 9 2ed para 637 and the cases there cited.)

[14] Based on these authorities it was held in *Man Truck & Bus SA (Pty) Ltd v Dusbus Leasing CC* 2004 (1) SA 454 (W) para 39 that the sole member and controlling mind of a close corporation is bound by a decision in earlier proceedings against the close corporation. Relying on *Mann Truck & Bus SA*, in turn, the court a quo held Prinsloo bound to Webster J's decision against the trust. The appellants' argument that the court a quo had erred in doing so rested mainly on the proposition that persons litigating in their personal capacity are not bound by earlier decisions against them when they were acting as representatives of another.

[15] The general proposition relied upon by the appellants appears to be supported by authority (see eg *Shokkos v Lampert* 1963 (3) SA 421 (W) at 426 (A); *LAWSA*, *op cit* para 639; Spencer Bower and Handley *Res Iudicata* 4ed para 9.22). But, in my view, these authorities do not contemplate the situation that arose in this case. In this case Prinsloo not only represented the trust, he was the controlling mind of that entity. It would therefore surprise me if the controlling mind were not bound by an earlier decision that he committed fraud, while the mindless body of the trust was held bound by that finding. But, be that as it may. In the view that I hold on the appellants' further argument based on fairness and equity, I find it unnecessary to decide this issue which, in any event, relates to Prinsloo only. I therefore proceed on the assumption that Prinsloo's position with regard to the application of issue estoppel is no different from that of the trust.

[16] The appellants' argument that the application of issue estoppel in these proceedings would result in unfairness and inequity derives from two hypotheses. First, that it was not necessary for Webster J to arrive at any final decision as to whether or not Prinsloo committed fraud in order to dismiss the trust's application to compel specific performance. Secondly, that Webster J could not and should not have decided the disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses and so forth.

[17] I think both these propositions are well supported by authority. As to the first, the trite position is that, as a general rule and save in exceptional circumstances, disputes of fact arising on affidavit cannot be finally determined on the papers. The concomitant rule is that in the event of material factual disputes arising on affidavit in motion proceedings, the applicant can only succeed in those exceptional circumstances where the respondent's version of the disputed facts can safely be rejected on the papers as farfetched or untenable (see eg the oft quoted passage in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) at 634E-635C). The dispute of fact that arose in the motion proceedings before Webster J fell outside the ambit of the exceptional circumstances envisaged by the authorities. The allegations of fraud against Prinsloo which Goldex raised in answer to the application by the trust, could hardly be described as so farfetched or untenable that they could be rejected on the papers and it was not suggested that they should. The application for final relief by the trust was therefore doomed to fail. On that basis and that basis alone Webster J was bound to dismiss the application with costs. That is obviously also why this court refused the trust's application for leave to appeal. Appeals are not aimed at the reasoning but at the order of the lower court. Whether or not the court of appeal agrees with the lower court's reasoning is therefore of no consequence, if the result would remain the same (see eg *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355).

[18] This brings me to the appellants' second proposition: that it was inappropriate and unwise for Webster J to find Prinsloo guilty of fraud purely on the basis of allegations against him on affidavit, which he disputed on feasible grounds. This proposition emanates from the same considerations as the previous one. The appellants were also entitled to have their version approached with caution on the basis that it could only be rejected if it was clearly untenable, which it was not. What rendered a final rejection of the appellants' version in principle even more unwise and inappropriate was, of course, that as the

respondent's version could not be rejected out of hand, the application was in any event bound to fail.

[19] I therefore agree with the appellants' contention that Webster J should not have made a finding of fraud against Prinsloo on the basis of untested allegations against him on motion papers that were denied on grounds that could not be described as farfetched or untenable. The reasons why he should not have done so, derive not only from common sense, but from many years of collective judicial experience. They were thus formulated in *Sewmungal and another NNO v Regent Cinema* 1977 (1) SA 814 (N) at 819A-C:

'In approaching this particular type of problem [of factual disputes arising on affidavit] it is not wrong for a court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he had been seen and heard by a court. An incautious answer in cross-examination may change the whole complexion of a case.'

[20] In answer to these arguments the respondents contended that, even if Webster J was wrong, that would not preclude them from relying on his finding of fraud for the purpose of *res iudicata*. In support of this answer they referred to *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-G where Steyn CJ said:

'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 iudicata* 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 iudicata* notwithstanding that the judgment is wrong.'

[21] But as I see it, the respondents' answer misses the point of the appellants' objection. Their objection is not only that Webster J was wrong in his finding of fraud. Their crucial objection is that, because of Webster J's fundamentally wrong

approach to the matter before him, it would be inequitable and unfair to preclude them from denying fraud on the part of Prinsloo in this case, through the application of issue estoppel. The result of doing so, they argued, will be to deprive them of the opportunity to properly test the allegations of Prinsloo's accusers and to have the findings of fraud reconsidered on appeal.

[22] The respondents' objection must be evaluated with reference to the principles that govern the defence of *res iudicata* in general and issue estoppel in particular. I have already referred to some of these principles. They have in any event been discussed extensively in a number of reported decisions (see eg *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A); *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BHC); *Holtzhausen v Gore NO* 2002 (2) SA 141 (C); *Smith v Porritt* 2008 (6) SA 303 (SCA)). Repetition of the discussion will serve little, if any, purpose. Suffice it therefore to distil from these authorities those principles that I find of pertinent application in this case.

[23] In our common law the requirements for *res iudicata* are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res iudicata*. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.

[24] At the same time, however, our courts have realised that relaxation of the strict requirements of *res iudicata* in issue estoppel situations creates the potential of causing inequity and unfairness that would not arise upon application of all three requirements. That potential is explained by Lord Reid in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd* (No 2) [1966] 2 All ER 536 (HL) at 554G-H when he said:

'The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought?'

[25] One can also imagine a situation where a purchaser seeks confirmation of his or her purported cancellation of the sale in motion proceedings. The seller may decide that the expensive and time consuming game is not worth the candle and thus decide not to oppose. But if the purchaser were then to sue for substantial damages the application of issue estoppel in the second case may cause clear inequity. The same situation will not arise in the case where all the requirements of *res iudicata* are satisfied. In that event the relief sought in both cases will be the same. The seller will have to decide whether to speak up in the first case or hold his or her peace in the second.

[26] Hence, our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of *res iudicata* should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings (see eg *Kommissaris van Binnelandse Inkomste v Absa*

Bank Bpk 1995 (1) SA 653 (A) at 676B-E; *Smith v Porritt* supra 2008 (6) SA 303 (SCA) para 10. That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution.

[27] In this light I agree with the appellants' contention that the court a quo erred in allowing the plea of *res iudicata* in the form of issue estoppel in this case. In the proceedings before Webster J the allegations of fraud against Prinsloo were clearly not properly investigated. Consequently, his finding of fraud on motion papers was clearly inappropriate. But, because of the rules pertaining to motion proceedings, he happened to be right in dismissing the application before him. In the result his inappropriate findings of fraud had not been tested on appeal. In these circumstances I believe it would be patently inequitable and unfair to hold the appellants bound to those inappropriate findings in the present proceedings.

[28] In the result:

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and replaced with the following:

'The defendants' plea of *res iudicata* in the form of issue estoppel is dismissed with costs.'

_____

F D J BRAND
JUDGE OF APPEAL

Appearances:

For Appellant:	H F Oosthuizen
	Instructed by:
	Bernhard van der Hoven, Pretoria
	Rosendorff Reitz Barry, Bloemfontein
For Respondent:	A B Rossouw SC (with him J H A Saunders)
	Instructed by:
	Van Zyl Le Roux Inc, Pretoria
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