

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 38965/2019

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 26 May 2025

SIGNATURE OF JUDGE:

A black rectangular box redacting the signature of the judge.

In the matter between:

DR ANIL ANIRUDHRA

Plaintiff

and

SEFAKO MAKGATHO HEALTH SCIENCES UNIVERSITY

Defendant

JUDGMENT

THE PLEADINGS

- [1.] The plaintiff, a specialist gynaecologist, claims contractual damages in the form of past loss of earnings in the amount of R5 million from the defendant, representing the difference between what the plaintiff would have earned as a specialist and what the plaintiff actually earned as a general medical practitioner between 2009 and May 2019, when a MMed degree was conferred on him.
- [2.] The defendant was established on 16 May 2014 as a public university in terms of section 20(1)(a) of the *Higher Education Act*, 1997¹ ("the act") and the Medunsa Campus of the University of Limpopo ("UL") was incorporated as a subdivision of the defendant with effect from 1 January 2015 in terms of section 24(1) of the act.
- [3.] The plaintiff relies for its claim on a contract which he concluded on 22 January 2008 with UL ("the UL agreement") in terms of which plaintiff was admitted, registered and enrolled as a student for a MMed degree at UL's Department of Obstetrics and Gynaecology.
- [4.] The plaintiff relies for its claim of damages against the defendant on section 24(2) of the act, which provides as follows:
- "The assets, liabilities, rights and obligations of the subdivisions concerned devolve upon the public higher education institution with which the subdivision has been incorporated in a manner agreed by the councils of the public higher education institutions concerned or failing such agreement, in a manner determined by the Minister [of Higher Education and Training] after consulting such councils."* (emphasis added)
- [5.] What is conspicuously absent from the plaintiff's particulars of claim, is an allegation that the councils of the defendant and UL agreed the manner upon which the liabilities and obligations of UL would devolve upon the defendant or,

¹ Act 101 of 1997

failing such agreement, the manner in which the Minister determined how the liabilities and obligations of UL would devolve upon the defendant.

- [6.] The plaintiff moreover relies on section 23(2H)(ii), read with section 24(3) of the act, which provides. with the changes required by the context, as follows:

"If [a subdivision of a public higher education is incorporated with another public higher education institution, the public higher education institution with which the subdivision has been incorporated]-

- (ii) awards a degree, diploma or certificate to a student who qualifies before or after the date of the [incorporation] in its own name, but such degree, diploma or certificate must also reflect the name of the education institution at which the student was registered immediately before the date of the [incorporation] if the student was so registered."*

- [7.] The defendant's plea includes a special plea of misjoinder ("the special plea") in which it is *inter alia* pleaded that:

- [7.1.] the councils of UL and the defendant entered into a written incorporation agreement ("the incorporation agreement"), as envisaged by section 24(2) of the act;

- [7.2.] clause 14.1 of the incorporation agreements provides that the defendant would not be responsible or liable for any of the "*UL Liabilities*" (as defined in clause 3.2.31 of the incorporation agreement), all of which shall be discharged by UL as and when such UL Liabilities fall due for payment, and UL indemnifies and holds harmless the defendant against all and any claims of whatsoever nature and howsoever arising in respect of the UL Liabilities; and

- [7.3.] the plaintiff's claim falls within the definition of "*UL Liabilities*", which implies that the defendant is not responsible or liable therefore and such liability did not devolve upon the defendant in terms of section 24(2) of the act.

- [8.] The plaintiff denies all the allegations in the special plea, including the conclusion of the incorporation agreement, in his replication. Notwithstanding the denial of the conclusion of the incorporation agreement, the plaintiff pleads that he was not a party to the incorporation agreement and that the terms and conditions of the incorporation agreement are therefore not applicable to him or to his claim.
- [9.] The plaintiff further pleads that in view of the indemnification contained in clause 14.1 of the incorporation agreement, the defendant should follow the procedures envisaged in rule 13 *"if it wishes to enforce liability upon UL"*.
- [10.] The plaintiff also relies on issue estoppel and pleads that the issues regarding the UL agreement, the breach thereof and the defendant's liability were finally adjudicated in an action under case number 38887/2013 ("the first action") and that the defendant is estopped from denying liability.

THE SEPARATION APPLICATIONS

- [11.] The defendant applies in terms of section 33(4) for the separation of the special plea from the other questions in the action and that oral evidence be presented in respect of the special plea.
- [12.] The plaintiff previously applied to separate the special plea as well as a further special plea of waiver (which was based on certain clauses in the UL agreement) from the other questions in the action..
- [13.] In the founding affidavit in support of his separation application, the plaintiff contended that both special pleas can be conveniently separated from the main action and that it should be heard in the motion court.
- [14.] In the defendant's answering affidavit in the plaintiff's separation application it indicated that the proposed separated issues could not be heard in the motion court because no affidavits had been exchanged. The defendant moreover indicated that the plaintiff denied the conclusion of the incorporation agreement, which is fundamental to the special plea.

[15.] The plaintiff subsequently withdrew his separation application.

LEGAL PRINCIPLES

[16.] Rule 33(4) provides as follows:

"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[17.] It is incumbent on the party opposing an application for separation to satisfy the court that the questions sought to be separated cannot conveniently be decided separately and that the application should accordingly not be granted.²

[18.] In support of the plaintiff's opposition to the application, Ms Maritz argued that the issues in the special plea are inextricably linked to the remainder of the disputes in the action and she relied in this regard strongly on the following dictum in *Denel (Edms) Bpk v Vorster*:³

"In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately."

² *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G

³ 2004 (4) SA 481 (SCA) at 485A-B

DISCUSSION

- [19.] The special plea is based on the incorporation agreement. In the event that the plaintiff continues to deny the conclusion of the incorporation agreement, the defendant will have to prove this aspect. It is moreover possible, although on the face of it unlikely, that evidence may be led in support of the interpretation of the incorporation agreement.
- [20.] There is no indication of any overlap of evidence in respect of the conclusion of the incorporation agreement and the merits of the plaintiff's claim, which occurred many years before the conclusion of the incorporation agreement and at a different higher education institution.
- [21.] The legal principles in respect of issue estoppel was enunciated as follows in *Prinsloo NO v Goldex 15 (Pty) Ltd*:⁴

"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 exception was available at common law if it was shown that the judgement 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 ... In time the requirements were, however, relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in Smith v Porritt and Others 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 ... in both the case in question and the earlier judgement. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same ... and that the same issue ... must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgement on which reliance is placed. Where the plea of res iudicata is raised in the absence of a communality of cause of action and the relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But ... 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... Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others..."

[22.] In the first action, which had been instituted before the defendant was established, Stoop AJ ordered the defendant to confer the MMed degree on the plaintiff, which order has apparently been complied with. It appears from the judgement in the first action ("the judgement") that UL breached the terms of the UL agreement in various respects between 2009 and 2011 (i.e. long before the establishment of the defendant as a public university).

[23.] In its founding affidavit in the separation application, the registrar of the defendant stated that although the defendant was cited as the defendant in the judgement, it was not a party to the first action. In view of the fact that the defendant did not exist at the time of the institution of the first action, it could not (initially) have been cited as the defendant in the first action, which implies that the plaintiff's allegation in his answering affidavit that the defendant admitted its citation in the first action does not make any sense.

[24.] Neither party placed the court papers in the first action before me and I am accordingly unable to find whether the parties in the first action were in fact the same parties as in this action.

[25.] Even if the defendant is bound by the findings regarding the UL agreement, the breach thereof and the defendant's liability (in respect of which I make no finding), there is no factual or legal findings pertaining to the special plea which can form the basis of a plea of *res iudicata* in the form of issue estoppel.

[26.] The only allegation which is even remotely relevant to the special plea is paragraph 2 of the judgement, which reads in relevant parts as follows:

"It is common cause that the Medunsa Campus of [UL] ... was incorporated as part of the Defendant with effect from 1 January 2015. As a result, a

reference in this Judgement to the Defendant includes a reference to the former University of Limpopo (Medunsa Campus)."

- [27.] The allegation in the first sentence of paragraph 2 of the judgement remains common cause.
- [28.] The remainder of the judgement dealt with the terms of the UL agreement, the breach thereof and the defendant's liability to award and confer the MMed degree on the plaintiff.
- [29.] Although the judgement did not expressly refer to section 23(2H)(ii), read with section 24(3), of the act, the defendant would, subsequent to the incorporation of the Medunsa Campus of UL as a subdivision of the defendant, have been obliged to award the the MMed degree to the plaintiff who had qualified before the date of the incorporation.
- [30.] The fact that the MMed degree was awarded to the plaintiff by the defendant does not however imply that the defendant is liable for any damages which the plaintiff may have suffered as a result of breach of contract by UL. Whether or not the defendant is liable for such damages depends on the provisions of section 24(2) of the act, read with the incorporation agreement, which forms the subject matter of the special plea.
- [31.] It accordingly follows that the issues in the special plea are discrete and that the plea of *res iudicata* in the form of issue estoppel is not an answer to the special plea.
- [32.] There is in my view a reasonable prospect that the parties would be able to agree on a written statement of facts in the form of a special case for the adjudication of the court which would make it unnecessary to present any oral evidence in respect of the special plea and which would enable the parties to set the special case down in the manner provided for opposed applications, as provided for in rule 33(2)(b). This would alleviate the prejudice of delay raised by the plaintiff.
- [33.] It accordingly follows that it is convenient for the special plea to be decided separately.

ORDER

[34.] I accordingly grant the following order:

[34.1.] The questions of law and fact raised by the defendant's special plea of misjoinder, read with paragraph 2.1, 2.4, 2.5 and 2.6 of the plaintiff's replication ("the separated questions"), must be decided separately from all other questions in the action.

[34.2.] All further proceedings in the action are hereby stayed until the separated questions have been disposed of.

[34.3.] The plaintiff is ordered to pay the costs of the application for separation, including the costs of counsel on scale B.


HF OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 26 May 2025.

Appearances

Adv Sophia Maritz, instructed by Jarvis Jacobs Raubenheimer appeared on behalf of the plaintiff.

Adv Jo Withaar, instructed by Anton Bakker Attorneys, appeared on behalf of the defendant.

Date of Hearing: 6 May 2025

Date of Judgment: 26 May 2025