REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case: 13433/2011

In the matter between

Hume Housing **Plaintiff**

and

Hibiscus Coast Municipality **Respondent**

JUDGMENT

Delivered on 13 September 2013

Steyn J

[1] This action involves another round of litigation between the same parties for compensation of property owned by the plaintiff in the Gamalakhe Township. The plaintiff is a property developer and the defendant the local municipality of the Hibiscus Coast. The parties have been involved in protracted litigation and accordingly it is necessary for the purposes of this judgment to deal with the historical background that foreshadows the present action.

[2] The plaintiff launched an application under case number 14041/2010 seeking the eviction of those who were occupying the property illegally. It was contended that the first respondent was aware of the illegal occupiers and failed to prevent illegal structures being built on the property. The applicant under case number 14041/2010 sought *inter alia* an order that the respondent be directed to acquire the said property from the applicant or alternatively, pay constitutional damages to the applicant. The application was heard by Vahed AJ, as he then was, and the following order was issued:

> *'(1) It is recorded that the terms of the order about to be made have been settled as amongst counsel but for the fact that the order is not going to be one by consent.*
>
> *(2) It is recorded that Attorneys Shepstone & Wylie and Mr Goddard appear for the 1st Respondent and 5th to 38th Respondents.*
>
> *(3) That the 1st Respondent will acquire the properties referred to in the application, which are owned by the Applicant, once compensation determined as set out below has been paid. The 1st Respondent shall be entitled to effect transfer into its own name or into the name of its nominee(s).*
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> *(4) That the compensation will be determined in accordance with Section 12(1), 12(2) and 12(3) of the Expropriation Act 63 of 1975.*

(5) *That the Applicant will deliver a summons and particulars of claim within 10 days. The 1st Respondent will deliver a plea and counterclaim, if any, within 10 days thereafter, and the Applicant a plea in reconvention and replication, if any within a further 10 days.*

(6) *That the provisions of the Uniform Rules of Court will apply.*

(7) *It is ordered that the Respondent currently occupying the property will not be required to vacate, pending finalization of the said proceedings.*

(8) *For the purpose of the Act the date of Expropriation insofar as it requires to be defined for the purposes of that Act, in determining compensation, is 26th November 2010.*

(9) *That the Applicant shall not as from the date of this order, be liable for rates or taxes on the properties.*

(10) *That the costs of today are reserved. All previous reserved costs order, including those of today will be decided in the above proceedings.*

(11) *That it is recorded that the 4th Respondent has agreed to fund the acquisition in paragraph (1) above. Nothing herein will affect the Applicant's right to receive payment from the 1st Respondent.*

(12) *That any amounts found payable by any party to the other will be payable* pari passu *with the other.'*

[3] There were a series of applications that preceded this action, *inter alia* an application for leave to appeal against a judgment of Koen J. At the commencement of the trial I was informed that the application for leave to appeal against the judgment of Koen J had been abandoned and costs incidental to the

appeal were tendered. The defendant then stated that an amount of R2 200 000.00, being the value of the raw land, has been tendered and that the parties agreed that the interest on the aforesaid is R750 195.07. The Defendant also stated that it has agreed to pay *solatium* of R55 000 as claimed by the plaintiff. What was placed in issue by the defendant was that the plaintiff is entitled to judgment in the sum of R6 045 000.00. The defendant raised a special plea of *res iudicata*. The parties were *ad idem* that the special plea should be dealt with at first and that the issues of costs and VAT be reserved for later determination. Both parties reserved their right to address me on the remainder of the issues once a decision has been made on the special plea.

[4] The following special plea was raised by the Defendant:

> *'By judgment handed down under the above case number on 10 August 2012, this Honourable Court finally determined the issues listed below, and they are* res iudicata*:*
>
> *(a) that the parties did not reach agreement on the appointment of Mills Fitchet, as alleged in paragraph 7 of the particulars of claim (judgment paragraph [25] and [26]);*
>
> *(b) That the Mills Fitchet valuation is not as contemplated by the order in case no 14041/2010 (judgment paragraph [32]);*

(c) That section 12(5) of the Expropriation Act was intended to apply when determining compensation (judgment paragraph [29]); and

(d) That the order in case number 14041/2010 was ambiguous (judgment paragraph [24]).'

The plaintiff at the commencement of the proceedings applied for an amendment to its particulars of claim and asked that paragraph 7 be deleted. The paragraph reads as follows:

'The parties agreed to the appointment of Mills Fitchet (Pty) Ltd, Property Valuers, for the purposes of valuing the Plaintiff's properties as set out in paragraph 6 above. The properties have been valued at R6 045 000.00 (plus VAT), which is arrived at as follows:-

7.1	*The land value*	*R2 200 000.00*
7.2	*Depreciated replacement costs of the top structures*	*R3 790 000.00*
7.3	*Solatium*	*R55 000.00*

		R6 045 000.00'

The amendment was unopposed and accordingly granted. In the light of the aforesaid amendment it is no longer necessary to deal with what is contended by the defendant in its special plea under (a) and (b).

[5] The plaintiff's cause of action as set out in the particulars of claim is that the defendant in terms of the order of Vahed AJ,

was ordered to acquire the immovable properties listed, compensate the plaintiff, and that the calculation of the compensation should be in accordance with the provisions of section 12(1), 12(2) and 12(3) of the Expropriation Act, 63 of 1975 (hereinafter referred to as the 'Expropriation Act'). It has been pleaded that the compensation of R6 045 000.00 claimed, is calculated in accordance with the order of Vahed AJ.

Res Iudicata

[6] The doctrine *res iudicata*[1] remains a fundamental part of our legal system and is aimed at preventing parties from re-litigating in instances where a court has definitively determined the issue by delivering a judgment.[2] In order to succeed with a plea of *res iudicata*, the following requirements should be met: (i) the party who relies upon it should show that the two matters are between the same parties, (ii) the same cause of action[3] and for (iii) the same relief.[4]

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1 *Res iudicata* literally means that the matter has already been decided.

2 This defence originates from Roman-Dutch law. See discussion by J Salant 'Res iudicata' *De Rebus* Vol 13 Issue 436, at 47-48. Also see Joubert (ed) *The Law of South Africa 2 ed* Vol 9 para 624.

3 For a comparative analysis, see Ernst Schopflocher 'What is a single cause of

In *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng*[5] the Supreme Court of Appeal clearly distinguished between *res iudicata* and issue estoppel:[6]

> *"[T]hat the strict requirements of the exception, especially those relating to* eadem res or eadem petendi causa *(the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (*viz idem actor *and* eadem quaestio*), it has become commonplace to refer to it as being a matter of so called 'issue*

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action for the purpose of res iudicata?' *Oregon Law Review* Vol 21 (1942) at 319-364.

4 See *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* (2012) JOL 28866 (SCA) at para 23.

5 2009 (3) SA 577 (SCA).

6 See *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BHC) where the Court defined and distinguished 'issue estoppel' as follows:

> *"Issue estoppel is a rule of* res iudicata *but is distinguished from the Roman-Dutch Law exception in that in issue estoppel the requirement that the same subject-matter or thing must be claimed in the subsequent action is not required. Issue estoppel has a twofold requirement. Issue estoppel has been applied in our law in decisions of Provincial and Local Divisions. However, in the* Kommissaris *case supra the Court accepted that the expression 'issue estoppel' had been in use in our law for a long time, and is a useful description of these cases which do not strictly conform to the threefold requirements* res iudicata*, because the same relief is not claimed on the same cause of action, but notwithstanding that the defence may be successful. Issue estoppel is also founded on public policy to avoid a multiplicity of actions in order '*inter alia *to conserve the resources of the courts and litigants'. There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case by case foundation without rigidity and the overriding or paramount consideration being overall fairness and equity."* (At 566 G-J).

Cf. D Zeffentt *'Issue Estoppel in South Africa'* (1971) SALJ at 312-320.

> *estoppel'. But that is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law, and the defence remains one of* res iudicata*."*[7]

I must thus compare the relevant facts of the two cases upon which reliance is placed to determine whether the cause of action is the same in both.[8] Simply put, is the plaintiff 'demanding the same thing on the same ground'?[9] Most of the *dicta*, it would appear to me, held that the 'cause of action' requirement should not be interpreted narrowly.[10] Regard should also be had to the Constitution[11] and a party's right to have a dispute heard. On a procedural level it should be

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7 *Ibid* at para 22.

8 See *Janse van Rensburg and Others NO v Steenkamp and Another*; *Janse van Rensburg and Others NNO v Myburgh and Others* 2010 (1) SA 649 (SCA) at para 25.

9 See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A; and *Ferreira v Minister of Social Welfare* 1958 (1) SA 93 (E).

10 See *Boshoff v Union Government* 1932 TPD 345 (T) at 349; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A; *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (WLD) at 200H; *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669G and *Smith v Poritt and Others* 2008 (6) SA 303 (SCA) at 307-308.

11 See section 34 of *the Constitution of the Republic of South Africa*, 1996 that declares that everyone has the right to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court.

borne in mind that the application of the principle *res iudicata* should not cause actual injustice.[12]

[7] After the parties presented their submissions I ruled that the special plea raised by the defendant be argued and decided before any evidence was tendered. I ordered that the remainder of the proceedings be stayed until judgment is delivered and further directions could be given.

[8] The special plea of *res iudicata* arises in consequence of the application before Koen J which he dismissed. The relief sought before Koen J was an order in the following terms:

> *'(1) That the valuation report compiled by Mills Fitchet – Natal (Pty) Ltd be made an order of court;*
> *(2) That judgment be granted in favour of the applicant in the sum of R6 045 000,00 (six million and forty-five thousand rand);*
> *(3) Payment of interest on the amount referred to in paragraph 2 above in accordance with section 12(3) of the Expropriation Act, from 26 November 2010 until date of payment;*
> *(4) Costs of this application; and*
> *(5) Further and/or alternative relief.'*

[12] See *Bafokeng Tribe supra* at 566D-E.

[9] I shall now apply the principles to the present case. In consideration of the requirements of the defence *res iudicata*, it is the requirement of 'the same cause of action' that is in dispute. It is common cause between the parties that the other two requirements of the defence have been met. Mr Stokes SC has argued that in the application before Koen J, the claim was based on the underlying agreement between the parties that Mills Fitchet – Natal Pty (Ltd) should evaluate the properties and that the valuation report be made an order of court. In the action before court reliance is placed on the order of Vahed AJ, and based on that, judgment should be granted in its favour in the amount of R6 045 000.00. The plaintiff contended that Koen J had to rely on extrinsic evidence to determine whether there was a true agreement between the two parties to use the services of Mills Fitchet and did not rely on the order of Vahed AJ.

In light of this submission it is necessary to closely examine Koen J's judgment and consider the role that Vahed AJ's order played in reaching the conclusion that the application be dismissed. Without such analysis, there would be no certainty

regarding Koen J's judgment and whether it should be binding on this court.

[10] A careful and cautious analysis of Koen J's judgment shows that the Court considered the terms of the order and the impact of the terms on the parties. What follows hereinafter is what was spelt out in Koen J's judgment. In para 10 it is stated:

> *'The applicant contends that the agreement between the attorneys of December 2011 did not in any way affect the basis upon which the amount of compensation was to be determined as set out in the order of Vahed AJ and that Mills Fitchet quantified the compensation in accordance with the terms of the order. The respondent contends that the valuation by Mills Fitchet is not one in accordance with the court order.'*

(My emphasis)

At para 12, the Court held:

> *'The applicant does not agree that there is any factual dispute and contended that to the extent that there is a dispute between the applicant and the respondent, it relates to the proper interpretation of the order made by Vahed AJ on 21 November 2011, which is a matter of interpretation, not evidence (oral or otherwise), and accordingly that the matter should be determined on the papers in accordance with the rule in* Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.'*

(My emphasis)

In my view the applicant in the application before Koen J not only relied on the order of Vahed AJ, as being final, but also relied on the certainty of the order. In the judgment of the learned judge, he considered the order of Vahed AJ, and decided:

> *'Paragraph 3 of the court order granted by Vahed AJ deals with the first respondent acquiring the properties referred to in the application. Clearly what the first respondent would acquire would be the land with the enhancements thereon which accede to the land. The acquisition was to occur* pari passu *with the payment of 'compensation', once such compensation was determined. The issue is how that 'compensation' was to be determined.'*

(My emphasis)

In my view it would have been impossible to decide the earlier issue without considering the content of the order by Vahed AJ and what it prescribed. In deciding upon quantum for example Koen J held:

> *'The basis upon which the quantum of compensation was to be determined was prescribed, namely that it had to be in accordance with the provisions of s 12 of the Act. It is in regard to what was to be valued i.e. raw land with enhancements or raw land without any enhancements, or, differently stated perhaps, land 'not illegally occupied and enhanced', or land with enhancements thereon, that the attorneys (and hence the parties) were not* ad idem*.'*

(My emphasis)

It was only after Koen J had found Vahed AJ's order to be ambiguous that the Court resorted to extrinsic evidence, in deciding upon the application. It would have been improper for the Court, hearing the previous application, to decide upon the issues without interpreting the terms of the order granted by Vahed AJ. In the present action the plaintiff is placing reliance on the very same order that was interpreted by Koen J. If the special plea of *res iudicata* does not succeed, then this court would have to consider the very same order that was considered by another court and found to be ambiguous. On the strength of the order being ambiguous Koen J relied on the discussions between the parties and their legal representatives in determining whether the parties agreed on a valuation report.[13] The order of Vahed AJ, remained an integral part of the evidence before Koen J.

[11] When the matter was argued, Mr Stokes submitted that paragraph 29 of Koen J's judgment was not part of the *ratio*

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[13] Cf. *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A):

> *'According to Voet 44.2.4 it is not the form of action which determines the sameness of the* causa petendi, *but the identity of, the question which is again raised or set in motion.'* (At 562B).

decidendi and should be considered as an *obiter* statement. The said paragraph reads:

> *'Even if I was incorrect in my above reasoning, I nevertheless believe that the application cannot succeed also on the following basis. The amount of the compensation was to be determined in accordance with s 12(1), (2) and (3) of the Act. It seems clear to me that such compensation could not be calculated other than by taking into account also the prescripts referred to in* inter alia *the remainder of the provisions in s 12, notably s 12(5). Section 12(5) expressly refers to factors which need to be taken into account 'in calculating the compensation payable in terms of the Act'. Although the properties were not actually being expropriated, by fixing of a 'date of expropriation' in paragraph 8 of the order, and by prescribing that the compensation was to be determined in accordance with* inter alia *s 12(1), (2) and (3) of the Act, provisions such as s 12(5) which would normally apply to a determination of the amount of compensation, particularly subsection (c) thereof, were clearly intended to apply.'*

It appears to me that the learned judge not only applied his mind to the calculation of the compensation but gave additional reasons in support of the findings. In my view it was necessary and appropriate for the Court to give all the reasons why the application should fail and accordingly it cannot be said to be an *obiter* dictum.

[12] In paragraph 30 of the judgment the Court expressly dealt with section 12(5) of the Expropriation Act and found that the property was used for unlawful purposes and accordingly the enhancements arising from the property must be disregarded. The judgment of Koen J in respect of the issues above, had not been appealed against and that judgment remains binding upon the plaintiff, however much the plaintiff disagrees with it.

In my view the threefold test[14] of the *exceptio res iudicata* have been met. To decide differently would give rise to conflicting decisions on the same issues in dispute. Given the circumstances in which the principle finds application, and operates, I am of the view that the operation of this common law rule is not only fair but also just and equitable.

[13] It follows therefore that the special plea of *res iudicata* should succeed.

13.1 In the premises the special plea raised by the defendant is upheld with costs.

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[14] See *Mitford's Executor v Ebden's Executors and Others* 1917 AD 682 at 686; *Pretorius v Barkly East Divisional Council* 1914 AD 407; *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 605, *African Farms and Townships Ltd v Cape Town Municipality supra*; *Custom Credit Corporation (Pty) Ltd v Shembe* (*supra*).

13.2 The remainder of the issues are adjourned *sine die*.

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Steyn, J

Date Judgment Reserved:	21 August 2013
Date of Judgment:	13 September 2013
Counsel for the Plaintiff:	Adv Stokes SC
Instructed by:	Knight Turner Inc.
Counsel for the Respondent:	Adv Goddard
Instructed by:	Shepstone & Wylie Attorneys