IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal case number: A184 / 2020

Court *a quo* case number: 20986 / 2014

In the matter between: **REPORTABLE**

THE DEMOCRATIC ALLIANCE Appellant

and

JOHANN WICHARDT GREYLING BRUMMER Respondent

Coram: Saldanha, Gamble et Wille, JJ

Heard: 18th of January 2021

Delivered: 12th of April 2021

(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on the 12th of April 2021)

JUDGMENT

WILLE, J: (Dissenting)

INTRODUCTION

[1] Notwithstanding, that I have had the benefit of reading the majority judgment of my senior colleague Gamble J, I nevertheless remain unpersuaded that it is desirable to lend support to a relaxation of the doctrine of - *issue estoppel* - so as to find in favour of and to the benefit of the respondent. I say this because, I hold the view that the facts of this case, do not promote the exercise of a judicial discretion in favour of the respondent, on the basis of either fairness or equity.

[2] This appeal concerns the core issue of the correct application of a plea of *res judicata* in the form of - *issue estoppel* - to what I view, as mostly common cause facts. The respondent is an erstwhile member of the appellant and relied on the appellant's funding and ran on the appellant's electoral ticket as a career politician. The respondent was elected as one of the appellant's councillors. During 2012, the appellant terminated the respondent's membership in and to the party.[1]

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[1] The appellant took the position that the respondent had not settled his 'dues' to the party, despite a valid demand for payment thereof being hand delivered to the respondent

[3] No doubt, this prompted the respondent to launch an application for, inter alia, an order to re-instate his membership in and to the appellant, asserting that the termination of his membership by the appellant, was unlawful. At the outset, interim relief was agreed upon and the application was postponed for the delivery of further papers and for its ultimate determination. Following argument, the application was dismissed with costs by Traverso DJP.[2]

[4] The current action proceedings were launched during 2014. The respondent undeniably relied on the alleged unlawful termination of his membership in and to the appellant, as the foundation for the relief he claimed in his application proceedings. The respondent now seeks the remedy of damages as opposed to one of re-instatement.[3] Both the action and the application proceedings were buttressed by the core allegation that the respondent's party membership had been terminated unlawfully by the appellant.

[5] Put in another way, the - *issue* - before Traverso DJP, was whether the respondent's membership of the appellant had been unlawfully terminated. It is the appellant's case that the - *issue* - in the action is analogously whether the appellant unlawfully terminated the respondent's membership in and to the appellant. It is submitted by the appellant that the court *a quo* correctly categorized that the - *same issue* - was before it, that served before Traverso, DJP. The primary argument is that the court a quo failed to apply the doctrine of - *issue estoppel* - correctly.

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[2] This, during 2012

[3] 'Re-instatement' was pursued in the application proceedings before Traverso DJP.

NEW EVIDENCE

[6] The respondent rather belatedly launched an application for the introduction of new evidence, this on appeal. The legal position in this connection is now a matter of established law. An appeal court will only accept new evidence on appeal sparingly, and in exceptional circumstances.[4] The respondent contends that in view of certain of the positions taken by the appellant in its heads of argument on appeal, he was impelled to obtain a transcript of the proceedings, which he now seeks to introduce on appeal. On this score, the respondent takes the view that Traverso DJP, had determined only interim relief and not final relief. I must say that I find it difficult to appreciate that the respondent sought re-instatement on an interim basis in view of the exacting order that he sought in his notice of motion. In my view, he sought the re-instatement of his membership in and to the appellant and nothing in the papers suggests that the respondent sought this on an interim basis. It is precisely this - *issue* - of his re-instatement that was argued on the papers that served before Traverso, DJP.

[7] This line of reasoning[5], by the respondent had been advanced on many previous occasions and is not by any stretch of the imagination 'new evidence'. Moreover, the respondent contends for the standpoint that it was the appellant that had insisted upon the discrete adjudication of the special plea. I do not see the relevance of this argument as the record clearly exhibits that both parties submitted to the adjudication of the special plea as a matter of convenience, by agreement.

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[4] *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) at para 10

[5] The nature of the relief claimed in the application proceedings

[8] Finally, in a last ditch effort on this score, the respondent suggests that a duty bore down on the appellant to file the transcript of the proceedings. I disagree. Firstly, because the appellant is only obliged to put up evidence it deems apposite to prove its case, nothing more and nothing less. Secondly, the parties agreed as to what material from the application proceedings would be included and what material, would also be disregarded. By way of example, the parties agreed that their respective heads of argument from the application proceedings would be excluded and they were so excluded.

[9] The appellant submits that the transcript is neither material, nor weighty and is such that it will not determine the outcome of the appeal. To the converse, the respondent takes the position that this new evidence will demonstrate that only interim relief was contended for in the application proceedings. As I have mentioned previously, I find it difficult to resign myself to the fact that the respondent would have approached the court on application for an order that his membership in and to the appellant, only be fleetingly restored. This, curiously in view of the fact that his seat on the council had already been taken up in the interim, before the fate of his urgent application was determined by Traverso, DJP. The dismissal of the unqualified application with no return day, must also of necessity have decided the matter in its entirety. The decision was clearly to dismiss the application which, as a matter of logic, must have included final relief on the issue of the respondent's re-instatement of his membership in and to the appellant.

[10] What is of moment is that the evidence now sought to be introduced, was neither before the court of first instance, nor before the Supreme Court of Appeal, when it overturned the decision of the court *a quo*, to refuse leave to appeal. No explanation is advanced as to why it was not previously introduced and further, why it will alter the outcome of the appeal. Nevertheless, I hold the view that the issue of prejudice remains the principal weighty and material factor, worthy of consideration. The nature of the evidence sought to be introduced, also cannot be ignored.

[11] It is conceded that there is no prejudice to the appellant should the new evidence be introduced and in my view, the new evidence will be of some assistance to the appeal court in its ultimate determination of this appeal. Although, the material sought to be introduced is evidence[6], empirically and realistically, it is merely a recording of the proceedings that played out before Traverso, DJP. Further, the respondent contends for the existence of a dispute in connection with the labelling of the relief contended for before Traverso, DJP. For these reasons, I hold the view that the new evidence falls to be admitted into the record for the purposes of the determination of this appeal.

THE APPLICATION

[12] During August 2012, the respondent lost his membership in and to the appellant after he failed to pay his compulsory dues. The appellant's constitution[7], provides, *inter alia*, that:-

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[6] In a strict 'technical' sense

[7] In terms of clause 3.5.1.9

'A member ceases to be a member of the party when he or she … is in default with the payment of any compulsory public representative contribution for a period of 2 (two) months after having been notified in writing that he or she is in arrears and fails to make satisfactory arrangements or fails to comply with such arrangements for payment of the arrears'

[13] This, in turn triggered the respondent's urgent application for relief in the following terms, namely: an order restraining the appellant and others from taking steps to fill the seats on those councils lost by respondent: an order directing the appellant to - *re-instate my membership* - and to restore the respondent to his - *salaried positions* - on those councils: an order restraining the Independent Electoral Commission[8], from filling the vacated seats and an order directing any of the respondents to show cause on a return date to be determined by the court, why the above interim order should not be made final.

[14] The primary relief sought was incontestably his re-instatement to the appellant and this relief could only have been ordered in the event that the court was satisfied that the termination of the respondent's membership was unlawful. The respondent advanced a plethora of reasons as to why he alleged the termination of his membership was unlawful. Significantly, the validity of the guillotine clause in the constitution was not challenged.[9] Thereafter, and by agreement, during September 2012, an order was handed down regulating the further conduct of the matter and the

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[8] The IEC

[9] This issue was belatedly raised in the form of an amendment which was refused Traverso, DJP

IEC was temporarily prohibited from filling the vacancy created by the respondent's loss of his membership, pending a determination of the respondent's application.

[15] Comprehensive papers were thereafter filed and the application was argued before the Deputy Judge President on the 12th of September 2012. The application was dismissed with costs on the 12th of September 2012. Traverso DJP, was not persuaded that that the respondent had established that his membership in and to the appellant had been terminated unlawfully. This, on any of the grounds asserted by him.

[16] It is the appellant's case, that both the remedy of re-instatement that the respondent had sought in his application, together with the damages he now seeks in his action proceedings, could only be successful, if the court was satisfied that the termination of his party membership had been unlawful. The only other argument that the respondent was left with to advance in his application, was the argument that sought to revile the validity of the guillotine clause in the appellant's constitution. This, on the grounds that it was against public policy and accordingly invalid.

[17] On this score, Traverso DJP, refused the respondent's application to amend his notice of motion to include a prayer for a declaration that assailed this clause of the appellant's constitution on the basis of its alleged invalidity. In my view, herein lies the rub! Despite this ruling by the DJP, the respondent persisted with his application, regardless of the legal consequences and refused to accept that he was no longer a member of the appellant. By doing this, he fell on his own sword.

[18] The core issue in this appeal, in my view, remains an enquiry into the nature of the remedy sought by the respondent, namely his re-instatement. The remedy of re-instatement could only have been ordered in the application proceedings, in the event that the court having being satisfied that the termination of the respondent's party membership had not been lawful. This was after all, and still is, the issue. The court *a quo* also decorously identified this as the issue.

THE ACTION

[19] The respondent thereafter instituted action proceedings seeking damages against the appellant. This claim is buttressed by the allegation that the appellant had unlawfully terminated his membership during 2012. The respondent formulated his claims in contract, in delict and on constitutional grounds. The kernel of his claims focused primarily on the allegations relating to the unlawful termination of his membership in and to the appellant.

[20] The appellant raised the shield of - *issue estoppel* - by way of a special plea. The basis of this shield is the argument, that the respondent cannot litigate - *the issue* - of whether or not his membership was unlawfully terminated, because - *this issue* - had already been finally determined against him in the application proceedings. The parties agreed, that the court *a quo* determine this defence of - *issue estoppel* - as a separated out issue, because if successful, it would be dispositive of the entire dispute between the parties.

DISCUSSION

[21] The appellant's case is that the respondent, by operation of the doctrine of - *issue estoppel* - was prevented from revisiting the validity of the termination of his party membership, albeit now clothed in contract, delict, constitutionally or otherwise, and irrespective of the relief now sought.

[22] Undoubtedly, the court *a quo* fittingly identified the test for issue estoppel and also correctly concluded that the - *same issue* - as to the lawfulness of the termination of respondent's membership was indeed determined by Traverso, DJP. The court also correctly determined that the requirements for issue estoppel were namely:- '*the same issue and the same parties'.*

[23] It is advanced that paramount to the judgment in the court *a quo*, was the finding that the application concerned itself only with the manner in which the appellant had exercised its power to terminate the respondent's party membership and not whether the appellant had that power at all. For this reason, inter alia, the respondent takes the position that the court *a quo,* was not estopped from considering the latter aspect as a basis for determining - *the issue* - as to whether or not the respondent's membership had been terminated unlawfully. I disagree.

[24] Significantly on this aspect, the findings in the application proceedings were not the subject of any appeal by the respondent. More importantly, the respondent persevered with - *the issue* - in the application proceedings and did not abandon his relief in this connection. His seat had already been taken up when the application was argued before Traverso, DJP.

[25] Despite this, the respondent sought an order in connection with the status of his membership in and to the appellant. The dismissal of his application was not the result he had hoped for and now he is left with no option but to argue that - *the issue* - was not a live issue before Traverso, DJP. In my view he cannot have it both ways. I will deal with this more fully when it comes to the issue of the court's discretion to relax the doctrine of issue estoppel. This discretion must obviously be exercised judicially, within the precincts of the legal principals and is case specific.

[26] Issue estoppel applies where an - *issue* - of fact or law was an essential element of a prior final judgment. The - *issue* - cannot be revisited in subsequent proceedings before another court, even if a different cause of action is relied upon or different relief is claimed.[10] Our courts have recognised that a strict application of issue estoppel could result in unfairness in some unusual circumstances, but this is typically applied in cases where the - *nature of the issue* - is in dispute or at least open to some doubt. The nature of the issue was never in any doubt in this case. The court *a quo* itself had no difficulty in circumscribing the issue and correctly defined the issue.

[27] Issue estoppel applies when different relief based on different causes of action is sought in the subsequent case, if it involves the determination of the same - *issue* - of fact or law.[11] I take the following from *Ekurhuleni,* where it was held as follows;

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[10] *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) at para 10

[11] *Aon SA (Pty) Ltd v Van Den Heever* 2018 (6) SA 38 (SCA) at para 40

'…the submission that res judicata does not apply because of the lack of sameness in the cause of action is misconceived. Sameness is determined by the identity of the question previously set in motion'[12]

[28] Issue estoppel developed precisely because, requiring sameness between the two causes of action allows parties to re-litigate the same issue by garbing these up in different causes of action. The authorities not to apply issue estoppel for reasons of justice and equity, need to be evaluated with reference to the *Henderson*[13] principle. This principle provides, inter alia, that when a given matter becomes a subject of litigation;

' the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case'

[29] This doctrine has been fully assimilated into our law. The doctrine applies equally to pure claims of res judicata and to claims based on issue estoppel. When the respondent went to court to challenge the termination of his membership, it must be so that he was required to put forward his entire case. Further, and most importantly, the respondent elected to persist with the issue of the termination of his

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[12] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC) at para 31

[13] *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, [1843-1860] All ER Rep 378 at 381-2.

membership, despite the fact that there was seemingly no urgent need for this relief, at that stage.

[30] By doing this, the respondent euthanized his case in connection with the issue of the challenge to the unlawful termination of his membership. Additional or alternative causes of action for the determination of - *the issue* - as to whether the termination of the respondent's membership was unlawful or lawful, cannot be raised in subsequent proceedings on the same - *issue* - this, in circumstances where the respondent's first attempt failed on the same issue.

[31] In my view, for issue estoppel to apply, it is not necessary that the previous court - *expressly* - determines the issue before the latter court. I say this because, it would undermine the purpose of res judicata and issue estoppel to hold otherwise. It would allow litigants to freely exodus from any order granted without not only a reasoned judgment, but one that expressly addresses the issue of fact or law that was nonetheless structural to the decision. As a matter of logic, it must be so, that the fashion in which Traverso, DJP expressed herself and decided the - *issue* - of the lawfulness or unlawfulness, of respondent's loss of his party membership, is irrelevant.

[32] What endures is that Traverso DJP, could not have legitimately dismissed the respondent's application without concluding that the respondent's membership of the appellant had not been unlawfully terminated. I take the view, that notwithstanding the innovative grounds upon which the respondent now seeks to rely, the foundations raised in respect of - *the issue* - as to whether or not his membership was terminated

unlawfully, remain. Accordingly, the doctrine of issue estoppel applies as set out in the appellant's special plea of res judicata. The doctrine of issue estoppel then inevitably precludes - *the issue* - being raised again in fresh proceedings as the footing for any new causes of action, whether in contract, delict or constitutional.

[33] The respondent places much reliance on the proposition that because of the legal conclusions drawn by Traverso DJP, - *the issue* - was decided on the papers and arguments placed before her, rather than on the unique arguments now advanced, alternatively, on arguments that could have been, but were not then advanced. In my view, this approach is incongruous because issue estoppel exists to prevent litigants approaching a later court, on new papers and armed with fresh arguments, to revisit the same - *issue* - that they had previously lost. This is the very purpose of issue estoppel.

[34] The court *a quo* found that the issue of the legality of the appellant's constitution was not expressly decided by Traverso DJP. This was so because the belated amendment by the respondent in this connection, was refused by Traverso DJP, and correctly so. This notwithstanding, the respondent persisted with his application on the - *issue* - of his alleged unlawful termination of his membership in and to the appellant. It is precisely because he adopted this stance that he, in my view, falls to be estopped from now raising the legality issue in clean proceedings.

[35] The - *issue* - for the purposes of issue estoppel is totally discrete from a *cause of action* or a *remedy*. It is precisely for this reason, that a litigant is not permitted to

pioneer in later proceedings in respect of an - *issue* - a ground that he failed to raise in the original proceedings. To allow this would undermine the finality of judicial decision making and cast doubt over the trustworthiness of judicial decisions. The whole purpose of issue estoppel is to depart from the strict requirements of *res judicata* that the cause of action and the relief must be identical.

[36] I take the view that the only basis upon which the respondent may attempt to exodus the shield of issue estoppel put up by the appellant, is for this court to exercise its discretion, not to invoke the doctrine of issue estoppel against the respondent. This exercise involves both a factual and a legal enquiry. I am unable to unearth any basis for a finding in fact that there would be unfair consequences if issue estoppel were to apply against the respondent, in these circumstances. I say this because, to an extent, the respondent is the author of his own misfortune. Less important for me, is the form in which the respondent sought to launch his application proceedings and the procedural manner in which his application unfolded. More important for me, is the - *issue* - that he presented for determination before Traverso, DJP.

[37] Put in another way, it would be grossly unfair were the doctrine not to apply as the respondent would then be allowed to escape the consequences of the Traverso judgment and have the lawfulness of his party membership decided afresh. This in my view, would undermine the rule of law and would open the door to recurring legal challenges to the same conduct, which is contrary to conventional legal principle.

[38] Litigation is not for pot-plants in a greenhouse. The respondent was in control of his own destiny. He did not pay his legal dues to the appellant and he alone decided to persist with the relief about his membership in and to the appellant, without any urgent need to do so at all. Many different possibilities were open to him in this connection and yet he persisted with his application before Traverso, DJP. This course of action had consequences which he now seeks to exodus on the basis of fairness and equity.

[39] A constant refrain by the respondent is that Traverso DJP was only considering an application for an interim interdict. I disagree. The respondent's application initially sought interim relief, pending a return date and then a final determination. This included a prayer that his membership in and to the appellant be immediately restored.

[40] The application was launched on the 5th of September 2012 and set down for hearing on an urgent basis for the 6th of September 2012. Interim relief was granted in a modified form so as to preserve the respondent's seat from being filled, pending the outcome of the final relief, which was set down for hearing on the 12th of September 2012. There is not an iota of evidence, alternatively, any material to suggest that the decision by Traverso DJP, was in any manner limited to refusing only interim relief.

[41] Traverso DJP, pedantically recorded the relief sought in unqualified terms and dismissed the entire application and that relief in its entirety. This was in the form of

final relief, after some interim relief had already been sought and obtained. This must be so because, if Traverso DJP, had only intended to refuse interim relief, she would have said so. The respondent himself accepted that the ruling was dispositive of his application. He could have appealed the order if he was unhappy with the result. He did not do so. Nothing in law, prevented him from doing so.

[42] The respondent also takes the position that the effect of Traverso DJP's order was the same as absolution from the instance, and not a dismissal. The order reads as follows – '*the application is dismissed with costs'* - nothing more and nothing less. In my view, it can never be argued that the effect of this order is to absolve from the instance. It was an out and out dismissal. It follows, that Traverso DJP, could only have granted that order if she had concluded that the termination of respondent's membership of the appellant was not unlawful.

[43] In addition, the respondent alleges that Traverso DJP's judgment was influenced by the fact that his seat had been filled in the interim. There is simply no basis for this argument. To the contrary, what this does emphasize is the fact that the re-instatement of the respondent's membership in and to the appellant, was the only relief which lingered before Traverso DJP to decide upon. The fact that the respondent's seat had been filled in the interim, did not bring about a - *chameleonic change* - of the nature of the - *issue* - before Traverso, DJP.

[44] As far as the policy document[14] argument advanced by the respondent, the following falls to be recorded at the outset. I attempted to enquire from the respondent's counsel as to why his client had not dealt with the policy document of the appellant (amongst others), during the course of the hearing before Traverso, DJP. I was acutely aware of the fact that his client's stated position was that he was unaware of the existence of this material at that time. The reason for my attempted enquiry was twofold, namely: firstly, I had noticed that the relevant policy document was adopted by the appellant approximately (1) year before the respondent's application was launched and, secondly, I had noticed that the respondent had signed an undertaking during 2010. This undertaking contained a wide ranging deeming provision in it, regarding the respondent's imputed knowledge of the affairs of the appellant.

[45] In addition, I held the view that the test to be applied, in connection with the respondent's knowledge of the existence of the policy document, was rather an objective test and not a subjective test. Regrettably, rather than gratiously exploring my enquiry, the respondent's counsel uttered unfortunately chosen words to the effect that I had not read the record of the proceedings. The respondent seeks to somehow rely on the policy document to attempt to justify not applying the doctrine of issue estoppel.

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[14] The 'policy'

[46] This proposition by the respondent requires some scrutiny. The respondent's argument on this score is that the policy indicates that candidate fees are not - *compulsory public representative contributions* - the non-payment of which leads to the automatic loss of membership. Only the non-payment of the so-called - *tithes* - so the respondent contends, has this guillotine effect and accordingly, so it seems, the principals of issue estoppel should not be invoked against the respondent on the basis of fairness and equity.

[47] In amplification, the respondent takes the position that the appellant's failure to disclose the details of its own policy will render it unfair to apply issue estoppel against him and accordingly, the court should exercise its discretion and relax the application of the doctrine of issue estoppel. The respondent is ostensibly making an argument that the appellant is obliged to assist the respondent in making out a case against itself. Even if I were to accept this unorthodox approach by the respondent, no such conduct on the part of the appellant was established by the respondent.

[48] More importantly, in my view, the policy does not have the effect that the respondent says it does. The appellant tendered evidence which revealed that there were two primary sources of income that the appellant collected from its public representatives: - *firstly* - a tithe that is paid on a monthly basis; and - *secondly* - a candidate fee that is a once-off fee paid by every person elected on the appellant's electoral ticket. Both of these are fees, both are paid only by public representatives and both are compulsory.

[49] Further, it was demonstrated by the appellant that the policy does not create obligations to pay tithes or candidate fees as these arise from decisions of the appellant's federal council. The policy does not determine any consequences for non-payment. These consequences are set out in the constitution of the appellant.

[50] In addition, this is precisely why, I attempted to draw to the attention of the respondent's counsel, the specific terms and conditions of the document deposed to under oath by the respondent, during 2010. In this document[15], the respondent, inter alia, declares and undertakes as follows:-

'I am familiar with the provisions of the federal and, if applicable, provincial constitution of the party, and will abide by their provisions'

[51] The policy document merely administratively regulates the procedures and processes for the management and collection of the various income streams for the appellant. The document has less to do with any sanction to be imposed on the respondent. In any event, the policy document boosts the plain meaning of the appellant's constitution that the - *compulsory public representative contributions* - as a matter of logic, must include a candidate fee. This must be so, *inter alia*, because the same disciplinary process is followed for the non-payment of both tithes and candidate fees.

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[15] Styled the 'Candidate Statement'

[52] For these reasons, the - *policy argument* - by the respondent is of no moment and is, in my view, simply a red herring. The fact that the policy was not before Traverso, DJP is completely immaterial for determining whether issue estoppel applies or not.

[53] In another throw of the dice to attempt to persuade the court that the respondent should escape the doctrine of issue estoppel, the respondent advances some arguments about the merits of his claim. One of these arguments by the respondent's counsel is that the respondent did not have a clear and sufficient breakdown of the amount that he allegedly owed to the appellant in the form of his outstanding dues. Litigation is not a game and the respondent is somewhat hoisted by his own petard in this connection. An analysis and evaluation of the record clearly exhibits that a letter of demand (together with a full recapitulation statement of the amount outstanding to the appellant), was hand delivered to the respondent. The respondent's own version on this, is that he became so irritated by this, that he did not even read the letter, nor the attachment thereto and discarded these documents into the rubbish bin. It hardly now lies in his arsenal to allege that he did not know what was due owing and paying to the appellant by way of his outstanding dues.

[54] Finally, on the merits, the respondent belatedly advances a constitutional argument in which he attempts to embrace the provisions of section 34 of the Constitution[16]. This argument falls to be dealt with swiftly. It does not matter at all whether Traverso, DJP was right or wrong in her decision. The merits of that decision

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[16] The Constitution of the Republic of South Africa, 1996

and the current action do not matter for the purposes of determining the special plea res judicata in the form of issue estoppel. As mentioned previously, the respondent could have appealed the order if he was unhappy with the result. He did not do so. Nothing in law, prevented him from doing so.

[55] In this connection, I take the following from *African Farms*[17], namely that: -

'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 judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment'

[56] In summary, my reasoning is that I am unable to think of any grounds upon which a court seized with the Traverso application would be entitled to have come to any decision without in terms, dealing with the issue of the unlawfulness or otherwise of the respondent's membership in and to the appellant. Further, I am not persuaded that there are any legal or factual grounds, based on either fairness or equity, which would legally permit or justify a relaxation of the principals of issue estoppel, in favour of the respondent.

[57] For all these reasons, I would have upheld the appeal and would have issued out an order in the following terms:

1. That the application for the introduction of new evidence on appeal is granted.

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[17] *African Farms v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C - F

2. That the appeal is upheld.

3. That the defendant's special plea of issue estoppel is upheld with costs, including the costs of two counsel (where so employed).

4. That the plaintiff's action is dismissed with costs, including the costs of two counsel (where so employed).

5. That the respondent is liable for the costs of an incidental to the appeal, including costs of two counsel (where so employed).

6. That each party shall be responsible for their own respective legal costs in connection with the application for the introduction of the new evidence on appeal.

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E D WILLE

(Judge of the High Court)

GAMBLE, J: (Saldanha, J concurring)

INTRODUCTION

[58] The facts material to the determination of this appeal appear, generally, from the minority judgment of my colleague, Wille, J, handed down herewith. Briefly, they may be summarized as follows.

[59] The respondent "(Brummer") joined the appellant political party ("the DA") in 2000. He subsequently served as a councillor on the Bitou Local Municipality in Plettenberg Bay and on the Eden District Municipality, which has its offices in George, for more than a decade. On 13 August 2012, the DA confirmed termination of Brummer's membership of the party, alleging that he had failed to pay his dues to the party.

[60] As the basis for the termination of membership, the DA relied on cl 3.5.1.9 of its Federal Constitution, which reads as follows.

"*A member ceases to be a member of the Party when he or she…is in default with the payment of any compulsory public representative contribution for a period of 2 (two) months after having been notified in writing that he or she is in arrears and fails to comply with such arrangements for payment of the arrears*."

[61] The contribution referred to in cl 3.5.1.9 was termed a "tithe" which the DA required its public representatives (who earned a salary) to pay every month to the party. In later years in this litigation, the DA would rely on a certain internal policy document, which it said, fixed the payment of such contribution. The factual background to Brummer's termination of membership is not relevant to this appeal: suffice ot to say that there was a measure of dispute in relation thereto during June

and July 2012, particularly in relation to the extent of Brummer's indebtedness to the DA and the notice given to him to settle it.

[62[As a consequence of the termination of his membership, Brummer's position on the Bitou Municipality became vacant with effect from 31 July 2012 and the Independent Electoral Commission ("the IEC") was statutorily required to advertise that vacancy. This it did on 23 August 2012. Brummer, who was a career politician without any other source of income, then launched an urgent application on 5 September 2012 to interdict the IEC from filling the post and to procure the reinstatement of his membership in order that he could continue to earn an income as before. That application served before Louw J on 6 September 2012.

[63] On that day, the matter was postponed by agreement between the parties until 12 September 2012 with the DA agreeing to an interim order that the vacancy would not be filled pending the return day. When the matter served before Traverso DJP on 12 September 2012 in the Fast Lane of the Motion Court, it became apparent that the vacancy had already been filled by the IEC on 3 September 2012 – even before the papers in the urgent applicant before Louw J had been issued. Just what the DA's involvement in this state of affairs was is not clear from the record, but it seems as if it had already taken steps to inform the IEC of its new candidate prior to the first hearing of the matter.

[64] Before Traverso DJP, the DA was represented by Adv.D.Borgstrom from the Cape Town Bar and Brummer by Adv.A.Knoetze from the Johannesburg Bar. At that

stage, Mr. Knoetze informed the Court that the DA had already nominated a substitute to fill the vacancy and that "(t)he DA's position is that it has become, for all intents and purposes, *functus officio…"* In light of the fact that the interim relief sought before Louw J had effectively been rendered moot, Mr Knoetze informed Traverso DJP that his client wished to raise a challenge to the constitutionality of the aforesaid clause 3.5.1.9. The main argument Mr Knoetze sought to advance was that the clause in question was contrary to public policy.

PROCEEDINGS BEFORE TRAVERSO DJP

[65] Traverso DJP refused to entertain such a challenge in light of the fact that no constitutional relief had been sought in the notice of motion, although the issue had been touched upon in the founding affidavit. A gallant, last-ditch attempt by Mr Knoetze to move a handwritten amendment to the notice of motion from the Bar fell on deaf ears and Brummer's attempt to procure the reinstatement of his membership, and effectively the retention of his job, ultimately failed.

[66] In delivering a short *ex tempore* judgment, Traverso DJP (who was of the view that the matter was then genuinely urgent) held that the constitutional challenge had not been properly ventilated on the papers and that Brummer's late "application for an amendment of the notice of motion [was] yet a further step…to avoid the inevitable consequences of his actions." In dismissing the application with costs, Traverso DJP held that -

"the application for the amendment of the notice of motion at this late stage is dismissed and from that it follows, that, in view of the concessions made by Mr Knoetze that (sic) the balance of the application can also not succeed."

[67] It would appear from the interchanges between the Bench and Mr. Knoetze during the hearing that Her Ladyship was of the view that the provisions of the Federal Constitution were unambiguous – if a member failed to pay what the DA determined was due to it after timeous notice had been to such member, the termination of membership was automatic. One is reminded in this regard of the claim by an employer in respect of an employee who was on strike and failed to return to work after due demand by the employer, that the employee had "dismissed him- or herself". Be that as it may, nothing further transpired after the dismissal of the urgent application and, in particular, there was no application to appeal Traverso DJP's ruling.

THE ACTION PROCEEDINGS

[68] Towards the end of 2014, Brummer commenced action proceedings in this Division against the DA for damages founded in contract, alternatively delict and in the further alternative, for constitutional damages. The basis of Brummer's claims in the action was that the DA had unlawfully terminated his membership of the party in 2012. The DA filed its plea on the merits in the ordinary course and on 9 November 2018 the parties held a pre-trail meeting at which it was recorded that in the up-coming trial set down to commence on 12 February 2019 –

"[t]he parties are ad idem that the matter will still be decided on the issues as defined in the pleadings. The only issue that is presently being reserved for separate adjudication is the issue relating to the quantification of the Plaintiff's damages."

[69] Just a week before the trial was due to commence, the DA sought to introduce for the first time a special plea of issue estoppel and then insisted upon that issue being determined separately and *in limine* at the trial. The DA effected its special plea on the day of the trial and the matter stood down for two days to enable Brummer to respond thereto. In the result the trial commenced on 14 February 2019 on the separated issue. During that hearing, the court heard oral evidence from an official of the DA and Brummer and on 15 May 2019 the Court *a quo* dismissed the special plea with costs.

[70] The appeal before us against that order was with the leave of the Supreme Court of Appeal ("the SCA"). The DA was represented in the appeal (which was heard virtually) by Advs. A. Kantor SC and M.Bishop of the Cape Bar while Brummer was represented by Adv. M.G. Swanepoel of the Port Elizabeth Bar, all of whom had appeared in the Court *a quo.* Another member of the Port Elizabeth Bar, Adv. J. Nepgen, presented argument to us in relation to the introduction of further evidence on appeal, the heads of argument in that application having been drafted by Adv. M. Adhikari of the Cape Bar.

[71] The argument presented by Mr. Nepgen was intended to place before this court the transcript of the proceedings before Traverso D.J.P. Unsurprisingly (given the level of animosity between the parties), yet quite unnecessarily, the DA opposed

that application which generated another 168 pages of paper. In my view, the proceedings before Traverso DJP were clearly material and helpful to this Court and could hardly have occasioned any embarrassment or prejudice to the DA. Indeed, they should have been placed before us by the DA as appellant and in my respectful view, the application to adduce further evidence should therefore be granted with costs.

ISSUE ESTOPPEL

[72] As the judgments of the SCA in Prinsloo[18] and Hyprop[19] establish, the defence of issue estoppel has taken root in our law as a subsidiary of the principle of *res judicata.* The following passage in the judgment of Lewis JA in Hyprop provides a useful summary of the position.

"[13]… This court has most recently confirmed the application of issue estoppel in Prinsloo…

[14] Brand JA pointed out [in Prinsloo] that the plea of res judicata - that the matter has already been decided - was available where the dispute was between the same parties, for the same relief or on the same cause (In Voet's words, *idem actor, idem res et eadem causa petendi*). The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel - borrowing the term from English law. The relaxation and the

[18] Prinsloo NO and others v Goldex 15 (Pty) Ltd and another 2014 (5) SA 297 (SCA)

[19] Hyprop Investments Ltd v NSC Carriers and Forwarding CC and others 2014 (5) SA 406 (SCA)

application of issue estoppel effectively started in the Boshoff matter[20] where Greenberg J referred to Spencer- Bower's work on *Res Judicata.* In Smith v Porrit [21] Scott JA explained the evolution of the defence as follows:

> "Following the decision in Boshoff… the ambit of the *exceptio rei judicata* 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 judicata* is raised in the absence of a commonality 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, 670J – 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 judicata.* 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…"

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[20] Boshoff v Union Government 1932 TPD 345

[21] 2008 (6) SA 303 (SCA) at [10]

[73] The aforementioned passage in Smith to which Lewis JA referred in Hyprop concludes with the following reference to old authority by Scott JA :

"As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood (1893) 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals' ".

[74] The Constitutional Court has adopted a similar approach to issue estoppel. In that court's second judgment in Molaudzi[22], Theron AJ conducted a detailed examination of the principle of *res judicata* across several common law jurisdictions. She commenced by explaining the foundation underpinning *res judicata* as follows -

"[16] The underlying rationale of the doctrine of res judicata is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts."

[75] After reviewing the aforesaid international common law authorities, the learned Acting Justice concluded that -

"[30] The general thrust is that res judicata is usually recognised in one way or another as necessary for legal certainty and the proper administration of justice. However, many

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[22] Molaudzi v S 2015 (8) BCLR 904 (CC)

jurisdictions recognise that this cannot be absolute. This is because "[t]o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience"[23]

[76] The decision in Molaudzi (2) was ultimately grounded in s 173 of the Constitution. I thus quote extensively from the judgment to place the constitutional approach in its proper context. In so doing, and to avoid prolixity, I omit the extensive footnotes contained in the original text of the judgment.

"*This Court's power to revisit final orders*

[31] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

In terms of section 173, each superior court is the master of its own process. Jafta J stated in Mukaddam [v Pioneer Foods (Pty) Ltd and others 2013 (5) SA 89 (CC) at [32]]

> "It is apparent from the text of the section that it does not only recognise the courts' power to protect and regulate their own processes but also their power to develop the common law where necessary to meet the interests of justice. The guiding principle in exercising the powers in the section is the interests of justice."

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[23] The quoted passage is from the decision of the Indian Supreme Court in MS Ahlawat v State of Haryana and another 1999 Supp (4) SCR 160.

[32] Since res judicata is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.

[33] This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This Court held in South African Broadcasting Corp Ltd [v National Director of Public Prosecutions and others 2007 (1) SA 523 (CC) at [90]]:

> "The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction."

[34] The power in section 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have…

[37] The incremental and conservative ways that exceptions have been developed to the res judicata doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be

compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata."

[77] It is trite that the party seeking to rely on the defence of *res judicata* must allege and prove all the elements underlying the defence.[24]

WHAT WAS DETERMINED BY TRAVERSO DJP?

[78] In seeking to rely on the judgment of Traverso DJP as constituting *res judicata* in respect of the claims for damages subsequently launched by Brummer, the DA argues that what was squarely before Her Ladyship for determination on 12 September 2012 was the issue as to whether the DA had lawfully terminated Brummer's membership of the party. As appears from the passage in Her Ladyship's judgment referred to above, her decision to dismiss the application was premised on certain "concessions" allegedly made by Mr. Knoetze during the course of his argument.

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[24] National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA) at 239F-I.

[79] I have carefully considered the transcript of those proceedings and must confess to some doubt as to whether Mr. Knoetze indeed conceded unequivocally that the termination of Brummer's membership of the party was unassailable in law. The transcript reflects that Her Ladyship was clearly in a hurry to dispose of the matter: that is the nature of hearings in the Fast Track where the court often has a heavy roll of opposed matters. Having initially expressed the view to Mr Knoetze that the urgency in the matter may have been self-induced, Her Ladyship delivered judgment off the cuff and immediately after Brummer's counsel had completed his reply.

[80] The transcript reflects, too, that when he attempted to address the Court on issues of general legal principle, and in particular, whether cl 3.5.1.9 was contrary to public policy, Mr. Knoetze was cut short by the Bench and urged to complete his address. The points which counsel attempted to make included –

23.1 An argument that the fact that the DA was entitled to fix a member's indebtedness without more, offended the "conclusive proof" cases similar to those in which banks had been permitted to put up certificates of balance. The court was referred to Appellate Division authority on point;

23.2 The fact that Brummer had attempted to dispute his indebtedness to the DA (albeit in a relatively small amount) but was precluded from doing so by virtue of the DA's unflinching attitude in relation to the enforcement of clause 3.5.1.9 – effectively saying "pay up or face termination";

23.3 Reliance on the *dictum* of the SCA in Bafana Finance[25] in which Cachalia AJA dealt extensively with various contracts which might be considered to be *contra bonos mores* in light of the manner in which they were in conflict with the values inherent in the Constitution, 1996; and ultimately

23.4 The constitutionality of cl 3.5.1.9 itself, particularly in the context of s19 of the Constitution which protects the right to political association.[26] In this regard there was reliance on Ramakatsa[27] in which the Constitutional Court stressed that the right to political association afforded every member of a political party the right to demand exact compliance by the party with the terms of its own constitution and, further, that where there was a breach thereof by the party, its members were entitled to approach the court for appropriate relief.

APPLYING ISSUE ESTOPPEL

[81] The factual issue, which arose in this matter, was the termination of Brummer's membership through the application by the DA of clause 3.5.1.9. That termination afforded Brummer various causes of action. Firstly, he could dispute the amount of his indebtedness to the DA. Secondly, he could show that he had not received the DA's letter of demand at all, or, at the least timeously. Thirdly, he could seek urgent interim relief that his seat on the municipal council not be advertised pending the resolution of

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[25] Bafana Finance Mabopane v Makwakwa and another 2006 (4) SA 581 (SCA)

[26] Section 19 (1)(b) declares that "(e)very citizen is free to make political choices, which includes the right…to participate in the activities of…a political party…"

[27] Ramakatsa and others v Magashule and others [2013] 2 BCLR 202 (CC) at [16];[43]; [119]

his dispute with the DA. Then, Brummer could have demanded that he be reinstated pending the final determination of the matter.

[82] Fifthly, he could accept the fact that his seat had been filled by another member of the DA and sue for damages, given that his relationship with the DA was governed, primarily, by the law of contract.[28] Sixthly, he might have approached the court for non-patrimonial damages founded in delict based on an allegation that the DA breached a duty of care that it owed to him. Lastly, with reliance on, inter alia, Ramakatsa, Brummer was entitled to allege a breach of his rights protected under s19 of the Constitution and seek appropriate relief, including constitutional damages.[29]

[83] But, in light of the attitude adopted by Traverso DJP, Brummer was unable to advance any of the causes of action entitling him to seek compensation of whatsoever nature flowing from the loss of his membership because he was denied the opportunity to place that case before the court. The only cause of action which was effectively before that court was his reinstatement as a councillor representing the DA.

[84] Moreover, the evidence adduced before the Court *a quo* in support of the DA's policy in relation to the obligatory contributions by members revealed that the policy itself had only come to the attention of Brummer and his legal representatives in the run-up to the 2019 hearing. To the extent that the policy was the basis for the reliance by the DA on clause 3.5.1.9, and insofar as Brummer sought to attack the

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[28] Ramakatsa at [79] – [81]

[29] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

enforceability and constitutionality of that clause, he was manifestly unable to do so before Traverso DJP.

[85] In the result, I am persuaded that Brummer was not afforded the opportunity before Traverso DJP to litigate his cause of action in relation to damages to finality and that it would thus be unjust and inequitable to uphold the special plea of issue estoppel.

CONCLUSION

[86] In the result, I respectfully consider that the Court *a quo* correctly dismissed the appellant's special plea. In the circumstances, I would make the following order.

A. The respondent's application to admit the transcript of the proceedings before this Court on 12 September 2012 in the matter of Brummer v Democratic Alliance and 3 others (case no. 17305/2012) is granted with costs.

B. The appeal is dismissed with costs.

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GAMBLE, J

SALDANHA, J: I agree and it is so ordered

pp SALDANHA, J

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