REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 25981/2011

[1] REPORTABLE: YES
[2] OF INTEREST TO OTHER JUDGES: YES
[3] REVISED.

12/3/19
Date:

WHG VAN DER LINDE

In the matter between:

Ilima Projects (Pty) Limited (in liquidation)	Applicant
and	
MEC: Public Transport, Roads and Works	1st Respondent
MEC: Infrastructure Development	2nd Respondent

JUDGMENT

Summary

Pleadings – proposed amendment of replication to rely on *res judicata* or issue estoppel – objection to on basis that previous litigation not between same parties;

Respondent/defendant in previous action by present applicant's/plaintiff's funder, held by Supreme Court of Appeal to have unlawfully repudiated contract between present applicant/plaintiff, and respondent/defendant accepting that finding in subsequent appeal to Constitutional Court, although present applicant/plaintiff not party to previous litigation;

Present applicant/plaintiff suing on basis of breach of unlawfully repudiated contract;

Question raised whether exception to replication sustainable procedure;

Held: No procedural objection in principle to exception to replication;

Held: Concept of "same parties" not limited to identical parties or even privies – Supreme Court of Appeal having left scope open for relaxation of requirement if in the interests of justice;

Held : Opposition to amendment rejected and amendment allowed.

Van der Linde, J:

Introduction

[1] This is an application by the applicant to amend its replication in a pending action between the parties in which the applicant as plaintiff sues the two respondents as defendants for payment of R21 500 000. I will refer to the applicant as "the contractor", and to the respondents as "the employer", for reasons that will become evident later. The application for the amendment is opposed on the basis that it seeks to introduce an answer to the employer's defences that is bad in law. The objection is thus that the amendment, if granted, will render the replication excipiable. This is, in principle, a known basis for objecting to a proposed amendment, but here the excipiability is raised in relation to a replication. Although that is a rare exception, it appears not per se impermissible.[1]

[2] But, according to a judgment in this Division, unless the exception is against a plaintiff's case as comprised of assertions in both the particulars of claim and the replication read together, the procedure may be bad.[2] By precedent, if this judgment is in point, it binding on me unless I am persuaded that it is clearly wrong. I raised this judgment with the parties after the hearing, and have received helpful written argument on this issue, for which I am grateful.

[3] In arriving at its conclusion, the Momentum court reasoned as follows:

"[7] An exception to a replication on the ground that it discloses no cause of action is not only unusual but also hardly conceivable. A replication is not required to disclose a cause of action, it constitutes, where necessary, an answer to the defendant's plea. To allow an exception to a replication on the ground that it fails to disclose a cause of action would offend the well-entrenched principles relating to exceptions: firstly, the summarily disposal of the matter on the acceptance of the correctness of the pleaded facts, without having to toil

[1] Hosking and Others v Attorneys Fidelity Fund Board of Control (ECJ 2004/023) [2004] ZAECHC 27 (2 September 2004), per Chetty, J.
[2] Momentum Property Investments (Pty) Ltd v Amadwala Trading 591 CC T/a Wimpy and Another (2478/2011) [2016] ZAGPJHC 306 (21 October 2016), per Van Oosten, J.

through lengthy litigation is envisaged (see Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd 2014 (2) SA 157 (GNP) 161C-D) and secondly, in order to succeed, the excipient must show that upon every reasonable interpretation of the pleading, no cause of action is disclosed (First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA) para [6]; H v Fetal Assessment Centre 2015 (2) SA 193 (CC) 199B)."

[4] A replication is of course a pleading, just like the particulars of claim and the plea; and it has to comply with the requirements for pleadings generally.[3] The reference in rule 23(1) to the taking of exceptions is to *"any pleading"*, and *"any"* is notoriously wide; but the rule might suggest that exceptions are limited to either the particulars of claim or the plea (emphasis supplied): *"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be,..."*. The rule goes on however to provide for an exception that a pleading is vague and embarrassing, and there is no textual or contextual reason why such an exception cannot be raised against a replication.

[5] A replication is required to contain an answer to the plea, but not an adumbration of the cause of action set out in the particulars of claim.[4] If it does the later, it *"departs"* from the particulars of claim, and this is impermissible. No doubt the provisions of rule 30 relating to irregular proceedings are wide enough to permit of an application to strike out a replication which constitutes a departure. The point is, the replication can by definition not be required to contain all the averments necessary to sustain a cause of action; that is not its function.

[6] What if it raises an answer to the defendant's plea, as is its function, and that answer is bad in law (as the employer contends here)? Put differently, what if the replication, a pleading according to the rules of court, does not properly achieve its objective? If no further pleading is filed, a defendant is taken to join issue with a plaintiff. However, if the bad answer opens the door to evidence, it may in the interests of justice be advisable to have the

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[3] Rule 18(4), for instance (emphasis supplied): "*(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.*" The employer's notice of objection in this matter also accepts this principle; it objects to the intended amendment inter alia on the basis that it does not comply with rule 18(4).

[4] Broad v Bloom, 1903 TH 427.

bad answer weeded out early in the process, before the expense of pre-trial preparation is embarked upon.

[7] An application to strike out may still provide the solution. But can an exception be taken? Momentum could be read as having decided that it could not, but that court might not have been referred to the judgment in De Beer v Minister of Posts and Telegraphs, 1923 AD 653, in which the then Appellate Division dismissed an appeal from a decision of the Provincial Division of the Cape of Good Hope which, sitting as a court of appeal, had dismissed an appeal from a magistrate's court which in turn had dismissed exceptions by a plaintiff to a defendant's plea. The magistrate had also dismissed exceptions taken by the defendant to the plaintiff's replication, but on appeal to the Provincial Division, these exceptions were allowed, on the basis that the replication contained a departure.

[8] It was argued before the Appellate Division that there is no provision in the Magistrate's Court Act for taking an exception to a replication. That court dismissed the argument (emphasis supplied):

"But then it was contended that there is no provision in the Magistrate's Court Act for taking an exception to a replication, the pleadings being deemed to be closed upon delivery of a reply. If that be correct it would lead to somewhat remarkable results, but we are fortunately not driven to such a conclusion. Order 16 (2) provides that the rules applicable to the plea shall mutatis mutandis apply to the reply, and Order 15 (5) provides that 'a plaintiff may except to a plea on the ground that it does not disclose a ground of defence to the action.' It follows, therefore, that a defendant may except to a replication, if it does not disclose a reply to the plea."

[9] Nearly a century later the High Court rules and their interpretation fully accept that a replication is a pleading and that the rules applicable to pleadings generally also apply to it. It is required to be set out in sequentially numbered paragraphs containing a clear and concise statement of the material facts upon which the pleader relies for his/her *"... claim, defence or answer to any pleading, as the case may be ..."*. It may not contain scandalous, vexatious or irrelevant matter.

[10] If exceptions are legal objections complaining of a defect inherent in the pleading of the opposite party,[5] then it would, in the words of the Appellate Division, *"lead to somewhat remarkable results"* if a legally insufficient replication cannot form the subject of an exception. In my view the High Court rules relating to pleadings generally, including rule 23, must be so construed as to permit exceptions to replications, for two related reasons: first, since a replication is also a pleading, those rules apply to them; and second, there is no express exclusion of replications in the provision for exceptions.

[11] Yet it is not necessary to conclude that Momentum was clearly wrong, for two reasons. First, it was concerned with an exception that the replication did not disclose a cause of action, not that the replication did not constitute an answer. And second, the matter before me is, of course, not an exception but an application for leave to amend, and so Momentum is distinguishable, at least in form.

[12] The essence of the employer's objection to the contractor's proposed amendment of its replication, is that the contractor seeks to introduce reliance on the asserted binding force of two earlier judgments of respectively the Supreme Court of Appeal and the Constitutional Court in a matter between the employer and a 3rd party known as Country Cloud CC.[6] I will refer to Country Cloud as "the funder". The SCA had found that the employer had unlawfully cancelled a contract between it and the contractor, and before the Constitutional Court in the subsequent appeal, the employer had accepted that it had unlawfully cancelled the contract.

[13] In the present litigation the contractor sues the employer for payment of R21 500 000 on the basis that the employer had unlawfully cancelled that contract, but the employer denies that its cancellation was unlawful. The contractor seeks to replicate that the previous

[5] Erasmus, Superior Court Practice, 2nd Ed, Van Loggerenberg, Vol 2, pD1-293.
[6] Country Cloud Trading CC v MEC, Dept of Infrastructure Dev, 2014 (2) SA 214 (SCA); Country Cloud Trading CC v MEC, Dept of Infrastructure Dev, 2015 (1) SA 1 (CC).

litigation had definitively determined that issue, not only as between the employer and the funder, but also as between the employer and the contractor, even though the contractor was not a party to that litigation; and that it is no longer open to the employer to contest the unlawfulness of its cancellation. The employer argues however that since the contractor was not a party to the earlier litigation, the contractor cannot rely on those judgments in the contractor's action against the employer.

The previous litigation

[14] The more expanded background, which is stated in précis form to avoid detail that might obscure the essentials relevant to this interlocutory application, is the following. The two separate provincial state departments for which the two respondents are currently responsible, were previously merged into a single department known as the Gauteng Department of Public Transport, Roads and Works. Under that name it contracted as employer with a joint venture for the construction of a 300 bed district hospital in Zola, Soweto. That contract, concluded on 31 July 2006, fell apart when the joint venture fell apart.

[15] Then, without issuing a public invitation for a fresh tender, the Department awarded the contract to the applicant (it was then not yet in liquidation). On 4 August 2008 these two concluded a written standard form construction contract as employer and contractor respectively. The contract comprised the well-known JBCC Principal Building Agreement, and an annexure called the Engineering and Construction Contract. This annexure made provision for the usual employer's principal agent's payment certificates.

[16] However the employer subsequently purported to rescind the contract on the basis that the contractor was not SARS compliant and had previously represented differently to the employer. In the meantime the contractor had, so as to enable it to perform its obligations

under the contract, borrowed some R21 500 000 from the funder. In terms of the construction contract between the employer and the contractor, the employer was obliged to pay the applicant R21 500 000 for remobilisation and establishment costs, and the employer's principal agent had so certified. I was told from the Bar that this obligation on the part of the employer was in the nature of the usual Preliminary and Generals, and that it had in fact been certified by the time the employer cancelled the contract.

[17] The contractor had apparently intended to apply those monies to repay the funder its loan. Since the employer had cancelled the contract without paying the contractor the said R21 500 000, the contractor was placed into final liquidation on 13 April 2010.

[18] The funder thereupon sued the employer delictually for R20 500 000 representing the pure economic loss it had suffered as a consequence of the liquidation of the contractor and the latter's inability to repay the loan. The funder contended that the employer had deliberately cancelled the contract, envisaging that the funder would suffer the loss.

[19] The funder's action against the employer commenced in the High Court of this Division. Its case was that the employer owed the funder a legal duty not to repudiate the construction contract prior to the payment of the (certified) initial mobilisation fee of R21 500 000 to the contractor. The High Court held that it was not necessary to decide whether the employer had repudiated the construction contract, because that contract was, in law, void ab initio, on the basis of the lack of authority of the employer's agent. So the funder lost.

[20] The funder appealed to the Supreme Court of Appeal. That court overturned the finding that the construction contract was void ab initio, and it rejected the employer's defence that its cancellation of the construction contract was not unlawful and thus not a repudiation. It therefore held that the employer's purported cancellation of the construction contract was a wrongful and unlawful repudiation. The only issue that then stood in the way of success for

the funder was whether the employer's cancellation of the construction contract was delictually wrongful vis-à-vis the funder; in other words, whether policy considerations justified an extension of delictual liability to this novel factual scenario.

[21] The court (Brand, JA) held that there were insufficient policy considerations warranting such an extension. It pointed in this regard, amongst others, to the fact that the funder had alternative remedies available to it, one of which was to take cession of the contractor's claim for breach against the employer. So the appeal was dismissed and the funder lost. Not deterred, it applied for and was granted leave to appeal to the Constitutional Court.

[22] It that court the issue before it was defined in these terms (emphasis supplied):

"[19] The sole issue is whether the Department should be held delictually liable for Country Cloud's loss. The answer to this question rests on an important question: Was the Department's conduct in cancelling the completion contract wrongful? The issue is not whether the Department's conduct was wrongful in some general sense, or wrongful towards iLima. It is whether its conduct was wrongful vis-à-vis Country Cloud."

[23] In the above quotation I underscored the recordal that it was not an issue before the Constitutional Court whether the employer's cancellation was wrongful towards the contractor. Importantly, it was not rendered irrelevant on the basis of an hypothesis of unlawfulness merely for the purposes of argument. To the contrary: Khampepe, J expressly said (emphasis supplied):

"[36] Mr Buthelezi also knew of iLima's parlous financial affairs and that it would be able to repay Country Cloud only if it received the remobilisation fee. Tau Pride had been brought into the fold for precisely these reasons. The above considered, the ineluctable inference is that, at the very least, Mr Buthelezi subjectively foresaw the possibility that the repudiation of the completion contract would cause loss to Country Cloud. He reconciled himself with this possibility and repudiated the contract regardless."[7]

[24] The court went to record, as part of its reasoning:

[7] Other examples from which it appears unquestionably that the court accepted, and no-one, particularly not the employer contested, that the employer's cancellation was unlawful are to be found in [38] and [42].

"[50] And the Department is of course liable to iLima, the party whose contractual right it unquestionably breached. So there are much more direct and effective ways of calling the state to account in this case, most obviously the enforcement of this contract."

[25] And so, although the question whether or not the employer had repudiated the construction contract was not in issue before the Constitutional Court, the reason why that was so, is because the employer (and the Constitutional Court) had accepted the finding of the Supreme Court of Appeal in this regard. The principle of peremption certainly beckons, but it was not argued before me and nothing further should be said about it.[8]

[26] The Constitutional Court went on to decline, as did the Supreme Court of Appeal, to extend delictual liability, albeit for added considerations, and it dismissed the appeal. The employer therefore won again, and the funder lost again; but on the issue of the employer's unlawful repudiation of the contract vis-à-vis the contractor, the employer first lost that consequence in the Supreme Court of Appeal and later accepted it in the Constitutional Court. Whether that is legally relevant to the proposition put up on behalf of the contractor in the present matter, is considered below.

The present litigation

[27] The liquidators of the contractor resolved to institute action against the employer for payment of the R21 500 000 which had been certified for payment before the contract was unlawfully repudiated. In the summons the contractor alleges that the contract was unlawfully cancelled by the employer. I leave aside the question whether that assertion is necessary for the contractor's cause of action, being for payment by an innocent party of a contractual claim that had legally accrued before the unlawful cancellation of the contract by the guilty party; and I will accept for purposes of the argument that the assertion is necessary.

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[8] NUMSA obo Thilivali v Fry's Metals (A division of Zimco Group) and Others (JR2817/2009) [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) (27 March 2014) contains a recent with respect thorough exposition of the principle.

[28] In its plea, the employer raised defences that attack the proposition that the R21 500 000 payment obligation had already accrued; but it also pleaded that, in fact, the employer lawfully cancelled the construction contract. The contractor filed a replication. It replicated that the Supreme Court of Appeal and the Constitutional Court both had found that it was the employer that had unlawfully repudiated the contract. In relation to those findings, it replicated:

"That finding is binding, alternatively, of strong probative force, on the defendant in these proceedings."

[29] The employer did not file a rejoinder. The amendment now proposed to the replication would introduce a substantial elaboration of the proposition already advanced in the unamended replication that the finding of the Supreme Court of Appeal and the Constitutional Court relative to the cancellation of the contract binds the employer, and accordingly the contention pleaded by it, that the employer validly cancelled the contract, cannot be sustained in law.

[30] The legal niche(s) into which this replication fits was argued on the bases of the principle of *res judicata* or at least an extension of it in the form of issue estoppel, the prohibition of a collateral challenge to a judgment, and finally that of abuse of process. Central to the employer's riposte to the contractor's propositions, were: that *res judicata* is inapplicable if only because the contractor was not a party to the funder litigation;[9] that the prohibition of a collateral challenge to a judgment is a doctrine of English Law not received here; and that there can be no suggestion of abuse of process if a litigant raises a legal point which is available to it.

Discussion

[9] The contention was that the causes of action are also not the same, and the relief claimed is not the same.

[31]Before proceeding further it bears repeating that the test at this stage, where there is merely an application for leave to amend, is whether the case put up in the proposed amendment is one that is triable; the threshold is accordingly relatively low. Of course, if the legal proposition sought to be put up in the proposed amendment is bad in law, then by definition the case proposed to be introduced is not triable. And it has been said authoritatively that exceptions should be dealt sensibly, as they are useful mechanisms to weed out cases without legal merit.[10] That, I suggest respectfully, applies also where the opposition to a proposed amendment is on the basis that the pleading sought to be amended will be rendered excipiable, as is here contended.

[32]I interpose also to remark that it has been held that it is no answer for an application to say that the pleading already contains the objectionable proposition, i.e. that the proposed amendment is not introducing an excipiable pleading because the pleading is, as it were, already excipiable. It has been held that no court will allow an excipiable pleading to proceed by allowing an amendment which is equally excipiable.

[33] Turning now to the merits of the application. The interface of the arguments between the contractor and the employer lies in the principles applicable when it is considered whether an earlier judgment has determined an issue in a way which is binding on the current litigants. Generally, it is a requirement that the same parties must have been involved in the earlier litigation. There is a qualification to this, which is that if not the same parties, then at least parties of whom it could be said that they were privies of the current parties are required to have been involved in the earlier litigation.

[34] Take the present matter. Here the employer was a party before the courts in the earlier matter. But the contractor was not. However, the funder – who stood in relation to the contractor in the position of creditor – sought to establish that the employer had unlawfully

[10] Telematrix (Pty) Ltd v Advertising Standards Authority SA (459/2004) [2005] ZASCA 73; [2006] 1 All SA 6 (SCA) (9 September 2005) at [3], per Harms, JA.

cancelled the contract. That contention, and the subsequent positive finding in that regard, is precisely what the contractor requires to establish in the present proceedings for it to be successful.

[35] In the context of the doctrine of *res judicata* it has been said that the requirements are threefold: the same parties, the same issue, and the same relief. Compare *Firstrand Bank Ltd t/a First National Bank v Fondse and Another* (A5027/2016) [2017] ZAGPJHC 184 (23 June 2017) (Full Court) at [23]. These three requirements have to some extent been relaxed, and the legal phenomenon that is applied in the relaxed mode has been labelled "*issue estoppel*" by some, lexicon derived from English practice.

[36] This relaxation of the requirements has been referred to in a number of cases but of particular authoritative import, in *Prinsloo NO v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA). A case in which the relaxation was discussed more fully is *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) where at [10] this was said (emphasis supplied):

"*Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res 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 (ea dem 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 communality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Beperk 1995 (1) SA 653 (A) at 669D, 667J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of 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 (Kommissaris van Binnelandse Inkomste v Absa (supra) at 670E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others ..."

[37] Commenting on *Goldex v Prinsloo*, the Full Court in *FirstRand Bank* said that the critical dimension of *Goldex* was the caution to a court to apply the defence with regard to the fact-specific circumstances and to be wary of applying it.

[38] The requirement of the parties having to be the same in both actions (*idem actor*), of which it was said in *Porritt* that even if there were to be an extension of the application of the concept, this requirement would remain, requires some exposition. In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* (7414/12) [2013] ZASCA 129 (26 September 2013) the court was concerned with the defence of *lis alibi pendens* which was said to bear an affinity to the plea of *res judicata*, both of which are directed at achieving the same policy goals.

[39] In discussing the requirement for the parties to have been the same, the court (at [42] and following) discussed what is meant by "*the same person*" in the context of a plea of *res judicata*. It said (emphasis supplied):

"*[42] As I have mentioned Caesarstone submitted that while the remaining family members were not parties to the proceedings in Israel there was a sufficient communality of interest between them and both Womag and Mr Oren Sachs to satisfy the requirements of the plea of lis pendens. The argument commences with a reference to Voet 44.2.5, where Voet gives examples of what is meant by the 'same person' in the context of a plea of res judicata. Whilst the rule is often stated as being that it covers only those who are privies in the sense of having derived their rights from a party to the original litigation, it is by no means clear that Voet can find it that narrowly. He includes a principal and agent; the pledger and pledgee in relation to the right to possession of the thing pledged; to joint and several debtors or creditors in relation to a claim to a thing and a surety and a principal debtor. In practice it has been held to include the sole member of a close corporation. In Prinsloo NO v Goldex 15, Brand JA refrained from deciding whether this approach was correct but said:*

'In this case Prinsloo not only represented the trust, he was the controlling mind of that entity. It would therefore surprise me if the controlling mind were not bound by an earlier decision that he committed fraud, while the mindless body of the trust was held bound by that finding.'"

[40] The court went on to suggest that it may be that the requirement of "*the same persons*" is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. It said (emphasis supplied):

"[43] *Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence and the hope of a different outcome, merely because there is some difference in the identity of the other litigating party. This case provides an illustration of that type of problem.*"

[41] It was unnecessary for the court in *Caesarstone* to reach a final conclusion on the point of how far – or, more correctly put, by what principle - a court may relax the "same parties" requirement. I suggest with respect however that the concern raised by the *Caerstone* court applies exactly in the present matter. The party against whom the finding was made in the earlier litigation, is exactly the same party that is currently the defendant in the present litigation. That party, the employer, had full opportunity to participate in the determination of the very issue now raised against it. That issue, i.e. the as to whether the cancellation of the contract by the employer constituted an unlawful repudiation, is precisely the same issue that arises in the present matter.

[42] The only difference between the two is that in the earlier case it was a different party – the funder - who contended that the cancellation of the contract by the employer was an

unlawful repudiation. In the present matter the party who so contends, the contractor, stands in an even more direct relationship with the employer; they were contracting parties. The party against whom the issue went, namely the employer, is the same, and that party actually fully canvassed the issue before the courts in the prior litigation.

[43] In my view it would be inimical to the principles of *"equity and fairness"* referred to in *Porritt*, to permit the employer to escape the judgment of the two highest courts in the country on the very issue, simply because another party, now in direct relationship with the employer, is pursuing rights following from those judgments.

[44] As the learned authors Chitimira and Warikandwa point out,[11] the concepts of *equity and fairness* ground the doctrine of issue estoppel. They argue that issue estoppel is applicable when the strict requirements of *res judicata* are not met, and then only as a defence. In the context of s.173 of the Constitution and the development of our common law, the *interests of justice* ought rather to be substituted for *equity and fairness*. Such development, on a case-by-case basis, is foreshadowed by *Porritt* and *Caesarstone*, and it would thus be inappropriate to smother it here.

[45] It is specifically an extension of the "same party" requirement of *res judicata* under licence afforded by issue estoppel to cover the facts of this case that is at stake. The party sought to be bound in this litigation by the judgment in the earlier litigation is the identical party that was involved there; not its privy nor its agent. The question is thus whether the same party principle may be extended in respect of the other party, the party seeking to hold the former party bound. In my view the question is, at least, triable.

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[11] "Unmasking some challenges associated with the enforcement of issue estoppel in South African commercial-related disputes with reference to *Prinsloo NO v Goldex* 15 (243/11) [2012] ZASCA 28" (28 March 2012), Juridical Tribune Volume 8, Special Issue, October 2018, p97.

[46] The employer raised two other objections to the proposed amendment. They were that the contractor's objection to the leading of certain evidence was bad in law, and that the contractor's argument concerning the requirement that notice of contractual breach was required to be given was, as a matter of contractual interpretation, bad in law. In my view both these issues are issues for a trial court. I cannot on these papers dispose of them in favour of the employer.

[47] Costs was an issue. I cannot conclude that the opposition to the amendment was unreasonable, since for the contractor ultimately to succeed, an extension of a legal principle is required. The usual order should therefore follow.

[48] It seems to me therefore that the threshold for a successful application for leave to amend has been met and in consequence I make the following order:

(a) The application for leave to amend is granted.

(b) The applicant is to pay the costs of the application, such costs to include the costs consequent upon the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

Date of hearing:	7 March 2019
Date of judgment:	12 March 2019
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