

THE APPLICATION OF THE PRINCIPLE OF ESTOPPEL, AND THE INGENUITY OF THE SOUTH AFRICA COURTS

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ABSTRACT

This paper explored interesting cases on the principle of estoppel indicating that the streams of equity have never closed. These cases demonstrate the ingenuity of the South African Courts. Finding reveals that when constitutional principle roars, the *res judicata* principle must bow, even in criminal cases. Finding also revealed that the court will not assist the gullible by opening to them the safety umbrella of equity or by allowing them to use the principle of estoppel as a subterfuge to enforce a right. The first set of cases considered in this paper is the case of *Africast Property Ltd v. Pangbourne Ltd*, and *Aquarius Maritime Pty Ltd v. M.V Agatis and Or*. The consideration of the controversial phrase inserted in the agreement with particular reference to the suspensive term, subjecting enforceability of contract to the required notice of communicating the approval of the defendant's board of directors. In legal practice, a draft agreement mutates into a binding agreement when there remain no issues upon which the parties were yet to be *ad idem*. There should be no condition or conditions contemplative for enforceability. Put differently, there should be zero condition contemplative for enforceability. The effect of the suspensive condition in a contract is self explicit and ordinarily connotes suspension. Other cases are that of *Ekurhuleni Metropolitan Municipality v. Germiston Retirement Fund*, *Aquarius Maritime Pte Ltd, v. MC, Agatis, Meranti Bahari Pt, and Meranti Maritime Pt*. In the latter case, the Court was faced with the question of whether *Aquarius* has the enforceable right in the light of the privity of contract rule when *Aquarius* has failed to avail itself of the benefit of demanding for an assignment or cession of right which would have given *Aquarius* the right of claim against *Maritime* and *Bahari*. The Courts in South Africa give the principle of *estoppel* and *estoppel per res judicata* new lease of life in other three important cases of *Ekurhulen Metropolitan Municipality v. Germiston Municipal Retirement Fund*ⁱ. *Concor Holdings (Pty) T.A Ltd Concor Technicrete v. Hermanus Phillipus Potgieter*ⁱⁱ

and *Malaudzi v. The State*. Finding reveals through the cases that the approaches of the Courts are originalist approach and strict constructivist.

Keywords: Application, Principle, Estoppel, Ingenuity, South Africa, Courts.

INTRODUCTION

The approaches of the courts are either activist approach, liberal approach, strict constructivist approach, or coherence approach when deciding on a case before the Courts. The approach of the Court is activist when the Court did not confine itself to the traditional role of adjudication of disputes but assumes the law-making function by usurping the role of the legislature. The approach of the Court is liberal when the Court decides to widen its horizon by learning from other disciplines to resolve issues outside its terrain. The approach of the Court is strict constructivist or originalist when the court decides to confine itself to the laws made by the legislature or to the terms of contracts freely entered into by parties. The approach of the court is coherence when the court determines to strike a balance between the cognate common law principles and the provision of a statute to reconcile the two. This paper revealed through cases decided in the South African court that the approach of the courts is sometimes activist and often strict constructivist. The Republic of South Africa is an important commonwealth country that attained its independence in 1992, with Dr. Nelson Mandella as the first black president South Africa has a very robust legal regime on the principle of estoppel. Three important decisions from the South Africa Courts demonstrated the activist approach of the court. Some of these decisions are exemplified in the case of *Africast Property Ltd v. Pangbourne Ltd*, *Aquarius Maritime Pty Ltd v. M.V Agatis and Orⁱⁱⁱ*. And *Ekurhuleni Metropolitan Municipality v. Germiston Retirement Fund^{iv}*.

In the first case i.e. the case of *Africast Property Ltd v. Pangbourne Ltd^v*, Africast Property Ltd, the plaintiff, entered into a written contract with the defendant, Pangbourne where the plaintiff was to acquire land and erect a building for the defendant's specification for a fixed price. The contract embodied a suspensive condition in favour of the defendants. Specifically, the terms of the written contract included the followings.

- i. The agreement is subject to the suspensive condition, which may be waived by written notice given by Pangbourne to Africas within seven days (excluding

Sundays, Saturdays, and public holidays) after the date on which the agreement was concluded (or such other date in writing from time to time) Pangbourne company must give Africast written notice that its Board of Directors has approved the purchase of the property, the condition which is incapable of fictitious fulfillment.

- ii. That if the condition above is not fulfilled or waived, then the agreement between the parties will terminate and neither party will have a claim against the other in consequence thereof.

To understand the foundational basis that accentuates the invocation of the principle of estoppel, it is crucial to discuss the five core issues that call for resolution before the South Africa High Courts.

- i. The consideration of the controversial phrase inserted in the agreement bothers the question of when is a contract concluded? With particular reference to whether it was concluded at the time the contract was signed or with particular reference to the suspensive term, subjecting enforceability to the required notice after the approval of the defendant's board of directors.
- ii. Whether a suspensive condition requiring the defendant's board of directors (as principal) express approval suspends the enforceability of the contract only, pending its fulfillment.
- iii. A consideration of lapse of time as to whether it amounts to a failure to revive or conclude a fresh contract.
- iv. The gravamen of the controversy bothering on a proper interpretation of the written contract signed by the representatives of the parties and the sub-question as to the existence of authority of the defendant's signatories to bind the principal at the time when their signatures were appended.
- v. And the requirement that to prove estoppel, whether the estoppel asserter must act reasonably and clarify ambiguities in exchanges between itself and the contracting parties, and the distinction between asserting a misrepresentation of fact and a tacit representation of belief that a valid contract was in existence.

In consideration of the first and second points raised in this case, the plaintiff contended first that the phrase imputed in the contractual term that states after the date on which the agreement is concluded means the date upon which the defendant signatories were authorized to bind the defendant; and second that on the 11th date of April, notwithstanding the warranties of

authority, the defendant signatories were at that moment not authorized to bind the defendant; and that the requisite authority to bind the defendant was given on the 20th day of April 2007, being the date when the defendants Board of Directors approved the transaction. Hence, the plaintiff contended that the date that the contract was concluded could not have been earlier than the 20th day of April 2007. In essence, the plaintiff further contended that the date the suspensive condition was fulfilled was the 25th day of April 2007 via the transmission of an email from the assistant to the defendant's company secretary. Consequently, the repudiation by the defendant in August 2010 was actionable and the cancellation by the plaintiff was accordingly justifiable.

In contrast, the defendant canvassed the argument that the effective date when the contract was concluded was the 11th day of April 2007, when the contract was signed by the representatives of both parties, and that the email of 25th April from the defendant to the plaintiff via which the approval of the Board of Directors was communicated, even though, by implication was a fulfillment of the second clause in the agreement as to the fulfillment of the suspensive condition as contemplated that approval was belated as the prescribed period elapsed at the midnight of 20th April, seven days calculated from 11th April excluding non-juridical days. Consequently, the contract effluents.

Before the court made its logical decision, the court noticed that it was not part of the plaintiff's pleading that even though the contract had lapsed, it was, however, revived despite its elegant formulations on the appropriate approach to the interpretation of contractual provision by Wallis Rolland Sutherland, J stated thus^{vi};

It was not the plaintiff's case that on any basis, the contract if it had lapsed, was ever revived.

Meanwhile, on the contested authority of the Kennedy and Groenewald signing for the defendant. The Court gathered evidence that;^{vii}

It was common cause that the defendant's standard operating procedure was that the board alone had to especially authorize any transaction, save those amounting to a maximum of R50million, in respect of which the CEO alone, could bind the defendant. It was further common

cause that Kennedy, a director, and Groenewald, the company secretary and not a director, were not authorized, in general, to bind the defendant in that sum. It was upon this factual premise that the plaintiff contended that because this transaction, at R66million, was a transaction reserved for the board's approval, the appending of signatories by Kennedy and Groenewald was not authorized on 11th April and they only secured such authority on 20th April when the board resolved in the terms.....

The gist of the above contentions are as follows:

- i. That any transaction beyond 50million Rands must be authorized by the CEO alone, who alone could bind the defendant in a contract of above that sum.
- ii. The board alone could authorize any transaction over the maximum of 50million Rands.
- iii. That Kennedy – a director and Groenewald – an assistant secretary were incapable of binding the company in that sum.
- iv. It was based on the above that the defendant contended that because the transaction amounted to 66million Rand, it was within the exclusive prerogatives of that Board of Directors to approve the transaction. In consequence, they argued that the contract came to effect or was concluded on the 20th day of April 2007.
- v. Consequently, it was argued that Kennedy and Groenewald were not authorized on the 11th of April and that both only secured authority on the 20th of April 2007.

According to the court, per Sutherland J.^{viii}

“Kennedy was unavailable to testify owing to illness. Groenewald testified that he was indeed authorized to sign the contract documents on the 11th of April in line with the customary procedures of the defendant which procedures included a habitual provision in the documents to be signed that would be substantially in accordance with the reservation set out in clause 16.1 of this contract in the form

of a suspensive condition subordinating their acts of binding the defendant pending formal board approval and a notice to the seller as stipulated”.

Furthermore, Sutherland J explained further that evidence further revealed as per Groenewald's testimony that^{ix}:

Moreover, it was (the) practice for the investment committee, an entity composed in part of directors and in part of others, to vet projects, even when the CEO acting alone, bound the defendant to a contract. At Groenewald's initiative, the Board approved on the 22nd February 2007, a framework for the approval of transactions. This board resolution required an originating document to be generated and signed by two directors, and all documentation to implement the transaction to be signed by a director or the company secretary. Groenewald testified the signing of the document on 11th April was an act of putting into effect the originating document approved by the investment committee.

In line with the above revelation, therefore, Groenewald's testimonies on proper dissection could be itemized as follows;

- i. That he was indeed authorized to sign the contractual agreement on the 11th day of April 2007.
- ii. That the signature on behalf of the company was in line with the standard practice whereby the signing of the contract was a prelude to the suspensive condition requiring the approval of the board.
- iii. That such board approval must be communicated to the seller.
- iv. That, therefore, the investment committee composed in part of the Directors must vet the project even when the CEO acting alone bound the defendant company to a contractual relation by its appendage.

- v. That the board resolution must be followed by an originated documents, or put differently, a document signed by two directors containing the board resolution must be generated.
- vi. That all necessary documents for the implementation of the agreement must be signed by a director and the company secretary.
- vii. That the signing of the contract document on the 11th of April was, therefore, an act that set in motion the process for the origination of the generating documents.

In a thorough linguistic analysis by Sutherland J, premised on the language of the contract itself, his Lordship concluded that a binding contract was effectuated on the 11th day of April 2007. According to his Lordship.^x

It is not controversial that there is no principle of law that compels a juristic person to confer authority on his agent in a specific way. The existence of authority is simply a question of fact. In my view, the notion that Kennedy and Groenewald acted without authority on 11th April when they signed the contract is not established by the facts adduced in evidence. On the contrary, I find (S.C) that they indeed acted with authority at that time. This finding is also substantiated, in part, by the findings of the proper interpretation of clause 16.1

It should be noted that clause 16.1 of the agreement in question is to the effect that;

1st strand: *The agreement is subject to the condition..... that within seven days (excluding Saturdays, Sundays, and public holidays) after the date on which the agreement is concluded PANGBOURNE COMPANY gives SELLER COMPANY written notice that its board of directors has approved the PURCHASE of the PROPERTY by PANGBOURNE COMPANY.*

2nd strand: *If this condition is not fulfilled or waived, then this agreement will terminate and neither party will have a claim against the other as a result thereof.*

According to the court, the word ‘concluded’ and the phrase ‘subject to a suspensive’ conditions are the real challenges and the keys to resolving the issues. Sutherland J stated that.... It is the word concluded upon which the eye falls. The opinion of his Lordship, translated properly, is that no word is an Island entire to itself and in so far as a particular word has many tasks attributed or assigned to it including the adjoining phrases which are the building blocks of the ideas being communicated.^{xi}

In essence, the critical focus rests on the whole phrase used, which gives real meaning to the proposition. The proposition determines the real meaning attached to the word within the relevant test. There are different language games. Within the language games, words might be construed either in the positive sense or conversely in the negative sense. The word good does not necessarily yield to positive interpretation. Calling a person a good boy is positive, whilst calling a person a good idiot is a negative acclamation.

However, according to the court, properly construed, the event alluded to as the conclusion of the contract imports by that word nothing but a notion of finality, without any ambiguity. That court reiterated the fact that the word ‘concluded’ or its variants in common usage in contractual agreement along with the word ‘signed’ and ‘reached’ connotes nothing but finality and that the dictionary conception also endorses the notion of finality. In the words of Sutherland J^{xii},

Moreover, as pointed out by the defendant’s counsel, the customary equivalent phraseology in Afrikaans that nooreenkoms is gealuit, illustrates the employment of a vern even stranger in its notion of finality than the English is concluded. However, as important as the intrinsic connotations of the word itself may be is the phrase that gives voice to this agreement being suspended..... Can there be a suspension of an agreement not yet concluded? In my view, this would be bizarre.

With the above foundational explanation, the court per Sutherland J. commenced the infinite regress argument from where we have drawn the following points or condition precedents for the existence of a final and conclusive agreement.

- i. In legal practice, a draft agreement mutates into a binding agreement upon an agreement by the contracting party that there remain no issues upon which the parties were yet to be *ad idem*.
- ii. There should be no condition or conditions contemplative for enforceability. Put differently, there should be zero condition contemplative for enforceability.
- iii. The effect of the suspensive condition in a contract is self explicit and ordinarily connotes suspension.
- iv. It is bizarre to suspend an agreement yet to be concluded and strange to all sense of logic.
- v. The effect of suspension is that until the fulfillment of certain conditions, the parties are yet to be completely *ad idem* i.e. consensus remains outstanding.
- vi. The condition for the enforceability of a contract is the board's approval and communication of the notice of approval within the time stipulated by the contract.
- vii. Serious the most, is the fact that for a contract to be enforceable, there must be no conceivable reservation rendering the agreement unenforceable.

Continuing the slippery slope argument, the court observed that the contract was concluded on the 11th day of April 2007. The court found itself unimpressed by the argument forcefully put forward by the plaintiff that all the people that matter acted in ways suggesting that the contract was concluded on 20th April and that behaviour persisted till 2010. Further, it was also forcefully argued that upon that belief, a company named INVESTEC granted a 40million Rand bond. Despite this, the court reiterated the point that they all acted with genuine ignorance as the contract was concluded on the 11th day of April 2010 and that on the 20th, when the notice of the board approval was communicated, the contract had lapsed and the defendant failed to revive it, nor and thereafter failed to exercise a waiver as required by the stipulation in the agreement. In the words of Sutherland J, whilst delivering the judgment of the court, the court succinctly puts it thus;^{xiii}

In my view, the mere fact that all these people might have conducted themselves in a manner that was consistent with an inference that they believed the agreement was

enforceable does not prove anything useful. The fact that they might all believe, the contract was enforceable or binding does not prove that they thought the date of the conclusion of the contract was 20 April 2007. Their conduct is equally consistent with mere oversight about that requirement or mere indifference.

Continuing, his Lordship opined that the parties failed to extend the time for the fulfillment of the second crucial clause in the agreement once the contract had lapsed. The court also refused to recognize waiver by conduct as it opined that the exchange of email between the parties on the 23rd and 25th of May respectively about an inquiry about the board approval had the reply given en passant, whilst the author of the confirmation of the board noticed in the defendant's reply was at best perfunctory carried out without real interest performed as a routine duty. His Lordship put it thus;^{xiv}

The defendant's email of 25 April was a reply to an inquiry about the board approval, not a response to a reply to comply with clause 16.1. The email sent to the plaintiff..... was perfunctory..... it must follow upon those findings that the date upon which the contract was concluded was 11th April. The condition remained unfulfilled on 20th April. Thus it lapsed. It was not revived.

On whether the parties took the alternative cause of action to reactivate the lapse of time by extension of time, the court said they failed so to do. According to the courts.^{xv}

This contention, not pressed too strenuously, is premised on the exchange of the emails on 23rd and 25th April alluded to already. All that is contained therein is an inquiry about board approval, en-passant at that and confirmed as such in evidence by its author, Nolan, while he was dragging another extraneous matter with the defendant. The defendant's reply was equally perfunctory It is not possible to construe this exchange as contemplating an extension of time to fulfill the contention. The contention

fails on the facts adduced..... The first enquiring must be about the facts: is there such a written notice given within the prescribed time? There is no evidence of such notice at any time..... However, the signal above all, in the present case, is the absence of a contention that the contract was revived..... In my view, no waiver is established.

In concluding the infinite regress argument, all the above consideration serves as a prelude to a consideration; of whether the principle of estoppel could rescue the revival of the contract. The court, per Sutherland J, answered in the negative by first stating that the foundation of this leg of the plaintiff's case is the premise that the contract indeed lapsed and was not in force or effect, yet was not revived. Meanwhile, the plaintiff canvassed the argument that the defendant is estopped from relying on the non-fulfillment of the suspensive condition and set out several factual grounds describing the defendant's conduct after the signing of the agreement on the 11th day of April 2007.

However, the court expressed the view that in argument, the plaintiff was at pains to disavow that the defendant ever misrepresented to the plaintiff that the suspensive condition had been fulfilled.

On the defendant's behalf, it was argued that no deception misled the plaintiff and in the absence of deception, the reasonableness of the estoppel pleader, the principle of estoppel is irrevocable. In its judgment, the court quoted with approval the law of estoppel in South Africa as contained in the works of Rabie and Sonnekus to the effect that;

In general, the premise applicable in all circumstances is that the estoppel asserter can only successfully rely on estoppel if the reasonable person in the street in the position of the estoppel asserter would also have been misled by the conduct on which the estoppel is founded. To determine whether the reasonable person would have been misled, it might be helpful to answer the applicable question in the negatives. The reasonable person would have been misled if it can be ascertained that the circumstances were such, that they would have put the reasonable person on his guard and

compelled him to ask more questions before accepting the allegations or representations of the representor at face value. If in reality, the estoppel asserter had under the same circumstances neglected to ask for further explanation or had not been on his guard due to the fact that he tends to be more gullible than a reasonable person would have been, then the conduct of the representor is not to objectively be classified as reasonable or wrongful, and the reliance on estoppel must fail. It has already been emphasized that the doctrine of estoppel cannot be misused to protect the naïve or gullible against his stupidity. Even the man in the street must take cognizance of the facts that may have bearing on his legal position.

The tenor of the above position as regards the position of law relating to estoppel in South Africa could therefore be summarized thus;

- i. The asserter of estoppel must be misled by the misrepresentation of the representor.
- ii. To be so misled, the asserter must establish the fact that a reasonable person on the street would be misled by such misrepresentation by the representor.
- iii. The standard is an objective one, rather than the subjective feelings of the pleader.
- iv. The test is that of a reasonable man's test.
- v. The pleader of the estoppel must not himself be found by the court to be gullible as the law is not in a position to protect the naïve against his stupidity.
- vi. By implication, the asserter must be alive to his responsibility to take cognizance of the fact that may have bearing on his legal position in the negative sense.

Thus, whilst concluding on the legal position of the principle of estoppel in South Africa, Sutherland J., added the following requirements; that the estoppel pleader must establish:

- i. That he reasonably understands the representation in the sense contended by him.
- ii. That his reliance on the representation was reasonable.
- iii. That he did not know the representation was not true.
- iv. That he did not have information which put him upon inquiry.

- v. That if he had information which put upon his inquiry, he exercised reasonable care and diligence to learn and distill the truth from the representor and
- vi. Finally, he was not misled by the lack of reasonable care on his part.

While rejecting the plea of estoppel, the court reiterated the fact that the plaintiff asserter would have requested for the renewal of the contract without stipulation as to the suspensive condition or seek clarification on the stance of the defendant on the suspensive condition or in the alternative whether the suspensive condition had been waived. In the absence of both steps taken by the estoppel asserter, the court pronounced against the invocation of the principle of estoppel as a recipe to soothe the interest of an aggrieved representee.

In this case, the court per Sutherland J. made it clear despite the conduct of the defendant which pointedly indicated that the contract subsists, it was wrong to think that the contract exists. According to his Lordship:

The defendant's belief that it had a binding agreement, as evidenced by its common cause conduct, is invoked as the misrepresentation. This in my view is not good enough. Estoppel cannot be raised against a party who says that though it had a contract, it turns out that in law, it was wrong to think so.

Meanwhile, a point of law so neglected by the court is the principle of freedom of contract. This principle is to the effect that when parties are ad idem, they could freely enter into the contract of their own volition. This principle of the contract is enshrined in the clause that none of the parties could take the other in litigation nor have a claim over the other. The clause read thus;

If this condition is not fulfilled or waived, then this agreement will terminate and neither party will have a claim against the other as a result thereof.

Another important case from the court in South Africa is the case of *Aquarius Maritime Pte Ltd, v. MC, Agatis, Meranti Bahari Pt, and Meranti Maritime PT^{xvi}*, the fact of which were as follows: This case involved a BIMCO standard agreement between Solutions and Maritime. The contract was in respect of the management of a Vessel named Agati and three other vessels

namely Putih, Eboni, and Ramin. The contract also covered provisions for security guards for two other vessels, namely: Kenenga and Mahoni. The respondents in this case were the owners or deemed owners of the above-listed vessels. The contract was sub-contracted by Solutions to Aquarius. It was apparent in the arrangement between Solutions and Aquarius, its sub-contractor that Solutions was in this respect the manager with the contractual obligation to provide all the services, while Aquarius was the party who would do the work with particular regard to the management services since it was apparent that solutions had no infrastructure to carry out the technical and operational support management duties and it was Aquarius which did the work, which fact was unknown to Maritime and Bahari who contracted Solutions. As a result, Aquarius haven did the work without payment upon request sued Maritime for the management fees, and the latter repudiated liability. Having refused to pay Aquarius, it brought an application for the arrest of the Barge in an action against Maritime.

To understand the scenario of this case that gave rise to invoking the principle of estoppel by Aquarius against Maritime and the direction of the court, some salient features of this case need to be stated;

- i. An important term of the contract was that the contracts should be governed by Singaporean law, and disputes are to be resolved by way of arbitration in Singapore.
- ii. Clause 26 of the contract states that no third parties might enforce the terms of this agreement.
- iii. By clause 23 wherein the contract, details were inserted, it became apparent that the contract details for serving notice and communications to the manager, contained Aquarius's name and address in the case of the Berges; Putin, Eboni, and Ramin, whilst in the case of Agatis, Box 23 contained Solutions name and address. Solutions and Aquarius had the same addresses in Singapore and both companies are within the same corporate organization or were part of the same corporate group.
- iv. Aquarius was relying on four BIMCO contracts which identified Solutions and not Aquarius as the manager.
- v. Aquarius in its affidavit failed to aver that there was an error in the completion of the contract requiring rectification.
- vi. The invoices attached to the *ex-parte* application in support of Aquarius's claim accord with the conclusion that Solution rather than Aquarius has the possessory

right for claiming the management fees. The invoices were written in Solution's name and the account for remittance of payments bears Solution's name.

In proceeding to judgment in this case, the court was poised to find solutions to the following questions in logical sequence;

- i. Whether expert opinion was necessary to prove the Singaporean law which the party agreed should be applied to this contract.
- ii. Whether the applicant i.e. Aquarius had a prima facie case.
- iii. Whether based on the BIMCO standard agreement between the parties, a third-party sub-contractor could enforce the contract.
- iv. Whether the principle of estoppel could be applied to vary the terms of a contract freely entered into by a parity who are of equal bargaining strength.

On a prima facie case, Roger J stated the law that^{xvii};

The requirements for a security arrest were dealt with by Wallis J in MV Pasquale Della Gatta, MV. Fillipo Lembe; Imperial Marine Co. v. Deiulemar Compagnia di Navigazione; The claimant must satisfy the court (a) that he has a claim enforceable by an action in rem against the ship or an associated ship; (b) that he has a prima facie case in respect of such claim which is prima facie enforceable in the relevant foreign forum and that (c) that he has a genuine and reasonable need for security in respect of the claim. Where the claimant prima facie case depends on factual inferences that can reasonably be drawn from the evidence,..... The onus is not discharged by far-fetched inferences.

From the above dictum, Roger J. held that:^{xviii}

..... Aquarius's legal team had failed to notice that the attached BIMCO contracts identified Solutions rather than Aquarius as the manager. In my view, the ex-parte application failed to make out a prima facie case in respect of the claims for the manager's services. Aquarius was

relying on four BIMCO contracts, which identified Solutions, not Aquarius as the manager.

The tenor of the above decision by the court is that from the available evidence before the court, Solutions and not Aquarius has the *locus standi* to bring that action rather than Aquarius. Without speculation, it is apparent from the contract Solution rather than Aquarius is more intimately connected to the contract with Maritime.

On whether the Court would need expert evidence to prove the Singaporean law which the parties in their contract opted to be applicable in this matter, the Court observed that since the Singaporean law is *in pari material* with the English law in this regard, it needs no prove by expert evidence. This, according to the Court remained so as no ambiguity in that law could be found. *Quoting Wallis J.A.* with approval on the proof of foreign law, Roger J., stated that;

Ordinarily, foreign law is a fact requiring to be proved by tendering expert evidence. This is unnecessary, however, where the law in question could be ascertained readily and with sufficient certainty without recourse to the evidence of an expert because the court is then entitled to take judicial notice of such law.

Furthermore, the court stated that applying the principle of Singaporean law, therefore, since contracts are private between parties to it, Aquarius, a sub-contractor could in no way enforce a contract that was between Maritime and Solutions being a meddlesome interloper in the contract. The Court further reiterated the fact that since Aquarius failed to rectify the contract by making itself a party, Aquarius could not succeed in this action. According to Roger J:

Aquarius was a sub-contractor to solutions. He conceded in the argument that if Aquarius was a sub-contractor, Singaporean law did not accord it a right of action against Maritime. This is bourne With the rule of privity of contract.

It is pertinent to note that the court listed some important terms of the contract between Maritime and Solution to wit.

- i. The contract confers no right and imposes no obligations on the company.
- ii. Indeed, the latter (i.e. Aquarius)^{xix} is not a party to the contract.
- iii. Clause 21 of the agreement provides that the management agreement constitutes the entire agreement between the parties and that no promise, undertaking, representation, warranty, or statement by either party before the date stated in Box 2 shall affect the agreement. Any modification of the agreement is of no effect unless in writing signed by or on behalf of the parties
- iv. Clause 26 states that, except to the extent provided in sub-clause 17(c) and 17(d), neither of which is relevant here, no third parties may enforce any term of this agreement.

In logical sequences, the court per Roger J, poised to solve the following riddles that could serve as necessary pillars on which the principle of promissory estoppel could be established to wit:

- i. Whether Aquarius could have refuge by appealing to extrinsic evidence.
- ii. Whether Solutions by way of cession or assignment had ceded the right to sue to Aquarius.
- iii. Whether there was a rectification of the contract by the three parties i.e Maritime and Solutions who were involved in the contract on the one hand, and Aquarius that was engaged by Solutions as sub-contractor. Such rectification could come by way of novation.
- iv. Finally, whether the principle of promissory estoppel could be applied to have the remedial effect of contractual rectification.

The court per Rogers J. provided answers to all the riddles in the negatives. On whether appealing to extrinsic evidence could bring solution his Lordship stated that;

Submissions were made regarding the Singaporean approach to the interpretation of contracts I was referred to Leong op. cit..... and Zurich Insurance (Singapore) Plc Ltd v. B. Gold Interior Design & Construction Plc. Ltd⁵²⁷, a decision of the Singaporean Court of Appeal, in the use of extrinsic evidence..... Although Mr. Fitzgerald was anxious to persuade one of the liberal approaches adopted by Singaporean law to extrinsic evidence, it was not

apparent to me what extrinsic evidence he wished to deploy and in what way it aided the interpretation of the BIMCO contracts. Absent a claim for rectification, the contracts unambiguously identified Solutions, not Aquarius, as the manager contracted to provide services and entitled to management fees.

The court also ventures to look at other situations that might assist Aquarius in the claim, like assignment or cession. It would have been better, peradventure if Aquarius seeks cession from Solutions. Put differently, one would have expected Aquarius to request a formal giving up of right from Solutions. Assignment of right by a tripartite arrangement between Maritime, Solutions, and Aquarius by way of Novation, whereby Aquarius would assume rights over Solutions entitlements under the contract would have done the magic. However, Aquarius failed to avail itself of this opportunity. In the words of Roger J;

Aquarius did not claim to have obtained a cession from Solutions. Mohan said in his answering affidavit that clause 16 of the BIMCO contract only enquired written consent for a sub-contracting of the manager's obligations. There was the alleged, no prohibition on the manager's entitlement to sub-contract any rights under the agreement, which axiomatically must include the right to demand payment and or to take action under the agreement to enforce such rights. Mr. Fitzgerald made no submissions in support of this proposition. Self-evidently, a right to payment cannot be sub-contracted. On the assumption that there is otherwise no impediment under Singaporean law to cession or assignment of solutions rights to Aquarius, there is no allegation or evidence of cession or assignment.

Appealing to the principle of promissory estoppel, it was argued that in the first instance on behalf of Aquarius that maritime was precluded by the principle of promissory estoppel from denying the fact that Aquarius was the manager, who performed the task, and by that fact entitled to the fees with *locus standi* to apply for the arrest of Agati. The premise for the

argument was ‘an allegation that Maritime’s conduct in acknowledging and in permitting Aquarius to actively, managed the vessel for two years periodicity without any objection to the performance constituted a clear and unambiguous representation that Aquarius was indeed the manager of the vessels. To that extent, therefore, Aquarius was argued to have performed the task to its detriment.

As per the law applicable, it was also argued on behalf of Aquarius that the Singaporean law on promissory estoppel was in tandem with English law. The court was referred to the case of *Oriental Investment (SH) Pte Ltd v. Catalla Investments Pte Ltd*^{xx} where the doctrine of promissory estoppel was held to protect a party’s reliance on promises not supported by consideration on the basis that the party has acted on the promise to his detriment and it is now inequitable for the promisor to go back on his promise.

In that case, the elements on which the principles of promissory estoppel were held to be applicable were elicited thus;

- i. That the promisor must have made an unambiguous representation.
- ii. That the promisee must have acted in response to that representation.
- iii. Sequel to the reliance, the promisee must have suffered detriment.
- iv. The promisee must have shown that it would be inequitable for the promisor to resile out of the promise.

The court, per Roger J, concerning whether the principle of promissory estoppel applied held that:

- i. Counsel to Aquarius was unable to prove to the court any authority to support the proposition that promissory estoppel provides an alternative way for the rectification of a contract freely entered into by the parties.
- ii. That the BIMCO contracts were between Solutions and Maritime on the one hand and between Solutions and Bahari on the other.
- iii. That there is no privity of contract between Aquarius and Maritime at all, though one could not deny the fact that Aquarius was a sub-contractor to Solutions.
- iv. That promissory estoppel as an equitable remedy could only apply to arrangements that vary parties' contractual rights and upon that variation, the promisor could not resile out of his promise as varied.

Arguably, it is submitted that the tenor of this case is clear on points of law. In the first instance, the doctrine of privity of contract states that contracts are only privates between parties to it. That means, only the contracting parties have enforceable rights to sue nor be sued on the contract. The doctrine is impermissive and securely closed its door against any enforceable rights enuring in favour of a meddlesome interloper. Aquarius was not involved in any contractual relationship with Maritime on the one hand and neither was it involved in any contractual relationship with Bahari, on the other hand. Aquarius was only a sub-contractor to Solutions. It is also submitted that the equitable principle of assignment or cession of right which is one of the exemptions to the doctrine of privity of contract would have given Aquarius the right of claim against Maritime and Bahari, but Aquarius never availed itself of this opportunity by demanding a cession or assignment from Maritime and Bahari. To this extent, therefore, the application must be crashed as it failed.

It is further submitted that the absence of any contractual relationship between Aquarius, and Buhari implies that, there is nothing to vary. Variations of contractual rights ride on the principle that a pre-existing legal relationship could be found between the parties. Non exist and none could be varied. It is open that Aquarius failed to avail itself of the legal opportunities required for help and the maxim *vigilantibus et non demientibus jurat subvenit* applies; meaning the law aids the vigilant not the indolent.

Rejecting the applicability of the principle of promissory estoppel, Roger J, puts it thus;

If there was a management contract between Aquarius and Maritime, the latter might be precluded from relying on one or other terms of the contract if before or after the conclusion of the contract, Maritime had made a promise inconsistent with the enforcement of the term in question and if the other requirements for promissory estoppel were met. However, if the BIMCO contract is, as I have found to be clear between Solutions and Maritime, Aquarius's invocation of promissory estoppel would be an impermissible attempt to establish a cause of action.

Meanwhile, two other issues were dealt with on the applicability of the principle of promissory estoppel. First was the existence of representation, which was argued on behalf of Aquarius that Maritime had made a misrepresentation. But, it is obvious from the factual situation of this case that Maritime has not misrepresented anything. Roger J, made this clear in the following observation:

What he says is that Maritime is estopped from denying that Aquarius was the true manager. But in context, what does that mean? If it means that Aquarius was the true person which actually did the technical management work, Maritime does not deny it. A representation that Aquarius was the true manager in that sense would not be a representation inconsistent with what ...elsewhere was expressly alleged, namely a sub-contracting arrangement. There is certainly no evidence that Maritime ever represented that it viewed Aquarius, rather than Solutions as the manager with which he contracted.

Upon the other issue on whether Aquarius had suffered detriment sequel to the alleged misrepresentation could not be found; Roger J, concluded in these words:

.....the submission does not make sense. If one view Aquarius as a separate entity, there is no reason why it should be worse off looking to Solutions than to Maritime. If Aquarius was sub-contracted by Solutions to do the work, there must have been some inter-company arrangement for Solutions to be reimbursed. If there was not, Aquarius cannot complain, if one view Aquarius and Solutions from a group perspective, the claim could as well be advanced by Solutions as by Aquarius. As a fact, it was solutions that issued the invoices.

A sound judgment? Perhaps, yes. Though a passivist approach indeed. But the question or a vexing issue unattended to being that it is submitted Aquarius waived its right by allowing Solutions to issue the invoices.

APPLICABILITY OF RES JUDICATA IN SOUTH AFRICA

At common law, where a cause of action, which forms the subject of earlier litigation between the same parties had been adjudicated upon by a court of competent jurisdiction, is brought again in a subsequent proceeding between the same parties, the subsequent plaintiff would be barred or estopped *per rem judicata*. In such a case, the earlier judgment is ‘res judicata’ i.e the final judgment on the issue. The requirement of *Res judicata* are as follows:

- i. The parties in the earlier and subsequent case must be the same
- ii. The subject matter in the earlier case and the subsequent case must also be the same
- iii. The issues in the first case and the subsequent one must also be the same
- iv. There must be a final judgment in respect of the parties, the issues, and the subject matter by a court of competent jurisdiction. This final judgment is referred to as the ‘res’ the property of the person in whose favour the judgment enure; which comes by way of judgment or which has been decided upon *judicata* – i.e. ‘res judicata’.

The principle of res judicata was well articulated in the English case of *Thrasyvoulou v. Secretary of State per the Environment*^{xxi} by Lord Simon thus:

As means of resolution of civil contention, litigation is certainly preferable to personal violence. The law itself is fully conscious of the evil of protracted litigation. Our forensic system, with its machinery of cross-examination of witnesses and forced disclosure of documents, is characterized by ruthless investigation of truth. Nevertheless, the law recognizes that the process cannot go on indefinitely the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by law – by every system of law - of the finality of judgment. If the judgment has been obtained by fraud or collusion, it is considered a nullity, and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But, such

exceptional cases apart, the judgment must be allowed to conclude the matter. That indeed is one of the society's purposes in substituting the lawsuit, not for the vendetta.

The principle was also restated and elaborated upon in another English case of *Fraser v. HM MAD Ltd* per Moore – Bick J^{xxii}.

*It has been recognized for centuries that it is neither just nor in the public interest that a person should be allowed to litigate the same issue more than once. The principle is encapsulated in the well-known maxims *nemo debet bis vexari prona et eadem causa* and *interest republicae ut sit finis litium*. Out of these broad principles of justice and policies, however, there have developed three distinct principles of law usually referred to as the cause of action estoppel, issue estoppel, and abuse of process. The first two are aspects of estoppel by record since they both depend on a prior decision by a court or tribunal of competent jurisdiction on matters before it. The third involves the exercise of the Court's inherent jurisdiction to prevent abuse of its process.*

For a litigant to succeed in proving *Res judicata*, the following elements must abound.

- i. A judgment by a court of competent jurisdiction or a tribunal
- ii. The judgment must be final and binding
- iii. The judgment must be founded on a decision on merit
- iv. The judgment must be predicated on a fair hearing

The fact that the earlier decision is right or wrong is irrelevant.

The principles enunciated in the above cases, upon which the doctrine of estoppel *per res judicata* is founded could be itemized thus:

- i. The fundamental principle in every society is that there must be an end to litigation
- ii. The principle against contradictory judgments on the same issue
- iii. The principle that a person ought not to be allowed to relitigate the same issue twice

- iv. The principle that a person ought not to be twice vexed on the same matter.
- v. The principle that a court should not allow the abuse of its processes.

The principle of *res judicata* is well recognized by the courts in South Africa. The activist approach of the Courts is well articulated in three important cases exemplified in the judgments of the courts. The cases are as follows.

- i. *Ekurhulen Metropolitan Municipality v. Germiston Municipal Retirement Fund*^{xxiii}.
- ii. *Concor Holdings (Pty) T.A Ltd Concor Technicrete v. Hermanus Phillipus Potgieter*^{xxiv} and
- iii. *Malaudzi v. The State*^{xxv}.

The factual situation of the case of *Ekurhulen Metropolitan Municipality v. Germiston Municipal Retirement Fund*^{xxvi} concerns a claim by the fund for payment by the Municipality of a certain sum of money in addition to the interest thereto being the shortfall in terms of a Guarantee under the pension fund rate. The rule in question contains an investment guarantee which states that whenever the fund achieves less than 5.5% returns on its investment, all the contributors to the fund must pay for their respective shortfall to meet up with the 5.5% target on returns.

The applicant, *Ekurhulen: Metropolitan Municipality* was established under Section 12 of the Local Government Municipal Structures Act and pays pension contributions to the Fund on behalf of its employees, The Fund invests the contributions for a better pay-out to such employees on retirement.

The fund claimed from the Municipality the pay-up of that shortfall for the 2007-2008 and 2008-2009, financial years. The Municipality repudiates liability for payment while opposing the application and praying the court to dismiss same.

The controversial guarantee as incorporated in rule 10.8.1 is that:

If the rate of interest earned on the total money (including any uninvested money) of the fund during any financial year should be lower than five and one-half percent (5.5%) the council shall contribute to the Fund such a sum as would increase, on being added to the interest actually to five and one-half percent (5.5%) during such financial year.

The Municipality raised several defenses, which are as follows:

- i. The Municipality challenged the interpretation of the rule and asked the High Court to reconsider the interpretation in *Ekurhuleni I*, against the background of the availability of new evidence on the history of the rule and the Fund financial accounting records over the year, which according to the Municipality would lead to a different interpretation to what the court adopted in *Ekurhuleni I*.
- ii. The municipality further, asserted that the interpretation contended for by the Fund violated section 152(1) of the Constitution which saddles the Municipality with the responsibilities to provide democratic and accountable government, ensure the provision of service delivery for local communities in a sustainable manner and promote social and economic development.
- iii. The Municipality also contended that the interpretation violates section 153 of the Constitution because, in years where the guarantee is activated, the Municipality cannot structure its budgeting processes to give priority to the basic need of the community. They argued that the construction of the rule as the Fund contended would have the effect of depriving the Municipality of a huge fund of 70million Rand plus interest which amount would have been used to provide basic needs of the community.
- iv. Alternatively, the Municipality argued that if the interpretative defense is rejected, then in the light of S.50 of the Local Government Municipal Finance Management Act, (MFMA) in conjunction with sections 230A, 193(1)(b), 152(1) and 153 of the Constitution, the rule is unconstitutional and invalid.
- v. The Municipality in furtherance of the repudiation stated in addition that if the above argument was not persisted, it is still contrary to public policy and, unenforceable particularly given the market volatility since the start of the 2003 financial year, when the annual rate of increase of the total assets of the Fund reduced below 5.5% and the likelihood that this would persist in 2010, thereby making the Municipality in perpetual slavery to fund the shortfall in perpetuity.
- vi. Raising further argument in the alternative, the Municipality pleaded that by sections 7(c) and 7(1) of the Act, read in conjunction with the Fund Rules, the Board of the Fund owes a duty of good faith to all the participating employers when the investment of assets are made, having regard to the risk carried in terms of the rule.

The Fund in replication raised *res judicata* and *issue estoppel* since all the issues now raised were in issue in Ekurhuleni I.^{xxvii}

The South Africa High Court held while rejecting the evidence that:

- i. The Municipality's argument for a reconsideration of the interpretation of the rule was fraught with difficulties in that the evidence was available before the institution of the 2003 proceedings and despite that, they failed to seek the leave of the Supreme Court of Appeal to introduce it, despite the reminder on it by the Local Division.
- ii. The Municipality failed to meet the established test for the admission of further evidence.
- iii. That there was nothing of substance in the history and development of the rule which could lead the court to arrive at a different interpretation in contradiction to the decisions reached by the Supreme Court of Appeal in Ekurhuleni I.⁵³⁶

Consequently, the court rejected the public policy defense and the fiduciary duty defense raised by the Municipality, and the Municipality was ordered to pay 70million Rand plus interest at 15.5% per annum.

In furtherance, of their quest, the Municipality applied for leave to appeal which the High Court and the Supreme Court of Appeal of South Africa respectively refused. As a measure of last resort, the Municipality sought leave to appeal before the Constitutional Court of South Africa. It found a supportive argument for the leave to appeal in its quest for a reconsideration of *Ekurhuleni I*, by invoking the constitutional obligations in sections 152, 153, 195(1)(b), and 230A of the Constitution. The Municipality submitted that the interpretation of Ekurhuleni I, if not revisited would result in it expending money in contravention of the various provisions of the Constitution.

The Constitutional Court, therefore, granted the Municipality's prayers because of the serious Constitutional issues that were raised by the Municipality in the interest of justice. As a prelude, however, despite the grant, the court raised some caveats.

- i. That an issue does not become a constitutional issue simply because it was tagged so by the application.

- ii. That in law, acknowledgment by the court that a constitutional issue had been raised is not tantamount to having the effect of a finding on the merits in favour of the applicant.
- iii. The mere fact that a matter raises a constitutional issue does not automatically result that the leave to appeal would be granted, rather the interest of justice would dictate whether leave to appeal ought to be granted.
- iv. In granting the leave to appeal, the Constitutional Court reiterated the fact that the issues regarding the interpretation and enforcement of the rule, as it affects the constitutional obligations of the Municipality were not the focal point for the Court's consideration in *Ekurhuleni I*.

In the words of Nkabinde, ADC J;^{xxviii}

In Ekurhuleni I, the Supreme Court of Appeal was concerned with the interpretation of the rule having regard to the consenting nature of the fund, purposes of the rule; and the rule's general practice and effect in order to give it its commercially sensible meaning. But, here the issues raised regarding the effect of the interpretation of the rule – having regard to the said constitutional principles and public policy considerations, were squarely pleaded and argued a quo. However, the High court paid no attention to them. Those issues transcend the narrow interests of the parties because they may impact on the mentioned obligations and may implicate the interest of the local communities. Therefore, the issue ought to be considered by the court. I conclude that the interest of justice warrants granting leave to appeal.

Thus, despite the plea of *Res judicata* and issue Estoppel by the Fund. The tenor of this case is that there could be exceptional circumstances when the court may revisit a case, such as we found here; the grounds as considered by the Constitutional Court in South Africa but conjunction with the plea of *Res judicata* are as follows;

- i. Reconsideration based on New Evidence.
- ii. *Res judicata*

- iii. Reliance on the Constitution and
- iv. Public Policy Defence

The above as considered by the constitutional court shall be considered seriatim.

RECONSIDERATION BASED ON NEW EVIDENCE

On the quest for reconsideration of Ekurhuleni I based on new evidence;

- i. That the evidence was readily available when the Municipality instituted the first claim, and no sufficient explanation was given as to why they failed to advise or avail themselves of the evidence,
- ii. The possibility of potential prejudice against the Fund as well as the Employees who were protected via the investment guarantee is another potent factor.
- iii. That the new evidence which relates to the calculations of the Fund's past performance is irrelevant to the interpretation of the rule.
- iv. During the argument, the Municipality conceded that the new evidence was always available and that no cogent explanation was advanced as to why the evidence was not produced at the first trial. Evidentially, therefore it is apparent that a proper foundation as to the whereabouts of the supposedly new evidence was not laid before the court.
- v. The core evidence was to show that in the three years, preceding June 2003, the average annual rate of interest on the total amounts of money of the Fund far exceeded the 5.5% target as exemplified in the 2001 and 2002 financial years where the interest on the total money of the fund (not only cash) reached unprecedented 15.7% and 12.5% respectively.

Interestingly, in discarding the Municipality argument, the court used the Omega management style, common with public administrators. This is done by taking a point from the camp of the enemy to defeat the enemy itself. Concerning the above argument that the total money of the fund far exceeded its target for the 2001, 2002 financial years the court stated that,^{xxix}

If the interpretation was used to the benefit of the Municipality, to the extent that it resulted in the finding that the yield was more than 5.5% and the Municipality thus

needed not to pay any shortfall then it should in equal measure be used to the benefit of the Fund when there is a shortfall in terms of the rule.

The court, therefore, concluded that,^{xxx}

The High court did not misdirect itself in rejecting the new evidence. The admission of the new evidence must be refused and on this ground alone, the interpretive defense should fail. It follows that the interpretation of the rule in Ekurhuleni I which was never overturned on appeal remains binding. The issue of res judicata thus arises.

The Constitutional Court of South Africa considered and thoroughly vet the record and discovered that the Supreme Court of Appeal had regard to the language used, the context of the contract, the purpose of the pension rule, the general practice in the pension fund industry, the impact of the fund rule on members of the fund, the nature of the fund when it was established in 1924 and its nature when it was converted in 1994 given it all commercially sensible meaning. The Court concluded that, whatever may be the case, the *res judicata* issue and not the correctness of Ekurhuleni I interpretation, should occupy the center stage in this case. Nkabinde ADCJ, delivering the majority judgment and with whom the majority concurred stated thus, on the principle of *res judicata* as applied to this case;

The Fund submits that the matter is res judicata. This matter is founded on public policy which requires that litigation should not be endless, especially when the demand for payment of money is based on the same ground. And, as the law regarding this doctrine remains settled, the inquiry is not whether the decision is right or wrong, but simply that there is a decision. This must not be understood to suggest that Ekurhuleni I. was

incorrect. The construction of the rule in that it is unassailable

CONSIDERATION OF RES JUDICATA

Meanwhile, to properly consider *res judicata*, the constitutional court considered the Municipality's argument that *res judicata* does not apply. The Municipality argued the absence in the cause of action to the relief sought. The Fund argued on the contrary that even if *res judicata* is inapplicable, the Municipality would be precluded and insulated considering the defense of issue estoppel. To the above counter-arguments, the court reacts that:^{xxxii}

It is correct that the payment is for different financial years and amounts. 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. The ground for demanding payment is similar to the one in the previous litigation between the same parties; on the same cause of action, and for the same thing. The fact that the claim is for different financial years and amounts is no license for the Municipality to raise the same interpretative defense. If that is allowed, it will, impermissibly, prevent the Fund from relying on Ekunhuleni I.

In essence, according to the court, the identity of the question set in motion in the subsequent suit and the present one is the determinant factor in *res judicata* application.

The Constitutional Pillar

Worth considering were the facts that the Municipality anchored its arguments in support of re-opening its case and reconsideration of the rule in *Ekurhuleni I*, on two pillars; first, on constitution pillar and the other public policy pillar. On the constitution pillar, the Municipality canvassed the argument that an open-ended guarantee of the pension fund rule would unreasonably give primacy to the interests of the members of the Fund over the needs of the community. The court in reaction to this argument decided in rejection that:

It is correct that the constitutional provisions relied upon providing general obligations on the Municipality to ensure that public funds are used in an economically effective manner. However, there is simply no evidence to support any

suggestion that the Municipality is, because of the unlimited nature of the exposure through the guarantee, unable to meet its constitutional obligations. Despite being invited during the hearing to demonstrate that the discharge of its constitutional obligations has been impeded by its liability in terms of the rule, the Municipality failed to do so. Therefore, there is no merit in the Municipality's argument that the rule has a continuing oppressive consequence.

The court through this dictum laid down the conditions to succeed in constitutional policy pillars that;

- i. The Municipality must show the constitutional provision compelling its obligations to the public contra its contribution to the Pension Fund.
- ii. Evidence must be adduced to support the contention that its unlimited exposure to its commitment to the Fund would disable it from meeting up with the constitutional obligation
- iii. It must also be able to show on hearing how the pension rule would have a continue oppressive consequential obligation to the community.

The Municipality had failed to discharge these burdens, and the constitutional argument pillar collapsed.

The Public Policy Pillar

On the second pillar on the ground of public policy, the court while rejecting the argument stated in the following dictum.^{xxxii}

It is now trite that all law, including contract law, derives, its force from the constitution. Generally, public policy represents the legal conviction of the community. It requires parties to a bargain to comply with their contractual obligations that have been free and voluntarily undertaken. The principle gives effect to the central constitutional values of freedom and dignity. It needs to be stressed that the guarantee in terms of the rule was negotiated by all

concerned and agreed upon by parties. To this end, the consequences of enforcing the rules were foreseen by the parties. Therefore, given the interpretation in Ekurhuleni I, which I accept (sic) as binding on the parties, the enforcement of the guarantee cannot in the circumstances be contrary to public policy. This is because the bargain was freely undertaken for a legitimate purpose for which it was intended to serve as a framework to safeguard the interests of the employees of the Municipality.

Contract, the Demolition Refused

Finally, in demolishing the last relics of the second pillar, the court per Nkabinde, ACDJ stressed that the court could not frustrate the contract freely entered into by parties. His Lordship stressed the fact that the effect of doing that would be to declare the contract a nullity. The Municipality was privy to the contract and more so the Municipality failed to establish how the pension rule threatened its rights and failed to advance reasons for the perceived failure to comply with its contractual obligations. Nkabinde ACDJ concluded thus;^{xxxiii}

To allow the Municipality to escape liability by extricating itself from the bargain, when it has failed to establish the threatened rights, or even advance cogent reasons for its failure to comply with its contractual obligation, would constitute an injustice to the Fund. It would frustrate the principle of pacta sunt servanda and the very purpose the rule was intended to achieve. This is so because when the Municipality agreed to the bargain, it did so as a contributing employer for the benefit of its employees in a bargaining process that is at the very heart of the employment relationship.... The court's power should, therefore, not be used to nullify that which has been freely and voluntarily agreed upon.

LIMITATIONS TO THE PRINCIPLE OF RES JUDICATA

Though when a court delivered its judgment or ruling or makes an order regarding a case, the court administratively could be said to be *functus officio*. In effect, it implies that once a court has duly made its pronouncements whether in form of a final judgment, order, or ruling, that same court is said to have handed off its hand and cannot make any corrective order on it again or supplement except it goes on appeal.

Generally, however, *functus officio* only applies to the final decision of a court and the implication is that a decision is revocable until it becomes final. The finality of pronouncements is of its essence. Finality could be achievable when the decision of the court is published, conveyed to the affected parties, or announced^{xxxiv}.

Nevertheless, the *functus, officio* principle rationale is designed to ensure certainty in the law and to gladden the court with the garment of respect far from an object of ridicule for making contradictory order. However, the doctrine itself should not be seen in any absolute categorical sense as impermissible of correction, when need be. Hence, the doctrine could be revisited against the demands of fairness and as justice in a case demands. Thus, there is the need for re appraisalment of decisions most especially where it is necessary to balance certainty with fairness in furtherance of the requirement of justice where a party might be subjected to unfathomable hardship such as when it is necessary to vindicate a person's constitutional rights for an accused not represented by a counsel.

The doctrine of constitutionalism could be said to suck from the breast of the same mule togetherness with the principle of *res judicata*^{xxxv}. As exemplified above, the principle of *res judicata* could be revisited by the court to vindicate the accused whose constitutional right was abused or abridged. Consequently, Dube and Machata, posits that it is trite that no legal principle is cast in stone, and that where the interests of justice require it, the court might make a significant u-turn from an established principle or doctrine, such as that of *res judicata*^{xxxvi}.

CONSTITUTIONAL COURT SET ASIDE ITS PREVIOUS JUDGMENT

However, it should be noted that ascribing the notion of absolute rigidity to this common law principle of *res judicata* as an iron incapable of bending has the negative prospect and potential

danger of subjecting litigants to untold hardship. Consequently, the Constitutional Court in South Africa in the celebrated case of *Molaudzi v. The State*^{xxxvii} was confronted with the question of whether the court would yield itself to depart from its own previous decision, even this time around in the ambit of Criminal Law. Appreciably, drawing from foreign jurisprudence and in the interest of justice, and in furtherance of the principle that a court ought to treat equals equally and unequal differently, the constitutional court for the first time in the annual of its history set aside its own decision^{xxxviii} contrary to the principle of *res judicata* and the putative doctrine of *functus officio*. The case that marked such a significant departure is that of *Malaudzi v. The State*^{xxxix}. The scenario of that case is as follows; the accused and other co-accused stood trial before the North West High Court of South Africa sequel to the events of the 3rd day of August 2002, which resulted in the killing of a member of the South African Police Service, *Warrant Officer Johannes Dingaun Makuna*, who was fatally shot at his home. *Malaudzi* was alleged to be one of those groups of men that carried out the gruesome murder, looting, and stealing of the bakkie belonging to the victim police officer.

Malaudzi together with the other seven co-accused was found to have a common intention to rob the deceased and was therefore convicted on four out of the five charges. Consequently, on the 22nd day of July 2004, all the accused were sentenced to life imprisonment for the robbery, and three years imprisonment for illegal possession of firearms and ammunition, to run concurrently with the life sentences^{xl}.

All the accused appealed against their convictions and sentences to the full court. They grounded their appeals on the admissibility of the extra-curial statement of a co-accused which they argued before the court that it was procedurally wrong. Their appeal was dismissed on the ground that the extra-curial statement became automatically admissible because some of the accused confirmed some portions of the statement in their oral testimonies. In essence, their appeals were struck out.

A petition to the Supreme Court of Appeal for leave to appeal was also dismissed on the 6th day of August 2013.

The Separate Litigations before the Constitutional Court in South Africa

In South Africa, the need to raise a Constitutional Court is a Constitutional matter. According to Dube and Machaya; before the seventh amendment of the Constitution, this was regulated

partly by S. 167 (3)(a) of the Constitution of South Africa, which states that the Constitutional Court of South Africa is to be the Highest Court in all Constitutional matters. The above provisions were amended in 2012 to provide that the Constitutional Court in South Africa is the highest Court of the Republic. This is by the Constitutional Seventeenth Amendment Act 2012, section 167(3)(b) in particular which provides that;

The court may decide (i) constitutional matters, and (ii) any other matter if the court grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by that court.

Armed with this provision and provided with this opportunity, Malaudzi, appealed to the Constitutional Court and the main thrust of his appeal is as follows^{xli};

- i. That his trial before the trial court and the full court did not properly apply the principle in *S. v. Ndhlovu and others*^{xlii} where the Supreme Court of Appeal had to be confronted with the question of whether an accused out of court statement incriminating a co-accused, when disavowed, could nevertheless be used as incriminating evidence against the co-accused.
- ii. That is admitting hearsay evidence, the courts must take all the factors in S. 3 of the Evidence Amendment Act, No.45, of 1988 into consideration.
- iii. He further contended that the trial court mistakenly corroborated his co-accused, i.e. Matjeke's evidence with other evidence which according to him did not at all implicate him, whilst those one's implicating him are unreliable.
- iv. He further contended that Matjeke's extra-curial statement amounted to a confession, and not admission, and under S. 219 of the Criminal Procedure Act, No.51 of 1977 such could not be admitted as evidence. That section emphatically states that no confession made by any person shall be admissible against another person.
- v. He further argued that the trial was procedurally unfair as the trial court had ruled and premised that ruling on the admissibility of hearsay evidence after the state had closed its case to convict him. And in addition to the above procedural unfairness, the trial court rushed the proceedings to allow Matjeke to re-open his case and allowed the defense to testify out of sequential orders.

From the above grounds of Appeal, it is apparent that *Malaudzi* had failed to raise any constitutional matter to engage the jurisdiction of the court.

Making a significant departure from *Malaudzi's* grounds of appeal against his conviction, the other co-accused, *Mhlongo and Nkosi* applied for leave to appeal against their convictions and sentences by raising constitution arguments against their convictions in a separate suit regarding the evidence against them. Thus, in *Mhlongo v. S; and Nkosi v. S*^{xliii}, they separately challenged the constitutional validity of the admissibility of extra-curial statements of a co-accused in a criminal trial.

However, the constitutional court gave the direction that *Malaudzi's case* should be combined with that of *Mhlongo and Nkosi* because they were similar incidents. The constitutional court granted their leave to appeal. Eventually, the constitutional court quashed the convictions of *Mhlongo and Nkosi* since their appeal raised constitutional issues which engaged the jurisdiction of the court and both of them were subsequently released from prison. However, as per *Malaudzi's* appeal, the constitutional court dismissed the application for failure to raise any constitutional issue.

Malaudzi's Second Appeal before the Constitutional Court

Rectifying a fundamental flaw that worked negatively against him in the first Appeal, Malaudzi brought in a second application before the Constitutional Court for leave to appeal to the Constitutional Court to have his conviction quashed, raising the Constitutional issue to engage the jurisdiction of the court. At the reception of his application, the court called for written submissions from the parties to address the issue as to whether the court could entertain the matter on the basis that it was caught by the estoppel principle of *res judicata*.

In the second case of *Malaudzi v. The State; Malaudzi*^{xliv} contended that his second application differed from the first one in that whilst the first one raised procedural unfairness which did not invoke the jurisdiction of the court, the second application raised the constitutional issue which engaged the jurisdiction of the court. Succinctly, *Malaudzi's* grounds of Appeal are as follows;

- i. That the first application did not raise a constitutional matter

- ii. That the challenge to the Constitutional tenability of the admissibility of extra-curial statement of an accused to implicate a co-accused is now being raised for the first time.
- iii. And since the court did not decide on this fundamental Constitutional issue in the very first application, the second application was not caught by the principle of *res judicata*.

As a preliminary, the court first considered the general principle of law on *res judicata*, placing reliance on its conceptualization by Classen^{xiv}, which defines it as ‘*case or matter which has been decided upon and the authority that in the public interest, when the court makes its final decision, the effect must be given to it even if it is erroneous*’. Thus, as per *res judicata*, the inquiry or the focal point is not whether the judgment is right or wrong, but simply whether there is a judgment. Nevertheless, the vexed question that pre-occupied the Constitutional Court in South Africa was whether a cause of action could be said to exist in criminal law as the doctrine of *res judicata* mostly found its applicability in the realm of civil cases.

Meanwhile, the constitutional court in the Malaudzi case found refuge in the Canadian case of *Antim Capital Inc. v. Appliance Recycling Centres of America*, where the Court of Appeal stated that;

The purpose of res judicata is to balance the public interest in the finality of litigation with the public interest of ensuring a just result on merit. The court also noted that the doctrine is intended to promote the orderly administration of justice and is not to be mechanically, applied where to do so would create injustice.

In its first consideration, the court found its power to revisit its final judgment in S. 173 of the South African Constitution which provides that;

The constitution court, the Supreme Court of Appeal, and the High Court of South Africa, each have the inherent power to protect and regulate their process, and to develop the common law, taking into account the interest of justice.

The court, therefore, expressed the view that since *res judicata* is a common law principle, the above constitutional provisions saddled it with the power to mitigate the hardship that its strict applicability might occasion so far as the interest of justice demands^{xlvi}. The court in what could be likened to an activist approach noted three situations to displace the principle of *res judicata*.

- i. When the interest of justice so requires.
- ii. When exceptional circumstances abound for departure
- iii. Flaws of unrepresented accused.

In the interest of justice, the court noted that;

The interest of justice requires the court, to balance the rule of law and the need for legal certainty in the finality of criminal convictions, as well as the effect on the administration of justice if parties are allowed to approach the court on multiple occasions on the same matter. This should be weighed against the necessity to vindicate the constitutional rights of an unrepresented accused, the vulnerable party, in a case where similarly situated accused have been granted relief^{xlvii}.

It is submitted that^{xlviii}, here with this pronouncement; the court clearly expressed the mind of *A.V. Dicey*^{xlix} in his second principle of the rule of law which emphasized equality before the law as an important pillar of justice. The constitutional court, therefore, found the fact that *Mhlongo and Nkosi*, who were co-accused with *Malaudzi* are now enjoying the breath of freedom, nothing prevents them to extend the same olive branch to *Malaudzi* and allow salvation to come forth to him, enabling him to descend from his sycamore tree since what is good for the goose is equally good for the gander.

On the exceptional circumstances exemplified in the matter before the court as an excuse to depart from its previous judgment, the court expressed its feelings in the following propositions:

The parties agreed that apart from this court reconsidering the appeal, there is no effective alternate remedy. If the court had failed to entertain Malaudzi's second application, this

would have denied him the right to equality before the law. His case was similarly situated to the related cases of Mhlongo and Nkosi. His right to equality before the law would also have been infringed by the arbitrary distinction between confessions and admissions, whose consequences would have been to render extra-curial admissions of the accused admissible against a follow accused.

In the words of Dube and Machaya¹;

The constitutional court also took into account the fact that Malaudzi was unrepresented when he lodged his first application. Needless to say, this had a bearing on his right to a fair hearing.

In conclusion, the court held that the doctrine of *res judicata* should not be rigidly applied to preclude the court from revisiting and overruling its earlier decision. The court, however, raised the *caveat* that the court should guide easy resort to the alternation of its previous decision given S. 173 of the Constitution which must be carefully used to avoid uncertainty in the law, potential chaos, and the erosion of the twin doctrines of *functus officio* and *res judicata*.

THE APPLICABILITY OF ESTOPPEL AS A DEFENCE TO REI VINDICATIO

Rei vindicatio is a legal action by which the plaintiff could take an action demanding that the defendant in whose possession lies his goods or properties should return them to him. The legal action is sustainable when the plaintiff owns the property in question and the defendant is impeding the plaintiff of the property in question.

Meanwhile, if the property could not be recovered, the plaintiff could institute a personal action, otherwise known as an *actio forti* to punish the defendant. With this, by claiming damages the plaintiff could be restored to his original position equivalent to the monetary value of the property in question. This is based on the underlying principle of *restitutio in integrum* in so far as the plaintiff does not suffer additional loss occasioned by the detention of his

property.^{li} Before the applicant could succeed in a *rei vindicatio* application he has to prove that;

- i. that the property belongs to him
- ii. that the defendant had detained his good.
- iii. He did not pass the ownership to the defendant
- iv. That he did not make any representation to presuppose that he has been paid

The question is whether the plaintiff who owns the property in question has *jus dispodendi* or a right to repossess and dispossess off the property. The significance of the law relating to *jus dispodendi* relates to the principles of law relating to the sales of goods. This has to do with a situation where the vendor or owner of goods reserved to himself the right to repossess the goods by preventing ownership of the goods from passing to the purchaser, even though he had parted with the possession of the goods^{liii}.

In the South Africa case of *Concor Holdings (Pty) Ltd L/A Conor Technicrete v. Hermanus Philipus Portjieteri*^{liii}, the supreme court of Appeal was confronted with the question of whether the defense of estoppel by conduct could be raised as a defense to the doctrine of *rei vindicatio* and the sole issue raised for the determination of the court in the appeal is whether the appellant is estopped from vindicating paving stones of which as the vendor and owner, therefore, possession had been passed to the purchaser who was the respondent in the case. The magistrate held that it is not estopped. However, the Pretoria High Court, with Bothe J, and Patel J concurring reversed the decision but granted leave to appeal to the Supreme Court of Appeal.

The facts of this case fall within a small compass in which the appellant manufacturers and supplier of paving stones had supplied paving stones to his customer, a builder, named Van Dyk, who traded as Polokuane Home, hereinafter referred to as the builder. The builder purchased the paving stones from the appellant on credit under the appellant's standard credit application form which had previously been completed by the builder, wherein the following clause was imprinted.

The ownership in the goods supplied shall remain vested in the supplier, until the date of payment the supplier shall be entitled to repossess all the goods not paid for.

Factually, it was revealed that the appellant knew through his salesman, *Mr. Uys* that the paving stones were needed urgently by the builder to cover the parking area of a building owned by the respondent with whom he had contracted for paving the adjacent parking area of his building. It was further revealed that some of the paving stones were collected by the builder from the appellant's premises while others were delivered by the appellants directly to the site. The respondent paid the money for the paving stones as well as for the work executed by the builder, but the builder did not pay the appellant. The respondent gave testimony that if peradventure he has the awareness that the builder has not paid the appellant, he would have ensured the payment. This evidence was not challenged. The builder has not paid the appellant, the respondent's estate was sequestrated. The appellant, thereafter brought a *rei vindicatio* against the respondent for the return of the paving stones and the respondent raised the defense of estoppel.

The primary question raised by the counsel to the appellant was whether the appellant had conducted itself to the extent of establishing estoppel by representation. The appellant's counsel submitted by answering in the negative citing many authorities in support of this submission^{liv}. He submitted further that to establish estoppel, a representation must be precise and unambiguous.

However, the Supreme Court of Appeal per (Loete J.A.), with whom Scott, J.A. Zulman J.A., Farlam J.A., and Comrade J.A. concurred found it desirable to examine the positions of law in South Africa. On thorough analysis, it is apparent that there are many views on situations where estoppel may or may not dislodge the ownership *rei vindicatio*.

The First Test-Representation must be Precise and Unambiguous

The first test postulated by the court in *B & B Hardware Distributors (Pty) Ltd v.*

The administrator^{lv} is that a representation must be precise and unambiguous. But the court observed that his test has been held to be a court reflection of the South African law in cases involving representations by words^{lvi}.

The Second Test of Reasonable Expectation

The court made it clear that the test as regards representation by conduct has been formulated differently. Thus, the second test on estoppel by conduct is that of reasonable expectation or

likelihood of reliance by the representee. This test, according to the South African Supreme Court of Appeal, is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if the representee acted reasonably in construing the representation how the representor did.

The Third Test of Reasonable Foreseeability

The third test is that of reasonable foreseeability that the representee might deem, the third-party swindler as the owner with the right to dispose of the property. This test was laid down by Trollip J in the case of *Electrolux Pty Ltd v. Khota*^{lvii}. The test was succinctly formulated thus;

Consequently, I think that generally and logically, the first inquiry should be into what was the specific conduct of the owner that the respondent relies upon for the estoppel? If that conduct is not such as would in the eyes of a reasonable person in the same position as the respondent, constitute a representation that the swindler was the owner of, or entitled to dispose of the articles, then cadit questio-no estoppel could then arise. But if such conduct does beget that representation, then the next inquiry would be whether the respondent relied upon, or was misled by that representation in buying the article.

Under this text, two questions ought to be asked; first what was the specific conduct by the representor that the representee relied upon, for raising the defense of estoppel? Then the second question is whether such conduct constitutes a representation that the swindler was the owner of the goods with the right to dispose of the property. If the answers to the two questions are answered positively, then estoppel by conduct could be found, only if the representee relied on the representation or was misled into placing reliance on the representation. Conversely, if the two answers are in the negative, then it implies that the representee, even if he relied on such representation does that to his peril.

However, the above test stands as the foundation for adding the fourth test. Hence, the Supreme Court of Appeal in the *Concur Holdings (Pty) Ltd*, added a caveat as a prelude to putting forth an all-embracing test. The *caveat* is that where the representation by conduct is ambiguous, the representee would nonetheless not act reasonably without seeking clarification. Thus, where the representation is ambivalently connoting more than one interpretation and the representee without inquiry chose out of his own volition one of the possible contradictory meanings, he could not have acted reasonably. Thus, in cases of ambiguous representations, the representee must seek clarification from the representor. In line with the above, Cloete, J.A. with whom all other justices of appeal concurred resonates the above position in this dictum;

In view of the body of authority to which I have referred including a judgment of Rabie J.A. in Van Rooyen and his subsequent remarks expressed extra-curially, I am driven to the respectful conclusion that the statement in B & B incorrectly formulates the test for a representation by conduct. The same criticism may (Sic) be leveled at the decision in Saflec where the test postulated that the representation had to be unequivocal. Nevertheless, if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chooses to rely on one of the possible meanings without making further enquiring to clarify the position^{lviii}.

It is very essential to consider the appellant's counsel submitted to the effect that the respondent knew of a general practice whereby ownership is reserved by the seller in building materials sold on credit to a builder and based on this, he concluded that the court should reject the defense of estoppel in this situation. The court per Cloete J.A. disregarded the appellant's counsel submitted that the respondent knew that sometimes building suppliers reserve ownership in goods sold on credit. The court stated that the submission would not suffice to defeat the plea of estoppel. According to *Cloete J.A.*

An owner's rei vindicatio can be defeated not only when the representation made by the owner is that the third person is entitled to transfer ownership to the representee. In this

latter regard, there are the following important facts, The paving stones were going to form part of the works being constructed by the builder for the respondent. They were purchased for that specific purpose. Without them, the building works could not be completed. The colour of the majority was chosen to match the building. A number had to be cut and fitted, they could without difficulty be picked up, it is clear that some efforts would have been required to perform this task bearing in mind the area (570m²) and the fact they had been embedded in a sand base. All these facts suggest that the paving stones, once laid, were going to remain permanently in place and the admission by the respondent that they remained movable does not destruct this – it merely has the effect that the respondent is precluded from arguing that he became the owner of the paving stone by accession.

The Test of Awareness of the Possibility of Non-Payment

In discountenancing the application of the principle of estoppel as a defense to the *rei vindicatio* principle, *Cloete J* concluded thus;

The builder was entitled to dispose of them in the ordinary course of the building operations undertaken for the respondent, even before he made payment to the appellant. Indeed, they were required and it could, therefore have been expected that they could be laid quickly. The appellant must have been aware of the possibility that the builder might not pay the amount owing to it. It was for that very reason, that the appellant reserved ownership in the paving stones.

The court added;

But the reservation of ownership created the further foreseeable possibility which the appellant did not guide

against, namely, that the respondent would pay for the paving stones once they had been laid, in the belief that he would become the owner.

Finally, in the above reasoning and on proper analysis, the following conclusion could be distilled and which is that the defense of estoppel could be displaced if the applicant for *rei vindicatio* could prove that:

- i. That the respondent had not been misled into believing that the third party has a right to transfer ownership of the property.
- ii. That the representee was acting upon his own misconceived false assumption that the representor had the right to transfer ownership in the property and
- iii. Lastly, that the representor owner and applicant had not been negligent in representing the third party as having the right to transfer ownership in the property.

On the whole, the court, in this case, failed to apply the doctrine of privity of contract that contracts are only private between parties to it. This is the principle laid out in the case of *Dunlop Pneumatic Tyre v. Selfridge*^{lix}; on that alone, the action by the applicant ought to fail except the applicant could formulate one of the exceptions to the privity of contract rule. However, the applicant could have deployed the equitable doctrine of tracing to trace his money to the account of the third party and whatever that money is converted to. These principles were not deployed in the case.

On proper analysis, it is apparent that the Courts in South Africa imbibed the strict constructivist approach in the interpretation of law, and in constructing the rules laid down by parties to govern their contractual rights. In addition, the Constitutional Court in South Africa engages the activist approach while turning its back to the principles of *res judicata*, and the fact that a Court is deemed to be *functus officio* after the delivery of its well-considered judgment in granting a second appeal in the Malaudzi's case. Nevertheless, interesting novel cases in South Africa reveals that the principle of estoppel would not be invoked by the Courts to protect the gullible.

ENDNOTES

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- ⁱ Constitutional Court of South African (2017) case no CCT 265/15, decided on 17th January, 2017.
- ⁱⁱ The Supreme Court of Appeal of South Africa case no – 219/03, decided on 28th May, 2004.
- ⁱⁱⁱ (2013) ZAG PJ 11 C 39; (2013) 2 All S.A. p. 574 (GSJ) 6 March 2013
- ^{iv} Case No AC/14/2015; High Court of South Africa Western cape division, cape town
- ^v (2017) 2 ACC I
- ^{vi} Wallis J.A., in Madal Joint Municipal pension fund v. Erkhuruleni Municipality (2012) (4) SA 593 (SCA) at paras (17) and 25 – 26
- ^{vii} *Supra.*
- ^{viii} *Supra.*
- ^{ix} *Supra.*
- ^x *Supra.*
- ^{xi} *Supra.*
- ^{xii} *Supra.*
- ^{xiii} Cf Fairoaks Investment Holdings (Pty) Ltd driver (2008) ZASCA p. 41 2008, (4) SA, p. 302 (SCA). Pangbourne Properties
- ^{xiv} Ltd v. Basin view properties ltd. (2011) JL 27157 (SCA) ZASCA p. 20 (17/03/2011)
- ^{xv} *Ibid*
- ^{xvi} Aquarius Maritime Pty Ltd v. Mv Agatis and ors. Case no. AC 14/2015
- ^{xvii} Spa (2012) (1) S.A. 58 (SCA) para 19 – 26
- ^{xviii} *Ibid*
- ^{xix} Aquarius added for the purpose of identification
- ^{xx} (2012) SGHC, p. 246, paras 82 – 89
- ^{xxi} (1990) 2. A.C, p. 273, per Lord Simon, Phillip Yang, 11th - 20th November 2017 CILT Two – day Course – commercial Arbitration principles of Res Judicata
- ^{xxii} (2006) EWCA Civ. P. 738, per Moore Bick J.
- ^{xxiii} Constitutional Court of South African (2017) case no CCT 265/15, decided on 17th January, 2017.
- ^{xxiv} The Supreme Court of Appeal of South Africa case no – 219/03, decided on 28th May, 2004.
- ^{xxv} Reported in: The Doctrine of Res Judicata Revisited, Argelo, Dube and Musavengana Machaya, Strategic Review for South Africa Vol. 39 No. 2
- ^{xxvi} *Ibid*
- ^{xxvii} *Ibid*
- ^{xxviii} *Ibid*
- ^{xxix} *Ibid*
- ^{xxx} *Ibid*
- ^{xxxi} *Ibid*
- ^{xxxii} *Ibid*
- ^{xxxiii} *Ibid*
- ^{xxxiv} Hoexter, C (2012), Administrative law in South Africa, 2nd Edition, Cape Town, Juta publisher
- ^{xxxv} Per Plasket, AJA in Retail moto industry organization v. minister of water & environmental affairs (2013) ZASCA 701
- ^{xxxvi} Dube, and Machaya. The doctrine of Res Judicata Revisited, strategic review for South Africa vol. 39, No. 2.
- ^{xxxvii} Molaudzi v. The State (2015) Z ACC 20
- ^{xxxviii} Dube and Machaya, op. cit.
- ^{xxxix} (2015) ZACC p. 15

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- ^{xi} Dube and Machaya, op.cit
^{xli} In *Malaudzi v. The State* 2014, Z ACC p. 15
^{xlii} *S. v. Nahlovu*
^{xliii} *Mholongo V.S., Nkosi v. S* (2015) Z ACC 19
^{xliv} *Malaudzi v. The State* (2015) Z ACC p. 20
^{xlv} Claassen, C (1977), Dictionary of legal words and phrases. Durban: Butterworths
- ^{xlvi} Paragraph 32 of *Malaudzi v. The State* (2015) Z ACC
^{xlvii} Per paragraph 38. *Malaudzi's case*
^{xlviii} *Ibid*
^{xlix} A. Divey, A.V. Introduction to the Law of the Constitution of a State
¹ Paragraph 39, op.cit
^{li} US LEGAL: US LEGAL com, retrieved from <http://definitions.uslegal.com> on the 25th day of June, 2019.
^{lii} *Ibid*
- ^{liii} Case number: 219/03, reportable
^{liv} *B & B Hrdware Distributors (pty) ltd v. Administrator, cape* (1989) ISA, p. 957, Kennemeyer, JP in *saflec Security system (pty) limited v. Group five Building (East cape) pty ltd* 1990 (4) S.A.p. 626 E.
^{lv} *Cape* (1989) 1 SA p. 957(A)
- ^{lvi} *Hartosh v. National Bank* (1970) St. 1092 at 1104. Rabie and Sonnkuns, *The law of Estoppel in South Africa* (2nd)
^{lvii} (1961) 4 S.A. 244(w) at p. 246. A.C
^{lviii} Referring to the judgement of Rabie J.A. in *Van Rooyen v. Minister Van Openbare Werke en Gemeenskapsbon.* (1978) (2) J.A. 835. A at p. 849 D.F
^{lix} *Dunlop Pneumatic Tyre v. Selfridge*