

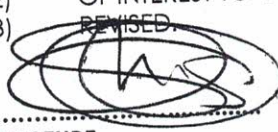
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 39357/2009

16/2/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE 16/02/2018

In the matter between:

**W J VAN WYK**

Applicant/Plaintiff

**versus**

**ROAD ACCIDENT FUND**

1<sup>st</sup> Respondent/Defendant

**TSHWANE MUNICIPALITY**

2<sup>nd</sup> Respondent/Defendant

**JUDGMENT**

**MPHAHLELE J**

[1] The plaintiff instituted action against the defendants for damages due to bodily injuries sustained in a motor vehicle accident, which occurred on 30 November 2007.

[2] At the time of the accident, the plaintiff was the driver of the motor vehicle bearing the registration numbers and letters DHL 926 MP, which motor-vehicle was the property of the plaintiff's husband, namely Johannes Willem Ernst ("Ernst"). The matter between the plaintiff and the first defendant has since been settled, albeit on a limited basis.

[3] In essence, the plaintiff's case is that the accident was due to a lack of proper signage and road markings. The second defendant denies any negligence on its part and alleges that the negligence of the plaintiff was the sole cause of the accident.

[4] On 26 June 2008, Ernst instituted action against the second defendant, in the Magistrate's Court for the district of Pretoria under case number 65559/2008, in which he claimed recovery of the damages allegedly caused to his motor vehicle.

[5] The second defendant defended the action and at the end of the trial judgment was granted in favour of Ernst. The second defendant appealed the judgment. The appeal was upheld and the judgment of the Magistrate's Court was replaced with a judgment of absolution from the instance against Ernst.

[6] The second defendant raised a special plea of estoppel. It is the second defendant's contention that Ernst's claim against the second defendant was based on the same alleged negligent omission relied upon by the plaintiff in the present action. The second defendant contended that the plaintiff actively participated in the litigation in the Magistrate's Court and gave evidence on behalf of Ernst as the driver of Ernst's motor vehicle. The plaintiff therefore had a fair opportunity to participate in the litigation in the Magistrate's Court. She was the only witness at the hearing at the Magistrate's Court. The case was basically decided upon on the version of the plaintiff.

[7] The second defendant further contended that the issue of negligence of both the plaintiff and the second defendant was litigated and decided upon. In the course of the judgment it was, *inter alia*, the

finding of the court of appeal that the collision in issue was caused by the sole negligence of the plaintiff. The second defendant prays that the plaintiff be estopped from re-litigating the same issue in the present matter.

[8] Counsel for the plaintiff submitted that the plaintiff was not a willing participant in the Magistrate's Court. Plaintiff was only a witness. The order of the appeal court is absolution from the instance, meaning the door was not closed against the plaintiff's husband. The court of appeal found that "*the inability of the plaintiff to see the stop sign did not cause the collision. The sole cause of the collision was her failure to take reasonable steps to establish whether it was safe for her to enter the intersection.*" The plaintiff maintained that the finding of the court of appeal was wrong. Further the appeal against the judgment of the Magistrate's Court was not opposed and the plaintiff had no access to the appeal court as she was not a party to those proceedings.

[9] To succeed in its special plea that the point in issue is already *res judicata*, the second defendant must show that:



- (a) That there has already been a prior judgment;
- (b) in which the parties were the same; and
- (c) the same point was in issue.

[10] If there is any doubt, as to any of the essentials required to be proved, the plea will fail. The expression 'issue estoppel' is a convenient description where a party may succeed despite the fact that the classic requirements for *res judicata* have not been complied with because the same relief is not claimed, or the cause of action differs, in the two cases in question. The common law requirements of same thing and same cause have been relaxed by our courts in appropriate circumstances. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same and that the same issue must arise. See *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* 2014 (5) SA 562 (SCA) paras 12 and 13.

[11] The "same party principle" is not met by the fact that an applicant was joined as a nominal respondent in previous proceedings with no relief being claimed against it (*Mogalakwena Municipality v Provincial Executive, Limpopo* 2016 (4) SA 99 (GP) at 118E-F). In my view, the same must apply where a party is a witness and not a party to the proceedings in question.

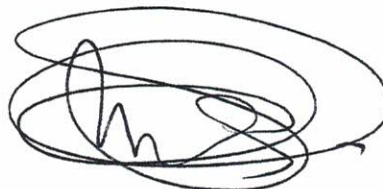
[12] As a general rule a judgment of "absolution from the instance" does not constitute a bar to a subsequent action. It is however possible that a judgment of absolution does finally determine a question of fact, in which case it can be pleaded that the particular issue is *res judicata*. (See *De Wet v Paynter* 1921 CPD 576; *Cohn v Rand Rietfontein Estates Ltd* 1939 TPD 319). I do not think that the issue of negligence has been finally determined in the present case to justify a finding that the issue is *res judicata*.

[13] A judgment of a court is presumed to be right, and can be challenged only on appeal or review. It is common cause that the magistrate's judgment in favour of Ernest was set aside on appeal and replaced with an order of absolution from the instance, against which there has been no further appeal. As matters stand the appeal judgment stands and is final and binding between the parties to that litigation.

[14] It is important to recognize that the plaintiff was not a party to the litigation in the magistrate's court and the subsequent appeal. The plaintiff maintains that the decision of the appeal court is incorrect, a point which this court cannot pronounce on. The plaintiff had no right of appeal. This court cannot punish her for her failure to the impossible. In the circumstances, to deny her the right to prosecute her legitimate

and *bona fide claim* against the second defendant would be tantamount to denying her access to justice. The special plea must fail.

[15] In the result, the special plea is hereby dismissed with cost.

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S S MPHAHLELE  
JUDGE OF THE HIGH COURT,  
PRETORIA

FOR THE APPLICANT: D J MARX

INSTRUCTED BY: T C Stoffberg Attorneys

FOR THE RESPONDENTS: C van Jaarsveld

INSTRUCTED BY: Klagsbrun Edelstein, Bosman & de Vries Inc.