IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: **A62/2022**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 18 April 2023
SIGNATURE: JANSE VAN NIEUWENHUIZEN J

In the matter between:

NICO ANDRIES BOVERHOFF
Appellant

and

ALDES BUSINESS BROKERS (PTY) LTD
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The appellant (defendant in the action) raised a special of *res judicata* against the respondent's (plaintiff in the action) particulars of claim. The special plea was adjudicated separately from the merits of the respondent's claim and on 17 March 2021 the court *a quo* dismissed the appellant's special plea with costs on an attorney and client scale.

[2] This appeal, with leave being granted by the Supreme Court of Appeal, is against the aforesaid order and judgment of the court *a* quo.

FACTUAL *MATRIX*

[3] The respondent's claim is based on a written franchise agreement entered into between the parties on 23 June 2014. The respondent alleges that the

appellant breached certain terms of the franchise agreement and formulated five claims founded on the alleged breach. The claims will be referred to in more detail *infra*.

[4] The appellant raised a special plea of *res judicata* in the form of issue estoppel against the respondent's claims. The special plea is premised on a judgment delivered by Matojane J on 13 March 2018 in an application brought by the respondent to enforce the restraint of trade clause in the franchise agreement.

Matojane J judgment

[5] The appellant avers that the three issues decided by Matojane J in his judgment are the same as the issues that must be determined in the action. I propose to deal with the issues with reference to the findings in the judgment of Matojane J.

Termination of agreement

[6] This issue pertained to the enforceability of the franchise agreement. In terms of the 23 June 2014 agreement referred to *supra*, the parties agreed that the term of the agreement is five years commencing on 1 January 2012. In the result, the agreement expired by effluxion of time on 1 January 2017.

[7] After the agreement came to an end on 1 January 2017 the parties continued to do business as they had previously done during the subsistence of the agreement. The respondent, therefore, contended that there was a tacit relocation and that the agreement remained in force after 1 January 2017 until it was terminated on 23 June 2017. In support of tacit relocation point, the respondent relied on the authority in *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822 (SCA).

[8] Matojane J considered the tacit relocation point against the backdrop of the Consumer Protection Act, No 68 of 2006 (CPA) at para [15] to [17]:

> *[15] The Consumer Protection Act, was enacted after Golden Fried Chicken was decided. It deals specifically with franchise agreements. Regulation 2(a) of the Act provides that every franchise agreement must contain the exact text of section 7(2) of the Act at the top of the*

first page of the franchise agreement, together with a reference to the section of the Act.

[16] Section 7 of the Act sets out the requirements of franchise agreements as follows:

***7.** (1) A franchise agreement must-*

(a) be in writing and signed by or on behalf of the franchisee;

(b) include any prescribed information, or address any prescribed categories of information; and

(c) comply with the requirements of section 22."

[17] A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement. An implied franchise agreement will be contrary to the provisions of the Consumer Protection Act and thus unenforceable."

[9] In view of the aforesaid finding, the franchise agreement terminated on 1 January 2017 by effluxion of time.

Restraint of trade clause

[10] Having had regard to the legal principles pertaining to the enforceability of a restraint of trade and the facts contained in the affidavits filed on behalf of the parties, Matojane J came to the following finding in paragraph [31]:

"[31] The period is excessive and the restraint has operated long enough, only 16 months is left of the restraint. The restraint imposes an unreasonable restriction on the first respondent's freedom to work and it will be against public policy to enforce it. I accordingly conclude that the restraints of trade are unreasonable and are, as a result, invalid and unenforceable."

Repudiation of the agreement

[11] Although Matojane J made a finding in respect of the repudiation of the agreement, the respondent's claims are not based on the repudiation and it is not necessary to consider this issue any further.

COURT *A QUO*

[12] Avvakoumides AJ differed from the findings by Matojane J. Insofar as Matojane J found that the agreement between the parties terminated on 1 January 2017 due to effluxion of time, the court *a quo* held that the finding is wrong.

[13] The rationale for this finding is set out as follows:

> *"10. It is a well-known principle that in commercial leases, where the lease terminates by effluxion of time and the parties, by their conduct continue with their relationship,* a *tacit relocation occurs which means a new lease comes into existence. In this case, bearing in mind the comments of Harms J in Golden Fried Chicken, the same occurred. A tacit franchise agreement came into existence. To contend otherwise is non-sensible."*

[14] I do not agree with the court *a quo*'s finding. The finding loses sight of the fact that the agreement between the parties is not a lease agreement, but a franchise agreement that is governed by the provisions of the CPA. *Golden Fried Chicken* is, in the result, not applicable.

[15] Although the court *a quo* later in the judgment referred to the CPA, it held that the Act and regulations do not cater for a situation where a franchise agreement terminated by effluxion of time and where parties continue the same relationship on the same terms and conditions. The court then held, that *"There can thus be no question of illegality under theses circumstances and the finding in this regard is misplaced."*

[16] I do not agree. In reaching this conclusion, the court *a quo* lost sight of the fact that any relocation agreement would be a <u>new</u> agreement to which the provisions of the CPA will apply.

[17] The court *a quo* also differed from the finding by Matojane J in respect of the restraint of trade on the basis that the enforceability of the restraint should be determined at trial and not during motion proceedings. I do not agree for the reasons stated *infra.*

[18] The upshot of these findings, led the court *a quo* to make the following findings:

> *"17. I am not persuaded that the findings of Matojane J in the application entitles the defendant to raise the plea of issue estoppel. In NM Prinsloo NO and Others v Goldex 15 (Pty)Ltd and Another 2014 (5) SA 297 (SCA) the court held that the special plea of issue estoppel should not be allowed that the prospect is that it would deprive the other party of a fair hearing in subsequent proceedings.*
>
> *18. In my view the Learned Judge could not have made the findings on motion proceedings, as he did, without the benefit inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses and so forth. The judgment stands, however, in my view, cannot be relied upon to support the special plea of issue estoppel."*

[19] It is thus clear that the court only had regard to the findings by Matojane J in dismissing the special plea of *res judicata*.

[20] The appellant submits that the court *a quo* erred in its findings *supra,* which submission is dealt with *infra.*

RES JUDICATA

Facts

[21] In order to properly adjudicate the special plea, the cause of action set out in the plaintiff's particulars of claim needs to be examined.

[22] In the preamble to its claims, the respondent alleges the following:

> *"The franchise agreement terminated by way of effluxion of time on 1 January 2017, but was:*

6.1 renewed thereafter on the same terms and conditions as contained in the franchise agreement tacitly, by the parties acting in accordance therewith, alternatively by way of quasi-mutual assent with the Defendant acting in accordance with the terms and provisions of the franchise agreement; alternatively

6.2 tacitly relocated on a month-to-month basis on the same terms and conditions as contained in the franchise agreement,

*Until its termination on or about 30 June 2017 when the Defendant repudiated the franchise agreement by way of an e-mail, a copy of which is annexed hereto as **"POC2"** ("the repudiation e-mail"), which repudiation the Plaintiff accepted."*

[23] The relevance of these averments will become evident *infra*.

Claim 1

[24] The respondent alleges that, on or about April 2016, it entered into a written mandate and commission agreement with Pool Spa and Filtration Contracts (Pty) Ltd and Pool Spa and Filtration Supplies ("Pool Spa") through the agency of the appellant. In terms of the agreement the respondent was granted certain rights including the right to sell the business of Pool Spa. The commission to be earned on the transaction was 7%.

[25] On or about 11 January 2017 one Brian Algar ("Algar") entered into a written confidentiality and non-disclosure agreement with the respondent *via* the agency of the appellant. Algar was interested in purchasing any business in the next six months.

[26] The respondent asserts that Pool and Spa and Algar were therefore at all material times clients in the group register of the respondent.

[27] During mid-2017 the appellant facilitated a sale of the Pool Spa business to two companies owned by Algar and earned a commission of R 770 000, 00.

[28] The respondent alleges that:

"14. The Pool Spa & Filtration sale agreements were concluded by the Defendant which involved clients registered in the group client register, which transactions were not authorised in writing by the Plaintiff in terms of clause 40.2, and accordingly the total commission charged on the Pool Spa & Filtration sale agreements were payable to the Plaintiff."

[29] *Ex facie* the formulated claim, whether the franchise agreement was terminated by effluxion of time on 1 January 2017 or was terminated on 30 June 2017, has no bearing on the claim.

Claim 2

[30] Claim 2 is also based on clause 40.2 and pertains to further transactions arising from mandates from businesses given before the cessation of the franchise agreement.

[31] According to the respondent, the appellant referred to these further transactions in the *"repudiation e-mail"*. The cause of action, however, does not flow from the email.

[32] The termination finding by Matojane J does have a bearing on this claim insofar as any of the mandates were given after 1 January 2017.

Claim 3

[33] Claim 3 is for the rectification of certain clauses of the franchise agreement. The subject matter of this claim was not an issue that was decided by Matojane J.

Claim 4

[34] Claim 4 is for the return of the respondent's trademark, proprietary material and for access to the appellant's computer systems for purposes of removing the Plaintiff's material. The cause of action arose on the date of termination of the agreement whether it was on 1 January 2017 or 30 June 2017.

[35] In the result the termination finding by Matojane J has no bearing on the relief claimed herein.

Claim 5

[36] Claim 5 pertains to the breach of the restraint of trade clause, in that post termination of the franchise agreement, the appellant allegedly:

29.1 competed with the respondent or any Aldes Business Brokers franchisee in any business similar to the franchised business;

29.2 became engaged or interested in or to a business or undertaking which carried on business as a business broker;

29.3 used for his own benefit or the benefit of another person, trade secrets and confidential information of the respondent, Plaintiff or Aldes Business Brokers franchisees; and

29.4 failed to keep secrets and confidential information of the Plaintiff or Aldes Business Brokers confidential.

[37] The respondent claims a penalty of R 50 000, 00 per month for a 24-month period, which amounts to R 1 200 000, 00.

[38] I pause to mention, that Matojane J stated the following in para [37] of his judgment:

"[37] The interdict cannot be granted because the applicant has an alternative remedy should it be able to prove that the respondent has used its confidential information or has enticed its clients due to customer connections or has exploited corporate opportunities. Namely, the penalty provision which provides for an agreed pre-estimate of damages in the amount of R 50 000, 00 per month." (own underlying)

[39] There is a clear distinction in the restraint clause (clause 21) between competing with the franchisor (clause 21.1 to 21.4) and the utilisation of trade

secrets and confidential information (clause 21.7 to 21.10) of the franchisor by the franchisee. The averments in paragraphs 23.1 and 23.2 is based on clause 21.1 to 21.4, whereas the averments paragraph 23.3 and 23.4 is based on clauses 21.7 to 21.10.

[40] Clause 21.5 provides as follows:

"21.5 Each and every restraint contained in this clause 21 is separate and divisible from every other restraint in the clause so that if any of the restraints is or becomes unenforceable for any reason that restraint will be severable and will not affect the validity of any other restraint contained in this clause or otherwise."

[41] The respondent is, therefore, at liberty to enforce the restraint in respect of trade secrets and confidential information.

[42] The finding by Matojane J relates only to the restraint to trade contained in clauses 21.1 to 21.4 of the agreement.

Legal principles

[43] The principles applicable to a plea of *res judicata* have been succinctly summarised by the Supreme Court of Appeal in *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) as follows:

"[21] In considering this argument, it is necessary to deal briefly with the principles of res judicata and so-called 'issue estoppel' relied on by both sides. The underlying ratio of the exceptio rei judicatae vel litis finitae is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other on the same cause of action should not be permitted. In National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA) ([2001] 1 All SA 417) at 239 para 2 F Olivier JA stated the requirements for a successful reliance on the exceptio to be as follows:

The requirements for a successful reliance on the exceptio were, and still are: idem actor, idem reus, eadem res and eadem causa petendi. This means that the exceptio can be raised by a defendant in a later suit against a G plaintiff who is 'demanding the same thing on the same ground' (per Steyn CJ in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, 'on the same cause for the same relief' (per Van Winsen AJA in Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472A - B; see also the discussion in Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A) at 664C - E); or which also comes to the same thing, whether the 'same issue' had been adjudicated upon (see Horowitz v Brock and Others 1988 (2) SA 160 (A) at 179A - H).

[22] It has been recognised though that the strict requirements of the exceptio, especially those relating to eadem res or eadem petendi causa (the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (viz idem actor and eadem quaestio), it has become common place to refer to it as being a matter of so-called 'issue estoppel'. But that is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law, and the defence remains one of res judicata. Importantly when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the ***same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment."*** (own emphasis)

[44] The respondent with reference to *Janse van Rensburg NNO v Steenkamp; Janse van Rensburg NNO v Myburgh* 2010 (1) SA 649 (SCA) submitted that issue estoppel cannot be raised successfully, because the claims of the respondent as set out in the particulars of claim is not dependent on the findings of Matojane J. The relevant passage in the *Janse van Rensburg NNO* matter, *supra* reads as follows:

"..So, although the finding of absence of intention in Fourie created an issue estoppel to that limited extent and the liquidators would not be permitted to counter the respondents' averment that such intention was absent, that minor triumph will not avail the respondents, because a plea of res judicata (whether in its classical or extended form) cannot succeed unless it nullifies the legal force of the cause of action (put otherwise, it cannot be raised successfully if it leaves the plaintiff with a viable cause of action). That being the result here, the respondents did not, on the first ground, set up a sustainable answer to the relief claimed by the liquidators." [659J -660A]

[45] Paragraph 6 read with claim 2 entails that a court will need to determine afresh the date of the termination of the agreement. The claim pertains to commission for mandates that were entered into until the "cessation date", i.e either 1 January 2017 or 30 June 2017.

[46] Although claim 2 seems at first glance "viable", the computation of the claim depends on the date on which the agreement terminated. In this respect, the termination date is issue estoppel.

[47] Claim 5 insofar as it is based on the enforceability of the restraint to trade clauses (21.1 to 21.4) is for obvious reasons issue estoppel.

[48] I therefore have no hesitation in finding that the date of termination of the agreement and the enforceability of the restraint to trade clause is issue estoppel.

[49] That is, however, not the end of the matter. Scott JA in *Smith v Porritt and Others 2008 (6) SA 303 (SCA),* sounded the following word of caution in the blanket application of issue estoppel:

" [10] …. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (Kommissaris van Binnelandse Inkomste v Absa Bank (supra) at 670E - F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood (1893) 10 SC 177 at 180, 'unless carefully circumscribed,

*[the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals'. [*Also see: *Hyprop Investments Ltd v NSC Carriers & Forwarding CC* 2014 (5) SA 406 (SCA)A at para [14]]

[50] In exercising the discretion whether to uphold the plea of *res judicata* in the form of issue estoppel, two sets of rights need to be balanced. On the one hand the right to have issues determined in a fair trial and on the other hand the right to finality in litigation, which includes the right not to be harassed by the canvassing of the same issues in multiple litigation.

[51] As set out aforesaid, the special plea only pertains to the date of termination of the agreement in claim 2 and the restraint to trade on which the relief sought in prayer 5 is dependant.

[52] In respect of the termination finding by Matojane J, the finding is based on a point of law and can only be revisited if the finding is found to be legally unsustainable. The respondent did not appeal the judgment and the finding, in my view quiet correctly so, stands.

[53] The time-honoured principle that there should be finality in litigation, to my mind, outweighs any perceived prejudice the respondent could suffer if the special plea in respect of this finding is upheld.

[54] In respect of the enforceability of the restraint to trade clause, both parties had an equal opportunity to place all relevant facts before the court. Although the matter was initially instituted on an urgent basis, it was eventually heard in the normal opposed motion court. The respondent was at liberty to supplement its papers, if it was of the view that more evidence was required. The respondent did not do. The respondent also had the opportunity to request that the matter be referred to oral evidence. Once again, the respondent did not do so.

[55] In the final instance, the respondent could have sought leave to appeal the judgment and order of Matojane J. It similarly failed to avail itself of this remedy.

[56] Bearing the following *dicta* in *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA) in mind, I am of the view that the

enforcement of issue estoppel will not, in the circumstances, be unfair to the respondent:

"[23] In our common law the requirements for res iudicata are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) ***may result in defeating the whole purpose of res iudicata****.* ***That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg Evins v Shield*** *Insurance Co Ltd 1980 (2) SA 814 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief,* ***where the same issue has been finally decided in previous litigation between the same parties.****"* (own emphasis)

[57] The respondent contended that this court should only in very limited circumstances interfere with the discretion of a lower court. In support of its submission it relied on the authority in *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* 2014 (5) SA 406 (SCA). The court held as follows at 412 D to 412 A:

"..The learned judge considered that he had to exercise a discretion in this regard and that the fact that the question of fraud had been determined on the papers alone was sufficient to justify the dismissal of the special plea. He added, however, that he was not laying down a general principle that whenever a trial action follows upon an application a res judicata plea would fail.

[23] In my view, Sutherland J exercised his discretion not to apply issue estoppel judicially. Mokgoatlheng J not only made a finding on the absence of fraud where the evidence had not been properly tested: he also considered that reliance on fraudulent misrepresentations was precluded by the terms of the contract. If that were to bind NSC and Costa, and prevent them from suing

for loss suffered as a result of the misrepresentations, issue estoppel would operate most inequitably." (own underlining)

[58] The question to be answered prior to interfering with the jurisdiction of a lower court is, therefore, whether it was judicially exercised. I have indicated *supra* that, in my view, the court ***a quo***'s rejection of the findings by Matojane J was without legal justification. The court *a quo* exercised its discretion on the strength of, what it perceived to be incorrect findings by Matojane J. The court *a quo,* in the result, did not exercise its discretion judicially.

[59] I wish to emphasise that only two issues are issue estoppel, to wit: the date of the termination of the contract and the unenforceability of clauses 21.1 to 21.4 of the restraint clause.

[60] The remainder of the respondent's claims remain intact, which is further support for the finding that an injustice will not occur if the special plea is upheld in its limited form.

[61] In the premises, I am of the view that the appeal should be upheld and that costs should follow suit.

ORDER

I propose the following order:

The appeal is upheld and the order of the court *a quo* is set aside and replaced with the following order:

1. The special plea of res judicata is upheld and the plaintiff is issue estopped from relying on:

    1.1 a franchise agreement between the parties after 1 January 2017, and;

    1.2 the breach of clauses 21.1 to 21.4 of the agreement. Or any remedy arising therefrom.

2. The plaintiff is ordered to pay the costs.

3. The respondent is ordered to pay the costs of the appeal.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

H KOOVERJIE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

MNGQIBISA - THUSI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:
08 March 2023

DATE DELIVERED:
18 April 2023

APPEARANCES

For the Appellant:	Advocate G Kairinos Sc
Instructed by:	Rowe Taylor Attorneys
For the Respondent:	Advocate H P van Nieuwenhuizen
Instructed by:	Jarvis Jacobs Raubenheimen inc