



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case No: 793/2021

In the matter between:

**DEMOCRATIC ALLIANCE**

**APPELLANT**

and

**JOHANN WICHARDT GREYLING BRUMMER**

**RESPONDENT**

**Neutral citation:** *Democratic Alliance v Brummer* (793/2021) [2022] ZASCA 151  
(3 November 2022)

**Coram:** DAMBUZA ADP and MOLEMELA and MOTHLE JJA and MUSI and  
GOOSEN AJJA

**Heard:** 8 September 2022

**Delivered:** 3 November 2022

**Summary:** Plea of *res judicata* by reason of issue estoppel in action for damages arising from alleged unlawful termination of membership – prior judgment of court dismissing application for order reinstating membership – whether same issue (*eadem quaestio*) decided in prior judgment requiring close examination of the basis upon which application dismissed – such relief not sought and court finding that the issue not fully ventilated – dismissal of application not amounting to determination of the issue at stake in later damages action – no scope for issue estoppel to apply.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court sitting as court of appeal, (Gamble and Saldanha JJ concurring, and Wille J dissenting).

The appeal is dismissed with costs, such costs to include the costs of two counsel.

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## JUDGMENT

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**Goosen AJA (Dambuza ADP and Molemela and Mothle JJA and Musi AJA concurring)**

[1] The appeal is against an order of the Western Cape High Court, on appeal, confirming an order of a trial court dismissing a special plea of *res judicata* raised by the appellant in an action for damages against it. I shall, for the sake of convenience, refer to the parties by name. The appellant is the Democratic Alliance (the DA), a registered political party. The respondent, Johann Brummer (Brummer) is a former member of the DA. The appeal is with the leave of this court.

[2] It is common cause that Brummer was a member of the DA since 2000. He was elected as a municipal councillor in the Bitou Local Municipality in December 2000. He was re-elected in successive local government elections, including in 2011, when the DA secured political control of the council. He served as a member of the Bitou Local Council and on the Eden District Council. In July 2012 his membership of the DA was terminated because of his alleged failure to pay certain mandatory financial contributions to the DA.

[3] The termination of his membership sparked an urgent application in the Western Cape High Court to secure the reinstatement of his membership (the re-

instatement application). The application was unsuccessful. Thereafter, Brummer commenced an action for damages flowing from the unlawful termination of his membership. In this action the DA filed a special plea of *res judicata* in the form of issue estoppel. The question was decided as a separated issue by the trial court (Martin AJ), which dismissed the special plea. Leave was granted by this court to the DA to appeal that order before the full court of the Western Cape Division. The full court, by majority, dismissed the appeal.

### **The facts**

[4] On 21 April 2012, the DA wrote to Brummer advising him that he was in arrears with the payment of compulsory public representative contributions due by him. The letter was delivered on 7 May 2012. His attention was drawn to clauses 3.5.1 and 3.5.2 of the DA's Federal Constitution which provides for cessation of membership in the event of a member being in arrears with the payment of such contributions. The clauses read as follows:

'3.5.1 A member ceases to be a member of the Party when he or she:

...

3.5.1.9 is in default with payment of any compulsory public representative contribution for a period of 2 (two) months after having been notified in writing that he or she is in arrears and fails to make satisfactory arrangements or fails to comply with such arrangement for the payment of the arrears. ...

3.5.2 A member, who ceases to be a member of the Party, loses all privileges of Party membership and, if that member is a public representative, he or she also loses the office which he or she occupies by virtue of his or her membership, with immediate effect.'

[5] On 13 August 2012, Brummer was advised by letter that, since payment had not been made to the DA, his membership had ceased. He was given a period of 72 hours to make representations to the DA to furnish reasons why his membership had not terminated. On 20 August 2012, the Federal Legal Commission of the DA terminated his membership with effect from 31 July 2012. This was confirmed by the Federal Executive Commission on the same date and Brummer was advised on 21 August 2012.

[6] On 5 September 2012, Brummer launched the urgent re-instatement application referred to above. He cited the DA, the Municipal Managers of the Bitou Local and Eden District Municipalities and the Independent Electoral Commission (the IEC). The notice of motion claimed the following relief:

- '2. Interdicting the [DA and Municipalities] from taking steps to appoint anybody to the position ... which has now been declared vacant.
3. Directing the [DA] to immediately reinstate my membership of the DA, and restore my salaried position on the Bitou Local Municipality and Eden District Municipality.
4. Interdicting the [IEC] from filling the vacancy created by the termination of the Applicant's membership in the [DA].
5. Directing any of the Respondents to show cause on a return date to be determined by the Court, why the above interim order shall not be made final.'

[7] The re-instatement application came before Louw J on 6 September 2012. The hearing was postponed to 12 September 2012 upon terms for the filing of answering and replying affidavits. Louw J also ordered that, pending the hearing, the IEC be interdicted from filling the vacancy created by the termination of Brummer's membership of the DA.

[8] On 12 September 2012, the matter came before Traverso DJP. A full set of papers had been filed and the case was argued. Traverso DJP delivered a short judgment dismissing the application with costs. No appeal was brought against the order dismissing the application.

[9] On 24 November 2014, Brummer commenced an action against the DA in which he claimed damages founded upon the unlawful termination of his membership of the DA (the damages action). He claimed damages in an amount of R2 717 182 plus interest, calculated with reference to the income he would have earned as a councillor had his membership not been terminated. The DA opposed the action and filed a plea. In December 2016, Brummer filed amended particulars of claim. The amended particulars set out a claim for contractual, alternatively delictual, alternatively constitutional damages. The matter was enrolled for trial in February 2019.

[10] On 12 February 2019, the DA amended its plea to introduce a special plea of *res judicata* in the form of issue estoppel. Brummer filed a replication to the special plea on the same date. On 13 February 2019, the respective parties filed further pleadings dealing with the special plea. It is unnecessary to set out the terms of these pleadings. It suffices to state that the special plea was premised upon the fact that the judgment of Traverso DJP ‘necessarily involved a judicial determination that the actions taken by the DA in terms of clause 3.5.1.9 ... and the termination of [Brummer’s] membership ... were lawful’. Such a finding was, it was pleaded, integral to the order granted by Traverso DJP. The parties agreed that the special plea be adjudicated as a separated issue and proceeded to trial before Martin AJ on 14 February 2019. Both parties led evidence on the separated issue. On 15 May 2019, Martin AJ handed down his judgment (the trial court judgment), dismissing the special plea. Leave to appeal against that order was refused on 30 October 2019.

[11] On 20 April 2020, this court granted the DA leave to appeal to the full court of the division. The full court heard the appeal on 18 January 2021. On 12 April 2021, it delivered its judgment. The full court was divided. The majority (Gamble and Saldanha JJ) dismissed the appeal. The minority (Wille J) would have upheld the appeal.

### ***Res judicata* – issue estoppel**

[12] The nature of a plea of issue estoppel has been explained by this court on numerous occasions. The explanation in *Smith v Porritt*<sup>1</sup> is worth reiterating.

‘Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995

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<sup>1</sup> *Smith v Porritt* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) para 10.

(1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*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 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'.

[13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (*eadem quaestio*) was not determined by the earlier court, an essential requirement for a plea of *res judicata* in the form of issue estoppel is not met. There is then no scope for upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That is so because the court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of *res judicata*. It must therefore, with reference to the facts of the case and considerations of fairness and equity, decide whether in that case, the defence should be upheld.<sup>2</sup>

[14] This first component of the enquiry requires a careful examination of what issues of fact or law were decided by the first court. In *Boshoff v Union Government*<sup>3</sup> (*Boshoff*), the following statement by Spencer-Bower in *Res Judicata*, was held to be a correct:

'Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.'

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<sup>2</sup> *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 26.

<sup>3</sup> *Boshoff v Union Government* 1932 TPD 345 at 350-351.

[15] Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made.<sup>4</sup> In *Boshoff*, for instance, the plaintiff had sued for damages arising from an unlawful cancellation of a lease and ejectment. The defendant raised a plea of *res judicata* on the basis that the defendant had, in a prior action, obtained a judgment for ejectment. The prior order was obtained by default judgment. The court found that an order for ejectment could not have been granted unless the court had found that the cancellation of the lease was lawful. The order that was granted was read against the backdrop of the case as pleaded.<sup>5</sup>

[16] Whether the findings made by the court or the order(s) granted are correct is of no relevance. A prior determination of an issue, although wrong, may nevertheless support a plea of *res judicata*. As held in *African Farms and Townships Ltd v Cape Town Municipality (African Farms)*<sup>6</sup>, 'Because of the authority with which, in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to *res judicata* the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment.'

### **The re-instatement application**

[17] The relief that was sought is set out above.<sup>7</sup> In argument before this court considerable attention was focussed upon the nature of the application and the form of the relief that was requested. It was argued that since Brummer only sought interim relief, as reflected in paragraph 5 of the order, Traverso DJP was not required to finally

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<sup>4</sup> *Aon South Africa (Pty) Ltd v Van Den Heever NO and Others* [2017] ZASCA 66; 2018 (6) SA 38 (SCA) para 40.

<sup>5</sup> *Boshoff* fn 3.

<sup>6</sup> *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C.

<sup>7</sup> See para 6 above.

decide the issues raised. On this basis it was submitted that the judgment was not dispositive of any issue raised before her, since it was relief sought in an interlocutory proceeding. Counsel for the respondent, referred to *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club*<sup>8</sup> (*African Wanderers*), *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others*<sup>9</sup> (*Cipla Agrimed*), and *Mkhize NO v Premier of the Province of KwaZulu-Natal (Mkhize)*<sup>10</sup> in support of the proposition.

[18] None of these cases, however, support the proposition. They did not hold that the form of the order is determinative of whether it is final in effect. *Cipla Agrimed* involved an instance where an interim order had been granted. Both the minority and the majority held that it was not the form, but rather the effect of the order that is decisive.<sup>11</sup> In *African Wanderers*<sup>12</sup> Muller JA stated that in order to decide whether an interlocutory order is appealable (as was required in that case), 'One must therefore examine the issues raised before Howard, J., in the interdict proceedings, and the manner in which he dealt therewith, in order to determine whether he meant to express a final decision thereon, i.e., *whether he intended to dispose finally of those issues or any part of them.*' (My emphasis.)

[19] In the *Mkhize* matter the question arose in relation to the dismissal of an application, rather than the granting of interim relief. The following passages from the judgment illustrate the approach that is required in this matter.<sup>13</sup>

'The orders of Booyens AJ, the Supreme Court of Appeal and Sishi J all concerned the rule *nisi* and the Van Zyl J order. The pertinent question is therefore whether an order can be considered final when it is concerned with dismissal or discharge of interim or interlocutory orders.

In *Cohn*, the finality of a dismissed matter was considered and the Court stated:

"In dealing with the position where an action is dismissed, Spencer Bower says that the answer to the question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal depends upon whether . . . the dismissal

<sup>8</sup> *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A).

<sup>9</sup> *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] ZASCA 134; 2018 (6) SA 440 (SCA).

<sup>10</sup> *Mkhize NO v Premier of the Province of KwaZulu-Natal* [2018] ZACC 50; 2019 (3) BCLR 360 (CC).

<sup>11</sup> *Cipla Agrimed* supra para 19 (Rogers AJA) and para 48 (Gorven AJA (as he then was) for the majority).

<sup>12</sup> *African Wanderers* supra at 46C.

<sup>13</sup> *Mkhize* supra paras 41 – 45.



itself is seen to have *necessarily involved a determination of any particular issue or question of facts or law*, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought." (Own emphasis.)

Also instructive is the more recent case of *Cipla*, which dealt with the finality of court decisions in the context of whether or not they could be appealed. In that case, the Supreme Court of Appeal listed the following attributes: "it must be final in effect; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial part of the relief claimed".

It appears that the question is whether Booyens AJ made a determination of "any particular question of fact or law" with the result that his order was final. I believe that he did. In his judgment, Booyens AJ stated:

"The issue that falls to be decided is whether the death of the [deceased] would put an end to his rights of review of the decision of the Premier and whether his minor son has got any right to claim that he should be appointed Inkosi and the executrix be appointed as Regent until such time as he reached majority."

Booyens AJ then held that "the right [of the deceased to be Inkosi] is a purely personal right of his. He cannot in any way deal with this right by transferring it in any way whatsoever." On this basis, Booyens AJ held that Ms Mkhize did not have legal standing to pursue the review of the deceased's removal and dismissed her application for substitution. Does this satisfy the *Cipla* criteria? Yes. The decision was final in effect as Booyens AJ made a final determination of Ms Mkhize's legal standing with the consequence that she was barred from pursuing a review of the deceased's removal from office – indeed, the Booyens AJ order went so far as to bar anyone besides the deceased from pursuing a review. It defined the rights of the parties, specifically Ms Mkhize's rights, and legal standing. And the result was that the relief sought by Ms Mkhize was disposed of entirely. In light of the above, I must conclude that the Booyens AJ order was final and fell within the purview of the doctrine of *res judicata*.<sup>14</sup>

[20] These passages illustrate that the focus is not, therefore, upon what orders the respondent sought before Traverso DJP. The form of the application and the nature of the relief sought, i.e. that it was interim, is not relevant. The question is always, what issue of fact or law was decided by the court in the proceedings, and was it finally decided.<sup>14</sup> In order to answer the question reference must be made to the founding

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<sup>14</sup> *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd* [2008] ZASCA 21; 2008 (3) SA 585 (SCA) para 9.

affidavit that served before Traverso DJP. It is against that background that the judgment must be read.

[21] Brummer founded his re-instatement application upon two main grounds. The first involved a challenge to his alleged indebtedness to the DA. Brummer alleged that he was not indebted or, if indebted, only in a trifling amount. He also alleged that his account was in credit. The second, more significant challenge, was presented as a challenge to the lawfulness of the 'process' adopted by the DA. In regard to clauses 3.5.1.9 and 3.5.2 of the DA constitution, Brummer alleged that:

'These clauses, applied to the letter, as has been done, are nothing short of un-Constitutional and draconian and fly in the face of all that the [DA] professes to hold dear, respect and stand for.'

[22] He expanded upon the averment by alleging that the cessation of membership envisaged by the clauses, is in breach of the principle of *audi alteram partem*; that it denies due process by precluding access to a review court to set aside a decision; and that the rules of natural justice are breached. The second component of the unlawfulness challenge was that the procedure constituted unfair administrative action in circumstances where he had challenged the underlying debt. He concluded this portion of his affidavit by stating:

'I submit that item 3.5.1.9 of the Federal Constitution is so demonstrably unfair and unjust that it should be considered to be *pro non scripto* and therefore of no force or effect. A determination that can only be made by a competent court. If we cannot settle this dispute, I intend pursuing my rights, even if I have to approach the Constitutional Court.'

[23] It is unnecessary to detail the DA's basis for opposition. It suffices to say that, in relation to the unlawfulness challenge, the DA denied that the cessation of membership involved administrative action. It denied that the 'factual determination' of indebtedness was procedurally unfair. In dealing with the relief claimed, the DA averred that the declaration of a vacancy in the municipal councils occurred upon the IEC being notified of the termination of membership and that the filling of such vacancy was within the province of the IEC. There was nothing that the DA could or was required to do in that regard. The relief sought was therefore not competent.

[24] A transcript of the proceedings before Traverso DJP was received in evidence on appeal to the full court. Extensive reference was made to it in argument before this court. There are, however, only three respects in which the submissions made before Traverso DJP need be considered. First, at the stage that the matter was argued on 12 September 2012, the vacancies which had been declared in the municipal councils, had been filled by the IEC. This occurred despite the interim order issued by Louw J. It appears from the record that the DA had already advised the IEC of the termination of Brummer's membership before the urgent application was launched. The IEC had already acted upon that information and proceeded to fill the vacancies. The date on which this occurred is not clear. Be that as it may. On the basis of what had already occurred by 12 September 2012, Brummer's counsel conceded, quite correctly, that he could not move for the orders as framed in the notice of motion. The orders could not be granted irrespective of the lawfulness, or otherwise, of the termination of Brummer's membership.

[25] Second, a reading of the transcript indicates that Brummer's counsel accepted that interim relief could not be granted, at least in relation to his re-instatement to positions in the municipal councils. It is apparent from the transcript, however, that he prevaricated in relation to Brummer's membership of the DA. First contending for final relief and then later for interim relief. Nevertheless, he proceeded to present full argument before Traverso DJP. A substantial portion of his address concerned clause 3.5.1.9; that it was contrary to public policy in that it deprived a member of the right to be heard and to challenge the basis upon which his membership was terminated. Counsel who then appeared for Brummer, submitted to Traverso DJP that the 'real issue...although it is not identified as such in the notice of motion...is an investigation into clause 3.5.1.9 of the Federal Constitution of the Democratic Alliance'. He went on to say that 'this fact is clear from all the affidavits and annexures before the court which were exchanged between the parties' and that the issue had been properly raised in the papers. In relation to this submission Traverso DJP said that it was 'a completely different issue to the one that I am asked to decide in terms of the notice of motion'.

[26] These exchanges indicate that Brummer's counsel had in mind that the lawfulness of the termination of Brummer's membership was squarely before Traverso DJP. It was upon this basis that he later moved for an amendment of the

notice of motion. The circumstances in which this occurred indicate that counsel came to accept that the only basis upon which he could obtain re-instatement of membership of the DA, whether on an interim or final basis, was if the court granted a declaratory order that clause 3.5.1.9 was invalid, either because it was in conflict with the Constitution or was against public policy. However, and this is the third aspect which arises from the transcript, when he moved for an amendment of the notice of motion, Traverso DJP refused the amendment on the basis that such a case had not been made out and that the issue was not fully ventilated on the papers.

[27] After hearing argument in the matter Traverso DJP delivered a short judgment dismissing the application with costs. It is appropriate to record the essential reasoning adopted by Traverso DJP.

‘Mr Knoetze conceded that as regards paragraph 3 above [a reference to the interdict against the IEC], steps have already been taken and that one cannot interdict past action. Mr Knoetze further conceded that the outcome of the remainder of the relief sought, hinged on the outcome of the Court issuing a declarator that clause 3.5.1.9 of the Constitution of the 1<sup>st</sup> respondent be declared to be against public policy and accordingly invalid.

No such relief is asked in the original notice of motion and consequently it was not dealt with in the heads of argument and in my view not properly ventilated in the papers.’

In dealing with the amendment, Traverso DJP went on to state:

‘I am not inclined to grant the amendment. There has been no tender as to costs. This matter is urgent. It was brought on an urgent basis and there seems to me to be no basis whatsoever for prolonging the uncertainty in respect of a municipality such as the Bitou Local Municipality which we all know has got problems of its own. In any event the proposed amendment introduces matters which have not been properly ventilated in the papers.’

The judgment then records:

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

[28] Counsel for the appellant, argued that in order to succeed in obtaining orders for re-instatement (whether interim or final) Brummer had to establish that the termination of his membership was unlawful on one or more bases. He set out to establish that case before Traverso DJP. He was required to advance his case upon every ground available to him. He did not do so. He therefore sought to introduce a

further ground, i.e., the constitutional invalidity ground, at the hearing but was not permitted to do so when the amendment was refused. Since he pursued the relief, he must be bound by the outcome notwithstanding that he did not advance every ground available to him. Once the question of lawfulness of the termination of his membership is decided, he is not at liberty to seek to advance another ground not considered by the court. This, it was submitted, is the essential rationale for the *res judicata* principle. It applies equally in relation to the *exceptio* in the form of issue estoppel.

[29] The argument is sound. However, it does not account for what occurred at the hearing of the re-instatement application. It does not account for what Traverso DJP considered she was called upon to decide, nor what she in fact decided.

[30] I accept that the re-instatement application squarely raised a lawfulness challenge. I also accept that the same issue (*eadem quaestio*) regarding the unlawfulness of the termination of membership, is raised for determination in the damages action. In relation to each of Brummer's alternative causes of action, as pleaded, the lawfulness of the termination of his membership, whether substantive or procedural, will be an essential element upon which liability is established. So too the validity of the clauses upon which the DA relied.

[31] The fact that the same issue arose before Traverso DJP is not in itself sufficient to sustain a plea of *res judicata* in the form of issue estoppel. It must be established that the issue was finally determined. Counsel argued that the order dismissing the application necessarily means that Traverso DJP found against Brummer on the lawfulness challenge, since the order dismissing the application could not rationally have been given without such finding. I disagree.

[32] The argument does not acknowledge that, in this instance, there was not only a single basis upon which Traverso DJP might have dismissed the application. She was dealing with an application for an interdict, and so had to be satisfied that all of the requirements for such an order were met. In any event, by the time that the matter was argued an interdict against the IEC could not be granted. Nor could an order preventing the DA and the municipalities from taking steps to 'appoint anyone to the positions vacated' by Brummer. Those orders, on the facts, were no longer competent.

What remained was the order seeking reinstatement of membership of the DA coupled with a directive to the DA to restore Brummer into his salaried positions with the municipalities. This latter aspect of the order was also not competent. That left only reinstatement to membership of the DA, which, in Traverso DJP's view, required a declaratory order.

[33] Traverso DJP's judgment, read in the light of the papers before her and the conduct of the hearing, does not support the conclusion that she must have decided that Brummer's membership termination was lawful. Her judgment indicates that she dismissed the application because a case was not made out for granting the relief. Apart from the relief that was no longer competent, she understood that in order to re-instate Brummer to membership of the DA, and provide any consequential relief, it would be necessary to declare that clause 3.5.1.9 was invalid and that his termination was therefore unlawful. But the learned judge held that such a case had not been foreshadowed in the notice of motion and was not fully ventilated on the papers. Whether or not Traverso DJP was correct in coming to that conclusion and to refuse the amendment, is not relevant. Having come to that conclusion, she dismissed the application.

[34] It was argued on behalf of the respondent that an order dismissing an application is necessarily equivalent to an order of absolution. However, this Court held in *African Farms*,<sup>15</sup> in relation to a similar argument, that:

'In my view there is no substance in that argument. As Sande, *De Diversis Regulis ad L.* 207, points out, the *res judicata* is not so much the *sententia*, the sentence or the order made, as the *lis* or *negotium*, the matter in dispute or question at issue about which the *sententia* is given, or the *causa* which is determined by the *sententia judicis*.'

[35] In *MV Wisdom C*<sup>16</sup> Farlam JA stated that:

'It is clear in our law that a defendant who has been absolved from the instance cannot raise the *exceptio rei judicatae* if sued again on the same cause of action: see *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuysen* (1888) 6 SC 259; *Corbridge v Welch* (1891-2) 9 SC 277 at 279; *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 252B-C; *Herbstein &*

<sup>15</sup> *African Farms* (supra) at 563E.

<sup>16</sup> *MV Wisdom C* (supra) para 9.

Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed 1977 544 and 684; It was held in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563G-H that the dismissal of an application (which ordinarily would be regarded as the equivalent to granting absolution from the instance : *Municipality of Christiana v Victor* 1908 TS 1117; *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A)) can give rise to the successful raising of the *exceptio rei judicatae* where, regard being had to the judgment of the court which dismissed the application,

the import of the order [was] clearly that on the issues raised the Court found against the appellant [which had been the applicant in the previous proceedings], and in favour of the respondent.

It is thus clear that it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits.'

[36] In my view, Traverso DJP could not have intended her order dismissing the application to mean that she had decided that the membership termination was lawful. This is so despite her expression of doubt that the termination of membership was not unlawful during exchanges with counsel. To hold that the learned judge intended her dismissal of the application to mean that she had decided that question, would be to accept that she had, despite stating that the issue was not properly and fully ventilated, indeed decided the issue against Brummer. Rather, Traverso DJP's perfunctory treatment of the matter indicates that she was not prepared to decide that issue.

[37] In these circumstances, the dismissal of the application amounted to no more than an order of absolution. Accordingly, a plea of *res judicata* was not available and the appeal must fail.

[38] It is regrettable that Traverso DJP did not expressly state, even if briefly, what findings she made and how those justify the order. This is what one expects to find in a judgment. It ought to set out the reasoning adopted, so that the parties might understand what the adjudicated result means. In this case, the paucity of the reasoning gave rise to the present dispute about the effect of the judgment. Trial courts ought to be astute to avoid a situation where the effect of the orders they make become

the subject of subsequent litigation because they have failed to set out and explain the findings which underlie their orders.

[39] The judgment of the majority in the high court adopted a different line of reasoning to that followed here. An appeal, however, lies not against the reasoning of the high court. It lies against the order. In this instance the order is correct.

[40] I therefore make the following order:

The appeal is dismissed with costs, such costs to include the costs of two counsel.

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GG GOOSEN  
ACTING JUDGE OF APPEAL



Appearances:

|                    |                                                                               |
|--------------------|-------------------------------------------------------------------------------|
| For the appellant  | A Kantor SC (with M Bishop)                                                   |
| Instructed by      | Minde Schapiro & Smith Inc., Cape Town<br>Symington De Kok Inc., Bloemfontein |
| For the respondent | M G Swanepoel SC (with J J Nepgen)                                            |
| Instructed by      | Nolte Smit Attorney, Cape Town<br>Webbers Attorneys, Bloemfontein.            |