IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 9619 / 2020

In the matter between:

CHARLNITA CASSIEM First Applicant

YUSUF CASSIEM Second Applicant

and

GOVERNMENT EMPLOYEES MEDICAL SCHEME Respondent

Coram: Cloete, Wille et Kusevitsky, JJ

Heard: 26th of February 2021

Delivered: 15th of March 2021

JUDGMENT

WILLE, J: (Cloete et Kusevitsky, JJ concurring)

Relevant background

[1] On the 15th of August 2019, the first and second applicants[1], launched an application[2], in which they, inter alia, on an urgent basis, sought interim relief in the form of a money judgment[3], against the respondent.[4] The first application was opposed and was determined on the 23rd of August 2019.

[2] The first application was dismissed on the merits and also for want of urgency.[5] Some of the relevant findings in the first application, were the following; that the application's purportedly altruistic purpose was without merit**;** that it was an application brought for payment of money to the applicants' own benefit; that it had been brought in respect of a disputed claim forming the subject matter of a pending action and therefore it must have been reasonably anticipated that the applicants' claim would be disputed; that the application had no prospect of success and that the relief was not urgent.

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[1] The first applicant is a registered nurse, married in community of property to the second applicant ('applicants')
[2] With reference to the relevant case number in the action proceedings
[3] The first application
[4] The respondent is the 'Government Employees Medical Scheme'
[5] The 'Sievers' judgment

[3] Almost a year after the dismissal of the first application[6], the applicants launched the present application[7], in which they similarly seek a money judgment[8], also by way of an order for relief, pendente lite. The interim relief now sought is in all material respects a mirror image of the core relief for a money judgment which had been sought in the first application. The first application was also not the first instance in which the same relief was sought. Prior to launching the second application, the applicants sought direct access to the Constitutional Court and same was denied by no less than ten judges of the Constitutional Court.[9]

[4] The common thread that permeated through these various proceedings, is the contention by the applicants that the first applicant is entitled to payment in full, from the respondent of her claims for dialysis services rendered to members of the respondent and for equipment hire connected therewith, irrespective of what she charges.[10] This is the core dispute between the parties.[11] This is precisely the very dispute which is the issue that needs to be determined in the action proceedings.

The action proceedings

[5] On the 15th March 2019, the respondent instituted action against the first applicant in which it sought repayment by the first applicant of R1 181 558,80. The respondent's case is that this sum had been paid in error to the first applicant as a consequence of inflated claims for

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6 During July 2020
7 The second application
8 Now in the sum of R3 million
9 By way of an order granted on the 26th of June 2020
10 The first applicant's services
11 The 'dispute'

services having been submitted by the first applicant to the respondent.

[6] The applicants advanced a plea and a counterclaim to the claims in the main action. The counterclaim is for payment of: - the sum of over R8 million for alleged claims due and payable by the respondent: - the sum of a further R5 million rand for alleged services rendered to members of the respondent: - and a further sum of R5 million rand for alleged pain, humiliation and trauma which the respondent has inflicted upon the applicants and their minor children.

[7] The first applicant's case is that she rendered dialysis services to members of the respondent and that she is further entitled to certain equipment hire fees in connection therewith. These fees are in most instances more than R80 000,00 per session. These services were also often rendered twice per day.

[8] The respondent delivered a plea to the first applicant's counterclaim as well as a replication to her plea. From these pleadings, it is apparent that the core issue of the dispute between the parties is the first applicant's contention that the services rendered by her, amount to 'Prescribed Minimum Benefits' and are accordingly payable to her without demur. She takes the position that these benefits are as defined in terms of the Medical Schemes Act[12], read together with the relevant regulations, rules and tariffs. Simply put, it is the first applicant's case that she is entitled to claim any amount that she desires for these 'services' and that respondent is obliged to compensate her for the rates she determines. The pleadings in the pending action have closed and the parties have already entered the trial preparation phase of the

[12] Act 131 of 1998 - (the 'Act')

proceedings. [13]

The first application

[9] As mentioned previously[14], the applicants launched their first application in which they sought a money judgment against the respondent, which relief was couched as relief, pendente lite. The first application was dismissed with reasons.[15]. No steps have been taken by the applicants to seek leave to appeal against that judgment and order.

The second application

[10] Almost a year after the dismissal of the first application, the applicants launched a second application[16], in which they again similarly seek a money judgment, pendente lite. The relief now sought is in all material respects a mirror image of relief which had been sought in the first application.

[11] It is the respondent's case that the second application again falls to be dismissed, but this time, with costs on a punitive scale. The position is also taken that the founding and replying affidavits in the second application, mostly contain irrelevant allegations, including numerous unfounded, vexatious and slanderous allegations. The point being that these unfounded allegations do not advance any clarity in connection with the disputed issue.

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[13] The pleadings already closed at the end of May 2019
[14] During the course of August 2019
[15] On the 23rd of August 2019
[16] The current application

Res judicata

[12] Issue estoppel applies where an issue of fact or law was an essential element of a prior final judgment. The issue cannot be revisited in subsequent proceedings before another court, even if a different cause of action is relied upon or different relief is claimed.[17] Our courts have recognized that a strict application of issue estoppel could result in unfairness in some unusual circumstances, but this is typically applied in cases where the nature of the issue is in dispute or at least open to some doubt. In my view, the nature of the issue was never in any doubt in this case. The court in the first application itself had no difficulty in defining the issue and correctly defined the issue.

[13] Issue estoppel also applies when different relief based on different causes of action is sought in a subsequent case, if it involves the determination of the same issue of fact or law.[18] I take the following from *Ekurhuleni*[19], where it was held as follows: -

> *'...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'*

[14] Issue estoppel developed precisely because requiring sameness between the two causes of action allows parties to re-litigate the same issue by garbing these up in different causes of action. The authorities not to apply issue estoppel for reasons of justice and equity need to be

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[17] *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) at para 10
[18] *Aon SA (Pty) Ltd v Van Den Heever* 2018 (6) SA 38 (SCA) at para 40
[19] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC) at para 31

evaluated with reference to the *Henderson*[20] principle. This principle provides, inter alia, that when a given matter becomes a subject of litigation, the following approach falls to be adopted:

> *' the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case'*

[15] This doctrine has been fully assimilated into our law. The doctrine applies equally to pure claims of res judicata and to claims based on issue estoppel. When the applicants launched their first application, it must be so that they were required to put forward their entire case. Further, and most importantly, the applicants elected to persist with their first application, despite the fact that there was seemingly no urgent need for the relief, at that stage.

[16] By doing this, the applicants effectively euthanized their case in connection with the issue of payment, pendente lite. Additional causes of action for the determination of the same issue cannot be raised in subsequent proceedings on the same issue. This, particularly in the circumstances where the applicant's first attempt failed on the very same issue.

[17] Further, in my view, for issue estoppel to apply, it is not necessary that the previous court expressly determines the issue before the latter court. I say this because, it would undermine the purpose of res judicata and issue estoppel to hold otherwise. It would allow litigants to freely exodus from any order granted without not only a reasoned judgment, but one

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[20] *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, [1843-1860] All ER Rep 378 at 381-2

that expressly addresses the issue of fact or law that was nonetheless structural to the decision. As a matter of logic, it must be so, that the fashion in which Sievers AJ, expressed himself and decided the issue, remains largely irrelevant in subsequent proceedings in a court of first instance on the same issue.

[18] This is so also because this doctrinal principle is founded on public policy, which necessitates that litigation should not be endless, and it is founded upon the requirements of good faith which do not permit of the same thing being demanded more than once.[21] It is so that the relief sought by the applicants in the second application, had already been dismissed in the first application, and has unsuccessfully been pursued since at least the middle of 2018.

[19] The requirements for the defence of res judicata have clearly been met in that the first application was between the same parties[22], and that the same relief in the form of payment on a pendente lite basis was sought on the same grounds. Further, that the first application was dismissed on the merits in that it was found that it had been reasonably anticipated that the alleged debt would be disputed. The issue, which is subject to issue estoppel, is the question whether the first applicant can claim payment of a portion of her disputed counterclaim in the main action, pendente lite, by way of urgent motion proceedings. The answer is that this is legally impermissible. Of equal importance is that one[23] of the issues that was adjudicated upon in the first application was also the subject of a striking from the roll by this court on the 3rd of December 2020. This was connected to the issue of urgency.

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[21] *African Farms and Townships Ltd v Cape Town Municipality* 1963(2) SA 555 (A) at 564A – E
[22] *Le Roux v Le Roux* 1967 (1) SA 446 (A)
[23] Samela J, struck the matter from the roll for want of urgency on the 3rd of December 2020

Lis pendens

[20] In my view, the relief pendente lite sought by the applicants is undoubtedly subject to numerous factual disputes. These disputes are clearly formulated in the pleadings in the main action which would in any event render them the subject of this latter defence raised in the form of a shield. Any party wishing to raise this defence bears the onus of alleging and proving: - that there is pending litigation: - that the pending litigation is between the same parties[24]: - that the litigation is based on the same cause of action and that the pending litigation is in respect of the same subject matter.[25] All these manifestations are present in this application.

No cause of action

[21] It is a matter of trite law that an application may be dismissed particularly when the applicant should have realised when launching her application that a serious dispute of fact was bound to develop. It is certainly not appropriate that an applicant should inaugurate proceedings by motion with the knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment.[26]

[22] The applicants seek a judgment in the form of relief, pendente lite, sounding in money. This on an urgent basis. The facts set out in the founding affidavit must be formulated clearly absent any argumentative matter. The respondent takes the position that the applicants'

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[24] *Caesarstone SdotYam Ltd v The World of Marble and Granite 2000 CC and others* 2013 (6*) SA 499 (SCA)*
[25] *Williams v Shub* 1976 (4) SA 567 (C)
[26] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162

monetary claim is subject to various disputes[27] and it simply cannot be determined by way of motion proceedings. On this, I agree.

[23] Further, it is advanced that there is a clear dispute of fact on the papers in as much as the applicants have failed to demonstrate that the services claimed for have been duly rendered and they also have failed to prove the quantum of the first applicant's claims. The applicants must have foreshadowed these disputes of fact when the present application was launched, taking into account the pervious litigation in connection with this matter.

[24] A litigant is entitled to seek relief by way of application, but if the applicant has reason to believe that facts essential to the success of the claim will probably be disputed, the applicant is at risk. This is so because the court, in the exercise of its discretion, may decide neither to refer the matter to trial, nor to direct that oral evidence be placed before it, but to dismiss the application.[28]

[25] Regrettably, the applicants have attempted to disguise the money judgment in the form of an interim interdict. No case for an interim interdict has been made out. The requirements for an interim interdict have been clearly defined in *Sitologoi*[29] and do not need to be rehearsed. The alleged right to payment of the first applicant's claims is subject to several serious disputes of fact, which by far exceed - some doubt - as these claims are disputed on sound grounds, although it is not for us to make any findings in regard thereto since this will be the function of the trial court. Further, the applicants have not proved a reasonable apprehension of irreparable

[27] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C
[28] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168
[29] *Setlogelo v Setlogelo* 1914 AD 221 at 227

and imminent harm should the interdict not be granted.

[26] To the extent that any balance of convenience may be at play, it is clearly weighted in favour of the respondent as the applicants are on their own version, heavily financially indebted. If any funds were to be disbursed to them, the chances of recovery would be very remote. The applicants have an alternative remedy, which is already at an advanced stage. They should simply prosecute their counterclaim in the pending action proceedings.

Urgency

[27] In my view, insufficient factual evidence has been advanced by the applicants which would justify the relief sought by them being adjudicated by this court on an urgent basis. Rule 6 (12) (b) requires that an applicant shall set forth explicitly the circumstances which render the matter urgent and the reasons why substantial redress could not be afforded at a hearing in the ordinary course. Mere lip service to this rule does not suffice.[30] The applicants allege that if the matter is not heard as a matter of urgency, they will lose their right to housing as their primary residence will be sold on an auction. However, on their own version, the applicants' residence was already under siege by a secured creditor during the course of 2018.

[28] The respondent reached out to the first applicant[31] in an attempt to arrive at an amicable solution to the current impasse. Subsequently, a further approach was pioneered. These approaches were in line with the threshold of the global fees paid to clinical technologists for

[30] *Luna Meubel Vervaardigers (Edms) Bpk v Makin* 1977 (4) SA 135 (W) at 137 - F
[31] During the course of 2018

similar services at the time. These approaches too, were seemingly without success.

Costs

[29] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[32] The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[33]

[30] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[34]

[31] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.

[32] No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.[35] Costs follow the event in that the successful party should be

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[32] *Union Government v Gass* 1959 4 SA 401 (A) 413
[33] *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) at [16]
[34] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F- G
[35] *Fripp v Gibbon & Co* 1913 AD 354 at 364

awarded costs.[36] This rule should be departed from only where good grounds for doing so exist.[37]

[33] Regrettably, the applicants have over a number of years been inaugurating proceedings against the respondent, with ostensible impunity. In their first application, the applicants sought payment of a portion of the first applicant's counterclaim in the main action from the respondent on an urgent basis. This was dismissed with costs. The respondent is now faced with a similar application. The current application is not urgent and is merely a repetition of the money judgment sought in the first application and it squarely confronted by all of the defences raised by the respondent.

[34] It is so that the applicants are unrepresented and remain so unrepresented. This in itself, does not allow me to depart from the fundamental principles applicable to the awarding of costs. A successful litigant must be indemnified for the expense put through in unjustly having to defend litigation. Besides, the respondent is a medical scheme which is, inter alia, funded by its members who should not foot the bill for these proceedings. The respondent submits that the current application has no merit, amounts to an abuse of the court process, and contains a large amount of irrelevant and scandalous allegations. This, submits the respondent, calls for a punitive cost order. On this I agree.

Order

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[36] *Union Government v Gass* 1959 4 SA 401 (A) 413.
[37] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 3 SA 692 (C)

[35] In all the circumstances of the matter, I would propose the following order: -

1. That the application is dismissed.

2. That the first and second applicants, jointly and severally, the one paying the other to be absolved, shall be liable for the respondent's costs of and incidental to this application, on the scale as between attorney and client, as taxed or agreed.

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WILLE, J

I agree, and it is so ordered,

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CLOETE, J

I agree,

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KUSEVITSKY, J