IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 23724/2016 & 11709/2017

In the matter between:

ALESSANDRA MICILLO	Applicant
and	
MANFREDI FILLIPPO	Respondent
In re:	
MANFREDI DE FILIPPO	Applicant
ALESSANDRA MICILLO	First Respondent
NEDBANK	Second Respondent
FIRST NATIONAL BANK A DIVISION OF FIRST RAND BANK	Third Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Fourth Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 22 FEBRUARY 2022

MANGCU-LOCKWOOD, J

I. INTRODUCTION

[1] There are four interlocutory applications between the parties, in two matters under case numbers 23724/2016 and 11709/2017, as follows:

a. An application in terms of Uniform Rule 15(4), brought by the applicant;
b. An application in terms of Uniform Rule 30, brought by the applicant;
c. A special plea of issue estoppel, raised by the applicant;
d. An exception to the applicant's amended plea, brought by the respondent.

[2] The applicant is Ms Alessandra Micillo, (*"Ms Micillo"*) and the respondent is Mr Manfredi de Filippo (*"Manfredi"*). The respondent's deceased father, Mr Giancarlo de Filippo (*"Giancarlo"* or *"the deceased"*), and Ms Micillo were previously in a romantic relationship and lived together.

[3] While he was still alive, Giancarlo obtained an anti-dissipation order in this Division against Ms Micillo under case number 23724/2016. Thereafter, on 30 June 2017 he instituted an action (under case number 11709/2017) against Ms Micillo for the recovery of the proceeds of a sale of property at [….], Constantia, and to compel her to sell another property at [….], Cape Town, and to transfer the proceeds of the sale to him (*"the action proceedings"*).

II. THE RULE 15 APPLICATION

[4] Giancarlo passed away on 9 August 2018, and on 11 October 2018 his son, the respondent delivered a notice in terms of Uniform Rule 15(3) for his substitution for the deceased in the action proceedings. The Notice in terms of Rule 15(3) stated as follows:

> *"BE PLEASED TO TAKE NOTICE that by reason of the death of the Plaintiff it has become necessary to substitute for the Plaintiff his son and sole heir Manfredi Francesco Saverio de Filippo.*
>
> *TAKE NOTICE FURTHER that the proceedings in this matter shall continue in respect of the aforesaid Manfredi Francesco Saverio de Fillippo as substituted as if he had been a party from the commencement thereof and all steps validly taken before such substitution shall continue of full force and effect."*

[5] Some two and a half years later, on 3 May 2021 the applicant brought an application in terms of Rule 15(4), for the substitution to be set aside. The application in terms of Rule 15(4) was due within 20 days of service of the respondent's Rule 15(3) notice, and as a result, the applicant applied for condonation for its lateness. However, it is now argued on behalf of the applicant that the condonation application is not strictly necessary because, in opposing the applicant's Rule 15(4) application, the respondent has also brought a conditional counter-application for the confirmation of the respondent's substitution for the original plaintiff, the deceased, with effect from 11 October 2018.

[6] The legal position is that the substitution of a party to litigation by another is a procedural matter.[1] It can either occur by virtue of an amendment to the pleadings, or an application under Rule 15 of the Uniform Rules of Court or in terms of the common law. Rule 15 applies where the substitution of a party has become necessary due to a change of status of such party. Where, however, there is no change in status of a party involved, the court will, under its common-law power, grant an application for substitution involving the introduction of a new *persona* on being satisfied that no prejudice will be caused to the opposite parties which cannot be remedied by an order for costs or some other suitable order, such as a postponement.[2]

[7] Previously, it was necessary to apply to court for substitution when there was a change in status of a party to proceedings.[3] Rule 15 now renders such an application

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[1] *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) 410E – F.

[2] Erasmus *Superior Court Practice*, B1-118; *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA); *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA).

[3] *Erasmus* D1-159 to D1-160.

unnecessary, and substitution may be effected by notice, subject to the rights of an affected party to bring an application in terms of Rule 15(4).

[8] The purpose of Rule 15 is merely to provide a simplified form of substitution, subject to the right of any affected party to apply to court for relief in terms of Rule 15(4).[4] It is not to afford the High Court the power to substitute a party to proceedings, since it already had that inherent power under the common law.[5] The court furthermore still has power to grant a substitution of parties on substantive application where Rule 15 does not apply.[6]

[9] In *Tecmed v Nissho Iwai Corporation*[7], similar to the present case, the respondent had brought both a Notice in terms of Rule 15(3) and subsequently, a substantive application for substitution. Based on the approach followed by the Supreme Court of Appeal (*"SCA"*) in that case, now that the respondent here has brought a substantive application for substitution in the form of a conditional counter-application, it is a futile exercise to consider the substitution application on the narrow basis of whether the Rule 15(3) notice was effective or whether it was given in a situation covered by the Rule.[8] The substitution application is to be considered on a wide basis, which includes the grounds mentioned in Rule 15(3), and broadly takes into account the presence or otherwise of prejudice.[9] In the absence of any prejudice to the other side, a substitution application will be granted unless the prejudice cannot be remedied by an order for costs or some other suitable order, such as a postponement.[10]

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[4] *Tecmed* para [12]; See eg LTC Harms *Civil Procedure in the Supreme Court* B-1 to 5; HJ Erasmus *Superior Court Practice* B1-118.
[5] *Tecmed* para [12].
[6] *Ibid*.

[7] *Tecmed (Pty) Limited and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) paras [12] – [14].

[8] *Tecmed* para [13].
[9] *Tecmed* para [13] – [14].
[10] *Tecmed* para [13]; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) (supra)* at 369F-I; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D-H).

[10] As already set out earlier, the application for substitution is based on the death of Giancarlo, which is common cause. The respondent's case for substitution is supported by the contents of a sworn translation of a notarial deed issued in Monaco and dated 4 September 2018, and which is attached to his papers. The notarial deed reveals that the late Giancarlo died intestate and was unmarried at the time of death. It also reveals that the respondent is the sole heir of the late Giancarlo.

[11] The consequences of these facts are summarized in an expert affidavit from Mr Donald Manasse, a counsellor-at-law practicing in Monaco and other jurisdictions for some 30 years, and which is attached to the respondent's papers. Mr Manasse points to three provisions of the Monegasque Civil Code (*"the Civil Code"*), which bear relevance because the deceased was domiciled in Monaco when he died. Article 655 of the Civil Code provides that a succession can be accepted outright (either expressly or tacitly), or under benefit of inventory. Article 607 provides that the legitimate heirs, the natural heirs and the surviving spouse are seized of the property of the deceased, under the obligation to pay all the expenses of the succession. Article 684 provides as follows:

> *"The heir beneficiary is responsible for administering the property of the succession, and must account for its administration to the creditors and legatees.*
>
> *He can only be forced on his personal property after having been put on formal notice to present his account, and failing to have fulfilled this obligation.*
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> *After the clearance of the account, he can be constrained on his personal property only up to the amount only of the sums of which he finds himself remaining."*

[12] According to Mr Manasse, since the respondent has taken the title of an heir in terms of the notarial deed, he has expressly accepted the estate of his father. As a result, he has become seized of the deceased estate and is required to account to creditors and is entitled to pursue debts owed to the deceased estate. Furthermore, according to Mr Manasse, Monegasque law does not provide for letters of

executorship. Nor does it require the respondent to compile an inventory of his late father's estate or to furnish security.

[13] In summary, according to Monegasque law the fact that the respondent is the sole heir means that he became possessed of the deceased estate and assumed responsibility for administering it, and for accounting for its administration to creditors and legatees. On the basis of these facts, the respondent states that he holds an office akin to that of an executor or other offices envisioned in Rule 15(3).

[14] The expertise and conclusions reached by Mr Manasse are not disputed. It is the admission of his affidavit that is contested, because of the late stage at which it was delivered. However, I consider its contents to be admissible, taking into account the importance and relevance of the contents of the affidavit for the resolution of the current dispute between the parties; the fact that the applicant has had an opportunity to respond thereto, though she states that she was unable to obtain an expert that she could afford; the fact that the contents of the expert affidavit are not new, and have been the basis for the respondent's substitution since as far back as January 2019 when he applied for his father's affidavits to be admitted as evidence in the main action; the contents of the expert affidavit are not opposed; and no prejudice has been occasioned upon the applicant by its admission.

[15] The applicant's grounds for opposing the conditional counter-application for substitution are the same as her grounds for the Rule 15(4) application, and are based on the provisions of the Administration of Estates Act 66 of 1965, particularly sections 13(1), 21 and 23.

[16] Section 13(1) provides that no person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under the Administration of Estates Act, or in pursuance of a direction by a Master. The applicant points out that the provisions of section 13 are concerned not with an appointed executor as such, but with someone who wants to perform the work of an

executor. Given the respondent's position that he performs duties akin to those of an executor, the applicant argues that he is obliged to comply with section 13(1).

[17] Section 21 provides for the Master to receive letters of executorship issued in a foreign state and for the Master to sign and seal the letters, thus allowing the person to perform the functions of an executor in South Africa. Section 21 also requires that, before the foreign letters of executorship are signed and sealed, an inventory of all property belonging to the deceased within the Republic must be lodged with the Master. The applicant points out that the respondent has failed to apply to the Master for recognition to perform the functions of an executor in South Africa. Neither has the respondent provided an inventory of all property belonging to the deceased.

[18] Section 23 provides that every person who is not nominated by a will to be an executor must provide security to the Master before letters of executorship may be signed and sealed. Although in terms of section 23 a child of the deceased may be exempted from the requirement to provide security, the applicant states that it is likely that the Master would direct the respondent to furnish security given the 'volatility of this matter' and the fact that the respondent is neither domiciled in South Africa nor holds any assets within South Africa.

[19] In addition to the above, the applicant gives three reasons, all of which are related to security of costs, for why she will suffer prejudice if the substitution of the respondent is permitted: (a) First, if she succeeds in the main matter, she will have no security of recouping her costs from the deceased estate; (b) Second, the bond of security for costs which was issued on behalf of Giancarlo on 8 December 2017 in favour of the applicant for legal costs of up to an amount of R1 500 000 is neither negotiable nor transferable, and shall not stand as security for any other claim or person; (c) Third, the applicant will not have any effective recourse against the respondent in recovering wasted costs because he is neither domiciled in South Africa, nor does he hold any assets within South Africa.

[20] The applicant states that the respondent has provided no good reason for why the Master, the provisions of the Administration of Estates Act and the respondent's duty to provide security should be circumvented and overridden, and accordingly the substitution should be dismissed.

[21] In considering the applicant's grounds for opposition, it bears highlighting that the respondent's substitution application does not amount to an application to clothe the respondent with powers of an executor. It is to clothe him with the capacity to continue litigation commenced by his late father. As the SCA has stated[11], that is a matter of procedure.

[22] When regard is had to the applicant's opposition to the substitution it becomes clear that its focus is on the fact that the respondent is not appointed by the Master to act as an executor for the estate. However, that is not a requirement for a substitution or in terms of Rule 15(3). The Rule states thus:

> *"Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted."*

[23] What is required in Rule 15(3) is an executor, curator or trustee or person who acts as a 'similar legal representative' to an executor, curator or trustee. In my view, the phrase 'legal representative' in Rule 15(3) is not limited to a person with legal qualifications or to a legal practitioner, but to an individual who is legally permitted to represent another, in a manner similar to executor, curator or trustee. If the phrase 'legal representative' were interpreted restrictively, to limit it to a person with legal qualifications or to a legal practitioner, such an interpretation would render the word "similar" meaningless.

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[11] *Brummer v Gorfil Brothers Investments* at 410E – F.

[24] I am furthermore of the view that, in light of the fact Mr Manasse's evidence is not disputed, the respondent meets the requirements of Rule 15(3) in that he is according to Monegasque law, a representative of the deceased estate. In other words, he performs an office that is similar to the South African concept of an executor.

[25] As regards the applicant's reliance on section 21 of the Administration of Estates Act, it does not assist on the facts of this case because, in order for that provision to apply, the respondent would have to be in possession of a letter of executorship. It is not in dispute that Monaco does not recognize the concept of executors, and as a result, the respondent is unable to produce letters of executorship. Further, as already set out earlier, in terms of Article 655 of the Civil Code if a succession is accepted outright (as opposed to under benefit of inventory), the benefit of an inventory is obviated.

[26] The Monegaque Civil Code furthermore provides the answer for the applicant's fears that a substitution will prevent her from recovering costs awarded to her, because as Mr Manasse points out, the respondent is required to account to creditors of the deceased estate, which includes what is already due to the applicant in terms of previous cost orders.

[27] As regards the applicant's security of costs in the continued litigation between the parties, my view is that this is a well-founded concern, which can be cured by an order that the respondent should post some security for the applicant's costs. The respondent's suggestion in this regard is that the bond of security issued by the deceased's legal representatives for an amount up to R1.5 million be declared as continuing to be of force and effect as though it had been given by Giancarlo. This, in my view, is a reasonable suggestion.

[28] For all the above reasons, the respondent's application for substitution is upheld, and the substitution should be considered effective from 11 October 2018, and the applicant's application in terms of Rule 15(4), dismissed.

III. RULE 30 APPLICATION

[29] The basis for the applicant's application in terms of Uniform Rule 30 is similar to the basis for her opposition to the substitution application discussed above. The application in terms of Rule 30 is an objection that the respondent did not have title to issue a notice of taxation dated 14 May 2021, on the basis that the cost orders that are the subject of the taxation were granted to the late Giancarlo, and not to him.

[30] The taxation relates to cost orders which were granted in 2017 and 2018 in favour of Giancarlo against the applicant, under case number 23724/2016. The costs orders concern unsuccessful rescission and variation applications launched by the applicant in respect of the anti-dissipation order obtained by Giancarlo, as well as successful contempt proceedings against the applicant by Giancarlo.

[31] On 20 March 2018 Giancarlo delivered a notice of intention to tax a bill of costs upon the applicant. On 28 April 2018 the applicant delivered a notice of intention to oppose and a list of objections.

[32] On 1 August 2018 the taxation was part-heard, and the taxation was to continue on 12 November 2018. From 1 August 2018, there was a series of postponements, as well as attempts at settlement, which were not successful. As I have already indicated Giancarlo passed away on 9 August 2018, and the respondent's Rule 15(3) notice was delivered on 11 October 2018.

[33] In response to the respondent's notice of taxation which was delivered on 14 May 2021, the applicant delivered a notice in terms of Rule 30 on 30 June 2021, stating that the respondent's notice of taxation was an irregular step because the cost orders were granted to Giancarlo and the respondent has no title to issue the notice of taxation.

[34] For the same reasons discussed above in relation to the substitution application, the application in terms of Rule 30 ought to be dismissed. Similarly, for purposes of the taxation proceedings, the respondent should be deemed substituted with effect from 11 October 2018 when he delivered the notice in terms of Rule 15(3). In light of this finding I consider it unnecessary to decide the question of whether the applicant took further steps before delivering the Rule 30 application.

IV. ISSUE ESTOPPEL

[35] Ms Micillo has raised a special plea of issue estoppel against Giancarlo's summons case number 11709/2017 as follows:

> *"1A.1 On or about 6 October 2016 and in the Principality of Monaco, the plaintiff [Giancarlo] instituted legal proceedings against the defendant [Ms Micillo] for an order that the defendant be liable to the plaintiff, inter alia, for payment of the amount of €3 856 400,00.*
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> *1A.2 On or about 11 October 2018 the Court of First Instance of Monaco dismissed all the plaintiff's claims with costs. A copy of the judgment and Order, together with a true translation thereof is annexed, marked 'DP1'.*
>
> *1A.3 The plaintiff's present claim for payment of R12 181 781, 48 and the sale of 12 Klein Constantia Road involves a judicial determination of the same questions of law or issues of fact which were determined by the Court of Monaco, and constitutes a claim on the same ground against the same party.*
>
> *1A.4 The defendant in the premises pleads that the plaintiffs present claims (sic) was finally adjudicated upon by a court of competent jurisdiction."*

[36] The issue for determination on this score is whether the Monaco litigation, and Giancarlo's claim in the South African action regarding 12 Klein Constantia Road involve a judicial determination of the same questions of law or issues of fact and on the same grounds.

[37] No pleadings relating to the Monaco matter were attached to Ms Micillo's special plea, and no evidence was led for the purposes of its determination. The only

document on which reliance is placed for purposes of determining the special plea is the judgment dated 11 October 2018 from the Court of First Instance in the Principality of Monaco (*"the Monaco judgment"*), a copy of which was translated into English for purposes of these proceedings.

[38] It is trite that the expression *res judicata* means that the dispute raised for adjudication has already been finally decided. In terms of the common-law, the three requisites of *res judicata* are: that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause.[12] This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is "demanding the same thing on the same ground"[13]; or which comes to the same thing, "on the same cause for the same relief".[14]

[39] With time, the common law requirements were relaxed, giving rise to the expression *issue estoppel*, which describes instances where a party can successfully plead that the matter at issue has already been finally decided even though the common law requirements of *res judicata* have not all been met.[15] This relaxation of the common law requirements was explained as follows in *Smith v Porritt & others*:

> *"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*

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[12] Voet 42.1.1; *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* 2001 (2) SA 232 (SCA).

[13] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 A.

[14] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A - B; see also the discussion in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 664 C - 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 179 A - H.

[15] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 10; *Smith v Porritt & others* 2008 (6) SA 303 (SCA) para 10.

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 commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Bnnelandse Inkomste v Absa Bank Bpk 1995 (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 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".'

[40] In *Molaudzi v S*[16] the Constitutional Court affirmed the development away from the strict application of common law *res judicata,* and stated as follows:

'Since res judicata is a common-law principle, it follows that this court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 [of the Constitution] does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures."

[41] It is common cause that the two matters involve the same parties. The question is whether they concern the same issue. According to the Monaco judgment the relief sought by Giancarlo in the summons issued on 6 October 2016 was for Ms Micillo:

[16] *Molaudzi v S* 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015) at paras [14]–[16].

> *"[t]o reimburse him the amount of €3 856 400 representing the amount of nine bank deposits/instalments (transfers), carried out for her benefit for the purchase of three real estate properties situated in France and in South Africa as well as the financing of the current account as associate of the SCI BELLEVUE SUR MER, as well as the furniture, the furnishing and property improvement works of the above real estate properties.*
>
> *To restitute to him, within 15 days with effect from the judgment to intervene into the furniture and objects furnishing and decorating the apartment situated in Roquesbrune-Cap-Martin, under penalty of 500 EURO per day of delay*."

[42] However, it is also recorded in the Monaco judgment that it was decided on 19 October 2017 that the same court had "*found that Giancarlo abandoned his claims relating to the refund of the funds intended for the purchase of real estate in South Africa"*, and therefore the court was *"only considering the requests from Giancarlo attempting to obtain the conviction of Alessandra Micillo to reimburse him the amount of €1 480 827.30 deposited by him for the purchase by SCI Bellevue of a real estate property situated in Roquebrune-Cap-Martin, 75 Avenue de la paix residence ("Les Lumieres du Cap"); to return, under penalty, the furniture furnishing the said real estate and, failing this, to reimburse its purchase price, i.e. the amount of €168. 827,30."* In other words, the relief sought by Giancarlo was amended to only seek relief pertaining to the property referred to as Les Lumieres du Cap.

[43] It was common cause in the Monaco proceedings that Giancarlo had made two deposits or transfers for the purpose of purchasing *Les Lumiere du Cap* which was to be purchased in the name of SCI Bellevue SUR MER. One deposit was for an amount of €135 000 and was paid into the account of a notary, and the other was for an amount of €1 320 000 and was paid into Ms Micillo's bank account. Much of the Monaco judgment is concerned with whether or not the deposit paid by Giancarlo into Ms Micillo's account constituted an irrevocable manual donation or not, and the court concluded that it did. That is the full gamut of the Monaco judgment. At no point did the court make any decision concerning the properties in Cape Town on 11 October

2018. Instead, as I have indicated the court painstakingly clarified that Giancarlo had abandoned his claims relating to the refund of the funds intended for the purchase of real estate in South Africa; and it proceeded to define the parameters of its judgment by confining itself to the lesser amount claimed and the Les Lumieres du Cap property.

[44] By contrast, the subject matter of the action proceedings launched in this Court is the Constantia properties, and a claim for R12 181 781,48. There is no claim sought in those pleadings concerning the French property. The two matters clearly do not concern the same thing or the same issues or the same relief. The only thing that the two matters have in common is the fact that they involve the same parties.

[45] Mr Prinsloo on behalf of Ms Micillo made much of the fact that in both matters Giacarlo alleges that the payments he made into Ms Micillo's bank account for the purchase of the properties did not constitute donations, which is denied by Ms Micillo. This, according to him, means that the same issue arises in both matters. He argues that the *modus* of the Giancarlo, of making payments into the bank account of Ms Micillo, instead of paying them to the notary when purchasing the different properties, gives rise to the same issue in both matters. The *modus* relied upon in respect of the purchase of the South African properties was, however, not part of the Monaco judgment. As I have set out earlier, the evidence considered in that judgment was the fact that two payments were made by Giancarlo, one into the account of the notary and the other into the account of Ms Micillo. The adjudication in the Monaco judgment did not include all the alleged nine deposits made by Giancarlo. It is correct that the original claim of €3 856 400 represented nine bank deposits for the purchase of the three properties situated in France and in South Africa. However, as I have pointed out, Giancarlo’s claim, according to the Monaco judgment was amended to a reduced amount made up of two deposits and involved only the French property.

[46] It was contended that the fact that Giacarlo abandoned the claims regarding the South African properties in the Monaco proceedings is of no moment because, in an application he brought in 2016 before abandoning those claims he admitted that the

facts in the two matters were the same. However, the fact is that he did abandon the claims in respect of the South African properties in the Monaco proceedings, and the result is that the facts relating to those properties were not part of the adjudication in those proceedings. There is no final judgment regarding the South African claims. In fact, there has been no adjudication of the claims in relation thereto. It can therefore not be said the claims are *res judicata* in any sense of the word. Nor is there any basis for the relaxation of the *res judicata* principles in these proceedings to decide in favour of Micillo based on issue estoppel. There is furthermore no legal basis for venturing into hypothesis regarding what the Monaco judgment would have decided had Giancarlo not abandoned the claims in respect of the South African properties. There is no legal basis for this approach.

[47] For all the above grounds, the special plea of issue estoppel is dismissed.

V. THE EXCEPTION

[48] The respondent (Giancarlo) raised an exception against Ms Micillo's amended plea which was delivered on 16 March 2020. However, by the time the matter was argued before me, it was the determination of costs that remained in issue between the parties.

[49] The litigation background provides some context. In response to Giancarlo's summons, Ms Micillo delivered a plea on 2 August 2017, and later - on 16 March 2020 - an amended plea in which she raised three special pleas alleging that the alleged contract between her and the deceased contravened the provisions of the Financial Intelligence Centre Act 38 of 2001 (*"FICA"*); secondly, was *contra bonos mores ("the second special plea")*; and thirdly contravened the provisions of the Alienation of Land Act 68 of 1981. The amendments were preceded by some objections and litigation between the parties, but were ultimately effected with leave of the Court.

[50] On 24 March 2020 the respondent served a Notice of Exception which raised an exception to the amended plea on the basis that the new defences raised in the amended plea did not disclose a defence. On 29 June 2020 a similar notice was again delivered, this time with a different signature. In this regard I was referred to email correspondence written on a 'with prejudice' basis by the respondent's attorney to the applicant's attorneys. It was stated therein that the notice delivered on 24 March 2020 had been signed by an attorney who did not have right of appearance, and that the later notice was filed to avoid having the prior notice declared an irregular notice.

[51] On 8 July 2020, the applicant delivered a Notice in terms of Rule 30(2)(b) which objected to the exception of 29 June 2020 as an irregular step because it was delivered more than 15 days after the delivery of the amended plea, and calling upon the respondent to remove the cause of complaint.

[52] On 6 October 2021 Ms Micillo delivered a notice to amend her plea by removing the special pleas replying on FICA and the Alienation of Land Act, and amending the second special plea. The latest amendments effectively abandoned two special pleas and sought to amend the *contra bonos mores* special plea without tendering costs.

[53] On 13 October 2021 the respondent delivered an objection to the applicant's proposed amendment on the grounds that it was an attempt to cure the defects on the plea without tendering costs; was *mala fide*; was not sought timeously; would render the plea excipiable; and would cause prejudice which could not be compensated by an appropriate cost order.

[54] Nevertheless, the parties were agreed that the issue for determination before me is costs.

[55] In the heads of argument delivered on behalf of the applicant it is argued that the respondent's exception of 29 June 2020 was barred because it was delivered out of time. This is in terms of Uniform Rule 26 which provides that any party who fails to

deliver a replication or subsequent pleading within the time stated in Rule 25 - which is 15 days after service of a plea - shall be *ipso facto* barred. As I have already mentioned, it appears that the respondent's attorneys had previously attempted to except as far back as 24 March 2020 but later discovered a defect in their attempt in that the notice was not signed by an attorney with right of appearance. Had that notice to except not been defective, it would have been timeously effected. In those circumstances, it is strange that, when the applicant delivered a notice in terms of Rule 30(2)(b) objecting to the late filing of the notice of 29 June 2020, the respondent did not apply for condonation in respect of the late delivery of its notice on the basis of the reasons advanced in the email correspondence. I, however refrain from making a finding in this regard since that issue is not before me, and I note the objection raised on behalf of the applicant regarding any further venture into the communication between the lawyers in this regard.

[56] However, the fact remains that the applicant has now removed most of the causes of complaint raised in the exception, and has amended the second special plea to include facts which were not previously included in the amended plea. The respondent argues that these amendments to the second special plea are designed to supplement *facta probanda*, which were not sufficiently pleaded in the amended plea, as raised in the exception.

[57] Furthermore, the applicant's latest proposed amendment of 6 October 2021 was delivered after the heads of argument on behalf of the respondent had been delivered and with no tender as to costs. This, after the parties had agreed to set the matter down for a hearing of, amongst other things the exception. It is clear from reading the heads of argument filed on behalf of the respondent dated 29 September 2021 that they did not contemplate the removal withdrawal of the special pleas relating to FICA and the Alienation of Land Act, or the amendment to the second special plea.

[58] The argument that the respondent's exception was time-barred cannot assist the applicant in the circumstances of this case in escaping an adverse order as to costs.

The applicant was aware that the matter of whether the exception was time-barred was one of the issues to be determined in these proceedings, and had been raised as far back as June 2020 when she delivered the Rule 30(2)(b) notice. However, before the issue of whether or not the respondent's exception was time-barred was determined, the applicant withdrew the causes of complaint raised in the exception. And she did so at a very late hour in the proceedings, thus depriving the respondent the opportunity of having the matter fully ventilated and adjudicated. Furthermore, the amendments that she now seeks to make confirm the respondent's position that the exception was well-taken. In these circumstances, it is only fair that the applicant should carry the costs of the exception.

VI. ORDER

[59] In the circumstances, the following order is made:

a. The respondent is substituted for Giancarlo de Filippo (*"the deceased"*) in cases 23724/2016 and 11709/2017, with effect from 11 October 2018.

b. The applicant's application in terms of Rule 15(4) is dismissed.

c. It is declared that the Bond of Security dated 8 December 2017 issued by the deceased's legal representatives for an amount up to R1.5 million shall continue to be of force and effect as though it had been given by the deceased.

d. The applicant is ordered to pay the costs of the Rule 15(4), Rule 15(3) and Rule 30 applications.

e. The applicant's special plea of issue estoppel is dismissed, with costs.

f. The respondent's exception dated 29 June 2020 is upheld, and the applicant is ordered to pay the costs thereof.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	**:**	**Adv B Prinsloo**
Instructed by	**:**	**Mr P Taylor**
		Paul M Taylor Attorneys
For the respondent	**:**	**Adv J Heunis SC**
Instructed by	**:**	**Mr R Africa**
		Webber Wentzel