Unmasking some challenges associated with the enforcement of issue estoppel in South African commercial-related disputes with reference to *Prinsloo NO v Goldex* 15 (243/11) [2012] ZASCA 28 (28 March 2012)[1]

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Abstract

Estoppel is generally aimed at promoting equity and fairness in litigation by preventing a person (asserter) from resiling or asserting something contrary to what was implied by a previous action, conduct or statement of that person or by a previous pertinent judicial determination regarding such action, conduct or statement. Accordingly, issue estoppel could be defined to include instances where a person is prevented from re-litigating or raising a particular issue in a cause of action that was previously decided by a final judgement of a competent court between the same parties in future cases that have a different cause of action involving such parties. In other words, res judicata prevents the re-litigation of a dispute that was previously decided by a final judgement of a competent court between the same parties (idem actor) or persons (eadem persona) for the same relief, thing or right (eadem res) on the same ground or same cause of action (eadem causa petendi) in future cases involving such parties or their privies. Issue estoppel and res judicata are closely interrelated. For instance, both issue estoppel and res judicata have similar requirements. Nonetheless, issue estoppel and res judicata are relatively different in their application. Accordingly, issue estoppel may only be employed as a defence in appropriate instances where it is justifiable for the court to dispense with the strict application of the requirements of res judicata. Having said this, it must be noted that issue estoppel and res judicata have been confusingly and inconsistently employed in many South African cases to date. Such confusion is mostly found in relation to the relaxation of the three-fold requirements of res judicata and the application of issue estoppel. Given this background, this article exposes certain challenges that are associated with the practical enforcement of issue estoppel in South Africa with reference to Prinsloo NO v Goldex 15 (243/11) [2012] ZASCA 28 (28 March 2012).

Keywords: *res judicata; application; issue estoppel; enforcement; challenges; South Africa.*

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[1] The case *Prinsloo NO v Goldex 15* (243/11) [2012] ZASCA 28 (28 March 2012) – see www.saflii.org/za/cases/ZASCA/2012/ 28.html (consulted on 1.09.2018).

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1. Introduction

The doctrine of estoppel is widely recognised in many jurisdictions, including South Africa. In this regard, it must be noted that several types of estoppel are distinctly recognised in countries such as the United States of America (USA), United Kingdom (UK), Canada, South Africa and Australia.[4] Estoppel is generally aimed at promoting equity and fairness in litigation by preventing a person (asserter) from resiling or asserting something contrary to what was implied by a previous action, conduct or statement of that person or by a previous pertinent judicial determination regarding such action, conduct or statement. Accordingly, issue estoppel could be defined to include instances where a person is prevented from re-litigating or raising a particular issue in a cause of action that was previously decided by a final judgement of a competent court between the same parties in future cases that have a different cause of action involving such parties.[5]

Res judicata means that the matter between the relevant parties has already been decided by a final judgement of a competent court.[6] In other words, *res judicata* prevents the re-litigation of a dispute that was previously decided by a final judgement of a competent court between the same parties (*idem actor*) or persons (*eadem persona*) for the same relief, thing or right (*eadem res*) on the same ground or same cause of action (*eadem causa petendi*) in future cases involving such parties or their privies.[7] Issue estoppel and *res judicata* are closely interrelated. For instance, both issue estoppel and *res judicata* have similar requirements. Moreover, both issue estoppel and *res judicata* are targeted at preventing the unfair consequences of re-litigation such as the: (a) harassment of the defendant through the multiplicity of legal actions; or (b) possibility of conflicting decisions by different courts on the same cause of action or same issue in respect of same persons. Nonetheless, issue estoppel and *res judicata* are relatively different in their application. Accordingly, issue estoppel may only be employed as a defence in appropriate instances where it is justifiable for the court to dispense with the strict application of the requirements of *res judicata*. This is usually done by relaxing the three-fold common law prerequisites of *res judicata*,

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[4] R. Nazzini, 'Remedies at the seat and enforcement of international arbitral awards: Res judicata, issue estoppel and abuse of process in English law' (2014) 7(1) Contemporary Asia Arbitration Journal, p. 139-158; Y. Sinai, 'Reconsidering res judicata: A comparative perspective' (2011) 21 Duke Journal of Comparative & International Law p. 353-360; B. Wunsh, 'Is issue estoppel part of our law?' (1990) 2 *Stell LR*, p. 198-218 & *Royal Sechaba v Coote* (366/2013) [2014] ZASCA 85 (30 May 2014) (*Royal Sechaba case*): 1-28; *Transalloys v Mineral-Loy* (781/2016) [2017] ZASCA 95 (15 June 2017): 22-23; *Hibiscus Coast Municipality v Hume Housing* (638/15) [2016] ZASCA 71 (23 May 2016): 16-17.

[5] Y. Sinai, *op. cit.* (2011), p. 358; B. Wunsh, *op. cit.* (1990), pp. 198-218.

[6] *Prinsloo NO v Goldex 15* (243/11) [2012] ZASCA 28 (28 March 2012); *Prinsloo NO v Goldex 15* 2014 (5) SA 297 (SCA) (*Prinsloo case*): 10.

[7] R. Nazzini, *op. cit.* (2014), p. 149-152; M. Maaniago, & C.R. Chiasson, 'Court reaffirms application of res judicata and issue estoppel to commercial arbitrations' (2016) Arbitration & ADR, p. 1-2; J. Voet, Commentarius ad Pandectas, Lyon: Apud fratres De Tournes, 1778: 42.1.1 & Roodt, 'Reflections on finality in arbitration' (2012) De Jure pp. 502-503.

especially, the requirement that the: (a) same relief, right or thing must be claimed; and (b) same cause of action must have been adjudicated and previously decided by a competent court between the same parties.[8] Consequently, issue estoppel and *res judicata* are distinctly applied in various jurisdictions.[9] For instance, English law principles are mainly used to distinctly enforce issue estoppel and *res judicata* in the UK.[10] On the contrary, Roman-Dutch law (common law) principles are usually employed to recognise and enforce *res judicata* and issue estoppel in the USA, South African, Canadian and Australian courts.[11] Nevertheless, this article will not discuss the possible merits and demerits of issue estoppel and *res judicata* in South Africa or other jurisdictions. Having said this, it must be noted that issue estoppel and *res judicata* have been confusingly and inconsistently enforced in many South African cases to date.[12] Such confusion is mostly found in relation to the relaxation of the three-fold requirements of *res judicata* and the application of issue estoppel. Accordingly, this article provides a brief discussion of the negative consequences that could culminate from the rigid application of the three-fold common law requirements of *res judicata* by the courts. This does not disregard the different approaches that are adopted by the South African courts when interpreting *res judicata* and issue estoppel from time to time and the need to relax the strict requirements of the doctrine of *res judicata* in order to prevent the very object of that doctrine from being defeated. Thus, notwithstanding the fact that the strict reliance on *res judicata* could defeat its very essence, the courts' relaxation of the requirements of *res judicata* should be carefully employed through the application of issue estoppel on a case by case basis. Consequently, any successful reliance on the defence of issue estoppel must depend on the facts and merits of each case as well as other factors such as equity and fairness to all the relevant persons.[13]

The article seeks to expose certain challenges that are associated with the practical enforcement of issue estoppel in South Africa with reference to the commercial-related disputes that ensued in *Prinsloo* case.[14] However, a detailed discussion of the legal nature of issue estoppel and its relationship to *res judicata* in

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[8] *Boshoff v Union Government* 1932 TPD 345; *Smith v Porritt* 2008 (6) SA 303 (SCA): par. 10; *Royal Sechaba* case: pars. 19-22; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A): par. 835G; *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA): par. 239F-H; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk* 1995 (1) SA 653 (A): pars. 670I-671B; *Prinsloo* case: pars. 10-11.

[9] *Royal Sechaba* case: pars. 10-15; M. Elvy, L. Hui & T. Gaffney, 'A One-stop shop? Issue estoppel and the limits to forum shopping in enforcement of arbitral awards' (2014) Ashurst Arbitration Update, pp. 1-2; *Diag Human Se v The Czech Republic* [2014] EWHC 1639 & S.S. Ruby, 'Res judicata, issue estoppel and abuse of process by relitigation' (2012) Davies Publications, p. 2-36.

[10] *Royal Sechaba* case: pars.11-13; R. Nazzini, *op. cit.* (2014), p. 149-158.

[11] Y. Sinai, *op. cit.* (2011), p. 357-360; M. Elvy, L. Hui & T. Gaffney, *op. cit.* (2014), p. 1-2; B. Wunsh (1990), pp. 198-203 & M. Maaniago, & C.R. Chiasson, *op. cit.* (2016), p. 1-2.

[12] *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 19-22; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 670I-671B & *Prinsloo* case: pars. 1-28.

[13] *Smith v Porritt* par 10; *Prinsloo case*: pars 10 & 23.

[14] *Prinsloo* case: pars. 1-28; *Royal Sechaba* case: pars. 1-28.

all the stated jurisdictions is beyond the scope of this article. Thus, the article only discusses selected challenges associated with the South African courts' inconsistent interpretation of the requirements for issue estoppel with reference to *Prinsloo* case. Furthermore, the article discusses the unfair, inequitable and negative consequences that could arise from the relaxation of the requirements of *res judicata* by the courts through the application of issue estoppel in South Africa. This is done to examine whether the plea of *res judicata* by the respondents was correctly upheld by the High Court (HC or court *a quo*) in *Prinsloo* case. Wherefore, the facts, HC judgement and the Supreme Court of Appeal (SCA) judgement in *Prinsloo* case are briefly discussed below. Nonetheless, related confusion surrounding the application of issue estoppel as a distinct legal doctrine in the South African law will not be discussed in detail due to space constrains.

2. Overview of the facts

Mr NM Prinsloo (first appellant) and Ms JJ de Bruin NNO (second appellant) were trustees of the NM Prinsloo trust (the trust). The third appellant was the same Mr NM Prinsloo in his personal capacity. Conversely, Goldex 15 (Pty) Ltd (a company of Mr JW Scheepers) was the first respondent while Mr JW Scheepers (the sole director and shareholder of Goldex 15 (Pty) Ltd) was the second respondent.[15] On 4 October 2004, the trust sold Rykdom farm which was located in the Limpopo province to the first respondent for R2.6 million.[16] During prior negotiations to this deed of sale, the trust and first respondent were represented by the third appellant and the second respondent respectively.[17] Thereafter, in February 2005, the second respondent purported to cancel the sale on behalf of the first respondent citing fraudulent representations that were allegedly made by the third appellant on behalf of the trust during prior negotiations to the sale.[18] In response to this purported cancellation of the deed of sale, the trust filed an urgent application in the North Gauteng HC for an order of specific performance to compel the first respondent to take transfer of Rykdom farm against payment of the agreed purchase price. Nonetheless, the second respondent maintained that he had, prior to the sale, told the third appellant that he would not be interested in buying the farm if any claim had been lodged against it in terms of the *Restitution of Land Rights Act*.[19] Thereafter, the third appellant gave the assurance to the second respondent that he was not aware of any such claim as stipulated in clause 18 of the deed of sale. However, after the sale, the second respondent discovered that a land claim had indeed been lodged in respect of Rykdom farm by the Mapela community in terms of the *Land Rights Act*. In this regard, the second respondent argued that the third appellant had knowingly

[15] *Prinsloo* case: par. 2.
[16] *Prinsloo* case: par. 3.
[17] *Prinsloo* case: par. 3.
[18] *Prinsloo* case: par. 3.
[19] *Restitution of Land Rights Act* 22/1994, hereinafter referred to as the *Land Rights Act*.

concealed and fraudulently misrepresented to him the existence of the stated land claim at the time of the conclusion of the deed of sale.[20]

The third appellant admitted on behalf of the trust that he erroneously gave the second respondent the assurance that there was no land claim against Rykdom farm. However, the third appellant maintained that he was unaware of any land claim that might have been lodged against Rykdom farm when he gave the assurance to the contrary. In light of this, the third appellant argued that the first respondent was still bound by an express provision in the deed of sale which obliged the buyer not to rely on any representation by the seller with regard to the property (Rykdom farm) sold which turned out to be untrue.[21] Subsequently, the court *a quo* was tasked to determine whether the third appellant was guilty of making a material fraudulent misrepresentation to the second respondent that no valid land claim was pending in relation to the Rykdom farm.[22] In relation to this, the court *a quo* held that the third appellant entered into a written agreement of sale of Rykdom farm with the full knowledge that it was subjected to a land claim. As a result, the court *a quo* dismissed the urgent application that was made by the trust and held that the third appellant had deliberately and fraudulently misrepresented the information regarding the existence of a land claim to the second respondent prior to the sale.[23] The trust unsuccessfully sought the leave to appeal against this verdict in the court *a quo* and the SCA. Sometime later, all the respondents instituted an action in the court *a quo* against the appellants for delictual damages they allegedly suffered as a result of the third appellant's fraudulent misrepresentation.[24] The appellants challenged this action and maintained that the third appellant was unaware of any land claim in respect of Rykdom farm prior to the sale. On the other hand, the respondents rejected the appellants' plea and argued that, in light of the earlier court *a quo* judgement, the appellants were estopped from denying the fraudulent misrepresentation on the basis of issue estoppel.[25] Consequently, the appellants approached the SCA and challenged the correctness of the court *a quo*'s decision to uphold the respondents' plea of issue estoppel without hearing any evidence on the alleged fraudulent misrepresentation from the parties concerned.[26] In light of this, relevant aspects of the HC and the SCA judgements are briefly examined below.

3. Overview of the HC judgement

Two distinct actions for specific performance and damages were brought to the court *a quo* for adjudication at different times by the trust[27] and the respondents[28] respectively. In the first action, the trust sued the first respondent for

[20] *Prinsloo* case: par. 4.
[21] *Prinsloo* case: par. 5.
[22] *Prinsloo* case: par. 6.
[23] *Prinsloo* case: par. 7.
[24] *Prinsloo* case: pars. 8-9.
[25] *Prinsloo* case: par. 9.
[26] *Prinsloo* case: pars. 1; 2 & 9.
[27] *Prinsloo* case: pars. 4.
[28] *Prinsloo* case: pars. 1; 2 & 9.

specific performance and/or the payment of the agreed purchase price in respect of Rykdom farm.[29] As earlier stated,[30] this claim was opposed by the second respondent who, *inter alia*, argued that the third appellant had fraudulently misrepresented to him the prior existence of the Mapela community land claim against Rykdom farm before the conclusion of the sale.[31] On the contrary, the third appellant argued that he had erroneously given the second respondent the assurance that there was no land claim against Rykdom farm. The third appellant also maintained that the first respondent was bound by the provisions of the deed of sale and not allowed to rely on the alleged untrue representation by the seller in relation to Rykdom farm.[32] It is on this basis that the court *a quo* was called upon to decide whether the third appellant was guilty of the material fraudulent misrepresentation.[33] In this regard, it is submitted that the third appellant could have inserted the clause that prohibited the buyer from relying on any untrue representations of the seller to indirectly cover up the Mapela community land claim which was allegedly pending in respect of Rykdom farm. Accordingly, the court *a quo* dismissed the urgent application of the trust probably due to its lack of prospects to succeed. Nevertheless, it is submitted that Webster J erred by finding the third respondent guilty of deliberately and fraudulently withholding information on the Mapela community land claim from the second respondent without hearing any oral and other relevant evidence from parties concerned.[34]

In respect of the second action, the appellants rejected the respondents' claim for delictual damages citing that the third appellant was unaware of any land claim in respect of Rykdom farm prior to the sale.[35] This gave rise to the respondents' submission that the appellants were estopped from denying the fraudulent misrepresentation on the basis of issue estoppel.[36] The respondents argued further that their plea of *res judicata* in the form of issue estoppel must be heard in the court *a quo* before the hearing of any evidence.[37] As a result, Pretorius J upheld the respondents' plea of issue estoppel with costs. In this regard, it is submitted that Pretorius J indirectly and erroneously endorsed the earlier wrong verdict by Webster J which held the third appellant guilty of fraudulently misrepresenting information on the alleged pending land claim to the second respondent without hearing evidence from all the relevant parties. Consequently, the appellants appealed against this verdict in the SCA as discussed below. However, before this SCA verdict is analysed, it imperative to briefly highlight some challenges that could ensue from the application issue estoppel.

[29] *Prinsloo* case: pars. 4.
[30] *Prinsloo* case: par. 7; related remarks in par. 2 above.
[31] *Prinsloo* case: par. 4.
[32] *Prinsloo* case: par. 5; see related remarks in par. 2 above.
[33] *Prinsloo* case: pars. 6-8.
[34] *Prinsloo* case: pars. 6-8.
[35] *Prinsloo* case: par. 9; see related remarks in par. 2 above.
[36] *Prinsloo* case: par. 9; see related remarks in par. 2 above.
[37] *Prinsloo* case: pars. 1 & 9.

4. Selected challenges associated with issue estoppel in South Africa

The concepts of *res judicata* and issue estoppel are largely founded on the protection of public policy and individual rights for the litigation parties by preventing repetitive litigation of matters that were previously decided by a competent court between same parties, on the same cause and for same relief. For instance, it is generally submitted that the promotion of finality of judicial decisions in any litigation is in the public's best interest.[38] Nonetheless, the effective application of issue estoppel is sometimes marred with confusion and inconsistencies in South Africa from time to time.[39] In this regard, it is submitted that the relaxation of the requirements of *res judicata* by the courts through issue estoppel must not be construed as a diversion from, or abandonment of common law principles to adopt English law principles.[40] Consequently, although issue estoppel can be usefully utilised to preserve the object of the doctrine of *res judicata*, it is submitted that issue estoppel should not be treated as a separate doctrine and/or be formally incorporated in the South African law to avoid further interpretational confusion.[41] This confusion is usually worsened by the fact that issue estoppel is largely governed by English law principles while *res judicata* is governed by Roman-Dutch law.[42] Thus, issue estoppel has continued to be inconsistently enforced in our courts to the detriment of the affected parties in many instances.[43] In light of this, the courts should be encouraged to continue employing the approach adopted in *Royal Sechaba* case[44] which, *inter alia*, stipulates that issue estoppel should not to be interpreted as an importation of English law principles but rather as a qualified application of *res judicata* in the South African estoppel law as initially stated in *Boshoff v Union Government*.[45]

Another challenge posed by issue estoppel is regarding how to distinctly enforce it in the courts without confusing its requirements with those of *res judicata*. The confusion is usually exacerbated by the fact that the requirements of

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[38] Sinai 2011: 360-362.

[39] *Prinsloo* case: pars. 1-28; *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 1-28; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 670I-671B & B. Wunsh, *op. cit.* (1990), pp. 203-212.

[40] *Prinsloo* case: pars. 10 & 23; *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 1-28; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 670I-671B.

[41] *Prinsloo* case: pars. 1-28; *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 1-28; B. Wunsh, *op. cit.* (1990), p. 203-212; J.C. Sonnekus, The Law of Estoppel in South Africa, Durban: LexisNexis, 2012, p. 10-30.

[42] B. Wunsh, *op. cit.* (1990), p. 198-218.

[43] J. C. Sonnekus, *op. cit.* (2012), p. 10-35; *Prinsloo* case: pars. 1-28; *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 1-28.

[44] *Royal Sechaba* case: pars. 11-12.

[45] *Boshoff v Union Government*: par. 345 read with *Prinsloo* case: pars. 10 & 23; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 11-12; *Hyprop Invesments Ltd v NSC Carriers and Forwarding CC & Others* [2014] (2) All SA 26 (SCA): par. 14; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite* 2000 CC & others 2013 (6) SA 499 (SCA): par. 43.

issue estoppel and *res judicata* are relatively similar. Moreover, issue estoppel is only applicable in South Africa where all the requirements of *res judicata* are not satisfied.[46] Consequently, where the plea of *res judicata* is raised in the absence of a common cause of action and relief claimed by the relevant parties in previous and current litigation, the courts will apply issue estoppel to the latter litigation.[47] In this regard, it has been submitted that the application of issue estoppel in South Africa should not be construed as implying an abandonment of the principles of the common law in favour of those of English law.[48] Accordingly, Botha JA submits that the main defence remains that of *res judicata* which could be sometimes enforced as issue estoppel in South Africa.[49] However, the effective and consistent application of issue estoppel has been sometimes impeded by the fact that issue estoppel is still not formally incorporated into South African law to date.[50] Having said this, it is now important to examine how these and other related challenges were addressed by the SCA in the next sub-heading.

5. Evaluation and analysis of the SCA judgement

As highlighted above,[51] the respondents instituted an action for delictual damages against the appellants in the court *a quo* for the fraudulent misrepresentation that was allegedly made by the third appellant. These allegations of fraud were rejected by the appellants who once again argued that the third appellant was unaware of any land claim in respect of Rykdom farm prior to the sale.[52] Consequently, the respondents argued that, in light of the earlier court *a quo* decision by Webster J, the appellants were estopped from denying their fraudulently misrepresentation on the basis of issue estoppel.[53] The respondents also sought and obtained an order that their plea of issue estoppel must be heard before the hearing of any evidence.[54] Astonishingly, Pretorius J granted the aforesaid order and upheld the respondents' plea of issue estoppel with costs without hearing any oral evidence from the litigating parties.[55] Thereafter, the appellants sought and obtained the leave to appeal against this verdict. The appellants approached the SCA and argued that the plea of *res judicata* in the form

[46] *Horowitz v Brock* 1988 (2) SA 160 (AD): pars. 178H-179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD): par. 472.
[47] *Prinsloo* case: pars. 10; *Royal Sechaba* case: pars. 11-16; J. Voet, *op. cit.* (1778), 44.2.3; *Bertram v Wood* 1893 (10) SC 177: par. 180.
[48] *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 669D; 667J-671B; *Prinsloo* case: pars. 10.
[49] *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 669D; 667J-671B; *Prinsloo* case: pars. 10.
[50] Roodt, 'Reflections on finality in arbitration' (2012) De Jure 485, p. 498-502.
[51] See pars. 2 & 3 above.
[52] *Prinsloo* case: par. 9; see related remarks in pars. 2 & 3 above.
[53] *Prinsloo* case: pars. 1 & 9; see related remarks in pars. 2 & 3 above.
[54] *Prinsloo* case: pars. 1 & 9; related comments in par. 3 above.
[55] *Prinsloo* case: pars. 1 & 9; related comments in par. 3 above.

of issue estoppel was incorrectly upheld by Pretorius J.[56] In other words, the appellants argued that issue estoppel was wrongly upheld by the court *a quo* because: (a) the same persons requirement was not satisfied since both the third appellant and the second respondent were not parties in the urgent application proceedings that were made by the trust; (b) it was unnecessary and inappropriate for Webster J (in the previous court *a quo*) to make findings of fraud on the basis of disputed allegations in motion proceedings, in order to dispose of the application.[57] The appellants contended further that it was unjust and unfair for Pretorius J to hold them guilty and bound by unnecessary and inappropriate findings of the previous court *a quo* in the present case that was instituted against them by the respondents for delictual damages.[58] Therefore, these and other related arguments are briefly examined below.

In order to explore the appellants' first argument, it is crucial to discuss the application of the requirements of *res judicata*. For one to successfully rely on *res judicata*, he or she must prove that the current matter under litigation was previously decided by a final judgement of a competent court between the same parties (*idem actor*) or persons (*eadem persona*) for the same relief, thing or right (*eadem res*) on the same ground or same cause of action (*eadem causa petendi*).[59] If any of these requirements are not satisfied, the defence of *res judicata* will not succeed.[60] In such instances, the courts are empowered to relax the three-fold common law prerequisites of *res judicata*. For instance, courts may relax the requirement that the: (a) same relief, right or thing must be claimed; and (b) same cause of action must have been adjudicated or previously decided by a competent court between the same parties.[61] Such relaxation usually gives rise to the defence of issue estoppel. The courts will, *inter alia*, investigate whether an issue of fact or law was an essential element of the previous judgement on which reliance is placed before upholding the issue estoppel defence.[62] Nonetheless, the relaxation of the three-fold requirements of *res judicata* must be carefully enforced by the courts on a case by case basis.[63] In this regard, the SCA correctly decided that there must be objective and appropriate circumstances that justify the relaxation of the three-fold

[56] *Prinsloo* case: pars. 1; 2 & 9.
[57] *Prinsloo* case: par. 12.
[58] *Prinsloo* case: par. 12.
[59] See related comments on par. 1 above.
[60] *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A): pars. 45E-F; Voet 1778: 44.2.3 & 42.1.1; *Bertram v Wood*: par. 180; *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*: pars. 239F-H; *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 10-22; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 670I-671B; *Prinsloo* case: pars. 10-11.
[61] *Boshoff v Union Government*: par. 345; *Smith v Porritt*: par. 10; *Royal Sechaba* case: pars. 19-22; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars: 670I-671B; *Prinsloo* case: pars. 10-11.
[62] *Prinsloo* case: par. 10.
[63] *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*: pars. 67E-F.

requirements of *res judicata* to promote equity and fairness to all the litigating parties.[64]

The SCA correctly held that the relief claimed by the trust in its urgent application was different from the relief claimed by the respondents in their delictual damages action against the appellants. Moreover, the SCA correctly decided that the pertinent issue regarding the third appellant's alleged fraudulent representation in respect of Rykdom farm as decided by Webster J was virtually the same issue that was later decided again by Pretorius J.[65] Thus, issue estoppel is the correct plea that should have been raised by the respondents from the onset instead of *res judicata*. In relation to this, the SCA correctly held that the same persons' requirement must not be rigidly interpreted to mean only the identical individuals concerned in both proceedings.[66] This suggests that the same persons' requirement could also include privies of the persons concerned or parties who are regarded in law as being the same for the purposes of *res judicata* or issue estoppel.[67] On the other hand, it appears that the appellants' argument that the court *a quo* erred to enforce the same persons' requirement was mainly based on the premises that the persons litigating in their personal capacity are not bound by earlier decisions against them when they were acting as representatives of another.[68] In this regard, it is submitted that the appellants wrongly concluded that the third appellant and the second respondent were both not bound by any decisions they made in their representative capacities. Therefore, the SCA held that the court *a quo* correctly decided that the third appellant was bound by an earlier decision of Webster J that he committed fraud despite the fact that such decision was wrong. This was probably done because the third appellant was the representative and controlling mind of the trust.[69] Consequently, the SCA correctly dismissed the appellants' argument that the same persons' requirement was not satisfied by the respondents. However, it is submitted that both the court *a quo* and the SCA erred by failing to distinguish between the personal and representative conduct of the third appellant for the purposes of the application of issue estoppel.[70]

With regard to the second argument, the appellants maintained that it was not necessary for Webster J to arrive at any final decision regarding whether or not the third appellant committed fraud in order to dismiss the trust's urgent application to compel specific performance from the respondents. In light of this, the appellants correctly argued that Webster J should not have decided the disputed issue of whether fraud was committed on motion proceedings without the benefits

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[64] *Prinsloo* case: par. 10; *Bertram v Wood*: par. 180.
[65] *Prinsloo* case: par. 11.
[66] *Prinsloo* case: par. 13.
[67] J. Voet, *op. cit.* (1778), 44.2.5; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A): par. 654.
[68] *Shokkos v Lampert* 1963 (3) SA 421 (W): par. 426 (A); *Prinsloo* case: par. 14.
[69] *Prinsloo* case: pars. 14-15; *Man Truck & Bus SA (Pty) Ltd v Dusbus Leasing CC* 2004 (1) SA 454 (W): par. 39.
[70] *Prinsloo* case: pars. 14-15.

inherent in the hearing of oral evidence and cross-examination of witnesses.[71] Accordingly, the SCA correctly decided that the general rule (save in exceptional, farfetched or untenable circumstances) is that disputes of fact arising on affidavit must not be finally determined on the papers without the hearing of oral evidence and cross-examination of witnesses.[72] In other words, the dispute of fact that arose in the motion proceedings before Webster J fell outside the ambit of the exceptional circumstances since the allegations of fraud that were levelled against the third appellant were not farfetched or untenable that they could be rejected on affidavits. Thus, the SCA correctly held that the urgent application for final relief by the trust was doomed to fail.[73] Nonetheless, it was unjust and unfair for the court *a quo* to hold the appellants bound by Webster J's inappropriate findings which were neither based on oral evidence nor the cross-examination of witnesses.[74] It is submitted that Webster J should have allowed the appellants to have their own oral version of the facts regarding the alleged fraud to be heard in court. Moreover, the SCA correctly held that Webster J should have only dismissed such facts before the cross-examination of witnesses if it was clearly farfetched or untenable.[75] The SCA also correctly decided that the respondents were entitled to rely on Webster J's erroneous finding of fraud for the purpose of *res judicata* and/or issue estoppel.[76] Nevertheless, the SCA correctly decided that the appellants' main ground of appeal was that the court *a quo* chose a fundamentally wrong approach by precluding them through the application of issue estoppel from denying the allegations of fraud on the part of the third appellant.[77] Accordingly, it is submitted that the upholding of issue estoppel[78] by the court *a quo* was inequitable and unfair to the appellants since it denied them the opportunity to test the respondents' allegations of fraud through oral evidence and cross examination of witnesses. While the rigid application of the requirements of *res judicata* could give rise to repetitive law suits between the same parties and the possibility of conflicting decisions,[79] the

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[71] *Prinsloo* case: pars. 12 &16.

[72] The SCA correctly held that the concomitant rule regarding material factual disputes arising on affidavit in motion proceedings is that the applicant may only succeed in exceptional circumstances where the respondent's version of the disputed facts can safely be rejected on the papers as farfetched or untenable. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A): pars. 634E-635C; *Prinsloo* case: pars. 17.

[73] *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A): par. 355; *Prinsloo* case: pars. 17.

[74] *Prinsloo* case: pars. 12; 16 &17; see related remarks 3 & 4 above.

[75] *Prinsloo* case: pars. 18-19; also see *Sewmungal and another NNO v Regent Cinema* 1977 (1) SA 814 (N): pars. 819A-C.

[76] *Prinsloo* case: par. 20; also see *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A): pars. 564C-G, where it was held that: "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..."

[77] *Prinsloo* case: pars. 21-22.

[78] *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BHC); *Holtzhausen v Gore NO* 2002 (2) SA 141 (C), for related comments on the application of issue estoppel and *res judicata* in South Africa.

[79] *Evins v Shield Insurance Co Ltd*: par. 835G; *Prinsloo* case: par. 23.

court *a quo* erred by upholding issue estoppel against the appellants without hearing oral evidence and cross examination of witnesses. The reckless relaxation of the strict requirements of *res judicata* by the court *a quo* through issue estoppel created an inequity and unfairness towards the appellants.[80] In this regard, the SCA correctly held that the court *a quo*'s decision to uphold issue estoppel against the appellants without hearing oral evidence and cross examination of witnesses violated their constitutional rights to fair trial and access to courts.[81] In other, Webster J did not adequately investigate the allegations of fraud that were levelled against the third appellant. On this basis, it was both wrong and inappropriate for the court *a quo* to find the third appellant guilty of fraud and later uphold issue estoppel in respect thereof against the appellants.[82] In short, it is submitted that the SCA correctly upheld the appellants' appeal with costs and set aside the order of the court *a quo* by dismissing the respondents' initial plea of issue estoppel.[83]

6. Concluding remarks

The article has exposed some challenges associated with the application of issue estoppel and *res judicata* in South Africa.[84] These challenges are usually encountered by the courts in relation to the relaxation of the requirements of *res judicata* and the application of issue estoppel. Accordingly, such challenges are mainly two-fold, first, the potential repetitive law suits and conflicting decisions that could ensue from the rigid application of the requirements of *res judicata*. Second, the potential inequity and unfairness on the part of the litigating parties due to reckless relaxation of the requirements of *res judicata* through issue estoppel.[85] These and other related challenges were highlighted in *Prinsloo* case. In this case the appellants challenged the initial verdict of the court *a quo* which had found the third appellant guilty of making a fraudulent misrepresentation to the second respondent.[86] The appellants argued that the court *a quo* erred by upholding the respondents' plea of *res judicata* in the form of issue estoppel without conducting proper investigations on the alleged fraudulent misrepresentation.[87] This court *a quo* verdict reveals the inconsistences and challenges that sometimes confront our courts in relation to the enforcement of issue estoppel. In relation to this, it was submitted that the SCA correctly held that the court *a quo*'s decision to uphold issue estoppel against the appellants without hearing oral evidence and cross examination of witnesses was unconstitutional and unfair to them.[88] Accordingly, the SCA correctly upheld the appellants' appeal with costs and

[80] See related comments on related challenges of issue estoppel in par. 4 above; *Prinsloo* case: pars. 24-25; also see *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1966] 2 All ER 536 (HL): pars. 554G-H.
[81] S 34 of the Constitution of South Africa, 1996; *Prinsloo* case: par. 26.
[82] *Prinsloo* case: par. 27.
[83] *Prinsloo* case: par. 28.
[84] See pars. 3-5 above.
[85] See pars. 3-5 above.
[86] See pars. 3 & 5 above.
[87] See pars. 3 & 5 above.
[88] See par. 5 above; *Prinsloo* case: par. 26

dismissed the respondents' initial plea of issue estoppel.[89] Consequently, the verdict of the SCA in *Prinsloo* case should be welcomed as positive move towards combating the inconsistencies and negative challenges that are associated with the application of issue estoppel in the South Africa to date. It is also submitted that issue estoppel should be formally incorporated into South African law. This could enhance its future application and enforcement by the courts in South Africa.

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[89] *Prinsloo* case: par. 28.