Aspects of the application of issue Estoppel on directors' fiduciary duties in South Africa: possible lessons from the United Kingdom and related jurisdictions *Royal Sechaba* case[1]

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Abstract

The doctrine of estoppel precludes a person (asserter) from asserting something different or contrary to what is implied by a previous action, conduct or statement of that person or by a previous pertinent judicial determination. While there are various types of estoppel, this article is primarily focused on the application of issue estoppel in relation to certain aspects of the directors' fiduciary duties in South Africa (s 76 of the Companies Act 71 of 2008 (Companies Act 2008)), in light of the judgment in Royal Sechaba v Coote (366/2013) [2014] ZASCA 85 (30 May 2014) (Royal Sechaba case). Issue estoppel could be defined to include instances where a person is precluded from re-litigating or raising a particular issue in a cause of action that was previously decided by a final judgment of a competent court between the same parties in future cases that have a different cause of action involving such parties. Issue estoppel is closely related to res judicata. For instance, both issue estoppel and res judicata are generally aimed at preventing the re-litigation of the same issues and same cause of actions that were previously decided by a final judgment in the relevant courts between same parties. Nonetheless, it is widely acknowledged that the application these two concepts is quite different in practice. For instance, some jurisdictions such as the United Kingdom (UK) and South Africa employs English law and Roman-Dutch law (common law) principles respectively, to distinguish between issue estoppel and res judicata. Likewise, similar common law principles are employed in the United States of America (USA), Canada and Australia to distinguish res judicata and issue estoppel in various ways. For example, issue estoppel is sometimes referred to as collateral estoppel, issue preclusion, claim preclusion or cause of action estoppel in USA, Canada and Australia. Despite this, it should be noted that a detailed discussion of the different requirements, merits and demerits of issue estoppel and res judicata in various jurisdictions is beyond the scope of this article. Put differently, this article provides a brief discussion of the application of issue estoppel to commercial agreements (certain aspects of the directors' fiduciary duties) in South Africa in accordance with the Royal Sechaba case. This is done to investigate whether the requirements of issue estoppel were correctly applied and enforced in Royal Sechaba case.

Keywords: *issue Estoppel, res judicata, fiduciary duties, application, South Africa.*

JEL Classification: K22, K41

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1. Introduction

The doctrine of estoppel precludes a person (asserter) from asserting something different or contrary to what is implied by a previous action, conduct or statement of that person or by a previous pertinent judicial determination. While there are various types of estoppel, this article is primarily focused on the application of issue estoppel in relation to certain aspects of the directors' fiduciary duties in South Africa,[3] in light of the judgement in *Royal Sechaba v Coote* (366/2013) [2014] ZASCA 85 (30 May 2014) (*Royal Sechaba* case). Issue estoppel could be defined to include instances where a person is precluded 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.[4] Issue estoppel is closely related to *res judicata*. For instance, both issue estoppel and *res judicata* are generally aimed at preventing the re-litigation of the same issues and same cause of actions that were previously decided by a final judgement in the relevant courts between same parties. Nonetheless, it is widely acknowledged that the application these two concepts is quite different in practice.[5] For instance, some jurisdictions such as the United Kingdom (UK) and South Africa employs English law and Roman-Dutch law (common law) principles respectively, to distinguish between issue estoppel and *res judicata*.[6] Put differently, the UK and other European Union (EU) countries such as the Republic of Ireland, Cyprus and Northern Ireland distinguishes between issue estoppel and *res judicata* through their relevant English common law principles. Likewise, similar common law principles are employed in the United States of America (USA), Canada and Australia to distinguish *res judicata* and issue estoppel in various ways. For example, issue estoppel is sometimes referred to as collateral estoppel, issue preclusion, claim preclusion or cause of action estoppel in USA, Canada and Australia.[7] Despite this,

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[3] Section 76 of the Companies Act 71 of 2008 (Companies Act 2008).

[4] Y. Sinai, 'Reconsidering *Res judicata*: A Comparative Perspective', 23 *Duke Journal of Comparative and International Law* (2011), p. 353 358; B. Wunsh, 'Is Issue Estoppel Part of our Law?', 2 *Stell LR* (1990), pp. 198 198-218 and C. Roodt, 'Reflections on Finality in Arbitration', 45 *De Jure* (2012), p. 485 502-503.

[5] M. Elvy, L. Hui and T. Gaffney, 'A One-stop Shop? Issue Estoppel and the Limits to Forum Shopping in Enforcement of Arbitral Awards', volume unknown *Ashurst Arbitration Update* (2014), p. 1 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' volume unknown *Davies Publications* (2012), p.1 2-36 and *Royal Sechaba* case pars 10-15.

[6] *Royal Sechaba* case pars 11-13; R. Nazzini, 'Remedies at the Seat and Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel and Abuse of Process in English Law', 7 *Contemp. Asia Arb. Journal* (2014), p. 139 149-158.

[7] M. Elvy, L. Hui and T. Gaffney, volume unknown *Ashurst Arbitration Update* (2014), p. 1-2; Y. Sinai, 23 *Duke Journal of Comparative and International Law* (2011), p. 357-360; B. Wunsh, 2 *Stell LR* (1990), p.198-203; M.T. Maniago and C. R. Chiasson, 'Court Reaffirms Application of *Res judicata* and Issue Estoppel to Commercial Arbitrations', unknown volume *Arbitration & ADR*, (2016) p. 1 1-2.

it should be noted that a detailed discussion of the different requirements, merits and demerits of issue estoppel and *res judicata* in various jurisdictions is beyond the scope of this article. Consequently, the requirements and enforcement of issue estoppel and *res judicata* in the UK and other jurisdictions will only be referred to in passing and where applicable, for the purposes of recommending possible measures that could be employed to enhance such enforcement in South Africa. Put differently, this article provides a brief discussion of the application of issue estoppel to commercial agreements[8] in South Africa in accordance with the *Royal Sechaba* case. This is done to investigate whether the requirements of issue estoppel were correctly applied and enforced in *Royal Sechaba* case. Accordingly, the facts, High Court (HC) judgement, Arbitration Appeal Tribunal (Appeal Tribunal) judgement and the Supreme Court of Appeal (SCA) judgement in *Royal Sechaba* case are briefly discussed below.

2. Overview of the facts

Mr Grant William Coote (first respondent) and Mr Daniel Elardus Engelbrecht (second respondent) were employees and directors of Royal Sechaba Holdings (Pty) Ltd (the appellant).[9] During the period between February 2007 and September 2009, the first and second respondents (respondents) were employed as Chief Executive Officer (CEO) and Chief Operating Officer (COO) of the appellant respectively. On 1 August 2006, the appellant entered into a written contract of employment with Mr Louis Martin Jones (third respondent). The appellant was represented by the first respondent while the third respondent acted personally. Accordingly, the third respondent was appointed by the appellant as its Director of Business Development with effect from 1 March 2007. Furthermore, the appellant and the third respondent concluded another agreement entitled the "Addendum to Employment Agreement" (Addendum) which was effective from 1 March 2007. This Addendum stipulated that the third respondent would be paid a commission by the appellant on every contract he procured for the benefit of the appellant. Moreover, the appellant was obliged to pay an incentive commission to the third respondent for overseeing the performance of the aforesaid contracts.[10] The Addendum stated, *inter alia*, that the third respondent was entitled to receive at least a 9% commission and incentive payments for all new customers that he brought to the appellant. Such commission and incentives were payable quarterly in arrears by the appellant to the third respondent in terms of the net profit including any estimated value of the assets that will accrue to the appellant at the end of each contract. Likewise, commissions, administration fees and other

[8] This includes certain aspects of the directors' fiduciary duties in South Africa.

[9] This suggests that section 76 of the Companies Act 2008 was applicable to the first and second respondents.

[10] *Royal Sechaba* case par 2.

expenses payable to the appellant by the third respondent were deducted from the net profit of each contract.[11]

It is stated that the third respondent was very successful in procuring new business contracts for the appellant. In relation to this, the appellant paid the third respondent an amount of almost R24 million between May 2007 and May 2009. These payments were authorised by the first and second respondents on behalf of the appellant. In July 2009, these payments were the subject of an investigation conducted by an auditor, Mr André Dames (auditor) at the instance of the appellant. The auditor concluded that the payments made to the third respondent were wrongly calculated on gross profit instead of net profit as indicated in the Addendum. The auditor also found that the third respondent had received some payments before they were due to him as provided for in terms of the payment schedule in clause 1 of the Addendum. Furthermore, the auditor discovered that the third respondent had claimed and received commission on a purported new business which he did not procure for the appellant.[12] On 30 September 2009, the first and second respondents were dismissed by the appellant for, *inter alia*, authorising unentitled payments to the third respondent. Nevertheless, the first and second respondents disputed that the third respondent was overpaid. They argued that the term "net profit" in the Addendum meant "net contract contribution" which differs from net profit in the ordinary accounting sense. The first and second respondents also argued that the payment schedule in the Addendum was not adhered to because they had entered into an oral agreement with the third respondent which authorised him to receive his full sales commission in advance whenever the cash flow permitted.[13] Due to these disputes, both the employment contract and the Addendum between the appellant and the third respondent were cancelled. Subsequently, the aforesaid disputes were referred to the arbitrator. The arbitrator was tasked to, *inter alia*, determine (a) the interpretation of the Addendum, (b) whether the Addendum was varied by way of a further oral agreement, and (c) whether the third appellant was overpaid. The first and second respondents were key witnesses during the arbitration and they testified on behalf of the third respondent.[14]

The arbitrator concluded that the term "actual net profit" in clause 3 of the Addendum (read with clause 4 of the Addendum), meant net profit in the accounting sense. This suggests that the term "actual net profit" meant net profit after all the expenses had been taken into account. Furthermore, the arbitrator discovered that the third respondent did not procure any contract in respect of the Ingula Dam for the appellant. Accordingly, the third respondent was not entitled to receive any commission or incentive in respect of the Ingula Dam.[15] The third respondent appealed against the arbitrator's award to the Appeal Tribunal. In this

[11] *Royal Sechaba* case par 3.
[12] *Royal Sechaba* case par 4.
[13] *Royal Sechaba* case par 5.
[14] *Royal Sechaba* case par 6.
[15] *Royal Sechaba* case par 7.

regard, the appellant also appealed against certain findings of the arbitrator. However, the Appeal Tribunal upheld the third respondent's appeal and dismissed the appellant's own cross-appeal and substituted the arbitrator's award with an order which obliged the appellant to pay the third respondent an amount of R 1 673 608, 55 plus interest and the costs of the arbitration.[16] This was done because the Appeal Tribunal held that the term "net profit" in clauses 1 and 3 of the Addendum meant "net contract contribution" as contended by the third respondent as well as the first and second respondents. The Appeal Tribunal also held that the parties had concluded a further oral agreement which empowered the third respondent to be paid in advance and not in tranches as provided in the Addendum whenever the appellant had sufficient cash resources. It is against this background that the appellant instituted a review application in the North Gauteng HC in terms of the Arbitration Act,[17] for the setting aside of the Appeal Tribunal's award. In other words, the appellant instituted an action against the respondents in the HC for the payment of damages of R13 122 516 (and/or R4 140 000) for the alleged breach of their fiduciary duties. Consequently, the respondents raised a special plea of issue estoppel. Accordingly, this plea was upheld by the HC and the appellant's claim was dismissed with costs. The appellant was granted the leave to appeal and it appealed in the SCA.[18]

Consequently, the appellant appealed against the judgement of the both the Appeal Tribunal and the HC in the SCA. The appellant argued that the plea of issue estoppel had been wrongly upheld by the HC on two main grounds namely: (a) the same person requirement was not met in that the first and second respondents were not parties to the third respondent's arbitration; (b) the same cause requirement was not satisfied since some issues which arose in the appellant's claim against the first and second respondents were not the same as those determined in the arbitration. On the contrary, the first and second respondents argued that they were privies of the third respondent (*Royal Sechaba* case par 10). Given this background, the validity of the Appeal Tribunal, the HC and the SCA's judgements as well as the various arguments of the appellant and the respondents are discussed below.

3. Overview of the Arbitration and Appeal Tribunal judgements

After an investigation into the first and second respondents' dealings, the auditor unearthed some unentitled and over-payments that were made to the third respondent at the instance of the first and second respondents.[19] Consequently, the first, second and third respondents were dismissed by the appellant. This dismissal was objectively justified since the first and second respondents had breached their fiduciary duties by authorising some undue and over-payments for the benefit of the third respondent in contravention of the relevant provisions of the Companies

[16] *Royal Sechaba* case par 8.
[17] 42 of 1965 (Arbitration Act), see section 33(1).
[18] *Royal Sechaba* case pars 1 and 9.
[19] *Royal Sechaba* case pars 4 and 5.

Act 2008.[20] The Companies Act 2008 provides, *inter alia*, that any director of a company who does not exercise his powers and functions: (a) in good faith; (b) in the best interests of the company; and (c) with the degree of care, skill and diligence that is reasonably expected of him may be disqualified, removed or held personally liable for the damages incurred by the company or any affected persons unless he is indemnified by the company concerned or proves that he objectively took some diligent steps to avoid such damages.[21] In other words, had the first and second respondents diligently performed their duties in accordance with the Companies Act 2008 and scrutinised the payment schedule in the Addendum, they could have prevented the over-payments which they made to the third respondent.

Moreover, the employment Addendum between the appellant and the third respondent was cancelled.[22] In this regard, it is submitted that the appellant's decision to task the auditor to investigate the conduct of its directors (the first and second respondents) was justifiably consistent with the Companies Act 2008.[23] It is also submitted that the auditor correctly stated that the payments made to the third respondent were wrongly calculated on gross profit instead of net profit as provided for in the Addendum.[24] Despite the arguments to the contrary by all the respondents,[25] it is submitted that the auditor correctly held that the third respondent had received some payments and commission on a purported new business which he had not procured for the appellant as stipulated in clause 1 of the Addendum.[26]

Eventually, the arbitrator was appointed and tasked to resolve the disputes between the appellant and the third respondent.[27] The arbitrator held that the term "actual net profit" in clause 3 of the Addendum (read with clause 4 of the Addendum), meant net profit in the accounting sense.[28] This was contrary to the respondents' argument that the term "net profit" in the Addendum meant "net contract contribution".[29] In light of this, it is submitted that the arbitrator correctly held that the third respondent was not entitled to receive any commission in respect of the Ingula Dam contract since he did not procure it for the appellant.[30] Nevertheless, this arbitrator's verdict was strongly challenged by the third respondent in the Appeal Tribunal. Ironically, the Appeal Tribunal held that the term "net profit" in clauses 1 and 3 of the Addendum meant "net contract contribution" as contended by the third respondent as well as the first and second

[20] See section 76(2) to (5) read with sections 69 and 71.
[21] Section 76(2) to (4) read with sections 69; 71 and 77.
[22] *Royal Sechaba* case pars 5 and 6.
[23] Section 76 read with sections 28 to 30; 34 and 75.
[24] See related remarks in par 2 above.
[25] *Royal Sechaba* case par 5.
[26] The payment made to the third respondent in respect of the Ingula Dam is a case in point. See *Royal Sechaba* case pars 4 and 7.
[27] See related remarks in par 2 above; *Royal Sechaba* case par 6.
[28] *Royal Sechaba* case par 7.
[29] *Royal Sechaba* case par 5.
[30] *Royal Sechaba* case par 7.

respondents.[31] The Appeal Tribunal held further that the parties concerned had concluded an oral agreement which empowered the third respondent to be paid in advance and not in tranches as provided in the Addendum whenever the appellant had sufficient cash resources.[32] Notwithstanding the possible existence of an oral agreement that could have been concluded between the appellant and the third respondent in terms of which the latter was allegedly obliged to be paid in advance in respect of certain contracts, it is submitted that the Appeal Tribunal erred by interpreting the alleged oral agreement as being enforceable against the appellant even in instances where the third respondent did not perform his own contractual obligations. In this regard, the author argues that it was both unfair and contractually absurd that the Appeal Tribunal rejected the arbitrator's verdict and obliged the appellant to pay a commission to the third respondent in respect of the purported new contracts (such as the Ingula Dam contract) that he did not procure for the benefit of the appellant.[33] Accordingly, the Appeal Tribunal incorrectly rejected the arbitrator's award against the third respondent and ordered the appellant to pay the third respondent an amount of R 1 673 608, 55 plus interest and the costs of the arbitration.[34]

4. Overview of the HC judgement

As stated earlier,[35] the verdict of the Appeal Tribunal was strongly opposed by the appellant in the HC.[36] The appellant correctly invoked section 33(1) of the Arbitration Act and instituted a review application in the HC (court *a quo*) for the setting aside of the Appeal Tribunal's decision which mandated him to pay the third respondent an amount of R 1 673 608, 55 plus interest and the costs of the arbitration.[37] Precisely, the appellant sued the first and second respondents in the HC for the payment of R13 122 516 (and/or R4 140 000) damages for their alleged misconduct and/or breach of their fiduciary duties. Nonetheless, the respondents disputed the appellant's claim for damages and raised a special plea of issue estoppel. This plea was upheld by Vorster AJ and the court *a quo* dismissed the appellant's claim with costs.[38] It appears that the court *a quo* upheld the Appeal Tribunal's verdict and the first and second respondents' issue estoppel claims without giving due regard to the auditor and arbitrator's findings as well as the contents of the Addendum between the appellant and the third respondent.[39] The court *a quo* overlooked the fact that both the auditor and arbitrator held that the first and second respondents had unlawfully authorised the third respondent to

[31] *Royal Sechaba* case pars 7 to 9.
[32] See earlier comments in par 2 above; *Royal Sechaba* case par 9.
[33] *Royal Sechaba* case par 7 to 9.
[34] *Royal Sechaba* case par 8.
[35] See pars 2 and 3 above.
[36] *Royal Sechaba* case pars 1; 9 and 10.
[37] *Royal Sechaba* case par 8.
[38] *Royal Sechaba* case pars 1; 8 and 9.
[39] *Royal Sechaba* case pars 3 to 10; related remarks in par 2 above.

receive undue commission in respect of the Ingula Dam contract and other over-payments out of the gross profit instead of the net profit as provided for in the Addendum.[40] Both the auditor and arbitrator did not confirm that the Addendum was altered in any way by the purported oral agreement between the appellant and the third responded. In this regard and in order to determine whether the court *a quo* correctly upheld the aforesaid issue estoppel plea, the application and possible interrelationship between issue estoppel and *res judicata* is briefly discussed below.

4A. Influence of the UK and related jurisdictions' common law on the HC judgement

Most legal systems derived their estoppel laws from the UK's English common law. For instance, several countries such as the Republic of Ireland, Cyprus, Northern Ireland Ireland, England, Wales, Australia, New Zealand, Bangladesh, India, Pakistan, Canada (excluding Quebec), Hong Kong, USA (on a state level, excluding Louisiana), Nigeria, South Africa and other EU countries' relevant laws are influenced by the English common law. In addition, many others countries that were previously colonised by England have adopted mixed legal systems consisting of the English common law, Roman law, Roman-Dutch law and other laws. Notably, most English common law jurisdictions are guided by the *stare decisis* principle which obliges the courts to be bound by the previous court decisions that were made in respect of the same matter. Accordingly, *res judicata* is sometimes treated as cause of action estoppel or issue estoppel in the UK.[41] A similar approach is employed in Canada where *res judicata* is normally employed to balance the public interest in finality of litigation as well as the public interest in providing just and equitable redress to the affected persons. [42] Moreover, in India, it is also stated that the common law doctrine of *res judicata* must be carefully enforced to avoid any injustice to the affected persons.[43]

As indicated above, it is clear that under the English common law *res judicata* doctrine is sometimes treated as a form of estoppel (cause of action estoppel[44] or issue estoppel) in the UK.[45] Thus, cause of action estoppel and issue

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[40] *Royal Sechaba* case pars 4 to 7.

[41] See *Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) par 104, for further discussion on the distinction between "cause of action estoppel" and "issue estoppel"; also see *Johnson v Gore Wood and Company* (2001) 1 All ER 481 par 494; *Buehler v Chronos Richardson* (1998) 2 All ER 960 (CA) and *Virgin Atlantif v Zodiac* (2012) 4 All ER 715 (SC).

[42] *Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62 read with Rule 73(1) of the Rules of the Supreme Court of Canada.

[43] *M/s Northern Indian Caterers (India) Ltd v Lt Governor of Delhi AIR* 1980 SC 674; *The Indian Supreme Court in M S Ahlawat v State of Haryana and Another* 1999 Supp (4) SCR 160.

[44] Cause of action estoppel relates to the evidential and procedural measures that are employed by the courts to avoid contradictions with the previous final court judgements. C. Roodt, 45 *De Jure* (2012), p. 497.

estoppel are both recognised and enforced in the UK, especially, in the English courts.[46] The application of the doctrine of estoppel is hugely influenced by both the English common law and certain principles of the Roman law and/or Roman-Dutch law.[47] This hybrid approach has been sometimes interpreted inconsistently and confusingly by the courts in respect of the application of *res judicata* and issue estoppel in South Africa. Such confusion is attributed to many factors. For instance, although the application of issue estoppel and *res judicata* under both the English common law and the Roman-Dutch law respectively is generally aimed at combating the repetition of lawsuits that were finally decided by the courts on the same cause, same relief that involved the same parties, no issue estoppel is found in the Roman-Dutch law. In other words, issue estoppel is mainly influenced by the English common law while *res judicata* is influenced by the Roman-Dutch law.[48] Moreover, the confusion in the enforcement of the doctrines of issue estoppel and *res judicata* is exacerbated by the fact that issue estoppel is yet to be formally incorporated into the South African law.[49] These doctrines are also sometimes confusingly and inadequately defined by the relevant courts in South Africa.[50]

Res judicata could be defined to include instances where persons are precluded from re-litigating a matter, issue or cause of action that was previously decided by a final judgement of a competent court between the same parties in future cases involving such parties or their privies.[51] As indicated earlier,[52] a similar definition is also applicable to issue estoppel.[53] Furthermore, both *res judicata* and issue estoppel are largely based on the principles of public policy which seeks to combat the negative effects of autrefois acquit and/or autrefois convict doctrine on the part of the accused persons in UK, South Africa and other English common law jurisdictions. Both *res judicata* and issue estoppel are also aimed at promoting fairness and finality in litigation in Canada, UK, India, South Africa and other English common law jurisdictions. This indicates that issue estoppel and *res judicata* are relatively similar and interrelated despite the fact that *res judicata* originated from Roman-Dutch law while issue estoppel is largely

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[45] Issue estoppel relates to the fact or aspect of law that is crucial for the court to make its final determination of the claim or what is required to establish a cause of action. C. Roodt, 45 *De Jure* (2012), p. 497.

[46] *Henderson v Henderson* (1843) 3 Hare 100 pars 114-115; see C. Roodt, 45 *De Jure* (2012), p. 497.

[47] Notably, the English common law was introduced into South African law between1795-1910. See C. Roodt, 45 *De Jure* (2012), p. 498.

[48] C. Roodt, 45 *De Jure* (2012), p. 499-502; B. Wunsh, 2 *Stell LR* (1990), p. 203-212; J.C. Sonnekus, *The Law of Estoppel in South Africa* 3rd ed (Durban, Lexis Nexis, 2012), p. 10-35.

[49] C. Roodt, 45 *De Jure* (2012), p. 499.

[50] See *Richtersveld Community v Alexkor Ltd* 2000 1 SA 337 (LCC) 342C; *Horowitz v Brock* 1988 (2) SA 160 (AD) pars 178H to 179C; *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A) pars 664-669; *Le Roux v Le Roux* 1967 1 SA 446 (A) 463.

[51] R. Nazzini, 7 *Contemp. Asia Arb. Journal* (2014), p. 149-152; M.T. Maniago and C. R. Chiasson, unknown volume *Arbitration & ADR* (2016), p. 1-2.

[52] See par 1 above, for the definition of issue estoppel.

[53] P.J. Cavanagh, 'Issue Estoppel Whiplash: Supreme Court Divided on Fairness', 91 *The Canadian Bar Review* (2012), p. 473 474-482.

founded on English common law principles.[54] In order for one to successfully rely on *res judicata*, he must prove that the matter in question was previously decided by a competent court: (a) between same parties (*idem actor*) or persons (*eadem persona*); (b) for the same cause of action (*eadem causa pretendi*); and (c) for the same relief, thing or right (*eadem res*).[55] Likewise, for one to rely on issue estoppel, he must prove that the issue in question was previously decided by a competent court: between same parties (*idem actor*) or persons (*eadem persona*); and (b) for the same cause of action (*eadem causa pretendi*). However, unlike *res judicata*, issue estoppel does not strictly require that the same relief, thing or right must have been claimed or demanded by the parties concerned in a previous judgement of the relevant court.[56] This suggests that issue estoppel could apply where all the requirements for *res judicata* have not been satisfied by the parties concerned because the same relief, thing or right is not claimed, or the cause of action or issue in question (*eadem quaestio*) differs from the one adjudicated in a previous judgement.[57]

Thus, as highlighted above, issue estoppel is treated as a form of *res judicata* in some common law jurisdictions such as Canada, UK and USA.[58] For instance, in Canada and UK *res judicata* has two main forms namely: (a) issue estoppel; and (b) cause of action estoppel. Likewise, in the USA *res judicata* has two main forms namely: (a) issue preclusion or collateral estoppel; and (b) claim preclusion.[59] On the contrary, in South Africa, issue estoppel only applies where some of the requirements of *res judicata* are not met (and not as form of *res judicata per se*).[60] This entails that the South African courts are obliged to give first preference to the common law principles of *res judicata* before resorting to issue estoppel. In other words, although the requirements of *res judicata* must be meritoriously interpreted and flexibly enforced by the courts on a case by case basis, issue estoppel may only be applied to avoid abuse of the process and/or actual injustice to the affected parties as result of immutably enforcing the doctrine of *res judicata*. This approach is also upheld in jurisdictions such as Canada where the rationale for *res judicata* is to promote the orderly administration of justice

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[54] See related remarks above; *Royal Sechaba* case pars 11-13; B. Wunsh, 2 *Stell LR* (1990), pp. 198-218; R. Nazzini, 7 *Contemp. Asia Arb. Journal* (2014), p. 149-152.

[55] *Prinsloo No and Others v Goldex 15 (Pty) Ltd and Another* (243/11) [2012] ZASCA 28 (28 March 2012) (*Prinsloo* case); *Royal Sechaba* case pars 10-14; 19; *Horowitz v Brock* 1988 (2) SA 160 (AD) pars 178H to 179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD) par 472.

[56] *Royal Sechaba* case par 12.

[57] *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk* 1995 (1) SA 653 (A) pars 670I-671B; *Smith v Poritt and Others* 2008 (6) SA 303 (SCA) par 10.

[58] Y. Sinai, 23 *Duke Journal of Comparative and International Law* (2011), p. 357-360; S.S. Ruby, volume unknown *Davies Publications* (2012), p. 2-36 and R. Nazzini, 7 *Contemp. Asia Arb. Journal* (2014), pp. 149-152.

[59] Y. Sinai, 23 *Duke Journal of Comparative and International Law* (2011), p. 357-360.

[60] *Royal Sechaba* case par 13; *Boshoff v Union Government* 1932 TPD 345, which pioneered the application of issue estoppel in South African law.

through the courts.[61] The same approach is widely accepted in the UK, India and other English common law jurisdictions.[62]

Related aspects of the application of issue estoppel were also discussed in *Royal Sechaba* case where the appellant argued that the respondents' plea of issue estoppel was erroneously upheld by the HC because the same person and same cause requirements were not met.[63] In this regard, notwithstanding the fact that the same parties requirement is not immutable,[64] the first and second respondents were not lawfully recognised as parties to the third respondent's arbitration proceedings.[65] In other words, the first and second respondents failed to prove that they were privies of the third respondent. The concept of "privity" could be broadly defined to include a legally recognised mutual or successive relationship of the same interests that exists between two or more parties to an agreement or a contract.[66] Accordingly, the court *a quo* erred by upholding the respondents' issue estoppel plea since they were not in privity with the third respondent.

Furthermore, the fact that the arbitration proceedings did not determine whether the first and second respondents had breached their fiduciary duties as indicated in the appellant's initial action against them is *prima facie* proof that different issues were addressed in both the initial arbitration and the Appeal Tribunal proceedings. Put differently, the initial arbitration action dealt, *inter alia*, with the appellant's assertion that the respondents' breached their fiduciary duties by allowing undue and over-payments to be made to the third respondent. On the other hand, the Appeal Tribunal proceedings mainly dealt with aspects on whether the third respondent received undue commission and over-payments out of net contract contribution (gross profit) rather than net profit as initially stated in the Addendum.[67] In light of this, the court *a quo* erred by upholding the respondents' issue estoppel plea yet the same cause requirement was evidently not satisfied. The court *a quo* failed to acknowledge that English common law principles of issue estoppel are not intended to substitute the requirements of *res judicata* and/or to be enforced where such enforcement could amount to an injustice on the part of any affected persons in South Africa.

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[61] *Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62 par 14.

[62] *Molaudzi v S* [2015] ZACC 20 pars 22-30.

[63] *Royal Sechaba* case par 10.

[64] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) par 43; *Hyprop Invesments Ltd v NSC Carriers and Forwarding CC and Others* [2014] 2 All SA 26 (SCA) par 14.

[65] *Royal Sechaba* case pars 18-19; *Prinsloo* case par 23.

[66] *Ferreira v Minister of Social Welfare* 1958 (1) SA 93 (E) pars 95H-96A; *Scharf v Dempers and Co* 1955 (3) SA 316 (SWA); various categories of persons who could be deemed as "privies" were enumerated in J. Voet, *Commentarius ad Pandectas* (Lyon, apud fratres De Tournes, 1778) 44.2.5; also see *Man Truck and Bus SA (Pty) v Dusbus Leasing CC and Others* 2004 (1) SA 454 (W) par 34 and *Kruger and another v Shoprite Checkers* (65/05) [2006] ZANCHC 114 (26 May 2006), where a close corporation and its sole member were regarded as privies.

[67] See related remarks in pars 2 and 3 above; *Royal Sechaba* case pars 23-25.

5. Evaluation and analysis of the SCA judgement

Notably, as highlighted before,[68] the appellant challenged the Appeal Tribunal's award in the HC and sued the first and second respondents for damages of about R13 122 516 (and/or R4 140 000) for their alleged breach of their fiduciary duties.[69] On the contrary, the respondents rejected the appellant's claim for damages on the basis of issue estoppel. Paradoxically, the court *a quo* upheld the respondents' issue estoppel defence and dismissed the appellant's claim with costs. The appellant was granted the leave to appeal to the SCA. Thereafter, the appellant launched its appeal and argued that the aforesaid issue estoppel defence was erroneously upheld because the same person and same cause requirements were not satisfied.[70] In light this, the validity of the SCA judgement is briefly discussed below.

It must be noted that the South African courts are empowered relax the requirements of *res judicata* and/or issue estoppel in certain appropriate circumstances.[71] Nevertheless, there must be relevant circumstances that objectively justify the relaxation of such requirements by the courts in accordance with the principles of equity and fairness to all the parties concerned.[72] In this regard, despite the fact that the respondents in *Royal Sechaba* case argued that they were parties inextricably associated with and/or privies of the third respondent by virtue of being the directors of the appellant and their role as key witnesses during the arbitration, no adequate justification was adduced to the court *a quo* for the relaxation of the same person requirement of *res judicata* or issue estoppel.[73] Put differently, the respondents could not be regarded as parties or privies of the third respondent since the arbitration proceedings were mainly held between the appellant and the third respondent.[74] This clearly shows that the arbitration proceedings were not a final and definitive judgement between the appellant and the respondents.[75] In relation to this, it must be noted that the finality of the judgement relates to the form or effect of the judgment in question and not aspects of whether it can be appealed or reviewed.[76] Over and above, although the same

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[68] See pars 2; 3; 4 and 4A above.

[69] This action was instituted in terms of s 33(1) of the Arbitration Act; *Royal Sechaba* case pars 1; 9 and 10.

[70] See pars 2; 4 and 4A above; *Royal Sechaba* case pars 1; 9 and 10.

[71] *Royal Sechaba* case pars 12-13; *Boshoff v Union Government supra* par 345; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk supra* pars 669D; 670I-671B; *Smith v Poritt and Others supra* par 10.

[72] *Bertram v Wood* (1893) 10 SC 177 par 180.

[73] *Royal Sechaba* case pars 12-22; related remarks in pars 4 and 4A above.

[74] See pars 2 to 4A above, for similar comments.

[75] *Royal Sechaba* case pars 11 and 16; see further *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) pars 45E-F; Voet 44.2.3; *Bertram v Wood supra* par 180.

[76] H.R. Dundas, 'The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal', 73 *Arbitration* (2007), p. 127 128-137; C. Roodt, 45 *De Jure* (2012), p. 498-502; C. Roodt, 'Autonomy and Due Process in Arbitration', 13 *European J of L Ref* (2011), p. 413 424; *CTP*

parties requirement does not refer to identical parties *per se*, the respondents failed to prove that they were: (a) same parties with or privies of the third respondent who derived their interest from the parties to the arbitration proceedings; (b) privies of the third respondent who derived their title from him; and (c) same individuals or persons who are in law identified with those who were parties to the arbitration proceedings.[77] In this regard, it is submitted that the SCA correctly held that the respondents had no legal or beneficial interest in the arbitration. The SCA also correctly held that the respondents did not legally control or represent the third respondent in the arbitration proceedings.[78] Consequently, there was no basis upon which the court *a quo* could accept that the respondents were privies of the parties in the arbitration. Accordingly, the SCA correctly decided that the same person requirement was not successfully proved by the respondents for the purposes of issue estoppel.[79]

With regard to the same cause requirement of issue estoppel, the appellant correctly argued that some issues that were to be adjudicated in the HC were not determined by the Appeal Tribunal.[80] For instance, despite the arguments to the contrary by the respondents and the fact that the relief sought or the amount of damages claimed by the appellant in both the Appeal Tribunal and the HC was identical, issues involving the allegations of a possible breach of fiduciary duties by the respondents were not determined in the arbitration proceedings.[81] Thus, the claim against the respondents for their alleged breach of the fiduciary duties was only raised by the appellant in the HC, making it a different cause of action than the one adjudicated in the arbitration proceedings. The arbitration proceedings determined claims against the respondents for approving the over-payment of commissions and undue operating incentives that were paid to the third respondent and other designated employees on the basis of net contract contribution instead of net profit, as provided for in clauses 1 and 3 the Addendum.[82] However, the arbitration proceedings did not determine whether the respondents' conduct in approving such commissions and operating incentives on the basis of net contract contribution amounted to a breach of their fiduciary duty to act with the degree of care, skill and diligence that is reasonably expected of them as directors of the appellant.[83] In light of this, the SCA correctly decided that the same cause requirement was not adequately satisfied by the respondents because some issues

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Limited v Independent Newspapers Holdings Ltd 1999 (1) SA 542 (WLD) and *Le Roux v Le Roux supra* pars 462G-463, which held that the judgement in question must be a definitive and final judgement of a competent court.

[77] *Royal Sechaba* case pars 14-19; *Rail Commuters Group and others v Transnet Limited and Others* 2006 (6) SA 68 (C) par 82H-83A; *Ferreira v Minister of Social Welfare supra* pars 95H-96A; *Shokkos v Lampert NO* 1963 (3) SA 421 (W) pars 425H-426A.

[78] *Royal Sechaba* case par 18.

[79] *Royal Sechaba* case pars 18-22; see related remarks in pars 4 and 4A above.

[80] *Royal Sechaba* case par 23; see related remarks in pars 4 and 4A above.

[81] *Royal Sechaba* case par 23; see related remarks in pars 4 and 4A above.

[82] *Royal Sechaba* case pars 23-24; also see related remarks in pars 2; 3; 4 and 4A above.

[83] Section 76(3) of the Companies Act 2008; *Royal Sechaba* case par 25; see related remarks in pars 2; 3; 4 and 4A above.

which were determined in the arbitration proceedings were not the same as those that were raised by the appellant in the HC.[84]

5A. Influence of the UK and related jurisdictions' common law on the SCA judgement

As earlier stated above,[85] issue estoppel is sometimes interpreted and enforced as a form of *res judicata* in English common law jurisdictions such as Northern Ireland, Republic of Ireland, England, Wales, Australia, New Zealand India, Canada and USA. Nonetheless, the common law interpretation and application of the requirements of *res judicata* is quite different from the enforcement of the requirements of issue estoppel in South Africa. Accordingly, the radical enforcement of the common law requirements of *res judicata* must be carefully balanced with the radical possibility of an *ad hoc* policy-based relaxation of such requirements by the South African courts through the enforcement of issue estoppel. Thus, although the courts have discretion to relax the requirements of *res judicata* by applying less stringent requirements of issue estoppel, issue estoppel must not be employed as a mechanical defence that abolishes the original requirements of *res judicata* in South Africa.[86] This entails that any reliance on issue estoppel should be carefully enforced by the courts to avoid possible interpretational confusion that prejudices the relevant parties to any lawsuit. Consequently, there must be valid reasons for the courts to relax the requirements of *res judicata* in favour of issue estoppel. The same approach is employed in the UK where the courts may only reconsider their own previous judgments and/or abandon the strict adherence to the requirements of *res judicata* to correct any injustice caused by such previous judgements to the affected persons.[87] However, given the recent outcome of the British EU (Brexit) referendum,[88] it remains to be seen whether the aforesaid position on the enforcement of the English common law principles of issue estoppel as a type of *res judicata* will continue to be upheld in England, Scotland, Wales and Northern Ireland which are still part of the UK and Great Britain. This follows the fact that British citizens voted to leave the EU and this has somewhat created a lot of uncertainty regarding the application and enforcement of the relevant laws in all the countries in the UK.

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[84] *Royal Sechaba* case par 27; related remarks in pars 4 and 4A above.

[85] See related remarks in pars 4 and 4A above.

[86] *Molaudzi v S supra* pars 22-30.

[87] *In re Pinochet* [1999] UKHL 1; *Taylor v Lawrence* [2003] QB 528. See further *Molaudzi v S supra* pars 25-26.

[88] The Brexit referendum to stay or leave the EU was held on 23 June 2016 and the outcome of the vote was for Britain to leave the EU. Consequently, the UK is now required to formally notify the European Council of its intention to leave the EU at least two years before the actual exit. Thus, the UK is likely to be totally independent from the EU by at least June 2018. Thus, the countries in the UK are likely to continue to be bound by their own laws and those of the relevant EU legislation until their withdrawal is finalised. See, SIA Partners (Banking and Insurance), 'Brexit and the Impact on the UK's Regulatory Framework', *SIA* (2016), http://en.finance.sia-partners.com/brexit-and-impact-uks-regulatory-framework, p. 1-4.

Despite this, in Canada, the courts may reconsider their previous final decisions only in very rare instances, in order to rectify any injustice that was caused to the relevant parties to a lawsuit.[89] Likewise, in India, the courts may only relax the English common law requirements of *res judicata* to remedy serious injustices or their earlier material mistakes and not to substitute a previous point of fact or view *per se*.[90]

Against this backdrop, the SCA correctly held that the third respondent was arguably not entitled to receive any commission in respect of the Ingula Dam contract in terms of the Addendum.[91] In a nutshell, the author submits that the SCA correctly decided to: (a) set aside the order of the court *a quo*; (b) dismiss the respondents' special plea of issue estoppel and uphold the appellant's appeal with costs; and (c) refer the matter back to the court *a quo* for adjudication on other particulars of claim and the relevant substantive defence.[92] In other words, the SCA was correct to dismiss the respondents' special plea of issue estoppel in order to prevent possible hardship and actual injustice to the appellant who was negatively affected by the court *a quo*'s erroneous relaxation and/or abandonment of the requirements of *res judicata*. Put differently, issue estoppel is intended to prevent and/or remedy the negative effects of the rigid application of the common law requirements of *res judicata* but it does not abolish or permanently replace such requirements in South Africa.

6. Concluding remarks

The article has revealed that both issue estoppel and *res judicata* are founded on the public policy, equity and fairness considerations that there should be finality in litigation in order to avoid the multiplicity of actions and conflicting judicial decisions by the competent courts on the same cause of action and same issues between same parties.[93] The article has further indicated that although the doctrines of issue estoppel and *res judicata* are interrelated, their application in practice varies from one jurisdiction to the other. For instance, various approaches are employed to enforce and adjudicate upon matters involving issue estoppel and *res judicata* in countries such as USA, UK, Canada, Australia and South Africa.[94] In this regard, it was further noted that although issue estoppel has not been formally incorporated into South African law, it has been utilised as a defence by the affected persons in several South African cases to date.[95] For instance,

[89] See Rule 73(1) of the Rules of the Supreme Court of Canada; *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44; [2001] 2 SCR paras 80-81; *Iron v Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 WWR 1 (Sask CA) paras 21.

[90] The Indian Supreme Court in *M S Ahlawat v State of Haryana and Another supra* par 160; see further *Molaudzi v S supra* pars 28-30.

[91] *Royal Sechaba* case par 26; see related remarks in pars 2; 3 4 and 4A above.

[92] *Royal Sechaba* case par 28.

[93] *Royal Sechaba* case par 10-28; par 1 above.

[94] See pars 1; 4 and 4A above.

[95] See pars 1 to 5A above; C. Roodt, 45 *De Jure* (2012), p. 498-502.

notwithstanding the fact that there is no constitutional imperative to use arbitration to resolve commercial disputes in in South Africa,[96] the application of issue estoppel in commercial-related arbitration proceedings was discussed in *Royal Sechaba* case.[97] The *Royal Sechaba* case exposed some challenges and inconsistencies that are associated with the application of issue estoppel in South Africa from time to time. For instance, this case uncovers the conflicting decisions of the HC which erroneously upheld the issue estoppel plea in favour of the respondents while such plea was dismissed by the SCA in favour of the appellant.[98] Thus, despite the fact that the South African courts are empowered to relax the requirements of *res judicata* or issue estoppel, the SCA and/or the Constitutional Court may, on appeal, set aside a previous court order that was based on *res judicata* or issue estoppel to promote equity and procedural fairness between the parties concerned.[99]

Given this background, it is submitted that the SCA in *Royal Sechaba* case correctly decided to set aside the order of the court *a quo* and dismiss the respondents' special plea of issue estoppel with costs.[100] It is further submitted that the *court a quo* in *Royal Sechaba* case should have determined whether the respondents had breached their fiduciary duties in the course of executing their duties. In this regard, the author submits that the respondents breached their fiduciary duties by authorising the over-payment of commissions and undue operating incentives to the third respondent and other employees contrary to the provisions of the Addendum.[101] Accordingly, the SCA correctly held that the matter between the respondents and appellant should be referred back to the court *a quo* for adjudication on other particulars of claim that were not determined as well as the relevant substantive defence.[102] Thus, while the relaxation of the strict requirements of the common law requirements of *res judicata* allows South African estoppel law to align with the practices in several English common law jurisdictions, it must be only exercised where necessary to promote the interests of justice.[103] It is submitted that the application and interrelationship between issue estoppel and *res judicata* should be carefully recognised in South Africa, especially, in commercial-related arbitration proceedings to avoid draconian and unfair consequences to the affected persons. Consequently, issue estoppel must be carefully enforced in South Africa, UK and other English common law jurisdictions to combat the abuse of process that is usually related to the rigid application of the requirements of *res judicata* in the relevant courts.

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[96] C. Roodt, 45 *De Jure* (2012), p. 500-502.
[97] See pars 1 to 5 above; section 28 of the Arbitration Act.
[98] See pars 4; 5 and 5A above.
[99] C. Roodt, 45 *De Jure* (2012), p. 500-502.
[100] *Royal Sechaba* case par 28; pars 5 and 5A above.
[101] See related comments in par 5 above.
[102] *Royal Sechaba* case par 28.
[103] *Molaudzi v S supra* pars 22-33.

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