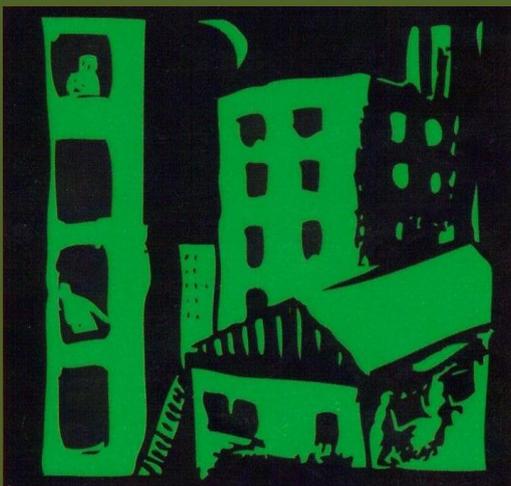


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**Confronting  
selected difficulties  
associated with the  
enforcement of *res  
judicata* in South  
Africa with  
reference to  
*Samancor v Rham  
Equipment (532/13)*  
[2014] ZASCA 66**

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**1 INTRODUCTION**

The doctrine of estoppel is a cornerstone of the judicial systems of several countries, such as, Canada, the United Kingdom (UK), the United States of America (USA), New Zealand, Australia and South Africa.<sup>1</sup> This

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<sup>1</sup> Nazzini R "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* 139 at 149-158; Sinai Y "Reconsidering *res judicata*: a comparative perspective" (2011) 21 *Duke Journal of Comparative & International Law* 353 at 357-400; Wunsh B "Is issue estoppel part of our law?" (1990) 2 *Stell LR* 198 at 198-218; and Roodt C "Reflections on finality in arbitration" (2012) 45(2) *De Jure* 485 at 498-503.

doctrine, *inter alia*, prohibits a person (asserter) from asserting something contrary to what is implied by the previous action, conduct or statement of that person or by a previous pertinent judicial determination regarding such action, conduct or statement. In this regard, it must be noted that there are various types and/or principles of estoppel that govern the application and enforcement of estoppel in many jurisdictions. Nevertheless, a detailed discussion of such types and/or principles is beyond the scope of this article which primarily discusses certain difficulties and/or flaws that are found in the enforcement of *res judicata* in South Africa as exposed in *Samancor v Rham Equipment* (532/13) [2014] ZASCA 66 (*Samancor*). This said, it is imperative to understand the meaning of *res judicata*. *Res judicata* means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties. Consequently, the *res judicata* principle prohibits the re-litigation of a dispute that has been decided previously by a final judgment 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.<sup>2</sup> As highlighted in the *Samancor* case,<sup>3</sup> *res judicata* is closely related to issue estoppel.<sup>4</sup> For instance, issue estoppel also precludes a person 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.<sup>5</sup> Thus, both issue estoppel and *res judicata* prohibit the re-litigation of the same issues and same causes of action that were previously decided by a final judgment in the relevant courts between the same parties.<sup>6</sup> Nonetheless, the concepts of *res judicata* and issue estoppel<sup>7</sup> were confusingly and erroneously enforced

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<sup>2</sup> *Prinsloo NO v Goldex 15* (243/11) [2012] ZASCA 28 (28 March 2012) at para 10; *Molaudzi v S* (CCT 42/15) [2015] ZACC 20; Nazzini (2014) at 149-152; Maniago M & Chiasson CR “Court reaffirms application of *res judicata* and issue estoppel to commercial arbitrations” (2016) *Arbitration & ADR* 1 at 1-2; Voet J *Commentarius ad pandectas* (Lyon: apud fratres De Tournes 1778) 42.1.1; and Roodt (2012) at 502-503).

<sup>3</sup> See paras 3, 9 & 16.

<sup>4</sup> Notably, the term “issue estoppel” prohibits the re-litigation of the same issues that were previously raised in relation to the same cause of action and decided by a final judgment in the relevant courts between the same parties while estoppel in general prohibits a person from resiling and/or asserting something different to what is implied by the previous action, conduct or statement of that person or by a previous pertinent judicial determination regarding such action, conduct or statement. Nonetheless, it must be noted that a detailed discussion of issue estoppel and its examples is beyond the scope of this article which is mainly focused on the correct application and enforcement of *res judicata* in South Africa.

<sup>5</sup> *Boshoff v Union Government* 1932 TPD 345; *Royal Sechaba v Coote* (366/2013) [2014] ZASCA 85 (30 May 2014) at paras 1-28; Sinai (2011) at 358; Wunsh (1990) at 198-218; and Roodt (2012) at 502-503.

<sup>6</sup> Elvy M, Hui L & Gaffney T “A one-stop shop? Issue estoppel and the limits to forum shopping in enforcement of arbitral awards” (2014) *Ashurst Arbitration Update* 1 at 1-2; *Diag Human Se v The Czech Republic* [2014] EWHC 1639; Ruby SS “*Res judicata*, issue estoppel and abuse of process by relitigation” (2012) *Davies Publications* 1 at 2-36; Sonnekus JC *The law of estoppel in South Africa* 3<sup>rd</sup> ed (Durban: Lexis Nexis 2012) at 10-35; and *Royal Sechaba v Coote* at paras 10-15.

<sup>7</sup> As indicated earlier, the *res judicata* principle prohibits the re-litigation of a dispute that has been decided previously by a final judgment of a competent court between the same parties or persons for the same relief, thing or right on the same ground or same cause of action in future cases involving such parties or their privies. On the other hand, issue estoppel could be regarded as a plea or defence that may

by the Court *a quo* in the *Samancor* case. For instance, the Court *a quo* wrongly upheld a plea of *res judicata* against Samancor Chrome Ltd (the appellant).<sup>8</sup> Moreover, the Court *a quo* failed to determine that the matter dealt with issue estoppel rather than *res judicata*.<sup>9</sup> Accordingly, the *Samancor* case exposes certain difficulties and inconsistencies that still confront the courts in relation to the application and enforcement of *res judicata* and issue estoppel in South Africa from time to time.<sup>10</sup> Thus, the *Samancor* case is key in that it has established a good precedent in South African estoppel law by satisfactorily resolving some of the challenges relating to the correct enforcement of the threefold common law requirements of *res judicata*.<sup>11</sup>

## 2 OVERVIEW OF THE FACTS

The appellant entered into a contract with Rham Equipment (Pty) Ltd (the respondent) between June and July 2000. In terms of this contract, the respondent was obliged to supply vehicular mining equipment to the appellant for use in its mining operations.<sup>12</sup> The precise nature of this contract is unclear. At first glance, it appears that the respondent sold the aforesaid equipment to the appellant in terms of an instalment sale agreement. Alternatively, it appears that the appellant hired the mining equipment from the respondent under an agreement of lease, in terms of which the respondent undertook to maintain the equipment for a yearly fee.<sup>13</sup> The contract was allegedly concluded, partly in writing and partly orally, for a fixed period of five years. The respondent delivered the mining equipment to the appellant between June and July 2000. The appellant commenced paying the agreed monthly instalments.<sup>14</sup> However, the appellant alleges that it cancelled the contract in December 2002 as a result of the respondent's breach thereof. The respondent, nevertheless, also alleged that it cancelled the contract as a result of a breach on the part of the appellant.<sup>15</sup> In October 2004, the respondent sued the appellant for over R6 million for the outstanding amount owed to it over the remainder of the period of the contract and for damages in respect of the expenses incurred in repairing the damaged equipment.<sup>16</sup> In September 2006, the appellant filed a plea denying liability for the aforesaid instalment sale agreement and

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be instituted by the affected person where a plea of *res judicata* or some of its requirements could not be established because the causes of action are not the same.

<sup>8</sup> *Samancor* at paras 1 & 8-16.

<sup>9</sup> *Samancor* at paras 1 & 8-16.

<sup>10</sup> *Horowitz v Brock* 1988 (2) SA 160 (AD) at paras 178H-179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD) at para 472; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at para 835G; *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at para 239F-H; *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk* 1995 (1) SA 653 (A) at paras 670I-671B; and *Smith v Porritt* 2008 (6) SA 303 (SCA) at para 10.

<sup>11</sup> Such requirements which must be present before *res judicata* is applicable are, namely, (a) same parties or persons, (b) same relief, thing or right and (c) same ground or same cause of action. *Samancor* at paras 1 & 8-16.

<sup>12</sup> *Samancor* at paras 1 & 4.

<sup>13</sup> *Samancor* at para 4.

<sup>14</sup> *Samancor* at para 4.

<sup>15</sup> *Samancor* at para 4.

<sup>16</sup> *Samancor* at para 5.

maintained that it had only concluded a lease contract with the respondent. The appellant also alleged that the respondent had undertaken to maintain the equipment but had failed to do so. In July 2009, the respondent filed a notice of intention to amend its particulars of claim. The proposed amended particulars alleged that the respondent had concluded an instalment sale agreement with the appellant. These amended particulars alleged further that the respondent undertook to maintain the equipment for the duration of the agreement. The amended particulars also provided the details of the costs of maintaining the equipment for each year and a number of variations that were allegedly made to the initial agreement.

Moreover, the amended particulars alleged that the appellant breached the agreement by failing to pay instalments and damages of over R3.6 million in respect of the equipment maintenance costs.<sup>17</sup> The appellant opposed these amended particulars. The respondent's application was eventually rejected by Blieden J in November 2009 stating, *inter alia*, that the claim for damages arising out of the maintenance agreement was a new claim that had prescribed.<sup>18</sup> In December 2012, the respondent filed another amended particulars of claim which, *inter alia*, suggested that it had concluded two separate main agreements or at least one composite agreement with the appellant.<sup>19</sup> The appellant also filed an amended plea, asserting that there was only one indivisible contract (a maintenance lease agreement) between the parties. On the contrary, the respondent argued that Blieden J's judgment had decided that there was more than one contract or at least one composite agreement between the parties. The respondent argued further that the matter was now *res judicata* and the appellant was precluded from asserting that there was one indivisible contract.<sup>20</sup> Put differently, the respondent applied for an order declaring that the remaining issues in the trial must only be adjudicated once the aforesaid *res judicata* matter was conclusively decided.<sup>21</sup> Baloyi AJ in the South Gauteng High Court (HC) concluded that Blieden J had already decided that there was more than one contract between the parties and that the issue raised by the appellant was *res judicata*.<sup>22</sup> The appellant appealed to the Supreme Court of Appeal (SCA) for adjudication regarding whether Blieden J's rejection of the respondent's application to amend its particulars of claim could be regarded as a determination that such amendment introduced a new claim arising out of another contract (or a composite contract) despite the absence of any evidence on these contracts or their terms.<sup>23</sup>

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<sup>17</sup> *Samancor* at para 6.

<sup>18</sup> *Samancor* at para 7.

<sup>19</sup> *Samancor* at paras 1 & 8.

<sup>20</sup> *Samancor* at paras 1 & 8.

<sup>21</sup> *Samancor* at para 2.

<sup>22</sup> *Samancor* at paras 2 & 8-9.

<sup>23</sup> *Samancor* at paras 1 & 8-10.

### 3 OVERVIEW OF THE HIGH COURT JUDGMENT

The respondent launched the initial claim against the appellant in October 2004 while its notice of intention to amend the particulars of the same claim was filed in July 2009.<sup>24</sup> The respondent sued the appellant for all the expenses incurred in respect of the damaged equipment.<sup>25</sup> Notably, the actual reason for the proposed amendment was not clearly provided. Nonetheless, it appears that the rationale for the proposed amendment was for the respondent to indicate that the contract under consideration between the parties was an instalment sale agreement.<sup>26</sup> Moreover, the respondent could have sought to amend its initial particulars in a bid to clarify that it only undertook to maintain the equipment of the appellant for the duration of the agreement.<sup>27</sup> The respondent could have further resorted to introduce amended particulars of claim in order to quantify all the losses that it suffered while maintaining the equipment of the appellant in terms of their agreement.<sup>28</sup> The appellant opposed the respondent's application to amend its particulars of claim in the Court *a quo* in September 2006.<sup>29</sup> In rejecting the respondent's application to amend its particulars as filed on 5 August 2009, Blieden J in November 2009 held, *inter alia*, that the claim for damages arising out of the maintenance agreement was a new claim that had prescribed.<sup>30</sup> In this regard, the author submits that Blieden J erred by rejecting the respondent's application to amend its particulars of claim on the basis of prescription.<sup>31</sup> Thus, although three years had lapsed since the respondent's initial claim, Blieden J should have determined the nature of the purported contracts between the parties before dismissing the respondent's claim on the basis of prescription. Put differently, it appears that Blieden J rejected the respondent's application simply because a period of more than three years had lapsed since the initial cause of action giving rise to the claim for damages against the appellant. It is further submitted that Blieden J wrongly applied the principles of prescription by overlooking the fact that a person is only precluded through prescription from amending his initial claim if a period of three years has lapsed since the initial cause of action giving rise to such claim. Moreover, such person is precluded through prescription from amending his initial claim if the amended claim is based upon a new cause of action which is older than three years.<sup>32</sup> The Court *a quo* did not receive any evidence from the parties concerned that the respondent's proposed amended particulars of claim were based upon a new cause of action.<sup>33</sup>

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<sup>24</sup> *Samancor* at paras 5 & 6.

<sup>25</sup> *Samancor* at paras 5 & 6.

<sup>26</sup> *Samancor* at para 6.

<sup>27</sup> *Samancor* at para 6.

<sup>28</sup> *Samancor* at para 6.

<sup>29</sup> *Samancor* at paras 1 & 6-7.

<sup>30</sup> *Samancor* at para 7.

<sup>31</sup> *Samancor* at paras 1 & 7-9.

<sup>32</sup> *Evins v Shield Insurance Co Ltd* at paras 836C-E; *Samancor* at paras 8-9 & 13.

<sup>33</sup> *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) at para 4; *Samancor* at paras 12 & 13.

As stated above,<sup>34</sup> the respondent filed other amended particulars of claim in December 2012 which were essentially similar to the initial particulars of October 2004.<sup>35</sup> In light of this, the appellant pleaded that the contract between the parties was an indivisible full maintenance lease agreement since its inception and had been like that even after its amendment on 22 March 2002.<sup>36</sup> It is on this basis that the respondent argued that the issues raised by the appellant had already been decided by Blieden J's initial judgment which indicated that there could have been more than one contract or at least one composite agreement between the parties. This led the respondent to assert that the aforesaid matter was now *res judicata*,<sup>37</sup> arguing that its plea of *res judicata* had to be determined by the Court in view of Blieden J's initial judgment.<sup>38</sup> It is submitted that Baloyi AJ wrongly upheld the plea of *res judicata* in favour of the respondent.<sup>39</sup> It is further suggested that both the respondent and Baloyi AJ interpreted Blieden J's initial judgment incorrectly. For example, it was not determined whether the respondent's amended particulars of claim were based upon a new cause of action, and no evidence was adduced in the Court *a quo* by either party regarding the nature of the alleged contracts and/or agreements. Blieden J did not make any conclusive finding regarding the nature and number of contracts or agreements that were concluded by the parties.<sup>40</sup> Moreover, even if Blieden J had made such decision, the respondent was only entitled to raise a plea of issue estoppel rather than *res judicata*.<sup>41</sup> This follows from the fact that some issues raised by the respondent in the amended particulars were decided by Blieden J while others were not. In these circumstances, it is submitted that the appellant was correct to oppose the erroneous application of *res judicata* by Baloyi AJ in the SCA.<sup>42</sup>

#### 4 EVALUATION AND ANALYSIS OF THE SUPREME COURT OF APPEAL JUDGMENT

The appellant sought and was granted leave to appeal against Baloyi AJ's judgment.<sup>43</sup> Accordingly, the appellant argued that Blieden J's dismissal of the respondent's application to amend its particulars of claim should not be regarded as a conclusive determination that the amendment introduced a new claim arising out of another contract or a composite contract.<sup>44</sup> In this regard, the SCA decided correctly that Blieden J had merely compared the respondent's initial claim and the amended particulars of claim without making any conclusive decision regarding the nature or number of

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<sup>34</sup> See related remarks in part 2 above.

<sup>35</sup> *Samancor* at paras 1 & 8.

<sup>36</sup> *Samancor* at paras 1; 8 & 9.

<sup>37</sup> *Samancor* at paras 1 & 8.

<sup>38</sup> *Samancor* at para 2.

<sup>39</sup> *Samancor* at paras 2 & 8-9.

<sup>40</sup> *Samancor* at para 9.

<sup>41</sup> *Samancor* at para 3.

<sup>42</sup> *Samancor* at paras 1-3 & 8-10.

<sup>43</sup> *Samancor* at paras 1; 2 & 8-11.

<sup>44</sup> *Samancor* at paras 1 & 8-11.

contracts that were concluded by the relevant parties.<sup>45</sup> For instance, Blieden J found that the respondent's claim regarding additional damages for breach of an obligation to maintain equipment was distinct from the initial claim. He also found that the respondent's aforesaid claim was not a mere re-calculation or adjustment of the initial claim for damages incurred in respect of the breach of the sale or lease agreement.<sup>46</sup> Consequently, Blieden J suggested that the respondent's amended particulars of claim could have arisen from a different agreement or a distinct part of a composite agreement.<sup>47</sup> In other words, Blieden J did not make any judicial determination regarding the nature of the agreements and/or contracts that were concluded by the relevant parties.<sup>48</sup>

The SCA held correctly that Baloyi AJ failed to realise that the threefold requirements of *res judicata* were not satisfied in that a plea of *res judicata* is only enforced when it is proved that the matter under consideration was finally decided by a previous competent court on the same cause of action and same relief, thing or right between the same parties or their privies.<sup>49</sup> In this regard, it is crucial to note that the relief sought by the respondent in its application to amend the particulars of claim was not the same as the relief sought in the initial action for damages.<sup>50</sup> Accordingly, the SCA correctly held that even if Blieden J had adjudicated on the nature of the alleged contracts, the respondent should have relied on issue estoppel since the relief sought in the respective proceedings was different.<sup>51</sup> Notably, issue estoppel applies when some of the requirements of *res judicata* are not satisfied.<sup>52</sup> This occurs when the courts relax the threefold common law requirements of *res judicata*.<sup>53</sup> Nonetheless, the courts must investigate whether an issue of fact or law was an essential element of the previous judgment on which reliance is placed before relaxing the requirements of *res judicata* or upholding any plea of issue estoppel.<sup>54</sup> Unfortunately, the appellant did not raise any

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<sup>45</sup> *Samancor* at paras 9 & 12.

<sup>46</sup> *Samancor* at para 12.

<sup>47</sup> *Samancor* at para 9.

<sup>48</sup> *Samancor* at paras 1 & 8-13.

<sup>49</sup> Voet (1778) at 44.2.3; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at paras 45E-F; *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (BH); *Bertram v Wood* 1893 (10) SC 177 at par 180; *Royal Sechaba v Coote* at para 11, where it was, *inter alia*, held that if one of the aforesaid requirements is not satisfied, the plea of *res judicata* will not succeed.

<sup>50</sup> *Samancor* at paras 3 & 15-16.

<sup>51</sup> *Samancor* at para 3; see further *Smith v Porritt* at para 10; *Royal Sechaba v Coote* at paras 10-28; *Prinsloo NO v Goldex 15* at para 10; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at paras 18-23; and *Hyprop Investments Ltd & Others v NSC Carriers* [2013] ZASCA 169, for related comments on the enforcement of issue estoppel and *res judicata* in South Africa.

<sup>52</sup> *Hyprop Investments Ltd v NSC Carriers and Forwarding CC & Others* [2014] 2 All SA 26 (SCA) at para 14; and *Royal Sechaba v Coote* at para 12.

<sup>53</sup> *Boshoff v Union Government* at para 345; *Smith v Porritt* at para 10; *Royal Sechaba v Coote* at paras 12-22.

<sup>54</sup> *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk* at paras 670I-671B; *Prinsloo NO v Goldex 15* at paras 10-11.

opposition in the SCA against Baloyi AJ's failure to distinguish between *res judicata* and issue estoppel.<sup>55</sup>

Additionally, it is submitted that Baloyi AJ wrongly enforced the requirements of *res judicata* against the appellant by ordering a separation of issues in the respondent's claims in terms of Rule 33(4) of the Uniform Rules of Court.<sup>56</sup> It follows that Baloyi AJ erred by upholding Blieden J's finding that the parties in question had two separate agreements namely, (a) the agreement of sale or lease and (b) the agreement for the maintenance of the equipment, without hearing any relevant evidence from the parties. Similarly, it is submitted that Blieden J wrongly enforced the principles of prescription and disregarded the fact that a person is only precluded through prescription from amending his initial claim if the new claim is based upon a new cause of action which has prescribed.<sup>57</sup> This could have been caused by the fact that no evidence was adduced in the Court *a quo* by the relevant parties to show that the respondent's proposed amended particulars of claim constituted a new cause of action.<sup>58</sup>

Interestingly, both the appellant and respondent argued that a judicial determination of the nature of the agreements was required before the SCA could uphold or reject the respondent's plea of *res judicata*.<sup>59</sup> Furthermore, the respondent argued that Blieden J made the aforesaid suggestion in order to determine that the claim for damages for breach of the maintenance agreement was distinct from the claim for damages for breach of the sale or lease agreement. Conversely, the appellant argued that Blieden J's statements suggesting that there was more than one contract or a composite contract with distinct parts were inaccurate and irrelevant.<sup>60</sup>

It is submitted that the SCA held correctly that Blieden J could have allowed the respondent's proposed amendment of the particulars of claim if it was simply a fresh quantification of damages or part of the original claim.<sup>61</sup> Had the respondent not persisted with the argument that the proposed amended particulars of claim for damages in respect of the maintenance agreement were new and different from those in respect of the sale or lease agreements, the amended claim could have been enforced even after the prescription period had elapsed.<sup>62</sup> It is further submitted that the SCA correctly held that Blieden J erred in dismissing the respondent's application to amend its particulars of claim on the basis of prescription or on the basis that its claim could have been based on a different agreement or a distinct part of a composite agreement.<sup>63</sup>

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<sup>55</sup> *Samancor* at para 3.

<sup>56</sup> *Samancor* at para 9.

<sup>57</sup> *Samancor* at paras 1, 7-9, 12 & 13.

<sup>58</sup> Thus, Blieden J incorrectly applied the related aspects of prescription which were raised in *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* at para 4; and *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at para 5. See further *Samancor* at paras 12 & 13.

<sup>59</sup> *Samancor* at paras 9 & 10, where the SCA held that such a determination had to be done in light of Blieden J's judgment which suggested that the relief sought by the respondent in its amended particulars of claim could have been based on a different agreement or a distinct part of a composite agreement.

<sup>60</sup> *Samancor* at para 11.

<sup>61</sup> *Evins v Shield Insurance Co Ltd* at paras 836C-E; *Samancor* at paras 13 & 14.

<sup>62</sup> *Samancor* at paras 13 & 14.

<sup>63</sup> *Samancor* at para 14.

Thus, Blieden J overlooked the fact that separate and distinct claims could arise from a single contract. Blieden J also disregarded the fact that a single contract may give rise to various obligations, while any breach of such obligations could culminate in different causes of action for damages against the offender.<sup>64</sup>

Furthermore, the appellant submitted that in order to correctly uncover and interpret what was decided by Blieden J, the SCA must have regard to: (a) the actual relief sought by the respondent in its claims for damages; (b) evidence that was placed before the Court; and (c) the context in which the judgment was delivered.<sup>65</sup> Given this status *quo*, the SCA was correct to decide that Baloyi AJ erred in upholding the respondent's plea of issue estoppel which was wrongly presented to the Court *a quo* as *res judicata*.<sup>66</sup> Moreover, the SCA correctly decided to: (a) uphold the appellant's appeal with costs; (b) set aside the order of the Court *a quo*; and (c) dismiss the respondent's plea of *res judicata* with costs.<sup>67</sup>

## 5 IMPLICATIONS OF THE HIGH COURT AND THE SUPREME COURT OF APPEAL JUDGMENTS

### 5.1 Implications of the High Court judgment

Baloyi AJ's decision to uphold the respondent's plea of *res judicata* has various negative ramifications for South African estoppel law. This follows from the fact that Baloyi AJ wrongly upheld the respondent's plea of *res judicata* without hearing any evidence from the parties concerned regarding the nature of their alleged contracts.<sup>68</sup> The verdict was also wrong because Baloyi AJ did not carefully examine whether Blieden J had made any judicial determination regarding the nature and terms of the parties' alleged contracts before enforcing the plea of *res judicata* against the appellant. Accordingly, Baloyi AJ's verdict was not only wrong because it ignored the fact that all the requirements of *res judicata* were not met, but also because it failed to recognise the distinction between issue estoppel and *res judicata*.<sup>69</sup> Baloyi AJ overlooked the fact that although both *res judicata* and issue estoppel seek to promote finality of judicial decisions and the protection of the litigating parties' individual rights by preventing unlawful repetitive litigation on matters that were previously decided by a competent court between the same parties; their application are quite different.<sup>70</sup> Furthermore, Baloyi AJ's judgment indicates that some South African courts are still grappling with the correct interpretation, application and enforcement of the requirements of *res judicata*. This judgment could also suggest that the enforcement of *res judicata* and issue estoppel in

<sup>64</sup> *Samancor* at para 14.

<sup>65</sup> *Samancor* at para 16.

<sup>66</sup> *Samancor* at para 16.

<sup>67</sup> *Samancor* at para 17.

<sup>68</sup> *Samancor* at paras 9-17.

<sup>69</sup> *Samancor* paras 3 & 9-17.

<sup>70</sup> Cavanagh PJ "Issue estoppel whiplash: Supreme Court divided on fairness" (2012) 91 *The Canadian Bar Review* 473 at 474-482; Wunsh (1990) at 203-212; and Sinai (2011) at 360-362, were it was, *inter alia*, held that the furtherance of finality of judicial decisions in litigation is in the interest of society.

South Africa is at times impeded by the confusion associated with the distinct application of their respective requirements.<sup>71</sup> Such confusion could have been exacerbated by the fact that issue estoppel is mainly governed by English law while *res judicata* is governed by Roman-Dutch law.<sup>72</sup>

## 5.2 Implications of the Supreme Court of Appeal judgment

Notwithstanding the fact that the SCA judgment in the *Samancor* case is not yet reported in the South African law reports, the SCA must be lauded for establishing a good precedent through its correct interpretation of both Blieden J's and Baloyi AJ's findings. For instance, the SCA correctly held that the respondent should have relied on *res judicata* instead of issue estoppel.<sup>73</sup> Furthermore, the SCA was correct to dismiss Baloyi AJ's initial judgment to uphold the respondent's plea of *res judicata* without making any conclusive determination regarding the nature of the alleged contracts of the parties concerned.<sup>74</sup> Nevertheless, it is submitted that the SCA erred by failing to clarify the actual nature and terms of the contracts that were allegedly concluded by the relevant parties. It appears that the judicial determination of the actual nature of the parties' alleged contracts was confusingly left open by both the Court *a quo* and the SCA. This could be indicative of the negative challenges that affect aggrieved persons in relation to the enforcement of *res judicata* related cases in South Africa.<sup>75</sup> In other words, the different judgments given by the Court *a quo* and the SCA could also suggest that *res judicata* and issue estoppel continue to be inconsistently and bewilderingly enforced by the South African courts to date.<sup>76</sup>

## 6 CONCLUDING REMARKS

The *Samancor* case should be embraced as an important step towards the eradication of the challenges that are associated with the enforcement of *res judicata* related cases in South Africa. This case successfully exposed the confusion and inconsistencies that usually impede the correct application of the requirements of *res judicata* in South Africa.<sup>77</sup> Such challenges include the failure by the courts to distinguish between issue estoppel and *res judicata*. For instance, the *Samancor* case uncovered the difficulties associated with the enforcement and relaxation of the requirements of *res judicata* for

<sup>71</sup> *Samancor* at paras 3 & 9-17. Related confusion was also noted in *Wunsh* (1990) at 203-212; *Prinsloo NO v Goldex 15* at paras 1-28; *Boshoff v Union Government* at para 345; *Smith v Porritt* at para 10; *Royal Sechaba v Coote* at paras 1-28; and *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk* at paras 670I-671B.

<sup>72</sup> *Wunsh* (1990) at 203-212; *Sonnekus* (2012) at 10-35.

<sup>73</sup> *Samancor* at paras 3 & 12-17.

<sup>74</sup> *Samancor* at paras 12-14.

<sup>75</sup> *Roodt* (2012) at 498-502.

<sup>76</sup> *Boshoff v Union Government* at para 345; *Horowitz v Brock* at paras 178H-179C; *Custom Credit Corporation (Pty) Ltd v Shembe* at para 472; *Prinsloo NO v Goldex 15* at paras 1-28; *Smith v Porritt* at para 10; *Royal Sechaba v Coote* at paras 1-28; *Samancor* at paras 3 & 12-17; and *Sonnekus* (2012) at 25-35, for related comments.

<sup>77</sup> *Samancor* at paras 3 & 12-17.

the purposes of issue estoppel in South Africa. Another challenge revealed by the *Samancor* case pertains to the interpretation and application of prescription in *res judicata* related cases in South Africa. Additionally, the SCA rightly upheld the appellant's appeal against the Court *a quo*'s initial order of *res judicata* which was erroneously enforced in favour of the respondent.<sup>78</sup> In conclusion, it is recommended that both issue estoppel and *res judicata* must be carefully and distinctly enforced by the courts on a case by case basis to avoid prejudice on the part of the aggrieved persons in South Africa.<sup>79</sup>

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<sup>78</sup> *Samancor* at paras 12-14, 16 & 17.

<sup>79</sup> Roodt (2012) at 498-502.