[2018] JMSC Civ 144

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 03871

BETWEEN	**SYDNIA MATHESON**	**CLAIMANT**
AND	**LELIETH WATTS**	**DEFENDANT**

IN CHAMBERS

Mr. Robert Collie instructed by Collie Law for the Claimant

Miss Georgine Edwards instructed by Taylor, Deacon and James for the Defendant.

Both parties present.

HEARD: October 10 and 31, 2018

Res judicata, - ambit of the doctrine, degree of understanding to execute will and power of attorney.

Pusey J.J (Actg.)

[1] On the 20th February, 2018 the claimant filed a Notice of Application for Court Orders, (NAFCO) seeking, inter alia:

1. That the court exercise its discretion and strike out the case of the defendant,
2. That judgement be entered against the defendant pursuant to the striking out of case.

[2] This application is grounded on Civil Procedure Rules 2002, amended in 2006 (CPR) 26.3(1)(b) and (c) as well as the following;

" 3. That the issues which arise in the present proceedings are res judicata based on the judgement of Mangatal J within the Supreme Court in the case of **Leslie Augustus Watts v Lelieth Watts and Watts Investment Limited** *[2013] JMCC Comm. 15....."*

CPR 26.3(1) (b) and (c) states;

(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

(2) a).....

b) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;

BACKGROUND

[3] The deceased, Leslie Augustus Watts died on the 18th August, 2015, survived by his only child, Lelieth Watts, the defendant herein. During his lifetime he was the Managing Director and principal shareholder in Watts Investment Limited, a company which he formed. The only asset of the company is an apartment complex in Kingston, which was his sole source of income from rental of the property.

[4] In 2010 he suffered a stroke and his daughter, who was residing overseas, returned to Jamaica to care for him. As a result of the stroke he suffered brain damage and was unable to manage his financial and other affairs. Consequently an application was made to the court seeking an order to make Dr. Lloyd Barnett his next friend and guardian ad litem. Dr. Lloyd Barnett was appointed as such by a consent judgement before Haynes j (as she then was) on the 20TH February

2012. The defendant, Lelieth Watts, was a party to this action – Claim No. 2011 HCV 00469.

[5] During his illness, there was a restructuring of the share capital and Directorship of Watts Investment Limited and a transfer of his motor car and signing rights on his bank account to his daughter, without the knowledge of Dr. Lloyd Barnett. This was accomplished as his daughter produced two Powers of Attorney dated **10th September 2010 and 17th January 2011** purportedly executed by him with requisite mental capacity and giving her power to manage his affairs.

[6] These activities became the subject matter of Claim No. 2012 CD 00090, Leslie ***Watts (by Lloyd Barnett, his next friend and Guardian Ad Litem), v Lelieth Watts, and Watts Investment Limited*** [2013]JMCC Comm. 15 (here in after referred to as '**the Lloyd Barnett matter'**) which was decided on the 31st October, 2013 by Mangatal J,(as she then was). In arriving at her decision the learned judge found,

> "I therefore find that Mr. Watt did not at the material times have the mental capacity to evaluate and make rational important decisions relating to his affairs."

And further;

> '*In my judgement, Mr. Watt did not have the requisite mental capacity to make rational important decisions and to evaluate the transactions attributed to him.'*

[7] Of critical significance in that case is not only its pronouncement on the mental capacity of the deceased but also the time period to which the assessment relates, (September 10, 2010).

[8] The Fixed Date Claim form filed September 16, 2016, out of which this NAFCO at Bar arises, concerns a Will made **September 10, 2010**. The Orders being sought in that claim are;

1. That the paper writing dated the 10th day of September 2010, be declared fraudulent, null and void,
2. That the Will of the deceased Leslie Watts dated the 24th June, 1965 be declared and stand as his true Last Will and testament.

[9] The deceased had made and executed his Last Will and Testament on June 24, 1965. The defendant's contention is that he revoked this Will and executed a second Will on September 10, 2010.

ISSUE

[10] The issue in this application is whether the court, Per Mangatal J, (as she then was) having found that the deceased did not have the mental competence to manage his affairs on the 10th September 2010, is res judicata in this Fixed Date Claim Form which seek to distil whether he was mentally competent to revoke his June 24,1965 last Will and Testament and execute a new Will on September 10, 2010.

THE CLAIMANT'S SUBMISSIONS

[11] The claimant contends that the defendant is purporting to Probate a paper writing dated the 10th September, 2010 as the true Last Will and Testament of the deceased Leslie Augustus Watts. This paper writing, according to the defendant, revokes the Last Will and Testament of the deceased executed on the 24th June 1965.

[12] Counsel urged the court to find that the 2010 paper writing is fraudulent, null and void as it was executed on September 10, 2010 when the mental capacity of the Testator was found by a court of competent jurisdiction to be impaired, rendering him unable to manage his affairs.

[13] In support of his contention counsel relied on the doctrine of Res Judicata as defined in **Halsbury Laws of England**, 4th Edition Volume 16 paragraph 1527 and analysed by McIntosh Bishop J (as she then was) in **Fletcher and**

Company Limited v Billy Craig Investment Limited and Scotia Investment Limited [2012 JMSC Civil 128 paragraphs 26-27.

[14] He argued that when the issue of the mental capacity of the deceased on September10, 2010 was adjudicated in 2013, the court, relying on expert medical evidence from a Neurologist and a Gynaecologist and General Practitioner and long time friend of the deceased found,

> *'.....that Mr. Watts did not at the* ***material time*** *have the mental capacity to evaluate and make rational important decisions relating to* ***his affairs****.'* ***Emphasis mine***

[15] The documents adjudicated on in the 2013 matter were the two Powers of Attorney giving the defendant the power to manage the deceased's affairs and was signed on the 10th September, 2010, the same day the 2010 Will was executed. He concluded that the issue which arises in this Fixed Date Claim Form concerns the mental competence of the deceased to execute a new Will and is therefore the same issue determined in the 2013 matter and need not be re-litigated. It follows, he argued, that any defence raised by the defendant that the deceased competently and with requisite mental competence, executed a will is barred res judicata by the decision of Mangatal J (as she then was).

[16] Turning to the application to strike out the defence's statement of case he argued that pursuant to CPR 26.3(1)(b) and (c) the statement of case of the defendant discloses no reasonable grounds for defending the claim and is therefore an abuse of the process of the court.

THE DEFENDANT'S SUBMISSION

[17] The defendant contends that the matter is not Res Judicata, as the earlier case was about the validity of a Power of Attorney and not a testamentary instrument. She argued that the standard of mental capacity required for a Power of Attorney

is higher than that required for a testamentary instrument, and further that that varying standard was not argued in the 2013 matter.

[18] She further argued that although the deceased suffered a stroke and was brain damaged, he had 'lucid intervals' during which he was competent to make a Will. She cited the case of **In the Estate of Walker,** [1912 28 TLR 466 to support the contention that if at the time of making a Will the testator has a 'lucid interval', the court will approve an application for probate. She referred to the affidavit of Karl Chantrielle filed on the 27th April 2017 where he gave evidence that he wrote the 2010 Will for the deceased and they discussed his assets, who should be the Executor and who was to receive various gifts and was lucid.

[19] She urged the court to accept that the 2010 Will revoked the 1965 Will as it contained a revocation clause and the testator had the animus testandi and animus revocandi, which is a rebuttable presumption. She relied on **Southern v Dening** 20 Ch D 99 to advance the position that a party seeking to rebut the presumption of revocation bears a heavy burden.

[20] She went on further to highlight that the Fixed Date Claim From alleges fraud in the execution of the 2010 Will but fraud is not specifically pleaded in the documents filed by the claimant. She relied on the decision in **John Wallingford v Mutual Society and the Official Liquidator** (1880) 5 App Cas 685 in support of her proposition that the absence of specific pleadings related to fraud is fatal to proof of fraud.

[21] Finally she contended that the defence adumbrated, is not an abuse of the process of the court as the defendant has reasonable grounds for defending the claim.

THE LAW

[22] CPR 26 .3 (1) gives the court the power to strike out the statement of case of either party if certain factors are present. In the matter at bar the claimant is

urging the court to strike out the defendant's statement of case pursuant to CPR 26.3 (1)(b) and (c), quoted above, as being an abuse of the process of the court and disclosing no reasonable grounds for bringing the defence.

[23] The power to strike out a party's statement of case is significant as it could result in the conclusion of litigation in the matter and a denial of justice. The only circumscription of that power is to found in CPR 1.1 and 1.2 – the overriding objective, that is, to deal with matters justly and expeditiously. It must therefore be carefully exercised. In **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926 Lord Woolf MR (as he then was) examining the same provision in the United Kingdom's Civil Procedure Rules, emphatically set the tone for the approach to be taken, of the then new provision, when he said,

> *The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader then they were. In many cases there will be alternatives which enable a case to be dealt with justly without the draconian step of striking the case out.*

[24] This approach has been followed in numerous cases in this jurisdiction for example in **McNaughty v Wright** SSCA No. 20/2005 delivered May 2005. The Caribbean Court of Justice (the CCJ) has also approved this approach in **Barbados Rediffusion Service Ltd v Asha Mirchandani and others (No. 2)** [2006] 69WIR 52.

[25] **Biguzzi v Rank Leisure plc** *supra,* was concerned with delays in complying with Case Management Orders. The instant case is concerned with the applicability of a bar to defending the matter- res judicata- which if established will lead to the conclusion that the defence discloses no reasonable grounds for defending the action and it would be an abuse of process to allow the trial to go on.

[26] In ***National Solid Waste Management Authority v Louie Johnson, Joya Hylton, Lemoy Malabre (b.n.f. Phyllipa Blake) and Ernest Sandcroft,*** [2018] JMCA App 22 the court was concerned with striking out of a statement of case as being frivolous and vexatious and an abuse of the process of the court. Frank Williams JA in delivering the judgement of the court agreed with the approach taken by the judge at first instant in determining whether the case was frivolous and vexatious and therefore not disclosing an arguable case. At paragraph 39 of his judgement he said,

> *She (judge of first instant) found that a proper determination of the application could only be made from an assessment of the "terms and contents of the statement of case".*

[27] Further at paragraph 43 of the judgement he said,

> *It would seem that, as was done by the learned judge, what is required here is an examination of the pleadings.*

[28] In the instant case in determining whether the statement of case should be struck out, the court adopting that approach, will examine the pleadings in the matter at bar and the decided case to determine if the Fixed Date Claim Form is seeking to decide that which has already been adjudicated on.

RES JUDICATA

[29] Before analysing the pleading a dissection of the doctrine of Res Judicata is pertinent, as it is the germ of the claimant's objection.

[30] Simply put res judicata is a Latin term meaning "a thing decided". It is a common law doctrine meant to prevent re-litigation of cases between the same parties regarding the same issues and to preserve the binding nature of a court's decision. Once a final judgement has been reached in a case and that decision is not appealed, subsequent judges who are presented with a case that is

identical to or substantially the same as the earlier one will apply the doctrine of res judicata to uphold the effect of the first judgement.

[31] In a number of cases our Court of Appeal has reaffirmed the doctrine. For instance in **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ 2 it was said,

> *The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between them.....*

[32] **Halsbury Laws of England** 4th Edition, Volume 16 paragraph 1527 in defining the doctrine says it is not a technical doctrine applicable to only records but a fundamental doctrine of all courts that there must be an end to litigation.

[33] In **Fletcher & Company Limited v Billy Craig Investment Limited and Scotia Investments Limited** [2012] JMSC CIVIL 128, McDonald Bishop J, (as she then was) in her usual careful and erudite manner analysed the doctrine of res judicata. At paragraph 27 of her judgement she said,

> *Usually res judicata is pleaded by way of estoppels and so the trend has been to treat res judicata as arising on the plea of three forms of estoppels: the two traditional ones being "cause of action estoppels" and "issue estoppels" and the third being an extension of the doctrine of estoppel as enunciated by Vice-Chancellor Sir James Wigram in* ***Henderson v Henderson*** *(1843) 3 Hare 100.*

CAUSE OF ACTION ESTOPPEL

[34] *Buckley J in* ***Carl Zeiss Stiftung v Rayner & Keeler Ltd. No. 3,*** *set down what* is to be established to succeed in asserting 'cause of action' estoppels in these terms;

1. That there has already been a judicial decision by a competent court or tribunal,
2. That decision is of a final character,
3. The decision relates to the same question as that sought to be put in issue by the plea in respect of which the estoppels is claimed, and
4. The decision must have been between the same parties or their privies as the parties between whom the question is sought to be put in issue.

ISSUE ESTOPPEL

[35] In paragraph [45] of her judgement McDonald Bishop J (as she then was defined 'issue estoppel' thus;

> *A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law.*

[36] Further in paragraph [43] she said simplifying the definition,

> *It is established on some authorities that this form of estoppels arises where a particular issue, forming a necessary ingredient in a cause of action, has been litigated and decided and one of the parties seeks to re-open it in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant:* ***Arnold v National Westminster Bank Plc. (No. 1)*** *[1991[2 AC 93, 105.*

[37] In those circumstances the earlier decision acts as a Bar to raising the issue in the subsequent matter.

HENDERSON V HENDERSON TYPE ESTOPPEL

[38] Regarding what can be called the **Henderson v Henderson** type estoppels - It is a wider conception of the doctrine than that enunciated in 'cause of action' and 'issue estoppels'. At paragraph [81] of her reasoning McDonald Bishop J (as she then was) said,

> *The principle, succinctly stated, is that a party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue* ***was open to him*** *in the former one:* ***Halsbury's Laws of England,*** *4th Edition, Vol. 16, paragraph 1533.*
>
> *Emphasis mine.*

[39] This definition contemplates that anything that is germane, relevant and/or instructive to the issue raised in the earlier matter and which through inadvertence or otherwise was not raised cannot now be invoked to re-litigate the same issue. This ensures finality between these particular parties on this particular issue.

[40] The principle was applied by the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd.** [1975] AC 581,591where it was said,

> *But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgement of Wigram V.C. in* ***Henderson v Henderson...***

[41] The question that now arises is whether an appeal to the doctrine in the matter at Bar can be successful.

ANALYSIS AND REASONING

[42] The claimant's Fixed Date Claim Form filed September 16, 2016 directly focuses on the existence of two Wills touching the estate of Leslie Watts, deceased. The natural corollary is that the later Will revokes the earlier Will, especially if it has a revocation clause. However, the later Will must be made with the requisite testamentary capacity - the important factor for consideration in this matter.

The classic statement of testamentary capacity is that of Cockburn C.J. in **Banks v Goodfellow** (1870) L.R. 5 QB 549,565;

> *'It is essential...that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that* ***no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'*** *Emphasis mine*

Did Leslie Watts have testamentary capacity on the 10th September, 2010?

The Lloyd Barnett matter has to be analysed to see if it decided what the mental capacity of the deceased was at September 10, 2010.

The Parties

[43] **The Lloyd Barnett matter** was instituted by Dr. Barnett in the shoes of the deceased as his next friend and Guardian ad Litem. The defendants were his daughter, Lelieth Watts and his company, Watts Investment Limited. The matter at Bar is instituted by Sydnia Matherson, the niece of the deceased and a

beneficiary under the 1965 Will and therefore is privy to the deceased. The defendant is the said Lelieth Watts.

Witnesses

[44] The witnesses in the **Lloyd Barnett matter** included, for the defendant, Mr. Karl Chantrielle, who along with Mr. Errol Mills were the procurers of the Powers of Attorney and assisted in the restructuring of the capital and management structure of the company. Mr. Errol Mills is an Accountant who assisted the deceased in his business and Mr. Karl Chantrielle is a former co-worker and lifelong friend of the deceased. Mr. Chantrielle gave evidence supporting the lucidity and competence of the deceased when executing the two Powers of Attorney and calling General Meetings and giving instructions concerning his company. Mr. Chantrielle is also a witness for the defendant in the current matter and the person, according to his witness statement, who received the instructions from the deceased regarding his assets, who should receive various gifts and who the executors of his will should be while making the 2010 Will. He also had the will drafted.

The Issues

[45] In **the Lloyd Barnett matter** the issue surrounded the mental capacity of the deceased to give instructions to grant two Powers of Attorneys, restructure his company and transfer shares and his motor car as well signing rights on his bank accounts. In this matter the issue surrounds the mental capacity of the deceased to revoke his 1965 Will and execute a different Will. There is therefore commonality on the issue of the deceased's mental capacity at the material time.

The decision

[46] The learned judge analysed the evidence of both the claimant and the defendant and found at paragraph [94] that the deceased lacked,

'the mental capacity to evaluate and make rational important decisions relating to his affairs'.

[47] In assessing the evidence the learned judge had for consideration the case of **In re Beaney estate** [1978] 1 WLR 770 concerning the extent of understanding required to execute instruments. In her judgement she quoted in its entirety the Headnote of the case but for present purposes what was Held according to the Headnote is sufficient to demonstrate my conclusion and reasoning. I will refer later to the Headnote.

[48] The learned judge also had for contemplation expert medical evidence from two doctors, a Neurologist and a General Practitioner and Gynaecologists. The evidence of both doctors was not challenged and they were not cross-examined by the defendant.

[49] The defendant has raised three main contentions in opposition to this application;

- The matters are concerned with different things, that is, the execution of Power of Attorney and a Will;
- The standard of understanding required to execute a will is higher than that of a Power of Attorney. This issue was not raised in **the Lloyd Barnett matter** and therefore not part of the ratio decideni of that case;
- Although the deceased had suffered brain damage from a stroke and diminished cognitive ability or understanding he experienced periods when he was lucid and had the capacity to execute his will.

[50] The defendant relies on the decision in **In re Beaney** *(supra)* to support its contention regarding the differing levels of understand or capacity required for different instruments.

[51] The question that arises is whether this is fatal to the application of the doctrine of res judicata.

[52] In **Henderson and Henderson** Wrigram V.C. in defining the ambit of the doctrine of Res Judicata gave it a wide formulation. This formulation allows a court in deciding whether the doctrine can be appealed to, to include anything

that could be raised in the decided matter. In **Yat Tung Investment Co. Limited v Dao Heng Bank Limited** the Privy Council put it this way,

> *.....it becomes an abuse of power to raise in subsequent proceedings matters which **could and therefore should** have been litigated in earlier proceedings. Emphasis mine.*

[53] The question which now arises is whether the issue of varying degrees of understanding requisite to execute different documents was, or could have been and should have been raised in **the Lloyd Barnett matter.**

[54] Certain poignant facts beckon:

- The 2010 Will was executed on the same day, September 10, 2010, as the first of the two Powers of Attorney which formed the subject matter of **the Lloyd Barnett matter**.
- The witness who was instrumental in the creation of the Power of Attorney and the 2010 Will is one and the same, Karl Chantrielle. He gave evidence in the first matter and has sworn to an affidavit in the Fixed Date Claim Form herein.
- The matter of **In re Beaney, deceased** *supra* was cited **in the Lloyd Barnett matter** and relied on in this application by the defendants on the issue of mental capacity

[55] The purport of this is that at all material times the defendants were not only aware of the existence of the 2010 Will but, more importantly for present purposes, were of the view that the execution of the will required a greater or higher level of understanding than that required for a Power of Attorney AND that the deceased had that level of understanding. They could have or should have raised its existence as evidence of the deceased manifesting at the material time, a higher degree of mental capacity than the court was contemplating in **the Lloyd Barnett matter**. Instead it was concealed and now they wish to re-litigate the mental competence of the deceased. According to **Henderson v Henderson** they should not be allowed to so. The decision in **the Lloyd Barnett matte**r was not appealed and the medical evidence upon which the decision was

based was unchallenged. The evidence of Mr. Chantrielle that he had such in-depth instructions, not only for a Power of Attorney but also a will was relevant and admissible to the issue of mental capacity.

[56] The defendant in mounting the challenge concerning the requisite degree of understanding for granting a Power of Attorney postulates that it is a lower standard than what is required for Will. This begs the question, how much less understanding is required for the Power of Attorney?

[57] The only authority cited was **In re Beaney Estate** *supra.* A careful examination of that decision as set out in the headnote is instructive. It states that;

> *...the degree or extent of understanding required in respect of the execution of* ***any*** *instrument was relative to the particular transaction which it was to effect: that for a will the degree of understanding required was always high but that for a contract made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varied according to the circumstances from a low degree where the subject matter and value of the gift were trivial* ***to as high a degree as was required for a will, where the effect of the gift was to dispose of the donor' only asset of value.....***
>
> Emphasis mine

[58] In **the Lloyd Barnett matter** it was alleged that the Power of Attorney was granted to permit, at the instruction of the deceased, the transfer of majority shares in the deceased company, make the defendant a Director of the company with full signing rights on the deceased and the company's bank accounts. It also allowed her to transfer his motor car to herself. These items were the principal or only assets of the deceased. For the deceased to give instructions and power to dispose of them required, according to **In re Beaney Estate,** as high a degree of understanding as that for making a Will. It follows that the defendant's contention

that a lower standard is required denotes a failure to appreciate that the entire estate of the deceased was at stake in **the Lloyd Barnett matter** and the full purport of the decision in **In re Beaney.**

[59] As both degrees of understanding are the same, that issue was litigated in the earlier proceeding and to my mind the defendant is estopped from re-litigating the same issue in later proceeding as the doctrine of res judicata is a bar that can be successfully appealed to.

[60] Another issue raised as an objection to the appeal to the doctrine of res judicata, is the notion of 'lucid interval,' occurring where the defendant was fully capable of managing his affairs from time to time. In **re estate Walker** it was decided that a Will made in such an interval, could be probated.

Was the issue of 'lucid interval' alive in **the Lloyd Barnett matter**?

[61] On reading the decision it is clear that Dr. Barnett instituted those proceedings to challenge the restructuring of the company, based on a conversation he had with the deceased. The evidence disclosed that Dr. Barnett had told the deceased that he could not really manage his affairs as Guardian Ad Litem or next friend as the deceased had transferred fifty- plus per cent of the shares of the company to his daughter. The deceased was furious and said he had done no such thing and anyone who did, is in real trouble. Clearly this was a moment of lucidity sufficient enough to cause Dr. Barnett to institute proceedings to rectify the matter.

[62] So when the matter was adjudicated, the notion of 'lucid interval' was present on the claimant's facts and open to the defendants to urge before the court. The defendants urged that the deceased did all the acts complained of lucidly and fully understanding what he was doing. The opportunity to emphasize the notion of 'lucid interval' before the court for consideration and to challenge the medical evidence not having been taken, they are barred from re-litigating it in later proceedings – **Henderson v Henderson.** In addition the court rejected the

notion when it decided that the deceased was not competent to give the Powers of Attorney.

[63] It follows that the parties are similar, the witnesses are the same, the issue is the same and the objections taken by the defendant against appealing to the doctrine of res judicata were capable of being adjudicated on and should have been adjudicated on in the earlier proceedings. The defendants cannot now re-litigate those issues in the Fixed Date Claim Form. The litigation must come to an end.

[64] While the power to strike out a defendant's statement of case is draconian, in the circumstance of this case it cannot be avoided, on the premise that there are no reasonable grounds for defending the matter and it could amount to an abuse of process to decide otherwise.

[65] For these reasons the following Orders were made:

1. Order in terms of paragraphs 1,2 and 3 as amended to add 'cost to claimant to be taxed or agreed' of Notice of Application for Court Orders filed on February 20, 2018,
2. The claimant is to prepare, file and serve this order.