



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM: The Registrar, Supreme Court of Appeal

DATE: 3 November 2022

STATUS: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Democratic Alliance v Brummer (793/2021) [2022] ZASCA 151 (3 November 2022)

The Supreme Court of Appeal (the SCA) today dismissed an appeal against an order of the Western Cape Division of the High Court (the high court) which, on appeal, dismissed a special plea of *res judicata*.

Mr Brummer was a former member of the Democratic Alliance (the DA) who had instituted action for damages (the damages action) arising from the alleged unlawful termination of his membership. The action was instituted in November 2014. In February 2019 the DA raised a special plea of *res judicata*. The DA pleaded that Mr Brummer was estopped from relying upon the alleged unlawfulness of the termination of his membership since that issue had been determined in earlier litigation between the parties. The trial court dismissed the special plea. The DA was granted leave to appeal to the full court of the Division on petition to the SCA. The high court dismissed the appeal by a majority of two to one.

In July 2012 Mr Brummer's membership of the DA was terminated because he was alleged to be in arrears with the payment of mandatory public representative contributions. He was, at the time a DA representative serving on the Bitou Local Council and Eden District Council. As a result of the termination of his membership vacancies were declared in the two councils. In September 2012 Mr Brummer brought an urgent application (the reinstatement application) to interdict the Independent Electoral Commission (the IEC) and

the DA from taking steps to fill the vacancies. He also sought orders reinstating his membership of the DA and restoring him to the representative positions he held as a representative of the DA.

The re-instatement application was heard by the high court on 12 September 2012. By that date the IEC had already taken steps to fill the vacancies. The high court dismissed the application. The special plea of *res judicata* in the damages action, was premised on the contention that the alleged unlawfulness of the termination of his membership had been before the high court in the re-instatement application. The dismissal of the re-instatement application necessarily involved a finding that the termination of Mr Brummer's membership was lawful.

The SCA found that although the same issue was before the high court in the re-instatement application, the high court had not decided the issue. It had dismissed the re-instatement application in part because the relief that was claimed was no longer competent. The SCA found that the high court's statement that the unlawfulness challenge was not fully and properly ventilated before it, meant that the dismissal of the application could not have been intended to imply a decision upon that issue. In the circumstances the dismissal of the re-instatement application amounted to no more than an order of absolution. The SCA therefore found that the plea of *res judicata* (issue estoppel) was not available to the DA. It accordingly dismissed the appeal.

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