

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

Case Number: JA 114/97

In the matter between

FIDELITY GUARDS HOLDINGS (PTY) LTD

Appellant

and

**THE PROFESSIONAL TRANSPORT
WORKERS UNION AND OTHERS**

First and further

Respondents

JUDGMENT

[1] On 10 September 1997 the appellant launched an urgent application in the Labour Court in which it sought a declaratory order that the strike called by the first respondent was an unprotected strike and an interdict. One of the grounds on which it was contended that the strike was unprotected was that in terms of s 65(3)(a) of the Labour Relations Act, 66 of 1995 ('the 1995 Act') the issue in dispute between the parties was regulated by a collective agreement. Revelas J dismissed the application. An urgent appeal was heard by this Court. The appeal was dismissed on Friday, 26 September 1997. The judgment is reported as Fidelity Guards Holdings (Pty) Ltd v PTWU a.o. [1997] 9 BLLR 1125 (LAC). This Court found that

the strike was protected.

[2] On Monday, 29 September, the appellant served an application on the first respondent which was enrolled for the following day. The appellant again sought an interdict and a declaratory order that the strike was 'an unprotected strike in that the strike called by the first respondent concerns a matter as contemplated by s 65(3)(a) of the Act, in that the matter/dispute pertaining to the said strike is a matter/dispute in respect of which the respondents are already by the terms of a collective agreement(s), and are therefore prohibited from striking concerning the same'. In the founding affidavit the appellant relied on three collective agreements:

- 'the first collective agreement' which was the constitution for the national

industrial council for the contract security services industry dated 20 March

1995;

- the 'second collective agreement' which consisted of two agreements concluded respectively in February 1996 and January 1997 which were made binding as labour orders by promulgation by the Minister of Labour in terms of s 51A of the Labour Relations Act, 28 of 1956 ('the 1956 Act');

- the 'third collective agreement' which was an agreement concluded between the appellant and the Transport and General Workers' Union ('TGWU') during June 1996. The first respondent filed a short answering affidavit in which it raised the defence of res judicata (that the matter had already been decided finally by another Court).

[3] The defence of res judicata was considered by the Labour Court. Basson J held that the defence of res judicata was sound in regard to the second and third collective agreements but that it failed in regard to the first collective agreement. There is no appeal by the appellant against the finding in regard to the second and third collective agreements.

[4] The matter was postponed to enable the first respondent to file an answering affidavit on the merits. Once the papers were in proper form, the matter was argued before Landman J, who granted a rule nisi and an interim interdict. On the return day, Brassey A J refused to confirm the rule on the basis that the issue in dispute was not regulated by the first collective agreement. The Court subsequently granted leave to appeal.

[5] Mr Todd, who appeared for the first respondent, submitted that the appeal should fail on a number of grounds. The first was the Basson J erred in not upholding the defence of res judicata in regard to the first collective agreement. The pertinent reasoning of the learned judge is contained in these passages from the judgment:

‘The *exceptio rei judicatae* forms part of South African common law principles as a weapon or defence in civil proceedings that has to be raised by plea or replication. Following writers such as Voet (*Commentarius ad Pandectas*, 44.2.3) it is now trite that, to succeed in the defence of *res judicata*, the defendant in civil proceedings has to establish that a prior final judgment had been given in proceedings involving (a) the same persons; (b) based on the same relief claimed; and (c) involving the same subject matter or cause of action (see, *inter alia*, Hoffmann and Zeffertt *The South African Law of Evidence* 4th edition at pages 335 *et seq*).

In determining the question whether these three requirements of the defence of *res judicata* are met in the present matter, the following are relevant. First, the parties in the present proceedings are exactly the same parties who were involved in the proceedings in which final judgments have been given by Revelas J and the Labour Appeal Court in the matters referred to above. Second, the relief claimed in these prior proceedings was also the same as the relief claimed... However, the third requirement presents problems. Mr Todd argued on behalf of the respondents that section 65(3)(a)(i) of the Act is, in effect, the cause of action in the present matter and, as the question whether this section brands the strike an unprotected strike (thereby entitling the applicant to the relief claimed in terms of section 68(1) of the Act), was already decided in terms of the prior judgments referred to above, the defence of *res judicata* must succeed... In my view, even though the protected status of the strike is determined in terms of the provisions of section 65(3)(a)(i) of the Act, the question in issue or the cause of action is not section 65(3)(a)(i) as such but it is, in fact, the existence of a collective agreement that regulates the issue in dispute. Simply put, such collective agreement is the very foundation on which the applicant bases its claim for a declarator and an interdict because of the fact that such collective agreement determines the protected status of the strike in terms of the provisions of section 65(3)(a)(i), read together with the provisions of section 67(1) and 68(1) of the Act (discussed above). In other words, the existence of such collective agreement is the cause of action and therefore the question (or ground or demand or matter) in issue. It follows that reliance on a different collective agreement to the one relied on before will constitute a new cause of action as the question in issue is whether this specific collective agreement brands the strike an unprotected strike in terms of the above-mentioned provisions of the Act’.

[6] Basson J thus found that the three requirements of res judicata were met in so far as the second and third collective agreements were concerned. In regard to the first collective agreement, which had not been relied upon by the appellant in the application before Revelas J, Basson J held that that agreement ‘...is “new” in the sense that it did not form a cause of action in the prior proceedings referred to above. In the event, the third requirement for the res judicata defence to succeed is not met and the applicant may bring an application based on this “collective agreement”.’ The question in this appeal is whether that finding is correct.

[7] The most oft quoted authority for the requirements of the defence of res judicata is Voet, Commentarius ad Pandectas, 44.2.3: ‘Under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that if one of those requisites is wanting, the exception fails.’ Bertram v Wood 10 SC 177 at 181. It is the requirement of ‘the same cause of action’ which requires further consideration. The cause of action is the same whenever the same matter is in issue: Wolfaardt v Colonial Government 16 SC 250 at 253. The same issue must have been adjudicated upon. An issue is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought: Horowitz v Brock a o 1988 (2) SA 160 (A) at 179F-H. The rule was explained in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562D-E as follows: ‘Where, for instance, the

causa or *quaestio* is ownership, the claimant, if his case is that he has the ownership through inheritance, would not, according to *Dig. 44.2.11* para. 5, be instituting a new claim by alleging a donation, for no matter in what he may have acquired the ownership, his right to it would be finally disposed of in the first action. According to *Dig. 44.2.27*, regard must be had to the immediate cause of action, and the reason why a claimant may think it is good cause, is of no consequence.’ The reason for the rule is to prevent difficulties arising from discordant or mutually contradictory decisions due to the same action being aired more than once in different judicial proceedings: Voet, 44.2.1. The object of the rule is that of public policy which requires that there should be an end to litigation and that a litigant should not be harassed twice upon the same cause: Boshoff v Union Government 1932 TPD 345 at 350; Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472A-E. The ratio underlying the rule is that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause: Custom Credit Corporation (Pty) Ltd v Shembe at 472A; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 835F-G. The strict common law requirements for the defence of res judicata should not be taken literally and in all cases applied as inflexible rules. There is room for the adaptation and extension of the rule. Every case has to be decided on its own facts: Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A) at 669F-I.

[8] The enquiry in this matter is whether the cause of action in the first application (heard by Revelas J) was the same in the second application which is the subject matter of this appeal. In both applications the contention was that the strike was unprotected. What differed was the basis for that contention. In my view, the cause

of action was nevertheless the same, namely, that the strike was unprotected for want of compliance with the provisions of the 1995 Act.

- [9] A strike may be unprotected for any number of reasons, for example:
- on procedural grounds, such as that the issue in dispute has not been referred to the Commission for Conciliation Mediation and Arbitration ('CCMA'), or that a certificate stating that the dispute remains unresolved has not been issued, or that a period of thirty days has not elapsed since the referral was received by the CCMA, or that 48 hours' notice of the commencement of the strike was not given timeously or in writing (s 64(1));
 - on the basis that the persons participating in the strike are disqualified from striking, for example, because they are bound by a collective agreement that prohibits a strike in respect of the issue in dispute or they are bound by an agreement that requires the issue in dispute to be referred to arbitration or they are engaged in an essential service or a maintenance service (s 65(1)(a), (b) and (d) respectively);
 - or the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court (s 65(1)(c)).

[10] If an employer in the initial application contends that the strike is unprotected because of a procedural defect, such as that the 48 hours notice has not been given, and fails in its application, can the employer thereafter approach the Court on another basis, for example, that the strikers are bound by a collective agreement that prohibits a strike in respect of the issue in dispute?

[11] The answer must be in the negative. In an application for a declaratory order and an interdict on the basis that a strike is unprotected, the employer is obliged to raise all its contentions in that application. It is not entitled to litigate piecemeal with the union and its members. Firstly, it is undesirable that one member of the Labour Court gives a judgment that a strike is protected (on one basis) and shortly afterwards another member of the same Court gives a different judgment in regard to

the same strike on a different basis - as happened in this matter. Secondly, parties should not be required to incur the expense of bringing or resisting more than one application when the facts are the same and the law is known. Thirdly, the consequences of a declaratory order that a strike is protected are important and far reaching for the employer, the trade union and its members employed by the employer: a person does not commit a delict or a breach of contract by taking part in a protected strike (S 67(2)); an employer may not dismiss an employee for participating in a protected strike (s 67(4)); in the case of an unprotected strike the Labour Court may grant an interdict to restrain any person from participating in the strike (s 68(1)(a) and may order the payment of compensation for any loss attributable to the strike (s 68(1)(b)). There should be certainty in regard to the rights and obligations of the parties. So, for example, it is undesirable that employees should embark on a strike, which is held to be protected on one basis, thereby placing pressure on their employer to accede to their demands, and then, before the strike bites, the strike is interdicted by the Court because the Court finds that the strike is unprotected on a different basis. It is also important for the employees to know whether, in striking, they enjoy the protection from dismissal if the strike is protected.

[12] This matter illustrates the undesirability of permitting a party to launch a second application for the same relief - a declaratory order and interdict - on the same cause of action - that a strike is unprotected - on facts which existed at the time the first, unsuccessful, application was brought:

-for a period of time the first respondent's members participated in a strike

which was held by the Labour Court and the Labour Appeal Court to be a

protected strike;

-the strikers were entitled to believe that they were immune from dismissal for striking;

-the same strike was thereafter interdicted on the grounds that it was in breach of a collective agreement which pre-dated the Court proceedings by two and a half years, thereby disarming the employees of their weapon of strike action;

-the union was obliged to incur costs, again, for defending the second application before three different judges of the Labour Court on three different occasions and on appeal before this Court;

-the Labour Appeal Court, having given a definitive final judgment on 26 September 1997 that the strike was protected is called upon almost a year later to find that the strike was actually unprotected.

[13] If a party fails to present evidence to the Court during the course of a trial or in an application and wishes to do so later, a Court has a discretion to allow further evidence at any time up to judgment. After judgment has been given a party may still apply to lead further evidence on appeal, or ask the appeal court to remit the matter for further evidence to be led in the Court below. In these cases, generally speaking, a proper explanation must be given why the evidence was not presented earlier, the evidence must be of a material nature, and the prejudice to the parties on either allowing or disallowing the evidence must be weighed up and considered. The law therefore makes allowance, within limits, for parties in litigation to remedy possible deficiencies in the original presentation of their case at a later stage. What the appellant did in the present matter, however, was to attempt to circumvent these provisions of the law by launching new proceedings on the same issue, albeit on a different basis. That it cannot do.

[14] The defence of res judicata should have succeeded.

[15] Mr Todd asked the Court to reverse the costs order of Landman J, who ordered the first respondent to pay the costs of 10 October 1997 when the application for an interim interdict was argued. Unfortunately the first respondent did not appeal against that order. Mr Todd also requested that the costs of appeal should be awarded on the attorney and client scale. No special grounds for making such an award are present.

[16] The appeal is dismissed, with costs.

_____My

burgh J P

I agree

Froneman D J P

I agree

Cameron J A

Date of Hearing: 6 August 1998

Date of Judgment: 17 August 1998

Appearance for Appellant: Mr S Snyman of Snyman Van der Heever Heyns Inc

Appearance for Respondent: Mr C Todd of Bowman Gilfillan Hayman Godfrey Inc

This judgment is available on the Internet at: <http://www.law.wits.ac.za>