

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO.: JA17/99

In the matter between:

MSIMANGO DUMISANI

1st Appellant

BHEKI NGOZO

2nd Appellant

and

MINTROAD SAW MILLS (PTY) LTD

Respondent

JUDGMENT

CONRADIE JA

[1] This is another case about dismissals for operational reasons. The appellants, who were two of the applicants in the court *a quo*, brought an urgent application for an interdict against the respondent, their employer, before Grogan AJ. The decision is reported as National Entitled Workers' Union & Others v Mintroad Saw Mills (Pty) Ltd (1998) 19 ILJ 95 (LC); [1998] 2 BLLR 159 (LC). The applicants alleged that the respondent had failed to make available to them (and the other proposed retrenchees) certain information to which they claimed to be entitled in terms of section 189(3) of the Labour Relations Act 66 of 1995 ('the Act'). The court found that there was no substance to these allegations. It dismissed the application. The affected employees were then retrenched.

- [2] The dismissal of the application meant that the respondent's evidence concerning the furnishing of the information was accepted. The learned judge at one point in his reasons says so explicitly. Apart from that, in terms of s 188 of the Act, the onus of proving compliance with s 189(3)) rested on the respondent. The learned judge could not have dismissed the application without having come to the conclusion that the respondent had established its case.
- [3] The two applicants (who were the only two of the eight retrenchees to again take up the cudgels) then challenged the fairness of their dismissal in the labour court. All they did in order to turn the founding affidavit in the interdict proceedings into a statement of claim in terms of rule 6(1) of the labour court rules was to suitably modify the text of the founding affidavit. There was no change whatever in the substance of their complaints.
- [4] In the minutes of a pre-trial conference it was recorded that the facts which were in dispute were 'whether the dismissals of the applicants were substantively and procedurally unfair, in particular, whether there was compliance by the respondent with the provisions of sections 189(1)(2)(3)(4) and (5) of the Labour Relations Act 66 of 1995...' In answer to a pertinent question by the respondent it was also recorded that the dismissals were substantively unfair because no commercial rationale therefor had been shown by the respondent. It emerged during the trial that the allegation concerning the absence of commercial rationale was (as the trial judge put it) 'sourced directly in the applicants' contention that the respondent had failed or refused to make financial disclosure to the Union on a basis which would substantiate such rationale.'
- [5] The trial judge, Jammy AJ, upheld a plea of *res judicata* by the respondent. He found that 'no issues or evidence have emerged in this matter which were not fully canvassed in the earlier application proceedings between the parties.'

Brought with the leave of the court *a quo*, this appeal is against the order dismissing the applicants' claims.

- [6] It is against public policy that a litigant should on the same grounds be able to keep demanding the same relief from the same adversary. The rule is expressed by saying that a valid defence of *res judicata* may be raised where the same thing has on the same grounds earlier been demanded from the same party.

'... where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.'

(African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562 D per Steyn CJ), approved in Horowitz v Brock & Others 1988 (2) SA 160 (A) at 178 H - J.

- [7] Grogan AJ decided in the interdict application that there was, on the facts found by him, compliance with the provisions of s 189(3) of the Act. Jammy AJ was then, on the same facts, asked to find that there had been no compliance and that it was therefore unfair to have dismissed the retrenchees. By bringing the application in terms of section 191(5)(b)(ii) of the Act, the applicants wanted, in effect, to have the fairness of the dismissals reconsidered and decided in their favour. The court *a quo* could not have acceded to their request without finding that Grogan AJ had been wrong in his assessment of the same facts and his conclusions on the same points of law.

- [8] It does not, in my view, matter that the 'thing demanded' in the first application was an interdict preventing the respondent from proceeding with the retrenchments without having complied with the provisions of s 189(3), and, in the second application, was a declaration that the retrenchees had been unfairly

dismissed and were to be reinstated. In each case the essential facts in dispute were the same and the same principles of law required to be applied. The judgment in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) has now made it clear that the doctrine of issue estoppel, as it has been applied in our law, has led to a new appreciation of the traditional *res judicata* doctrine. At 667 J – 668 F Botha JA said the following: -

‘Dit is na my mening duidelik uit die voorgaande opsomming van Greenberg R se beredenering dat *Boshoff v Union Government* nie vatbaar is vir die simplistiese beskouing dat die Hof daar Engelse reg toegepas het in plaas van ons eie reg nie. Die hele uitgangspunt van die beredenering was gegrond op gemeenregtelike bronne. Die gedagte dat Engelse reg aangewend is ter verdringing van gemeenregtelike beginsels spruit voort uit die resultaat wat bereik is: die verweer van *res judicata* is gehandhaaf, alhoewel dit wat geëis is en die eisorsaak nie dieselfde was in die twee aksies nie. Maar dit verloor uit die oog dat daar in die uitspraak aanknopingspunte vir daardie resultaat gevind is in die gemeenereg. Die kern daarvan lê in die vereiste van *eadem quaestio* en die gelykstelling daaraan van die vereiste *eadem petendi causa* na aanleiding van Voet 44.2.4 en sy voorbeeld van die *actio redhibitoria* en die *actio quanti minoris*. Greenberg R het die voorbeeld gebruik as steun vir die gedagte dat aan *petendi causa* eerder ‘n wye betekenis geheg behoort te word as ‘n enge een, maar inderwaarheid is die voorbeeld van veel groter betekenis as net dit. Dit wat geëis word met die *actio redhibitoria* is ongetwyfeld nie dieselfde as wat geëis word met die *actio quanti minoris* nie, en tog is die *exceptio rei judicatae* toepaslik. Voet se voorbeeld en Greenberg R se aanvaarding van ‘n wyer betekenis van *petendi causa* hou albei die noodwendige implikasie in dat dit vir ‘n verweer van *res judicata* nie ‘n onwrikbare vereiste is dat dit wat gevorder word dieselfde moet wees nie.’

He then (at 669 F – G) summarised his conclusion as follows –

‘Die ware betekenis van *Boshoff v Union Government* is dat die beslissing ingehou het dat die streng gemeenregtelike vereistes vir ‘n verweer van *res judicata* (in die besonder: *eadem res* en *eadem petendi causa*) nie in alle omstandighede letterlik verstaan moet word en as onwrikbare reëls toegepas moet word nie, maar dat daar ruimte is vir aanpassing en uitbreiding, aan die hand van die onderliggende vereiste van *eadem quaestio* en die *ratio* van die verweer.’

[9] It is highly desirable that employers and employees should have the largest possible measure of certainty in the conduct of their affairs. In National Union of Mineworkers v Elandsfontein Colliery (Pty) Ltd (1999) 20 ILJ 878 (LC) at 885 A - B Grogan AJ in reliance on Fidelity Guards Holdings (Pty) Ltd v PTWU & Others (1999) 20 ILJ 82 (LAC), remarked:

‘The consequences of a judgment, such as that of Zondo J in this case, which in effect gives the employer the go-ahead to retrench, are clearly of great significance to the employer. It would be invidious if an employer, armed with a judgment that states that it has complied with the applicable provisions of the Act, was subsequently told that it had not complied with the Act, and was ordered to reinstate or compensate the dismissed employees.’

[10] Jammy AJ considered the *dicta* in NUM v Elandsfontein Colliery (Pty) Ltd (supra) - that the doctrine of *res iudicata* found application in circumstances such as the present - to be correct. I am in respectful agreement with that conclusion.

The appeal is dismissed with costs including such costs as were incurred by the respondent in opposing the application for leave to appeal.

CONRADIE JA

I agree

ZONDO AJP

I agree

MOGOENG AJA

Date of hearing: 27 September 1999

Date of judgment:

Attorney for the Appellant: Mr D. Maluleke

Attorney for the Respondent: Sampson oakes Higgens Inc

Appearance for the Respondent: Adv Barrie

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