



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

JA02/2015

In the matter between:

NATIONAL EMPLOYERS

ASSOCIATION OF SOUTH AFRICA (NEASA)

Appellant

And

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL (MEIBC)

First Respondent

GENERAL SECRETARY OF THE MEIBC

Second Respondent

MINISTER OF LABOUR

Third Respondent

THE PRESIDENT OF THE MEIBC

Fourth Respondent

FURTHER RESPONDENTS (PER LIST “A”)

Fifth and Further Respondents

Heard: 26 March 2015

Delivered: Order delivered on 26 March 2015

Summary: Mootness – urgent application to interdict bargaining council from requesting extension of collective agreement to non-parties – interdict refused and Minister thereupon extending collective agreement to non-parties – Minister’s decision then on review – review of request to minister matter becomes moot as purpose of the interdict overtaken by events – no justifiable reasons to entertain merits of matter despite mootness –Appeal dismissed with costs.

Coram: Waglay JP, Davis and Sutherland JJA

REASONS FOR THE ORDER

SUTHERLAND JA

Introduction

- [1] On 26 March 2015, this Court declared the appeal moot and dismissed the appeal with costs. These are the reasons of the court.
- [2] The appellant (NEASA) had sought in the Labour Court two orders. First, to interdict the first, second and fourth respondents, (together referred to as the MEIBC) from requesting the third respondent (the Minister of Labour) to extend a collective agreement to non-parties, pursuant to her powers in terms of section 32(3) of the Labour Relations Act 61 of 1995 (LRA). Secondly, to set aside any decisions taken by the MEIBC Management committee on 8 October 2014, which had been the occasion of the decision, as contemplated in terms of section 32(1) of the LRA, to make a request to the Minister of Labour. ¹

¹ The relevant portions of Section 32 of the LRA provides:

(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council-

- (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and
- (b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

(2)...

(3) A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that-

- (a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);
- (b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council;
- (c) the members of the employers' organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement;
- (d) the non-parties specified in the request fall within the bargaining council's registered scope;
- (e) provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought against-
 - (i) the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement;
 - (ii) the withdrawal of such an exemption by the bargaining council;

- [3] The relief was sought on 23 October 2014. Judgment (per Rabkin-Naicker) was given on 1 December 2014, dismissing the application. The application for leave to appeal was lodged on 3 December and leave to appeal was granted on 18 December 2014.
- [4] Whilst these happenings occurred, the MEIBC, on 10 December 2014, requested the Minister to extend the agreement. She did so on 24 December 2014, and the extension was made effective from 6 January 2015. NEASA has brought a review application against the Minister of Labour to set aside the extension, which application is pending at the time the appeal was heard on 26 March 2015.
- [5] The argument is now advanced on behalf of the MEIBC that the appeal is moot. NEASA is of the view that it is not. What this Court is required to decide is whether the appeal is moot, and if so, do circumstances exist that require a judgment on the merits of the dispute between the parties.

Is the appeal moot?

- [6] The Constitutional Court has held that:

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law’.²

- [7] In my view, the mootness of this appeal is plain. The interdictory relief sought has been overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now perfectly academic.³

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- (f) the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act; and
 - (g) the terms of the collective agreement do not discriminate against non-parties.”

² *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at 18, fn18.

³ The Notice of motion was formulated thus:

“2.1 Interdicting and restraining the first and second respondents from requesting the third respondent to extend the first respondent’s main collective agreement to non-parties in terms of section 32 of the LRA insofar as the request is based on any decision purportedly taken by the first respondent at its special management committee meeting on 8 October 2014 and/or the balloted vote of the first respondents representatives concluded on 14 October 2014.

- [8] Whether the Minister of Labour has properly acted pursuant to section 32(3) of the LRA is a question distinct from that which the court *a quo* addressed. The validity of the Minister's decision is the subject matter of the pending review. On the principle established in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) and reaffirmed in *MEC for Health, EC v Kirland Investments (Pty) Ltd t/a Eye Laser Institute* 2014 (3) SA 481 (CC), the decision of the Minister must be directly impugned to be declared invalid, and, even if found to be invalid, a further enquiry must be embarked upon to assess what relief should follow, the range of which includes the prospect of allowing the effects of the invalid decision to remain effective.
- [9] Nevertheless, it was argued that the matter cannot be moot because an aspect of the judgment *a quo* which dealt with a legal question central to that controversy; ie being the proper interpretation of section 32(1) which is also an issue central to the controversy in the review challenging the Ministers' extension decision of 24 December 2014. Accordingly, runs the argument, the judgment of the court *a quo* on that point, which went against the view preferred by NEASA, and which is crucial to the success of the pending review, will be flourished by the opposition and NEASA will be met with a claim of *res judicata* or of issue estoppel. Thus, it is further contended, the law point about the interpretation remains a live and not an academic question. In my view, even if a *legal point* remains controversial, that does not save a *matter* from being moot.
- [10] However, in my view, the risk of issue estoppel does not arise. The requirements for issue estoppel were articulated in *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) as being (1) two matters founded on the same cause of action, (2) seeking the same relief, (3) between the same parties. Moreover, and at esp [24] - [26], the SCA held that the defence of issue estoppel would be allowed on an *ad hoc* basis and only in circumstances where unfairness does not result.⁴

2.2 Insofar as may be necessary, reviewing and setting aside any and all decisions which the first respondent purported to take at its special management committee meeting of 8 October 2014, pertaining to a request to the third respondent to extend the first respondents main collective agreement to non-parties in terms of section 32 of the LRA."

⁴ The Passages from the judgment of Brand JA are [24] – [26]:

[24] At the same time, however, our courts have realised that relaxation of the strict requirements of *res iudicata* in issue estoppel situations creates the potential of causing inequity and unfairness that would not arise upon

- [11] The circumstances that present in this matter are that in the first matter, relief was sought to prevent a request for an extension and in the pending second matter, the relief sought is to invalidate a decision extending the collective agreement. Moreover, as seems to be common cause, the pending review is substantial and comprehensive, as distinct from the urgent review that came before the court *a quo*. Furthermore, as it evident, the cause of action in the first matter was the alleged impropriety of the MEIBC's conduct and in the second matter, the alleged impropriety of the Minister's conduct. It is true that a collateral attack is to be made on the conduct of the MEIBC, but the cause of action is nevertheless distinct.
- [12] Accordingly, the argument that NEASA is certain to be trumped on the point of issue estoppel is unconvincing.

[13] The appeal before this Court is moot.

Despite Mootness is a judgment on the merits required?

- [14] The occasion for a judgment on the merits to be given when a matter is moot is self-evidently exceptional. It is in the exercise of a discretion in the service of the interests of justice whether to do so.⁵

application of all three requirements. That potential is explained by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1966] 2 All ER 536 (HL) at 554G – H when he said:

'The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought?'

[25] One can also imagine a situation where a purchaser seeks confirmation of his or her purported cancellation of the sale in motion proceedings. The seller may decide that the expensive and time-consuming game is not worth the candle and thus decide not to oppose. But if the purchaser were then to sue for substantial damages the application of issue estoppel in the second case may cause clear inequity. The same situation will not arise in the case where all the requirements of *res iudicata* are satisfied. In that event the relief sought in both cases will be the same. The seller will have to decide whether to speak up in the first case or hold his or her peace in the second.

[26] Hence, our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of *res iudicata* should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings (see eg *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* supra at 676B – E; *Smith v Porritt* supra para 10). That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution."

⁵ *Qoboshiyane NO v Avusa Publishing Eastern Cape and Others* 2013 (3) SA 315 (SCA) (*Qoboshiyane*) at para 7.

- [15] An example of such circumstances is that offered by *Buthelezi and Others v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA), the case of the Dalai Lama's patient request for a visa. The appeal was heard long after the event for which the visa was intended had passed and the Dalai Lama no longer could use it. The attack on the department of Home Affairs was that its officials had been *mala fide* in deliberately procrastinating on the application to defeat its purpose. This irregular conduct was held to remain a live issue which the court dealt with on appeal. Both parties accepted that the controversy remained alive and so the court had no need to resolve a debate, but held that that stance adopted by the parties was correct.
- [16] The test to decide whether to give a judgment was formulated by Wallis JA in *Qoboshiyane* thus:

‘...there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits. *The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.*⁶ (Emphasis supplied)

- [17] In this case, the two questions arise. First, does a discrete legal issue of public importance that would affect future matters? (For present purposes, the point of controversy, the interpretation of section 32, can be taken to be enduring in character). Second, is adjudication *required* by this Court? “Required” in this context, in my view, means “necessary”, that it might be said that it would be prudent to do so to address the risk of the point being the bone of litigation in future because the policy motivation to do so is to avoid future litigation over the legal point.
- [18] However, this Court is informed that there is already an existing and pending review application that will address the question of the interpretation of section 32, among other questions. The very existence of contemporaneous and incomplete litigation on the identical issue, which compels an examination of a composite number of factors, together with the section 32 interpretation question, produces a situation in which a judgment from this Court is not, in my view, “required”. Indeed, it seems that the

⁶ *Qoboshiyane* at para 5.

pending review application is the appropriate occasion upon which to plumb the depths of the whole controversy between the parties in context, and not piecemeal, which would be what this Court would be doing by deciding one of several questions. These factors seem to give rise to a substantial reason why it would be inappropriate for this Court to decide the issue in a moot case and in consequence of which the court's discretion to decide the legal question, despite the mootness of the matter, should be exercised against doing so.

Conclusion

[19] The matter is moot and a judgment on the merits is not required.

[20] The order as to costs should follow the result.

The Order

[21] For the reasons given, the order was made on 26 March as follows:

- (1) The case is declared to be moot and no judgment on the merits is required.
- (2) The Appeal is dismissed with costs.

Sutherland JA

I agree

Waglay JP

I agree

Davis JA

APPEARANCES:

FOR THE APPELLANT: Adv A Freund SC, with him, Adv G Leslie

Instructed by Anton Bakker

FOR FIRST SECOND AND

FOURTH RESPONDENTS: Adv N Cassim SC, With him Adv F Boda and Adv R Itzkin

Instructed by Patelia-Cachalia

FOR THE 37TH

RESPONDENT (NUMSA): Adv J Van der Riet SC

Instructed by Ruth Edmonds