

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT PORT ELIZABETH)

Reportable
Case no: P 550/2009

In the matter between:

FOOD & ALLIED WORKERS UNION

First Applicant

N GELA & OTHERS

Second to Further Applicants

and

KEY SPIRIT TRADING 193 CC t/a
JIMMY'S SUPERSPAR

Respondent

Date of hearing: 24 May 2011

Date of judgment: 24 June 2011

JUDGMENT

BHOOLA J:

Introduction

[1] This is a ruling on a point *in limine* raised by the respondent that the applicants are estopped by the *exceptio rei judicata* from presenting evidence

on

certain issues traversed in their statement of case, by reason of an earlier judgment declaring their strike unprotected.

Background facts

[2] During March 2008, the first applicant ('FAWU') represented the further applicants in discussions with Workers' Unlimited concerning various matters of mutual interest. The parties were unable to resolve the dispute and FAWU referred it to the CCMA, citing the respondent as a party. The dispute could not be resolved and a certificate of outcome was issued on 31 July 2008.

[3] On 21 August 2008, the respondent advised FAWU of the cancellation of its outsourcing agreement with Workers' Unlimited, and the following day it

forwarded a copy of its disciplinary code and procedure to FAWU. The applicants disputed that they were bound by the code, which appeared to also become an issue during the strike.

[4] On 14 November 2008, FAWU notified the respondent notice of its intention to strike and attached the certificate of outcome. The respondent sought urgent relief to declare the strike unprotected, contending that in truth, the applicants had embarked on the strike because of new grievances raised on 29 October and 11 November 2008. The new grievances related to abnormal overtime, lack of protective equipment, communication regarding shifts, and searches being conducted by untrained supervisors. These issues had not yet been processed in terms of Section 64 of the Labour Relations Act ('the LRA').¹ The applicants denied that the strike related to demands around these new issues.

[5] On 21 November 2008, the interdict court (as per Cele AJ - as he then was) granted a final interdict declaring the strike unprotected. The court found that it was clear that

“there have been issues of mutual concern between the employees represented by their union and their employer, which issues were referred for conciliation and in respect of which a certificate of outcome was issued. It is further clear that the first respondent has since highlighted a new set of facts or new issues for concern and for consideration by the applicant as an employer”.

¹ 66 of 1995.

[6]

Therefore, Cele AJ held : “[w]hen I look at the totality of the evidentiary material before me it appears to make sense to say that the strike is more about the latest of the issues and not the older issues”. He went even further to find that the applicants had utilised the older issues and the certificate relating thereto as “a disguise” to confuse the fact that the strike was about the new issues.

[7] Following the strike, the individual applicants were dismissed and they referred a dispute alleging that their dismissals were substantively and procedurally unfair to this court. One of the grounds of substantive unfairness on which they rely is that their strike was protected. The respondent’s objection is that a large portion of the facts and issues in the applicants’

statement of claim (i.e. paragraphs 68.1 to 68.4 of the amended statement of case and the issues identified in paragraphs 33 to 61 of the pre-trial minute) are *res judicata* as they are the facts and issues on which the Court based its determination that the strike was unprotected.

The law

[8] In South African law, the doctrines of *res judicata* and estoppel are aspects of the *exceptio rei judicata*, which is a single principle characterised by two main requirements, i.e. that the same issue should arise between the same parties. See: *Wolfaardt v Colonial Government*²; *Boshoff v Union Government*³; *Turk v Turk*⁴; *Liley v Johannesburg Turf Club*⁵; *Boland Bank v Steele*⁶; and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk*⁷

[9] In *Smith v Porritt and Others*,⁸ Scott JA set out this principle and the circumstances in which it can be relaxed as follows:

“Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment

2 (1899) 16 SC 250 at 253.

3 1932 TPD 345.

4 1954 (1) SA 971 (W).

5 1983 (4) SA 548 (W) at 551 G- H.

6 1994 (1) SA 259 (T) at 269-70.

7 1995 (1) SA 653 (A) at 664 C – E, 666 I – 668 D and 669 G.

8 2008 (6) SA 303 (SCA) at 307-308 para 10.

on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of the issue of estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D and 670J–671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will, however, require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E–F). Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180: ‘unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals.’”

[10] Mr Euijen contended that where there is some overlap between the issues but the cause of action and the relief sought are different, as is the case here, this court is not bound by earlier findings even on the overlapping issues. It retains an equitable discretion as to whether the earlier decision is correct and should be followed. In this regard he relied on the following authorities: *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*⁹; *Smith v Porritt and Others*¹⁰; *Janse van Rensburg and Others NNO v Steenkamp and Another*¹¹. Therefore, in exercising its discretion this court is entitled to examine the findings of the interdict court to examine whether they are supportable on the facts and the law. Otherwise, the *res judicata* defence would allow parties to :

“shelter, so to speak, behind a decision of this Court which I regard as wrong and insupportable. That weighs very heavily with me in the exercise of my discretion in deciding whether or not I should relax the requirements. To me it seems clear that 'overall fairness and equity' demand, in these circumstances, that I should exercise my discretion against the first and second respondents and decline to relax the requirements...”¹²

[11] Mr Euijen submitted that in the context of a dismissal for participation in an unprotected strike, Schedule 8 Item 6(1) of the Code of Good Practice provides that the determination of the substantive fairness of a dismissal in the

9 2001 (2) SA 232 (SCA) at 239-240.

10 Above n:3 at 307-308.

11 2010 (1) SA 649 (SCA) at 663.

12 *Holtzhausen and Another v Gore NO and Others* 2002 (2) SA 141 (C) at 156 C-D.

circumstances should be done in light of the facts of the case, including the seriousness of the contravention of the Labour Relations Act, attempts made to comply with the Act and whether the strike was in response to unjustified conduct by the employer. Hence notwithstanding the finding that the strike was unprotected, important considerations which arise in respect of the fairness of the ensuing dismissals would include:

- a) Each party's view of the issue giving rise to the strike and the reasonableness of such views: *FAWU and Others v Earlybird Farm (Pty) Ltd.*¹³
- b) Whether either party's conduct was provocative of the strike: *NUMSA and Others v Pro Roof Cape (Pty) Ltd.*¹⁴

¹³ [2003] 1 BLLR 20 (LC) at para 26.

¹⁴ 2005] 11 BLLR 1126 (LC) at 1135, paras 31-4.

- c) Whether the strike was nonetheless functional to collective bargaining: *LAW Wholesale Meat Distributors v FAWU and Others*.¹⁵
- d) Whether the strikers *bona fide* believed that the strike was protected: *Coin Security Group (Pty) Ltd v Adams and Others*.¹⁶
- e) Whether the strikers *bona fide* believed that the strike was legitimate: *NUM and Others v Free State Consolidated Gold Mines (Operations) Ltd and Others*..¹⁷

[12] Furthermore, in determining the fairness of the dismissals, this court, as is a presiding officer in similar circumstances, is required to hear the matter *de novo*, to consider all the circumstances of the case including the seriousness of the alleged misconduct; the harm caused; the employer's reason for dismissal; the alternatives to dismissal and the effect of dismissal upon the employee: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.¹⁸

[13] Mr Zilwa submitted that it is apparent from the pleadings that the applicants in essence seek to challenge the ruling on the status of the strike. The lengthy background to the dispute set out in the statement of case is designed to seek this outcome. This represents an attempt to resuscitate their failed application for leave to appeal against the interdict judgment.

Analysis and conclusion

¹⁵ [1998] 8 BLLR 859 (LAC) at para 32.

¹⁶ [2000] 4 BLLR 371 (LAC) at 377 para 18.

¹⁷ [1995] 12 BLLR 8 (AD).

¹⁸ [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) at 52E – H paras 78-9..

[14]

This court has considered the issue, albeit in the context of an interim interdict in respect of an unprotected strike. At the trial to determine the fairness of the strikers' dismissals, the court dismissed the *res judicata* plea, not because of the interim nature of the interdict but because the issues and the relief sought were different. The only overlap the court found was that the parties were the same. In addition, the court noted that trial proceedings could not be compared with application proceedings when it came to resolving disputes of fact. See in this regard *SASTAWU and Others v Karras t/a Floraline*.¹⁹ *SASTAWU* is however distinguishable on the facts in that the *rule nisi* was subsequently discharged because the conduct of the employees was held not to constitute a strike. *In casu* not only did Cele AJ make a finding that

¹⁹ [1999] 10 BLLR 1097 (LC) at 1102 paras 11-2.

the strike was unprotected, but he issued a final interdict in that regard. These proceedings cannot revisit his findings on the facts and law in regard to the status of the strike and the reasons for the strike.

[15] It is significant, as submitted by Mr Euijen that motion proceedings are normally decided on the pleadings and are generally aimed at temporary or interim relief, while section 191(5) (b) (ii) of the LRA referrals are determined by trial and generally on oral evidence. However, what is of significance as appears from the authorities is not the nature of the proceedings but whether the issue has already been finally determined by the interdict court which is now brought again. Put differently, is the same issue before this court which has been finally disposed of in the interdict application. This requires a view of the dismissal referral compared with the interdict application. There is a clear overlap in the pleadings in that the applicants rely on the fact that the strike was protected for their right to relief in respect of substantive fairness. This cannot in my view be countenanced given the *res judicata* rule. Although *Porritt* supports the relaxation of the *exceptio rei judicata* in appropriate circumstances where the relief claimed and the cause of action are not precisely the same, and *Kommissaris van Binnelandse Inkomste* confirmed that it is not an immutable requirement of *res judicata* that the same thing must have been demanded in both actions,²⁰ it is still clear from the authorities and submissions that the essential requirements remain that the parties must be the same and the same issue must arise.

²⁰ Above n:7 at 668D.

[16]

Mr

Euijen submitted that the essential issue raised in the urgent application, which was in dispute on the papers, was whether the respondent knew what was the issue which gave rise to the strike, or whether its assumptions in this regard were reasonable. On both counts, the union official had contradicted the respondent's assertions under oath. In effectively rejecting this version, the court disregarded the accepted approach in motion proceedings, which is to decide disputes of fact on the respondent's allegations unless these can be rejected as "far fetched or fanciful". It is clear that the interdict court did not so regard the union official's affidavit, since this is not mentioned in the judgment. Instead the court rejected the union's version on the singular basis that "it makes more sense" that the strike should be about the later rather than the earlier issues. With due respect, he submitted, the learned judge was

simply not entitled to do so without referring the matter to oral evidence. Other factors which he submitted should weigh with this court in the exercise of its discretion whether to accept the findings of the interdict court are that the applicants were not legally represented in those proceedings and the fact that the court gave an *ex tempore* judgment immediately on the conclusion of the argument by the parties representatives. None of these reasons would in my view justify a revisiting of Cele AJ's judgment on the law or facts.

[17] It is common cause that Cele AJ issued a final interdict having found on the facts that the strike was unprotected. The applicants cannot therefore seek to rely on the protected nature of the strike for the assertion that their dismissals were substantively unfair, nor can they advance reasons other than those determined by Cele AJ as being the issues that gave rise to the strike. This is indeed what is squarely prohibited by the *res judicata* principle. Although the cause of action is different, the determination of the appropriate relief arising from any determination on the substantive and procedural unfairness of the dismissals is dependent, at least partly, on the same issues of fact and law that were before Cele AJ and involve the same parties.

[18] Therefore, the finding that the strike was unprotected and the facts on which it was based falls under the ambit of the *res judicata* rule. I do agree however that, the scope of the respondent's objection is extremely wide ranging and effectively seeks to prevent the applicants from leading any evidence about the interactions between the parties during the preceding three

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months that led to the strike. In fact, Cele AJ alluded to the fact that virtually none of these issues were debated in any substantive form given the nature of interdict proceedings. The finding on the facts and issues that gave rise to the strike insofar as they are relevant to the conclusion on the unprotected status of the strike are therefore *res judicata*, and any evidence on those facts and issues led with the intention of asserting a different cause for the strike would be impermissible in law. However, given that the cause of action and the relief sought are different, there is an overlap in the facts relevant to determining the appropriate relief where employees are dismissed for engaging in an unprotected strike and the applicants cannot therefore be estopped from leading evidence on these issues.

[19] Therefore, I make the following order:

The *in limine* objection is upheld on the circumscribed basis that the finding of Cele AJ that the strike is unprotected and his reasons for this conclusion are *res judicata*. There is no order as to costs.

Bhoola J

Judge of the Labour Court

Appearances:

For the applicants: Adv TMG Euijen instructed by Cheadle Thompson & Haysom Inc.

For the respondent: Adv PHS Zilwa instructed by N Z Mtshabe Inc.