



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR483/14

In the matter between:

KHANYISILE. P. SHONGWE & 25 OTHERS

Applicants

and

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Respondent

Heard: 22 February 2016

Delivered: 25 February 2016

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicants approached this Court on 28 August 2014 by way of a statement of claim to seek an order of payment in the sum of R22 224 371.69 by the respondent. The applicants alleged that this payment was due to them collectively, arising from a collective agreement entered into between SAMWU and the respondent in June 2008. Other than resisting the claim, the

respondent also raised a variety of preliminary points which were the subject of the hearing of this matter.

Background:

- [2] The applicants are all employed by the respondent in various capacities. They are also members of South African Municipal Workers Union (SAMWU), which they had oddly cited as the twenty-sixth applicant in these proceedings. During June 2008, members of SAMWU in the Johannesburg Metro Police Department had embarked on industrial action in furtherance of their demands pertaining to wages and other terms and conditions of employment. That industrial action was resolved in terms of a 'Memorandum of Agreement' ('The Agreement') concluded on 27 June 2008. For the sake of completeness, the agreement and the relevant provisions read as follows;

"Whereas the City of Johannesburg Metropolitan Municipality is an employer, and whereas the members of SAMWU raised a number of concerns on behalf of their members employed at the Johannesburg Metro Police Department (JMPD), in order to resolve the current impasse, parties record their agreement herein.

- 1. In relation to the payment of minimum salaries to Metro Police Officers (MPOs), the parties agree that;*

1.1.1 Newly appointed Trainees will attend a course at the Academy for the period of 6 months in order to conclude theoretical aspects and will receive a stipend of R2 000.00 per month.

1.1.2 Upon completion of the 6 months theoretical training, a Trainee MPO will be placed as a trainee for a further period of 6 months, during which period he/she will be paid an amount of R4 200.00 per month.

1.1.3 Upon a successful completion of both theoretical and practical training, the MPO will be appointed on the permanent structure of JMPD and be paid the applicable minimum salary.

1.2 *In principle, the employer commits that none of its employees will be paid below the minimum salary of the grade applicable to the position.*

1.3 *In relation to employees who have been in the service of the employer for long, parties agree that these will be treated as follows:*

1.3.1 *Employees who have been in in the service of the employer at JMPD for a period of six years to twelve years, shall be placed on the median range of the salary scale;*

1.3.2 *Employees who have been in the service of the employer at JMPD for more than twelve years, shall be paid at the maximum salary of the salary scale.*

2. *The parties agree that the provisions of clauses 1.3.1 and 1.3.2 of this agreement shall apply once off only to permanent members of staff employed by JMPD, and shall not serve as a precedent nor can it be used against any other parties in any future disputes, engagements and or negotiations.*

3. *The parties agree that this agreement shall supersede any other agreements relating to the issues contained therein.*

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8.”

[3] The applicants contend that they are also covered by that agreement, and that the respondent has refused or failed to remunerate them in accordance with the provisions of that agreement. A number of disputes were raised in the statement of claim and as further recorded in the pre-trial minutes. Effectively, the issues are;

- a) Whether the provisions of settlement agreement are applicable to the applicants;
- b) Whether the applicants stand to benefit from the provisions of the settlement agreement;

- c) Whether the applicants are entitled to the amounts claimed as recorded in the statement of claim;
- d) Whether the settlement agreement was a once off arrangement applicable only to employees who were employed by the JMPD and who had participated in the strike in relation to wages and salaries in 2008;
- e) Whether none of the applicants were employed at the JMPD at the time of the conclusion of the settlement agreement and therefore the agreement is not applicable to them;
- f) Whether in July 2006 the applicants were transferred from JMPD to a centralised Human Resources department known as Group Corporate and Shared Services and were therefore no longer part of the JMPD;
- g) Whether the settlement agreement was a result of the strike action embarked upon by JMPD employees on or about May 2008 and that none of the other employees of the respondent including the applicants were to benefit from the settlement agreement.

[4] In the light of the dispute pertaining to whether the individual applicants were entitled to payment or not in terms of the agreement, they had then on their own referred a dispute to the CCMA under case number GAJB18002-13 on 17 July 2013. In that referral, they had cited SAMWU as the second respondent. The dispute was referred in terms of section 24 (2)¹ of the Labour Relations Act.

[5] Following the failure of conciliation proceedings on 2 August 2013, the matter came before an arbitrator on 1 October 2013. At the arbitration proceedings,

¹ 24. **Disputes about collective agreements.**

- (2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if -
 - (a) the collective agreement does not provide for a procedure as required by subsection (1);
 - (b) the procedure provided for in the collective agreement is not operative; or
 - (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

the individual applicants sought to join SAMWU as the co-applicant. The respondent had opposed the application for a joinder, and further raised a preliminary point to the effect that the CCMA lacked jurisdiction to determine the dispute on the basis that the applicants lacked *locus standi* to refer it. The preliminary issue raised was premised on the contention that the individual applicants on their own were not party to the collective agreement which was the subject matter of the dispute, and could thus not refer that dispute.

- [6] In the award issued on 11 October 2013, Commissioner Duduzile Madubanya had found that the individual applicants, even though bound by the terms of the agreement, were however not parties to it in their individual capacities for the purposes of a referral. The Commissioner had accordingly refused to join SAMWU as a co-applicant in the matter and further found that the CCMA lacked jurisdiction to determine the dispute before it on account of lack of *locus standi*.
- [7] SAMWU then referred another dispute under case number GAJB27117-13 pertaining to the interpretation or application of a collective agreement to the CCMA on behalf of the individual applicants. The matter came before another arbitrator on 4 February 2014. At those proceedings, the respondent raised yet another preliminary point, contending that the individual applicants' claim had prescribed. In terms of a ruling issued on 6 February 2014, Commissioner Lucky Moloi had found that the individual applicants' claim had prescribed, and that the CCMA lacked jurisdiction to determine the dispute.
- [8] On 26 March 2014, SAMWU on behalf of the individual applicants filed an application to review and set aside the ruling issued by Commissioner Moloi. The respondent opposed that application and has also since filed an application in terms of Rule 11 of the Rules of this court, to have that review application dismissed on account of lack of diligent prosecution. These two matters are pending before this court under case number JR483-14, which curiously is also the same case number under which the statement of claim was filed.

Preliminary points and evaluation:

- [9] The respondent raised the following preliminary points, viz; *res judicata*, *lis alibi pendens*, prescription, *locus standi* and non-compliance with the provisions of the LRA. These points are to some extent interlinked, and where one is upheld, it might be academic to deal with all the others.
- [10] The applicants' general approach to these preliminary points was that to the extent that the claim before the court was by way of action proceedings, short of admissions, the allegations made in the statement of case and responses thereto had to be proven by way of oral evidence. Essentially, the argument was that the respondent had not made out a case for all of these preliminary points to be upheld.
- [11] A few comments need to be made in regards to the applicants' general proposition that the preliminary points raised need to be supported by oral evidence, and further that the court cannot make a determination on those points solely on the basis of the documentation before it. In this regard, and as I understood the argument advanced by Adv. Mkhize on behalf of the applicants, a court is precluded from making a determination on such issues by mere reliance on documentation before it.
- [12] Preliminary points arising from a statement of case or a response thereto are dealt with in terms of Item 10.3 of the Practice Manual of this Court². In order to expedite the hearing of such points³, they are ordinarily separated from the merits of the main claim and heard on an interlocutory basis. These points, depending on their nature, only require oral argument to be presented before

² **"Interlocutory applications: points *in limine*, exceptions and special pleas that do not require the hearing of oral evidence.**

10.3.1 Except for those matters that are the subject of case management (where the judge concerned will issue directions on how interlocutory matters are to be dealt with), all preliminary points raised in a statement of claim and any response to a statement of claim (including but not limited to applications for condonation of the late referral of a statement of claim or the late filing of any statement of response, special pleas and exceptions) will be set down for hearing on an interlocutory basis."

"10.3.2 Once the preliminary point is ripe for determination, any of the parties may index and paginate the court file and request that the matter be enrolled for hearing without delay. Filing of heads of argument is not a prerequisite for making this request, though the registrar may, if directed to do so by a judge, call upon the parties to file their heads of argument before allocating the matter for hearing."

³ Rule 11 provides that;

' (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.'

the court. In this case, this matter was set down for trial, and once it became apparent that preliminary points were to be raised, the court was duty bound to deal with them on their own without the necessity of determining the merits of the main claim. These preliminary issues were raised in both the respondent's response to the applicants' statement of case and in the parties' signed pre-trial minutes. The applicants did not nevertheless deem it necessary to respond to the preliminary points as raised, and to the extent that they were of the view that they needed to present evidence in rebuttal to these points, nothing prevented them from doing so when they were heard in court.

[13] Despite Adv. Mkhize's assertions that these points were to be determined by way of oral evidence, the respondent did not, and correctly so, adduce such evidence, as there was no need to do so. Contrary to the applicants' submissions, there is nothing in practice or law that obliges a party to adduce oral evidence in support of preliminary points to be raised. This is even moreso in circumstances where there is no basis to contest the documentary evidence relied upon.

[14] In support of the preliminary points raised, the respondent relied on the applicants' referrals to the CCMA, the certificate of outcome issued, the two awards issued by different commissioners, the review application, the response thereto, and the Rule 11 application. These documents exist and are part of the pleadings before the court. I therefore fail to appreciate what possible oral evidence could have been necessary to prove the existence of these documents. They formed part of the parties' bundles and were facts well known to the applicants. As correctly pointed out by Adv. Matyolo on behalf of the respondent, the very premise of the applicants' argument, i.e to the effect that oral evidence was needed in order to establish these preliminary points, is clearly absurd and not sustainable in law.

Res Judicata and lis alibi pendens:

[15] The basic proposition of *res judicata* is that a party should not be allowed to re-litigate a matter that it has already litigated. The fundamental reason for the *res judicata* principle is to avoid conflicting decisions on the same issues and same

parties, and to bring about finality⁴. The defence is generally available where another court (or tribunal) of competent jurisdiction has already pronounced finally on the same issue based on the same cause of action between the same parties.

[16] The principle was summarised in *Nehawu obo Kgekwane v Department of Development Planning and Local Government*⁵, where the Labour Appeal Court held that;

“Allied to the rule against collateral challenges is the *exceptio res judicata*, which is available where another court (or tribunal) of competent jurisdiction has already pronounced finally on the same issue between the same parties. The previous judgment must have been given by a competent court, the matter must have involved the same parties (or their successors-in-title) and must have been based on the same cause of action with respect to the same subject matter or thing. These elements were all present in the dispute before the Commissioner in this matter. Importantly, in this regard, the *exceptio res judicata* is applicable also to arbitration awards whether obtained in private arbitration proceedings or in proceedings under the LRA” (Citations omitted)

[17] The principles surrounding the plea of *lis alibi pendens* and its relation to that of *res judicata* were aptly summarised as follows in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*⁶:

“As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is

⁴ See *Mpofu v Minister for Justice and Constitutional Development and Others* 2013 (9) BCLR 1072 (CC) at para 16

⁵ (2015) 36 ILJ 1247 (LAC) at para [26]. See also *Prinsloo NO and Others V Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA) at para [23] where the Court held that;

“In our common law the requirements for *res iudicata* are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res iudicata*. That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties”

⁶ 2013 (6) SA 499 (SCA)

raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years”⁷

And,

“The plea bears an affinity to the plea of *res judicata*, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:2

‘Exception of *lis pendens* also requires same persons, thing and cause.-The exception that a suit is already pending is quite akin to the exception of *res judicata*, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.’”⁸

[18] In contending that the dispute before the court is *res judicata*, it was submitted on behalf of the respondent that the dispute was referred by the applicants pursuant to the provisions of the settlement agreement, and was already decided by the CCMA as evident from the arbitration award issued in that regard. It was further contended that to the extent that the arbitration award had not been set aside, it remained valid, and to this end, the court accordingly lacked jurisdiction to determine the dispute before it.

[19] It was not in dispute that the parties in this matter were the same as those that were before the CCMA in respect of both case numbers GAJB18002-13 and GAJB27117-13. Not much though should be attached to the ruling under case number GAJB18002-13 in that a ruling to the effect that a party does not have *locus standi* does not technically dispose of the substance of the claim.

⁷ At para [2]

⁸ At para [3]

[20] In regards to the applicants' cause of action and the relief that they seek, central to this dispute is whether the ruling issued by the CCMA under case number GAJB27117-13 makes the matter before the Court *res judicata*. This requires a comparison of the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both⁹. Furthermore, it needs to be emphasised that it is the duty of this Court to determine the true nature of the issue in dispute between the parties before Court, no matter how the applicants may have chosen to label or describe the dispute in their statement of claim¹⁰.

[21] The nature of the claim and what the applicants sought at the CCMA can be gleaned from the referral¹¹. They had referred the dispute as pertaining to the interpretation/application of a collective agreement as contemplated in section 24 of the LRA. They had further summarised the facts of the dispute as "*Failure by the employer to interpret the collective agreement of 28 June 2008 in a manner that covers the applicants*", and the outcome that they sought is summarised as "*Proper interpretation*"

[22] In their statement of claim, the applicants made reference to the clauses of the collective agreement in contending that they were covered by that agreement, and also alluded to the fact that the respondent had with effect from July 2008, given partial effect to and/or partially implemented the agreement as it had remunerated certain employees. Their main contention was that the respondent, wrongfully and unlawfully failed to give effect to and/or implement the agreement.

⁹ See *Janse van Rensburg & others NNO v Steenkamp & Another v Myburgh & Others* 2010 (1) SA 649 (SCA) 2010 (1) SA 649 at paragraph 25

¹⁰ *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para 52, where the Constitutional Court held that;

'It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining the true nature of the dispute.'

¹¹ Pages 1-5 (LRA Form 7.11) and pages 9-14 (LRA Form 7.13) of the Supplementary Index

[23] As already indicated before, the second referral was effectively dismissed on the basis that the applicants' claim had prescribed. It was argued on behalf of the applicants that the cause of action that is before the court is different from the one that was before the CCMA in the second referral. The basis of this contention is that in the matter before the Court, the applicants contend that they are entitled to a payment based on the collective agreement, whilst the referral before the CCMA dealt with interpretation and application of a collective agreement, and further that the review of the second ruling had nothing to do with a monetary claim. As I further understood the argument, and in the same vein, the cause of action before the Court was not on in terms of the collective agreement.

[24] The submissions made on behalf of the applicants are not only confusing and contradictory, but also flawed in a number of respects. As correctly pointed out on behalf of the respondent, the genesis of the applicants' claim cannot be anything else but the collective agreement. The basis of any entitlement to a monetary payment is indeed the collective agreement. As can also be gleaned from the statement of claim, no other basis was laid for that claim other than the agreement itself. The claim could not have been based on the provisions of the Basic Conditions of Employment Act¹². As things stand, a determination has not been made by way of a section 24 of the LRA determination that the agreement is applicable to them, for the purposes of a conclusion to be made that the agreement formed part of their conditions of service.

[25] The dispute that was dismissed by the CCMA on account of prescription pertained to the interpretation and application of the collective agreement upon which they had relied upon in claiming payment. To the extent that any interpretation of the agreement in favour of the applicants would have entitled them to any payment, such an interpretation was not even arrived at, and effectively, any claim sounding in money emanating from that agreement had been declared as having prescribed. That ruling has not as yet been set aside and thus remains valid and binding.

¹² Act 75 of 1997

[26] In *Dumisani and Another v Mintroad Saw Mills (Pty) Ltd*¹³, the Labour Appeal Court held that it was against public policy that litigants should be able to consistently demand the same relief and on the same grounds from the same adversary. Furthermore, the primary purpose of the LRA is the effective and speedy resolution of disputes, and in line with that purpose, this court and other tribunals are duty bound to a measure of both finality and certainty in dealing with disputes between parties.

[27] In the light of the above, it is therefore untenable for the applicants to approach this Court with essentially the same claim under a different guise and effectively seek the same relief that was determined by the CCMA. A dispute pertaining to interpretation and/or application of collective agreement falls within the exclusive jurisdiction of the CCMA as contemplated within the meaning of section 24 of the LRA. This Court lacks the requisite jurisdiction to determine disputes pertaining to interpretation and/or application of collective agreements¹⁴. In my view the statement of claim before the Court is nothing but a feeble attempt by the applicants to get the agreement in dispute to be interpreted and applied in their favour, in clear circumvention of the provisions of section 24 of the LRA. This is untenable, and the Court cannot countenance such an approach.

[28] In *Kommissaris Van Binnelandse Inkomste v Absa Bank Bpk*¹⁵, the then Appellate Division held that the plea of *res judicata* was available not only when the cause of action was the same but also where, even if it appears that the cause of action was different, the earlier proceedings involved a judicial determination of a matter on the same facts or issues or for that matter the same relief. In this case, the applicants had an insurmountable task of distinguishing between the dispute determined by the CCMA and that as encapsulated in the statement of claim. The best they could muster was a contrived argument that the claim before the court is merely of a monetary nature. To repeat then, the genesis of their claim is the settlement agreement, and it is only through a determination by way of a section 24 of the LRA referral

¹³ (2000) 2 BLLR (LAC) at 136 par 9

¹⁴ *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 14

¹⁵ 1995 (1) SA 653(A)

that it can be determined whether they are entitled to any payment or not. That determination can only be made by the CCMA.

- [29] The essence of the applicants' claim at both the CCMA and in this court is the payment of money emanating from the provisions of the agreement. That claim has been declared as having prescribed, which matter is still pending before this court. To that end, it should be concluded that the applicants' claim before the court is *res judicata*, as a determination that a claim had prescribed effectively brings a matter to finality. Furthermore, to the extent that the applicants seek to pursue the review application in respect of Commissioner Moloi's ruling that the claim had prescribed, this effectively implies that the matter is equally *lis pendens*. The applicants cannot in my view be permitted to circumvent the ruling of Commissioner Moloi on prescription, by revisiting the issues under the auspices of a monetary claim, which in any event is baseless.

Locus standi and Prescription:

- [30] These preliminary issues in my view should be disposed of swiftly. In regards to the issue of *locus standi*, and for the purposes of the claim before the court, it was accepted by the respondent that SAMWU was a party to these proceedings *albeit* was cited as the twenty-sixth applicant. It is strange that SAMWU is cited as one of the applicants when ordinarily, it would have been expected of it to have brought this claim on behalf of its members. Nevertheless, nothing turns on this issue in the light of the conclusions in regards to other preliminary points raised.

- [31] The preliminary point relating to whether the claim has prescribed also needs to be disposed of swiftly. Prescription was raised and upheld at the CCMA under case number GAJB27117-13 by Commissioner Moloi. Since the ruling in this regard is a matter subject to review proceedings, it is not for this court to pronounce on that matter.

Costs:

- [32] The respondent sought a punitive cost order against the applicants on the basis that the claim had prescribed in 2013 and further that their claim was dismissed at the CCMA and yet they had approached the Court with a similar claim. It was

further contended that the applicants despite having instituted review proceedings had still approached the Court, and it was impermissible for them to do so in the light of the applicable provisions of section 24 of the LRA.

[33] The submissions made on behalf of the applicants were to the effect that costs should follow the result, and to the extent that the Court was inclined to order costs in favour of the respondent, such a cost order should not be punitive.

[34] Section 162 of the LRA provides that this Court may make an order of payment of costs according to the requirements of law and fairness. It is my view having taken account of these considerations that the respondent should be entitled to its costs. The applicants had no reason whatsoever in the light of the disputes referred to the CCMA and the subsequent rulings in that regard to again approach this Court with their contrived statement of case. Given the nature of their cause of action and the relief that they seek, and further in the light of their review application, there was clearly no reason to approach this Court whilst that application was still pending. The applicants' conduct in my view constitutes an abuse of the court's process. Furthermore, the respondent was forced to defend a claim that was clearly ill-conceived and misguided. In the light of these and other conclusions reached, the following order is made;

Order:

- i. The preliminary points raised by the respondent, and in particular, the pleas of *res judicata* and *lis alibi pendens* are upheld.
- ii. The applicants' main claim as per their statement of case is dismissed with costs.



Tlhotlhemaje, J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

On behalf of the Applicants: Adv. LP Mkhize with Adv. M Mafisa

Instructed by: Maenetje Attorneys

On behalf of the Respondent: Adv. XD Matyolo

Instructed by: Werkmans Attorneys

LABOUR COURT