



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS362/2022

In the matter between:

**PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA
OBO MEMBERS**

Applicant

and

SOUTH AFRICAN REVENUE SERVICES

Respondent

Heard: 31 January 2025

Delivered: 02 April 2025

Summary: Whether applicant entitled to refer a breach of contract dispute after unsuccessfully challenging unfair labour practice claim at the CCMA – employer raising four preliminary points of *res judicata*, *lis alibi pendens*, estoppel and arbitration – principles applied in each special plea considered – requirements for a special defence of *res judicata* and *lis alibi pendens* not met – special plea of issue estoppel dismissed on the basis of equity and fairness – contractual claim arising out of a collective agreement does not fall within the ambit of interpretation or application – special pleas raised by respondent dismissed.

JUDGMENT

PHAKEDI, AJIntroduction

[1] The Public Servants Association of South Africa (the applicant), National Education and Health Allied Workers Union (NEHAWU) and South African Revenue Services (the respondent) entered into a Leave Policy Collective Agreement (the collective agreement) on 22 February 2006. Clause 5.4 of the collective agreement provides for the encashment of a maximum of six days of outstanding leave days not taken within a cycle but to be paid out before the end of April of the following year.

[2] In order to give effect to the collective agreement, the respondent commissioned a Human Capital and Development Internal Policy Conditions of Service Policy (the Leave Policy) effective from 23 June 2018. Clause 2.6.2(h) confirms that employees have an option to cash up to a maximum of six (6) working days of the accumulated leave days within a cycle.

[3] During 2018 and 2019, the respondent complied with the terms of the collective agreement read with the leave policy. However, the applicant's members were not paid their leave encashment claim for the year 2020/2021.

[4] The applicant lodged an unfair labour practice dispute relating to the non-payment of the leave encashment with the Commission for Conciliation, Mediation and Arbitration (the CCMA). NEHAWU also lodged a similar dispute on or about 23 March 2021. The two disputes were eventually consolidated under case number HO50-21. The arbitrator issued an award dated 7 February 2022 and confirmed that the respondent's withdrawal and non-payment of the leave encashment did not constitute an unfair labour practice. The applicant did not take the award on review and instead approached this court as stated above.

[5] The applicant on or about 25 May 2022, filed a statement of claim against the respondent in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA) Act 75 of 1997¹ seeking an order:

5.1 Declaring that clause 5.4 of the collective agreement and clause 2.6.2(h) of the respondent's leave policy constitute conditions of service that apply to the applicant's members.

5.2 Directing the respondent to allow the applicant's members to exercise their elections to encash a portion of their accumulated leave balances in terms of clause 5.4 of the collective agreement and clause 2.6.2(h) of the respondent's leave policy in respect of the 2020, 2021 and 2022 financial years.

5.3 Ordering the respondent to pay to the applicant's members their accumulated leave encashment elections for the 2020, 2021 and 2022 financial years.

[6] By agreement between the parties, the respondent filed its statement of response on or about 8 June 2022 and raised the main plea of supervening impossibility. The applicant filed its replication on 21 June 2022, rejecting the defence raised by the respondent on the basis that the High Court had already rejected this defence on 22 November 2023².

[7] The parties concluded a pre-trial minutes on or during September 2022, and the parties listed the common cause facts as follows:

'1.4 The Respondent's "Leave Policy of the South African Revenue Service", signed on 22 February 2006, is a collective agreement ("the Collective Agreement)" between the respondent and organized labour, Clause 5.4 of that Collective Agreement provides for leave encashment of a maximum of six days of outstanding leave not taken or accumulated and to be paid out early the following year, preferably before end of April;

¹ Section 77(3) of BCEA reads:

'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

² *Public Servants Association v South African Revenue Service Commissioner of the South African Revenue Service and Others* [2023] ZAGPPHC 1914.

1.5. The Respondent's "Human Capital and Development Internal Policy" conditions of service Policy, effective from 23 June 2018 ("2018 Policy"). The 2018 Policy provided in clause 2.6.2(h) thereof that:

"the following accumulation and encashment provisions will be applicable if an employee did not utilise the full entitlement by the end of the leave cycle:

- (i) A maximum of five (5) working days will be accumulated to the brought forward leave category, however, the accumulated balance may not exceed twenty (20) working days;
- (ii) Balances that remain after the accumulation may be utilized within the first six months of the following year or employees may opt to encash up to a maximum of six (6) working days of this balance."

1.6. In both the Collective Agreement and the 2018 Policy, the Applicant's members are entitled to elect to encash a maximum of six days of his or her accumulated leave balance per annual leave cycle.

1.7. From 23 June 2018 to the end of the 2019 financial year, the Respondent complied with its obligations under the Collective Agreement and the 2018 Policy insofar as it relates to the encashment by the Applicant's members of their accumulated leave balances, by allowing the Applicant's members to elect to encash up to six days' accumulated leave, and by paying to such members as elected to encash a portion of their accumulated leave balances accordingly.'

[8] The matter was then allocated a trial date of the 4th of November 2024. However, on or about 31 October 2024, the respondent filed a notice of its intention to amend its statement of response in terms of Rule 20 of the Labour Court Rules. The amended statement of response was filed on 1 November 2024. On 4 November 2024 the matter was crowded out and the trial did not proceed.

[9] The amended statement of response introduced four preliminary points in respect of the applicant's claim, which if granted, shall oust the jurisdiction of the court to deal with this matter. Furthermore, should the preliminary points be upheld, the respondent seeks an order that its obligations to make payment of the leave encashment for the periods claimed by the applicant is extinguished. The preliminary points are dealt with hereunder:

Res judicata

[10] The respondent submitted that the applicant referred a dispute to the CCMA relating to whether the respondent's discontinuation of the leave encashment policy constituted an unfair labour practice as envisaged in section 186(2) of the Labour Relations Act³. The applicant was relying on clause 5.4 of the Collective Agreement and clause 2.6.2(h) of the Leave policy. In its referral form, the applicant sought the relief that "*the employer must pay out the leave encashment to all employees who elect to have it paid out*". The arbitrator issued an award stating that the discontinuation of the leave encashment policy did not constitute an unfair labour practice.

[11] The respondent submitted further that the preliminary point of *res judicata* must be upheld with costs because the present claim between the parties was finally adjudicated upon by the CCMA under case number HO50-2021.

[12] The applicant submitted that the cause of action it relied upon in the Labour Court is not the same as the one it relied upon at the CCMA. It submitted further that for the respondent to succeed with a special plea of *res judicata*, it must prove the four requirements underlying the defence and demonstrate that:

- 12.1 There must be a previous judgment by a competent court;
- 12.2 Between the same parties;
- 12.3 Based on the same cause of action; and
- 12.4 With respect, to the same subject matter or thing⁴.

Lis alibi pendens

[13] The respondent submitted further that there is a pending litigation between the parties relating to the same cause of action in that NEHAWU, being a party to the proceedings under case number HO50-2021 filed a review application in the Durban

³ Act 66 of 1995, as amended.

⁴ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC).

Labour Court under case number D116/22. The relief sought by NEHAWU in its notice of motion is for the arbitration award to be reviewed and set aside, alternatively that the matter be remitted to the CCMA for a hearing *de novo* before another commissioner other than the second respondent, and costs in the event of opposition. The respondent is seeking an order that the applicant's claim be stayed pending the finalization of the review application filed by NEHAWU.

[14] In respect of the special defence of *lis alibi pendens*, the applicant submitted that the review application filed by NEHAWU has no bearing on its case because NEHAWU is challenging the arbitration award on the basis of an unfair labour practice while the applicant is pursuing contractual claims. The applicant submitted further that in order to succeed with this defence, the respondent is expected to prove that:

- 14.1 There is a pending litigation;
- 14.2 Between the same parties or their privies;
- 14.3 Based on the same cause of action; and
- 14.4 In respect of the same subject matter.

Issue Estoppel

[15] The respondent also raised a special plea of estoppel and pleaded that the essential element in the finding of the CCMA arbitration award dated 7 February 2022 arose out of the same facts in that the applicant in both the CCMA and in this court seeks to enforce the terms of the Collective Agreement and the Leave Policy, both claims seek the payment of the same and/or equal amount and both claims rely on the same facts and evidence.

[16] The respondent further submitted that the judgment to be issued by this court in the main action will impact NEHAWU and that any judgment and/or award obtained from the review proceedings shall also impact the applicant. The respondent seeks that the special plea of *res judicata* be upheld and the applicant's claim be dismissed with costs.

[17] The applicant submitted that the third preliminary point be dismissed on the same arguments raised in both the first and second points in *limine*. The applicant submitted that the respondent is relying on the arbitration award to support its special plea of *res judicata* and *lis alibi pendens*, and the cause of action relied upon at the CCMA is not the same as the cause of action in the Labour Court. The applicant submitted further that a plea of *res judicata* can only be relaxed in the circumstances where the parties are the same and the same issue arises.

Arbitration clause

[18] The respondent further raised a preliminary point contending that the applicant's claim arises from its members' contract of employment with the respondent read with the provisions of the Collective Agreement and the Leave Policy. Clause 15 of the Collective Agreement prescribes a dispute resolution clause, which provides that:

'this agreement is binding on all parties and employees within the jurisdiction of SARS National Bargaining Forum. Any dispute between the parties in respect of the interpretation or application of this agreement will be resolved through private arbitration by an independent third party acceptable to the parties or through the CCMA.'

[19] The respondent submitted further that its preliminary point be upheld with costs because the dispute has already been determined by the CCMA under case number HO50-2021 and the applicant's claim must be dismissed with costs.

[20] The applicant submitted that this preliminary point must be dismissed because its current claim is distinct from the dispute lodged at the CCMA in that the claim before this court is contractual in nature and not emanating from any unfair labour practice.

[21] The respondent argued that the applicant had no basis for persuading any contractual claim and that its only option was to challenge the outcome of the arbitration proceedings through a review application. The respondent persisted that even the applicant's claim is contractual in nature, the applicant has not put forward

reasons as to why its contractual claim was not pursued in terms of clause 15 of the Collective Agreement which prescribes that any dispute relating to application or interpretation of the collective agreement will be resolved through private arbitration or CCMA.

[22] In respect of the last preliminary point, the applicant submitted that clause 15 is limited to the dispute of interpretation or application of the Collective Agreement. The applicant argued further that the contractual entitlement of its members to exercise their right to the leave encashment does not fall within the ambit of 'interpretation or application' and cannot, therefore, be referred to arbitration in terms of clause 15 of the Collective agreement.

Legal framework

[23] It is trite that the jurisdiction of a court is to be determined from the pleadings as formulated by the applicant/plaintiff. In this matter, the applicant pleads jurisdiction in paragraph 3 of its statement of claim as follows:

'3.1 The above Honourable Court has jurisdiction to determine the matter, as the applicant's claim is based on the express terms of its members' employment contracts with the respondent. In terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("BCEA"), the Labour Court has concurrent jurisdiction with the civil courts to adjudicate claims arising from employment contracts.

3.2 Although the applicant has already referred an unfair labour practice dispute to the CCMA, and although that dispute was decided against the applicant, that does not prevent the applicant from pursuing its contractual claim against the respondent, as a contractual claim is not the same as an unfair labour practice dispute under the LRA.'

[24] The respondent, in its amended statement of response, merely records that 'the contents of this paragraph is noted'. It is trite that an objection to the jurisdiction of a court ought to be raised by the party objecting at the earliest available opportunity. In this case, the respondent filed its statement of response on 8 June 2022. The objection to the jurisdiction was only raised four days before the hearing

date. The respondent has an onus to prove that this court does not have jurisdiction to determine the applicant's claim in terms of the specified provisions of the BCEA as pleaded by the applicant.

[25] The Constitutional Court in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another*⁵ held that section 77(3) expands the Labour Court's jurisdiction to cover disputes arising from contracts of employment even if they are not regulated by the Act. But in that event, the jurisdiction is not exclusive. It is shared with the civil courts.

Analysis of the preliminary point of *res judicata*

[26] The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token, the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.⁶

[27] The Constitutional Court in *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others*⁷ (*Ascendis Animal Health (Pty) Limited*) summarised the principles of the special defence of *res judicata* as follows:

'[69] *Res judicata* strictly means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties. In *Evins*, Corbett JA stated that:

"Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause

⁵ [2019] ZACC 45; [2020] 3 BLLR 225 (CC) at para 23.

⁶ *Nestle (South Africa) Pty Ltd v Mars Incorporated [Nestle (South Africa) Pty Ltd]* [2001] ZASCA 76; [2001] 4 All SA 315 (A) at para 16.

⁷ [2019] ZACC 41; 2020 (1) SA 327 (CC).

of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions.”

[70] In essence, the crux of *res judicata* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes.

[71] The requirements of *res judicata*, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) concerning the same subject-matter, or thing... the defence of *res judicata* requires that a party must establish that the present case and the previous case are based on the same set of facts that have been finalised by a competent court or tribunal by the same parties on the merits of the same cause of action.

[28] In *Archer v Public School-Pinelands High School and Others*⁸ the LAC had to determine whether a dismissed employee is entitled to refer a breach of contract dispute to the Labour Court after unsuccessfully challenging his unfair dismissal claim at the CCMA, and the court concluded that nothing precluded such an employee from doing so. The Court per Kathree-Setiloane AJA held that:

‘[16] ... the appellant has both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA which provides that the “*Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term*

⁸ [2019] ZALAC 70; (2020) 41 ILJ 610 (LAC) (footnotes omitted).

of that contract.” The appellant elected to pursue his contractual claim in the Labour Court. In relation to this election, the SCA in *Makhanya*⁹ observed as follows:

“... [I]t is true that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election as to which court to use. In that respect the law specifically allows for ‘forum shopping’ by allowing the litigant that choice. But it is altogether different when a litigant has two distinct claims, one of which may only be enforced in one court, and the other of which may be enforced in another court, which is how the court below applied it in this case.”

[17] Despite the adverse finding in the CCMA, the appellant was entitled to pursue his contractual claim in the Labour Court as it has a different cause of action from his unfair dismissal claim under the LRA. By virtue of this, it is immaterial that the CCMA dismissed the appellant’s unfair dismissal claim, and that that decision was not taken on review to the Labour Court. Even if it was, the appellant would have still been entitled to pursue his contractual claim in the Labour Court, because it was a completely different claim from the one that was dismissed in the CCMA.

[18] The upshot of this is that the appellant was not precluded by the principle of *res judicata* from pursuing his two claims in different fora. This is because the claim that was before the Labour Court, and the one that was pursued in the CCMA were not the same claims. The one is for payment of damages arising from a purported breach of contract by the first and second respondents, and the other is for compensation arising from an unfair dismissal as envisaged under the LRA. The two claims do not have the same cause of action. The pleadings bear this out.’

[29] On application of the above-mentioned principles to the facts of the case before me, I do not agree with the respondent that the applicant sought the same remedies it is seeking in this court before the CCMA. The CCMA did not pronounce on whether clause 5.4 of the collective agreement and clause 2.6.2(h) of the respondent’s leave policy constitute conditions of service that apply to the applicant’s

⁹ *Makhanya v University of Zululand* (2009) 30 ILJ 1539; [2009] 8 BLLR 721 (SCA).

members. The issue that the arbitrator had to determine was whether the respondent's discontinuation of the leave encashment policy was fair and constituted an unfair labour practice as envisaged in section 186(2) of the LRA.

[30] Upon receipt of the arbitration award, the applicant had an election to either lodge a review application challenging the outcome of arbitration proceedings or proceed with a contractual claim as it did in this matter.

[31] Finally, the respondent, in its statement of response, elected to remain silent on the averments that the Labour Court has jurisdiction to entertain this matter as pleaded by the applicant. The applicant's claim before this court is not *res judicata*, and the special plea of *res judicata* cannot succeed.

Analysis of the preliminary point of *lis alibi pendens*

[32] A defence of *lis alibi pendens* is a common law principle which prevents duplication of legal proceedings. In order to succeed with this defence, the respondent must demonstrate that there is a pending litigation between the same parties, based on the same cause of action, and in respect of the same subject matter.¹⁰

[33] In *Nestlé South Africa Pty (Ltd)*¹¹, the defence of *lis alibi pendens* was expounded in these words:

'There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view, none of those elements is present in this case...'

¹⁰ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite* 2000 CC [2013] ZASCA 129; 2013 (6) SA 499 (SCA) at para 2.

¹¹ [2001] ZASCA 76; 2001 (4) SA 542 (SCA) at para 17.

[34] It is common cause that the same parties before this court are the same parties before the CCMA in respect of case number HO505-21, with the exception that NEHAWU is not a party in these proceedings. Equally, in respect of the review application filed in the Durban Labour Court under case number D116/2022, the applicant is not a party in that matter. The second factor to be considered is that the relief sought by the applicant in this court is not the same as the relief sought by NEHAWU in its review application. Finally, the claim which was adjudicated by the CCMA was premised on unfair labour practice as envisaged in the LRA and the applicant is now seeking a remedy based on contract in terms of the BCEA.

[35] The arbitrator in paragraph 97 of the arbitration award records that *"the facts in this case are a classic example that one set of facts could be pursued in three different categories"*:

- 'a. Contractual disputes typically arise when a party does not comply with the terms of a contract or does not perform their side of its obligations under a contract. The obligations stemming from the collective agreement could have been pursued as a contractual dispute in which case the CCMA would not have the jurisdiction to arbitrate the dispute.
- b. Allegations of a unilateral change to terms and conditions have been made and such a dispute, being a matter of mutual interest, would have to be resolved through industrial action. Disregard by an employer of a binding collective agreement which governs terms and conditions of employment will amount to a unilateral variation. Disputes regarding unilateral changes to terms and conditions of employment are disputes of interest and therefore cannot be arbitrated by the CCMA.
- c. The Applicants have, however, chosen to refer this matter as an alleged unfair labour practice relating to benefits in terms of section 186(2) of the LRA. It is therefore for the applicant to discharge the onus on a balance of probabilities that an unfair labour practice was committed by the Respondent. In these disputes the test is not lawfulness of the conduct, but the fairness.'

[36] The above-mentioned paragraphs of the arbitration award confirm that the arbitrator only concerned himself with the case pleaded before him, i.e. unfair labour practice and only limited himself to the issue before him but did not pronounce on the

other two potential claims available to the applicant. The review court will equally be bound by the pleadings before it and cannot exceed its jurisdiction and deal with a matter not placed before it by NEHAWU.

[37] The respondent submitted that there is a possibility of conflicting judgments between this court and the review court. I do not agree that this is the case. The prayers sought by NEHAWU in its notice of motion are not the same as the relief sought by the applicant in this matter. The respondent has failed to successfully establish the defence of *lis alibi pendens*.

Analysis of the preliminary point of Issue Estoppel

[38] The defence of *issue estoppel* describes instances where a party can successfully plead that the matter at issue has already been finally decided even though the common law requirements of *res judicata* have not all been met.¹² *Issue estoppel* is more extensive in its reach than the doctrine of *res judicata*, in that a final judgment not only operates as a defence to the same cause of action but also estops the parties from later disputing any point of fact or law which was essential to the decision made by a tribunal.¹³

[39] *Issue estoppel* 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.¹⁴ At the same time, however, our courts have realised that relaxation of the strict requirements of *res judicata* in *issue estoppel* situations creates the potential of causing inequity and unfairness that would not arise upon application of all three requirements.¹⁵

[40] The essence of *issue estoppel* was distinguished from *res judicata* in the strict sense by Brand JA¹⁶ as follows:

¹² *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* [2014] ZASCA 85; [2014] 3 All SA 431 (SCA) at para 12.

¹³ *Smith v Poritt and others* 2008 (6) SA 303 (SCA); [2007] ZASCA 19 at para 10.

¹⁴ *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA); [2012] ZASCA 28 at para 23.

¹⁵ *Ibid* at para 24.

¹⁶ *Ibid* at para 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 e.g. *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 676B – E. That, I believe, is also consistent with the guarantee of a fair hearing in section 34 of our Constitution.’

[41] The Constitutional Court has cautioned that the “same issue” enquiry is whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Accordingly, each case will depend on its own particular facts, and any extension of issue estoppel will be done on a case-by-case basis, with the relevant considerations including questions of equity and fairness to the parties and also to others. A failure to carefully circumscribe the defence of *res iudicata* and, by extension, *issue estoppel* may cause hardship and injustice.¹⁷

[42] Having considered the above-mentioned principles and having applied them in this matter, I am satisfied that the same issue does not arise in the applicant’s claim based on section 77(3) of the BCEA and the unfair labour practice dispute which was arbitrated in terms of the LRA. The CCMA proceedings were concerned with the fairness of the respondent’s withdrawal and non-payment of the leave encashment claims.

[43] I have considered submissions from both parties, and I believe it would be patently inequitable and unfair to deprive the applicant of the right to a fair hearing and giving them an opportunity to pursue their contractual rights. The respondent’s third preliminary point cannot succeed and stands to be dismissed.

¹⁷ *Ascendis Animal Health (Pty) Limited* *ibid* at para 97.

Analysis of the preliminary point of the arbitration clause

[44] The principles applicable to the resolution of interpretation or application disputes were restated in *Western Cape Department of Health v Van Wyk & others*¹⁸ where the LAC held that:

‘In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.’

[45] Clause 15 of the Collective Agreement states that “... *Any dispute between the parties in respect of the interpretation or application of this agreement will be resolved through private arbitration by an independent third party acceptable to the parties or through the CCMA*”.

[46] From reading the above clause, it is clear that any disputes in respect of interpretation or application of the collective agreement ‘*will be*’ resolved through private arbitration or through the CCMA. The language used in the agreement is simple and straightforward and does not need any further interpretation. The contractual claim arising out of a collective agreement does not fall within the ambit of ‘interpretation or application’.

[47] My understanding is that the current claim of the applicant is contractual in nature and has nothing to do with the ‘application or interpretation’ of the collective agreement. The contractual entitlement of the applicant’s members to encash their

¹⁸ (2014) 35 ILJ 3078 (LAC); [2014] 11 BLLR 1122 (LAC) at para 22.

leave days does not fall within the ambit of interpretation or application; as such, it cannot be referred to private arbitration or the CCMA in terms of clause 15 of the collective agreement. I am not persuaded that the respondent has discharged its onus to prove that the existence of an arbitration clause in a collective agreement ousts the jurisdiction of this court to determine the applicant's contractual claim as pleaded.

Costs

[48] The respondent has argued that its special pleas be upheld and the applicant's claim be dismissed with costs.

[49] The applicant also argued that the special pleas be dismissed with costs on a punitive scale. The basis for the applicant's desire for costs is premised on the fact that the respondent introduced and raised the four preliminary points on 31 October 2024, just four days before the trial date on 4 November 2024. The applicant is also seeking wasted costs for the trial set down in the week of 4 November 2024.

[50] Costs in the Labour Court are regulated in terms of section 162(1) of the LRA when the litigant before the court is relying on any of the provisions of the Labour Relations Act. The Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*¹⁹, reaffirmed the principle set in *Zungu v Premier of the Province of KwaZulu-Natal and Others*²⁰, with regard to costs in employment disputes and stated that "*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties*".

[51] This is a civil matter launched in terms of section 77(3) of BCEA which confers the Labour Court with concurrent jurisdiction with the civil courts. Accordingly, the principle of costs not following the results does not find

¹⁹ [2019] ZACC 7; (2019) 40 ILJ 965 (CC) at para 30.

²⁰ [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 25.

application.²¹ I believe that the applicant's opposition to the four special pleas raised by the respondent was warranted and reasonable.

[52] The applicant has argued that the respondent must be saddled with wasted costs as a result of the matter not proceeding to trial because the respondent raised the points *in limine* just four days before the hearing of a trial date on 4 November 2024. However, I am not inclined to grant an order to the effect that the respondent must pay costs for the trial set down in the week of 4 November 2024. The court order of Phehane J on 4 November 2024 merely records that the matter is crowded out.

[53] Accordingly, the following order is made:

Order

1. The respondent's special plea of *res judicata* is dismissed.
2. The respondent's special plea of *lis alibi pendens* is dismissed.
3. The respondent's special plea of issue estoppel is dismissed.
4. The respondent's special plea of arbitration is dismissed.
5. The Registrar is directed to allocate this matter a preferential date on the trial roll.
6. The respondent is ordered to pay the applicant's costs associated with the four points *in limine*.

G.C. Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv P Kirstein

Instructed by: Couzyn Hertzog & Horak Inc.

For the Respondent: Adv T Manchu SC and Adv L Kekane

²¹ *Skinner & others v Nampak Products Limited and others* (2021) 42 ILJ 838 (LAC) at para 47.

Instructed by: Cliffe Dekker Hofmeyr Inc.

LABOUR COURT