THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. J3319/18

In the matter between:

MUSAWENKOSI HLONGWA	**Plaintiff**
and	
SM XULU INCORPORATED	**First Defendant**
SANDILE MDUDUZI XULU	**Second Defendant**

Heard: **12 - 13 June 2025**

Delivered: **10 July 2025**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 10 July 2025.

JUDGMENT

MAKHURA, J

[1] The plaintiff referred a claim in terms of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA) for breach of contract and payment of his outstanding remuneration. In defence, the defendants raised three special pleas - jurisdiction, *res judicata* and *lis alibi pendens*. The defendants have abandoned the special pleas of jurisdiction and *res judicata*. They persist with the plea of *lis pendens*.

[2] The plaintiff was employed by the first defendant with effect from 23 October 2017 in the capacity of a director, at a cost to company remuneration of R100 000.00 per month. He resigned from his employment with effect from 17 May 2018, citing *"intolerable working conditions in that the first [defendant] failed, refused and/or neglected to pay [him] his salary per the agreement".* He claimed that for the period 23 October 2017 to 17 May 2018, he received a total remuneration of R123 476.28 and that at the time of his resignation, an amount of R573 387.91 in outstanding remuneration remained due and payable.

[3] After his resignation, the plaintiff referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 186(1)(e) of the Labour Relations Act[2] (LRA), alleging that he was constructively dismissed. During the CCMA arbitration proceedings, the plaintiff alleged that he resigned from work because the first defendant made his continued employment intolerable. The CCMA determined that dispute in terms of an arbitration award dated 6 February 2024. The commissioner summarised the plaintiff's evidence as follows:

> 'The applicant's resignation letter, dated 17 May 2018, set out the reasons for his resignation… <u>The essence of the reasons for the resignation is that his agreed salary of R100 000.00 per month was not paid to him</u>, despite numerous demands, and, in the approximately 7 months that he was employed by the

[1] Act 75 of the 1997.
[2] Act 66 of 1995, as amended; section 186(1)(e) provides that dismissal means that an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.

respondent, he was paid just R123 386.28, leaving his salary short-paid in the amount of R573 387.91… The applicant received no response to his resignation letter. The applicant stated that since he was not being paid by the respondent, he worked from home from approximately 7 May 2018.' [Emphasis added]

[4] In his analysis of evidence, the commissioner noted that the first defendant did not challenge the reconciliation compiled by the plaintiff, which reflected that he was owed R573 387.91. The commissioner also took into account the contract of employment in terms of which the plaintiff was entitled to a total remuneration package of R100 000.00 per month and rejected the first defendant's evidence that the payment of remuneration was conditional on the plaintiff bringing new clients or developing the first defendant's business. He then concluded that the plaintiff was dismissed within the meaning of section 186(1)(e) of the LRA and that his dismissal was unfair.

[5] The commissioner dealt with the issue of remedy as follows:

'The applicant seeks compensation for his unfair dismissal... In determining an appropriate amount of compensation, I have had regard to the circumstances of the applicant's dismissal, his length of service (approximately 7 months) and the fact that he is still unemployed. <u>I have also borne in mind that the amount of remuneration owed to the applicant at the time of his resignation (R573 387.91) has still not been paid to him by the respondent</u>. In the circumstances, I am of the view that compensation equal to 9 months' remuneration constitutes "just and equitable" compensation.' [Emphasis added]

[6] The first defendant was ordered to pay the applicant an amount of R900 000.00, which is equivalent to 9 months' remuneration. Aggrieved by the commissioner's decision, the first defendant approached this Court in terms of section 145 of the LRA to review and set aside the award. That review application remains pending before this Court.

[7] During the trial, the defendants have pursued the *lis alibi pendens* point, which has seen some developments since the filing of the statement of defence. The defendants argued that the same parties who are before Court on this claim were in the CCMA for an unfair dismissal dispute where the evidence regarding the plaintiff's outstanding remuneration was the subject matter of his alleged continued employment intolerability which led to the commissioner determining that the plaintiff was entitled to compensation after having taken into account the non-payment of the plaintiff's remuneration. On that basis, the defendants submit that the issue relating to the outstanding remuneration or non-payment of the R573 387.91 was the subject matter before the CCMA, the CCMA made a determination on the issue, which is now pending for determination before this Court in the form of the review application. The defendants argued that ultimately, the plaintiff claimed monetary payments caused by the non-payment of his remuneration in both proceedings – compensation in the CCMA and outstanding remuneration in these proceedings.

[8] The plaintiff argued first that before the CCMA, the claim was against the first defendant and that in these proceedings, the claim is against the two defendants, which of course includes the first defendant. Second, the plaintiff submits that these are two different causes of action, which he is entitled to pursue. The CCMA claim was based on the LRA and the fairness of the dismissal, whereas the current proceedings are based on the BCEA, where he seeks a declaration for breach of contract. Third, the claims were instituted in the CCMA and the Labour Court, which have two different jurisdictional competencies and therefore prevent the defendants from raising the plea. Fourth, the plaintiff submits that there are two different subject matters. In this current claim, he seeks to recover unpaid remuneration, and in the CCMA, he sought compensation for unfair dismissal.

[9] In *Nestle (South Africa) (Pty) Ltd v Mars Inc*[3], the Supreme Court of Appeal (SCA) held that:

[3] 2001 (4) SA 542 (SCA).

'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.

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…'[4] [Emphasis added]

[10] In its subsequent judgment in *Caesratone Sdot-Yam Ltd v World of Marble and Grantite 2000 CC and Others*[5], the SCA explained that:

'[2] 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 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.

[3] The plea bears an affinity to the plea of res judicata, which is directed at achieving the same policy goals…'

[11] The SCA considered the requirement of *"cause of action"* and held that:

[4] Ibid at paras 16 – 17.
[5] 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) at paras 2 - 3.

'[21] … the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case. *Boshoff* was followed in a number of cases in provincial courts, but was regarded as controversial because it was thought to import into South African law the English principles of issue estoppel. It is unnecessary to explore that controversy because this court laid it to rest in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk*. There Botha JA held that *Boshoff* was based on the principles of our law. He said that its ratio that <u>the strict requirements for a plea of res judicata of the same cause of action and that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for their adaptation and extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea</u>.

[22] Scott JA summarised the current state of our law on this subject in *Smith v Porritt and Others*, where he said:

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res 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. <u>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</u>. Broadly stated, the latter involves <u>an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed</u>. 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 issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, B 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… 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.'[6] [Emphasis added]

[12] From the above, it is clear that the requirements for the plea of *lis pendens* are akin to those of *res judicata*. The plea can be invoked where there is litigation pending between the same parties, based on the same cause of action and in respect of which the same relief is sought. Whether the requirements have been met must be determined against the prevailing circumstances and facts of the case.

[13] The question therefore is whether the same parties before this Court are before this Court litigating on the same cause of action and for the same relief that is pending in the review application.

[14] There is no dispute that the plaintiff instituted a constructive dismissal claim before the CCMA, that an award was issued in his favour, and that there is a pending review application against the award before this Court. The plaintiff argued that the requirement of the same parties has not been satisfied because before this Court, the parties include the second defendant, who was not a party before the CCMA. This distinction is unsustainable. The claims remain against the first defendant. There is no specific order sought against the second defendant in these proceedings. Accordingly, the addition of the second defendant in these proceedings is superfluous. The claim

[6] Ibid at paras 21 – 22. On the relaxation of the requirements of the same cause of action and relief, see also *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA); [2014] 2 All SA 26 (SCA) at para 23, where the SCA held that our courts have realised that rigid adherence to these requirements may result in defeating the whole purpose of the plea.

involves the same parties who were before the CCMA and are currently before this Court on review.

[15] The second and third requirements, the same cause of action and relief, are not immutable. In determining whether the requirement of the same cause of action has been satisfied, the Court must enquire whether an issue of fact or law is an essential element of the matter, in this case the constructive dismissal claim, on which reliance is placed. In *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Reyneveldt and other (National Credit Regulator as Amicus Curiae)*[7], the SCA provided the meaning of the concept *"cause of action"* as follows:

> 'The meaning of the expression 'cause of action', when the identically worded predecessor to s 28(1)*(d)* was in operation, was authoritatively laid down in *McKenzie v Farmers' Co-Operative Meat Industries Ltd* where the definition of 'cause of action', adopted from *Cook v Gill* LR 8 CP 107, was held to be –
>
> 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[8]

[16] The Court must carefully examine the facts and consider whether the other proceedings, in this case the constructive dismissal claim now pending on review, involve the determination of a question that is necessary for the determination of the case in which the plea is raised, the current claim.

[17] In *casu*, the constructive dismissal dispute in terms of the LRA, which was arbitrated before the CCMA and currently pending before this Court on review, and the current claim for breach of contract and outstanding remuneration in terms of the BCEA, have one common denominator, which is the non-payment of remuneration. Therefore, what caused the plaintiff to resign and refer the constructive dismissal on the one hand

[7] 2016 (6) SA 102 (SCA); [2016] ZASCA 98.
[8] Ibid at para 12.

and the referral of the breach of contract and claim for outstanding remuneration on the other, is the first defendant's failure to pay the applicant his remuneration.

[18] The plaintiff's constructive dismissal claim was grounded on the same factual matrix - the plaintiff's contract of employment, the agreed remuneration of R100 000.00 per month, the actual payments received and the outstanding remuneration of R573 387.91 as at the date of his resignation, reflected in the reconciliation document prepared by the plaintiff. These exact same facts are now used to seek to prove the breach of contract and outstanding remuneration claim. Accordingly, this requirement has been satisfied.

[19] The CCMA awarded the plaintiff compensation and the first defendant is challenging the award by way of a review application before this Court. This compensation, as is evident from the award, was made after the commissioner found that the first defendant failed to pay the plaintiff's remuneration and had expressly taken this factor into account when awarding compensation of 9 months' remuneration. In terms of section 77A(e) of the BCEA, this Court has the power to make an order that it considers appropriate, including an order that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation.

[20] I accept that the relief sought before the CCMA in the constructive dismissal claim (compensation) is different from the relief sought in these proceedings (payment of outstanding remuneration), and that there is no strict compliance with the relief requirement. Rigid adherence to and the adoption of form over substance would suggest that the relief sought is different, and therefore, this requirement has not been satisfied. However, the relief need not be identical for a successful invocation of the *lis pendens*. In my view, rigid adherence would defeat the very purpose of *lis pendens* and thereby result in the repetition of lawsuits. Further, this multiplicity of actions is a harassment of the first defendant and may possibly lead to conflicting decisions. This

Court may find that the R573 387.91 was due and payable to the plaintiff, and again on review, this same Court may dismiss the review and thereby confirm the commissioner's finding that the plaintiff was owed R573 381.91. This is the mischief the *lis pendens* is intended to prevent. This requirement has been satisfied.

[21] The plaintiff's last defence is that the current claim was instituted in this Court, whereas the constructive dismissal claim was instituted in the CCMA with a different jurisdictional competency compared to this Court. The CCMA is a competent tribunal to deal with and consider, as it has done, the issue relating to the non-payment of the plaintiff's remuneration, albeit under the umbrella of section 186 of the LRA. The non-payment of the plaintiff's remuneration is an essential issue before this Court. Upholding the plaintiff's submission would defeat the very policy that underpins the *lis pendens* - which is non-replication of claims, conclusion and finality of the claim, and equity and fairness

[22] For the above reasons, the defendants' plea of *lis pendens* must succeed. The defendants asked that no costs order be awarded regardless of the outcome. I see no reason to disregard their request and wish. Accordingly, there will be no costs order awarded.

[23] In the premises, the following order is made:

<u>Order</u>

1. The special plea of *lis alibi pendens* is upheld, with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Plaintiff: Mr O Mfuloane of AJ Venter & Associates

For the Defendants: Mr S Mafuyeka of Mafuyeka & Associates