REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

NO: 29038/19

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 03 January 2024

SIGNATURE:

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **FIRST APPLICANT**

MINISTER OF PUBLIC SERVICES AND ADMINISTRATION **SECOND APPLICANT**

GOVERNMENT EMPLOYEES' PENSIONS FUND **THIRD APPLICANT**

and

J K VAN WYK AND 51 OTHERS BEING THE **1ST TO 52ND RESPONDENTS**

G P BARNARD AND 94 OTHERS BEING THE **53RD TO 148TH RESPONDENTS**

JUDGEMENT – APPLICATION FOR LEAVE TO APPEAL

Barit, AJ

Introduction

[1] The applicants in this application for leave to appeal were the unsuccessful parties in the Court *a quo,* where they then appeared as the defendants. The applicants are making application for leave to appeal against the whole judgment and the order handed down on 15 March 2023.

[2] The applicants, are asking the Court to grant leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of Gauteng Division of the High Court of South Africa,

[3] The application has been opposed by all the respondents (who in the Court a quo were the plaintiffs).

[4] In the Court *a quo*, the relief claimed by the respondents was in the form of a declaratory order that either the first Collective Agreement[1], or the second Collective Agreement applies to them. And further that the Department of Correctional Services ("DCS") should act in accordance with their obligation (to the applicable agreement).

[5] The Order in the Court a quo reads as follows:

[1] Section 213 of the Labour Relations Act No. 66 of 1995, as amended: Definitions - "Collective Agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-
(a) one or more employers;
(b) one or more registered employers' organisations; or
(c) one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council.

5.1. The plaintiffs' prayer for a declaratory order that the 2009 Collective Agreement, unamended, applies to them is granted.

5.2. The first defendant is ordered to implement the provisions of clause 11.1 of the 2009 Collective Agreement to all the plaintiffs' salary back pay.

5.3. The first defendant is ordered to recalculate monies due and owing to all the plaintiffs' and apply the rectification of any payment, deductions, and/or amounts owing including in respect to pension contributions and the recalculation of such pension benefits as the rules of the third defendant may provide for and applicable to the third defendant, or any other applicable rule may provide for.

5.4. The first defendant is ordered to pay the costs on a party and party scale with respect to these proceedings, including the costs consequent upon the employment of two counsel.

The Parties

[6] In this application the parties are as follows:

6.1. The first applicant is the Minister of Justice in Correctional Service cited in his capacity as the Executive Authority of the Department of Correctional Services ("DCS") in terms of the provisions of the State Liability Act, 1957.

6.2. The second applicant is the Minister of Public Service and Administration ("PSA") cited herein in the capacity as Executive Authority of Public Service and Administration in terms of the requirements of the State Liability Act, 1957.

6.3. The third applicant is the Government Employees Pension Fund duly established in terms of Section 2 of the Government Employment Pension Law 1996.

6.4. The first (1st) to fifty second (52nd) respondents are all former employees at the Department of Correctional Services (DCS) who resigned from the service of the first applicant, in the period 1 April 2010 to 21 November 2016, and were the plaintiffs in the Court *a quo*.

6.5 The fifty third (53rd) to the one hundred and forty eighth (148th) respondents are all former employees of the Department of Correctional Services (DCS) who had retired from the service of the first applicant in the period 1 April 2010 to 21 November 2016, and were the plaintiffs in the Court *a quo*.

Ground of Appeal

[7] The applicants, in this application for leave to appeal, raise and rely on the following grounds.

7.1. The Court *a quo* lacked the requisite jurisdiction to entertain the dispute.

7.2. The matter is res judicata.

7.3. The respondents' role in the second collective agreement is such that the applicants are entitled to invoke the principle of estoppel.

[8] Other grounds and certain additional factors, in the application, were taken into consideration but nothing turned on them, or alternatively were part of, or associated with one of the above-mentioned grounds.

Nature of Claim

[9] The respondents, all of whom left the service of the applicants prior to 2016, claimed declaratory orders together with orders for payment. The question the Court had to decide was:

a) Whether in 2009, the Occupations Specific Dispensation ("OSD") for Correctional Service Officials, Resolution 2 of 2009, and in particular clause 11.1 thereof should be applied to the respondent with a resulting order in favour of the respondent; or

b) The terms and in particular the amended clause 11.1 of the 2016 Departmental Bargaining Chamber ("DBC") Settlement Agreement of 2016 applies to the respondents with a resulting order in favour of the applicants.

[10] The respondents' claim supports the contention that the 2009 resolution (agreement) applies to them, while the alternative claim supports the contention that the 2016 agreement should be applied to the respondents.

[11] The applicants contend, for various reasons, which are of a legal nature that the 2016 agreement applies to the respondents.

The Dispute

[12] A summation of what the crisp issue for determination is as follows:

Whether the first collective agreement, which remained extant until 21 November 2016 in terms of which the respondents would be entitled to a 100% of the salary back pay applied to the respondents, or whether the Second Collective

Agreement which only came into effect after 21 November 2016, in terms of which they would be entitled to 30% of the salary back pay, applied to them.

The legal implication - Rule 17(1)

[13] The applicants, in their Heads of Argument, have made reference to 17(1) of the Superior Court Act.

[14] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 ("the Act") states that:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that - the appeal would have a reasonable prospect of success (Section 17 (1) (a) (i)) or; there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (Section 17 (1) (a) (ii))".*

[15] The Supreme Court of Appeal has held in the matter of *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund,*[2] that the test for granting Leave to Appeal is as follows (para 16-17):

> *"Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that Leave to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard". (My underlining)*

[2] MEC for Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund [2016] ZASCA 176 (25 November 2016).

"An application for leave to appeal must convince the court on proper grounds that the applicant would have a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound rational basis to conclude that there "would be a reasonable prospect of success on appeal". (My underlining).

[16] This is apparently in contrast to a test under the previous Supreme Court Act, 1959 that Leave to Appeal is to be granted where a reasonable prospect was that another court might come to a different conclusion. *(Commissioner of Inland Revenue v Tuck).*[3]

[17] In the matter of *Fusion Properties 233 CC v Stellenbosch Municipality*,[4] it was stated:

"Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17 (1) provides, in material part, that leave to appeal may be granted where the judge or judges concerned are of the opinion that:

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard….

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[3] Commissioner of Inland Revenue v Tuck; 1989 (4) SA 888 (T) at 890 B/C.

[4] Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 (29 January 2021) (para 18).

Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave".

[18] In Chithi and Others; in re: *Luhlwini Mchunu Community v Hancock and Others,*[5] it was held:

"[10] The threshold for an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success……"

[19] In *S v Smith*,[6] the court stated that:

"Where the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore the applicant must convince this court on proper grounds that the prospects of success of appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established then that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal."

[20] The Supreme Court of Appeal in the matter of *Notshokovu v S,* [7] held that an applicant *"faces a higher and stringent threshold, in terms of the Act compared*

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[5] Chithi and Others; in re: Luhlwini Mchunu Community v Hancock and Others [2021] ZASCA 123 (23 September 2021) ("para 18").

[6] S v Smith 2012 (1) SALR 567 (SCA) [para 7].

[7] See also the Supreme Court of Appeal in the matter of Notshokovu v S [2016] ZASCA 112, where it was held that an Appellant "faces a higher and stringent threshold, in terms of the Act compared to the provisions of

to the provisions of the repealed Supreme Court Act 59 of 1959 (para 2)". (My underlining).

[21] Reading Section 17 (1) (a) of the Act one sees that the words are: *"Leave to Appeal may only be given where the Judge or Judges concerned are of the opinion that - the appeal would have a reasonable prospect of success".* (My underlining)

[22] Bertlesmann J, in the *Mont Chevaux Trust v Goosen and Eighteen Others,*[8] stated the following:

> *"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised by the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, see Van Heerden v Cromwright and Others (1985) (2) SA 342 (T) at 343 H".*

[23] In a recent case, in this division, Mlambo JP, Molefe J, Basson J, cautioned that the higher threshold should be maintained when considering applications for leave to appeal. *Fairtrade Tobacco Association v President of the Republic of South Africa,* [9] the court stated:

> *"As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not*

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the repealed Supreme Court Act 59 of 1959 (para 2)".

[8] Mont Chevaux Trust v Goosen and Eighteen Others (2014 JDR) 2325 (LCC) at para 6.

[9] Fairtrade Tobacco Association v President of the Republic of South Africa (21686/2020) [2020] ZAGPPHC 311

might, find differently on both facts and law. It is against this background that we consider the most pivotal ground of appeal".

[24] From the above, and in considering this Application for Leave to Appeal, the Court is aware that the bar has been raised. Hence, this higher threshold needs to be met before leave to appeal may be granted.[10]

Jurisdiction

[25] In the first ground of appeal, the applicants contend that the Court *a quo* lacked the requisite jurisdiction to entertain the dispute, that the Labour Court has exclusive jurisdiction, and that the action should have been brought before the Labour Court.

[26] Section 157(2) of the LRA in relation to the jurisdiction of the Labour Court reads as follows:

> "*(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-*
>
> *(a) employment and from labour relations;*

[10] In the Annual Survey of South African Law (2016) (Juta, Cape Town p706), the following is stated in a discussion on the case of Seathlolo v Chemical Energy Paper Printing Wood and Allied Workers Union (2016) 37 ILJ 1485 (LC). The court noted that Section 17 of the Act sets out the test for determining whether leave should be granted: "Leave to appeal may only be granted if the appeal would have a reasonable prospect of success. According to the court the "would" in Section 17 (1) (a) (i) raised the threshold. The traditional formulation of the test only required Applicants for leave to appeal to prove that a reasonable prospect existed that another court might come to a different conclusion. That test was also not applied lightly. The court noted that the Labour Appeal Court had recently observed that the Labour Court must not readily grant leave to appeal or give permission for petitions. It goes against the statutory imperative of expeditious resolution of labour disputes to allow appeals where there is no reasonable prospect that a different court would come to a different conclusion". (My underlining)

(b) *any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*

(c) *the application of any law for the administration of which the Minister is responsible."*

[27] Section 157(2) of the LRA confers on the Labour and High Court concurrent jurisdiction to determine disputes over the constitutionality of any contract or act committed by the state in its capacity as employer giving the High Court concurrent jurisdiction to hear and decide a dispute based on breach of agreement with employees.

[28] In the matter of *Makhanya v University of Zululand,*[11] it was stated:

> "*… in respect of the enforcement of both contractual and constitutional rights the high courts retain their original jurisdiction assigned to them by the Constitution. In both cases equivalent jurisdiction has been conferred upon the Labour Court to be exercised concurrently with the high courts".*

[29] O' Regan J in *Fredericks and Others v MEC for Education and Training Eastern Cape & Others*[12] stated:

> "As there is no general jurisdiction afforded to the Labour Court in employment matters the jurisdiction of the High Court is not ousted by section 157(2) simply because a dispute is one that falls within the overall sphere of employment

[11] [2009] ZASCA 69 at para 26.
[12] 2002 (2) BCLR 113 at paras 40-41.

relations … *section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court, since it expressly provides for a concurrent jurisdiction".*

[30] It cannot be denied that the respondents constitutional rights as enshrined in section 27(1)(c), 33 and 34 of the Constitution are violated, *alternatively* threatened to be violated by the unilateral conduct of the first applicant.

[31] On this ground alone the Labour and High Court had concurrent jurisdiction to determine the dispute between the parties.

[32] In *Fedlife Assurance Ltd v Wolfaardt*,[13] Nugent JA held that:

> *"Section 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee".*

[33] In view of the provisions of section 157 of the Labour Relations Act, 66 of 1995, the court has concurrent jurisdiction to adjudicate the dispute between the parties as the unilateral application of the DBC Settlement Agreement 1 of 2016 to the respondents by the applicants in circumstances where the respondents constitutional rights as enshrined in section 27(1)(c), 33 and 34 of the Constitution is violated, alternatively threatened to be violated by the unilateral conduct of the applicants.

[34] For these reasons, as well as due to the fact that the dispute founds a contractual claim for enforcement of a right that does not emanate from the LRA and has expressly disavowed reliance on the provisions of the LRA.

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[13] Fedlife Assurance Ltd v Wolfaardt [2000] ZASCA 91; 2002 (1) SA 49 (SCA) at para 25

[35] In the *Baloyi v Public Protector and others*[14] matter, the Constitutional Court considered concurrent jurisdiction of the High Court in relation to contractual disputes stemming from employment relationships, deciding as follows:

> *"[47] Matters concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract, are expressly noted in section 77(3) of the Employment Act as falling within the concurrent jurisdiction of the High Court and the Labour Court. The question whether contractual claims arising from employment contracts fall within the concurrent jurisdiction of the High Court and the Labour Court has not explicitly arisen before this Court. However, as noted above, the Supreme Court of Appeal has explained on numerous occasions, with reference to the reasoning of this Court regarding jurisdiction over claims based on administrative action in the labour sphere, that the High Court retains its jurisdiction in respect of claims arising from the enforcement of contractual rights in the employment context."* [15]

And

> *"[48] The LRA does not extinguish contractual remedies available to employees following a breach of their contract of employment, or unlawful termination thereof… Nothing in the LRA or the Employment Act, required Mrs Baloyi to advance that claim in the Labour Court".*

[36] Another factor brought in by the applicants is Section 24 of the Labour Relations Act. Two factors emerge:

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[14] Baloyi v Public Protector and others [2020] ZACC 27 at paras 47-48.
[15] See, for example, Makhanya v University of Zululand (218/08) [2009] ZASCA 69 (29 May 2009).

Firstly, in this instance, the dispute concerns payment and does not fall under the edifice of collateral bargaining. Hence, the word 'dispute' as set out in Section 24 is not applicable as the '2009 Collective Agreement' is the source of the settlement. Therefore the payment aspect is what the 'dispute' concerns. Secondly, whichever it is looked at, nothing would turn on Section 24, in light of the wording and case law on Section 157.

Any reliance placed on Section 24 of the Labour Relations Act is hence misplaced.

[37] The contention that the Labour Court has exclusive jurisdiction, and the matter should have been brought before the Labour Court, can be seen to have no merit whatsoever.

Res Judicata

[38] The applicants' second ground in their application for leave to appeal is with respect to *res judicata.* [16] The applicants state that the Court's finding on that issue was incorrect.

[39] The applicants contend that the Second Collective Agreement (2016) brought an end to the dispute regarding the interpretation of the First Collective Agreement, thereby rendering it 'res judicata'. Hence the applicants stating that my finding on the issue of res judicata was incorrect.

[40] The respondents opposes this 'ground of appeal'. They state:

> "… the Court was correct in its findings that res judicata does not arise nor apply in the current setting".

[16] *Res Judicata* is the Latin term for "a matter already judged" and in the broad sense it is generally a plea or defence raised by a respondent in a civil trial.

[41] In the case of *The Trustees for the Time Being of the Burmilla Trust vs The President of the Republic of South Africa*[17] it was stated:

> "The trite requirements of res judicata are that the same relief on the same cause of action must have been finally decided in proceedings between the same parties".

[42] Various elements, in terms of the law must be present for Res judicata to succeed. See for example *Lowrey v Steedman;*[18] *Le Roux en Ander v Le Roux;*[19] *African Wanders Football Club (Pty) Ltd. v Wanders Football Club;*[20] *Lily v Johannesburg Turf Club.*[21] These are elements:

42.1 It must be part of the defendants' plea.

42.2 The judgement relied upon must be between the same parties.

42.3 The cause of action must have been the same.

42.4 The party who raised res judicata must prove all the elements underlying the defence.

42.5 The judgement must be of a competent court.

42.6 The judgement must have been a final judgment and a definitive order on the merits of the matter.

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[17] *The Trustees for the Time Being of the Burmilla Trust vs The President of the Republic of South Africa* 2022 (5) SA 78 (SCA) at para 43.

[18] Lowrey v Steedman, 1914 AD 532.

[19] Le Roux en Ander v Le Roux, 1967 (1) SA 446 A

[20] African Wanders Football Club (Pty) Ltd. v Wanders Football Club 1977 (2) SA 38 A.

[21] Lily v Johannesburg Turf Club 1983 (4) SA 548 W.

In the instance before this Court, inter alia, res judicata was never pleaded by the applicants, nor was the matter previously decided by a competent court.

[43] In addition, the *res judicata* principle cannot apply in this matter as it was not pleaded by the Applicants and there is no prior final judgement. In any event: As detailed in the Potchefstroom Electronic Law Journal,[22] the Constitutional Court, in the matter of *Thembekile Molaudzi v The State,*[23] created a new common law precedent with respect to *res judicata* and the interest-of-justice exception, and quoted as follows:

> "*In Molaudzi v S the Constitutional Court developed the common law by creating an interest-of-justice exception to the principle of res judicata and - for the first time in the Constitutional Court's history - overturned one of its own judgements."*

[44] In the Court *a quo,* I found that *res judicata* does not arise nor apply in this matter. The applicants' contention with respect to *res judicata* can be seen to be without merit.

Estoppel

[45] The applicants, as a third ground in their application for leave to appeal, have, at this stage, brought in the matter of estoppel. This being based on the respondents' role in the Second Collective Agreement being grounds to invoke estoppel.

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[22] The Potchefstroom Electronic Law Journal (PELJ), online version ISSN 1727-3781, PER vol.19 n.1 Potchefstroom 2016, http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1282.

[23] Molaudzi v The State 2015 2 SACR 341 (CC)

[46] The applicants claim that the respondents had a duty to speak and inform the applicants that they were no longer represented by the Trade Union. The DCS hence relied on the silence of the respondents and should be estopped.

[47] Estoppel was never pleaded by the applicants in the Court *a quo* and now seek to raise estoppel for the first time in the application for leave to appeal.

[48] The applicants had a fair hearing before the court *a quo*, where they were able to present all the arguments they wished. The arguments the applicants then sought to advance were fully ventilated, properly considered and comprehensively determined. For estoppel to be of any use in this matter same would have had to be pleaded in the applicants' original plea. Further, silence does not constitute a representation which is a requirement for estoppel, in the absence of a duty to speak.[24]

[49] The applicants attempt to invoke estoppel has no merit.

Summing-up

[50] I am satisfied that the application for leave to appeal, brought by the applicants, on the grounds that it has, has no merit.

Judgement

[51] The Supreme Court of Appeal's guidance for granting leave to appeal is stated in 2016 in *MEC For Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund*, [25] as Leave to Appeal *"must not be granted unless there (is) truly*

[24] Axiam Holdings Ltd. v Deloitte and Touche 2006 (1) SA 237 (SCA) para 21-24.
[25] MEC For Health, Eastern Cape v Ongezwa Mkhitha and the Road Accident Fund [2016] ZASCA 176 (25 November 2016) in para 14 above.

a reasonable prospect of success." Further this application for leave to appeal to the Supreme Court of Appeal or to a Full Bench of this division, has not passed the bar which has been raised in terms of Section 17 of the Superior Court Act of 2013.[26] Hence, this application leads me to believe that any appeal would have no truly reasonable prospect of success. In addition, there are no compelling reasons as envisaged in the legislation why the appeal should be heard, including conflicting judgments on the matter under consideration.

Order

[52] I therefore issue the following order:

The application for leave to appeal is dismissed with costs.

L BARIT
Acting Judge of the High Court
Gauteng Division, Pretoria

Date Heard: 7 July 2023
Date Judgment Delivered: 03 January 2024

[26] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 states that: *"Leave to Appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success (Section 17 (1) (a) (I))".*

Appearances

For the Plaintiff

Advocate L Kellerman S.C.

Advocate S J Coetzee S.C.

Instructed by Geyser Coetzee Attorneys

For the Defendant

Advocate H Gerber S.C.

Instructed by the State Attorney, Pretoria