IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA64/06

In the matter between

Dirk Willem Bouwer	**Appellant**
And	
City of Johannesburg	**1st Respondent**
National Fund for Municipal Workers	**2nd Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] I have had the benefit of reading the judgment prepared by Davis JA in this matter. Regrettably I am unable to agree with the conclusion he reaches in that judgment to uphold the appellant's appeal. Part of my difficulty with Davis JA's judgment is that, in my view, it does not give effect or proper effect to a dictum that I think is in point in this matter which is to be found in the majority judgment of the Appellate Division in **African Farms and Township v Cape Town Municipality 1963 (2) SA 555 (A)** at 563 D-F. I also have difficulty with the precedent which, in my

view, would be created by the acceptance of the appellants' contention on *res judicata* in motion proceedings where a Court dismisses an application on the basis that the applicant has failed to prove its case by sufficient and proper evidence. Davis JA's judgment accepts the appellant's contention and, therefore, creates, in my view, a precedent with which I have immense difficulty. I shall say more on the dictum and the precedent later in this judgment. In my view the appellant's appeal stands to be dismissed. I set out below my reasons for this conclusion.

The factual background

[2] Prior to 1 January 1995 the appellant was employed by the Town Council of Midrand as Assistant Town Engineer at post level 3. On the 1st January 1995 the Midrand/ Rabi Ridge/ Ivory Park Transitional Metropolitan Local Council ("**the TMLC**") superseded the Town Council of Midrand and became the appellant's employer. On the 5th December 2000 the appellant was employed by the TMLC in the position of Executive Manager: Environment and Recreation Management which was on post level 1. He reported directly to the Chief Executive Officer of the TMLC.

[3] With effect from the 6th December 2000 the TMLC was disestablished and the first respondent was established. By virtue of the provisions of sec 197 of the Labour Relations Act, 1995 ("**the LRA**") read with the provisions of sections 12 and 14 of the Municipal Structures Act, 1998 (Act 117 of 1998) the appellant's employment with the TMLC was transferred to the first

respondent. This had the effect that all the posts in the TMLC immediately before the 6th December were thereby abolished.

[4] Initially the personnel previously employed by the TMLC were, after their transfer to the first respondent, not allocated to any substantive posts. This included the appellant. He was initially employed by the first respondent as part of a "**management pool**" which had no substantive posts. After the first respondent had established a staff structure, it offered the appellant on the 26th March 2002 the position of Senior Professional Officer: Environment at the same rate of pay as he had been receiving thus far. The appellant rejected the offer on the basis that the position was lower than the position he had held in the TMLC in respect of status and responsibilities. Although the appellant rejected the offer, he performed the functions and duties associated with the position that he was offered.

The application to the Labour Court

[5] In terms of the appellant's conditions of service, if the position which he had been offered was on a lower level to the one he had held before, in terms of his conditions of service he would be entitled to be regarded as redundant, his contract of employment could be terminated in which case he would then be entitled to a huge severance pay. The appellant believed that he was redundant and that his contract of employment should be terminated and he should be paid severance pay. The appellant asked the first respondent to terminate his services on the basis that he was redundant and to then pay him severance pay. The first respondent refused to do so. The appellant then brought an application in the

Labour Court for an order inter alia declaring that the position he had been offered was lower than the position he had held in TMLC.

[6] The appellant filed a founding affidavit in support of his application. In paragraphs 31.2 to 31.12 of that founding affidavit the appellant set out a number of matters or factors which he contended demonstrated or proved that the post he had been offered by the first respondent was at a lower level than the level of the one he had previously occupied when he was employed by the TMLC. The first respondent opposed the appellant's application and in support of that opposition filed an answering affidavit. The appellant filed a replying affidavit in due course. Together with his replying affidavit, the appellant also filed a report or statement by a Mr Goosen in which Mr Goosen sought to give an expert opinion on how the two posts compared with each other. Mr Goosen's report or statement was not attested to nor did Mr Goosen file an affidavit to put the contents of his report or statement under oath.

[7] The first respondent later filed a supplementary affidavit a by Mr Marais in which it responded to Mr Goosen's report or statement. The appellant brought an application to strike out the first respondent's supplementary affidavit deposed to by Marais on the basis that it was irrelevant to the dispute between the parties. The matter was then set down for oral argument. The matter came before Landman J.

Landman J's order

[8] Landman J heard oral argument. During argument the appellant would have also presented argument in support of his application to strike out Mr Marais' supplementary affidavit. At the completion of the hearing of oral argument, Landman J reserved judgment. Before judgment could be handed down, the appellant brought an application for the admission of a supplementary affidavit deposed to by Mr Goosen. The purpose of the supplementary affidavit was to place under oath the contents of Mr Goosen's report or statement that had been filed together with the appellant's replying affidavit. Landman J dismissed the appellant's application for the admission of Mr Goosen's supplementary affidavit with a special order of costs in a separate judgment. In due course Landman J handed down his judgement. He dismissed the appellant's application. He also dismissed the appellant's application to strike out the first respondent's supplementary affidavit deposed to by Mr Marais. Landman J's order read thus:

> **"In the premises therefore this application and the application to strike out is (sic) dismissed with costs."**

This was in 2003.

[9] The reason for Landman J's order dismissing the appellant's application was that he, after considering the affidavits filed, concluded that there was not enough evidence placed before him by the appellant to prove that the post that the first respondent had offered the appellant was at a lower level than the level of the post he had previously occupied at the TMLC.

Referral of dispute to Labour Court

[10] In March 2005 that is over two years since Landman J's judgment the appellant referred a dispute to the Labour Court in which he sought in effect and in substance the same relief that he had sought in the application that was dismissed by Landman J. The appellant based this action the same cause of action as the application that had been dealt with by Landman J. The first respondent took two special pleas. The one was to the effect that the appellant's claim had already been decided finally by Landman J. This was the special plea of *res judicata*. The other special plea was prescription. The matter was set down for the hearing of argument on the special pleas. On this occasion the matter came before Francis J.

Francis J's judgment in the Labour Court

[11] Francis J upheld the special plea of res judicata and dismissed the appellant's claim. Before Francis J the parties were agreed that there was only one requirement of *res judicata* that was in issue. That was whether or not Landman J's judgment had decided the issue between the parties. The appellant argued that it had not and, therefore, the special plea of *res judicata* should fail whereas the first respondent argued that it had and, therefore, the special plea of *res judicata* should be upheld. In support of his decision upholding the special plea, Francis J referred to **Boshoff v Union 1932 TPD 345** at **35, Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) SA 462 (A)** at **472 A-D, Fidelity Guards Holdings (Pty)Ltd v Professional Transport Workers Union and others (1999) 20 ILJ 82 (LAC), National Union of Mine Workers v Elandsfontein Colliery (Pty)Ltd (1999) 20 ILJ 878 (LC)** and

Dumisani & Another v Mintroard Sawmills (Pty) Ltd (2000) 21 ILJ 125 (LAC) and **African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A)** at **563**.

[12] In paragraph 10 of his judgement Francis J referred to the appellant's Counsel's contention that Landman J's order amounted to an order for absolution from the instance. He then referred to Steyn CJ's judgment in **African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) "at 563"** and quoted a passage which I quote later in this judgment. That passage includes a statement by Steyn CJ that on motion proceedings an order dismissing an application does not amount to an order of absolution from the instance but is a judgment in favour of the respondent and that in such proceedings an order that could be equated to an order for absolution from the instance would either be an order that no order is made or an order granting the applicant leave to apply to Court again on the same papers.The passage that Francis J quoted included in it Steyn CJ's comment upon Watermeyer J's judgment in **Commissioner of Customs v Aiston Timber Co. Ltd 1926 CPD at p. 359.** I shall not include that part of the passage when I quote the passage later. In fact the passage that Francis J quoted forms the foundation of my own judgment in this matter. In par 11 of his judgment Francis J expressed the view that the passage that he quoted from Steyn CJ's judgment in African Farms applied with equal force in the matter before him.

[13] In par 12 of his judgment Francis J expressed the view that it was clear from Landman J's judgment that Landman J had made a definitive and final order. He then referred to **Wolfaardt v**

Colonial Government (1899) 16 SC 250 at **252** but the passage that he quoted from that judgment says nothing about when an order can be said to be definitive and final. It is in par 13 of his judgment that Francis J sought to substantiate the finding he made in par 12 that Landman J's order was definitive and final. Francis J said:

> "**Landman J had found inter alia that the applicant had failed to lead expert evidence on the two different posts and, therefore, his case was shipwrecked. The appellant had failed to substantiate his case by sufficient evidence in the previous case. In launching the present application the applicant has attempted to salvage his wrecked ship which he clearly cannot do. The special plea stands to be upheld and the applicant's claim stands to be dismissed**."

Subsequently, Francis J granted the appellant leave to appeal to this Court against his judgment and order; hence this appeal.

The appeal

[14] In this case Counsel for the appellant confirmed that the only requirement of *res judicata* which he submitted had not been met was the one to the effect that the previous judgment should have been final and have determined the merits of the dispute. He pointed out that before Landman J the appellant had sought a declaratory order that the post that the first respondent had offered him was a lower post than the post that he had previously occupied at the TMLC. He submitted that Landman J did not decide whether this was so and actually refrained from deciding the issue. He submitted that in looking at what Landman J decided, we should not just look at the order that he made, which was that the

appellant's application was dismissed, but we should consider the judgment as a whole. He submitted that to do otherwise would amount to placing form above substance.

[15] Counsel for the appellant emphasised that the two parties have a continuing relationship as employer and employee and need a decision on whether the post that the appellant had been offered was lower than his previous post or was comparable or equivalent. He submitted that, after receiving Landman J's judgment, the parties still had no decision on the question. Counsel for the appellant emphasised that Landman J said in his judgment that without expert evidence he could not compare the two posts and decide which one, if any, was lower than the other. Counsel for the appellant submitted that the order made by Landman J amounted to an order of absolution from the instance and as such the special plea of *res judicata* was of no application.

[16] Counsel for the first respondent submitted that Landman J had decided the issue on the merits in this case and that his decision was both final and definitive. For this Counsel for the first respondent relied, inter alia, on the fact that Landman J referred to the appellant's case in the judgment as "**shipwrecked**". Counsel submitted that this was an indication that Landman J was saying that the appellant's case was "**dead**". Counsel also referred to the fact that Landman J chose to frame his order as a dismissal of the application was dismissed and did not say that he was refusing to make an order which he could have done if he did not wish to dismiss the application nor did he postpone the application and grant the appellant leave to file supplementary papers which he

could have done if he wanted to give the appellant an opportunity to later pursue the same case in the same Court. Counsel for the first respondent submitted that Landman J did not formulate his order along those lines because he intended to dismiss the application on the merits.

[17] In **African Farms and Townships v Cape Town Municipality 1963(2) SA 555 (A)** Counsel for the respondent argued that the order that had been made by the Court in the previous motion proceedings on which the special plea of *res judicata* was based – which was an order dismissing the application – was to be equated with an order for absolution from the instance which left the issue undecided. This is the same argument that Counsel for the appellant is advancing in the present case. In the African Farms case Steyn CJ, writing for the majority – the minority decided the case on another point – found that submission to be without substance. Steyn CJ said at 563 D-F:

> "**As pointed out in Purchase v Purchase, 1960 (3) SA 383(N) at p. 385, dismissal and refusal of an application have the same effect, namely, a decision in favour of the respondent. The equivalent of absolution from the instance would be that no order is made, or that leave is granted to apply again on the same papers**."

This is the dictum which I said earlier on Davis JA's judgment does not, in my view, give effect or proper effect to. Based upon this dictum of Steyn CJ it seems to me that the order made by Landman J dismissing the appellant's application must be read to mean what Steyn CJ said an order dismissing an application means,

namely, "**a decision in favour of the respondent**" which, in this case, would mean a decision in favour of the first respondent.

[18] In considering this appeal it seems to me that it is fundamental to the appellant's appeal that the Court should find that the order which was made by Landman J dismissing the appellant's application did not decide the dispute between the parties but that it can be equated to an order for absolution from the instance. If this Court does not uphold this contention and concludes that Landman's order dismissing the application was an order on the merits of the dispute and cannot be equated to an order for absolution from the instance, the appeal must fail.

[19] The first obstacle in the way of the appellant's contention is the Appellate Division's dictum in African Farms referred to above because in terms of that dictum an order in motion proceedings that amounts to an order for absolution from the instance is an order that no order is made or an order granting the applicant leave to apply to Court again on the same papers, and not an order that the application is dismissed. Accordingly, the appellant's contention that Landman J's order dismissing the appellant's application amounted to an order of absolution from the instance is in conflict with the decision of the Appellate Division in African Farms.

[20] In actions a court may be asked at the end of the plaintiff's case to issue an order of absolution from the instance. That is before the defendant leads any evidence. If the Court does at that stage to grant an absolution from the instance, there can be no doubt that the plaintiff can later institute a fresh action for the same relief

based on the same cause of action. In such event the special plea of *res judicata* cannot be taken against the plaintiff because the order of absolution from the instance did not decide the dispute between the parties on the merits. However, sometimes a court issues an order of absolution from the instance in a case where both parties have adduced all the evidence that they chose to adduce, have presented their oral argument and none of them has indicated that there is any witness he wishes to call who was unavailable earlier on.

[21] I have serious doubt that an order of absolution from the instance is competent in a case such as the one referred to immediately above. Of course, if any of the parties had a witness who was temporarily not available whom he wanted to call, he would have applied for a postponement of the trial to a later date when that witness would be available. Such a party would not close his case and hope for an absolution from the instance. If both parties to the dispute had a fair chance to adduce all the evidence that they wanted to adduce and the Court found such evidence not enough to justify giving a judgment in the plaintiff's favour, there can be no justification, it seems to me, for the Court to grant an absolution from the instance. The proper order in such a case is that the plaintiff's claim is dismissed.

[22] If it were right for a Court to grant an absolution from the instance in such a case, that would mean that a Court is entitled to let a party institute a second action and seek the same order that he had sought in earlier proceedings on the same cause of action even though in the earlier proceedings the parties had had a fair

opportunity to adduce all the evidence that they wanted to adduce, had in fact adduced such evidence and even presented oral argument in the matters. In my view when the parties have done all of that the Court is obliged to decide the dispute before it on the merits and may not grant an absolution from the instance. Indeed, there can be no justification for the Court to grant an absolution from the instance in such a case. I accept that, for example, in a case such as an inquiry in a paternity dispute, this may be different either because of specific statutory provisions or for public policy reasons as such an inquiry affects an innocent third party, namely, the child and it may be contrary to public policy for the Court to later refuse to reopen such an inquiry if new evidence is found to prove paternity simply because there had been a similar inquiry before.

[23] The significance of the scenario referred to above in an action lies in comparing that scenario with the scenario in the present matter. The matter before Landman J was not an action but an application in motion proceedings. In motion proceedings the affidavits filed by the parties do not only serve as pleadings but they also contain the evidence that the parties place before the Court to enable the Court to decide the matter. The Court decides the matter by either granting or dismissing the applicant's application. An order that amounts to an absolution from the instance is an order that is one of the two orders that Steyn CJ referred to in African Farms at 563D – F. Just as I have said above with reference to an action that there can be no justification as a general rule for the granting of an order of absolution from the instance where both parties have adduced all the evidence that they have chosen to adduce in an

action and that in such a case the Court must decide the dispute on the merits finally, I am also of the view that in an application on motion the Court must decide the application on the merits and not make an order that amounts to an absolution from the instance once all the parties have filed the affidavits they wished to file or have filed all the affidavits that they are entitled to file. Obviously, if a party wished to file more affidavits but has failed to persuade the Court to grant it leave to do so, and did not appeal against such decision, such party is in the same position as the party who filed all the affidavits that he wished to file.

[24] In the case before Landman J there is no suggestion that there was any party at the time of the hearing of oral argument that felt that it had not had a fair opportunity to place before the Court all the evidence it believed it needed to put before the Court. That is not surprising because, if any one of the parties felt that it had not had a fair opportunity to place before the Court all the evidence it wanted to place before the Court, it would have applied for the postponement of the hearing of oral argument and sought leave to file further affidavits. It seems that as at the time of the hearing of oral argument, none of the parties applied for a postponement of oral argument or applied for leave to file further affidavits. It was only after argument had been presented and while judgment remained reserved that the appellant – probably after hearing the first respondent's criticism of the Goosen report or after hearing questions asked by or remarks made by Landman J during argument – made an application to Landman J for the admission of Mr Goosen's supplementary affidavit which application was dismissed.

[25] Landman J also dismissed an application by the appellant to strike out Mr Marais' supplementary affidavit which the first respondent had filed as a response to Mr Goosen's unattested report or statement. The appellant did not appeal against Landman J's order dismissing his application for the admission of Mr Goosen's supplementary affidavit nor did he appeal against Landman J's order dismissing his application to strike out Mr Marais' supplementary affidavit. As the appellant did not appeal against those orders, those orders stand and must be assumed to have been justified. That being the case this Court should not make any order that would undermine those orders or that would in effect overturn those orders when they have not been appealed against.

[26] In these circumstances we must therefore approach this appeal on the basis that the appellant had all the opportunity to place before the Court such evidence as he wished to place before the Court to prove his case and that the further affidavit he did not file which he wished to file was precluded by a valid order of Court made by Landman J against which he did not appeal and decide the appeal accordingly. That being the case, on what conceivable basis could Landman J have sought to make an order that would have allowed the appellant to later institute other proceedings to seek the same relief? I do not think that Landman J intended to make such an order nor do I think that there is justification – upon a proper reading of Landman J's judgment – for saying that his order did not decide the dispute on the merits. In this regard it must be borne in mind that a decision on the merits of the dispute between the parties was to be based on the evidence before the Court. If the

Court concluded that the appellant had failed to place sufficient evidence before it to justify the granting of the order that he sought, and, therefore, dismissed the appellant's application, that was a decision on the merits of the dispute. That is what Landman J did in the case between the appellant and the first respondent.

[27] If we say that Landman J's order was not an order on the merits based on the appellant's failure to prove his case by proper and sufficient evidence, what order would we say Landman J should have made when he was of the view that the appellant had failed to place sufficient proper evidence before the Court to support the order he was seeking. We cannot say that it was proper or competent to make an order that no order is made. What would be the justification for saying he should have made such an order? Once the parties have led all the evidence they wish to lead the Court must decide the case on the merits and not in effect grant an absolution from the instance. In my view, when, in motion proceedings, a Court finds that the applicant has failed to prove his case on the merits, the order that it makes to decide the case on the merits against the applicant is to make an order dismissing the application. Accordingly, there is nothing wrong with the order that Landman J made in the case. Indeed, Landman J's order accords with Steyn CJ's dictum in the African Farms case at 563 D-F. The appellant failed to prove his case before Landman J. He was, in my view, obliged to dismiss the appellant's application on the merits and, therefore, give judgment in favour of the first respondent. That is precisely what Landman J did in the case before him. To the extent that it may be necessary to do so, I propose to deal below

with Landman J's judgment in greater detail to show that his judgment was a judgment for the first respondent on the merits.

[28] At page 8 of his judgment Landman J referred to a supplementary affidavit deposed to by Mr Marais that was filed by the first respondent which was the first respondent's response to the unattested statement or report of Mr Goosen. Landman J said that Mr Marais said in the affidavit that he was the assistant Director: Remuneration and Grading. This suggests that he may have had some knowledge of issues relating to remuneration and grading. Landman J said in his judgment that Mr Marais went into details as to why Mr Goosen could not have evaluated the two positions in accordance with the principles of job evaluation and in the absence of a general job evaluation and a job evaluation scheme in use by the South African Local Government Bargaining Council. That Landman J said all of this about what was contained in Mr Marais' supplementary affidavit is indicative of the fact that he studied what Mr Marais had to say about the merits of the parties contentions on the two posts. Landman J referred to clause 3 of the agreement in regard to the definition of "**job evaluation**" and "**post evaluation**".

[29] At page 9 of his judgment Landman J pointed out that the appellant brought an application to strike out Mr Marais' affidavit on the grounds that it was irrelevant to the dispute between the parties. Landman J then said:

> "**I am of the view that the application to strike out should be refused. This dispute is about the job evaluation of the old and new posts. It is a legitimate response to Mr**

> **Goosen's report. Nevertheless, Mr Goosen's report is of no evidentiary (sic) value as it is an unsworn opinion**."

This, too, suggests that Landman J was looking at the merits of the case. That is why he was able to say that Mr Marais' affidavit was a legitimate response to Mr Goosen's report which dealt with the merits of the appellant's contention.

[30] Landman J proceeded to the next paragraph where he said:

> "**The result is that as I am called upon to decide whether the new post that the City of Johannesburg has offered to the [appellant] is at a lower post level** (see clause 17.4.7.4). **The [appellant] needs to show**:
>
> **(a) the Midrand post structure,**
>
> **(b) the City of Johannesburg post structure**
>
> **(c) the applicable job evaluation scheme;**
>
> **(d) the number of the points which should be allocated to the old post and the new post in order to comply with the agreement."**

After Landman J had completed setting out above what the appellant was required to show if he was to succeed on the merits, he immediately said in the first sentence thereafter:

> "**This is where the [appellant's] case is shipwrecked**."

The South African Coincise Oxford Dictionary gives the following meanings to the word "**shipwreck**" "**the destruction of a ship at sea by sinking or breaking up a ship so destroyed. V. (be shipwrecked) suffer a shipwreck."** The South African Students Dictionary gives the following meanings to the word **"shipwreck"**.

> "**Shipwreck is the accidental sinking or destruction of a ship; a shipwreck or wreck is the remains of a sunken or**

destroyed ship; shipwreck is also used to mean ruin or destruction generally".

In my view Landman J's choice of the verb "**shipwrecked**" to describe the condition or state of the appellant's case was made very consciously and deliberately. It is not a word that one uses every day or lightly to describe anything. In my view Landman J chose to describe the appellant's case as "**shipwrecked**" to convey his view that on the merits the appellant's case was like a shipwreck and was destroyed and "**dead**". It is highly unlikely that he would have described the appellant's case in those terms if he thought that the appellant's case could be "revived", revived and brought back to him or some other Judge in the Labour Court to be heard again.

[31] It must also be borne in mind that Landman J's choice of the word "**shipwrecked**" to describe the appellant's case did not occur in isolation. In my view Landman J sought to convey what he saw of the appellant's case. That case lay before him in tatters like the different parts of a shipwreck floating at sea. Landman J made this statement in the last paragraph of page 9 of his judgment. Before that Landman J:

(a) had at pages 6-8 of his judgment quoted in full paragraphs 31.2 - 31.12 of the appellant's founding affidavit in which the appellant compared the two posts in respect of a number of aspects to show that the new post was at a lower level than the level at which the previous post had been;

(b) had referred at page 8 of his judgment to Mr Goosen's report or unattested statement and noted that it was not under oath;

(c) had stated that he had given a separate judgment in which he had dismissed with a special order as to costs an application made by the appellant for the admission of a supplementary affidavit by Mr Goosen after judgment had been reserved;

(d) had referred at the bottom of page 8 of his judgment to Mr Marais' supplementary affidavit and had studied the contents thereof sufficiently to see that Mr Marais challenged Mr Goosen's report and said that Mr Goosen could not have evaluated the two positions in accordance with the principles of job evaluation and in the absence of a general job evaluation and a job evaluation scheme in use by the South African Local Government Bargaining Council;

(e) referred to the fact that the appellant made an application to have Mr Marais supplementary affidavit struck out but he had refused that application;

(f) had just considered what the appellant needed to show in order to succeed which included the points which had to be allocated to the old post and the new post.

It was after Landman J had considered all of these matters that he described the appellant's case as "**shipwrecked"**. In my view, in this context, he meant that the appellant's case was "**dead**" on the merits. Just in case it was not clear that it was in respect of the merits that he was describing the appellant's case as

"**shipwrecked**," Landman J pointed out in the next few sentences that:

- it was clear that the old post and the new post were dramatically different;
- the two posts had not been "**competently**" compared;
- the process, especially the one relating to comparing positions in different organisations and in different structures, required expert evidence which the appellant had not provided.

[32] Landman J made another statement which, in my view, also shows that he considered the matter on the merits. He said at the end of page 8 to the beginning of page 9 of his judgment:

> "**I may add that even if I were to have accepted the supplementary affidavit by Mr Goosen, I would not on these papers, have found in favour of the [appellant].**"

When Landman J said this, obviously he was referring to not finding in favour of the appellant on the merits. Accordingly, this means that he would have found against the appellant on the merits even if Mr Goosen's supplementary affidavit had been admitted. It also means that, without the supplementary affidavit of Mr Goosen, Landman J also found that he could not find in the appellant's favour. In my view this meant a finding in the first respondent's favour because the appellant failed to prove his case by proper and sufficient evidence.

[33] It seems to me that in setting out what the appellant needed to show in order to succeed, Landman J was demonstrating that he had considered the appellant's claim on the merits because he

considered what the requirements were and considered whether those requirements had been met and concluded that the evidence placed before the Court did not justify a conclusion that the post in question was at a lower level. In other words the appellant failed to prove his case on the merits. Landman J then continued:

> "**It is clear that [the appellant's] old post and his new post are dramatically different. But these posts have not been competently compared. This process, especially where one is obliged to compare positions in different organisations and in different structures, requires expert evidence. The [appellant] has not …. the opinion of an expert. I may add that even if I were to have accepted the supplementary affidavit by Mr Goosen, I would not, on these papers, have found in favour of the [appellant].**"

The first sentence in the paragraph quoted above is indicative of the fact that Landman J examined the evidence placed before him by the parties on the two posts and, that is why he was able to conclude that it was clear that the two posts were "**dramatically different.**" Obviously he was examining the evidence with a view to establishing whether the evidence was sufficient to enable him to grant the appellant's application and, thus, declare, as he was asked by the appellant to do, that the new post was at a lower level than the previous post. Obviously, part of the first respondent's case before Landman J must have been that Landman J should reject the contention advanced by the appellant that the new post was at a lower level than the previous post. One of the bases upon which the first respondent must have advanced its contention and request for the Court to reject the appellant's request or prayer or

application must have been that, if the Court made such a finding or order, that finding or order would be without a proper evidential basis. And Landman J was persuaded that there was no evidential support for the appellant's contention and decided to dismiss the application. That is, quite clearly, a judgment in favour of the first respondent on the merits.

[34] Landman J expressed the view in the paragraph quoted earlier that expert evidence was required in order for the two posts to be competently compared. The appellant had filed an unattested statement by Mr Goosen, a person that he regarded as an expert. There is no suggestion that the appellant had a valid reason not to have ensured that Mr Goosen's statement was attested to nor is there any suggestion that the appellant was in any way justified in not including all the evidence that he had in his founding affidavit.

[35] Landman J dismissed with a special order of costs the appellant's application to have Mr Goosen's affidavit admitted. He must have thought that such an application was so lacking in merit as to justify a special order of costs. In my view Landman J's decision to dismiss that application and to do so with a special order of costs is inconsistent with the proposition that he decided the matter in the way he did so as to allow the appellant to later come back to Court on the same issue again. Upon a proper examination of Landman J's judgment there can be no doubt that, if the matter that came before Francis J had come before him, he would have had no hesitation in dismissing it and would probably have dismissed it with a special order as to costs as he had done when the appellant

applied to him to have Mr Goosen's affidavit admitted after judgment had been reserved.

[36] Counsel for the appellant also referred to the case of **Sewnarain v Budha and others 1979(2) SA 353 (NPD)**, a judgment of Leon J in which Theron J concurred. That was a paternity case. In that case the principle of *res judicata* was raised in circumstances where the previous judgment or order that had been made by a magistrate was: **"no order made"**. In that case it was decided that such an order meant that no order had been made on the merits and the order made was equivalent to an order of absolution from the instance. This case cannot help the appellant. In fact this case and that of Cordigla, are inconsistent with the appellant's submission that in the present case that an order dismissing an application in motion proceedings can be equated to an order for the absolution from the instance.

[37] Counsel for the appellant also referred to the case of **Condigla v Watson 1987(3) SA 685(C)**. In that case Van Den Heever J, with whom Friedman J concurred, said at 688 A that **"(t)he 'order' made at the first enquiry was clearly intended to be the equivalent of an order for absolution which would not have barred a further suit had this been an action between complainant and respondent."** The order that was being referred to there was an order that no order is made. That statement is in line with the approach adopted in the African Farms case that an order dismissing an application in motion proceedings does not constitute an absolution from the instance but means a judgment in favour of the respondent. In any event, Van den Heever J said at

688 B that under the common law no order dealing with maintenance was ever final.

[38] The Condigla case is distinguishable from the present case because in that case the order made by the magistrate was that no order was made whereas in the matter before Landman J the order that Landman J made was one to the effect that the application was dismissed. Landman J could have chosen not to make any order rather than dismiss the application but he chose to dismiss the application instead. He also chose to shut the door to the appellant when the latter sought leave to file Mr Goosen's supplementary affidavit. Indeed he also chose to dismiss the appellant's application to strike out the affidavit put up by the first respondent to deal with Mr Goosen's report or statement. Why would Landman J have dismissed every effort made by the appellant to strengthen his case or reopen his case if the order he was to make was one that allowed the appellant to later come back and actually reopen the case?

[39] If an order to the effect that no order is made can be equated to absolution from the instance, then an order dismissing an application in motion proceedings cannot also be equated to an order for absolution from the instance. At 356 B-D Leon J said:

> "**In the present case it is my view that when the magistrate initially said 'no order made' all that he was saying in the circumstances of this case was that on the evidential material then before him he was not prepared to make an order. It cannot be said that his saying 'no order made' is tantamount to a decision on the question**

> **of paternity. It is not a decision on that question at all. It leaves the matter open to the applicant at a later stage, if there is further evidence available, to bring such evidence before the court. It in no way shuts the applicant out from doing so**."

The converse of what Leon J said in the above passage about an order that **"no order [is] made"** is that, if a Judge says in an application in motion proceedings that the application is dismissed that cannot mean the same thing as an order that no order is made, at least as a general rule.

[40] There is something else about the appellant's case which is very significant that must be highlighted. When the appellant and the first respondent had a dispute about whether or not the post that the first respondent had offered the appellant was at a lower level than the one he had occupied in the TMLC, the appellant decided to institute court proceedings to obtain an order to the effect that he was right in this dispute and the post concerned was at a lower level. Obviously, he appreciated that in order to succeed in getting the Court to give a judgment in his favour, he would need to place proper and sufficient evidence before the Court to prove his allegation or contention. He probably knew in advance that the first respondent would oppose his attempts to secure such a finding or judgment in his favour in the dispute. In bringing the application that was heard by Landman J, the appellant placed before the Court much evidence. That evidence was contained in paragraphs 13.1 to 13.12 of his founding affidavit and its purpose was to convince the Court to give judgment in the appellant's favour. In addition, the appellant filed Mr Goosen's report with his replying affidavit by

which he sought to strengthen his case so that the Court would be persuaded to give judgment in his favour and grant the order that he sought. The first respondent also placed before the Court such evidence as it deemed necessary to meet the appellant's case. The matter was set down for the hearing of oral argument. During oral argument the appellant must have realised that he had made an error by not ensuring that Mr Goosen's report was attested to and later applied unsuccessfully for the admission of a supplementary affidavit deposed to by Mr Goosen.

[41] In his statement of claim in the matter before Francis J the appellant did not include any explanation as to why he had not in the matter that came before Landman J included all the proper evidence that he needed in order to prove his claim then. In the light of this omission, if we uphold the appellant's contention that Landman J's judgment did not decide the issue on the merits in the first respondent's favour because Landman J said that there was not enough evidence, the precedent we will be creating is this: if a litigant brings an application to Court on motion and fails to place before the Court sufficient evidence to prove his case and the Court concludes that no proper or sufficient evidence has been placed before it to prove such case and issues an order dismissing the application, that litigant can later go back to Court with the same case and seek the same order that he had sought unsuccessfully before and the Court must entertain the matter and deal with it on the merits. Indeed, the precedent will not even require that the appellant should show good cause why he did not place before the Court all the evidence he wished to put before the Court in the first application. If we create a precedent that allows an applicant in

motion proceedings whose application has been dismissed to again initiate Court proceedings to secure the same order that he previously failed to obtain, it means that, if in the second proceedings, the Court still concludes that he has failed to prove his case and dismisses the application or the claim, the litigant can later come back to Court for the third or even for the fourth time.

[42] If we say that the applicant in such a situation can come back to Court for the second time but not for the third or fourth time, what would be the basis for that decision? Why would that basis be good enough to halt the applicant in his third or fourth attempt but not in his second attempt? In my view a litigant in such a position is precluded in his second attempt when the Court has dismissed his application on the basis that he has failed to place sufficient evidence before it to enable it to make the order that he seeks on the merits. I have never understood our law to be that, when in motion proceedings, a Court dismisses an application because the applicant has failed to prove his case by necessary and proper evidence, its decision to dismiss the application is not a decision on the merits of the dispute. My understanding has always been that that is a final and definitive decision on the merits of the dispute and the applicant cannot later come back to Court on the same dispute and say: I now have more or better evidence and institute fresh proceedings for the same relief as before on the same cause of action! If my view in this regard does not reflect the legal position and a litigant is, indeed, permitted to have a second or even a third or fourth bite at the cherry in such circumstances, this part of our law is bad and needs to be changed. In my view, any litigant who brings an application to Court should place before the

Court all relevant and material evidence in support of his case on the first occasion and should not institute multiple applications one after the other until the court says he has proved his case. In labour disputes the principle of expeditious resolution of disputes would be completely undermined by the principle which would be established if we uphold the appellant's appeal in this case.

[43] In the present case there can be no doubt, in my view, that Landman J intended to shut the appellant out of Court and prevent him from coming back to Court again with the same issue. That was not a case where an application was dismissed for lack of urgency or because the Court had no jurisdiction. That was a matter where the Court considered the requirements that the appellant had to satisfy in order to succeed on the merits, where it considered the sufficiency or otherwise of the evidence placed before it, where it described the appellant's case as "**shipwrecked**", where it stopped all attempts by the appellant to "**salvage**" its shipwreck by bringing an application to admit Mr Goosen's supplementary affidavit, where it dismissed the appellant's application to strike out the first respondent's supplementary affidavit and where it decided that the correct order to make was to dismiss the application. That was a definitive and final order on the merits in favour of the first respondent and against the appellant which precluded the appellant from bringing the same issue to Court again.

[44] If I were to extract a principle from my approach to this matter, it would be this: if in motion proceedings the parties have placed before the Court such evidence as they have chosen to place before

it and the matter has been argued and, thereafter, the Court issues an order that the application is dismissed and the basis of that decision is that the applicant failed to prove its case, the judgment or order of the Court is a judgment or order on the merits of the case and it is final and any attempt to institute proceedings later to effectively seek the same relief on the same cause of action would properly be met by the special plea of *res judicata.*

[45] In conclusion I am of the view that the Labour Court was correct in dismissing the appellant's application. Accordingly, this appeal falls to be dismissed. In my view the requirements of the law and fairness dictate that the appellant should pay the first respondent's costs.

[46] In the premises I make the following order:

1.The appeal is dismissed with costs.

ZONDO JP

Appearences

For the appellant : Mr Watt Pringle SC
(with Mr M. Le Roux)
Instructed by : Serfontein, Viljoen and Swart

For the first respondent: Mr P. Kennedy SC
Instructed by : Bowman Gilfillan Inc.

Date of judgement : 23 December 2008

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA64/06

BOUWER, DIRK WILLEM	**Appellant**
and	
THE CITY OF JOHANNESBURG	**First Respondent**
NATIONAL FUND FOR MUNICIPAL WORKERS	**Second Respondent**

JUDGMENT:

DAVIS JA:

[1] This is an appeal against a judgment of Francis J of 15 September 2006 in which he upheld respondent's special plea of *res judicata.* With leave of the court *a quo,* appellant has appealed to this court.

Factual Background

[2] The appellant was previously employed by the Midrand Town Council in the post of Executive Manager: Environment and

Recreational Management. As a result of the consolidation of the Midrand Town Council into the Greater Johannesburg Metropolitan area, a process of rationalization of posts took place. Pursuant to this rationalization, applicant was offered his current post of Senior Professional Officer: Environment at the same rate of pay as he enjoyed in the abolished post, with effect from 26 March 2002, an offer that he rejected.

[3] The appellant contended that he was rendered redundant as that term was contemplated in Clause 17 of his Conditions of Service and that he was therefore entitled to receive full severance benefits as contemplated in Clause 17.4.7.4 of his Conditions of Service, as well as the benefits arising under Rule 7.3 of the second respondent's Rules. The appellant contended that his redundancy arose from the disestablishment of the Midrand Town Council and the abolition of his substantive post. He contended that his services had, in effect, been terminated, as a result of the post becoming redundant and thus abolished, together with the failure to appoint him to a reasonably suitable alternative post. Accordingly, the appellant contended that his redundancy entitled him to terminate his employment and to receive redundancy benefits.

[4] The appellant therefore applied to the Labour Court for an order in the following terms:

"1. That the applicant's post at the Midrand Local Council be declared
redundant.

2. The alternative position offered to the Applicant was at a lower post lever.
3. That an order is made that the Applicant receives his full severance benefits in terms of clause 17.4.7.4 and 17.4.8 of his conditions of service."

[5] Before Landman J in the Labour Court, appellant argued that the post he had held with the Midrand Council had become redundant on 5 December 2002. This averment was conceded by first respondent. The appellant further submitted that the post he had been offered by first respondent, being Senior Professional Officer Environment was at a lower level than the post that had become redundant.

[6] In his founding affidavit, appellant set out a number of reasons in justification of this averment. However, only in his replying affidavit, did the appellant refer to any independent evidence in support of his contention that the post offered to him by first respondent was at a lower level than his previous post. In that affidavit, appellant sought to rely upon a report of Mr. B J Goosen regarding the comparative evaluation of the old and new positions.

[7] First respondent then filed a supplementary affidavit by Mr C F Marais which responded to the Goosen report. In his affidavit, Mr Marais took issue with the findings of Goosen regarding the latter's evaluation of the two positions.

[8] Landman J rejected the Goosen report as being of 'no evidentiary value as it is an unsworn opinion.' The learned judge then defined the dispute between the parties as follows:

> "The result is that as I am called upon to decide whether the new post that the City of Johannesburg has offered to the applicant is "at a lower post level" (see clause 17.4.7.4). The applicant needs to show:
>
> (a) the Midrand post structure;
>
> (b) the City of Johannesburg post structure;
>
> (c) the applicable job evaluation scheme;
>
> (d) the number of the points which should be allocated to the old post and the new post to comply with the agreement."

[9] Landman J dismissed the application with costs on the following basis:

> "This is where the applicant's case is shipwrecked. It is clear that his old post and his new post are dramatically different. But these posts have not been competently compared. This process especially where one is obliged to compare positions in different organizations and in different structures, requires expert evidence. The applicant has not produced the opinion of an expert. I may add that even if I were to have accepted the supplementary affidavit by Mr Goosen, I would not, on these papers, have found in favour of the applicant.The applicant does not seek an order that this matter be referred to oral evidence. Rightly so for there is simply no evidence before me on which a proper comparison based on the job evaluation or comparison of the results of several job evaluation has been made."

[10] In March 2005 appellant again approached the Labour Court for relief, claiming, as a result of the rationalization of the local government of the City of Johannesburg, that the post he had previously filled had been rendered redundant and that he had been offered an alternative post at a lower level, albeit at the same rate of remuneration. He sought declaratory relief, including an order that he was entitled to terminate his employment with first respondent on three months notice and was entitled to redundancy payment contemplated in his conditions of employment agreement and Rule 7.3 of the National Fund of Municipal Workers Pension Fund rules.

[11] First respondent opposed this relief and raised two special pleas, only

one of which remains relevant, being that of *res judicata*. The basis of this plea was the unsuccessful application launched by appellant on 16 May 2003, which resulted in the judgment of Landman J to which I have already referred.

[12] Francis J upheld this plea on the following basis: "It is clear from the judgment and order made by Landman J that he had made a definitive and final order…. The applicant failed to substantiate his case by sufficient evidence in the previous case. In launching the present application the applicant has attempted to salvage his wrecked ship which he clearly cannot do." paras 12-13

[13] For these reasons, Francis J upheld the special plea and dismissed the appellant's claim.

The Appellant's Case

[14] Mr Watt-Pringle, who appeared together with Ms Le Roux on behalf of the appellant, referred to the three requirements for the defence of *res judicata*:

1. essentially the same relief has been sought on the basis of the same cause of action;
2. the dispute is between the same parties;
3. the prior judgment was a final and definitive judgment on the merits, thereby disposing of the dispute between the parties.

[15] Mr Watt-Pringle correctly contended that the special plea in the present dispute depended exclusively on the determination of the presence of the third requirement, namely that the judgment of Landman J constituted a final and definitive judgment on the merits, thus disposing of the dispute between the parties.

[16] In Mr Watt-Pringle's view, Landman J had not found in favour of first

respondent, in that there was no finding that the new post was at a level similar to that of the previous post and that for this reason appellant was not entitled to any severance benefits. He submitted that the court had required certain evidence to be produced by the appellant, that is evidence of a proper expert evaluation of the two posts from which it could be determined whether the new post was at a lower level than the previous post. The failure to so adduce this evidence had 'ship wrecked' the appellant's case, rather than a dismissal by the courts of the merits of the case.

The respondent's contention

[17] Mr Kennedy, who appeared on behalf of respondent, submitted that, for a judgment to be final "on the merits", it was unnecessary that every piece of relevant evidence had to be placed before the court and considered accordingly. Were that to have been the case, appellant could continue to approach the court, each time on the basis of supplementing a different deficiency in the evidence that he had placed previously before the court.

[18] Mr Kennedy further referred to the judgment of Landman J in which he dismissed the appellant's claim and had gone on to say that he would not have found in favour of the appellant, even if he had admitted the evidence tendered in the supplementary affidavit of Mr Goosen. Accordingly, appellant's claim had been dismissed on the merits in a final judgment. The plea of *res judicata* was thus sustainable. The approach adopted by Francis J, in upholding the plea, accorded with the jurisprudential basis for *res judicata*, namely that there should be a defined end to litigation and that this principle was in the public interest because a defendant should not be compelled to defend itself twice on the same cause of action. Union Wine Ltd v E Snell and CO LTD 1990(2) SA 189 (C) at 196A.

[19] Mr Kennedy submitted further that, had Landman J not decided to dismiss the application on its merits, he could have declined to make any order, or granted leave to the appellant to approach the court again on papers duly supplemented. As Landman J had eschewed these alternatives and rather found, on the evidence

tendered by the appellant, that he had not proved his case, he had dismissed the application on the merits of the case.

Evaluation

[20] In oral argument, Mr Watt- Pringle concentrated his attack on Francis J's finding that Landman J's judgment had not amounted to absolution from the instance. Mr Watt-Pringle submitted that this finding confused absolution at the close of the plaintiff's case with absolution at the conclusion of the trial. In motion proceedings, absolution clearly can only be granted at the end of proceedings, since both parties "adduce" evidence before the matter is heard by the court. For this reason, absolution at the close of applicant's case cannot occur in motion proceedings.

[21] However, it is open for a court properly to grant absolution at the end of the whole case as set out, for example, in MV Roxana Bank Swire Pacific Offshore Services (Pty) Ltd v MV Roxanna Bank and another 2005(2) SA 65 (SCA) at para 2.

[22] More recently Maluleke J summarized the position in Machewane v Road Accident Fund 2005 (6) SA 72(T) at para 11:

> "Where there are two mutually destructive versions decision of absolution from the instance will follow unless the plaintiff's version can demonstrate a higher probability value than the version of the defendant. This is particularly so since the plaintiff bears the overall onus of establishing his case on a preponderance of probabilities. The correct approach for deciding whether a plaintiff has discharged his onus was aptly stated in the often quoted dictum of Wessels

JA in National Employers' Mutual General Insurance Association v Gany 1931 AD 187 at 199: 'Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false.'"

[23] By contrast, Mr Kennedy insisted that a final order had been made, which order could not reasonably be equated with an order of absolution from the instance, even after all the evidence had been considered.

[24] The meaning of the order, read within the context of the judgment, is critical to solving the present dispute. In such a case, it is the substance rather than the form of the order, read within the context of the judgment that is determinative of the outcome of a plea of *res judicata*. See The Laws of South Africa: Volume 9 (2ed) at para 645. The point is clearly stated in African Farms and Township LTD v Cape Town Municipality 1963 (2) SA 555 (A) at 563:

"Council for the appellant further argued that the order in the original proceedings, which as such is an order dismissing the application, is to be equated with absolution from the instance, leaving the issue undecided. In my view there is no substance in that argument. As Sande, *De Diversis Regulis ad L*. 207, points out, the *res judicata* is not so much the *sententia,* the sentence of the order made, as the *lis* or *negotium*, the matter in dispute of question at issue about

which the *sententia* is given, or the *causa* which is determined by the *sententia judicis.*"

[25] In support of his argument, that the substance of the order given by Landman J was, in effect, that of absolution from the instance, Mr Watt-Pringle referred to two paternity cases. In Sewnarain v Budha and others 1979 (2) SA 352 (N) Leon J was required to interpret the determination of the presiding officer in the Maintenance Court who, after hearing evidence regarding the paternity of the child, made a finding: "no order made". The question arose as to whether this order justified the application of a plea of *res judicata*. Leon J held that, unless the order in question was a final and definitive judgment, the doctrine of *res judicata* was not applicable. Applying this test to the facts in Sewnarain, Leon J said: "In the present case it is my view that when the magistrate initially said "no order made" all that he was saying in the circumstances of this case was that, on the evidential material then before him, he was not prepared to make an order. It cannot be said that he was saying "no order made" is tantamount to a decision on the question of paternity. It is not a decision on that question at all. It leaves the matter open to applicant at a later stage, if there is further evidence available, to bring such evidence before the court. It in no way shuts the applicant out from doing so." See also Cordiglia v Watson 1987 (3) SA 685 (C) at 688 D-F which is reflective of the same approach.

[26] It is arguable that paternity cases have to be examined within the constraints of the purpose of a paternity enquiry; that is, in the event that further and better evidence becomes available, it should

always be open to an applicant to approach a court for the determination of the question. Significantly however, Leon J cited with approval the decision in Cohn v Randall Rietfontein Estates Limited 1939 TPD 319 at 324: "In dealing with the position where an action is dismissed, Spencer Bower says that the answer to the question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual facts of the dismissal, 'depends upon whether, on reference to a record and such other materials as may properly be resorted to, the dismissal itself is seen to have necessarily to involve the determination of any particular issue, or question, of fact or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing except that in fact the party had been refused the relief to which he sought."

[27] This judgment emphasizes the nature of the key enquiry: the meaning of the order which can only be gleaned from the judgment read as a whole. Simply to rely on the wording of the order without examining the substance thereof, is to embark on a process of rigid formalism which is counter to the advocated route in the evaluation of a plea of *res judicata*. For the plea to be successfully applied in the present case, it has to be shown that the substance of the order of Landman J followed a final and definitive judgment on the merits, thereby disposing of the dispute.

Issue Estoppel – would it be applicable?

[28] The meaning of Landman J's order can, in my view, be best tested by applying the doctrine of issue *estoppel* to the present dispute. While it has been debated as to whether the doctrine of issue

estoppel is part of South African law, (The Laws of South Africa: Volume 9 at para 650; KBI v Absa Bank Bpk 1995 (1) SA 653 (A)), it has been applied in numerous South African cases. The effect of the doctrine is that, where a court in giving the final judgment on the dispute litigated before it, has determined a particular issue involved in that cause of action in a certain way, that determination may be raised as an *estoppel* in a subsequent action between the same parties. Even if the subsequent action is founded on a different cause of action, if the same issue is again involved and the right to recover depends on that issue, the plaintiff may be *estopped* from pursuing its action. However Botha JA cautioned as follows:

> "Each case must be decided according to its own facts. It is not practical to try to formulate guidelines in abstract terms which can be made applicable to all situations". at 669

[29] Spencer Bower The Doctrine of Res Judicata (3ed) at 90 sets the rule out thus:

> "Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without determining that question or issue in a particular way, such determination, even though not declared on the face of the decision, constitutes an integral part of it: but, beyond limits, there can be no such thing as a *res judicata* by implication."

[30] In a recent review of the position, Scott JA said in Smith v Porritt 2008 (6) SA 303 (SCA) at 307:

> "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 669 D, 670 J – 671 B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (Kommissaris van Binnelandese Inkomste v Absa Bank Bpk (*supra*) at 670 E – F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals"."

See also Janse van Rensburg NO and others v Janse van Rensburg NO [2008] ZASCA 154 at para 25.

[31] Applying these principles to the facts of the present dispute, it is important to first recapitulate on the nature of the dispute: Did first respondent offer appellant employment as a result of the restructuring of the government of the City of Johannesburg, which

was equivalent to the post he previously had filled, prior to the restructuring and hence the redundancy of his previous post? Viewed accordingly, the question arises: did Landman J make a decision which disposed, either on the basis of law or on fact, of that defined dispute?

[32] In my view, the answer must be couched in a negative. All Landman J did was to hold that, on the evidence placed before the court, the posts had not been "competently compared". Applicant failed to produce the opinion of an expert. It is correct that Landman J went on to say that, on the papers, he would not have found in favour of the applicant, even if he had accepted the supplementary affidavit of Mr Goosen. However, I take that to mean that, without a competent comparison, the applicant's case was "shipwrecked" and that further Goosen's report was not a competent comparison.

[33] Much was made of the phrase "shipwrecked" by Mr Kennedy. Its meaning, viewed within the context of the judgment read as a whole, is that, without a competent expert report, no conclusion can be reached to whether the present post was at a lower level than that of the previous post. Neither in law nor in fact was the substance of the dispute, that is the merits of the dispute, finally determined by Landman J. Applying the doctrine of issue *estoppel* to these facts, it cannot be said that Landman J's order had been of a kind whereby the 'particular condition', being the nature of the post offered, had been determined either on the facts or on the applicable law.

[34] For these reasons, the plea of *res judicata* cannot succeed. To the extent that questions of policy were raised, that is that a finding in favour of appellant will create the opportunity for unsuccessful applicants to approach a court with further evidence, so that litigation may never end, the success of any such application will depend, to a great extent, on the manner in which the case is initially determined by the court.

The Judgment of Zondo JP

[35] After I had written my judgment, I received a judgment prepared by my esteemed colleague Zondo JP. I then had an opportunity to carefully examine his most thoughtful contribution which makes a number of powerful points as to why my initial approach was incorrect. It also afforded me an opportunity to read the recent decisions of the Supreme Court of Appeal on this area of law and which were delivered subsequent to the preparation of my judgment.

[36] After anxious consideration of the judgment of Zondo JP, I have decided to maintain my initial conclusion. I do so for two reasons.

[37] In his judgment Zondo JP makes much of the fact that I had not followed a *dictum* of Steyn CJ in African Farms and Townships v Cape Town Municipality 1963 (2) SA 555 (A) at 563 E – F. That dictum reads thus:

> "As pointed out in Purchase v Purchase ….. dismissal and refusal of an application of the same effect, namely a decision in favour of the respondent. The equivalent of

> absolution from the instance would be that no order is made, or that leave is granted to apply again on the same papers."

That passage should also be read together with the reliance placed on Sande in a passage cited in para 24 of this judgement where, to recapitulate , the learned Chief Justice says:

> "The *res judicata* is not so much the *sententia*, the sentence or the order made as the *lis* or *negotium*, the matter in dispute or question at issue which the *sententia* is given or the *causa* which is determined by the *sententia judicis*." At 563E

[38] These dicta must be evaluated in terms of the facts in African Homes where a party had applied for an order declaring that an expropriation by a municipality of its property for a town planning scheme was invalid in that it the land was not required for the purpose so expressed by the council. The court found that the council required the land for the purpose of the town planning scheme and accordingly dismissed the application. Thereafter the same party served on the same municipality a summons claiming an order declaring the very same notice of expropriation to be null and void, essentially on the same grounds. As Steyn CJ said:

> "What the appellant proposes to do is to obtain a reversal of the decision of the same question, by advancing different reasons; but different reasoning's leading to a different conclusion cannot effect the identity of the question to be decided." at 563 D

[39] In my view, the question for determination is whether, as Sande has written, the actual matter in dispute has been determined.

That involves a substantive enquiry into the judgment invoked to sustain the plea of res judicata, rather than a determination about the scope absolution from the instance and its lack of application to motion proceedings. The latter is but an ancillary question.

[40] Whatever hermeneutic benefit was sought to be squeezed by Mr Kennedy from the use by Landman J of the word 'shipwrecked', a reading of his judgment clearly, in my view, shows that because inadmissible evidence had been brought before the court , the relevant posts had not been competently compared. Because they had not been competently compared by expert evidence; the application was dismissed. True enough , Landman J did not go on to say that the appellant could approach a court on papers duly supplemented but, in substance, this conclusion appears to be far closer to what was intended than any attempt to contend that the merits of the case were determined by Landman J.

[41] That leads to my second reason for the approach that I have adopted. As noted earlier, a plea of *res judicata* shuts a door on a party such as appellant and therefore terminates any constitutional rights the appellant might have been guaranteed in terms of section 34 of the Republic of South African Constitution Act 108 of 1996 ('the Constitution'). Even before the introduction of the Constitution, courts cautioned against too expansive an application of the plea which would work injustice and unfairness. In a case such as the present, that is exactly the consequence of a successful application of the plea.

[42] But whatever unfairness might be worked in this case, for this court to adopt the approach that the plea should be upheld is to have a far more significant effect. In my view, such a finding underestimates the consequence on labour relations within the South African context. All too often litigants in South Africa are without the financial means to procure the kind of legal representation which doubtless they would desire to employ. Cases are therefore not brought with the forensic precision that might be the case in the commercial or, often, the administrative law context. To insist upon such a evidential threshold is, in my view, to create an excessively large gap between law and justice in this area of litigation. For this reason alone, great caution should be exercised before upholding a plea that slams the court doors in the face of individual litigants possessed of little, if any, social power.

Conclusion

[43] A court can ensure by way of a clear statement that the application was dismissed on the merits, for example because applicant had failed to discharge the onus to justify its application. A court, as indeed should have been the case in the present dispute, can make it clear that the case had been disposed on the basis of insufficient expert evidence and accordingly applicant should be given a further opportunity to approach the court with duly supplemented papers. In short, the question of policy can be best handled by the manner in which courts expressly determine the basis and nature of their orders. Parties cannot surely be penalized for this form of judicial ambiguity. As noted above, in this conclusion I am fortified by the provisions of section 34 of the Constitution:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court of or, where appropriate, another independent and impartial tribunal of forum."

That conclusion does not mean a reduction in the importance of the plea of *res judicata*. That doctrine is important to bring certainty and finality to legal disputes; or to invoke Voet: "The main reason for the introduction of the *exceptio rei iudicatae* was to avoid the inextricable difficulties which could arise if different courts gave different or perhaps even mutually contradictory decisions on the same question." Voet Commentaries 44.2.1

[44] The application of the doctrine, of *res judicata* by its nature, brings an end to legal proceedings as well as to a party's right to approach a court in terms of section 34 of the Constitution. To justify this conclusion, the order read together with the judgment must be reasonably clear in its final determination of the dispute.

[45] In this case, the court *a quo* was required to examine the substance of the order read with the judgment to determine its meaning. It did not do so. When so examined, the plea of *res judicata* cannot be sustained.

[46] For these reasons, I would uphold the appeal is upheld with costs and order that the judgment of Francis J be set aside and replaced with the following order: First respondent's special plea of *res judicata* is dismissed with costs.

DAVIS JA

Appearances

For the appellant	**Advocate G Watt-Pringle SC & Advocate M Le Roux**
Instructed by	**Serfontein, Viljoen & Swart**
For the respondent	**Advocate P Kennedy SC**
Instructed by	**Bowman Gilfillan Inc**
Date of Judgment:	**23 December 2008**

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA64/06

In the matter between

Dirk Willem Bouwer **Appellant**

And

City of Johannesburg **1st Respondent**

National Fund for Municipal Workers **2nd Respondent**

JUDGMENT

NDLOVU, AJA

[1] I have had the opportunity to read both the judgments prepared by my colleagues Zondo JP and David JA in this matter and noted the different conclusions to which they have arrived. To my mind, the approach by Zondo JP as well as the conclusion to which he arrived represents the correct legal position in the matter, hence I concur to his judgment. In further amplification I propose to add the following comments.

[2] It does seem to me that the appellant's motive, in the first place, when he embarked on his exercise and endeavours with the first respondent, which culminated in the appellant instituting this litigation was simply

to exploit, for his personal gain, the provisions of clause 17.4.7.4, read with 17.4.8, of his so-called "Conditions of Service Agreement" by procuring for himself certain benefits envisaged in those provisions. Clause 17.4.7.4 prescribed as follows:

> "Employees whose posts have become redundant and who are offered alternative employment at a lower post level but at the same rate of pay and who reject such an offer, shall receive full severance benefits".

[3] Clause 17.4.8 set out various categories of severance benefits to which an employee who was retrenched by virtue of redundancy as contemplated in clause 17.4.7.4 would be entitled and, in some cases, the formula whereby the quantum of such benefits would be computed, as well as the issue of how the outstanding loans owing to the first respondent would be defrayed with minimal financial detriment to the employee concerned. These provisions were part of the conditions of service laid down in terms of the collective agreement known as "*Conditions of Employment Agreement: Transvaal (Local Government Undertaking)*" published in the Government Gazette No. 16047 (Regulation Gazette No.5416) dated 28 October 1997 (the so-called *Conditions of Service Agreement* referred to above) which was operational at the relevant time and applicable to the appellant.

[4] I tend to believe that the first respondent had promulgated the said provisions in good faith and, therefore, it was important and, indeed, expected that the affected employees would reciprocate the gesture accordingly in the interests of both sides. Therefore, whilst the appellant was legally entitled to exercise his right as enshrined in clause 17.4.7.4 it seems to me that he was grossly unreasonable, as

almost to border on *malafides*, when he declined the offer of the new post in those circumstances .

[5] As pointed out by Zondo JP the appellant set out at paragraphs 31.2 to 31.12 of his founding affidavit the grounds why he averred that the new post offered to him was at a lower level than his previous post. In response, the first respondent, while admitting that the appellant's previous post had become redundant, vehemently denied that the appellant himself had become redundant in the service of the first respondent. *(paragraph 7.8 of the first respondent's answering affidavit).* A schedule entitled "Role Description" in respect of the appellant was included in the answering papers *(paragraph 7.11.1, marked annexure "MC3")* which gave a detailed description of the appellant's job responsibilities in his new post. Concluding in this regard the first respondent stated:

> "While this is undoubtedly a different position to that previously occupied by the Applicant, I respectfully state that the position is one which entails considerable responsibility and significance to the First Respondent's operations. I deny that the Applicant's deployment constitutes a demotion. His functions in his present position are clearly strategic and require initiative and experience at a senior level. They envisage interaction with consultants (as opposed to subordinates)." *(paragraph 7.11.2 of the first respondent's answering affidavit).*

And,

> "In short, the Applicant's previous position comprised operational and line function management. His present position is focused on strategic project management."
> *(paragraph 7.11.4, ibid).*

Then admittedly,

> "The Applicant undoubtedly has a lower status within the organisational structure of the First Respondent than he had within the organisational structure of the Midrand Metropolitan Local Council. That is not, however, a proper basis upon which to make a comparison for the purpose

> of determining relative status. In colloquial terms, the Applicant is a smaller fish in a bigger pond."

(paragraph 7.11.5, ibid).

[6] Indeed, it does appear to me that the hard fact of the appellant's previous employer, the Transitional Metropolitan Local Council ("the TMLC") having been essentially only a part of, and therefore a much smaller entity both in size and status than his current employer, namely the first respondent, was a point which the appellant sought conveniently to ignore and overlook. As he was then "a smaller fish in a bigger pond" he could not have reasonably expected that his previous post would be the same or even similar to the new post offered to him.

[7] The allegations and counter-allegations on affidavit, a small fraction of which I have, directly or indirectly, referred to above constituted the evidential material presented by both parties to Landman J on 29 October 2003 when he dealt with the matter as an opposed application and in respect of which, after considering it on the papers and listening to oral arguments from Counsel on both sides, he dismissed the application with costs. There is no doubt in my mind that this decision by the learned Judge was a final and definite judgment on the merits, in respect of which the *exceptio rei iudicatae* applied. (*S v Moodie* 1962 (1) SA 587 (A) at 596E-F; *Liley and Another v Johannesburg Turf Club and Another* 1983(4) SA 548 (W) at 552F; *CTP Ltd and Others v Independent Newspapers Holdings Ltd* 1999(1) SA 452 (W)). In ***LAWSA*** (2005) Volume 9 the following is stated:

> "In order to qualify as a final or definitive judgment, the judgment must be on the merits of the cause of action which it is sought to litigate afresh. It follows that a judgment which is merely interlocutory

> or provisional – meaning that it is not intended to settle the dispute between the parties with finality – cannot found a plea of *res iudicata.* ……
>
> An order of absolution from the instance is ordinarily not decisive of the issue(s) raised, in other words it decides nothing for or against either party, and it is accordingly not a final judgment capable of sustaining a plea of *res iudicata.*
>
> An order dismissing a plaintiff's claim is usually taken to be the equivalent of an order of absolution from the instance since it decides nothing, except that the plaintiff has been refused the relief he sought. An order dismissing or refusing an application, when made on the merits, has the same effect as a decision in favour of the respondent, and can therefore found a plea of *res iudicata.* An order to the effect that no order is made on an application, or that leave is given to apply again on the same papers, is equivalent to an order of absolution from the instance." (at para 628) (My emphasis).

[8] The learned authors Spencer Bower *et al* in "*The Doctrine of Res Judicata*" (1996), give a few examples of dismissal orders not based on the merits:

> "Dismissals for want of prosecution being based on procedural defaults are not decisions on the merits, and do not constitute *res judicatae*. Similarly the dismissal of a suit on appeal for want of necessary parties was not a dismissal on the merits which would support a plea of *res judicata*. Dismissals for want of jurisdiction are also not decisions on the merits, except on the issue of jurisdiction,but will be *res judicata* on that issue unless the jurisdiction is altered by statute."

(at page 85 paragraph 175)

Clearly, in none of the abovementioned examples would the matter have been decided on the merits and the position does not seem to me to require any further elaboration.

[9] According to *Herbstein & Van Winsten*, "The Civil Practice of the Supreme Court of South Africa" 4th edition (1997) at p 684-5:

> "After hearing the evidence of both parties and counsel's arguments the court may…. grant judgment outright in favour of either party, or it may give absolution from the instance or, what in effect amounts to the same thing, dismiss the action….

> If the *onus* is on the plaintiff and the court concludes after hearing all the evidence by both sides that the plaintiff has failed to discharge the *onus*, the question arises whether judgment should be entered for the defendant or whether it should merely be one of absolution. The distinction is important, for in the latter event the plaintiff can institute fresh proceedings without having to face a plea of *lis finita* or *res judicata*. The position appears to be that if the court has on the evidence found against the plaintiff, it is entitled to enter judgment for the defendant rather than grant absolution. It can in such an event never be bound to enter a judgment of absolution in preference to one in the defendant's favour, but conversely it may be bound, if the defendant asks for it and the evidence warrants it, to enter a judgment in the defendant's favour."(My emphasis)

[10] I should hastily point out that the proposition made by the learned authors (cited above) clearly related to actions and not to applications. Indeed, it is significant to observe that an order for absolution from the instance is generally granted in actions and hardly heard of in motion proceedings. We are dealing here with an application and not an action. Where, in an action, a situation arose which warranted an order of absolution from the instance (such as illustrated by *Herbstein & van Winsen* in the preceding paragraph), in a similar situation in motion proceedings the application would simply be dismissed. A further distinction between actions and applications, in this regard, was that whilst in an action there was the notion of "judgment for the defendant" (again as illustrated above) which was a judgment on the merits, there was hardly such thing as "judgment for the respondent" in motion proceedings. In the latter instance the court, again, would simply dismiss the application, even where the decision was based on the merits. Therefore such dismissal order would be a final judgment founded on the merits and in respect of which the *exceptio rei iudicatae* could be competently pleaded.

[11] Much more was said and articulated in the judgment prepared by Zondo JP with respect to the reasons he advanced in reaching the conclusion that Landman J had, indeed, duly considered the merits of the dispute when he dismissed the appellant's application. As indicated earlier, I fully subscribe to those reasons and I do need to repeat them. I should point out, incidentally, that even though reliance was made on what was only an *obiter dictum* of Steyn CJ (in *African Farms and Township Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563D-F) it was trite that a *dictum* from the highest court of the land (as it then was) must still have not only persuasive authority but binding authority on this Court, absent any other directly relevant authority on the subject.

[12] What, however, was not dealt with by Zondo JP was the question of the doctrine of *issue estoppel* which was raised and relied upon by Counsel for the appellant during oral argument. Indeed, Davis JA appears to agree with Counsel for the appellant on this point. My respectful assumption for the omission by Zondo JP would simply be that it was, after all, not really necessary to explore and deal with submissions on that particular point for the purpose of determining this appeal. My reasons for saying so include the following.

[13] In the same way as the plea of *res iudicata* was a defence available to the first respondent (and not the appellant) to rely on, so would have been the defence of *issue estoppel*. In other words, it was up to the first respondent to make the election of the special defence it wished to raise and rely on. A defence of *issue estoppel* was not of the first respondent's choosing in this case, but rather something speculated upon in a hypothetical scenario by Counsel for the appellant

purportedly on behalf of the first respondent. I am referring here to the stage when Counsel for the appellant gave the example of what could possibly happen if the appellant were to resign from the first respondent's employ and then claim constructive dismissal on the ground of an alleged demotion by virtue of having been offered a post at a lower level than the one he previously occupied. According to Counsel for the appellant, although the appellant, in that hypothetical scenario, would not be claiming the same relief as in the present litigation the first respondent would obviously not succeed with the defence of *issue estoppel*. In my view, this line of argument was stretching the matter too far as to digress from the crisp issue before this Court (and, indeed, the issue before the Court *a quo*) namely, whether or not the first respondent's special plea of *res iudicata* in its traditional form (and not *issue estoppel*) should be upheld.

[14] The submission about the doctrine of *issue estoppel* (ostensibly on behalf of the first respondent) was not part of the pleadings and, as stated already, it was raised for the first time by Counsel for the appellant during oral argument. In fact it was just after the tea adjournment that Counsel for the appellant raised the issue which he said he had been discussing with his junior during the Court break. In other words, the point I am making, it took everyone by surprise. As a result, it seems to me, this issue was, understandably so, not properly canvassed and sufficiently argued before us by both parties. Although an appeal could succeed on a new ground not dealt with in the Court below and sometimes even a new ground raised by a Court of Appeal *mero motu* (*Greathead v SA Commercial Catering & Allied Workers Union* 2001 (3) SA 464 (SCA); *Mndi v Malgas* 2006 (2) SA 182 (E)), the present instance was not, in my view, a case in respect of which

resort to that route was necessary and justified. The appeal was sufficiently and properly determinable on the pleadings.

[15] In the result, I am satisfied, in particular, as to the following:

- That, both parties, duly represented by Counsel, presented their cases before Landman J to the fullest extent that the parties wished and desired to do at the time and that the evidential material so presented, plus the oral submissions by Counsel, was duly considered by the Court.
- That, the Court dismissed the application after satisfying itself that the appellant, who bore the onus of proof, had failed to discharge that onus.
- That, in dismissing the application, the Court essentially and effectively gave judgment for, or in favour of, the first respondent, which judgment was a final and definitive decision on the merits.
- That, holding otherwise would not only be a violation of the principle of *res iudicata* and the values and norms envisaged in that principle but would also open flood gates to all unsuccessful litigants in similar situations to approach the Court yet again in order to have the second, third or even the fourth bite at the cherry. The interests of justice would never have contemplated such a resultant legal absurdity.

Hence, I concur in the judgment of Zondo JP.

_____

NDLOVU, AJA

Appearences

For the appellant : Mr Watt Pringle SC

(with Mr M. Le Roux)

Instructed by : Serfontein, Viljoen and Swart

For the first respondent: Mr P. Kennedy SC

Instructed by : Bowman Gilfillan Inc.

Date of judgement : 23 December 2008