THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 68/ 2019

In the matter between:

SIBANYE GOLD LIMITED t/a	
SIBANYE STILLWATER	**Applicant**
and	
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**First Respondent**
NATIONAL UNION OF MINEWORKERS	**Second Respondent**
SOLIDARITY	**Third Respondent**
UASA THE UNION	**Fourth Respondent**
MEMBERS OF THE FIRST RESPONDENT IN THE EMPLOY OF THE APPLICANT	**Fifth to Further Respondents**

Heard: **25 January 2019**

Delivered: **8 February 2019**

Summary: Special plea of *res iudicata* upheld. Legal principles restated.

JUDGMENT

PRINSLOO, J

Introduction

[1] This matter has a litigious history that is connected to this application. A brief background of this matter will put the current application in proper context.

[2] The applicant operates a number of gold mines which are divided into three separate business units, *viz* Driefontein and Kloof in Gauteng and Beatrix in the Free State. These individual mines consist of various shafts and plants. The applicant also has various divisions which constitutes its workplace.

[3] The applicant recognised NUM, Solidarity, UASA and AMCU for collective bargaining purposes. There is intense rivalry between AMCU and NUM.

[4] Negotiations between the recognised unions, the applicant and other companies in the business of gold mining in regards to wages and terms and conditions of employment for the period 1 July 2018 to 30 June 2021 commenced on 11 July 2018 at the Mines Council of South Africa (previously known as the Chamber of Mines). A collective agreement was eventually concluded on 14 November 2018 between the Council on behalf of the applicant, other companies, NUM, UASA and Solidarity. AMCU was not a party to the collective agreement, and despite further negotiations with it, an agreement remains elusive.

[5] AMCU instead referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate of non-resolution was issued on 26 September 2018. Following a strike notice issued by AMCU on 19 November 2018, industrial action commenced on 21 November 2018.

[6] It is common cause that as at 14 November 2018, when the collective agreement was concluded, NUM, UASA and Solidarity did not jointly enjoy majority representation at the workplace and they could not extend the collective agreement in terms of section 23(1)(d) of the Labour Relations Act (LRA)[1].

[1] Act 66 of 1995 (as amended)

[7] The applicant's contention is that between 22 November 2018 and 13 December 2018, the union membership figures changed due to normal attrition and movement of employees between the unions. It contends that as at 13 December 2018, NUM, UASA and Solidarity acting jointly, have 51.2% of the employees as members. The figures were obtained from the applicant's 'Symplexity HR System'[2].

[8] On 13 December 2018, the applicant, NUM, UASA and Solidarity concluded an agreement to extend the Main Wage Agreement (the extension agreement) and by virtue of the provisions of section 23(1)(d) of the LRA, the agreement was extended to all employees employed in the category 4-8 miners, artisans and official recognition units in the workplace of each representative employer.

[9] On the same date that the extension agreement was concluded, the Council addressed a letter to AMCU advising it of the agreement and its effect. AMCU was further advised that the strike action embarked upon by its members was unprotected and it was required to cease the strike. AMCU's members were to report for duty by Saturday 15 December 2018, failing which they may be dismissed. The applicant, on the same date, also addressed a letter to AMCU referring to the Council's letter, confirming the extension of the wage agreement and its consequences. AMCU's response on 14 December 2018 was to deny that the strike was unprotected.

The litigation

[10] The applicant subsequently approached this Court on an urgent basis and the urgent application was heard on 18 December 2018. The said urgent application represented the sixth round in an on-going battle between the parties before this Court, since the commencement of AMCU's industrial action on 21 November 2018[3].

[11] The litigation history was aptly summarised in case number J 4552/18 and is repeated herein to provide the necessary context.

[2] This system is the internal software programme of the applicant.
[3] The introduction and brief history are similar to the facts presented in Case Number J 4552/18, wherein judgment was handed down on 21 December 2018 and what is recorded here, is from the said judgment, with the necessary changes and additions.

[12] Immediately upon the commencement of the strike, the applicant approached this Court on 22 November 2018 under case number J4217/18 and obtained a *rule nisi* with the return date of 22 February 2019, interdicting the respondents from *inter alia*, inciting / engaging in any unlawful conduct, violence and intimidation.

[13] On 29 November 2018, the CCMA issued rules to regulate picketing and the conduct of the employees during the strike. Upon the issuing of the picketing rules by the CCMA, the applicant again approached this Court on an urgent basis under case number J4390/18 to vary the picketing rules after alleged breaches. The matter under case number J4390/18 was heard on 4 December 2018 and on 5 December 2018 a rule *nisi* with return date of 27 February 2019 was issued, amending the picketing rules of 29 November 2018.

[14] On 12 December 2018, the applicant yet again approached this Court on an urgent basis under case number J4518/18 for an order calling upon AMCU and its members to appear before the Court to show cause why they should not be found to be in contempt of Court for failing to comply with its orders under case numbers J4217/18 and J4390/18. An order was granted on 14 December 2018, with the return date of 1 February 2019.

[15] AMCU, for good measure, also brought its own application under section 69(12) of the LRA under case number J4522/18 to vary the picketing rules, which matter has since by agreement between the parties, been removed from the roll. A further application followed on 28 November 2018 when AMCU sought an order that the applicant must comply with its common law duty to provide a safe working environment to all the employees at the applicant's workplace. This application was found to lack merit and was dismissed.

[16] On 18 December 2018, the applicant once again approached this Court on an urgent basis under case number J 4552/18. The applicant sought a *rule nisi,* for an order declaring the continuing strike that commenced on 21 November 2018 to be unprotected as contemplated in sections 65(1)(a) and 65(3)(i) of the LRA with effect from 13 December 2018; interdicting and restraining AMCU and its members from participating in and promoting the strike; and interdicting and restraining AMCU from calling its members out or

inviting them to participate in the strike or conduct in furtherance of the strike. The application was opposed.

[17] In the matter under case number J 4552/18, the applicant's case was that according to the figures, there was a total of 1591 movement of employee membership into and out of the recognised unions and non-unionised category, showing losses of 134 by AMCU and 802 in the non-trade union category; gains of 602 by NUM, 119 by Solidarity, and 215 by UASA. These figures took into account 86 employees who left the applicant's employ, and the recruitment of 25 new employees during the period. To confirm these figures, the applicant engaged the services of Sekela Xabiso Inc, a firm of auditors, to verify trade union membership movements during the period 23 November 2018 and 13 December 2018.

[18] The gist of the applicant's case was that the NUM, Solidarity and UASA have between the period 22 November 2018 and 13 December 2018 increased their membership to the extent that they enjoyed majority representation for the purposes of extending the wage agreement. As the wage agreement was extended to AMCU, the strike was to be declared unprotected, as contemplated in sections 65(1)(a) and 65(3)(a)(i) of the LRA.

[19] In the answering affidavit placed before the Court, AMCU contended that the applicant's figures were wrong, inflated, skewed and unreliable, and that the claim that the three other unions represented a majority was flawed for a number of reasons. Those reasons were recorded in paragraph 26 of the judgment issued by Tlhotlhalemaje J on 21 December 2018.

[20] The Court per Tlhotlhalemaje J concluded that serious doubt had been cast by the answering affidavit regarding the unsubstantiated versions in the founding affidavit in regards to how the figures were arrived at. It has to be mentioned that the applicant did not file a replying affidavit in case number J 4452/18. The Court was not satisfied that the applicant has established a *prima facie* right to the relief it seeks, let alone a clear right to the enforcement of the provisions of sections 23(1)(d); 65(1)(a) and/or 65(3)(a)(i) of the LRA. There was no basis, for any conclusion to be reached that the three other unions could have, between the period 22 November 2018 and 13 December 2018,

dramatically increased their membership to enjoy majority representation for the purposes of extending the wage agreement.

[21] The application was dismissed with costs.

[22] In paragraph 29 of the judgment Tlhotlhalemaje J stated that:

> 'The Court would however be remiss to ignore the irreparable harm the on-going strike has caused. The consequences of the extension of the wage agreement however, and its impact on AMCU's guaranteed constitutional right to strike are equally factors not to be ignored. To this end, it is my view that in the light of the orders to be made as below, it is within the powers of this Court to make any further orders that it deems prudent under the provisions of section 158 of the LRA, that will give effect to the primary purposes of the LRA, paramount being the effective resolution of labour disputes'.

[23] In line with this observation, the relevant orders that were made read as follows:

> '1. The Registrar of this Court is ordered to forward a copy of this judgment to the Office of the National Director of the Commission for Conciliation, Mediation and Arbitration (The CCMA), for it (National Director), to facilitate and set in motion within a period of three (3) days upon receipt of a copy of this judgment, a union membership verification process at the applicant's workplace
>
> 2. The National Director of the CCMA is ordered to file a report on the progress made in regards to order (2) as above with the Registrar of this Court by no later than 7January 2019.'

[24] The CCMA has set the verification process down for 3 January 2019. The applicant prepared an explanatory affidavit which addressed some of the membership issues AMCU had raised in its answering affidavit in case number J 4552/18 and it was proposed that the explanatory affidavit be used as the basis of the verification exercise and that AMCU respond thereto by 7 January 2019.

[25] There was however no consensus on how the verification exercise should be conducted and there was a dispute with regard to the period of the verification exercise. The applicant's view was that the verification exercise was confined

to the movement of union membership between 22 November and 13 December 2018, whereas AMCU was of the view that the verification should not be so confined and should go back as far as 2017. The CCMA adjourned the verification process and sought clarity from Tlhotlhalemaje J in respect of the period for which the verification exercise had to be conducted and whether it should be limited to 22 November and 13 December 2018. On 8 January 2019, Tlhotlhalemaje J delivered a clarification order wherein he clarified his order with specific reference to paragraph 21 of his judgment and indicated that the period of the verification exercise was limited to 22 November to 13 December 2018.

[26] The CCMA had set the verification process down for 16 January 2019. On 15 January 2019, however AMCU filed an application for leave to appeal against paragraph 21 of the judgment and paragraph 2 of the clarification order of Tlhotlhalemaje, J.

[27] On 16 January 2018, the verification process at the CCMA came to a standstill and was postponed, pending the finalisation of the application for leave to appeal.

[28] The applicant's case is that AMCU's application for leave to appeal and the subsequent postponement of the verification process has placed it in an untenable position. The strike has resulted in financial losses of approximately R 19 million per day, the strike has been marred by violence and loss of life, AMCU adopted a dilatory and intransigent approach to the verification process, the application for leave to appeal had further delayed the process and as things currently stand, there is no consensus as to the period and mechanism of the verification exercise. For these reasons the applicant submitted it has no alternative other than to approach this Court as a matter of urgency.

<u>The present application</u>

[29] On 23 January 2019, the applicant once again approached this Court on an urgent basis. The relief sought by the applicant is for the issuing of a rule *nisi,* wherein an order is issued to declare the strike by the fifth to further respondents (the employees) which commenced on 21 November 2018 to be

unprotected in terms of section 65(1)(a), as read with section 65(3)(a)(i) of the LRA, interdicting and restraining the employees from participating in the strike and interdicting and restraining AMCU from encouraging and inciting the employees to participate in the strike.

[30] AMCU opposed the application. The papers placed before this Court on an urgent basis, exceeded 2 500 pages.

[31] The applicant's case is that the present strike action, in which the employees (AMCU members) are participating, is unprotected as a binding collective agreement has been lawfully extended to the employees in terms of section 23(1)(d) of the LRA.

[32] In the founding affidavit placed before me, the applicant made reference to the proceedings before Tlhotlhalemaje J and in summary referred to the membership figures that were placed before Tlhotlhalemaje J, which figures were obtained from Symplexity, and verified by Sekela Xabiso Inc, Specific reference is made to the attacks AMCU made on the accuracy of the figures provided by the applicant, as was recorded in paragraph 26 of the judgment of Tlhotlhalemaje J.

[33] In the present application, the applicant has fully dealt with the issues previously raised by AMCU and in respect of which Tlhotlhalemaje J found that there was serious doubt.

[34] The applicant further stated in its founding affidavit that should this Court have reservations about the accuracy of the applicant's records on union membership, it can direct the CCMA to conduct a *de novo* verification exercise, which exercise should be restricted to the period between 22 November to 13 December 2018.

[35] In its opposing affidavit, AMCU raised two points *in limine* to wit *res iudicata* and the fact that the extension of the collective agreement is not retrospective and that the strike is protected.

[36] I will first deal with the special plea of *res iudicata.*

Res iudicata

[37] The principles applicable to the doctrine of *res iudicata* are well settled. In *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another*[4] it was explained thus:

> 'The expression *'res iudicata'* literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) ([2001] 1 All SA 417) at 239F – H and the cases there cited).'

[38] The requirements for a successful plea of *res judicata* are as well established – they acquire the party raising the defence to show that a previous judgment on the merits by a competent court has been given in an action or application between the same parties, based on the same cause of action and in respect of the same subject matter. In *National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd*[5] the Supreme Court of Appeal held that:

> 'The fundamental question in the appeal is whether the same issue is involved in the two actions; in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause of action, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action?'

[39] This Court had also considered the issue of *res iudicata* and held that it is against public policy that a litigant should be able to keep demanding the same relief from the same adversary on the same grounds. The rule is expressed by saying that a valid defence of *res iudicata* may be raised where the same thing had, on the same grounds, earlier been demanded from the same party.[6]

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[4] 2014 (5) SA 297 (SCA) at para10.
[5] 2001 (2) SA 232 (SCA).
[6] See: *Dumisani and another v Mintroad Sawmills (Pty) Ltd* (2000) 21 ILJ 125 (LAC).

[40] In *African Farms and Townships Ltd v Cape Town Municipality*[7] Steyn CJ held that:

> 'Where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.'

[41] In other words, what the court is required to do is to compare the relevant facts upon which reliance is placed for the contention that the cause of action is the same in both proceedings. Additionally, the order granted in the first application must be considered to determine whether or not the issues raised in the pleadings have been definitively disposed of on the merits.

[42] AMCU's case is that the applicant, under case number J 4552/18, sought essentially the same relief, based on the same cause of action, namely that the strike had become unprotected and was prohibited by sections 65(1)(a) and 65(3)(a)(i) of the LRA, by virtue of the fact that the applicant, NUM, Solidarity and UASA concluded an extension agreement on 13 December 2018. AMCU sought the dismissal of the entire application and that order was granted on the basis that the applicant had failed to make out a case on the papers before the Court. This was so because the applicant elected not to deliver a replying affidavit, did not seek an opportunity to supplement its papers or to refer the matter to oral evidence.

[43] I am satisfied that in the current application the same relief is claimed on the same cause of action as in case number J4552/18. The only issue that needs further consideration is whether the judgment of Tlhotlhalemaje J is final and definitive on the merits of the matter.

The arguments

AMCU

[44] AMCU's case is that the issue of the legality of the strike by its members is *res iudicata,* with the result that this application is incompetent. The entire application was dismissed on the basis that the applicant had failed to make out a case on the papers before the Court. The Court however, *mero motu*

[7] 1963 (2) SA 555 (A) at 562D.

issued an order that the verification of union membership at the applicant's workplace between 22 November and 13 December 2018 be referred to the CCMA for a verification process. The CCMA was ordered to file a report on the progress made by no later than 7 January 2019.

[45] The judgment and order did not spell out what the consequences would be in the event that the verification was favourable to the applicant. AMCU's case is that Tlhotlhalemaje J, having dismissed the application, nevertheless left the door slightly open and in the event that the verification process favoured the applicant, it could have approached the Court afresh on the basis of a favourable verification outcome.

[46] Instead, the applicant has approached this Court again on the same ground for the same relief, without obtaining a favourable verification from the CCMA and still relying on the same disputed figures previously placed before this Court, without affording AMCU any opportunity to participate in the verification process relied on by the applicant.

[47] AMCU's argument is that case number J 4552/18 gave rise to a final judgment, subject only to a specified form of verification, which has not been followed and which is for present purposes, moot. The judgment was final and definitive on the merits, thereby disposing of the application.

[48] Mr Watt-Pringle for the respondents, submitted that the present application follows on the heels of a failed application brought on the same legal basis, but that in this application, the applicant appears to have taken more care with the evidence presented in support of its claim that the other unions enjoyed a majority as at 13 December 2018. The applicant came back with the same case after it learnt a lesson from the previous application and this application is an attempt to fix what was not done previously.

[49] Mr Watt-Pringle submitted that Tlhotlhalemaje J could have postponed the matter pending the verification exercise or could have granted a rule *nisi*, but instead the Court considered the evidence presented and found that the applicant failed to make out a case and the application was dismissed.

[50] The applicant should have or could have come back to Court only after the verification process at the CCMA was completed, as that was the only door

that was left open for the applicant and that is the only door through which the applicant could come back.

[51] Mr Watt-Pringle referred to the case of *Bouwer v City of Johannesburg and Another*[8] where the Court *a quo* dismissed an application, after considering the affidavits filed, on the basis that the applicant had failed to prove his case by sufficient and proper evidence. When the applicant subsequently approached the Labour Court again, the special plea of *res iudicata* was upheld. On appeal the Labour Appeal Court dealt with the issue of *res iudicata* and the majority found that the Labour Court was correct to uphold the special plea of *res iudicata.*

[52] In conclusion, the issue of the legality of the strike, despite an extension agreement and the applicant's entitlement to the relief it seeks on the basis of facts in existence prior to the application brought under case number J 4552/18, are *res iudicata.*

The applicant

[53] Mr Myburgh for the applicant, also referred to *Bouwer v City of Johannesburg*[9] and he placed reliance on the minority judgment wherein it was held that:

> '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 the plea of *res iudicata.'*

[54] Mr Myburgh submitted that even where the word 'dismissed' is used in the order, it does not necessarily mean that the dismissal amounts to a final order. The meaning of the order can only be gleaned from the judgment read as a whole and the question that remains is whether the dispute had been determined. Where the case had been disposed on the basis of insufficient evidence, the applicant should be afforded an opportunity to approach the court with duly supplemented papers.

[8] Unreported Labour Appeal Court judgment, handed down on 23 December 2008 under case number JA 64/06. SAFLII reference: (JA64/08) [2008] ZALAC 15.
[9] Ibid n 8.

[55] The Applicant's argument is that in his judgment, Tlhotlhalemaje J merely identified flaws in the methodology used to verify the union membership numbers and he recited the six attacks by AMCU on the correctness of the numbers, without determining them. As far as the Court was concerned, serious doubt was cast on how the numbers were arrived at, with the result that a *prima facie* case had not been established on the papers. As the Court ordered an urgent verification process, aimed at the effective resolution of the labour dispute, the intention of the Court was not to shut the applicant forever out of Court on the same issue on the basis that the merits had been finally determined, but the intention was to allow the applicant to approach the Court in due course on papers duly supplemented.

[56] Mr Myburgh submitted that as Tlhotlhalemaje J did not determine the merits of AMCU's attack on the numbers, the flaws and concerns raised by the Court could be overcome, where the order was aimed at the effective resolution of the dispute in due course and where the Court enlisted the services of the CCMA to assist in the verification of union membership, the intention was not to shut the door for the applicant. In the absence of *lis terminate,* there can be no *res iudicata.*

Analysis

[57] The Constitutional Court has held in *Mkhize N O v Premier of the Provinces of KwaZulu-Natal and Others*[10] that 'the doctrine of *res iudicata* will apply only where a cause of action has been litigated to finality between the same parties on a previous occasion.' That is the gist of the issue before me – has the cause of action been litigated to finality? The applicant's case is that it has not and AMCU's case is that it has indeed been litigated to finality.

[58] In the judgment of 21 December 2018, Tlhotlhalemaje J concluded that there was no basis for any conclusion that the three other unions could have enjoyed majority representation for purposes of extending the wage agreement. Effectively Tlhotlhalemaje J found that the applicant had failed to substantiate its case by sufficient evidence and the application was dismissed.

[10] [2018] ZACC 50 at para 38.

[59] In *Bouwer v City of Johannesburg*[11] the Labour Appeal Court (majority) held that:

> '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.'

[60] It is trite that any litigant who brings an application to Court should place before the Court all the relevant and material evidence in support of his or her case on the first occasion. A litigant cannot institute multiple applications, one after the other, each time adding more and fixing the holes, until the court eventually says that the case has been proved.

[61] The applicant submitted in argument, the court's intention must also be considered, as was held in *Bouwer v City of Johannesburg* (minority)[12]:

> 'The application of the doctrine of *res iudicata* 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.'

[62] In my view, it is clear from Tlhotlhalemaje J's judgment that he has determined the merits and that he made a definitive and final order when he dismissed the applicant's case. The order was not framed as one where the applicant was granted an opportunity to file supplementary papers, with the intention to afford the applicant an opportunity to pursue the same issue at a later stage. The intention was clearly to dismiss the application on its merits.

[63] Considering the order, read with Tlhotlhalemaje J's judgment as a whole, the intention is clearly not what the applicant wants it to be.

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[11] *Supra* n 8 at para 42.
[12] *Ibid* n 8 per Davis JA at para 44.

[64] Even if there is merit in the applicant's argument that Tlhotlhalemaje J's order was aimed at the effective resolution of the dispute in due course when the Court enlisted the services of the CCMA to assist in the verification of union membership, and that the Court's intention was not to shut the door forever for the applicant, the question that leaps out is what door did the Court then leave open? The only door that was possibly left open, was the CCMA verification process and a possible application after the outcome of the said process was known. The Court certainly did not leave the door open for the applicant to approach the Court again on the basis of its own, internal verification process and there was certainly no scope for an invitation to place a better, more comprehensive case before this Court based on the applicant's own verification. The only door through which the applicant could possibly come back to Court, is not the one used in this application.

[65] I am bound by the following *dicta* of the Labour Appeal Court (majority), which aptly applies *in casu:*

> '..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 iudicata.*'[13]

[66] In launching the present application, the applicant has attempted to salvage its wrecked ship, which it can clearly not do. Put differently, the applicant seeks a second bite at the cherry to which it is not entitled. The applicant failed to persuade the Court in case number J4552/18 that the three other unions enjoyed majority representation for purposes of extending the wage agreement and as a result of insufficient evidence, the applicant's case was dismissed. The applicant certainly does not have the right to approach the Court a second time, with additional evidence and a better attempt to make out its case. There is no reason why the evidence the applicant now seeks to place before this Court, was not placed before Tlhotlhalemaje J. More so

[13] *Bouwer Supra* n 8 at para 44.

where the information was available at the time and the respondents disputed the information at the time, and the applicant elected not to file a replying affidavit.

[67] There is no merit in the argument that Tlhotlhalemaje J did not decide the application on its merits. It is evident from his judgment that he considered the figures presented by the applicant, as well as the opposing papers filed by AMCU in response thereto and he found that the applicant has not established a right to the relief it sought. He concluded that there was no basis for any conclusion that the three other unions could have enjoyed majority representation for purposes of extending the wage agreement. Tlhotlhalemaje J in dismissing the application, decided the merits of the application. It may be so that the dispute is not determined, but the application that served before Tlhotlhalemaje J was determined and has been decided.

[68] In these circumstances, the order granted on 21 December 2018 under case number J 4552/18 is a final order. The legal and factual issues raised in the present proceedings are the same as those raised in the proceedings conducted under case number J 4552/18 and the special plea of *res iudicata* is upheld.

[69] The issue of *res iudicata* aside: It is evident that Tlhotlhalemaje J was alive to the harm the ongoing strike has caused, hence the orders in respect of the verification process, which were issued to give effect to the primary purpose of the LRA, namely the effective resolution of labour disputes.

[70] This Court is also alive to the harm the ongoing strike has caused, for all involved. On the one hand the applicant suffers massive losses on a daily basis and is frustrated by the ongoing strike and the fact that no progress has been made with regard to the verification process that was ordered on 21 December 2018. The applicant describes its position as utterly untenable, with no end in sight. On the other hand, the principle of ‘no work no pay’ is applied to the striking employees, who have sacrificed their income since the commencement of the strike in November 2018 and it goes without saying that this has caused suffering for them too. It is unfortunate that individuals have lost their lives as a result of the strike action and such conduct can never be condoned.

[71] However, none of these factors can cause this Court to issue another order, where an order had already been issued and where the process envisaged in the order of 21 December 2018, has not been completed.

[72] In view thereof that the special plea of *res iudicata* is upheld, it is unnecessary to consider the other point *in limine* or the merits of this application.

Costs

[73] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[74] In *Zungu v Premier of Kwa Zulu-Natal and Others*[14] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching this Court to have their disputes dealt with, and on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[75] Mr Watt-Pringle submitted that the applicant should be ordered to pay the costs, for the same reasons Tlhotlhalemaje J ordered the applicant to pay the costs. *In casu,* the respondents submitted that although the Court is reluctant to grant costs where there is an ongoing collective relationship, there are special features associated with the applicant's conduct that justifies the granting of a cost order in favour of AMCU. Firstly, the applicant assembled an extraordinarily long application (founding papers of 2075 pages / 5 lever arch files), weeks after the judgment in case number J 4552/18 was handed down. This is the product of a team effort which must have taken hundreds of man, hours to compile. The signed application with annexures was delivered to the respondents' legal representatives on Saturday 19 January 2019 and the respondents were given until 16:00 on Monday, 21 January 2019 to serve an answering affidavit, with the application enrolled for hearing on 23 January 2019. The respondents' case is that this is a repeat of the tactic adopted by the applicant when it launched the urgent application under case number J 4552/18.

[14] (2018) 39 ILJ 523 (CC) at para 24.

[76] The applicant has set unreasonable time periods for the respondents to answer such a voluminous application. The respondents had great difficulty to consult with their lawyers and to deal with the various allegations over a weekend and in the time limited frame allowed.

[77] In my view, it was unreasonable to expect the respondents to put up an answer to an application such as the present one in the timeframe as set by the applicant. One would have expected the applicant to have taken note of the remarks by Tlhotlhalemaje J in respect of the inconvenience caused to AMCU in filing answering papers over a weekend, for which a cost order was granted. No lessons were learnt and the applicant indeed repeated the same unreasonable tactic, to the great inconvenience of the respondents.

[78] This is the second time the applicant has dragged the respondents to Court on extremely short notice and at great cost.

[79] Mr Myburgh submitted that as the principles that are at play in this matter, are not clear cut, no party should be burdened with costs.

[80] This Court has to strike a balance, considering the requirements of law and fairness. In my view this is a case where it is appropriate to award costs, which costs are to include the costs of two counsel.

[81] In the premises, I make the following order:

Order:

1. The special plea of *res iudicata* is upheld;
2. The applicant is to pay the First Respondent's costs, such costs to include the costs of two counsel.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate A Myburgh SC with Advocate M van As
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys
For the First and Fifth Respondents:	Advocate C Watt-Pringle SC with Advocate A Cook
Instructed by:	Larry Dave Attorneys