IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 234/16

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA First Applicant

SERUMULA, PHOMOLO AND 9 OTHERS Second – Further Applicants

and

KAEFER ENERGY PROJECTS (PTY) LTD Respondent

Case No: JS 857/15

and in the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA First Applicant

MEMBERS OF NUMSA Second- Further Applicants

and

AMT PLACEMENTS SERVICES (PTY) LTD First Respondent

WETBACK CONTRACTS (PTY) LTD Second Respondent

CIVIL AND POWER GENERATIONS PROJECTS (PTY) LTD Third Respondent

AVENG GRINAKER – LTA (PTY) LTD Fourth Respondent

TUBULAR TECHNICAL CONSTRUCTION (PTY) LTD Fifth Respondent

STEVAL ENGINEERING (PTRY) LTD Sixth Respondent

ACTOM (PTY) LTD t/a ACTOM CONTRACTING

ENGINEERING PRODUCTS AND CONTRACTS Seventh Respondent

PLATINUM LEAGUE TRADING 7 CC

(TRADING AS PRO FAB ENGINEERING) Eight Respondent

GLOBAL ISIZWE PLACEMENT CC Ninth Respondent

KENTZ (PTY) LTD Tenth Respondent

SVK HOLDINGS (PTY) LTD Eleventh Respondent

QUALITY TIME AND SAFE PROJECTS (PTY) LTD Twelfth Respondent

UTHINGOMNDENI PROJECTS CC Thirteenth Respondent

ESKOM HOLDINGS SOC Fourteenth Respondent

Case No: JS 88/16

and in the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA. First Applicant

MEMBERS OF NUMSA Second – Further Applicants

and

MURRAY AND ROBERTS LIMITED First Respondent

UTHINGOMNDENI PROJECTS CC Second Respondent

KENTS (PTY) LTD Third Respondent

BASADI CONTRACTING SERVICES (PTY) LTD Fourth Respondent

Enrolled: **8 May 2020**
Determined on the Papers

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 29 May 2020**

Summary: **Special Plea of *exception rei iudicata* in the form of *issue estoppel*: When appropriate to apply.**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] National Union of Metalworkers (NUMSA) approached this Court with three separate claims, alleging that the dismissal of its members between May 2015 and August 2015 by the various respondents was substantively and procedurally unfair. The three claims were subsequently consolidated in terms of an order of this Court issued on 6 December 2019.

[2] The respondents (Herein referred to as 'Contractors'), other than Eskom Holdings SOC, Tubular Technical Construction (Pty) Ltd, Steval Engineering (Pty)Ltd, Platinum League Trading 7 CC (Trading as Pro Fab Engineering), SVK Holdings (Pty) Ltd, and Quality Time and Safe Projects (Pty) Ltd, opposed the claims and also raised a special plea defence of *res iudicata* or issue estoppel.

[3] An agreed bundle of consolidated pleadings and three sets of written heads of argument were filed on behalf of the parties. In the light of the current period of the national state of disaster, and further in view of the issues to be determined, the parties had agreed that the special plea should be separated from the merits of the main claim, and to have the special plea determined first without the necessity of oral evidence and hearing.

Background:

[4] The individual applicants before the Court were employed by the Contractors, who in turn provide a variety of services to Eskom in relation to the ongoing construction of Medupi Power Station in Lephalale in Limpopo Province. To the extent that the sole issue before the Court is the determination of the special plea, the following relevant facts which are not seriously in dispute are highlighted;

4.1 NUMSA, together with other recognised unions, all the Contractors and Eskom, have concluded two significant collective agreements related to the Medupi Project, *viz*, the Project Labour Agreement (PLA) and the Final Partnership Agreement (FPA). The PLA, in accordance with its Clause 6 remains in force and effect for the duration of construction and commission of the Medupi Project.

4.2 The above collective agreements regulate *inter alia*, the site specific terms and conditions of employment of all employees employed by the Contractors, inclusive of minimum wages payable; the IR Procedures and Practices; the reciprocal rights and obligations of the parties; and the dispute resolution procedures to be followed in the event of labour disputes on the site.

4.3 The events leading to the dismissal of the individual applicants can be traced back to 25 March 2015, when employees embarked upon a march inside the construction site in order to submit a memorandum of demands to Eskom. These demands included a Unit 6 completion bonus in the amount of R10 000.00 and normal pay for 200 hours; the removal of expatriates from the site and their replacement with South Africans; preferential treatment to be given to locals during processes of recruitment; skills development and training for unskilled and semi-skilled employees; abolishment of hostels, and the provision of traveling and food allowances. Eskom was granted two days within which to respond to these demands.

4.4 There are disputes of facts in regards to what took place after the march of 25 March 2015. What is common cause however is that various meetings were held between the Unions, the Contractors and Eskom, in an attempt to resolve the employees' demands and to normalise the operations at the construction site. The Contractors were represented by a formation called Contractor's Management Forum (CMF) at these meetings.

4.5 Arising out of one of the meetings held on 13 April 2015, proposals were made by the Contractors and Eskom which sought to address the employees' demands and end the industrial action. These proposals, referred to as the 'April Agreement', made provision for the return of employees to work on 15 April 2015; the payment of the employees for the period of 25 March to 14 April 2015 as if they were not on strike; and guaranteed that no employee would be dismissed.

4.6 The proposals were rejected by the employees at a joint Union feedback meeting held on 14 April 2015. The industrial action had continued, and further ultimatums issued did not yield any results. This had resulted in the Contractors approaching this Court and obtaining an urgent interdict on 17 April 2015.

4.7 Most of the employees employed at the construction site reside in accommodation villages provided by Eskom. Around 28 April 2015, and as a result of the damage done to the accommodation facilities during the industrial action, Eskom had advised the Contractors to instruct all employees to vacate those premises from 30 April 2015 in order for repairs to be done. Those employees that vacated the village were granted a travel allowance to enable them to return to their homes. Others had refused to vacate the premises, and were eventually compelled to do so through a High Court order obtained by Eskom.

4.8 In the light of the on-going industrial action, the Contractors through the CMF decided to institute disciplinary proceedings against the employees who had participated in the industrial action and/or who had committed acts of misconduct, intimidation and violence during the industrial action.

4.9 The PLA makes provision for a section 188A of the LRA pre-dismissal arbitration should parties agree to that process. The Contractors contend that NUMSA was invited to indicate whether it would prefer the pre-dismissal process but had had not responded to the invitation. When no response was received within the time periods set, the Contractors then put a plan in place to commence with the disciplinary hearings.

4.10 The plan was put in motion in early May 2015 and involved dividing the employees into three categories and identifying the most serious suspected offenders to be taken through disciplinary enquiries. All the employees suspected of lesser offences were to be offered a settlement in terms of what is referred to as the 'Peace Agreement' which provided for a return of employees to work; the application of '*No Work No Pay'* principle since 27 March 2015 until the return of the employees to site; the forfeiture of accrued project bonuses from December 2014, and a final written warning to be placed on employees' records. The Contractors further reserved their rights to institute disciplinary action against any employee who participated in any form of misconduct (acts of intimidation, violence and damage to property) in the industrial action.

4.11 In accordance with the 'Peace Agreement', employees who had rendered their services during the period of the strike were not to be disciplined. Some employees accepted the terms and conditions of the 'Peace Agreement' and returned to work. Those that did not accept the terms or sign the settlement agreement were then charged with participation in an unprotected strike; failure to comply with the order of this Court issued on 17 April 2015; and continued refusal to follow a direct and lawful instruction (related to the failure to comply with various ultimatums issued).

4.12 Disciplinary proceedings had commenced against a number of employees including the individual applicants over a period between May 2015 and August 2015. Other employees had the terms of the 'Peace Agreement' imposed on them as a form of sanction after disciplinary enquiries, whilst other employees, including those before the Court were dismissed.

[5] In the consolidated Statement of Claim, it was submitted on behalf of the individual applicants that their dismissals were substantively and procedurally unfair on the grounds that;

5.1 They did not participate in the unprotected strike action;

5.2 They had tendered their services to the Contractors which tender was refused;

5.3 They were instructed by the Contractors on various dates not to resume their duties until further notice;

5.4 The Contractors blocked their access cards to the site and they could not access the site to resume their duties;

5.5 They intended to comply with the ultimatums but could not however do so in the light of the violent protest action that took place at the time and further due to lack of transport which the Contractors failed to provide;

5.6 They did not commit any misconduct during the relevant period.

5.7 The Contractors withdrew charges against employees who had signed the 'Peace Agreement' whilst they were dismissed.

5.8 The Contractors selectively reinstated/re-employed some employees who signed the 'Peace Agreement' after they had been dismissed and did not reinstate/re-employ them, simply on the basis that they (individual applicants) either did not agree to sign the agreement or were not given the option to sign it and resume their duties.

5.9 The march to submit the memorandum of demands to Eskom was not disruptive or violent and had only lasted 3 hours. According to the PLA and PA, a cooling off period of four hours should have been observed.

5.10 They were summarily dismissed without being granted an opportunity to be heard; or were merely informed via text messages that they were dismissed.

[6] In the Consolidated Statement of Defence, the Contractors submitted that;

6.1 After the memorandum of demands was handed in on 25 March 2015, the employees went on strike for varying periods of time on that day;

6.2 Following the public holidays between 28 March and 8 April 2015, the employees upon their return on 9 April 2015 embarked on an unprotected strike that lasted until May 2015, or remained absent until August 2015, resulting with the institution of disciplinary proceedings.

6.3 The industrial action was accompanied by intimidation and violence, including damage caused to accommodation facilities.

6.4 The dismissal of the individual applicants was procedurally and substantively fair.

[7] Other than the dispute surrounding the dismissal of its members, NUMSA had over a period between June and August 2015, also referred various disputes against the Contractors in terms of the PLA for arbitration. The disputes were framed as follows;

> "1.1 Whether NUMSA's members were suspended (after certain events which occurred during March/April 2015 at the Medupi Power Station) by their employers (the respondents) and, if so, whether the suspensions were unfair suspensions;
>
> 1.2 Unfair labour practices related to benefits (project bonuses); and
>
> 1.3 Unfair labour practices related to disciplinary sanction (final warnings)"

[8] The relief that NUMSA sought was an award in the following terms;

> '(a) Declaring that the suspension of all the individual applicants by the respective respondents constitutes an unfair labour practice as contemplated in section 186(2)(b) of the LRA and directing the respective respondents to pay to each of the individual applicants an amount equal to the remuneration due to the individual concerned during his/her suspension and not paid to him or her;
>
> (b) Declaring that imposing a final written warning on all the individual applicants who were not found guilty of any misconduct by the respective respondents constitutes an unfair labour practice as contemplated in section 186(2)(b) of the LRA and directing that these final warnings are set aside;

(c) Declaring that the conduct of the respective respondents in depriving all the individual applicants of their project bonus for the month of December 2014 , January 2015 and February 2015 constitutes an unfair labour practice relating to the provision of benefits as contemplated in 186(2)(b) of the LRA and directing the respective respondents to pay to each individual applicant an amount equal in remuneration due to the individual concerned in terms of the bonus scheme'

[9] The employees on whose behalf NUMSA had referred the above disputes comprised of a combination of those that were dismissed (the individual applicants), and those that had accepted the terms and conditions of the 'Peace Agreement' and returned to work. The latter group however sought to be relieved of the terms and conditions of the agreement, claiming *inter alia* that they had been unfairly deprived of their bonuses, and unfairly issued with final written warnings without any due process being followed.

[10] The disputes came before Adv ESJ Van Graan SC sitting as Arbitrator. After hearing the evidence of seventeen witnesses over a period of 22 days, the Arbitrator upheld the employees' claim. In the award, the Contractors were ordered to pay compensation to the employees equal to remuneration each would have received from 30 April 2015 until the dates of dismissal or the date on which individual employees had signed the 'Peace Agreement'; and to pay compensation to the individual employees equal to the project bonus each would have received for the period December 2014 to February 2015. The Arbitrator further set aside the final written warnings issued to the employees.

[11] The Contractors had appealed against the Arbitrator's award, and the appeal came before a Tribunal constituting of Nugent JA, Satchwell J, and M Sikhakhane SC. In its findings, the Tribunal upheld the appeal and dismissed the claims related to unfair labour practices and the project bonus. The Tribunal further substituted the Arbitrator's award with an order that the Contractors must expunge from the records of their respective employees who had concluded and accepted the settlement agreements, the final warnings and their

acknowledgement of having participated in the strike, and further having failed to adhere to the stipulation of the Court interdict.

The Special Plea:

[12] It was submitted on behalf of the Contractors that the arbitration proceedings were concerned with the same events that transpired between the march of 25 March 2015, and August 2015 when the employees were dismissed, and with the same employers and same individual applicants before the Court. It was further submitted that the Tribunal made findings on certain issues which are the same and are relevant to the applicants' current claim, which findings were binding on the parties as either *res iudicata* or issue estoppel, thus precluding the applicants from raising in evidence, any facts which are at variance with those findings.

The legal framework:

[13] In opposing the special plea, it was submitted on behalf of the applicants that since the cause of action and the relief sought in the current matter differs from the arbitration proceedings, at best for the respondents, the form of *res judicata* known as *issue estop*pel was applicable, and that on the facts of this case, the Court should exercise its discretion against the upholding of the special plea. The Contractors in their replying submissions agreed with the applicants that indeed the question the Court had to determine was the application of *issue estoppe*l, as opposed to *res iudicata* in the classical sense.

[14] The *exception rei judicatae* as a defence is available to a party to litigation to the effect that a matter has already been adjudicated and that the proceedings have been terminated by a judicial decision. The Constitutional Court in *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others*[1] (The first judgment of Khampepe J) has recently re-emphasised that the requirements of *res judicata* are that: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same

[1] 2020 (1) SA 327 (CC) ; 2020 (1) BCLR 1 (CC) at paragraphs 69 -71

cause of action[2], and (iv) with respect to the same subject-matter, or thing. It was also reiterated that the crux of *res judicata* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, to promote finality, and prevent the abuse of court processes.

[15] *Issue estoppel* on the other hand is more extensive in its reach than the doctrine of *res judicata*, in that a final judgment not only operates as a defence to the same cause of action, but also estops the parties from later disputing any point of fact or law which was essential to the decision made by a tribunal[3]. *Issue estoppel* describes instances where a party can successfully plead that the matter at issue has already been finally decided even though the common law requirements of *res judicata* have not all been met[4]. The essence of *issue estoppel* was explained and distinguished from *res iudic*ata in the strict sense by Brand JA in *Prinsloo NO v Goldex 15 (Pty) Ltd*[5] as follows;

> "In our common law the requirements for *res iudicata* are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res iudicata*. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court to dispense with the

[2] Defined at para 53 as "…cause of action means every fact that needs to be proved in order to support a litigant's right to a judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"

[3] *Smith v Poritt & others* 2008 (6) SA 303 (SCA) para 10.

[4] See *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 670I-671B; *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* [2014] ZASCA 85; [2014] 3 All SA 431 (SCA); 2014 (5) SA 562 (SCA) at para 12, where it was held;

> "The expression 'issue estoppel' is a convenient description of instances where a party may succeed despite the fact that the classic requirements for *res judicata* have not been complied with because the same relief is not claimed, or the cause of action differs, in the two cases in question"

[5] 2014 (5) SA 297 (SCA) at para 23

two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties."

[16] Brand JA had further pointed out that the relaxation of the strict requirements of *res iudicata* in *issue estoppel* situations created the potential of causing inequity and unfairness that would not arise upon application of all three requirements. However, and in order to avoid these unintended consequences, *issue estoppel* could not be applied in accordance with fixed principles or guidelines, and the Courts ought therefore consider its application on a case-by-case basis (*i.e.* apply its own discretion), and ensure that deviation from the threefold requirements of *res iudicata* should not be allowed in circumstances where it was likely to give rise to potentially unfair consequences in the subsequent proceedings. This approach as Brand JA held, was consistent with the guarantee of a fair hearing in section 34[6] of the Constitution[7].

[17] In summary, and as was pointed out by Davies JA in *Bouwer v City of Johannesburg and Another*[8], 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. Thus, 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[9].

Evaluation:

[18] Applying the above principles to the facts of this case, there is no dispute that the parties in the claims before the Arbitrator/Tribunal and the Court are the same. As to whether the same issues as were decided in the arbitration proceedings or by the Tribunal are before this Court is however placed in dispute by the applicants. It was submitted on their behalf that the matter before

[6] Section 34 of the Constitution provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
[7] At paragraphs 24 - 26
[8] (JA64/06) [2008] ZALAC 15 (23 December 2008)
[9] At para 24 of the Minority Judgment

the Court relates to a claim of reinstatement following their dismissal. To this end, it was submitted that the Tribunal had specifically stated that this issue (unfair dismissal) was not before the Arbitrator, hence the only possible application of *res judicata* in this matter, in line with the decision in *Archer v The Public School – Pinelands High School and others*[10] was in the form of *issue estoppel*.

[19] In *Archer*, the LAC had dismissed a plea of *res judicata*, and held that an employee was entitled to refer a breach of contract dispute to this Court or the High Court, after unsuccessfully challenging his unfair dismissal claim at the CCMA, and further that the employee had both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract, as the two claims did not have the same cause of action. The Contractors however contended that the reliance by the applicants on *Archer* was misplaced as that case was distinguishable on the basis that it concerned a classic case of *res judicata* rather than *issue estoppel*. It was submitted that the two separate claims in that case were distinct, and further that the Labour Appeal Court made no specific findings on *issue estoppel*.

[20] There is no doubt that the claims before the arbitration proceedings/Tribunal and the present matter emanate from the same set of facts. The disputes in that regard would ordinarily be adjudicated/arbitrated under the provisions of the Labour Relations Act[11]. In *Janse van Rensburg NO v Steenkamp*; *Janse van Rensburg NO v Myburgh*, the Supreme Court of Appeal (SCA) had accepted

[10] [2020] 3 BLLR 235 (LAC), where it was held;

> "[17] Despite the adverse finding in the CCMA, the appellant was entitled to pursue his contractual claim in the Labour Court as it has a different cause of action from his unfair dismissal claim under the LRA. By virtue of this, it is immaterial that the CCMA dismissed the appellant's unfair dismissal claim, and that that decision was not taken on review to the Labour Court. Even if it was, the appellant would have still been entitled to pursue his contractual claim in the Labour Court, because it was a completely different claim from the one that was dismissed in the CCMA.
>
> [18] The upshot of this is that the appellant was not precluded by the principle of *res judicata* from pursuing his two claims in different fora. This is because the claim that was before the Labour Court, and the one that was pursued in the CCMA were not the same claims. The one is for payment of damages arising from a purported breach of contract by the first and second respondents, and the other is for compensation arising from an unfair dismissal as envisaged under the LRA. The two claims do not have the same cause of action. The pleadings bear this out."

[11] Act 56 of 1995

that related claims under different sections of the same Act, constituted separate causes of action, even where the consequences of applying the different sections would be the same[12]. The SCA had further reiterated that in such enquiries, the first duty of the Court is to compare the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both[13]. In line with *Royal Sechaba Holdings (Pty) Ltd v Coote and Another,* as to whether the same *issues in dispute* that arise in this matter are the same as were before the arbitration proceedings or as *decided* by the Tribunal must be gleaned from two sources, *viz*, the Tribunal award and the parties' pleadings[14].

[21] To reiterate, the claims before the arbitration proceedings and the Tribunal related to unfair labour practices (*i.e.* suspensions, project bonus and final written warnings in respect of those employees subsequently reinstated), whilst the one before the Court relates to an alleged unfair dismissal related to the unprotected strike. As shall be demonstrated below, the claims, albeit related and brought under the provisions of the Labour Relations Act (LRA),[15] nonetheless constitute different causes of action with different forms of relief being sought.

[22] The first issue that is relevant for the purposes of the current claim that was before the Tribunal was whether the individual applicants were entitled to be paid the project bonus. The Tribunal had dismissed that claim by stating the following;

> "[75] The dismissed respondents (the applicants in the main claim) claimed they were entitled to be paid the project bonus we referred to earlier. The only basis for that claim was a submission that the bonus had accrued to them by the time they were dismissed. That submission can be disposed of summarily. It is clear from the terms of the bonus, which we set out earlier, that whatever had accrued was not payable if was fairly dismissed, nor if the employee participated in any disruption or unprotected industrial action. The

[12] [2008] ZASCA 154; 2010 (1) SA 649 (SCA) ; [2009] 1 All SA 539 (SCA); See also *Ascendis Animal Health (Pty) Limited* at para 64
[13] At para 25
[14] At para 23
[15] Act 66 of 1995, as amended

> onus being upon the respondents to show that the contractors acted unfairly, they have not shown that they did not participate in the disruption or the strike, nor was it any part of their case that their dismissals were unfair, and their claims to the bonus ought to have failed."[16]

[23] In respect of the second claim pertinent to the present matter, this related to the individual applicant's allegations that they were unfairly suspended with effect from 28 April 2015, and that they were therefore entitled to be paid from the time of the alleged suspension until their dismissal[17]. The Tribunal held that performance by employees of their obligation to provide their services or to tender their services was a pre-condition to their entitlement to be paid. In this case, the dismissed employees did not provide their services after their alleged suspension, nor had they tendered their services at any time. Thus without performance or a tender of performance, the dismissed employees had no right to be paid.

[24] Other than the above conclusions, a perusal of the Tribunal award clearly indicate that even though it had specifically mentioned that the issue of unfair dismissal was not before the Arbitrator, it had in the course of making the above conclusions, nonetheless made certain findings on certain facts and the law, which are relevant and intrinsically linked to the present claim. These findings must be assessed against the parties' pleadings as summarised at paragraphs 5 – 6 of this judgment.

[25] The question that arises therefore is whether it can be said that those findings were *essential* to the decision made by the tribunal for the purposes of the application of issue estoppel. As it was also correctly pointed out on behalf of the respondents, if the same issues involved in the present matter have been definitively decided by the Tribunal, this would imply that indeed the applicants would be prevented for the purposes of the present matter, from contradicting those findings of fact or law. The Contractors' special plea is based on the following conclusions and findings made on the facts and the law by the Tribunal;

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[16] At page 57 of the Joint Consolidated Pleadings
[17] At para 76 - 77 of page 57 of the Joint Consolidated pleadings

25.1 NUMSA initiated an unprotected strike between 25 March and August 2015, and the strike was in support of the various demands;

25.2 The members' mandate to NUMSA was to make the demands and threaten the withdrawal of labour in pursuance of the demands;

25.3 The individual applicants' contention that they did not participate in the strike or that they were prevented from returning to work by intimidation of others was hardly credible, and NUMSA's claim that its members had no hand in the strike was spurious.

25.4 It was likely that NUMSA's members were amongst the intimidators who sought to enforce the strike;

25.5 The strike was accompanied by violence and severe damage to property, and a majority of NUMSA members took part in the strike.

25.6 The union members had shown no intention to return to work once the strike was underway.

25.7 Despite endeavours by some union shop stewards to convince employees to return to work, the latter could not be moved to end the strike.

25.8 NUMSA did not have its members' mandate to end the strike or to tender the members' services during the strike. The members also did not tender their services during the course of the strike.

25.9 There was no legal obligation on the respondents to guarantee the safety of the union members.

25.10 Other employees were able to signal to their employers their willingness to return to work and those that did were not dismissed.

[26] It was correctly pointed out on behalf of the applicants that in considering whether *issue estoppel* was applicable in the light of the findings of the Tribunal as above, the central enquiry was whether such an application had potential for subsequent unfairness. In *Ilima Projects (Pty) Ltd v MEC Gauteng Department*

of Infrastructure Development, [18] it was held that flowing from *Goldex* the avoidance of unfairness was the focus of the enquiry. However, unfairness was to either litigant, and its assessment involved an exercise in balancing the legitimate interests of both parties.

[27] The only half-hearted concession made by or on behalf of the applicants was that if *issue estoppel* was to be applied, the only issue which they should be estopped from addressing at the trial is whether a tender of service was made during the strike either by NUMSA or individual members. That finding as already indicated, was made by the Tribunal in the context of determining whether the individual applicants were entitled to be paid the project bonus and any payment arising from their alleged suspension. To the extent that in their claim before this Court, the individual applicants raised issues surrounding their alleged tender of service during the strike which was allegedly rejected, I see no reason in the light of that definitive finding, why in fairness the Contractors and this Court should be burdened with having to deal with the same issue and evidence in the present matter. To this end, clearly *issue estoppel* finds application in that regard.

[28] In respect of the other findings of the Tribunal, the applicants contend that since the dismissal was common cause, section 192 of the LRA placed an onus on the respondents to prove that the dismissal was fair. It was submitted on their behalf that by invoking *res judicata*, the respondents sought to discharge elements of the onus based on the 'ostensible findings' made by the Tribunal, whose findings were at best, based on NUMSA's failure to discharge certain onuses in the arbitration proceedings.

[29] It is trite that the onus of proving the fairness of the dismissal of the individual applicants in the claim before the Court would be on the respondents in accordance with the provisions of section 192 of the LRA, whilst the onus in the claims before the arbitration proceedings was on the individual applicants to discharge. Be that as it may, in concluding that individual applicants had failed to discharge the onus in respect of their claims, the Tribunal had regard to the

[18] (25981/2011) [2019] ZAGPJHC 384 (9 October 2019) At para 12

totality of the evidence as presented before the Arbitrator, and also made specific findings on the facts and issues, which are similarly raised in the statement of claim before the Court.

[30] The applicants specifically take issue with the findings of the Tribunal that; '*It was likely that NUMSA's members were amongst the intimidators who sought to enforce the strike*'. I agree with the submissions made that this finding can hardly be considered definitive. It is appreciated from the findings of the Tribunal[19] that what it was considering at that point was NUMSA's contention that its members had no hand in the strike and were prevented from working through intimidation by other employees. The issue however, of whether the individual applicants were amongst the intimidators or had sought to enforce the strike was not central to the determination of the main issues in dispute before the Arbitrator or the Tribunal. For the purposes of the claim before the Court, the individual applicants were dismissed for amongst other things, committing misconduct during the strike. The onus remains on the Contractors in the main claim to prove that the individual applicants indeed committed the form of misconduct in question, *i.e*. intimidation, and that the dismissals were fair. In this regard, I agree that the finding that it was *'likely that the individual applicants were amongst the intimidators who sought to enforce the strike*', raises a presumption that they were amongst the intimidators who sought to enforce the strike. It is hardly definitive. Furthermore, to the extent that the fairness of the dismissal is dependent on whether the onus in this regard was discharged, to apply issue estoppel in regards to whether the individual applicants were amongst the intimidators would clearly lead to unfairness, as it would deprive them of a fundamental right to properly state their case in respect of that issue before this Court.

[31] The applicants' contentions in regards to all the other findings identified by the Contractors as sustaining the special plea however lack merit, specifically since the only generic defence was that these findings raised presumptions against them. In order to determine the disputes referred for arbitration, the Tribunal had to make those determinative findings which the Contractors relied upon in

[19] Para 28 at page 44 of the Consolidated bundle

seeking the application of *issue estoppel*. The issues in dispute before the Tribunal could not be determined in a vacuum, and without due consideration to whether the strike took place or not, or whether the individual applicants had taken part in or initiated that strike. Similarly, a determination of those issues in dispute would not have been complete without a finding on what took place during the strike and the consequences thereof.

[32] In a nutshell, all the other findings, which were definitive and relied upon by the Contractors as sustaining the special plea, were in respect of similar issues that gave rise to the claim before this Court. Whilst it is appreciated that the claim before the Court is founded on a different cause of action, having had regard to what was determined by the Tribunal and the parties' pleadings before the Court, it ought to be concluded that the same issues are nonetheless again involved, and the right to relief in this claim depends on those issue. Consequently, *issue estoppel* ought to find application in respect of those findings.

[33] In coming to the above conclusions, I have had regard to the submissions made on behalf of the applicants related to the potential unfairness the application of *issue estoppel* may have. This has to be balanced against a variety of factors if the same issues were to be revisited in Court, including but not limited to the fact that the arbitration proceedings took place over 22 days, with 17 witnesses having given evidence, which evidence was still far closer in time to the events that took place. There is no doubt that the findings made by the Tribunal were not easily arrived at, and that the parties, who were competently represented, were clearly afforded a proper and thorough hearing, inclusive of the arbitration hearings. The applicants knew that at some point that they would refer an unfair dismissal dispute, and the fact that they did not take the findings of the Tribunal any further is in my view decisive.

[34] Furthermore, upholding issue estoppel does not effectively put an end to the applicants' claim. Reference has been made to the question of onus and the Contractors' duty in that regard. Notwithstanding the definitive findings of the Tribunal on certain issues pointed out, it remains for the Contractors to justify the dismissal, on the proviso that the applicants are estopped from raising the

same issues upon which definitive findings were made by the Tribunal. The applicants would still be entitled to lead evidence on a variety of other issues in support of their claim that they were unfairly dismissed, and clearly there is no merit in any contention that their rights under section 34 of the Constitution would be curtailed. In the light of these considerations, there is no basis upon which it can be said that the objects of *issue estoppel* would not be served by its application in this matter.

[35] I have had regard to the requirements of law and fairness in regards to the issue of costs. To the extent that the applicants' opposition to the special plea was partially successful, it is my view that a costs order is not warranted in this case. Accordingly, the following order is made;

Order:

1. The Respondents' special plea of issue estoppel is upheld in part.

2. The findings made by the Tribunal in the 'Appeal Award' dated 4 December 2017, which findings are referred to in Paragraph 42 of the Respondents' Heads of Argument, with the exception of paragraph 42. 5 are binding upon the parties.

3. The applicants are granted leave, to within 30 days from the date of this judgment, amend their statement of claim in conformity with this judgment and order.

4. The respondents shall be afforded 30 days within which to file and serve an amended statement of defence.

5. After the pleadings in accordance with 3 and 4 above are completed, the parties are directed to convene a pre-trial conference and to thereafter file amended pre-trial minutes.

6. There is no order as to costs

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicants:	Heads of argument prepared by Adv C Orr SC, instructed by Haffegee Roskam Savage Attorneys
For the Respondents:	Heads of argument prepared by Adv HA van der Merwe and Adv W Isaaks, instructed by Fluxmans Incorporated