IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1755/14

In the matter between:

ESKOM HOLDINGS SOC LTD **Applicant**

and

NUMSA **First Respondent**

CCMA **Second Respondent**

D I K WILSON N.O **Third Respondent**

NUM **Fourth Respondent**

SOLIDARITY **Fifth Respondent**

Heard: **1 March 2017**

Delivered: **8 March 2017**

Summary: **When the defence of *res judicata* applies, the CCMA lacks jurisdiction to rehear the matter. A ruling that the CCMA has jurisdiction is bound to be set aside when on the objective facts present at the time of the ruling show that the dispute to be entertained became *res judicata.* The principles applicable to *res judicata* restated. Held: [1] The ruling is reviewed and set aside. [2] There is no order as to costs.**

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an opposed review application. The applicant seeks to review and set aside a jurisdictional ruling made by the third respondent. The third respondent found that the issue referred by the first respondent before me for arbitration was not *res judicata*. Following that he directed that the second respondent before me must set the matter down for arbitration. The applicant was aggrieved by such a finding and launched the present application, effectively punting that the finding that the issue is not *res judicata* is wrong. Accordingly, the first respondent wrongly assumed jurisdiction. The test on reviews of this nature remains that of whether objectively viewed was the third respondent correct in assuming jurisdiction. The well-known *Sidumo*[1] test finds no application.

Background facts

[2] The relevant facts are that around August 2013, the applicant referred a dispute around a wage dispute for arbitration. The first respondent had demanded around 44.3% increase whereas; the applicant had made a final offer of 6.3%. Both parties, the applicant and the third respondent contended that their demands are fair. The applicant contended that its 6.3% offer is fair and the third respondent contended that its 44.3 % is fair. After listening to the parties, arbitrator F Brand (arbitrator Brand) came to the conclusion on the evidence before him that he was not convinced that the demands of the Unions, first respondent included are fair and reasonable. He also concluded that the applicant's offer, as a package was fair and reasonable and therefore acceptable. In other words, the 44.3% was rejected and the 6.3% was accepted. The first and

[1] *Sidumo and another v Rustenburg Platinum Mines and others* 2008 (2) SA 24 (CC)

fourth respondents were aggrieved by this finding and headed to this Court for a relief. On 15 December 2016, this Court issued a reportable judgment[2]. Effectively, the first and third respondents were non-suited. However, the first respondent had in the meanwhile, requested that the demand of J.H Smith's R10 000.00 study loan be arbitrated as it has been left open by arbitrator Brand. As expected, the applicant queried the jurisdiction of the second respondent. An argument was presented to the effect that the issue of JH Smith was *res judicata* and has been disposed of in the arbitration hearing presided over by arbitrator Brand. After hearing evidence and argument, the third respondent came to the conclusion that the issue of JH Smith was not dealt with in the arbitration hearing before arbitrator Brand. Accordingly, he rejected the *res judicata* argument and concluded that the second respondent assumed jurisdiction. The applicant was aggrieved thereby and approached this Court in the present application.

Evaluation

[3] The real and the only objective fact determinative of this review application is whether the JH Smith issue was dealt with or not. If it was dealt with, then there is no jurisdiction. If it was not dealt with then there is jurisdiction. Mr Van der Riet for the first respondent conceded that if on the facts *res judicata* is present then there was no jurisdiction. He submitted that the only objective facts to be considered to determine the issue of jurisdiction are the ones presented before the third respondent through the evidence of Ms Edmonds. Ms. Edmonds' evidence was that the issue of JH Smith was not dealt with. Reference was made to a document containing the demand of the first respondent in this regard. It was recorded that 'the demand that the JH Smith Bursary be increased to R10 000.00 **will be abandoned** if Eskom can provide proof that it is currently R10 000.00'.

[2] National Union of Metalworkers of South Africa and Another v Commission for Conciliation Mediation and Arbitration and others Case number JR 388/14 delivered by Lagrange J on 15 December 2016

[4] It is common cause that at the arbitration proceedings conducted by arbitrator Brand, the applicant did not furnish the required proof. Axiomatically, the demand was not abandoned. Nonetheless I cannot agree with Mr Van Der Riet that the objective facts are those provided by Ms. Edmonds only. Another objective fact is the contents of the award by arbitrator Brand.

[5] The requisites of a valid defence of *res judicata* in Roman Dutch Law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties and the same thing must have been demanded. Voet in his work *Commentarius ad Pandectas*[3] wrote:

> 'Under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that if one of these requisites is wanting, the exception fails.'[4]

[6] The defence effectively prevents a party to previous litigation from disputing the correctness of a judgment in the sense that he or she may not again rely upon the same cause of action. The defence 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, at the same time, determining that question or issue in a particular way. Such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of that decision as effectively as if it had been made so in express terms.[5]

[7] In his award, arbitrator Brand concluded thus:

> "[24] It appears that the issue of the JH Smith study loan was not dealt with at the arbitration hearing held by Commissioner Brand. Although the second respondent included the issue amongst its

[3] Para 44.2.3

[4] Translation from *Bertram v Woods* 1893 (10) SC 177 at 181.

[5] See *Liley v Johannesburg Turf Club* 1983 (4) 584 (W) and *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (AD)

demands, the wording of the demand was changed before the arbitration hearing, as it appeared that the union was still seeking clarification. It appears that the union did not address this issue in the arbitration hearing as it expected the Applicant to respond to its demand for proof that it was in fact paying R10 000. However the Applicant did not respond and appears to have ignored the issue entirely.

[25] In the circumstances it appears that the issue was not ripe for arbitration due to the uncertainty of the union as to what the current position was. It only obtained this certainty after Commissioner Brand's award was issued. Since the issue was not dealt with by either of the parties at arbitration, it cannot have been considered by Commissioner Brand and therefore cannot be *res judicata*… "

[8] To my mind this conclusion is wrong. It completely ignores the objective facts contained in the award that was placed before him. After detailing the background in the award, arbitrator Brand stated that the issue that fell to be decided by him was: 'I am required to determine a fair and reasonable increase in the remuneration package of the bargaining unit employees.' Arbitrator Brand specifically stated that the fairness-based approach was adopted and using it as a yardstick will determine whether the parties have advanced sufficient reasons for acceptance of their respective positions. Amongst the demands of the first respondent laid the demand that the JH Smith study loan be increased to R10 00.00.[6]

[9] Inclusive of JH Smith study loan demand the total cost to company was 44.3%. Indeed the first respondent ran the risk of not presenting any evidence to support its demand in relation to JH Smith. Most importantly, arbitrator Brand concluded thus:

"[110] On the evidence before me I am not convinced that the Unions 'demands are fair and reasonable.

[111] Having considered all the evidence before me, I am convinced that Eskom's offer as a package is fair and reasonable and

[6] Paragraph 26.18 of the award.

> therefore acceptable. It is therefore not necessary to consider an intermediate position."

[10] The effect of the conclusion mentioned above is that the offer of the applicant was accepted as being fair and reasonable and the demands of the first respondent inclusive of the JH Smith demand was rejected as being unfair and unreasonable. To make his award clear, arbitrator Brand concluded that he makes no order in relation to the demands not specifically mentioned in his award. The demand of JH Smith was specifically mentioned[7]. Therefore, he made an order on it by rejecting it and accepting Eskom's offer. Accordingly on the objective facts, the third respondent was wrong when he concluded that it is apparent that the issue of JH Smith was not dealt with. He was wrong to interpret paragraph 120 of arbitrator Brand's award to mean that the issue remained open. Even if he is right that the wording of the demand changed before arbitration, the literal wording of the change was such that the demand would be abandoned upon proof of a certain fact. That fact was not proven; therefore the demand was not abandoned. Since the demand was not abandoned, it remained a live issue forming part of the rejected 44.3% increase. The JH Smith formed an integral part of the demands by the first respondent at arbitration conducted by arbitrator Brand. I cannot agree with Mr Patel for the applicant that the judgment of this Court dismissing the review application forms part of the objective facts to determine the issue of jurisdiction. At the time of the ruling to be expunged, 9 August 2014, the judgment of this Court was not in place. Even if it was in place, it would not have assisted because according to the third respondent, the issue was not dealt with by arbitrator Brand.

[11] In summary, I come to the conclusion that the third respondent wrongly assumed jurisdiction, which he did not have due to the operation of the *res judicata* defence. I am satisfied that on the objective facts apparent on the body of arbitrator Brand's award, the issue of JH Smith was decisively dealt with and the second respondent was effectively *functus officio*.

[7] Paragraph 120 of the award

Order

[12] In the results, I make the following order:

1. The ruling issued by the third respondent under case number HO 2602/13 dated 9 August 2014 is hereby reviewed and set aside.

2. It is replaced with an order that the second respondent lacked jurisdiction to entertain the demand of JH Smith's increase of study loan to R10 000.00.

3. There is no order as to costs.

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GN Moshoana

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr A Patel (Heads drafted by Mr Boda SC)
Instructed by: Cliffe Dekker Hofmeyer Inc,

For the First Respondents: Mr H Van Der Riet SC
Instructed by: Ruth Edmonds Attorneys