IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE No.J1894/99

In the matter between

Applicant

AND

Respondent

JUDGEMENT

MOLAHLEHI AJ

INTRODUCTION

[1] This matter comes before me as a review in terms of section 145 of the Labour Relations Act No. 66 of 1995 (the Act). In the morning of the hearing when the file was put before me there seems to have been confusion on the part of the registrar's office as to the status of this matter.

[2] The cause of the confusion became clear to me when the contents of case No. J1644/99 was brought to me after the hearing. It came to my attention that in the first instance the award which was subject of the review had already been made an order of court by Honourable Justice Ngwenya AJ and secondly that applicant had lodged an appeal against the said order.

[3] In the light of this I directed my associate to address a letter to the parties enquiring from them as to under which authority should I proceed to finalise the review in the light of the above facts and the decision of Brassey AJ in Dartprops (Pty) Ltd v CCMA and other 1999 2 BLLR 137 (LC). I also requested that both parties should submit written argument on whether or not I should follow the

decision of Brassey AJ in Dartprops supra.

[4] The applicant in its written submission argues that the decision of the:

"Honourable Judge Brassey in the case of Dartprops (Pty) Ltd v CCMA & Others 1999 2 BLLR 137 is distinguishable from the present case in that the learned Judge based his decision on the doctrine of res judicata which has no application in this case as the judgement handed down on 14 September 1999 is suspended pending the appeal. I respectfully submit that it is trite law that the res judicata doctrine operates only in respect of final judgments. See Horowitz v Brock & Others 1998 (2) SA 16 at page 178 H to J and page 179 A to G."

[5] The applicant further states:

"In the case of African Farms and Townships Limited v Cape Town Municipality 1963 (2) SA 555 (A) at 562 D the Court held that where the Court has come to a decision on the merits of a question, must not be capable of resuscitation in subsequent proceedings. From the foregoing it is evident that the doctrine of res judicata relied upon by the Honourable Mr Justice Brassey does not have application in this application for review. It is further submitted that if your Lordship is of the view that the award is an Order of Court until overturned on appeal it is submitted that the decision of Mr Justice Brassey in the case of Dartprops (Pty) Limited v CCMA & Others 1999 2 BLLR 137 is wrong and should not be followed."

[6] I align myself with the decision of Brassey AJ and accordingly do not agree with the above argument of the applicant. In my view the application for leave to appeal suspends the execution of the judgement but does not set it aside.

[7] Both the applications for review, under case No J 1894, and to make the award an order of court, under case No. J 1644/99 were served on the respective parties on the same day - 12 May 1999. The application to make the award an order of court was set down for the 16 September 1999. It would appear that even though the matter was placed on an unopposed roll, the applicant was afforded the opportunity to argue the matter before Justice Ngwenya AJ.

[8] The applicant, according to the respondent's submission, argued before Justice Ngwenya AJ that the award should not be made an Order of Court pending the outcome of the review. It would appear the court rejected the applicant's submission as the award was made an order of court.

[9] I now turn to the issue of res judicata. The requisites for the exception res judicata are stated by Hoffman and Zeffertt the South African Law of Evidence 4th ed at 337 as follows:

"... that a prior final judgement had been given in proceedings involving (a) the same subject matter, (b) based on the same res or thing, (c) between the same parties, or, put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to proceed against the other on the same cause, for the same relief, can be met by the exception res judicata."

[10] These requisites have been restated in a number of decisions of this court and the Labour Appeal Court. (see National Union of Mine Workers v Elansfontein Colliery (Pty) Ltd (1999) 20 ILJ 878 (LC). Dartprops (Pty) Ltd v CCMA and others (1999) 2 BLLR 137 (LC), Dumisani and Another v Mintroad Saw Mills (Pty) Ltd (2000) 2 BLLR (LAC) and Fidelity Guards Holdings (Pty) Ltd v PTWU and others (1998) 10 BLLR 995 (LAC).

[11] In the Elandsfontein Colliery, supra (at 881 par 2) for instance the court held that the requisites for

the plea of res judicata 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: Horowitz v Brock and other 1998 (2) SA 160 (A) at 178 H to I".

ad Saw Mills supra (at 136 par 6) the Labour Appeal Court held that it is against public policy that litigant should on the same grounds be able to keep demanding the same relief from the same adversary.

[13] The purpose and the application of the Labour Relations Act should also be taken into account in considering matters of this nature. The effective and speedy resolution of disputes is one of the fundamental purposes of the Act. In keeping with the spirit and the purpose of the Act it is highly desirable that the court should ensure a measure of both finality and certainty in dealing with disputes between employers and employees. (see Mintroad Saw Mills supra at 136 par 9).

[14] The Labour Appeal Court, held in Fidelity Guards Holders (Pty) Ltd v PTWU and others (1998) 10 BLLR 995 (LAC) at 999 par 7 that:

"The strict common law requirements for the defence of res judicata should not be taken literally and in all cases applied as inflexible rule. There is room for the adaptation and extension of the rule."

[15] In my view it is both desirable and in line with public policy consideration that once an arbitration award has been made an Order of Court in terms of section 158 (1) of the Act it should be regarded as final and binding. The Order is binding for so long as it has not been rescinded, or overturned on appeal.

[16] It is clear in my view that the order made by my brother Ngwenya AJ has not been rescinded nor set aside. It accordingly constitutes a final judgement (a)involving the same parties; (b) based on the same relief claimed; and (c) involving the same dispute. It would be both improper and contrary to public policy for me to go behind the said order and determine its validity.

ORDER

[17] Having regard to the fact that both parties made their submissions and arguments concerning the review, I order that the finalisation of the review proceedings be postponed pending the outcome of the appeal under case number J1644/99.

Molanlehi AJ

1.Date of judgement 15 September 2000

For Applicant

For Respondent