IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C 866/2008

In the matter between:

STUART BURTON Applicant

and

TELKOM S A LIMITED Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] This is a judgment on a point *in limine* raised by the respondent in this matter.

[2] The point *in limine* arises from a claim brought by the applicant on 17 November 2008 in which he seeks, *inter alia*, damages in respect of loss of earnings (i.e. back pay) for the period 1 April 2006 and 31 March 2008.

[3] The applicant had also sought an amount of R500 000.00 in respect of "general damages". Respondent pleaded that this claim stood to be dismissed on the basis that it was impermissible to claim alleged non-patrimonial loss arising from a breach of contract. This formed the basis of the second point *in limine*, which was conceded by the applicant and accordingly I am not required to deal with it.

[4] The relief sought in this matter flows from the unilateral change of the applicant's position in April 2006. The respondent has raised a plea of *res judicata* in respect of this claim, in that my brother Nel AJ had definitively and finally pronounced on this issue in case number C330/2006.

[5] The parties agreed that this plea could be argued as a *point in limine* prior to commencement of the trial in this matter enrolled for 21 and 22 May 2009. The trial was accordingly postponed *sine die* by consent, and is referred to as "the pending matter" below.

Background

[6] The applicant was previously employed by the respondent in the position of Business Accounts Sales Manager ("BASM"), which was changed with effect from 1 April 2006 to Key Account Manager ("KAM"). He considered this change to be in breach of his employment contract and sought relief in the following terms from this court on 6 July 2006 under case number C330/2006:

1. *"That Respondent is to re-instate Applicant with retrospective effect from 1 April 2006 in the position of Business Accounts Sales Manager, on terms and conditions of employment not less favourable than those which pertained to Applicant as at 31 March 2006; and*
2. *That Respondent is to adjust Applicant's Sales and Remuneration Plan so as to be not less beneficial to Applicant as would have been the case had Respondent retained Applicant as Business Accounts Sales Manager beyond 1 April 2006."*

[7] On 31 August 2007 an order was handed down by Nel AJ, followed by written reasons, in which the following relief was granted (I will refer to this order henceforth as "the Nel judgment"):

"[79] In the exercise of my discretion I am therefore satisfied that I should grant the applicant the relief sought in prayer 1 of his notice of motion. I am not persuaded that in the exercise of the discretion I have that I should order such reinstatement with retrospective effect from 1 April 2006.
[80] As far as the applicant's prayer contained in paragraph 2 of his notice of motion is concerned, he has failed to satisfy me that I should order the respondent to adjust his sales and remuneration plan. This is so because on the facts before me I am unable to conclude that the applicant's sales and remuneration plan is less beneficial than would have been the case had Telkom retained the applicant as [BASM] beyond 1 April 2006".

The Respondent's submissions

[8] The respondent's counsel, Mr Leslie, submitted that the proceedings under case number C330/2006 ("the first claim") amounted to a claim for specific performance of the applicant's employment contract, coupled with a claim for back pay to 1 April 2006. In addition, counsel made the submissions set out below.

[9] The Nel judgment had finally determined the question of whether the applicant was entitled to relief flowing from the alleged breach of contract for the period 1 April 2006 (the date of the alleged breach) to 1 September 2007 (the date of the order). The court had refused to grant such relief.

[10] The applicant had elected not to appeal against the judgment and is thereby deemed to have accepted this outcome.

[11] The respondent had complied with the order by placing applicant in the position of BASM with effect from 1 April 2008 and by paying him the difference between his salary as KAM and the amount he would have earned in the position of BASM between the date of the order and 1 April 2008. The computation of this amount forms part of the claim in the pending matter.

[12] The respondent pleads that the determination of pay in respect of the period 1 April 2006 to 1 September 2007 is *res judicata*. The requirements for such a plea are that there has to be a prior judgment; in which the parties were the same; and the same point was in issue.

[13] In *Horowitz v Brock and others* 1988 (2) SA 160 (A) 179H, the court held that an "*issue*", for the purposes of a *res judicata* plea, had the following meaning:

> *"An issue, broadly speaking, is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought".*

[14] In *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA), the majority, per Olivier JA, summed up the position thus at 239I:

"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, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?".

[15] Counsel disagreed on the interpretation of the dictum of Van Heerden ACJ in the minority judgment in *National Sorghum* (supra at 237B) to the effect that:

"As algemene reel kan dus gesé word dat indien 'n eiser op 'n remedie aanspraak gemaak het en later of dieselfde skuldoorsaak 'n verwante remedie traag af te dwing, hy hom vasloop teen a verweer van res judicata weens 'n verslapping van vereiste".

The applicant's counsel submitted that although this was a minority judgment the majority did not take issue with it and this *dictum* was accordingly cited with approval in *Holtzhausen & Another v Gore NO & Others* 2002 (2) SA141 (C) 149B.

[16] The requirement that the previous action is based on the same cause of action and has the same subject matter, need not be met in all cases, and may be relaxed. In this regard, a court is required to exercise an equitable

discretion, with the overriding consideration being overall fairness and equity (*Holtzhausen* (supra) 149F – 150G, with reference to *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (B) 566B-567B).

[17] In the present matter, the respondent submitted, there is a prior judgment dealing with the same issue between the same parties. If the applicant had been successful in his claim for retrospective reinstatement in the Nel judgment, he would have been entitled to payment of the difference in earnings between the two positions for the period at issue here, i.e. 1 April 2006 to 1 September 2007. The applicant was unsuccessful, and insofar as he was not awarded any back pay, now seeks precisely the same relief in the pending proceedings.

[18] Put differently, the respondent submits that this court has already considered whether the applicant should be entitled to the difference in remuneration between the positions of BASM and KAM between 1 April 2006 and 1 September 2007 i.e. his back pay. This issue was finally disposed of in the Nel judgment.

[19] In the premises, the respondent submitted, the applicant's claim in respect of loss of earnings for the period 1 April 2007 to 1 September 2007 falls to be dismissed.

The Applicant's submissions

[20] The applicant's counsel, Mr Rautenbach, relying on *Signature Design Workshop CC v Eskom Pension and Provident Fund and Others* 2002 (2) SA 488 (C) at 491ff and *National Sorghum Breweries* (supra), submitted that the *res judicata* rule and the "once and for all" rule were, for all practical purposes, indistinguishable.

[21] The "once and for all" rule was described by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) as follows:

"The "once and for all rule" applies especially to common law actions for damages in delict, although it has also been applied in claims for damages for breach of contract...
Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action...
Its purpose is to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation.
Closely allied to the "once and for all" rule is the principle of res judicata which establishes that, where a final action has been given in a matter by a competent court, then subsequent litigation between the same parties....in regard to the same subject matter and based on the same cause of action is not permissible, and if attempted by one of them, can be met by the exception rei judicatae vel litis finitae. The object of this principle is to prevent the repetition of law suits, the harassment of the defendant by a multiplicity of actions and the possibility of conflicting decisions" (835C-G).

[22] Mr Rautenbach submitted that the court in *National Sorghum Breweries* (supra), in determining whether an applicant could seek damages arising from a breach of contract when it had already been granted judgment in respect of restitution, considered whether the issue had been finally disposed of (my emphasis) in the first action. The court found, for the following reasons that it had not:

(a) The same thing was not claimed in each suit because restitution in the form of repayment of purchase price was a contractual remedy clearly distinguishable from damages.

(b) The claims were not based on the same grounds or cause of action because in the first suit the necessary allegations included: the conclusion of the contract; the breach thereof; the payment of the purchase price; and the cancellation of the contract. In the second action they included the further issues of: the damages suffered; the causal chain between the breach and the damage; and the quantum of damages. The mere fact that there were common elements in the allegations made in the two suits did not justify the *exceptio* - one had to compare the second claim in its entirety with the first claim in its entirety. When this was done in that case it became clear that the differences were so wide and obvious that it could not be said that the same thing was being claimed in both suits or that the claims were brought on the same grounds (*National Sorghum* supra at 239H-I and 240B-D). In other words, counsel submitted, similar to the present instance, the first suit was for a form of restitution, and the second is for damages arising from the initial breach of contract by the employer. In the circumstances in *National Sorghum* the court had held that neither the *exceptio res judicatae* nor the "*once and for all"* rule could be relied upon to thwart the claim (at 241E-F).

[23] The second question, counsel submitted, was whether, even if this claim were to be found to fall within the four corners of the rules, this court nevertheless has the discretion to depart from their strict application. A number of authorities were cited in support of the contention that such discretion exists or that the courts appear to be supportive of such a principle. In support of this proposition counsel cited *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669F-G, as well as *Evins* (supra), where Jansen AJA (at 825B) in the minority judgment expressed the desirability of re-examining the application of the *"once and for all"* rule in our law, as well as its restricted application in appropriate circumstances.

[24] Counsel cited as further authority the thesis of Professor J C van der Walt, quoted with approval by Davis J in *Signature Design* (supra at 496), to the effect that the "*once and for all*" rule could no longer be used to justify disposing of every possible action in one single formula. In the learned Professor's own words:

> *"Dit bring 'n mens by the slotsom dat die "once and for all" reel nòg as regsbeginsel nòg op praktiese gronde, en ook nie ter wille van die beperking van "onnodige" litigasie ingespan kan word nie. Die fiksie wat die tradisionele skadeleer ten grondslag lê, te wete dat daar deur*

middle van die aanwending van 'n enkele skadeformule meteen 'n beslissing gevel kan word oor alle gelede en toekomstige skade, kan derhalwe hoegenaamd nie meer gehandhaaf word nie."

(Die Sommeskadeleer en die "Once and for all" Reël, LLD thesis (1977) at 523).

[25] In *Signature Design* (supra at 498) Davis J expressed the rationale for the rule as follows:

*"It should also be remembered that the policy considerations which underpin the "once and for all" rule were developed with the purpose of the prevention of a multiplicity of actions based upon a single cause of action and the assurance that there would be a definitive end to litigation. (Evins (*supra at 835E)*). Such policy considerations clearly do not apply in the circumstances of this case...A court should be particularly cautious to extend the doctrine into an area which can only work a manifest injustice".*

[26] Counsel submitted furthermore that our courts have not only endorsed this principle of discretionary application, but that it had specifically been applied in *Cape Town Municipality v Allianz Insurance Co.Ltd* 1990 (1) SA 311 (C). I was referred to a passage in the judgment where the court, in respondent's counsel's submission, appeared to, in an *obiter* statement, endorse a two stage procedure and suggested that if it did "*occasion defendant's expenses which would not have been incurred in a single action, that hardship can be met by appropriate costs orders*" (at 332H- 333G). The passage quoted by counsel from *Allianz* has, he submitted been quoted with approval in: *Solomons v Multilateral Motor Vehicle Accident Fund and Another* 1999 (4) SA 237 (CPD) at 248 and *SZ Tooling Services CC v SA Eagle Insurance Co. Ltd* 1993 (1) SA 274 (AD) at 279 E- G. However, I agree with Mr Leslie's reply to this submission which is to the effect that the court, in dealing with a possible two stage process of litigation and the possibility of the second stage being met with a *res judicata* defence, found that this was irrelevant to the issue of prescription under consideration. This he submitted, was not an *obiter* remark as applicant's counsel contended, but rather formed part of the *ratio decidendi* of the decision. Mr Rautenbach conceded however that there was a distinction between *Allianz* (supra) and the present case, but reasserted that there was also an analogy in that in both cases the plaintiff/applicant sought to assert a money claim in subsequent proceedings, having earlier established its rights in terms of a contract.

[27] In summary therefore, it was submitted that the applicable legal principles were as follows:

(a) The *res judicata* and "once and for all" rules are virtually indistinguishable in our law;
(b) In applying the rules the court should ask not only whether the cause of action is the same in both claims, but in fact whether all the ingredients that the applicant/plaintiff needs to establish in proving his claim in the second case were required to be proved and were judicially disposed of in the first. Only if the answer is in the affirmative on all the

ingredients of the cause of action and the remedy, does the defence succeed.

(c) The rules are not rules of law inasmuch as principles of convenience, from which this court has the discretion to depart.

(d) The rationale for the rules is to avoid a multiplicity of actions, and to prevent a plaintiff continually harassing a defendant with claims.

(e) In applying the rules and exercising its discretion, the court will consider both the rationale for them as it applies to the particular circumstances of this case, as well as whether denying plaintiff a subsequent action would result in a grave injustice.

[28] In applying the law as set out above, Mr Rautenbach contended that in the present matter the applicant instituted a single claim for damages arising out of his loss of remuneration in respect of the period 1 April 2006 to 31 March 2008. The applicant did not institute two claims, one in respect of the period prior to the Nel judgment and one in respect of the period thereafter. The respondent's *in limine* point is restricted to that part of the damages claim which concerns the period prior to the Nel judgment, and the same point is not taken in regard to the period after the judgment. It follows that the respondent has implicitly conceded the claim for damages for the period 1 September 2007 (the date of judgment) to his reinstatement in April 2008, although the quantum is in dispute. This supports the contention that the claim is for an illiquid amount, and that it constitutes a claim for damages rather than pay or remuneration in that the latter implies a claim for specific performance. This is consistent, it was submitted, with the Nel judgment which found the applicant's demotion to constitute a breach of his employment contract. Accordingly, in respect of the single continuum of damages suffered by the applicant arising from the breach of contract, he initially sought specific performance in the form of reinstatement and Nel AJ exercised his discretion not the make the reinstatement retrospective. Even if the court had granted retrospective reinstatement (in the same manner it granted prospective reinstatement), the parties would still have had to approach this court to determine the applicant's loss for the pre-judgment period, as it now seeks to do. It is clear, the applicant submits, that the Nel judgment did not decide a claim for damages, which is what the applicant now seeks, arising from the breach of his contract by his employer, which commenced on 1 April 2006 until it was rectified by the employer in April 2008. The respondent, it was submitted is obfuscating the two issues – i.e. the finding that the demotion was a breach and declining to grant the remedy of retrospective reinstatement or specific performance. In fact, there was no claim for damages before Nel AJ which required him to exercise a discretion or to decide whether the facts in support of a damages claim existed. In particular, the applicant submits, the court did not decide whether the applicant suffered a loss arising from the breach of contract or not – there was in this regard no quantum put before the court to consider, which Olivier JA (in *National Sorghum* (supra)) said was essential for a damages claim.

[29] Lastly, counsel submitted that it would constitute a gross injustice not to allow the applicant to proceed in respect of the pre-judgment period (April 2006 – September 2007). The respondent has already permitted the applicant

in principle to proceed with his claim in respect of the period post judgment i.e. 1 September 2007 to 1 may 2008. The applicant will rely on the same evidence in respect of that part of the claim as in respect of the claim pre-judgment. In both cases applicant relies on the same method of calculation, in respect of which it will lead expert evidence. In the circumstances, it was submitted, there is no multiplicity of actions to be visited on the respondent arising from this claim. On that basis alone the court would be entitled to dismiss the point *in limine*.

Evaluation of submissions

[30] The applicant resists the point *in limine* on two grounds. Firstly, in case number C330/2006 ("the first claim") he sought specific performance of his contract of employment. He now seeks ("the second claim") damages pursuant to the breach thereof. He is therefore claiming a different thing. Secondly, even if the *res judicata* and "once and for all" rules are met, this Court has a general discretion to refuse to uphold these defences and should exercise this discretion in dismissing the *in limine* point.

I turn now to address this.

[31] In the first claim the applicant sought an order reinstating him in his job as BASM with retrospective effect to 1 April 2006, as well as an order adjusting the applicable Sales and Remuneration Plan so as to not be less beneficial to him had he remained in his BASM role beyond 1 April 2006. Differently construed, this was an order for reinstatement retrospective to when his demotion occurred and being placed in the financial position he would have been in, but for the demotion. Nel AJ granted the claim for reinstatement, in other words, it ordered specific performance, and declined to order an adjustment to the Sales and Remuneration Plan. This order was granted as from the date it was made, and obliged the respondent to return applicant to his position as BASM and pay him the equivalent remuneration from then onwards going forward.

[32] The second thing claimed was in essence financial restitution or, in other words, a claim for damages arising from the breach of the employment contract by way of his demotion. This cannot by any stretch of logic have formed part of the specific performance order or, as was submitted by respondent's counsel, it is self evident that a past obligation cannot be specifically performed. The applicant was therefore not seeking respondent's compliance with a particular prospective obligation, but was seeking payment equal to that which he would have received had respondent not breached its contractual obligation to him by demoting him. The respondent submitted that the applicant did not place the relevant evidence regarding the quantum of his loss as a result of the breach before the court. He did not adduce the *facta probanda* he was required to provide to succeed in a claim for back pay, and cannot now seek a further opportunity to do so.

[33] Ultimately however, whatever nomenclature is applied to his first claim and irrespective of whether it is labelled specific performance or contractual damages he is seeking precisely in the second claim what he sought and failed to obtain fully in the first, in my view. He sought that he be placed in the same position he would have been in, physically and financially, had the employer not acted in breach of its contractual obligations to him. He did not succeed in being physically placed back in his old role as BASM for the period 1 April 2006 to 1 September 2007, nor did he succeed in recovering the financial compensation he would have received for that period had been placed back in the that role. The reason for this is that the Nel judgment was based on an exercise by the court of its discretion not to grant this portion of the relief claimed. He is now seeking this relief by framing his action as a claim for damages rather than specific performance, albeit (and this is common cause) arising from the same cause of action. The long and short of it is that he wants his back pay for the period the Nel judgment did not award reinstatement i.e. 1 April 2006 to 1 September 2007.

[34] This is in essence the same relief framed differently and in my view does not differ in any material respects from that initially claimed. I am not persuaded that the applicant is claiming a different thing now. This claim is therefore aptly met by the *res judicata* defence. In any event, even if I were to find he is seeking different *relief* arising (as is common cause) from the same cause of action, his claim is still met by the "once and for all" rule, in that, as required by *Evins Shield* (supra at 835H) he still had to sue for all relief arising from that cause of action in one action. I am not persuaded that these two rules are for present purposes indistinguishable. In fact, as respondent submitted in its replying heads, this is correct only insofar as the once and for all rule could be construed as an extension of the *res judicata* rule. In particular, whereas *res judicata* applies where a party claims "the same thing", the once and for all rule has broader application and extends to situations where a different thing is being claimed out of the same cause of action. Accordingly, on either rule the applicant's claim fails.

[35] In regard to applicant's second argument that should I find that the requirements of *res judicata* or the "once and for all" rule have been met, I nevertheless have a discretion which I should exercise in the applicant's favour in the interests of justice and fairness. The applicant relied in this regard heavily on the *Signature Design* (supra) decision. However, I agree with respondent's counsel that this decision refers only to the "once and for all" rule not the *res judicata* defence. Furthermore, the *Kommisaris* case referred to in *Signature Design* is only authority insofar as the two requirements of *res judicata* i.e. the "same thing" and the "same cause of action" can be flexibly applied in certain circumstances. Indeed the facts in the *Signature Design* case are an indication of the kinds of specific circumstances contemplated, where grave injustice would have arisen from the rigid application of the "once and for all" rule. The present claim is not the kind of matter which in my view would justify flexible application to avoid gross injustice.

[36] In addition, I do not find in *Allianz* or other cases cited by the applicant, support for the proposition that this court has a general discretion to deny a plea of *res judicata*. Even if there may be overriding policy considerations which may justify not applying the rules in certain instances, I am not persuaded that those are applicable. I am in agreement with the submission that the applicant is seeking a second bite at the cherry in order to succeed in a claim for retrospective back pay. Should I allow this claim to proceed, and should the applicant succeed in proving same, this would in my view conflict with the decision of Nel AJ. This would be undesirable and is exactly the kind of outcome the *res judicata* and once and for all rules seek to prevent. Indeed it is exactly why an appeal mechanism is available to aggrieved applicants.

[37] The last point I wish to make is that insofar as applicant contends that denying the applicant the right to proceed would undermine the principles of fairness and equity the LRA is based on, in my view, so would the permitting of a multiplicity of actions. Here there is an ongoing relationship between the parties – and the labour relations framework that underpins the Labour Relations Act is premised on the effective and expeditious resolution of disputes in order to preserve the employment relationship. To permit a disgruntled employee to return to court over and over again on the same cause of action when there has been a judgement of this court that has not been appealed, would not serve the interests of our sophisticated labour relations framework.

[38] In the premises, I find that the portion of the applicant's claim for damages in respect of the period 1 April 2006 to 1 September 2007 is met squarely by the *res judicata* and once and for all defence. The point *in limine* accordingly succeeds. The applicant has conceded the point *in limine* pertaining to his claim for general damages. I see no reason why costs should not follow the cause.

[39] The only remaining issue for the pending trial is whether the respondent complied with the order issued by Nel AJ in paying the applicant the amount he would have earned as BASM for the period 1 September 2007 to 31 March 2008, being the date when he was reinstated to the position.

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

The respondent's *in limine* point succeeds. Costs follow the cause.

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Date of hearing: 21.05.09
Date of judgment: 09 .06.09

Appearance:
For the Applicant: Adv F Rautenbach instructed by Irish Inc Attorneys
For the Respondent: Adv G Leslie instructed by Herold Gie Attorneys