IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C117/2001

In the matter between:

NICOLAAS FRANSCOIS MAARTENS	First Applicant
WILLEM HENDRICK KOTZE	Second Applicant
HELEN LOUISA HENDRINA LOTTER	Third Applicant
PATRICIA YVONNE WOOD	Fourth Applicant
MAUREEN LORRAINE SCHARNECK	Fifth Applicant
FREDDIE ADAM HANSEN	Sixth Applicant
And	
SOUTH AFRICAN NATIONAL PARKS	Respondent

JUDGEMENT

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1. The six applicants herein, together with one Bantubonkwe, all erstwhile employees of the respondent instituted actions against the respondent for payment of compensation on the grounds that their resignation from respondent's employ was enforced and as such constituted an unfair dismissal and that the dismissal was based on respondent's operational requirements.

2. Bantubonkwe proceeded with his action separately. His trial has been finalized. The Court through Ngamu AJ found that Bantubonkwe's resignation did not constitute a dismissal and his action was accordingly dismissed. Leave to appeal against the judgment was refused and his petition to the Labour Appeal Court was likewise dismissed.

3. The six applicants who are now before me intend to proceed with their claim against the respondent. The pleadings in their matter were finalized some time ago, however before a trial date could be allocated, the respondent raised a number of points *in limine*. This is now before me for consideration. In raising one of the points respondent relies on the judgment handed down in the Bantubonkwe matter.

4. According to the respondent, the actions of the respondent towards Bantubonkwe as well as all of the applicants now before me were identical and that the applicants rely on respondent's said actions to succeed in their claim. Since this Court through Ngamu AJ, so respondent argues, has already pronounced that respondent's action could not be seen as making the employment relationship between Bantubonkwe and it intolerable and therefore his resignation did not constitute a dismissal --- that decision has the effect that none of the resignations can be regarded as dismissals and as such the judgment handed down in Bantubonkwe was a judgment *in rem.* Because Bontubonkwe's judgement is a judgement *in rem,* so respondent continues, the applicants are precluded from leading evidence in relation to the issue of their dismissal due to the principles of issue estoppel and/or *res judicata*.

5. In *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465 at 475, [1949] 2 All ER 118 at

122, (referred to in by Hoffmann and Zeffertt: " The South African Law of Evidence" 4th edition, page 338) a judgment *in rem* was defined as follows:

"A judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation)."

A judgment *in rem* is a judgment which is conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless whether or not they are parties to any legal proceedings are bound by a judgment *in rem* and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the Court has by its judgment declared or made it to be.

6. Opposed to a judgment *in rem* is a judgment *in personam* or as it is commonly referred to, a judgement *inter partes*. A judgment *in personam* determines the rights of the parties to an action and those who are privy to them in regard to the subject matter in dispute (See HALSBURY, 4th edition Volume 16 paragraph 1525 and Hoffmann and Zeffertt *supra* at 339-340). A judgment *in personam* does not affect the rights of third parties.

7. The judgment handed down in Bantubonkwe's case dealt neither with the status of any of the persons who were parties to that action nor did it deal with any property. The judgment merely determined whether or not Bantubonkwe had any claim against the respondent pursuant to the provisions of the Labour Relations Act (the Act), and as such it was a judgment *in*

personam and not a judgment *in rem*.

8. Respondent however goes on to argue that even if this Court finds that the judgment handed down in Bantubonkwe was not a judgment *in rem* it is still binding on the applicants herein as they were parties to the dispute or could at least be regarded as privies of Bantubonkwe.

9. While the applicants herein, like Bantubonkwe claim that their resignation constituted a dismissal which dismissal was unfair each of them has to individually satisfy the Court that his/ her continued employment had become intolerable due to respondent's action or inaction. The fact that all of their resignations may have been related to a particular conduct on the part of the respondent may not necessarily be conclusive of whether or not the applicants' resignations amounted to their dismissals. Factors, such as their levels of employment may well play a role especially since the court in Bantubonkwe held that an "employer is entitled to treat employees of different levels in a different manner", and it is common cause that Bantubonkwe and the applicants herein were not all employed on the same level. In the circumstances it cannot be said that the applicants herein were parties to the dispute between Bantubonkwe and the respondent. Respondent's argument that the applicants were at the very least privies of Bantubonkwe is likewise misconceived. For applicants to be privies of Bantubonkwe they must have derived their rights to the action against the respondent from Bantubonkwe or Bantubonkwe from them. This did not happen. Privies are those who have a relationship akin to that of an agent and principal. (See Hoffmann and Zefferett *supra* page 340; HALSBURY at paragraph 1543). One does not become a privy simply by virtue of having a claim against a common respondent based on the same cause of action.

10. As stated earlier the applicants' right to proceed with their action against the respondent was neither dependent upon nor related to the action instituted by Bantubonkwe, it is a right that stands independently of Bantubonkwe. The fact that the applicants had initially acted together with Bantubonkwe or that some of them testified at Bantubonkwe's trial did not make them privies of Bantubonkwe.

11. The applicants are accordingly not bound by the judgment in Bantubonkwe. While the Court is mindful of the undesirability of separate actions with its potential for conflicting judgments, that is not a reason to extend a judgment from one party to another. The respondent had available to it the right to consolidate the two actions, it chose not to do so. Having succeeded in the first matter it now seeks to extend that judgment to the applicants herein simply because its evidence against the applicants will be no different to that tendered in the Bantubonkwe matter. This is not a basis to grant the relief sought.

12. In view of what I said above respondent's reliance on the principle of *exceptio rei judicata* or principles of issue estoppel cannot be upheld.

13. In order for the respondent to have applicants' claim dismissed based on the *exceptio rei judicata* it must satisfy this Court that all of the following factors have been met:

    a) That the judgment was a final or a definitive decision;

    b) That a competent Court handed down the judgment;

    c) That the judgment was given in earlier proceedings between the same persons;

    d) That the judgment pleaded was about the same thing (*eadem res*) as that which is demanded in the latter proceedings and

e) That the cause of action in the proceedings in which the defence is raised is the same as that on which a final judgment was given in earlier proceedings.

(See Hoffmann and Zefferett *supra* at 335 – 345; Horowitz v Brock and others 1988 (2) SA 160(AD) at 178 H-J; Kommissaris Van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653(AD) at 664 C-E).

14. Reference to the "same persons" for purposes of the *exceptio rei judicata* is a reference to the identical persons who were parties to the previous proceedings and to persons who are privies to the said parties. As the applicants were not parties in the matter of Bantubonkwe, nor were they his privies the *exceptio rei judicata* cannot succeed, I do not therefore need to consider the other factors nor do I propose to do so.

15. For the reason recorded in the preceding paragraph respondent's argument that the applicants' claim could also be dismissed on the grounds of issue estoppel also cannot stand. The factors that need to be satisfied for a finding of issue estoppel are the same as that for the *exceptio rei judicata* save that issue estoppel does not require for its application that the same thing must be demanded.

16. As the applicants are not privies of Bantubonkwe the point *in limine* based on issue estoppel must also fail.

17. Respondent further appears to raise the point that this court does not have jurisdiction to entertain applicants' claims because the applicants were not dismissed but had resigned

voluntarily. In so far as this was an independent issue and not linked to the issues dealt with above it is misconceived. This is precisely one of the issues that the court is required to determine as the applicants allege that their resignation constituted a dismissal as contemplated by s186 (e) of the Act. If respondent's argument is that the determination of a dismissal as contemplated by s186 (e) falls outside this court's jurisdiction and with the CCMA, this again is incorrect – See in this respect the matter of *Jamela v Accord* (2000) 21 ILJ 2463 (LC) where this court held that "s186 (e) simply provides the meaning or a definition of a dismissal and once the definition is satisfied then there is no bar on the applicant categorizing his dismissal as he deems expedient and proper" at page 2468 C-D.

18. In the present matter therefore, if it is found that the applicants were dismissed then the issue arises as to whether their dismissal which it is alleged was based on respondent's operational requirements was fair and it is for this court and not the CCMA to determine the fairness of a dismissal based on the respondent's operational requirements.

19. Respondent also raised a further point *in limine* relating to a particular claim made by one of the applicants, this claim was abandoned thus there is no need to deal with that issue.

20. Finally the issue of costs. Notwithstanding that one of the issues was conceded I am of the view that the points *in limine* that I was required to deal with were of no merit whatsoever and therefore it is only equitable that costs follow the result.

21. In the result the points *in limine* are dismissed with costs.

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WAGLAY J

Date of hearing: **10 May 2004**

Date of judgement: **3 June 2004**

For the applicant: **Adv M de Swardt SC assisted by Adv A de Wet**

Instructed by: **Buchanan Boyes Smit Tabata Attorneys**

For the respondent: **Adv C.B. Yeo**

(the excipient)

David Short Attorneys (Johannesburg) and Farbridge Anderne Lawton Inc (Cape Town)