REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 424/11

In the matter between:

C K CAPSTICK-DALE **First applicant**

L WOOLLEY **Second applicant**

and

SUSTAINABLE FIBRE SOLUTIONS (PTY) LTD **Respondent**

Heard: **30 May 2012**

Delivered: **18 June 2012**

Summary: Jurisdiction – election and estoppel. Applicants claim relief i.t.o. LRA section 197 – respondent raised point *in limine.* Applicants had elected at CCMA proceedings to rely on agreement and not on section 197. Estopped from relying on different cause of action in same dispute.

RULING ON POINT *IN LIMINE*

STEENKAMP J:

Introduction

1] The applicants were retrenched by the respondent. They referred a dispute over severance pay to the CCMA in terms of s 41 of the Basic Conditions of Employment Act[1]. Prior to the arbitration on 1 June 2011 they specifically elected to base their claim on an alleged oral undertaking made by the respondent at the Cape Town Club on 4 February 2009 that it would honour the applicants' prior service with the Seardel Group, should they be retrenched. Their attorney, on their behalf, disavowed any reliance on s 197 of the Labour Relations Act.[2]

2] The CCMA ruled that it did not have jurisdiction. It did so because the applicants' claim was not based on continuous service with the respondent and therefore the provisions of s 41(2) of the BCEA did not apply. The applicants then referred a dispute to this court. In their statement of claim, they now rely on s 197 of the LRA as a basis for their claims for severance pay. In short, albeit through a rather convoluted series of transfers, they claim that there was a transfer of business from Seardel to the respondent.

3] The respondent has raised a point *in limine* that the applicants are bound by the election they made at the stage of the CCMA arbitration that they do not rely on s 197; and that, therefore, they are estopped from doing so in the Labour Court proceedings. In the alternative, it pleads that this court has no jurisdiction to adjudicate the applicants' claim based on their reliance on s 197 as that claim is governed by s 41 of the BCEA and must be arbitrated by the CCMA.

Background facts

4] The applicants joined Brits Textiles, a division of Seardel Group Trading (Pty) Ltd, in 1977 and 1996 respectively. The first applicant eventually served as managing director of Brits Textiles.

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1 Act 75 of 1997 (the BCEA).

2 Act 66 of 1995 (the LRA).

5] The applicants moved to a company called Brits Automotive Systems (Pty) Ltd ("BAS"), formed by Seardel, in 1997. In June 2005 the Industrial Development Corporation acquired 49% of the shareholding of BAS. At the same time, a new company, Sustainable Fibre Solutions (Pty) Ltd ("SFS") (the respondent) was formed. The IDC had a 66,7% shareholding and Seardel the remaining 33,3% in SFS. Both applicants were appointed to positions in SFS.

6] The respondent dismissed the applicants for operational requirements in July 2010. They now claim that their contracts of employment had been transferred to SFS in terms of s 197 of the LRA; and that their periods of service with Brits Textiles, BAS and Seardel should be taken into account to compute their entitlement to severance pay.

7] The respondent disputes this entitlement. It has raised a point *in limine* that the applicants are estopped from relying on s 197 as they had specifically elected to rely, not on s 197, but on an alleged agreement with the respondent that it would recognise their years of service with the Seardel Group.

8] On 16 May 2011 the respondent's attorney, Glen Cassells of Maserumule Inc, sent an email to the applicants' attorney, Michael Bagraim, in the following terms:

> "The email from the second applicant [Woolley] to the first applicant [Capstick-Dale] dated 30 October 2009 refers to the provisions of section 197 of the LRA as the basis for the second applicant contending that his services with Seardel 'have been recognised and transferred' to respondent. Your clients' claim as recorded in the pleadings and amplified by your email dated 18 April 2011 does not refer to a reliance on section 197 as a basis for their claims, but rather on a specific undertaking that respondent would recognise their previous service and they would not be prejudiced should they be retrenched at a later stage from my client.
>
> In the light of the content of the email from second applicant to first applicant referred to above, we also request that you confirm whether your clients are relying on section 197 of the LRA."

9] Bagraim responded on 16 May 2011:

> "There was a specific undertaking in the discussions that the respondent would recognise their previous services [*sic*] and [the applicants] would not be prejudiced should they be retrenched at a later stage.
>
> We are not relying on section 197 although this was pointed out in the e-mail."[3]

10] On the basis of their attorney's reassurance that the applicants were not relying on s 197 of the LRA, the respondent objected to the jurisdiction of the CCMA to arbitrate the dispute that they had referred in terms of s 41 of the BCEA. That subsection reads:

> "An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936) severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35."[4]

11] Commissioner Bill Maritz ruled as follows on 7 June 2011:

> "[T]he applicants' claim is not based on continuous service rendered to the respondent and the provisions of section 41(2) of the BCEA can therefore not apply.
>
> In the result the respondent was entitled to a ruling that section 41(2) of the BCEA does not apply and the CCMA accordingly has no jurisdiction to determine the dispute referred to it...
>
> The claim for severance pay referred to the CCMA does not fall within the ambit of section 41 of the BCEA and the application in terms of that section is accordingly dismissed."

12] On 22 July 2011 the applicants referred a claim for severance pay to this court in which they do rely on s 197 of the LRA. Their attorney of record remained the same throughout.

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3 My emphasis.

4 My emphasis.

Relevant legal principles

13] The respondent argues that the applicants – through their attorney – have exercised an election to base their claim on a specific undertaking and expressly not on s 197 of the LRA. By virtue of this election, it argues, the applicants are estopped from claiming relief based on the section. Had applicants relied on s 197 at arbitration, the CCMA would have had jurisdiction and would by now have arbitrated the dispute in terms of s 41(2) of the BCEA.

14] The applicants cannot approbrate and reprobate. Mr *Elliot* referred in this regard to the old *dictum* of Lord Blackburn in *Scarf v Jardine,* as cited in *Churchyard v Redpath, Brown and Co Ltd:*[5]

> "Where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he had not only determined to follow one of his remedies but has communicated it to the other side in such a way so as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act – I mean an act that would be justifiable if he had elected one way and would not be justifiable if had elected the other way – the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

15] The principles applicable to election / waiver in respect of breach of contract are analogous to the present matter:[6]

> "The innocent party's choice is subject to what is usually known as the doctrine of election. Enforcement and cancellation being inconsistent with each other or mutually exclusive the innocent party must make his election between them; he cannot both approbate and reprobate the contract; he cannot blow both hot and cold. The doctrine is stated by Watermeyer JA in *Segal v Mazzur* 1920 CPD 634 at 644-645:

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5 1911 WLD 131.

6 Christie, *The Law of Contract*, Fourth Edition, LexisNexis Butterworths, pages 627 – 628.

'Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way; this is, however, not rule of law, but a necessary inference of fact from his conduct;…

As already stated, a question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence; but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach.'

This passage makes clear the true nature of the doctrine of election. It is not a mechanical rule of law but a combination of waiver and estoppel – the onus is on the defendant to prove that, as a question of fact, the plaintiff has waived the relief he claims or, failing such proof, that he is estopped from claiming it – reinforced by a logical bar to claiming inconsistent remedies, but only if the claims are truly inconsistent.

16] In *Montesse Township and Investment Corporation (Pty) Limited and another v Gouws NO and Another* [7]the court found that whilst it was not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others, such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to the one or other of them.

17] And the Labour Appeal Court explained the relevant principles as follows

7 1965 (4) SA 380 (A) at page 380 per Beyers JA.

in *Maluti Transport Corporation Ltd v MRTAWU & others*[8]*:*

> "The principle of 'estoppel by election or waiver' (as it was called by Hoexter JA in *Chamber of Mines of South Africa v National Union of Mineworkers* 1987 (1) SA 668 (A) at 690J) has been applied to labour law, both against a union (the *Chamber of Mines* case (*supra*)) and an employer (*Administrator, Orange Free State & others v Mokopanele & another* (1990) 11 *ILJ* 963 (A)). The principle is based on 'considerations of elementary fairness' (*Chamber of Mines* case (*supra*) at 690J) and for this reason I do not agree with Mr Campbell's submission that once made, an election cannot be undone. Where fairness dictates it, and it causes no injustice to the other party, I see no reason why a party cannot change his or her mind (in a labour context) on this kind of issue (cf *Mshumi & others v Roben Packaging (Pty) Limited & another t/a Ultrapak* (1988) 9 *ILJ* 619 (IC) at 625G–I)."

18] It seems abundantly clear that the applicants' attorney's email dated 16 May 2011 (quoted above) constitutes an election as contemplated above in that it was made by the applicants' legal advisor on their behalf. It cannot be argued that where applicants are represented by attorneys specialising in labour law they were unaware of the effect of their election or unequivocal waiver at the time that it was made

19] Should the applicants now be allowed to rely on the provisions section 197 of the LRA despite their prior unequivocal communication to the contrary, the respondent's prejudice is both obvious and material as that dispute will have to be referred back to the CCMA for arbitration in circumstances where the dispute that the applicants brought to the CCMA has already been resolved. Fairness does not dictate that the applicants and their attorney can now change their mind.

20] In these circumstances the point *in limine* must be upheld. The parties submitted that costs should follow the result. I agree.

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8 [1999] 9 BLLR 887 (LAC) para [35] (per Froneman DJP, as he then was).

Order

21] I grant an order in the following terms:

21.1 The applicants elected on 16 May 2011 not to place any reliance on section 197 of the LRA in their claim against the respondent for severance pay in terms of section 41of the BCEA;

21.2 The applicants are estopped from placing any reliance on section 197 of the LRA in support of the claim against the respondent;

21.3 The applicants are ordered to pay the respondent's costs of this application jointly and severally, the one paying, the other to be absolved.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPLICANTS:	Michael Bagraim attorney.
RESPONDENT:	Adv Guy Elliot, instructed by Maserumule Inc (Glen Cassells).