IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. JS611/2016

In the matter between

ASSOCIATION ON MINEWORKERS AND CONSTRUCTION UNION (AMCU)	**Applicant**

and

CHAMBER OF MINES SOUTH AFRICA	**First Respondent**
NATIONAL UNION OF MINEWORKERS	**Second Respondent**
UASA	**Third Respondent**
SOLIDARITY	**Fourth Respondent**

Heard: 18 May 2017

Delivered: 05 December 2017

Summary: Exception, Rule 23 of the Uniform Rules- *Lis alibi pendens*- section 6 vs section 27 of the EEA.

JUDGMENT

MABASO AJ

Introduction

[1] The applicant delivered an amended statement of claim in pursuance of its alleged unfair discrimination claim,[1] asking for an order in the following terms: that the alleged historical wage disparities and gaps in a certain category of employees in gold sector (mines) are discriminatory on the grounds of race alternatively on arbitrary grounds; that the extension of the collective agreement in the gold mining sector to employees who are not members of a trade union[2] perpetuates growing income inequalities, and are in violation of section 6(1) in the Employment Equity Act[3] (the EEA). Furthermore, the applicant asks for an order that the first respondent be ordered to pay damages to a certain category of employees and in addition to this a payment of compensation. The only claim against the second, third and fourth respondents is a costs order.

[2] The applicant is the Association of Mineworkers and Construction Union (AMCU), the first respondent is Chamber of Mines of South Africa (the Chamber of Mines), the second respondent is the National Union of Mineworkers (NUM), the third respondent is UASA, and the fourth respondent is Solidarity (Solidarity). AMCU, NUM, UASA and Solidarity are registered trade unions in terms of the provisions of the Labour Relations Act[4] (the LRA).

[3] UASA has raised an exception to the amended statement of claim, and its grounds are that "*AMCU has failed to demonstrate a cause of action for three reasons*"[5] namely:

[1] In terms of section 6 (1) of the Employment Equity Act 55 of 1998 ("the EEA").

[2] In terms of section 23(1) (d) of the Labour Relations Act 66 of 1995 ("the LRA").

[3] Act 55 of 1998.

[4] Act 66 of 1995 as amended.

[5] Notice of exception, page 62, para 2.

(a) that AMCU's claim "is squarely about large-scale income differentials. The Legislature created a specific remedy for this s27 of the EEA. AMCU is limited to the remedies set out in s27 of the EEA. Consequently, section 6 of the EEA cannot form the basis for a cause of action concerning industry-wide income differentials"[6] .***(whether ss 6(1) or s27 points)***

(b) where AMCU bases its claim on section (6)(1) of the EEA, on the grounds of race "it has not demonstrated that race is a factor in the appointment into positions in lower or higher categories". On this point, UASA *inter alia,* says "[o]n the applicant's version, all persons employed in the categories 4 - 8 are black. The applicant selects, "artisans, miners and officers" as its comparator. The applicant does not allege that either the majority of all or all persons employed artisans, miners, or officers are white."[7] (section 6-***the race ground***).[8]

(c) "AMCU's reliance upon the difference in the standard rate of pay as the arbitrary ground is circular. The difference in the standard rate of pay cannot simultaneously be the result and reason for discrimination. AMCU has not pleaded that the difference is irrational and that this irrationality amounts to discrimination."(section 6-***the arbitrary ground***).

[4] On the other hand, the Chamber of Mines has raised a special plea and an exception, in the following manner:

(d) that AMCU is precluded from pursuing this litigation, taking into account that (i) there is a pending litigation ,on the same cause of

[6] Summary as found in the written submission.

[7] Ibid, page 64 to 65.

[8] The Chamber of Mines also raised a similar exception.

action and involving the same parties, in a form of a review application before this Court (*Lis alibi pendens*).

(e) It is also in agreement with point (a) of the UASA's exception.

I shall deal with these below without any sequence.

Brief Background

[5] In August 2016 the applicant instituted a claim against the respondents, wherein it is clearly pleaded as to what reliefs are sought in respect of the Chamber of Mines. However, in respect of the second to further respondents (which are all fellow trade unions) it only asks for a costs order. The Chamber of Mines delivered a statement of response incorporated a point *in limine*. Whereas UASA delivered a notice of exception. These preliminary points were argued before *Mooki* AJ who upheld the exception by making an order that the statement of claim be struck out and gave AMCU 30 days to amend its statement of case and to pay costs.[9]

[6] Following this order, AMCU proceeded to deliver the amended statement of the claim, whereafter, again, UASA delivered the notice of exception raising the points as mentioned above and on the other hand the Chamber of Mines delivered the special plea and the notice of exception.

[7] In the amended statement of claim, AMCU alleges that its members are employed in the gold sector by the Chamber of Mines in grade category 4-8 and all of these employees are blacks and have been disadvantaged by the past laws and practices in the mining industry in respect of remuneration and remuneration increases, as they are amongst the lowest paid employees in the mining industry.

[9] *Association of Mineworks and Construction Union v Chamber of Mines of South Africa and Others, Unreported Labour Court case no: JS611/16* handed down 15 December 2016.

[8] AMCU further avers the types of jobs that are being performed by these members,[10] that the income disparity prejudices the category 4-8 employees and perpetuates the discrimination against them on the grounds of race and alternatively on arbitrary grounds.[11]

Exception

[9] The following brief inculcation of the applicable principles is important.

[10] The rules of this Court do not specifically provide the provisions in respect of exception, as it is housed in rule 23(1) of the Uniform Rules, which reads thus:

> "Where any **pleading** is vague and embarrassing or **lacks averments which are necessary to sustain an action** or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.(Own emphasis)

[11] Exceptions may be raised in two forms, namely, where a party is alleging that the pleading lacks the averment to sustain the cause of action, and/or where a party alleges that the pleading is vague and embarrassing. *In casu*, the former is raised by UASA being supported by the Chamber of Mines, this was further confirmed by the UASA's representative during argument and taking into account that no notice was delivered in terms of sub-rule 23(4) of the Uniform Rules.[12]

[10] Page 38 to 39, paras 10.1 to 10.6.

[11] Page 41, para 16 -19.

[12] Pages 2.

[12] In the Uniform Rules, the phrase "*sustain an action*" as found in Rule 23(1) is not defined. I deem it necessary to briefly deliberate as to how other courts have defined the phrase *"cause of action"* taking into account that UASA's contention is that "The applicant has failed to demonstrate *a cause of action*". The then Cape Provincial Division, by *Watermeyer* J,[13] clarified this phrase in this way,

> *"But a much narrower meaning has also been given to the expression "cause of action."*
>
> *After considerable difference of opinion, it was decided in England that the expression "cause of action" in the Common Law Procedure Act meant "**that particular act on the part of the defendant which gives the plaintiff his cause of complain"***(Own emphasis)

[13] It is for the excipient to satisfy this Court that the claim as pleaded by AMCU cannot be supported by any reasonable interpretation of the amended statement of claim.[14] Put differently, the excipient has a burden to show that no matter how one interprets the pleadings, there is no cause of action that has been pleaded. As recently enunciated by the Supreme Court of Appeal in the matter of *Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others (Legal Resources Centre as amicus curiae)*[15]), where *Wallis* JA, writing for the Court said,

> *"Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the Court that the*

[13] *Lyon v South African Railways and Harbours* 1930 CPD 276. See also McKenzie Appellant v Farmers Co-Operative Meat Industries Ltd Respondent 1922 AD 16, where it was held that: What is the real meaning of the phrase cause of action arising in the city'? It has been defined in Cook v Gill (L.R., 8 CP 107) to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

[14] *Stewart and Another v Botha and Another* (340/07) [2008] ZASCA 84; 2008 (6) SA 310 (SCA) ; 2009] 4 All SA 487 (SCA) (3 June 2008

[15] [2013] 1 All SA 648 (SCA)

> *conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts*"[16](Own emphasis)

[14] In LAWSA,[17] the authors opined that, if evidence can be led which can disclose the cause of action in the pleading, that particular pleading is not excipiable. See also *Harmse v City of Cape Town*[18], where this Court referring to the Rules of this Court held that:

> *"Accordingly the rules of this Court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The Rules of this Court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the pre-trail conference. The rules therefore anticipate that the parties at the pre-trial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadows this activity but is not a substitute for it. It is for this reason that the rule on pre-trial conferences provides for reaching consensus on the issues that the court is required to decide".*[19]

[15] All parties herein , AMCU, the Chamber of Mines and UASA are in agreement that this Court has to be guided by *inter alia* the SCA's *obiter dictum* in the matter of *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[20]*,* para 3, where it said:

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[16] Ibid, para 36.See also *Trustees for the Time Being of The Bus Industry Restructuring Fund v Breakthrough Investments CC and Others* (397/06) [2007] ZASCA 101; [2007] SCA 101 (RSA); [2008] 1 All SA 23 (SCA); 2008 (1) SA 67 (SCA), para 11. (*Francis v Sharp and Others* 2004 (3)

Page 63 of [2015] 4 All SA 58 (ECP) SA 230 (C) at 237G.

[17] LAWSA Second Edition (Vol 3(1), paras 184-185), [2003] 6 BLLR 557 (LC)

[18] (2003) 24 ILJ 1130 (LC) at para 9.

[19] And the SCA in Children's Resource Centre's matter held that *"In my judgment these are the standards that should be applied in assessing whether a proposed class action reflects a cause of action raising a triable issue. I will deal with each in turn. Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts*.

[20] 2006 (1) ALL SA 461 (SCA) at para 3.

> *"Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit.* ***An over-technical approach destroys their utility****. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that 'cuts through the tissue of which the exception is compounded and exposes its vulnerability"(Own emphasis)*

[16] Summing up, the person who raises an exception has a burden to convince the court that, he is not raising an over-technical point which would prevent the substantial merits of the case from being decided by a court, it is not possible that evidence and/or any step that would be taken such as pre-trial minutes would not correct the alleged defect. It is my view, that such court in deciding on this aspect has to take into account *inter alia* (i) the manner in which the pleadings have been crafted, (ii)the onus of proof,(iii) burden to adduce evidence, (iv) the manner in which such point has been raised, (v)the relief sought, and (vi)the type of exception (either lacks averments which are necessary to sustain an action or vague and embarrassing) that has been raised by such party and other factors. I deal with this below.

Whether AMCU's claim is based on ss 6(1) or s 27 of the EEA

[17] As UASA submitted that in truth the claim for AMCU is one which is based on section 27 of the EEA and not in terms of sub-section 6(1) of the same Act. In its heads of argument, it submitted that section 27 of the Act is "t*o regulate large-scale systematic disparities*". UASA, summarises the case for the applicant as follows:

> *"AMCU seeks to address this disproportiate income disparities between category 4 - 8 employees on one hand, and all other employees on the other. Alternatively, AMCU seeks to address perceived unfair discrimination (whether directly or indirectly) in terms and conditions of employment between category 4 - 8 employees and other employees on the other. Terms and conditions of employment include remuneration. This unfair discrimination, on AMCU's formulation, is based upon race, alternatively arbitrary"*

[18] AMCU in their submissions contended that their case is about unfair discrimination in terms of section 6(1) of the EEA, resisting this exception on the basis that it set out essential averments for both its main cause of action and the alternative one.

[19] The upshot of this point has to be determined by looking at the EEA itself and the provisions that have been mentioned by both parties. There are two reasons why UASA's exception (whether ss 6(1) or s 27 points) cannot succeed herein, because of the following.

[20] In contrast with what the SCA said in *Children's Resource Centre Trust's*[21] matter, that UASA's exception of lack of cause of action is based on what the law should apply and not on the factual matrix thereof. Therefore, the question of whether AMCU has brought its claim in respect of the correct section of the EEA or not cannot succeed , as the test in exception is about facts (that particular act on the part of the [respondent] which gives the [applicant] his cause of complain) and not which law to apply, as in the pleadings. What is required is that a litigant should plead facts, not law and such facts will have to support a principle.

[21] If my conclusion above is wrong, I still believe that the excipients(the Chamber of mines and UASA) have not made out a case in respect of this exception in that: Section 27 of the EEA that the excipients are wrenching the applicants to, directs as to what a *"designated employer"* has to do in order to correct among other things discrimination, e.g. unfair discrimination by virtue of a difference in terms and conditions of employment such designated employer "*must take measures to progressively reduce*[22] *such differentials*". This section also gives the Minister of Labour a task in respect of assisting to *"reduce"(*not eliminate*)* such discrimination. There is no timeframe as to when

[21] *Supra*.

[22] Means " Bring down, lower,weaken,impoverish, diminish,contract" (Oxford dictionary)

this should be done. A third party, which is either a union and/or employees have no compulsory task to do under this section as it provides that,

> *"27. Income differentials and discrimination.—(1)* ***Every designated employer, when reporting in terms of section 21 (1), must submit a statement****, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational level of that employer's workforce.*
>
> *(2****) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6 (4)****, are reflected in the statement contemplated in subsection (1),* ***a designated employer must*** *take measures to progressively* ***reduce*** *such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4).(Own emphasis)*

[22] Whereas sub-section 6(1) of the EEA has to be read with section 10 of the same Act regarding the process to be followed by any party that is involved in a dispute relating to discrimination, for example, sub-section 10(2) provides that:

> *"(2)* ***Any party*** *to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination" .(Own emphasis)*

[23] Reading the latter sub-section, it clearly gives any party who is of the view that the discrimination has taken place to refer the dispute to the appropriate forum within a specified time period. As the word *"Any"* is not defined in this section, it clearly includes a union, employee, and an employer if any of them is of the view that there is a discrimination that has taken place, whereas section 27 refers to every designated employer and it does not refer to a number of employees whether large scale or small scale.

[24] Sub-section 10(2) refers to any party and it does not specifically refer to the designated employer as compared to section 27. I have also taken into account that, section 3 of the EEA provides that this Act must be interpreted in compliance with the Constitution and the purpose of the same Act. The purpose of the EEA *inter alia,* is that it is to promote equal opportunities and fair treatment in employment through the "*elimination*"[23] of unfair discrimination.

[25] I am mindful of the fact that in interpreting a section in a statute, one has to interpret it in line with the purpose of such Act, as *Myburgh* JP held that "*a particular section may have to be interpreted restrictively rather than extensively*"[24]*,* and I share the same view in respect of section 27 in that it does not deal with grounds as contained in sub-section 6(1).

[26] There is nothing in the EEA which suggests that one who has detected an unfair discrimination cannot take an action but wait for a designated employer to take action, and what if such an employer does not take action?. Taking into account that there are timeframes in which a party is allowed to take action against an alleged defaulter of unfair discrimination in terms of chapter II of the EEA. Therefore, I conclude that the point that has been raised by UASA has no basis and should be dismissed.

Section 6: the race ground and -the arbitrary ground

[27] The respondents' contention that AMCU relies on race under section 6 (1) of the EEA has failed to demonstrate that race is a factor in the appointment to the position in those categories.

[28] The starting point would be to establish, based on the amended statement of case before this Court, as to whether the facts before this Court show that there is any alleged "*particular act on the part of the defendant*", and in order

[2323] From word " eliminate" , means remove,get rid of, set aside(Oxford dictionary)

[24] *Business South Africa v Congress of South Africa Trade Unions and Another* (1997) 18 ILJ 474 (LAC), at 479A-B.

to determine this, one has to look at "*whether on all possible reading of facts*", is this established. In order to determine this most important question, the Court has to ask about the issue of the onus of proof. AMCU, in terms of section 11 of the EEA is required to make allegations of unfair discrimination based on race, once this has been done, the onus of proof is on the employer to prove that such discrimination did not take place or is justified.[25]

[29] As thus, the rules of this Court, specifically Rule 6, do not require an exposition of the full facts. In this matter, one has to look at whether the pleadings make any allegations of unfair discrimination which will necessitate the Chamber of mines to be in a position to answer to such application. In the amended statement of claim, AMCU *inter alia* avers that:

> *"8. members in gold sector employed by [the Chamber of mines] in grade category 4 -8,* ***are all black employees as defined in the EEA*** *and have been disadvantaged by apartheid and past discriminatory laws and practices in the mining industry as they applied to remuneration and remuneration increases "*
>
> *"14. On or about 12 May 2015 the union address correspondence to Harmony Anglo Gold Ashanti and Sibanye concerning wages and other conditions of employment for the 2015 review period in which the union raised its concern with the ever widening income disparities between ordinary workers and members of management and in particular the wage gap between category 4-8 employees and* ***other*** *employees in the workplace.*
>
> 16. This wage disparities and wage gaps were and remain discriminatory as ***against the category 4-8 employees on the grounds of their race***…"(Own emphasis)

[30] Section 1 the EEA, on the definition section, defines black people as "*a generic term which means Africans, Coloured and Indians*". The dictionary

[25] *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC), at para 27.

meaning of the word "*other*", is "*used to refer to a person …that is different from one, already mentioned or known* ".[26] I, therefore, conclude that this word *" other"* refers to races which are not black employees . Clearly, in line with the *Children's Resource*[27] principle above, I am satisfied that AMCU has presented sufficient averments in respect of allegations of unfair discrimination based on race. This will give the Chamber of mines an opportunity to respond as required by section 11 of the EEA. Therefore, AMCU has managed to plead that there are comparators. This exception by UASA is one which can be classified as an over-technical approach which destroys the utility of exception.

[31] In respect of the arbitrary ground which is pleaded as an alternative ground, I am mindful of the onus of proof in the respect of this one, but I am satisfied that looking at the amended statement of claim it covers sufficiently and the respondents would be in a position to respond by way of statement of response.

Lis alibi pendens[28]

[32] The Chamber of Mines has raised the point which has some kind of weight which is *lis alibi pendens*, in that there is a pending litigation[29] against the same parties [30]on the same cause of action.[31]It has to be emphasised that in this country there are three main sources of law, namely common law, customary law, and statutes.

[26] *Concise Dictionary, English-English by V&S Publishers. Oxford Dictionary defines the word "other" as "Not the same as one or some already mentioned or implied"*

[27] *Supra.*

[28] *Lis alibi pendens* is a Latin term that means an action on the same cause of action pending elsewhere.

[29] Van As v Appollus 1993(1)SA 606 (C)

[30] Caesarstone Sdot- Yam Ltd v The World of Murble and Granite 2000 CC and others 2013 (6) SA 499(SCA)

[31] Nestle (SA) (Pty) v Mars Inc 2001(4)SA 542 (SCA)

[33] The *lis alibi pendens* is a common law principle which has been applied in this country for decades. The EEA is a statute which was promulgated shortly after South Africa introduced its first democratic system.[32] Once these elements have been properly established, the other party will now have a burden to present evidence which will have to suggest otherwise. The then TPD, in *Marks and Kantor v Van Diggelen*[33], held that,

> "The points raised by the objection and which are in dispute support an objection of lis pendens and the real dispute between the parties was whether these points were established and not whether the correct description was res judicata. It is clear from Voet (44.2.7) that the requisites of the defence of lis pendens and res judicata, in relation to the identity of the issue and parties, are the 'same"[34]

The *Marks* dictum indicates that in dealing with this principle one has to apply the same principle that is applicable in *res judicata*.

[34] Recently the Constitutional Court in the case of *Molaudzi v S*[35], in discussing *res judicata,* had the following to say in respect of the application of common law principles,

> "Since *res judicata* is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section Rigidity has no place in the operation of court procedures". (Own emphasis)

[32] Act 108 of 1996, as amended.

[33] *1935 TPD 29*

[34] Ibid, page 37. See also *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA), at para 16.

[35] 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 at para 32

[35] Since it is common law, sometimes it has to be relaxed and in relaxing common law there are a number of factors that have to be taken into account, , as correctly pointed out by Scott JA in the matter of *Smith v Porritt and Others*[36] where was held that:

> *"The recognition of the defence in such cases will, however, require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. (KBI v Absa Bank supra at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals'*

[36] As the Chamber of Mines has asked this Court to make an order that the proceedings under this case number be stayed pending the finalisation of the other matter which is a review application, in essence, it says both matters cannot run parallel to each other. In order to do that this Court has to take into account that the stay of proceedings is a matter of discretion, and such discretion should be exercised sparingly.[37]

[37] As I have mentioned above, that one has to look at a number of factors before he can decide as to whether proceedings are stayed pending the finalisation of another matter. The purpose of the EEA is to *eliminate* discrimination. I need to consider the sections concerned and look at the Act in its totality in order to determine as to whether there is any restriction in respect of the one section as compared to the other. In respect of section 6 read with section 10, (a) it is housed under Chapter II, (b) deals with any employee , (c) unfair discrimination dispute has to be referred to the CCMA within six months, (d) failure of the CCMA to resolve the dispute under conciliation and any party to that dispute may refer the matter to this Court within 90 days[38], (e) most

[36] 2008 (6) SA 303 (SCA) at para 10.

[37] *Clipsal Australia (Pty) Ltd v Gap Discributors (Pty) Ltd* [2009] 3 All SA 491 (SCA).

[38] SATAWU obo members v SAA [2015] 2 BLLR 137 (LAC), at paras 10 & 11.

importantly the provisions of ss 11(1) deal with the onus of proof, in that if an unfair discrimination is alleged the employer will have the onus of proof, for example, to say discrimination did not take place or is a fair discrimination.

[38] The provision of section 27 of the EEA, (a) housed in Chapter III, (b) refers to every designated employer, (c) a task is given to a designated employer in that upon submitting a statement as required by section 27 (1) would be required to take measures in order to *reduce* such differentials and the Minister will have to be involved and (d) in reading the section it suggests that a designated employer must report its conduct to the Director-General of Department of Labour. The question is what will happen whereby such designated employer does not submit such statement or submits an incorrect statement and/or submit a statement but conceal remuneration disparities. In terms of the EEA, the only answer would be to pay a fine.

[39] Taking into account that the Constitution of the Republic of South Africa provides that "*When interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*"[39] if it was the intention of the legislature that these two processes cannot run parallel . I am of the view that it would have been dealt with in the same Act. Further section 27 does not deal with sub-section 6(1) but sub-section 6(4), therefore I conclude that I cannot make an order staying the proceedings pending the finalisation of the review application.

[40] I agree with the Chamber of Mines that the affidavit of AMCU in the review application consists of similar averments as in this matter, meaning that there are common features in the two cases. However, the question is whether the claims are the same. I have noted that in the review application AMCU is asking the reviewing court to review and set aside *inter alia* the extension of the same collective agreement to non- members of a registered trade union(s). Therefore, the reliefs sought are not the same, as in the amended statement of claim before me, in addition to a prayer for unfair discrimination,

[39] Section 39 of the 1996 Constitution.

is that each employee under category 4-8 be paid an amount of R12,500.00, and claiming further compensation in the amount of R50,000.00.

[41] I am mindful of the fact that the SCA in the matter of *Socratous v Grindstone Investments 134 (Pty) Ltd*[40] (10 March 2011), *Navsa* JA, writing for the court said:

> *"[13] It is necessary to consider the underlying principle of the defence of lis alibi pendens. In Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA) para 16 this court said the following:*
>
> *'The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally.'*
> "*This principle has been stated and repeated by the authorities over a period of more than a century.1*."

However, in the *Nestle* case, and *in casu*, the facts, the question of law and reliefs sought (raised in the amended statement of claim) are not the same. Based on all of the above,I, therefore, conclude that the special plea of *lis alibi pendens* has to fail.

[40] 2011 (6) SA 325 (SCA).

[42] In the circumstances, I make the following order:

Order:

1. The First and Third Respondents exceptions are not upheld.
2. The First Respondent's special plead is dismissed.
3. The First and Third Respondents are granted 30 days from the date of this order to deliver statements of response.
4. No order as to costs

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S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Chamber of Mines(First Respondent)	: Myburgh SC
Instructed by	:Edward Nathan Sonnenbergs Inc.
For UASA(Third Respondent)	:Adv M Sibanda
Instructed by	:Bester & Rhoodie Attorneys
For the AMCU(Applicant)	:Boda SC with assisted Adv Navsa
Instructed by	:Larry Dave Incorporated Attoneys