

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J 2285/99

In the matter between:

ST HELENA GOLD MINES LTD

First Applicant

ORYX MINE

Second Applicant

and

NATIONAL UNION OF MINEWORKERS AND OTHERS

Respondents

APPLICATION FOR LEAVE TO APPEAL

BASSON, J:

[1] This is an application for leave to appeal against my judgment in this matter delivered on 19 July 1999 in which the application for urgent relief was dismissed with no order as to costs.

[2] I believe that most of the contentions contained in the notice for leave to appeal are such that I am not persuaded that there is a reasonable prospect that another Court would come to a different conclusion than I did in my judgment.

[3] There is, however, one, and I believe significant, aspect that may lead another Court to come to a different conclusion and this concerns the factual dispute which appears at page 18 of the applicants' papers.

[4] A union (NUM) representative is namely alleged to have stated or demanded on 15 July 1999 when the strike commenced that a moratorium be placed on retrenchments for an indefinite

period of time. This allegation which is about the existence or not of a new casus belli for the strike was not denied but was answered in the following fashion by the respondents (in the answering affidavit):

"I attended the meeting referred to but I was not the union's spokesperson at the meeting. Director Matlala, union office bearer, was the union spokesman and may have well made the remarks incorrectly attributed to me" (my underlining).

[5] In regard to this factual dispute I was also alerted to the document handed up by the NUM at this meeting of 15 July 1999 (Annexure KH22 at page 259 of the papers to which I referred in my judgment) where it is proposed that the company (the second applicant) agree to suspend the retrenchments up until 31 December 1999, the date which has then, and I think significantly, been scratched out.

[6] I had taken the view in my judgment that this dispute of fact, namely:

"In view of the following I believe that the proposed strike action is intended to prevent retrenchments at the mine" (paragraph 21.1 of the applicants' founding affidavit - my underlining)

can be dealt with on the papers. I decided this dispute in favour of the respondents' version, that is, that the dispute giving rise to the strike was the dispute about the failure to conclude a retrenchment agreement (which dispute arose already in August 1998).

[7] I found in my judgment that the documents and the conflicting averments should be read in the context of what had happened already on 9 June 1999 when a strike about the same dispute was averted. I accordingly found that the meeting and document of 15 July 1999 (*supra*) amounted to no more than negotiations during or before the (continuance of) the strike in order to prevent the strike and that it did not give rise to a new casus belli for the strike. In other words, I found that the dispute which gave rise to

the strike (which was the dispute about the failure to reach agreement on the collective retrenchment agreement) remained the same throughout.

[8] Mr Kennedy on behalf of the applicants in the application for leave to appeal argued that the existence of a new casus belli was indeed alleged by the applicants (at paragraph 21.1 quoted above) and also referred me in this regard to the so-called replying affidavit of the applicants (by Mr Adan at page 2). Mr Adan stated that Mr Mantashe (of the NUM) at a previous meeting (which was not the meetings referred to in my judgment but a different meeting of the Gold Crisis Committee on 8 July 1999) had informed him that the dispute over the retrenchment package was, in fact, not a dispute over the package but an attempt to prevent the pending retrenchments as that this was the only way open to the NUM to act on the proposed retrenchments. However, I am of the view that no regard should be had to this affidavit as it was filed as a so-called replying affidavit in regard to factual allegations which had been made already on 8 July 1999, whereas these factual allegations were completely omitted from the founding affidavit signed on 16 July 1999. No application to condone the late filing of such supplementary affidavit was brought neither was the Court's indulgence sought in this regard.

[9] In any event, it may be noted that this document also shows that there is the said factual dispute about the alleged new casus belli for the strike on the papers (as borne out by paragraph 21.1 of the founding affidavit, quoted above). It therefore appears to take the matter no further.

[10] Mr Kennedy further contended that another Court might reasonably come to a different conclusion and accede to Mr Le Roux's request during argument on 19 July 1999 to refer this specific factual dispute about the existence of a new casus belli to oral evidence and that I should not have followed the so-called robust approach in weighing the probabilities in regard to this dispute in terms of the documents and the versions available to me on the papers.

[11] I believe that there is a possibility, albeit a small possibility, but nevertheless a

reasonable prospect, that another Court might hold a different view on this issue. For this reason I am inclined to grant the application for leave to appeal.

[12] It would, in my view, not be correct to limit the Labour Appeal Court to decide the appeal on this narrow basis alone as this is an important matter which has to be dealt with not seriatim but as a whole.

[13] In the event, I grant leave to appeal against the whole of my judgment. Costs are to be costs in the appeal.

BASSON J

Judge of the Labour Court of South Africa

ON BEHALF OF APPLICANT : ADV P KENNEDY

Instructed by :

ON BEHALF OF RESPONDENT : MR P MASEREMULE

Instructed by :

DATE OF JUDGMENT : 22 JULY 1999