IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO J1143/99

In the matter between:

ANGLOGOLD HEALTH SERVICE (PTY) LTD Applicant

and

THE NATIONAL UNION OF MINEWORKERS First Respondent

THE PERSONS LISTED ON ANNEXURE "A" Second to Further Respondents

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JUDGMENT

JAMMY AJ

1. The Applicant in this matter, a company providing medical services to employees on various mines belonging to its holding company, Anglogold Limited, at hospitals on or near such mines, seeks from this Court a Declaratory Order as provided for in Section 158(1)(a) of the Labour Relations Act 1995 as amended ("the Act").

2. The Second and further Respondents, all of whom are members of the First Respondent, are employed as ward assistants at one such hospital, - The West Vaal Hospital ("the hospital") with a job grading of A3.

3. Their job description, filed as an annexure to the Respondents' Answering

Affidavit, includes as part of their general duties, the "taking" of *emergency* specimens and the "fetching" of *urgent* results from the laboratory (my emphasis).

4. Until 31 July 1998, the South African Institute for Medical Research maintained a laboratory at the hospital which however, was closed at that time due to financial constraints. Prior to such closure, its own laboratory assistants collected and delivered *routine* medical samples from the various hospital wards (my emphasis). As a consequence of the closure of the laboratory, the individual Respondents were requested to collect and deliver the routine samples which were previously the province of the Institute's assistants, pending the assumption of duty of a laboratory assistant, Grade B1 (two grades higher), who was to be transferred from another hospital and whose duties would specifically include the collection, receipt and despatch of medical samples.

5. Following the advent of that assistant however, the individual Respondents found themselves required to continue with the collection and delivery of routine medical samples. They declined to do so on the basis that this was the designated duty of the new, significantly more highly paid, laboratory assistant and that this requirement constituted a unilateral change to their conditions of employment. They continued however to perform that duty in relation to emergency samples.

6. When subsequent meetings between the Applicant and representatives of the First Respondent failed to resolve the issue, the Applicant, on or about 30 October 1998, served disciplinary enquiry notices on certain of the individual Respondents, in which they were charged with "refusing to obey an instruction." The disciplinary hearings were scheduled for 2 and 3 November 1998.

7. On or about 3 November, the First Respondent referred the dispute to the Commission for Conciliation Mediation and Arbitration ("the CCMA"), alleging a

unilateral and unfair change of conditions of employment and by agreement, the disciplinary hearings were suspended pending the statutory conciliation meeting which would follow.

8. A conciliation meeting convened by the CCMA on 4 January 1999 failed to resolve the dispute and a certificate in terms of Section 135 of the Act was issued to that effect on 24 January 1999.

9. On 7 June 1999, the Applicant launched this application. The order which it seeks is one -

Declaring that the collection and delivery of routine medical samples by the Second to further Respondents does not constitute a unilateral change to their terms and conditions of employment as contemplated in Section 64(4) of the Labour Relations Act 1995.

10. The application is based on the following submissions:

The deadlocked dispute, being one concerning a matter of mutual interest as contemplated by Section 134 of the Labour Relations Act, is not susceptible to arbitration under the auspices of the CCMA.

If therefore the Respondents are correct that, in the circumstances referred to, they are being subjected to a unilateral change to their terms and conditions of employment, they are in a position to embark upon protected industrial action in terms of Section 64 of the Act. Conversely, if the instruction in question does not constitute a unilateral change to the conditions of their employment, any industrial action which they may implement would be unprotected and render them vulnerable to disciplinary consequences.

Threats of industrial action, which could include secondary strike activity by members of the First Respondent, have, it is alleged, been received by the Applicant from officials of the First Respondent if the demands of the individual Respondents and which it would seem relate to increased wages, are not met.

Any such industrial action will not only jeopardise the health and safety of patients of the Applicant, but will cause severe financial losses to the affected gold mines, with a direct negative impact on the gold mining industry as a whole.

Having regard therefore, the Applicant submits -

"..... to the potential for labour unrest as well as the threat to the lives and safety of the Applicant's patients should the individual Respondents embark upon industrial action, it would be in the interests of all parties should the above Honourable Court make a declaratory order in this matter."

11. The Labour Court's power to make such an order is prescribed by Section 158(1)(a)(iv) of the Act. It is a power concomitant with that of the High Court in terms of Section 19(1)(a)(iii) of the Supreme Court Act 1959 as amended. Mr Cassim, who appeared for the Applicant in this matter, submitted however that, having regard to the broad objectives of the Labour Relations Act, the factors which, in an appropriate case, will influence the discretion of this Court to grant or refuse such an order, may well be different from those which would have relevance in the High Court and that in that context, this Court might well be disposed to granting a declaratory order in circumstances in which the High Court might not do so. The Act, he suggested, is innovative and interventionist legislation which, in its broad context, has the effect of telling the employer how to conduct its business in the interests of workplace democracy. As such, in its dispute resolution procedures and its regulation of industrial action and retrenchment, it has wide social ramifications.

12. It is in that context, it was submitted, that the order sought in this application and which, if granted, would have the presumed effect of precluding threatened strike and secondary strike action, of obviating the necessity for the continued pursuit of the disciplinary action initiated against certain individuals and of avoiding the necessity of a possible consequent retrenchment exercise, is both justified and appropriate.

13. The prerequisites for protected strike action are defined in Section 64 of the Act. Section 189 regulates the termination of employment by an employer for operational reasons. The circumstances in which dismissals will be deemed to be unfair are defined in Chapter 8. The Act as a whole is the product of intensive consultation and negotiation and it is to be presumed that in formulating its objectives and provisions, its drafters were alive to its social significance and ramifications, as referred to by Mr Cassim. The rights and obligations of parties to an employment relationship are unambiguously prescribed by the legislation and there is no basis, in my view, for this Court to attribute to it any wider social significance or intention than that which is self-evident from its language. That is not the function of this or any other Court. Courts exist to interpret and apply the law as it stands and, in a proper case, to define the rights and obligations of parties that flow therefrom.

14. This Application, in my opinion, is misconceived in a number of respects. The Applicant seeks an order which, if granted, will effectively preclude what it contends, if the alleged threats by the First Respondent are implemented, will be unlawful industrial action. The fact that that alleged threat is disputed by the Respondents is in itself a compromising factor as far as the Applicant is concerned. An application on motion for a declarator, is inappropriate in the face of a *bona fide* dispute of fact. See **Hattingh v Ngake 1966(1) SA 64(0).**

15. The right to the Applicant to take appropriate action to prevent or abort an unprotected strike, will come into existence if and when that strike occurs and will presumably be exercised in the form of interdict proceedings, more particularly if, as the Applicant alleges, such unlawful action would constitute "a threat to the lives and safety of the Applicant's patients." **Ref Founding Affidavit: Paragraph 26.** The point in issue however is whether or not, if there is a strike - and there is no certainty that this will be the case - a valid basis will exist in law to support it. That is the essence of the dispute between the parties and in that context, -

"Courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions however important." Per **Innes C J in Geldenhuys and Neethling v Beuthin 1918 AD 426 at 441.**

A declaratory order will not be granted if the right in respect of which the order is sought does not yet exist. **See: Ross & another v Silberman and others 1963(2) SA 296.** Save by way of interdict proceedings where appropriate, the Applicant is not entitled to

anticipatory relief, more particularly in the present case where other immediate courses of action are open to it. No valid reason has been suggested as to why it should not proceed with the disciplinary action which it has already initiated or why, in the restructured circumstances arising from the closure of the SAIMR laboratory, it should not embark upon a retrenchment programme if this is now indicated. It seems to me that what the Applicant is seeking to obtain from this Court is not a declarator, but legal advice. That, once again, is not the function of this Court or any other.

16. Applicant's Counsel, in their Heads of Argument, request that this matter be referred to oral evidence. Such reference would, in my view, and in the light of what is set out above, serve no purpose. Whatever facts might emerge therefrom would have no bearing on the material flaws in the Applicant's case and that request is therefore refused.

17. In the result, the application is dismissed with costs.

B M JAMMY AJ

25 October 1999

For Applicant:

ADV N A CASSIM SC
with him:
ADV M J VAN AS
For Respondent:
ATTORNEY P MASERUMULE