

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG**

**Case Number:**

**J2399/99**

In the matter between

**DE BEERS CONSOLIDATED MINES LTD**

Applicant

and

**THE COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

First Respondent

**ADVOCATE C H BOTHA**

Second Respondent

**NATIONAL UNION OF MINeworkERS**

Third Respondent

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**JUDGMENT**

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**PILLAY AJ**

1. This is a review in terms of Section 158(1)(g) of the Labour Relations Act of 1995 {"the Act"} against the decision of the Second Respondent, a commissioner of the CCMA, to issue a Certificate of Outcome of Dispute referred to Conciliation, Form 7.12, which certified that the dispute between the Applicant and the Third Respondent concerning "*matters of mutual interest*" remained unresolved. On the same form he indicated that the dispute should be referred to "strike/lockout"
2. In the Outcome Report the Second Respondent went on to add:-  
  
*"Being a matter of mutual interest the next step for the parties would be to take industrial action."*
3. The referral to Conciliation from the Third Respondent described the dispute as :-

*"The respondents unilateral implimentation (sic) of Contractors Gray Security contrary to the substantive agreement clause 16.5 of 1995 (attached), Gray Security was contracted on the 26 January (sic) 1999."*

4. The Applicant contended that the dispute referred to the CCMA was clearly about the interpretation and application of a collective agreement and not a matter of mutual interest.
5. Counsel for the Applicant submitted the disputes about matters of mutual interest and the interpretation and application of collective agreements followed mutually exclusive dispute procedures. The former could be resolved through industrial action whereas the latter had to be arbitrated. He subsequently accepted that the dispute procedures were not necessarily mutually exclusive. However, he maintained that the characterisation of a dispute as one of mutual interest was so wide as to be uninformative about what the dispute was other than that it was one concerning employment.
6. Counsel for the Applicant submitted further that by characterising the dispute as one of mutual interest and stating in the Outcome Report that the next step for the parties would be to take industrial action, the Second Respondent failed to distinguish between disputes about the interpretation and application of agreements and those concerning matters of mutual interest. This was a material error of law, which was reviewable. (*Johannesburg Stock Exchange and Another 1988 (3) SA 132 (A) at p152 A-E; Hira and Another v Booyesen and Another 1992 (4) SA 69 (AD) at p 85 A-B*)
7. It was conceded by Counsel for the Third Respondent that the characterisation of the disputed was incorrect. However, he submitted that it was immaterial how a commissioner characterises a dispute as it has no juristic effect.
8. The powers of a commissioner when conciliating a dispute are prescribed in Section 135 of the LRA read with Regulation 8 of the General Administrative Regulations (Government Notice R1737 of 1 November 1996). The Regulations are authorised by section 208 of the LRA which permits that Minister to make regulations about "any matter". Form 7.12 requires a commissioner to certify what the dispute is about.

9. Counsel for the Third Respondent submitted that the regulations would be *ultra vires* if it required the commissioner to characterise the dispute as this was not authorised by section 135 of the LRA. This submission is, as a result of section 208, without foundation.
10. It is necessary to describe the dispute as it is a jurisdictional prerequisite for the next step in the procedural chain. If the dispute is resolved it would also be clear what dispute was resolved. Section 157(4) provides:-
- " (b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation." (my underlining)
11. The Form 7.12 should therefore specify what "that" dispute is. The submission by Counsel for the Third Respondent that Form 7.12 is without any effect is therefore rejected.
12. Usually, the description of the dispute can be extracted from the Referral to Conciliation Form 7.11. If it is clear and consistent with the submissions made during conciliation then the Form 7.12 should reflect the dispute substantially as described in Form 7.11.
13. However, if the description of the dispute in form 7.11 is vague, ambiguous, unclear or inconsistent with the submissions made during conciliation, and the commissioner decides to characterise the dispute differently on Form 7.12, s/he must do so with great caution.
14. A commissioner should therefore attempt first to secure an agreement between the parties on what the dispute is about and to record such agreement. If there is no agreement then the commissioner should get clarity from the party referring the dispute. The commissioner should be slow to substitute his or her own understanding of what the dispute is about for the parties' understanding. These steps are not prescribed but may assist the commissioner to characterise the dispute correctly.
15. Ultimately however, the responsibility for Form 7.12 rests with the commissioner who must ensure that the dispute is correctly characterised. When completing and issuing Form 7.12, a commissioner performs administrative functions which are reviewable in terms of Section 158(1) (g). (*Carephone (Pty) Ltd v Marcus No & Others 1998 19 ILJ 1425 LAC*). The commissioner must

ensure that the dispute is characterised correctly.

16. The term "matters of mutual interest" is not defined in the Act. It must therefore be interpreted literally to mean any issue concerning employment. It has been given a wide interpretation. (*Rand Tyres and Accessories v Industrial Council for the Motor Industry (Transvaal) 1941 TPD 108; The Labour Relations Act of 1995, DuToit, Woolfrey, Murphy, Godfrey, Bosch and Christie., Second Edition Butterworths 1998 at p198*)
17. The term would include disputes of right as well as of interest. It follows that some disputes about matters of mutual interest may be referred to arbitration or to the Labour Court whilst others may be resolved through industrial action. This view is fortified by reference to Section 51(1) and (3)(iv) of the Act which contemplates that a council may arbitrate a dispute about a matter of mutual interest if the Act requires arbitration.
18. Not every dispute about a matter of mutual interest need be resolved through industrial action. On the other hand, however, industrial action must be about a matter of mutual interest. This follows from the definition of "strike" which provides:-
- " 'strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory;"**
19. To characterise a dispute as a matter of mutual interest in a Form 7.12 is ineffectual. It means no more than saying that it is a labour dispute which would be obvious.
20. It is common cause that the Second Respondent characterised the dispute incorrectly. The issue to be decided is whether the characterisation of the dispute had any juristic effect and whether the Second Respondent had any obligation to characterise the dispute. Both questions must be answered affirmatively.
21. With regard to costs, I take into account that the parties have an ongoing relationship with each

other. The matter traversed a relatively untested area of law. Neither party persisted vigorously for costs to follow the result. I accordingly make no order as to costs.

22. In the circumstances I make the following order:-

- a) The decision of the First Respondent is reviewed and set aside.
- b) The Certificate of Outcome of Dispute referred to Conciliation (Form 7.12) is hereby amended by the substitution for the words "matters of mutual interest (contracting out of services) of the words "a dispute about the interpretation and application of a collective agreement".
- c) There is no order as to costs.

**D PILLAY A J**

Acting Judge of the Labour Court

DATE OF HEARING: 25 February 2000

DATE OF JUDGMENT: 29 February 2000

For the Applicant: Adv C Watt-Pringle

Instructed by: Perrot, van Niekerk and Woodhouse Inc

For the Respondent: Adv T Bruinders

Instructed by: Nomali Tshabalala Attorneys