IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J2397/02

In the matter between:

RUSTENBURG BASE METAL REFINERS
First Applicant

PRECIOUS METALS REFINERS
Second Applicant

and

THE NATIONAL UNION OF MINE
First Respondent

THE NATIONAL UNION OF METAL
Second Respondent

THE COMMISSION FOR CONCILIATION
Third Respondent

REASONS FOR J U D G M E N T

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1 In this judgment I shall refer to the Applicants as "*the Employers*" and the First and Second Respondents severally as "*the Unions*". The Employers launched an urgent application which came before the Labour Court on 26 June 2002. On 27 June I dismissed the application with costs. The reasons for that order are furnished herewith.

2 The material relief sought by the Employers was as follows:

"*2 Declaring that the First and Second Respondents are in breach of Clause 5.2.8 of the Employer Relations Policy Agreement (ERPA) entered into between the Applicants on the one part and the First and Second Respondents (and other Unions and associations) on the other part, during March 2002 in referring a dispute concerning the implementation of the Platinum Health as a medical aid for the Applicants' employees and who are members of the First and Second Respondents (the dispute).*

3 Interdicting the First and Second Respondents from continuing to process the conciliation of the dispute in terms of Section 134 or any other provision of the Labour Relations Act 66 of 1995 as amended, in the CCMA.

4 Directing the Third Respondent not to conciliate or take any further steps in relation to the disputes having been referred to it by the First Respondent under reference number NW 3021/02 and the Second Respondent under reference number NW 3043/02."

3 When this application come before me, at the instance of the Unions, the papers in related litigation, between the Employers and the Unions in case number J1697/02 was also placed before me. In that matter, Zilwa AJ on 2 May 2002 had given an order by default, in the following terms:

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3.1 Pending the final determination on an application to be launched by the Applicants for declaratory relief concerning the implementation of the health management organisation:

3.1.1 The Third Respondent (the CCMA) is interdicted and restrained from holding conciliation proceedings in relation to the referral submitted to it by the First Respondent under reference numbers NW 2150/02 and NW 1971/02 and by the Second Respondent under reference numbers NW 1892/02 and NW 2197/02;

3.1.2 The First and Second Respondents are interdicted and restrained from promoting, inciting and instigating their members to participate in any unlawful industrial action in relation to the implementation by the Applicants of the Health Management Organisation.

3.2 The Applicant shall launch a substantive application for declaratory relief concerning the implementation of the Health Management Organisation by no later than Monday 13 May 2002, failing which the orders in paragraph 1 above shall forthwith lapse and give no force and effect.

3.3 The costs of this application shall be reserved for determination by the

Court hearing the substantive application."

4 The Unions, in placing the matter before me on 26 June 2002 sought to oppose "*the granting of final relief*" in this related matter. The relevance of this order and the facts of this related matter appears from what follows.

5 The parties have been at loggerheads for a considerable time concerning an appropriate medical aid regime to apply to the relevant body of employees. Apart from the two applications already referred to, a third came before Francis J and is reported as Rustenburg Base Metal Refineries (Pty) Ltd v NUM and others (2002) 23 ILJ 935 (LC). That decision dealt with claims by the Employers of a managerial right pursuant to the contracts of employment to vary the identity of the provider of medical aid for the workers who were members of the unions. In addition to these encounters there have been other jousts that have occupied the attention of both parties and this Court.

6 Because of the view I take of the matter, it is not necessary to burden this judgment with details of the opinions of the Employers and of the Unions concerning the various ideas and proposals which have formed the subject matter of the debate concerning an appropriate medical aid regime for the body of employees.

7 The Employers, in their founding affidavit set out the basis of their complaint about the conduct of the Unions, which led up to the relief being sought as set out above. The gravamen of the complaint is that the Unions are unwilling to engage constructively in any process of interaction in order to resolve the controversy over the medical aid regime, and are intent on moving towards the point where they will be able to embark on a protected strike. It is said that there is an intention to launch a strike as early as they can after a meeting scheduled for 4 July 2002. Extensive discussions have already occurred which produced little progress in the direction of a resolution, whereupon, on 28 May 2002, the unions referred a dispute in the prescribed form to the CCMA in the following terms:

1 "*The employer changed or seeks to change employees from their current medical aid schemes to Platinum Health, a Health Management Organisation.*"

8 It is averred by the Employers that the subject matter of these referrals is indistinguishable from the subject matter of the referrals which were interdicted by Zilwa AJ in the case mentioned above. At the time of the order by Zilwa AJ, the Unions undertook to withdraw all the referrals which were mentioned in the order of Zilwa AJ, and did so. It is averred that the conduct of the Unions in referring the same subject matter, albeit in different referrals, constitutes bad faith and is in violation of the order of Zilwa AJ.

9 Moreover, it is said, the Unions and the Employers had during March 2002

concluded the Employee Relations Policy Agreement (the ERPA). Clause 5.2.8 of the ERPA, in particular, requires the signatories "*in the event of a dispute arising out the provisions of this agreement, including interpretation and application"* to refer the dispute to a domestic dispute resolution forum styled "*the Partnership Forum*". Clause 5.2.10 provides that only when the parties in dispute "*are unable to reach agreement on a process and terms of reference to resolve the dispute they may exercise their rights in terms of the Labour Relations Act.*" Having regard to those reciprocal obligations, the Employers contend that the Unions are in breach of their undertakings in terms of the ERPA. In paragraph 72 of the founding affidavit the statement is made:

"*The referrals are unlawful in that they are made in breach of the ERPA. This conduct by the* (Unions) *undermines the institution of collective bargaining. Clearly they must refer the dispute and ventilate the dispute in terms of the agreed procedures set out in Clause 5.2.8 of the ERPA.*"

Further in paragraphs 74 and 75 of the founding affidavit it is stated that:

" *... the categorisation of the referred disputes as disputes of mutual interest have been engineered by the Unions to circumvent the substantive application.* (This is a referral to the procedure which received the *imprimatur* of this court in the order of Zilwa AJ.) *The fact that these disputes are categorised as disputes of mutual interest, does not differentiate these referrals from the previous referrals as it relates to the same matter (implementation of Platinum Health) and more*

importantly 'matters of mutual interest' is still a basis for the Unions to commence with industrial action.

... The dispute referrals by the Unions is in exceptional bad faith. The Unions placed the medical aid issue as a demand in the wage negotiation process and are therefore precluded from proceeding with these referrals until the central collective bargaining forum has officially reached deadlock on this issue and the dispute procedure as set out in terms of Section 5.2.8 of the ERPA has been exhausted."

10 The essence of the controversy is plain: the Employers' perspective is that the Unions should confine the action which they take in pursuing their point of view on the question of the medical aid regime to that prescribed in the domestic dispute resolution procedures until such procedures are exhausted, and only then invoke their "*rights under the Labour Relations Act,*" which is another way of saying that they may then take the necessary steps which are imposed on them by the Labour Relations Act in order to conduct a protected strike. The nature of the relief sought therefore is a classic example of an order for specific performance, in this case, of the Unions' alleged obligations under the ERPA.

11 The answer filed on behalf of the Unions asserts that the refusal of the Unions to ventilate this particular dispute in the partnership forum set up under the provisions of the ERPA does not constitute any violation on their part of their

obligations under that agreement. This argument rests on an interpretation of the provisions of the ERPA which, in contrast to the view adopted by the Employers, would have it that the nature of the dispute in question is not one which the Unions are obliged to subject to that particular avenue of dispute resolution. Axiomatically, in order to decide the question of breach, it will be necessary to determine the proper interpretation of the agreement and assess the scope within which it can be implemented in respect of the controversy in issue.

12 Independently of that counter to the case set up by the Employers, is the unions' further contention that, as a matter of law, the Unions are not obliged to submit a dispute to a domestic dispute resolution procedure and exhaust that procedure, prior to being entitled in law to call for and conduct a protected strike, and may if they choose, follow the route prescribed by section 64 of the LRA. This contention is indubitably correct and rests on the authority of the Labour Appeal Court in **County Fair Foods (Pty) Limited v FAWU and Others (2001) 22 ILJ 110 (LAC)**. The fundamental question which was addressed in that matter, and which is in point on the issues debated in this matter, is what prerequisites the Unions must satisfy to facilitate an opportunity to embark on a protected strike. At **p 1108 G - I** Zondo JP stated as follows:

1 "*What the legislature has sought to achieve is to give parties a choice of either following a pre-strike dispute procedure contained in the collective agreement or following the statutory procedure in Section 64(1). Compliance*

with either procedure suffices to confer on employees the right to strike and the resultant strike acquires the status of a protected strike with all the benefits and consequences which flow from such status. I have considered the question whether there could be any basis on which, applying purpose of interpretation, it could be said that a strike which has been resorted to without prior compliance with the procedure in a collective agreement, but has complied with the procedure of Section 64(1) of the Act can nevertheless said not to be a protected strike. I do not think that that can be said without the court unjustifiable usurping the legislature's legislative function. In those circumstances I conclude that this point must also fail."

13 If is it correct that the Unions are entitled to chose to either ventilate a dispute in the domestic dispute resolution forum or ventilate it in the CCMA, and either one of the two routes confers a licence to embark on protected industrial action, it follows that there must be grave limits to the scope for any relief in the nature of an order of specific performance, the effect of which is to direct the conciliation of a dispute to a domestic dispute resolution forum in preference to allowing it to be dealt with by the CCMA.

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14 In their argument, the Employers rely expressly on section 23 of the LRA. Section 23 unequivocally establishes the status of a collective agreement, of which the ERPA is an example, to be that of a binding agreement, enforceable at law. A

collective agreement, enjoying that status, therefore is susceptible to an application to have it specifically enforced. However, Section 24 of the LRA regulates disputes about collective agreements. It provides as follows:

"*1* *Every collective agreement excluding an agency shop agreement concluded in terms of Section 25 of a closed shop agreement concluded in terms of Section 26 or a settlement agreement contemplated in either Section 142 A or 158 (1) (c) must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and if the dispute remains unresolved to resolve it through arbitration.*

2 *If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the commission if:*

(a) *the collective agreement does not provide for a procedure as required by sub-section 1;*

(b) *the procedure provided for in the collective agreement is not operative; or*

(c) *any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.*"

15 On the facts set out in the founding affidavit it is plain that the gravamen of the controversy is the interpretation and implementation of the agreement and, more particularly, Section 24(2)(c) must govern the complaint articulated by the Employers about the conduct of the Unions. These issues are in terms of section

24(5) to be resolved by arbitration. That being so, it follows that the Labour Court is not a forum clothed by the LRA with the requisite jurisdiction to determine the proper interpretation of the ERPA nor whether or not the Unions are in violation of its provisions, and, supposing that they are in breach, to order specific performance of any obligations which flow from the ERPA.

16 It is plain therefore in my judgment that the Labour Court lacks the jurisdiction to entertain the relief which is set out in prayer 2 of the employer's notice of motion.

17 It was argued that in the event that the Employers were not entitled to invoke the ERPA as a foundation for the relief sought in their notice of motion, and that prayer 2 was to be refused, it was nevertheless appropriate to consider granting the relief set out in prayers 3 and 4, as set out above, on the basis that the Unions were in contempt of the order of Zilwa AJ.

18 The factual foundation for that contention is that the two referrals which are sought to be interdicted from being entertained by the CCMA are in respect of subject matter which is for all practical purposes identical to the referrals which were interdicted by Zilwa AJ from being referred by the Unions to the CCMA. The Unions dispute that the referrals which have been identified in the notice of motion are indeed identical to those which were interdicted by Zilwa AJ. The argument is advanced on their behalf that the referrals which were dealt with by

the order of Zilwa AJ dealt with complaints concerning an alleged unilateral variation of terms and conditions of employment whereas the referrals which are identified in the notice of motion relate purely to a dispute of interest as whether or not one or other possible innovation might or might not be introduced to provide for the medical health requirements of the employees. This distinction is not disputed by the Employers; rather, it is contended that the distinction is inconsequential.

19 In my view, to resort to an assessment of whether or not the same "*subject matter*" is addressed in the two sets of referrals is to pose the wrong question. The appropriate focus should be on the demands or outcomes which are sought in the referrals. The reason for preferring that as the test rather than the former is that it is plainly evident, in my view, that there can be several distinct disputes which relate to the same subject matter and no sound reason in logic or in policy has been advanced to me why those distinctions ought not to be maintained. What is interdicted is the ventilation of disputes not topics, and what constitutes a dispute in this context is the point of controversy not the theme or subject matter. In applying the preferred approach to these circumstances, I am by no means convinced that the various referrals are identical or that, on the basis of the test I have postulated, there is on the facts any violation of the order contemplated by Zilwa AJ. To the extent that it is conceivable that a party might manipulate the process to circumvent a prohibition in an order of this Court, it is not apparent to

me that such an abuse has occurred on these facts. Indeed, the success of the unions in the case in which Francis J gave judgment demonstrates that the point of controversy has shifted away from the scope of the workers prevailing terms and conditions of employment to an interest dispute in respect of the introduction of innovations at the instance of the Employers.

20 Independently of those considerations, it is appropriate that I express my disquiet about the very principle that this Court is vested with jurisdiction to interdict the CCMA from receiving a referral of a dispute of whatever nature, for the purposes of conciliation. It is plain that this is precisely what the order of Zilwa AJ is intended to achieve. That order was granted by him in the absence of opposition, and ostensibly in the absence of argument on the propriety of the substance of the relief upon which he placed his *imprimatur.* It seems to me to be contrary to sound industrial relations practice, and moreover, to be a dangerously radical policy choice to inhibit, through judicial means, the referral of any industrial relations dispute to the CCMA for conciliation. In the arguments ventilated before me, the propriety of such relief was not motivated. I am inclined to take the view that it is a wholly inappropriate remedy, and even if within the four corners of the Labour Relations Act, some support could be found for the power of the Labour Court to do so, it would be a power that should be so sparingly exercised that the most exceptional circumstances ought to be present before it should be contemplated. No basis for such jurisdiction to exist in terms of the LRA, nor for

such exceptional circumstances to exist in this case, have been drawn to my attention.

21 I alluded earlier in these reasons to the solicitation on behalf of the Unions to "*discharge*" the order granted by Zilwa AJ. I refused that application because it seems to me, on the face of it, that the order constitutes final relief. There is a resolutive condition contained in paragraph 2 that the force of the order shall lapse if an event, namely the application for declaratory relief, is not launched by a particular date. No case is advanced to me to declare the order to be ineffective on those grounds. I do not understand the tenor of the order to be such that it is of an interim nature, even though it is intended to govern a period which will expire upon an identifiable and certain event, namely the conclusion of the proceedings in the application for declaratory relief. The relief to my mind is not susceptible to being undone, even if as submitted , the withdrawal of the referrals interdicted by the order renders the order academic. I am minded not to usurp the function of a Court of Appeal by setting aside the order of Zilwa AJ through the back door by declaring it ineffective. If proper grounds exist for setting it aside, that relief should be pursued, together with any applications for condonation that might be appropriate for having brought proceedings late, in a direct challenge to the propriety of the order.

22 For these reasons, I concluded that the orders made on 27June 2002 were

appropriate.

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ROLAND SUTHERLAND
ACTING JUDGE OF THE
LABOUR COURT OF
SOUTH AFRICA
24 July 2002

DATE OF HEARING: 26 June 2002

DATE OF JUDGMENT: 27 June 2002

For the Applicant: Adv. Cassim SC. and Advocate Hutton instructed by Leppan Beech Attorneys.

For the Respondent: Adv. H. van der Riet SC. instructed by Cheadle Thompson & Haysom Inc.