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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

BRAAMFONTEIN CASE NO: J440/98

2002-01-29

In the matter between

UNITED PEOPLE'S UNION OF SOUTH AFRICA Applicant

and

EVANDER GOLD MINE Respondent

J U D G M E N T

REVELAS J:

1. The applicant, the United People's Union of South Africa, referred a dispute to this court about the dismissal of some 262 employees for operational requirements in October 1997.

1. 1. 2. At the time of the hearing of the matter the applicant indicated that it wanted to proceed only in respect of 84 employees who were listed in the document

which was handed to the respondent's advocate and to the court. It is common cause that at the time of the retrenchment which affected some 5,278 employees across three of the respondent's mines, the recognised trade union at the respondent, now known as Harmony Gold Mines, was the National Union of Mine Workers, with whom the respondent consulted widely. Negotiations with NUM resulted in the conclusion of an agreement on the retrenchment of NUM's members. Clause 14 of the agreement provides that:

"**The parties agree that the terms and conditions of this agreement shall constitute full and final settlement of the retrenchment concluded at EGM**."

EGM refers to Evander Goldmine.

3. The applicant's case is that its not party to the agreement and that the employees in this matter, whom the applicant had represented all along,(according to it), were members of UPUSA and not the National Union of Mine Workers as early as 1996 and consequently no consultation took place as envisaged by Section 189 of the Labour Relations Act 66 of 1995.

4. The respondent's case is *inter alia* that although it consulted with the applicant in respect of the employees affected by the retrenchments at its Kinross

mine, it did not consult with the applicant in respect of employees at its Winkelhaak mine who where retrenched between 8 and 14 October as the applicant had not established any membership at that mine.

1. 5. On 1997 the applicant referred a dispute about the alleged unfair dismissal of 213 employees apparently from the Winkelhaak mine to the Commission for Conciliation Mediation and Arbitration, ("the CCMA"). In 1997 it referred a second dispute which appears to be the same dispute but this time with a more extensive list of employees. The two referrals were combined and the dispute which was essentially the same one, was conciliated by Commissioner Shongwe, the commissioner appointed by the CCMA.

6. The respondent raised certain preliminary points before the Commission. It contended that of the 262 employees who appear on both lists referred to in the referrals, 217 of them were members of the National Union of Mine Workers ("NUM") and bound by the retrenchment agreement referred to above and consequently could not proceed with the referral before the CCMA. The respondent also challenged the applicant's mandate to represent the employees in the absence of stop order facilities and the employees not being signatories to the referrals.

7. On 22 January 1997 Commissioner Shongwe found that the

217 NUM members as identified by the respondent in the list, were excluded from conciliation and the conciliation should only continue with the remaining 45 employees clearly identified as non-union members in 'the list supplied by the company.' The respondent also provided the court with that list which is found in bundle A of the pleadings. Mr Luthuli who is the spokesperson for the applicant contends that this list is a fabrication.

1. 8. On Monday 28 January 2002, some four years after the ruling of Commissioner Shongwe, the applicant served an application for the review of the ruling referred to above. While the ruling stands, the referral is invalid in respect of 217 employees.

9. Mr Luthuli does not seek a postponement pending the review application. Mr Luthuli asserted that the late filing of the application for review must be condoned because the ruling came to the attention of the union only on 25 January 2002, in other words, last week.

10. There is also an attempt to bolster this explanation by some confirmatory affidavits which in my view just serves to underline the lengths to which the applicant would go in this matter to deceive the court and undermine the respondent.

11. Even though it is patently clear that the employees

were represented by UPUSA officials during the proceedings before Commissioner Shongwe, and the application for review is brought on the basis that someone of the applicant was present there, Mr Luthuli at one stage during argument suggested that the proceedings never took place and argued that Commissioner Shongwe should be called upon to give evidence in this regard. Here is another example of how Mr Luthuli, in an attempt to impress his clients (all sitting in the back of the court), would make scurrilous allegations by placing into question the integrity of persons for no reason, and all to serve the applicant's own purposes.

1. 12. At page 264 to 265 of bundle "B" of the record there is a written notice of objection to Commissioner Shongwe's ruling purportedly signed by Mr Luthuli, who denies emphatically that he ever signed it. However, this document was clearly served by UPUSA. It was sent on 28 January 1998. There is also a response to the notice, by the respondent dated 29 January 1998 at page 266 to 268 of Bundle B.

13. Subsequent correspondence confirms that the applicant, and particularly Mr Luthuli, was well appraised of Commisioner Shongwe's ruling and the respondent's concern about applicants persistence in continuing with

the case in respect of 217 NUM members. Mr Luthuli held forth that any such letters were fabrications. He even went as far as to suggest that copies of letters signed by him were written by a person not from the applicant, on UPUSA letterheads stolen by someone. Clearly the innuendo was that it was someone from the respondent who had allegedly conducted themselves in this way.

14. The explanation proffered by the applicant for the late filing of the review applicant is rejected as false. It is an attempt to mislead the court. The degree of lateness is inordinate, it is four years. The prospects of success are nil and the application is *mala fide*. Consequently the application for review is dismissed and Commissioner Shongwe's ruling is upheld.

1. 15. In the matter of ***Metal Workers of South Africa & Others v Driveline Technologies (Pty) Ltd & Another*** **(2000) 21 ILJ 142**, the Labour Appeal Court per Zondo AJP (as he then was), held that Section 191(5) of the Labour Relations Act:

"imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication." (at paragraph 73).

16. In the present case the dismissal dispute has been referred for conciliation and a certificate of outcome was issued. The Labour Court has jurisdiction to adjudicate the dispute as long as the certificate of outcome has not been set aside on review. (See: ***Fidelity Guards Holdings (Pty) Ltd v Epstein N.O. and Others (2000) 21 ILJ 238 (LAC)*** at par. 11 per Zondo JP. This has not been done and the application for review has been dismissed.

17. Commissioner Shongwe ruled that the collective agreement concluded with NUM was binding on its members. Effectively it is a jurisdictional bar to the 217 NUM members proceeding against the respondent. In the circumstances this matter can only proceed in respect of the 45 non-members as identified by Commissioner Shongwe in his ruling.

1. 18. The respondent has also drawn my attention to the fact that UPUSA attempted to withdraw from this matter and argued that on that basis, the matter should only proceed in respect of four of the employees, who are identified at this stage only by virtue of the affidavits they attached to the statement of case filed by the applicant. However, it is not certain at this stage what the union's position is and therefore the matter may proceed in respect of all 45,whoever they

may be. It has not been clearly demonstrated that any of them should be precluded. It may very well be that at a later stage, when they are identified, that they are also not on the list of 84 employees.

19. On 7 December 2001 the applicant filed a notice of amendment to amend the citation of the applicant on the basis that:

"UPUSA was wrongly cited at the beginning of the case and it is not a party to the application."

20. This is not a simple amendment under rule 22(4) of the Labour Court rules but an attempt to withdraw as a party. This is another example of the scant regard the applicant has to the court procedure. It is quite plain that the applicant saw a punitive cost order looming because of the manner in which it pursued its client's interests. This was becoming very evident in the correspondence of the respondent. The applicant attempted to escape those consequences with this notice of amendment. Such amendment is not granted.

21. The applicant acted on behalf of the employees before court all along. Repeated requests for their identity and other requests were ignored on the basis that it, the union, acted on their behalf. The union was a party to both referrals and the certificate of outcome

was issued in its name. It also filed the statement of claim and other documents.

22. The point *in limine* is therefore upheld against the applicant.

1. 23. The matter may proceed in respect of the 45 employees referred to in Commissioner Shongwe's ruling. The applicant's opposition to the point *in limine* was based on lies and false accusations levelled against innocent parties. Some of the individual employees perjured themselves on affidavit to support a *mala fide* case. I am however not certain to what extent they were induced to do so by the applicant who apparently has no scruples about the manner in which it litigates. One thing however is certain and that is that this matter warrants a punitive costs order against the applicant.

24. I therefore make the following order:

1. The application for the review of the ruling dated 22/01/1998 is dismissed.
2. The point *in limine* is upheld
3. The referral application in respect of the 217 NUM-members identified by Commissioner Shongwe, is dismissed.
4. The matter may proceed only in respect of the 45 employees identified by Commissioner Shongwe in his

ruling.

5. The Applicant (UPUSA) is to pay the Respondent's costs on a scale as between attorney and client.

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E. Revelas

of the applicant: Adv. A T Myburgh

Instructed by Deney Reitz Attorneys (Santon)

of the respondent: Mr. E. Luthuli of United Peoples' Union of South Africa