IN THE LABOUR COURT OF SOUTH AFRICA **REPORTABLE**

BRAAMFONTEIN CASE NO: JR1694/02

DATE HEARD: 18/11/2002

DATE DELIVERED: 19/11/02

In the matter between

NUM Applicant

and

COMMISSIONER T ORLEYN First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION Second Respondent

KLOOF GOLD MINING COMPANY LIMITED Third Respondent

J U D G M E N T

PILLAY D, J:

1. This application in terms of section 158(1)(g) of the Labour Relations Act No 66 of 1995 (the LRA) is brought urgently to review and set aside the ruling dated 4 October 2002 of the first respondent commissioner. The third respondent had objected to the commissioner conciliating the dispute on two grounds:

a. Firstly, the applicant's demand was allegedly unlawful in terms of the Mine Health and Safety Act, Act No 29 of 1996.

b. Secondly, the dispute fell to be adjudicated in terms of section 7 of the Basic Conditions of Employment Act, No 75 of 1997 (the BCEA).

2. On the first ground, the commissioner found as follow:

"I do not believe that the CCMA has jurisdiction to determine whether a 13 day closure constitutes an occurrence, practice or condition that would cause the inspector to provoke the conditions of section 54 and section 55 of the Mine Health and Safety Act" (*sic)*.

3. From this response it seems that she declined to determine the lawfulness of the demand, which would bring about a 13 day shut down of the mine.

4. On the second ground she found in favour of the third respondent. Her ruling that the second respondent, the CCMA, does not have jurisdiction to conciliate and facilitate the dispute, seems to be based on this finding.

URGENCY

5. The third respondent challenged the urgency of the matter. Mr Van As conceded on its behalf, however, that it was semi-urgent. But, he argued that the issue in dispute had become academic, as the applicant's members would not be able to work in the additional shifts before Christmas. Consequently, the third respondent had no legal obligation to meet the demand. The third respondent also objected to being put to the inconvenience of preparing for the application at short notice. The urgency, it submitted, was occasioned by the applicant’s own tardiness in launching this review.

6. In my view, the third respondent has had an opportunity to present its case fully. It has not sought a postponement to do so. In so far as the applicant may be found to have been inconsiderate, an appropriate order for costs may be made. However, whether the dispute is academic, must be determined after consideration of the argument as a whole. I will therefore return to the question of urgency and costs in due course.

THE APPLICANT'S SUBMISSIONS

7. Mr Jammy for the applicant argued that on a proper construction of sections 133, 134 and 135 of the LRA and the definition of the word "dispute", the CCMA had referred to it a dispute about a matter of mutual interest, which it had to conciliate as all the jurisdictional prerequisites therefor had been complied with. It denied that the lawfulness of the demand constituted a jurisdictional prerequisite.

THE THIRD RESPONDENT'S SUBMISSIONS

8. The third respondent submitted that it is implied in sections 134 and 135 that only a dispute in which the demand is lawful may

be conciliated. The conciliating commissioner would otherwise be persuading the employer to accede to something unlawful. Moreover, the commissioner ought to determine the lawfulness of the demand as a preliminary issue, otherwise it could result in a certificate of non-resolution being issued, followed by a strike or adjudication in support of an unlawful demand. The issue of the unlawfulness of a strike would therefore rear its head again, and third respondent would have to suffer the inconvenience of launching an interdict at that stage.

9. Mr Van As denied that the dispute was a matter of mutual interest. As it was about hours of work involving occupational health and safety issues, it was regulated by section 7 read with section 77 of the BCEA. The lawfulness of the demand therefore fell to be adjudicated by this court. He therefore urged me to determine this issue on the basis of the evidence before me. Alternatively, he asked that I remit the matter back to the commission for determination of this limited issue.

THE JURISDICTIONAL PREREQUISITE OR RECONCILIATION

10. Section 133 of the LRA compels conciliation in two situations:

a. If a dispute about a matter of mutual interest is referred to the CCMA in terms of section 134; and
b. If any other dispute is referred to it.

11. Disputes other than about matters of mutual interest may be referred in terms of section 135. A scrutiny of these provisions unveils the following jurisdictional prerequisites relevant to this matter:

a. There must be a referral of a dispute or an alleged dispute.
b. It must be a dispute or an alleged dispute about a matter of mutual interest.
c. If the provisions of sections 133(1)(a) and 133(4) are relied on, if it is a dispute about matters of mutual interest, the parties to it must be an employee or a trade union on the one side and an employer or an employers' organisation on the other side.

12. It is common cause that the last requirement has been satisfied.

MATTERS OF MUTUAL INTEREST

13. There is no collective agreement or other instrument that

confirms that the applicant's members are entitled to the 13 day shut down as a right. The third respondent's reliance on section 7 of the BCEA as support for its proposition that the dispute is one of right and not a matter of mutual interest, is misconceived. Section 7 merely imposes a duty on the third respondent to regulate working time according to certain criteria including any Act governing occupational health and safety. It does not specify what the working times should be. That is a matter for bargaining.

14. In the past the parties engaged each other on this issue and had in fact agreed on the working hours. This year they did not. Their demand for a 13 day shut down is not a right yet, but may become one through collective bargaining. As such, the dispute is a dispute about a matter of mutual interest. (*Sithole v Nogwaza NO and Others* 1999 20 ILJ 2710 LC. Wallis *Labour and Employment Law* at paragraph 46 footnote 12-13, Cameron *et al New Labour Relations Act* at page 96; Rycroft and Jordaan *A Guide to South African Labour Law* 2nd Ed 168 to 171; Grogan *Work Place Law* 6th Ed page 333.) It is also not artificially contrived as such.

15. The second jurisdictional prerequisite for conciliation has therefore been met.

THE DISPUTE

16. The word "dispute" is not defined in terms of the lawfulness of the demand. Its definition is broadened to include an alleged dispute. This means that conciliation can take place even though there is no dispute in fact.

17. In many disputes that are conciliated, one party may have a legal, valid claim whilst the other has no case. To require the lawfulness of the claim to be determined as a jurisdictional prerequisite for conciliation defeats the very purpose of that process and the objectives of the LRA. The purpose of conciliation is to provide an avenue for channelling industrial conflict into a process that proceeds in a relatively predictable manner towards resolution. It is, at the least, an opportunity to vent grievances and demands and thereby reduce frustrations and tensions in the work place.

18. The conciliation is conducted by commissioners who are

specially skilled in moving the parties towards consensus. To suggest, as the third respondent does, that conciliation would serve no purpose, firstly because the applicant was intractable and in transigent before conciliation, and secondly, because the commissioner cannot conciliate about an illegal demand, ignores the fundamental differences between negotiation and conciliation. Furthermore, it pre-empts that the outcome of conciliation would be to give effect to an illegality, either by the employer acceding to the demand, or the certificate of non resolution being issued and thereby leading to unlawful industrial action.

19. These outcomes are entirely speculative. Furthermore, they are not the only outcomes of conciliation. The mere allegation that the demand is illegal, would in all probability feed into the process and contribute to determining its outcome.

20. Conciliation in terms of the LRA is therefore conceived not only as a jurisdictional prelude to other forms of dispute resolution, but also as an end in itself. Having, as it does, a quintessential value in the design of dispute resolution in the LRA, it cannot be implied that the lawfulness of the demand is a

jurisdictional prerequisite for conciliation.

21. In my view, to impose such a prerequisite, would effectively amount to a limitation, which excludes access to an independent, impartial dispute resolution forum. Such a limitation is not only unreasonable and unjustifiable in terms of section 36 of the Constitution of the Republic of South Africa, Act No 108 of 1996, but also unnecessary. It is a restrictive interpretation that does not give effect to the values of a democratic society insofar as such values are manifest in one of the primary objectives of the LRA namely, to resolve disputes expeditiously. In fact, it runs counter to those objectives.

22. I accordingly find that all three jurisdictional prerequisites for conciliation have therefore been met.

23. If the lawfulness of the demand is a jurisdictional prerequisite for a protected strike-and I make no finding in this regard-that does not make it a requirement for conciliation.

THE LAWFULNESS OF THE DEMAND

24. At the proceedings before the commissioner, an official of the Department of Minerals and Energy led evidence that he would not condone a closure of 13 days for health and safety reasons, and that such a demand contravenes the Mine Health and Safety Act No. 29 of 1996.

25. Section 54 confers wide powers on inspectors to give instructions necessary to protect health and safety. Before issuing such instructions, the inspector must allow the employer and employee parties a reasonable opportunity to make representations. Section 54 and its enforcement in section 55 also prescribe a procedure for determining health and safety matters. It cannot be said, therefore, that the 13 day shut down is unlawful until the inspector has invoked that procedure and made a determination.

26. By testifying at the CCMA hearing that he would not condone the closure for 13 days does not make it unlawful. At this stage it is merely potentially unlawful. It is common cause that the lawfulness of the 13 day shut down has not been determined. However, my analysis above is necessary, because it may explain why the commissioner declined, correctly in my view,

not to decide the issue: That was a power vested in the inspector, not the commissioner. For the same reason I also do not have the power to determine the matter. Besides, that would require a substantive counter application by the third respondent.

27. As the lawfulness of the demand has not been determined, the argument that the dispute cannot be conciliated because the demand is unlawful, must fail.

28. The commissioner's ruling is therefore not reasonable and justifiable. It amounts to a gross irregularity and must be set aside.

29. Returning to the question of urgency, in view of the aforegoing analysis, the dispute is not academic. The shifts to make up for the Christmas shut down, if it is agreed, can be arranged for any time, even if it is after the shut down. The third respondent might have preferred that the time be worked in before the shut down. But, as that has not been possible, there is no reason why the applicant’s members cannot be contractually bound by a collective agreement to work in the

time after they return from the shut down.

30. With regard to costs, the matter raised novel points. The parties have an ongoing relationship and may continue to engage each other about the issues in this dispute. The applicant's conduct has not been unduly dilatory.

31. The review accordingly succeeds with each party paying its own costs.

32. The order I make is as follows:

a. The application for the amendment of the citation of the third respondent is granted.
b. I grant an order in terms of paragraphs 1, 2 and 3 of the notice of motion.
c. Each party is to pay its own costs.

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PILLAY D, J

APPEARANCES:

FOR APPLICANT: ADVOCATE PAUL JAMMY

INSTRUCTED BY: CHEADLE THOMPSON & HAYSOM INC.

FOR RESPONDENT: ADVOCATE VAN AAS

INSTRUCTED BY: LEPPAN BEECH ATTORNEYS