"Reportable"

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

CASE NO. J5193/00

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED
(RUSTENBURG ECTION) Applicant

and

S MONNAPULA & SIXTEEN OTHERS 1ST TO 17TH
Respondents

L L LEBELO 18TH
Respondents

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION 19TH
Respondents

JUDGEMENT

GAMBLE AJ

1. The 1st to 17th respondents (" the individual respondents") were dismissed from the employ of the applicant on 10 May 2000 after allegedly participating in unlawful industrial action. They were apparently part of group on 222 employees who were dismissed on that day.

2. The dismissal was referred to the 19th respondent ("the CCMA") on 17 May 2000 for conciliation. The prescribed referral document (form 7.11) was signed only by the 1st respondent. However, in the appropriate section of the form in which the relevant facts relating to the dispute are to be recorded the words "we" and "our" were used on a number of occasions.

3. Attached to the form 7.11 was a hand written document containing the names of the individual respondents (other than 1st respondent) and a company referral number in respect of each individual. The said annexure bears no signatures.

4. When the matter came before the 18th respondent ("the Commissioner") for conciliation on 27 July 2000, the applicant took a jurisdictional point in respect of the 2nd to 17th respondents contending that they had not properly referred their disputes to the CCMA, in particular because they had not signed any form(s) 7.11. It was also argued that 1st respondent lacked the *locus standi* to refer a dispute for and on behalf of the remaining individual respondents.

5. Having heard oral submissions on the points *in limine* on 27 July 2000 the

Commissioner gave an *ex tempore* ruling in favour of the individual respondents. The applicant was evidently not happy with this and requested the Commissioner to provide a written copy of the ruling (presumably with reasons) in order that it could consider its position (presumably the applicant was contemplating reviewing the Commissioner's ruling.) The Commissioner undertook to do so.

6. On 28 July 200 the applicant received from the Commissioner a certificate in terms of section 135(5) of the Labour Relations Act 66 of 1995 ("the LRA") in which it was recorded that the dispute remained unresolved as at 27 July 2000. On the strength of that certificate the individual respondents filed a request for arbitration (on the prescribed form 7.13) on 27 July 2000. This form was accompanied by a typed document setting out the names and company reference numbers of the second to seventeenth respondents together with their individual signatures.

7. The applicant now seeks to review and set aside:

7.1 the Commissioner's ruling that the 2nd to 17th respondents had properly referred their dispute to the CCMA;

7.2 the certificate of non-resolution of the dispute issued by the Commissioner in terms of section 135(5) on 27 July 2000.

8. In the founding affidavit filed in support of the review application the applicant makes the bald assertion that " the first respondent purported also to refer the dispute on behalf of sixteen other persons whose names appear on an annexure to the referral."

9. In his opposing affidavit 1st respondent stated the following:

" We referred a dispute to the CCMA in terms of section 191(1) of Act 66 of 1995. We referred the matter as a group because we were dismissed as a group for the same alleged misconduct and on the same day. I deny that in the referral I purported to be referring on behalf of sixteen other persons. Each one of us signed on a document which formed part of the referral indicating he is also referring as part of a group."

Later in the affidavit this contention is repeated. There are confirmatory affidavits filed by each of the remaining individual respondents.

10. The relevant provisions of section 191(1) of the LRA read as follows in May 2000:

" 191(1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to-

…(b) the Commission, if no council has jurisdiction."

11. It has been held that a referral to the CCMA was irregular where it was signed not by the employee concerned but by a labour consultant. *Rustenberg Platinum Mines Ltd (Rustenberg Section) v CCMA and other* (1998) 19 IJL 327 (LC).

12. However, there are other decisions of this court which suggest that such a referral may be made in a representative capacity. *Etschmailer v CCMA & others* (1999) 20 IJL 144 (LC) p150 para 50. *Moolman Brothers v Gaylard n.o* (1998) 19 IJL 150 (LC) p155 D. See also Brassey: EMPLYOMENT AND LABOUR LAW VOL 3 A8: 54.

13. I prefer the latter approach rather than the earlier *Rustenberg Platinum Mines* case which seems to me to be an unduly restrictive and overtly technical approach. The present case is, however, slightly different in that there is a joint referral as opposed to a referral in a representative capacity.

14. If regard be had to the directions contained on the first page of the erstwhile form 7.11, it will be noted that the drafters of the form (promulgated under Ministerial Regulations) included the following in an effort to assist applicants:

"WHO FILLS IN THIS FORM?

Employer, employee, union or employer's organization."

15. And on the second page of the erstwhile form 7.11 (opposite the section reserved for filling in details of the referring party) there is an advisory block which contains the following: *" If more than one party is referring the dispute, write their details on a separate page and staple it to this form."* While the current form 7.11 in use is worded slightly differently, the advice remains the same in both instances.

16. I am mindful of the fact that the regulations are subordinate to the LRA itself, but I do not see any inconsistency between the two and, in particular, nothing in the LRA which precludes a referral by an agent on behalf of a principal or as in the present case, a joint referral relating to one incident in which all the complaining employees are listed but where only one (or some) of them has signed the referral form. Indeed the individual respondents complied with the directions in the form 7.11 and recorded their details in the form in the required manner.

17. In my view, therefore, the Commissioner was correct in finding that there had been a valid referral by the individual respondents (in the form of a joint referral) and that she had the necessary jurisdiction to conciliate the dispute. *Librapac cc v Moletsane no and others* (1998) 19 IJL 1159 (LC) at p1159 para 56.

18. I might add that requiring individual referrals by each employee in the case of a mass dismissal (such as often occurs in unlawful strikes) would lead to an intolerable situation at the CCMA and no doubt to the clogging of an already overburdened system

19. Accordingly I hold that the first ground of review advanced by the applicant is without substance.

20. I turn now to the certificate issued by the Commissioner in terms of section 135(5) of the LRA. The issuing of such a certificate constitutes an administrative decision which remains valid until set aside by the Labour Court in review proceedings *Cleanrite Droogskoonmakers v Commission for Conciliation, Mediation and Arbitration and other* (1999) 20 IJL 1747 (LC) at 1751 G.

21. In the opposing affidavit, 1st respondent states that

> *"(6) The representatives of the applicant refused to proceed with the conciliation proceedings after the presiding Commissioner ruled against their points in limine.*
>
> *(7) I, therefore, submit that the certificate was properly issued because the dispute remained unresolved as a result of the refusal of the applicant's representatives to proceed with the conciliation*

proceedings."

22. In the replying affidavit the applicant stated that the Commissioner had postponed the conciliation *sine die* after handing down her ruling in order to afford the applicant an opportunity to consider its legal position. In such circumstances, it was contended, no attempt was made at conciliation on 27 July 2000.

23. It is clear that the applicant did not wish to conciliate on 27 July 2000 because it considered that the ruling of the Commissioner on the jurisdiction point was wrong. Evidently it did not wish to conciliate with persons who were possibly not properly before the Commissioner.

24. The 19th respondent has filed a notice stating that it does not wish to deal with any of the facts and submissions deposed to by the applicant in its founding papers. However, it did purport to confirm the facts contained in the certificate.

25. As a matter of fact, the allegation in the certificate that the dispute *"remains unresolved as at 27-07-2000"* is correct. This fact is not disputed by the applicant which states that non-resolution of the dispute was due to a failure to conciliate. Of course, the failure to conciliate was directly

attributable to the applicant's stance adopted at the hearing.

26. Immediately upon the issue of he certificate in terms of section 135(5) of LRA, the individual respondents filed a request for arbitration on the prescribed form 7.13. They obviously wanted to get on with the matter and no doubt requested the Commissioner to issue the certificate. Given the attitude adopted by the applicant (see para 23 above) the individual respondents cannot be blamed for presuming that their erstwhile employer did not wish to conciliate the dispute. Their request to the Commission to issue the certificate was therefore not unreasonable nor irregular.

27. In the *Cleanrite case*, supra, the court noted that the issue of a certificate of outcome in terms of section 135 (5) of the LRA is an administrative decision that has considerable significance for the parties. Where the parties are going to rely on the certificate, for example, to embark on a strike which they believe to be protected, the Commissioner must verify the correct position before issuing the document (see para 20 of the *Cleanrite* judgment).

28. On the other hand, this court has held that it is not the duty of the commissioner *"to police conciliation meetings or to second – guess the parties when they advise that their dispute has been resolved."* (*Van Niekerk v Zondi*

NO and another (2001) 22 IJL 1202 (LC))

29. While the conciliation proceedings play a very important part in any dispute resolution procedure (to the extent that they offer the parties an early opportunity to resolve their differences) they should not be permitted to be manipulated by a party who evidently has no intention to settle the dispute.

30. In the present case, there has been a number of cases brought before this court by the applicant (against various employees involved in CCMA proceedings arising out of the aforementioned mass dismissal.) These cases have in the main raised procedural objections to the CCMA proceedings ranging from jurisdictional complaints to the allegedly irregular issue of outcome certificates in a number of differing factual scenario's. In some of those matters orders have already been given by this court.

31. In the circumstances it would appear to me that the applicant's approach to these dismissals has been to avoid, rather than promote, conciliation. The individual respondents were therefore entitled to assume, in the present matter, that the conciliation process was not going to lead to the resolution of the dispute and were correct in informing the commissioner

of this fact. Clearly the conciliation had "failed" as contemplated in the LRA.

32. Accordingly, I am not persuaded that the Commissioner committed any reviewable irregularity as contemplated by section 158(1)(g) of the LRA in issuing a certificate under section 135(5).

33. Finally, I turn to the time lapse which occurred in the present case between the date of alleged irregularity on the part of the Commissioner (27July 2000) and the date upon which the application for review was lodged (2 November 2000).

34. There is no time limit prescribed in the LRA for the initiation of such proceedings. Accordingly they must be institituted within a reasonable time. This court has held that a period of 6 weeks is to be considered as reasonable, due regard being had to the time limits being prescribed by section 145 of the LRA. *Ruijgrok v Foschini (Pty) Ltd and another* (1999) 20 ILJ 1284 (LC) 1287 para 20-1288 para 22.

35. The delay of more than 3 months in the instant case is, in my view, unduly long in the circumstances and has not been explained by the applicant, nor has the applicant made an application for condonation for

the late filing of the application.

36. In all the circumstances I am of the view that the application should fail. The individual respondents were previously represented by attorneys and there is no reason why they should not be entitled to recover their costs in this regard.

37. The following order is made:

37.1 The application is dismissed.

37.2 The applicant is ordered to pay the costs of suit of the 1st to 17th respondents incurred up to the withdrawal of their former attorneys of record.

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P. A. L GAMBLE
Acting Judge of the Labour Court

Date of hearing	:	27 June 2003
Date of Judgement	:	9 July 2003
For the Applicant	:	Adv. M.J Van As instructed by Leppan Beech Attorneys
For the 1st to 17th Respondent	:	Mr. M. Mogashoa of the Commercial Workers Union of S.A.