IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: JA34/2002

In the matter between:-

RUSTENBURG BASE METAL REFINERS (PTY)LTD **1ST APPELLANT**

PRECIOUS METALS REFINERS (PTY)LTD **2ND APPELLANT**

and

THE NATIONAL UNION OF MINEWORKERS **1ST RESPONDENT**

THE NATIONAL UNION OF METAL WORKERS OF SA **2ND RESPONDENT**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **3RD RESPONDENT**

JUDGEMENT

ZONDO JP

[1] The first appellant in this matter is Rustenburg Base Metal Refiners (Proprietary)Limited, a duly registered company with limited liability. The first respondent is the National Union of Mineworkers which is a duly registered trade union. The second respondent is the National Union of Metal Workers of South Africa, a duly registered trade union. The third respondent is the Commission for Conciliation, Mediation and Arbitration **("the CCMA"**) which is established by sec 112 of the Labour Relations Act, 1995 (Act 66 of 1995**)("the Act")** as juristic person whose main functions are the conciliation, Mediation and Arbitration of certain disputes as provided for in the Act.

[2] The appellants are wholly owned subsidiaries of a company called Anglo Platinum Limited. The appellants are based in Rustenburg. The appellants carry out certain benefication operations on behalf of various platinum mining companies falling within the Anglo Platinum Group. In the founding affidavit the Anglo Platinum Group of companies is described as the largest platinum producer in the world. It is also said in the founding affidavit that all platinum ore that needs to be processed, together with the ancillary precious and base metals, are processed through the appellants.

[3] One, if not both, of the first and second respondents has as its members some of the employees employed by each one of the two appellants. One of the first and second respondents does not seem to have as its members any employees employed by one of the appellants. It is not clear exactly which one of the first and second respondents does not have as its members any of the employees employed by which one of the two

appellants. Nothing, it appears, really turns on this. What is clear is that one of the first and second respondents does not have any members in the employ of one of the two appellants.

[4] The first appellant's employees had signed different types of contracts of employments. The one group of employees had signed contracts of employment which the first appellant says were signed by employees who were employed before 1989. For convenience this contract will be referred to as the old contract of employment. These contracts had a clause to the effect that the employees concerned had to become members of either the Good Hope Medical Society ("**Good Hope**") or the Anglo American Managed Care Plan ("**the AACMED**"). Another type of contract of employment was one that had been signed by employees who were employed after 1989. For convenience these contracts will be referred to as the new contracts of employment.

[5] The respondents suggested in their answering affidavit that there was yet another type of contract. However, clause 7.2 of that contract, which contains the relevant provisions, reads exactly the same as clause 7.2 of the new contract which contains the provisions that are relevant to this matter. The new contracts did not make reference to any specific medical aid. However, they did contain a clause in the following terms:-

> "**The employee shall join and conform with the rules of the Pension Fund of / Provident Fund / Retirement Fund or insurance arrangement or medical aid /**

benefit society nominated by the company when required to do so as a condition of employment."

[6] From what has been said above it will be clear that that category of the first appellant's employees who had signed the old agreement was entitled as a term or condition of employment to be members of one of two medical aid schemes, namely, Good Hope or AACMED while the other category of employees was not entitled to be members of any specific medical aid scheme but were obliged to become members of any medical aid scheme that the first appellant nominated as a condition of employment.

[7] Towards the end of 2001 the first appellant began consultations with the first and second respondents on its proposal to implement Platinum Health, a health management organisation owned and managed by Anglo Platinum Management Services (Pty)Ltd. The first appellant wanted to implement this proposal in respect of both categories of its employees irrespective of which one of the two contracts they had signed as the contract of employment.

[8] The first and second respondents, hereinafter referred to as "the unions", rejected the first appellant's proposal. Despite the union's rejection of the proposal, the first appellant informed the unions that it intended to implement its proposal with effect from the 1st April 2002. The implications of the implementation of this proposal were, among others,

that those employees of the first appellant employed in terms of the old contracts of employment who were on the Good Hope medical aid scheme or on the AACMED plan would be moved from those medical aid schemes and put on to the Platinum Health.

[9] The unions' response to the first appellant's plan to implement its proposal was to submit numerous dispute referrals to the CCMA for conciliation during the first half of 2002. Except for two, these referrals were submitted to the CCMA during March, April and before the 28th May 2002.

[10] On the 28th and 29th May 2002 the first and second respondents withdrew all the disputes that they had hitherto referred to the CCMA concerning the medical aid issue. On the same days they referred to the CCMA respectively two disputes which were allocated the CCMA case numbers NW 3043/02 and NW 3021/02. The appellants reacted to the service of these referrals on them by launching an urgent application before the Labour Court for an order:-

a) declaring that the first and second respondents were in breach of clause 5.2.8 of the Employee Relations Policy Agreement entered into between them and the appellants in referring to the CCMA disputes concerning the implementation of Platinum Health as a medical aid for the appellants' employees, and,

b) interdicting the first and second respondents from continuing to process the conciliation of the disputes in terms of sec 134 or any other provisions of the Labour Relations Act, 66 of 1995 in the CCMA;

c) interdicting the CCMA from conciliating or taking any further steps in relation to the disputes allocated CCMA case numbers NW 3021/02 and NW 3043/02.

[11] When the appellants launched the urgent application in the Labour Court, the CCMA had given notice of the dates when conciliation meeting would be held in regard to one of the disputes. From the orders prayed for in the appellants notice of motion it is clear that the appellants did not want anything further to be done either by the CCMA or by the first and second respondents in regard to the dispute referrals or in regard to the disputes themselves.

[12] The Labour Court, through Sutherland AJ, dismissed the urgent application with costs. With the leave of the Court a quo, the appellants now appeal against that judgement and order.

The appeal

[13] The case that the appellants had sought to make out in their founding affidavit was largely based on their assertion that the first and second respondents' conduct in referring the two disputes to the CCMA for conciliation was in breach of the Employment Relations Policy Agreement signed between the parties. However,

on appeal Mr Cassim, who, together with Mr Hutton, appeared for the appellants informed us that he was abandoning any reliance on the Employment Relations Policy Agreement or its breach.

[14] Mr Cassim pointed out that the appellants' case on appeal was that the two disputes that the first and second respondents referred to the CCMA on the 28th and 29th May 2002 were the same as some of the disputes that had previously been referred to the CCMA by the first and second respondents in respect of which Zilwa AJ, sitting in the Labour Court, had granted a certain interdict. Mr Cassim submitted that Zilwa AJ's order had interdicted the CCMA from holding conciliation proceedings in regard to those disputes and the two unions from pursuing those disputes pending the determination of a certain application that the appellants were required to launch by a given date. Mr Cassim submitted in effect that the first and second respondents should be interdicted from taking the disputes any further and the CCMA from conciliating the disputes because that would be in breach of Zilwa AJ's order. In this regard Mr Cassim conceded that, if the two disputes were not the same as any of the disputes that were the subject matter of the order granted by Zilwa AJ, the appeal should in that event fail.

[15] Before it can be ascertained whether the two disputes are the same as any of the disputes that were the subject of Zilwa AJ's order, it is, in my judgement, necessary to refer to Zilwa AJ's order. This is necessary because, if it is found that the conduct which the appellants sought to interdict in this matter falls outside the ambit

of the order granted by Zilwa AJ, then the appeal must fail because the appellants' case, as argued on appeal, is based on the conduct of the CCMA and of the first and second respondents being in breach of Zilwa AJ's order. Zilwa AJ's order was that:-

> **"1. Pending the final determination of an application launched by the applicants for declaring relief concerning the implementation of the Health Management Organisation:**
>
> **1.1 The third respondent is interdicted and restrained from holding conciliation proceedings in relation to the referrals submitted to it by the first respondent under reference numbers NW2150/02 and NW1971/02 and by the second respondent under reference numbers NW1892/02 and NW2197/02;**
>
> **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.**
>
> **2. The applicants 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 be of no force and effect.

3. **The costs of this application shall be reserved for determination by the Court hearing the substantive application".**

[16] The first and second respondents in the matter before Zilwa AJ were the first and second respondents in this appeal. The appellants in this appeal were the applicants before Zilwa AJ. The third respondent before Zilwa AJ was the CCMA. It is also the third respondent in this appeal. It is clear from Zilwa AJ's order that the only part of that order that was directed against the first and second respondents is order 12. That order says absolutely nothing about the first and second respondents being interdicted from referring the disputes referred to in that order to the CCMA for conciliation pending the final determination of the application contemplated in par 2 of that order. Indeed, it says nothing about the first and second respondents being interdicted from doing anything about those disputes.

[17] In the present case the order that the appellants sought in the Court a quo against the first and second respondents, if one leaves out the declaratory order based on the breach of the Employment Relations Policy Agreement, was that they be interdicted **"from continuing to process the conciliation"** of the disputes in terms of the Act. Zilwa AJ's order contains no such interdict against the first and second respondents. Accordingly, it seems to me that the

appellants' reliance on Zilwa AJ's order to seek the order that they sought was misconceived.

[18] With regard to the CCMA Zilwa AJ's order was to the effect that the CCMA was interdicted from holding conciliation proceedings in relation to the referrals 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. In the present matter the order that the appellants sought against the CCMA was one interdicting the CCMA from conciliating or taking any further steps in relation to the two disputes in question. To interdict the CCMA from conciliating a dispute probably falls within the ambit of holding conciliation proceedings in regard to a dispute. From that point of view I would agree that at least that part of the order that the appellants sought against the CCMA in the present matter that referred to conciliation would fall within conduct by the CCMA which Zilwa AJ's order interdicted. That part of the order in the present matter that the appellants sought against the CCMA which referred to interdicting the CCMA from taking any further steps in relation to the disputes probably fell outside the ambit of the order granted by Zilwa AJ. However, for purposes of this case I shall assume, without deciding, in the appellants' favour that even that part of the order fell within the ambit of Zilwa AJ's order.

[19] The first and second respondents have admitted in their answering affidavit that the dispute referred to the CCMA by the first respondent on the 29th May 2002 which was allocated the CCMA case number NW 3021/02 is the same as the dispute which was referred to the CCMA and allocated CCMA case number NW 2150/02 and which was the subject matter of Zilwa AJ's order. The dispute in CCMA case number NW 2150/02 was referred to the CCMA by the first respondent on the 16th April 2002 against the first appellant. I have examined the information written about the dispute in both referrals and I agree that it is the same dispute.

> That, therefore, means that, in respect of that dispute, at the time of the second referral of that dispute when it was allocated a new CCMA case number the CCMA was still interdicted by Zilwa AJ's order from conciliating that dispute. That being the case, there was no need for the appellants to approach the Labour Court for a second order interdicting the CCMA from conciliating the dispute. I have no doubt that the CCMA, if it was served with Zilwa AJ's order, would not have conciliated the dispute. I leave out of consideration, for present purposes, the question of how this would have helped the appellants since in terms of the Act once a period of 30 days from the date of the referral of a dispute has expired, the relevant union and its members could have taken the dispute further. It seems to me that an order that the CCMA should not conciliate a dispute lacks the necessary efficacy. I doubt if such an order is competent but it is not necessary to decide that issue. For present purposes I shall assume that such an order is competent.

[20] It seems to me that, instead of approaching the Labour Court for another order in respect of a dispute that is covered by Zilwa AJ's order, the appellants should have brought this fact to the attention of the CCMA and sought an undertaking from the CCMA that it would not conciliate the dispute. If such an undertaking was sought given and honoured, there would have been no need for this application in respect of the dispute in question. If, however, the CCMA did not give the undertaking and proceeded to conciliate the dispute, the appellants could have then brought contempt of court proceedings against the CCMA.

[21] Before us Mr Cassim advanced two bases why, in his submission, a resort to contempt of court proceedings would not have been appropriate. The one basis was that the appellants have continuing relationships with the unions involved in this matter which would be affected adversely by such proceedings. This argument is misplaced. On

the facts of this case it is not the unions against whom the appellants would have had to institute contempt of court proceedings. It is the CCMA. The unions have not acted in breach of Zilwa AJ's order by referring these two disputes to the CCMA for conciliation.

[22] The second basis on which Mr Cassim sought to justify the appellants' failure to await the bringing of contempt of court proceedings was that in such proceedings the applicant party must show that the failure or refusal to obey the order of court is wilful and mala fide and this would, in this case, create material disputes of fact. There is no merit in this submission. Material disputes of fact arise often in motion proceedings and there is an established practice in our courts of how disputes of fact must be dealt with in such circumstances. The fact that such disputes of fact may arise is no reason for a party not to make use of contempt of court proceedings when they are the proceedings that should be resorted to.

[23] The dispute referral that was allocated CCMA case number NW 3043/02 was annexed to the founding affidavit as annexure DM 20. The CCMA's notice of set down was annexed as annexure "**DM21**". In that referral form the party who referred the dispute is reflected as second respondent in these proceedings. It was signed on the 28th May 2002. The other party to that dispute was given as the first appellant in this appeal. The nature of the dispute in that referral was given as **"mutual interest".** In the space provided in the referral form where the referring party was required to give a brief summary of facts relating to the dispute, the second respondent wrote: "**The employer changed or seeks to change employees from their current medical aid schemes to 'Platinum Health', a health management organisation**". The dispute was alleged in the form to have arisen on the 1st April 2002. On details of dispute procedures followed, second respondent stated in the

referral form that **"(t)he parties have negotiated to deadlock".**

[24] In the referral form the second respondent stated, in the space provided for a statement of the desired result out of conciliation, that **"(t)he unions (sic) members demand that they be members of either AACMED or Good Hope. Any change that employer seeks to make regarding the medical schemes must first be agreed upon between the union and employer".** In the space provided for the referring party to state the special features of the dispute, the second respondent stated in the referral form that **"(t)he dispute, concerns a large number of workers, and an important and emotive issue. The union will seek the conciliation of this dispute on an urgent basis… all previous referrals, concerning this issue, have been withdrawn".**

[25] In paragraph 55 of the founding affidavit the appellants stated that the description and characterisation of the dispute under CCMA case number NW 3043/02 in the referral form (Annexure DM 20) is exactly the same as the description and characterisation of dispute referred by the first respondent on 16 April 2002 which the appellants said was "**described in section 47.1 supra".** There is no sec 47.1 in that affidavit. It seems to be a reference to par 49.1. Par 49.1a refers to annexure "**DM14**" which was referred to the CCMA by the first respondent on 16 April 2002. It is true that the description and characterisation of the dispute in annexure DM 14 and the contents of that annexure are the same as the description,

characterisation of the dispute in annexure DM 20" and that the contents of its contents are the same as those of DM 20 (which is case no NW 3043/02 except that the referring party in DM 14 is the first respondent whereas in DM 20 it is the second respondent and that in annexure DM20 the second respondent added the words "all previous referrals, concerning this issue, have been withdrawn" which the first respondent did not do in annexure **"DM14**". The dispute covered in annexure DM14 is said by the appellants in par 49.1 to have been allocated the CCMA case number NW2150/02. The latter is, of course, the CCMA case number that is linked to the dispute allocated CCMA case no NW 3021/02. The link between CCMA case no NW 3021/02 and NW 2150/02 have been dealt with above. The appellants have not in their affidavits linked CCMA case no NW 3043/02 to any CCMA case numbers appearing in Zilwa AJ's order. That being the case the appellants have failed to show that the dispute under case no NW 3043/02 was in any way the subject of Zilwa AJ's order. Accordingly the appellants' appeal must fail in regard to such dispute as well.

[26] In the light of all of this I conclude that the appellants' appeal falls to be dismissed. Mr Cassim left the issue of costs in the Court's hands. The first and second respondent's Counsel asked that costs should follow the result. I am of the view that the appellants' application to the Court a quo was so misconceived that the requirements of law and fairness dictate that the appellants should be ordered to pay the costs despite the existence of the continuing relationship between the appellants and the first and second respondents.

[27] In the result the appeal is dismissed and the appellants are ordered to pay the first and second respondents' costs jointly and severally, the one paying the other to be absolved.

Zondo JP

I agree.

Davis AJA

I agree.

Jafta AJA

Appearances:

For the Appellant: Adv. N. Cassim SC, Adv. Hutton

Instructed by: Leppan Beech Attorneys

For the 1st and 2nd Respondents: Adv Van der Riet SC

Instructed by: Cheadle Thompson and Haysom Inc

No appearance for the third Respondent.

Date of Judgement: 23 December 2003