1. IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

APPEAL CASE NO: JA29/06

REPORTABLE

In the matter between:

RANDFONTEIN ESTATES LIMITED Appellant

(Applicant *a quo*)

and

THE NATIONAL UNION OF MINEWORKERS Respondent

(Respondent *a quo*)

JUDGMENT

---

2. WILLIS JA:

3. [1] This appeal concerns the correct interpretation of the Public Holidays Act 36 of 1994 ("the Act") which provides that some twelve specified days in Schedule 1 to the Act

shall be public holidays but that whenever a public holiday falls on a Sunday, the following Monday shall be a public holiday.

4. [2] The appellant is the employer. It is a mining company which conducts operations at four gold mining shafts in Randfontein: Cooke 1, Cooke 2, Cooke 3 and Doornkop. The employer has entered into a "continuous operation agreement" with the respondent (the union) in respect of those shafts at which work operates continuously. The agreement stipulates that production at the Cooke 2, Cooke 3 and Doornkop shafts will be continuous for seven days a week on all days of the year excluding public holidays. The relevant clause pertinently reads as follows:

> 5. Production work under continuous operations (or Conops) will take place seven days a week on all days of the year, excluding public holidays.

6. The agreement provides that there is normal production seven days a week, excluding public holidays, according to a shift cycle of 7-1, 7-1, 7-5 (seven days on, one day off; seven days on, one day off; seven days on, five days off). The agreement provides, further, in clear terms, that Sundays are treated as normal working days. In summary, in terms of the agreement, Sundays are treated as being normal working days but public holidays are not. On public holidays, unlike any other day of the year, production stops and all affected employees are entitled to a day's paid leave. The agreement defines "public holidays" as meaning "those days declared as public holidays from time to time by the relevant authority in terms of the Public Holidays Act, 1994". It is common cause, indeed, that a public holiday in terms of the agreement is the same as a public holiday as defined in the Act. For the sake of completeness, it should be noted that the agreements comply with the Basic Conditions of Employment Act 75 of 1997 ("the BCEA") and that, in

terms of those agreements, employees who are covered thereby are not required to work on public holidays.

7. [3] One of the public holidays designated in Schedule 1 of the Act is Workers' Day. It occurs on 1st May of each year. In 2005, Workers' Day fell on a Sunday. When Workers' Day fell on a Sunday in 2005, it was contended by the union that Sunday, 1st May 2005 was a public holiday. The consequence of the union's argument was that workers who would ordinarily have worked on Sunday 1st May 2005 were not obliged to do so but were entitled to be paid for that day. In addition, the union contended that workers were entitled to be paid for the following Monday as well, without having to work. The employer contended that these employees were obliged to work on Sunday 1st May, but not on Monday 2nd May 2005. In the event, the employees did not work either on Sunday 1st May 2005 or on Monday 2nd May 2005. The employer paid employees for both days.
8. [4] A dispute thus arose between the parties as to the correct interpretation of the Act. In light of this dispute, the employer approached the Labour Court for a declaratory order in terms of s158(1)(a)(iv) of the Labour Relations Act, 66 of 1995 ("the LRA"). The court *a quo* (*per* Francis J) dismissed the application but made no order as to costs. The court *a quo* reasoned that the public holidays specified in Schedule 1 of the Act do not cease to be public holidays when they fall on a Sunday: all that happens is that the Monday following becomes an additional public holiday.

[6] The dispute arose again on 25th December 2005 and 1st January 2006, and will obviously arise yet again in the future. The employer considers it important that the issue be resolved. This dispute has a direct effect on the number of days the employees are required to work, and for which they are entitled to be paid. The employer contends that the issue has significant financial implications for it. Indeed it does. The cost to the employer in terms of lost production and additional wages paid has already run into millions of rands. Clearly, the dispute has significant implications for both sides.

[7] The purpose of the Act, as appears from the long title, is:

> To make provision for a new calendar of public holidays; to provide that the public holidays be paid holidays; and for matters incidental thereto.

Section 1 of the Act provides:

> 1 In this Act, unless the context otherwise indicates-
>
> "public holidays" means the days mentioned in Schedule 1 and any other day declared to be a public holiday under section 2A

Section 2A relates to additional public holidays declared as such by the President and proclaimed in the *Gazette*. It is clearly irrelevant to this dispute.

Section 2 of the Act provides:

> 2. Days to be observed as public holidays
>
> (1) The days mentioned in Schedule 1 shall be public holidays, and whenever any public holiday falls on a Sunday, the following Monday shall be a public holiday.
>
> (2) Notwithstanding the provisions of sub-section (1) any public holiday shall be exchangeable for any other day which is fixed by agreement or agreed to between an employer and employee.

There are twelve days specified in Schedule 1 to the Act:

New Year's Day	1 January
Human Rights Day	21 March
Good Friday	Friday before Easter Sunday
Family Day	Monday after Easter Sunday
Freedom Day	27 April
Workers' Day	1 May
Youth Day	16 June
National Women's Day	9 August
Heritage Day	24 September
Day of Reconciliation	16 December

Christmas Day 25 December

Day of Goodwill 26 December

[8] Section 5 of the Act provides that employees shall be entitled to be paid for public holidays, subject to certain exceptions which, it is common cause, are not relevant to this dispute. It reads as follows:

> **5. Employee entitled to paid public holidays**
>
> (1) Subject to the provisions of sub-section (2), every employee shall be entitled to –
>
> (a) at least the number of public holidays as provided for in this Act;
>
> (b) payment for every public holiday, which payment shall be at least as favourable as the payment provided for by Section 11 of the Basic Conditions of Employment Act, 1983 (Act 3 of 1983).
>
> (2) Where an employee, in terms of any wage regulating measure referred to in Section 1(1) of the Labour Relations Act, 1956 (Act 28 of 1956), agreement or contract of employment, is entitled to more than the number of public holidays as provided for in this Act, such regulating measure, agreement or contract of employment shall, insofar as it relates to the number of public holidays, not be affected by the provisions of this Act.

[9] The Act does not define Sundays as being public holidays. Traditionally, Sunday has been and continues to be treated by many, if not most, South Africans as some kind of holiday or "rest day". In this regard it is instructive to peruse the respective judgments in the case of *S v Lawrence: S v Segal: S v Solberg* [1] decided in the Constitutional Court in order to see that court's views on Sundays. Broadly, it seems to be a correct summary that it recognized Sundays as special days which transcend

1 1997 (4) SA 1176 (CC)

religious observance; the fact that the origin of the special status of Sundays arose from Christian religious observance is largely irrelevant - Sundays serve socially useful purposes which extend well beyond religious worship.[2] Many sectors of the economy continue to treat Sunday as a public holiday. If an employer and employees agree that Sundays are to be treated as public holidays then, in terms of the provisions of section 5(2) of the Act, as between the parties, Sundays become public holidays. That is not the position in the present case.

[10] The Act does not, either expressly or impliedly, state that where a public holiday falls on a Sunday, that both the Sunday and the following Monday shall be public holidays. The employer contends that to interpret the Act in this way would require a "reading in" of the words emphasised below in Section 2(1) of the Act:

> The days mentioned in Schedule 1 shall be public holidays, and whenever any public holiday falls on a Sunday, the following Monday shall be a public holiday and in that event, both the Sunday and the Monday will be regarded as public holidays.

The employer contends that such a reading in would be manifestly impermissible and relies on the following cases in advancing this submission: *S v Burger*[3]*; Rennie NO v Gordon and Another*[4] *and Standard Bank Investment Corporation Limited v Competition Commission and Others*[5].

---

2 See the judgment of Chaskalson P at paras [86] to [96] (Langa DP, Ackermann J and Kriegler J concurring) and the separate judgment of Sachs J at paras [155] to [162] and [170] to [180] (Mokgoro J concurring) which substantially supported that of Chaskalson P but see the minority judgment of O'Regan J (GoldstoneJ and Madlala J concurring), especially at paras [122] to [128].

3 1963 (4) SA 304 (C) at 308 C-F

4 1988 (1) SA 1 (A) at 22 E-H

5 2000 (2) SA 797 (SCA) at para 23

[11] Mr *Pretorius*, counsel who prepared the heads of argument for the respondent, submitted that, if the legislature had not intended that both the Sunday and the Monday should be public holidays when a public holiday falls on a Sunday, it would have used the word "but" instead of "and" in section 2 (1) of the Act. He also submitted that it was significant that section 2 (1) refers to "a public holiday" rather than "the public holiday" – in other words, so he contended, the legislature clearly intended not that the Monday be in lieu of what would otherwise have been the public holiday but in addition to it. Much the same argument was advanced as to the significance of the legislature employing the word "whenever any public holiday falls on a Sunday" instead of "whenever any of the days referred to in schedule 1 falls on a Sunday". He submitted that the employer's case might have been arguable if section 2 (1) had, instead of its wording in the Act, read as follows:

"The days mentioned in Schedule 1 shall be public holidays: provided that whenever any of the days mentioned in Schedule 1 falls on a Sunday, the following Monday shall be the public holiday."

Mr *Pretorius* said that the Afrikaans text, which was signed by the President, used the word "is" for the English "shall be" in section 2 (1) and this, so the argument went, made it even more emphatic that the following Monday was an additional public holiday.

[12] Mr *Pretorius* submitted that the intention of the legislature in providing for public holidays was to set aside certain days for commemoration and/or celebration by reason of their historical, social or religious significance. He made the point that if Freedom Day (27th April), for example, fell on a Sunday it would still be celebrated or commemorated on that day because the Monday, being the 28th had no significance.

9. [13]In *Randburg Town Council v Kerksay Investments (Pty) Ltd*[6], The Supreme Court of Appeal reaffirmed the trite proposition that:

The starting point in statutory interpretation remains an endeavour to

6 1998 (1) SA 98 (SCA) at 107A-B

> ascertain the intention of the Legislature from the words used in the enactment. Those words must be attributed their ordinary, literal, grammatical meaning.

10. Interestingly, Counsel for both sides relied on this trite proposition to contend that the interpretation of the Act quite obviously favoured their particular contentions. Mr *Pretorius* pointed out that the employer did not even attempt to argue that the contention of the union would lead to absurdity. Onerous for the employer the union's interpretation of the Act may be but it is not absurd. The employer contends that, on the plain interpretation the Act, the meaning contended for by the union is strained and artificial and that it could only be achieved by reading words into the statute in an impermissible way. It furthermore contends that, even if the Act is ambiguous, the result would be the same because, where a statute is ambiguous, it is permissible to adopt a purposive construction. In this regard it relies on *Public Carriers' Association and others v Toll Road Concessionaries (Pty) Limited and Others*[7] where the following was said:[8]

> Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity.

The employer has also relied on *Standard Bank Investment Corporation Limited v Competition Commission and Others*[9]. Mr *Marcus*, counsel for the employer, emphasised that, although the words must be attributed their ordinary meaning, they must also be read in the context in which they are used and regard can be

7 1990 (1) SA 925 (A)
8 At 943G-H
92000 (2) SA 797 (SCA) at paras 16-22

had to other sections of the Act, the Act as a whole and even other legislation which is *in pari materia.* See, in this regard *Azisa (Pty) Limited v Azisa Media CC and Another* [10] In this regard, Mr *Marcus*, pointed out that, in terms of Section 15(1) of the BCEA, an employer must allow an employee a weekly rest period of at least 36 hours, which must include a Sunday, “unless otherwise agreed” It should be noted, however, that this provision does not apply to emergency work in terms of Section 6(2) of the BCEA. The 1997 BCEA repealed and replaced the Basic Conditions of Employment Act 3 of 1983 ("the 1983 BCEA"). In terms of Section 10 of the 1983 BCEA, as amended, broadly, an employer could not require or permit an employee to perform any work on a Sunday in or in connection with a factory or shop save with the written permission of an inspector. The prohibition did not apply to employees engaged in continuous activities (as determined in terms of Section 33 of the 1983 BCEA) or to specified employees earning less than a prescribed annual amount or involved in emergency work. The 1983 BCEA in turn consolidated the provisions of a number of sector-specific pieces of legislation. Prior to the implementation of the 1983 BCEA, in terms of Section 5(1) of the Shops and Offices Act 75 of 1964, no employer was entitled to require or permit an employee to work on any Sunday in or in connection with a shop or an office unless entitled to do so in terms of that act or any other law. In terms of Section 19(1)(d) of the Factories, Machinery and Building Work Act 22 of 1941 no employer was entitled to require or permit an employee to work in a factory on a Sunday without the authority of an inspector appointed under the Act. A provision for exemption was contained in Section 54(1) of the Act.

[14] The Act repealed and replaced the whole of the Public Holidays Act 5 of 1952. The previous Act, like its successor, also

---

10 2002 (4) SA 377 (C) at 385 D – 386 E

made certain provision for the consequences of a public holiday falling on a Sunday. Thus, when New Year's Day fell on a Sunday, the following Monday was to be a public holiday. Similarly, when Founder's Day fell on Good Friday, the following Saturday was to be a public holiday. In this regard it is instructive to refer to *Gold Circle (Pty) Limited and another v Premier, Kwazulu-Natal* [11]

11. [15] The ordinary, literal, grammatical meaning favours the contention of the union. At first blush, the alternative argument of the employer is attractive indeed. Read in context, it is that where a public holiday falls on a Sunday, the following Monday is substituted as a public holiday and is not to be regarded as an additional public holiday. After all, as noted above, many, if not most South Africans, do not work on a Sunday: surely the intention of the legislature must have been that the citizenry should not lose the benefit of a public holiday by reason of the accident of its falling on a Sunday? That, so the employer's argument goes, was the sole purpose of section 2 (1) of The Act. *Caedit quaestio*, the union cannot, in the colloquial expression, "have their cake and eat it at the same time".

12. [16] Nevertheless, as Mr *Pretorius* correctly argued, the legislature need not have had a single intention. Like anyone else, it may have acted by reason of several or, indeed, mixed intentions. It seems that the following were the intentions of the legislature:

(i) To set aside days for commemoration and/or celebration by reason of their historical, social or religious significance;

(ii) To ensure that employees do not lose remuneration thereby;

(iii) To ensure that the majority of South Africans do not lose the additional benefits of a public holiday by reason of the accident

11 2005 (4) SA 402 (D) at 405C-E

of its holiday falling on a Sunday;
(iv) To allow a measure of flexibility for employers and employees to enter into agreements varying the recognition of particular public holidays provided that the number enjoyed by employees is at least the number provided for in the Act.

Both Mr *Pretorius* and Mr *Sutherland* (who appeared for the respondent at the actual hearing of the appeal) were undoubtedly correct in their submission that, with the exception of the holidays focused around the Easter week-end, when it comes to public holidays, it is the *dates* and not the *days* in the week that are important. New Year's Day provides an obvious, world-wide, example. The accident of its falling on a Sunday has never seriously detracted from the new year being "seen in" on that day. Those who are particular about the observance of the Christian sabbath may subdue or even abandon their celebrations but this is not the point. The point is that the significance of New Year's Day is that it occurs on 1st January every year. If it falls on a Sunday, there is not an alternative public celebration on the Monday.

[17] By reason of Christian religious tradition, Easter Day or Easter Sunday is always the first Sunday after the full moon which happens next or after 21st March each year and if the full moon happens on a Sunday, Easter Day is the Sunday thereafter.[12] The lunar-relatedness of Easter arises from the linkage between the Last Supper and the Jewish festival of Passover.[13] Schedule 1 of the Act itself determines Good Friday and Family Day (what is widely known as "Easter Monday") by reference to "Easter Sunday". This short religious "detour" has been made in order to explain why the public holidays focused around Easter are quite unlike all other public holidays, including Christmas: except for the "marker" of 21st March, they are not specifically date-related and "move". The reasons are that:

12 See, for example, *The Book of Common Prayer*
13 See, for example, the gospels in the Bible

(i) Easter Day or Easter Sunday always falls on a Sunday;

(ii) Good Friday always falls on the immediately preceding Friday;

(iii) Both Good Friday and Easter Sunday follow the full moon on or after 21st March each year.

The holidays focused around Easter are, for very particular reasons, the singular exception to publicly commemorated and/or celebrated dates being significant and therefore set aside by a date rather than a day in the week. Mr *Sutherland* correctly submitted that the very exception of the holidays focused around Easter serves to illuminate and underline the fact that all other holidays are date-related.

[18] Mr *Marcus* argued that the primary purpose of the Act was not to set aside certain specific dates as public holidays but to ensure that employees would be paid for the twelve public holidays set out in schedule 1 to the Act (in terms of section 1 of the Act, the Act includes the schedules). Mr *Marcus* relied on the long title of the Act in advancing this submission. The difficulty, however, is that the opening words of the long title refer to making provision " for a new calendar of public holidays" and then goes on to refer to the provision "that public holidays be paid holidays". He referred to the fact that almost every public holiday is of no relevance to at least some sectors of the South African community to advance his argument that the intention was not so much to set aside certain specific days but to provide for a certain number of days for which persons would be paid. This cannot be. Why bother, then, to list in the schedule the particular days appearing therein? It is clear that the days which are public holidays are the result of a pragmatic, strategic and indeed generous-spirited compromise, trying, as far as reasonably possible, to give recognition in a broadly inclusive manner to a range of days which, in a pluralistic society, the different communities may identify. Obviously, it is not possible

to satisfy everyone. That Good Friday and Christmas Day are public holidays but not, for example, important Jewish, Muslim or Hindu religious days may lead perhaps to the inference that Christians have been unfairly favoured but pragmatic considerations relating to the proportion of Christians in South Africa, tradition and world norms relating to the recognition of Easter and Christmas no doubt influenced the provisions relating thereto. Here again, it is useful to refer to the respective judgments in the case of *S v Lawrence: S v Segal: S v Solberg* [14] decided in the Constitutional Court in order to see that court's views on Good Friday and Christmas Day as public holidays.[15] Moreover, as Mr *Sutherland* correctly pointed out, those who belong to religious minorities or who have no religious belief at all may, in terms of section 5(2) of the Act, either collectively or individually, by agreement, trade any of the public holidays designated in schedule 1 of the Act for other days which have special significance for them. The pragmatic approach of the legislature does not, however, extend so far as to justify the inference that the legislature was indifferent as to which days were to be regarded as public holidays. Mr *Marcus* conceded that if his interpretation was correct, it would mean that if, for example, important rallies were planned to celebrate Freedom Day (27th April) in Randfontein, (the centre where the employer is located) despite the fact that that particular holiday fell on a Sunday, the employer would be entitled to insist that an employee who wanted to attend these celebrations could not do so but must work on that day and celebrate the day on the Monday instead. This cannot have been the intention of the legislature.

---

14 1997 (4) SA 1176 (CC)

15 See the judgment of Chaskalson P, especially at paras [86] and [101] (Langa DP, Ackermann J and Kriegler J concurring) and the separate judgment of Sachs J especially at paras [150], [159] to [164] and [170] to [180] (Mokgoro J concurring) which substantially supported that of Chaskalson P but see the minority judgment of O'ReganJ (Goldstone J and Madlala J concurring) especially at paras especially at paras [122] to [128].

[19] In the end, counsel for both sides agreed that the case turned on whether the legislature intended:

(i) that the number of paid public holidays be limited to 12 and no more (this favours the employer); or

(ii) that there should be at least 12 public holidays in a calendar year (this favours the union).

If one refers to the fact that section 2A provides that the President may, by proclamation, declare additional days as public holidays, that section 5(1)(a) of the Act refers, in terms, to "at least" the number of public holidays provided for in the Act, that section 5(2) of the Act provides for agreements to be concluded to provide for more, as well as the plain reading of section 2 (1), then it is clear that the latter interpretation – the one favouring the union - must prevail.

13. [20] Finally, it should be noted that, although the relevant agreement between the parties is comprehensive, and provides that, ordinarily, a Sunday is an ordinary working day, it clearly provides that "production work under continuous operations (or Conops) will take place seven days a week on all days of the year, excluding public holidays." (Emphasis added). The union has not, either in this agreement or elsewhere, "contracted out" of this clause. Section 5 of the Act thus has, in this regard, no relevance to this case whatsoever. It needs to be emphasised that not all employers are saddled with the burden to be borne by this particular employer. It all depends upon what one negotiates and agrees with one's employees. In this particular case, the employer hitched its continuous operations agreement to the provisions of the Act. Mr *Marcus* submitted, probably correctly, that it was a "racing certainty" that when the agreement was signed, no one had considered what would happen, in terms of the

> agreement, when a public holiday fell on a Sunday. Unsurprisingly, Mr *Sutherland* vigorously disagreed. Wherever the truth lies, this case underlines the importance of negotiating such agreements carefully and recording them in clear and precise terms.

[21] The appeal must fail. The parties agreed that the appropriate order as to costs was that each party should pay its own costs. This seems eminently sensible in the circumstances.

[22] It is proposed that the following be the order of this court:

> The appeal is dismissed. The parties are to pay their own costs in the appeal.

N.P. WILLIS

JUDGE OF APPEAL

I agree. The appeal is dismissed. The parties are to pay their own costs in the appeal.

R.M. M. ZONDO

JUDGE PRESIDENT

I agree.

B. WAGLAY

JUDGE APPEAL

Counsel for the Appellant: *G. J Marcus* SC

and, with him, *P.R. Jammy*

Attorneys for Appellant: Brink Cohen Le Roux Inc

Counsel for the Respondent: *R.T Sutherland SC,* (heads of argument prepared by *P. J Pretorius* SC) and, with him, *G.I. Hulley*

Attorneys for Respondent: K.D. Maimane

Date of hearing: 6th November, 2007

Date of Judgment: 15th November, 2007