IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case Number: J3137/98

In the matter between

DELIHLAZO SIGWALI & OTHERS Applicant

and

LIBANON ado KLOOF GOLD MINE LTD Respondent

JUDGMENT

NGWENYA AJ

Introduction

24. Applicants seek relief on the following terms:-

1.1 that Respondent complies with the provisions of Section 189 of the Labour Relations Act 65 of 1995 ("the LRA") *"prior to the retrenchment of the applicants";*

1.2 that Respondent reinstate them with effect from the date of their retrenchment;

1.3 that Respondent pays the cost of this application.

Parties

25. The number of applicants in these proceedings, which is not readily ascertainable on paper, but I will elaborate later on that. They are cited as follows:-

2.1 "The first applicant is an individual employee who is residing at 1635 Bhanyabhaya Street, at Bekkersdal, who is appointed by the other 112 applicants to be on their behalf."

2.2 The Respondent is Libanon, a division of Kloof Gold Mining Company Ltd.

Background

26. The First and Further Applicants were employees of Respondent.

27. On 25th March 1998, Respondent and the National Union of Mineworkers ("NUM") entered into a written "Retrenchment Avoidance" agreement ("the agreement").

28. The pertinent issues for the purposes of this Judgment in the agreement are:-

5.1 *"...employees who are more than 55 years in age must retire with full benefit. Employees between the age of 50 and 54 will be approached to volunteer for early retirement with full benefit where applicable. This will be done through a committee of four persons, two from management and two from the union."*

5.2 *"...employees who proceed on early retirement will receive one weeks pay for every completed year of service. Such payment will be over and above the benefit to which the employee is entitled in terms of he rules of the Mineworkers Provident Fund ("MPF")."*

29. The agreement further states that it will be extended to all employees.

30. It would appear that this agreement was concluded after Respondent detected a need to retrench and consulted with the NUM in this regard. NUM was the majority trade union and apart from other things had signed an agency shop agreement with Respondent.

31. Pursuant to the conclusion of the agreement, Respondent implemented it. The implementation thereof obviated any pending retrenchments. It did not however obviate other problems associated with the retrenchments. The result was this matter ending up in Court. I am asked to decided a few points *in limine*.

32. This dispute was triggered after Applicants employment was terminated on the grounds that they had reached the age of retirement in terms of the agreement. They all contend that they:-

9.1 not NUM members and therefore not bound by the agreement;

9.2 therefore should have been consulted prior to their retrenchment.

Mr Shokoane, on their behalf, argued strenuously that Respondent contemplated retrenchment prior to 25 March 1998 and forestalled it by entering into the agreement with the NUM.

33. Earlier on I indicated that the number of applicants was not readily ascertainable on paper. This is because in the statement of claim it is stated that First Applicant had been appointed by 112 Further Applicants to act on their behalf. In the citation it is stated “William Khunabi and 114 others.”

34. Before dealing with the pointes *in limine* raised I thought it prudent to make some comments about the agreement and the confusion it has generated. In my view the agreement is not a substitute for Section 189 of the LRA. Instead it is an amendment of the conditions of service to the extent that the age of retirement is now above 50. As to whose conditions of service have been amended, I will deal with that shortly.

35. Before doing so, I must first deal with the effect of the agreement. I said earlier that the agreement alters the retirement age. In short it reduces the age of retirement to 50. Any person over the age of 50 can retire without any loss of benefits as provided for by the MPF. The only difference is that those over the age of 55 are compelled to go on retirement while those between the ages of 50 and 54 can retire at the discretion of Respondent. This is stated clearly in the agreement which provides:-

"Employees between the age of 50 and 54 will be approached to volunteer for early retirement with full benefit where applicable."

36. In my reading of the agreement the employees are not given the discretion to retire upon reaching that age, but rather the employer will approach them. If the employees were given a discretion it would not be necessary to approach them. For they could not use their discretion simultaneously with those who have reached the age of 55 and who are compelled to retire. Further it is apparent that the employer will exercise its discretion to approach employees only as a first call to avoid retrenchment. In short where the employer does not contemplate retrenchment it will not approach the employees to avail themselves for early retirement. Therefore the verb "volunteer" is somewhat misleading as it suggests the initiative comes from the employee. I find it strange that an employee could be approached so that he could volunteer a

predetermined course of action because he is of a predetermined age.

37. The next question is whether the agreement binds NUM members only or of it binds members of other minority unions as well. Section 23(1)(d) of the LRA provides as follows:-

"-a collective agreement binds

(d) employees who are not members of the registered trade union or that trade union party to the agreement of-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their numbers the majority of the employees employed by the employer in the workplace."

38. *In casu*, it is common cause that NUM represented the majority of the employees in Respondents business. It is not disputed that the agreement identifies the employees affected by it with sufficient particularity. Even if it was disputed, it is my view that the agreement clearly identifies the employees as set out in Section 23(1)(d)(i). Consequently in my view the agreement concluded between the NUM and Respondent binds not only those employees who are members of the NUM but also non-members as contemplated above.

39. I indicated that the agreement also brought about confusion. One such confusion is the failure by the Applicants to distinguish between the consultation required by Section 189 of the LRA and measures to avoid retrenchment. Mr Shakoane submitted that once Respondent contemplated

retrenchment, it should have been obliged to consult with the applicants outside the process it had with the NUM. The question is should the employer consult before considering alternatives to retrenchment?

40.

17.1 In my view the answer lies in the section itself. Section 189(1) provides:-

"When an employer contemplates dismissing one or more employees for reasons based on the employers operational requirements..."

17.2 Section 189(3) states that the employer must disclose in writing all relevant information including the alternatives that the employer considered before embarking on dismissals.

41. It would appear on a closer reading of the text that it is not expected of the employer to take piecemeal compliance with every subsection, but that the employer is expected to take a holistic view. In practical terms this means that the employer will take stock of his or her business operations and come to the conclusion that there is a need to retrench based on operational requirements. This decision is not a firm one. S/he should immediately consider ways and means to avoid retrenchments and evaluate the pros and cons of all such measures. Among such measures could be an agreement such as the one under consideration here. In engaging the union is such discussions whilst not obliged to the objective thereof is not a consensus seeking exercise set out in Section 189 but rather to look at all available alternatives to retrenchment. If none is viable then the employer will have to take a firm view on dismissal. In this instance s/he is obliged to consult in a consensus seeking approach. The provisions of Section 189 must be religiously observed as set out in **Johnson**

and Johnson as the employer now contemplates a dismissal.

42. I may further add that the employer need not necessarily seek ways to minimise retrenchments, only when s/he has foreseen such an eventuality. S/he may enter into an agreement to this effect under normal circumstances when the operational requirements do not dictate any need for retrenchment. Where the employer has successfully attained alternative measures to the retrenchment, the need to retrench becomes fortuitous. Evidently it would be open to any employee affected to challenge such alternative measures on grounds of fairness, reasonableness and prejudice.

43. Otherwise the legislature could not have required of an employee to furnish information regarding the alternatives s/he considered if it was not expected that such consideration precedes contemplating a dismissal. In short therefore one can say that Section 189 envisages a two stage approach. The first being a tentative one leading to the employer closely interrogating all options available and the second one being a final one leading to consultation and information sharing.

44. With the above in mind, I now deal with the two points raised *in limine*.

21.1 Respondent entered into an agreement with NUM

21.1.1 I have substantially dealt with this argument above. Whether the Applicants were members of the NUM or not they are bound by the terms of the agreement for the reasons set out above. The effect of the agreement was to regulate the retirement age of the employees in the bargaining unit concerned. Consequently I hold that Respondent was not obliged to consult the individual applicants for the following reasons:-

21.1.1.1 to the extent that Respondent consulted with the NUM, it was with a view to avoid retrenchment and therefore not obligatory in terms of the LRA;

21.1.1.2 the applicants are bound by the collective agreement even if they were not NUM members.

To hold otherwise would be a failure of this Court to give effect to the purpose of the LRA, which inter alia is to promote orderly collective bargaining. What the Applicants purport to argue is that Respondent was obliged to consult them before contemplating to discuss any employee. In short before it had taken a firm decision to retrench. It follows that the above point in limine falls to be upheld.

45. Some of the Applicants are not properly before this Court as the First Applicant has no locus standi to represent them.

22.1 The above relates to the second point in limine raised. As I have said, at the end of the day I do not know exactly how many applicants have approached this Court. Therefore much as the first point in limine has been raised, and substantially disposes of the matter, I will nonetheless deal with this point as well.

22.2 *"On the 3rd and 4th June 1999, the parties held a pretrial conference before Seady A.J. Among other the following was recorded:-*

22.2.1 The Respondent does not contest the locus standi *of Khubani and Sigwali to bring the application on behalf of the persons whose names appear on the schedules;*

22.2.2 The Respondent will treat the persons whose names appear in the statement of claim as being applicants properly before Court if a confirmatory affidavit has already been filed, or their names appear on the register of those present in Court

on 3 June 1999, or a confirmatory affidavit is filed on or before 30 June 1999.

23. Relying on an unreported Judgment In **Lebusa and Others v Kloof Gold Mine**, Case No J1497/98, Mr van As, on behalf of Respondent withdrew the above admissions holding that they were made improperly as they confer *locus standi* where none in fact exists. He argued that he was justified in withdrawing the admissions as they are matters of law. In this regard he relied on **Vaneta Spa v Caroline Collieries (Pty) Ltd** 1987 (4) SA 883 (A) at 893C-D where Viljoen A.J. had the following to say:-

"No direct authority, either in our case law or in the Roman-Dutch law, has been quoted to this court in support of this proposition. On the contrary, the dictum of Innes CJ in ***Heckerman v Feinstein*** *(supra), to the effect that there can be no propagation in regard to cases where the Court has no authority at all to adjudicate upon the subject - matter of dispute has never been ____ in this country."*

46. In the Ventura Spa case the Court quoted with approval **Farquharson v Morgan** (1894) 1 QB 552 (CA) where Lord Davey held:-

"Parties cannot by agreement confer upon any Court or Judge a coercive jurisdiction which the Court or Judge does by law possess."

I agree. In the same breath parties cannot confer upon individuals *locus standi* which s/he does not possess.

47. Having said the above I now turn to the issues before me. I accept without deciding the issue that UPUSA, a duly registered trade union, referred the

dispute on behalf of all the Applicants to the CCMA. Further that the parties are the same save that UPUSA is no longer a party to these proceedings. By this I mean that UPUSA, at the conciliation stage at the CCMA, represented all the Applicants before me now. In the **Lebusa** decision the Court drew a distinction between an application brought by an individual member and that brought by the union. In respect of the former the members need not even be cited as parties while any other interested party needs to be properly cited.

48. In **Amalgamated Engineering Union v Minister of Labour** 1949 (4) SA 908 (A) at 914 Centlives FA, referring to the 1937 Act, had the following to say:-

"...when, ... a trade union applies for a conciliation board to determine an dispute between its members and an employer, it acts as the representative of its members."

This case has been quoted with approval in **Marievale Consolidated Mines v President of the Industrial Court** 1986 (2) SA 485 (T) and followed in **General Industries Workers Union of SA and Others v LC van Aardt (Tvl) (Pty) Ltd** (1991) 12 ILJ 122. See also Colin Kahanovitz **"The standing of Unions to litigate on behalf of their members"** (1999) 20 ILJ 856.

49.

27.1 In **National Motor Freight Association v United States** 372 US 246 (1963) the US Court held as follows:-

"...even in the absence of injury to itself, an association may have standing solely as the representative of its members."

In **Hunt v Washington State Advertising Commission** 432 US 333 (1977) at 343 this doctrine was stated as a three point test as follows:-

"[A]n association has standing to bring suit on behalf of its members when:

(a) its members would otherwise have standing to sue in their own right;

(b) the interests it seeks to protect are germane in the organisations purpose; and

(c) neither the claim asserted nor the relief requested requires the participation of the individual members of the lawsuit."

These decisions were cited with approval in **Automobile Workers v Brock** 447 US 274 at 290 where the Court held as follows:-

"...the doctrine of association standing recognises that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."

50. In the **van Aardt** decision the Court concluded that the dismissed workers need not be members of a particular union at the time of their dismissal. They can join any union as long as this is before referring the matter for conciliation. I do not propose to deal with this point further as it is not an issue before me.

51. Coming closer to the contention of the parties in this matter, I found the following passage by Conradie J in **Merlin Gerin (Pty) Ltd v All Current and**

Drive Centre (Pty) Ltd 1994 (1) SA 659 at 660D-F to be very helpful:-

"The 'right' - if it is one - is a respondent's right not to be subjected to the risk of litigating against an ostensible applicant when the latter will not be bound by orders made in litigation, or when it is not clear that the applicant's ostensible agent has the authority to conduct the litigation on its behalf. The right is the right to refuse to litigate under such prejudicial circumstances. It is a fundamental right to a fair trial. For the enforcement of this right, the respondent has only one remedy, to move for dismissal of the application. Moving for dismissal is not itself a right, but a remedy for the right not to be unfairly proceeded against."

52. The gravamen of Respondent's complaint is that an individual applicant is not a trade union or a person with the necessary *locus standi*, in terms of the LRA, to represent further applicants in this matter. In my view the matter does not end there. If the complaint was only that *locus standi* was the problem, it is not insurmountable. This is because the other applicants in such a case could still proceed on their own. What has happened is a unique situation. The union brought consolidation proceedings on behalf of its members, possibly all the applicants herein, before the CCMA. When the matter was referred to Court, the union took a back seat. It prepared the statement on behalf of the two individuals only. Apparently it instructed an attorney as well as counsel, but is not cited as a party in the proceedings.

53. In Section 161 of the LRA, the legislature in its wisdom has set out who can represent a party in proceedings before the Labour Court. If it intended that anyone could represent parties then it would have specifically said so. As I have stated above, the issue is not only that of representation but that of confusing representation with referral. While representation may include referral this is not necessarily the case all the time. Section 191(5)(b) states that the employee may refer the dispute to the Labour Court. In my respectful view what that

envisages is that the employee **personally** may refer, or a person referred to in Section 161 on behalf of an employee. Indeed one must be careful here as the word employee for the purposes of the above sub-section may refer to the past tense. Once an employee is dismissed, s/he ceases to be one. Mr Shakoane was at pains to point out that the legislature intended that one ceases to be an employee after the matter has been disposed of by the Court or arbitration tribunal. I disagree.

54. In my view the import of Section 161 is that an employee or ex-employee may only be represented by a legal practitioner, or a member or office-bearer or official of his or her trade union and no-one else. It goes without further ado that the section does not contemplate an employee or ex-employee representing an employee. Therefore a referral made by any person other than the persons I have referred to on behalf of the applicants cannot be said to be a referral by them or on their behalf.

55. At the risk of repeating myself in the **Lebusa** case, had the union referred the matter in its name then there is no doubt in my mind that it would be perfectly in order. Absent that, each applicant or applicants jointly refer this matter to Court. A confirmatory affidavit is not a referral. It is more like a joinder application. *In casu* it is even worse because its sole purpose is to confer authority on First Applicant to represent the further applicants. In my view the second point in limine falls to be upheld as well. This means that with the exception of Khubani and Sigwili (assuming that they have each referred the dispute to this Court) the rest of the applicants have not complied with Section 191(5)(b) and are not properly before this Court.

56. I have not been addressed on the issue of costs and reserve this issue for trial.

SJ NGWENYA A J

Acting Judge of the Labour Court

DATE OF HEARING: 9 SEPTEMBER 1999

DATE OF JUDGMENT: 7 OCTOBER 1999

For the Applicant: ADV SHAKOANE

For the Respondent: ADV VAN AS