REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J367/12

In the matter between:

HARMONY GOLD MINING CO LIMITED **Applicant**

[TARGET MINE]

and

NATIONAL UNION OF MINEWORKERS **First Respondent**

THOSE PERSON WHOSE NAMES

ARE LISTED IN ANNEXURE "A" HERETO **Second Respondents**

Heard: **3 March 2012**

Order: **3 March 2012**

Reasons: **14 March 2012**

Summary: **"Belt riding" is a condition of service. Strike is unprotected. Rule Nisi confirmed.**

JUDGMENT

AC BASSON J

[1] This is the return date of a Rule Nisi issued by my learned brother Molahlehi, J on 15 February 2012 in terms of which the Court -

1. declared the work stoppage, alternatively strike action which the second and further respondents intended to embark upon on 15 February 2012 at 18H00 to constitute an unlawful work stoppage, alternatively unlawful and unprotected industrial action;

2. interdicted and restrained the second and further respondents from participating in, promoting or inciting such unlawful work stoppage, alternatively such unprotected strike action against the applicant in support of their demand that the applicant stops the use of the 'conveyor belt as a mode of transport for man riding'; and/or their demand that the applicant uses buses to transport employees in place of belt riding; and/or their unlawful demand that the applicant removes Mr Tshediso Azel Mantje from his position at the mine forthwith.

3. interdicted and restrained the second and further respondents from promoting or inciting any actions in contemplation or furtherance of such work stoppage alternatively strike;

4. interdicted and restrained the first respondent from promoting or inciting such work stoppage alternatively strike action against the applicant and promoting or inciting any actions in contemplation or furtherance of such work stoppage alternatively strike;

5. ordered such respondents who oppose this application to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

The applicant seeks confirmation of the Rule.

[2] The applicant, Harmony Gold Mining Co Ltd (Target Mine) conducts gold mining operations at various sites. The present application relates to the Target Mine in the magisterial district of Welkom, Free State (hereinafter referred to as "the mine"). The mine has two operational shafts: Target 1 and Target 3 shafts as well as a plant. The first respondent is the National Union of Mine Workers (hereinafter referred to as "NUM"). NUM represents the second and further respondents ("the individual respondents"). They number approximately 2361 and are all members of the NUM.

Brief background to this dispute

Belt riding

[3] It appears from the founding affidavit that the applicant bought the Target mine from Avgold Ltd in 2003. From the establishment of the mine in the mid 90's, the mine used a conveyer belt system which runs down an incline shaft (Target Shaft 1) to transport employees to and from their places of work (hereinafter referred to as 'belt riding' or 'man riding'). The conveyer belts system spans a distance of approximately six kilometres. Only employees who work in Target 1 Shaft utilise the belt riding system as a means of transport to get to their places of work. Target 3 Shaft employees do not use the belt riding system. Target 1 Shaft was designed in such a way that employees will first descend down a vertical shaft and then move to their work stations *via* a decline shaft which runs from 50 level for approximately six km at an angle of nine degrees to the horizontal. The belt riding system is made up of six independently operated sections, each of which is separately powered. There are boarding and alighting platforms at the beginning and the end of each section. Should one section of the conveyor belt become inoperative the remaining five will still be able to operate. Employees will, then have to walk the distance of the inoperative belt section.

[4] Target 1 Shaft was designed and conceptualised on the belt riding system

when this shaft was commissioned in the 1990's. The design of this Shaft precludes, according to the applicant, the use of any other mode of transport given the number of employees, the physical dimensions of the shaft and the distance to be travelled.[1]

Relationship between the applicant and the NUM

[5] The relationship between the applicant and NUM is regulated by a collective agreement dated 3 October 2005 which came into effect on even date. In terms of this agreement, NUM was granted bargaining rights for a specific bargaining unit. This bargaining unit consists of all the employees who are employed at the mine who are members of NUM and who are engaged in production work.[2] The applicant is further a member of the Chamber of Mines of South Africa (hereinafter referred to as "the COM"), an employer's organisation registered in terms of the Labour Relations Act 66 of 1995 ('hereinafter referred to as "the LRA"). The COM negotiates terms and conditions of employment on behalf of its members with the NUM. The current agreement is in force for the period 2011 to 2013. In terms of this agreement, employees are precluded from striking in respect of their terms and conditions of employment during the currency of the agreement.

The dispute between the parties

[6] The dispute between the parties is crisp. The applicant contends that it is a condition of employment that employees use belt riding as a form of transportation. NUM disputes that it is a condition of employment and argues that the employees are therefore able to strike on the issue of belt riding. More in particular, NUM disputes the documents relied upon by the applicant in support of its contention that belt riding is a condition of employment. In this regard, the applicant referred to 'Annexure AM2' which is a standard letter addressed to the recruiting organisation, TEBA, in terms of which TEBA is required to inform the relevant applicant for employment that it is a condition of employment that during his or her employment at Target 1 Shaft, the said

1 Paragraph 9 of the founding affidavit and paragraphs 5.4 – 5.6 of the replying affidavit.
2 Clause 1.8 of the Collective Agreement.

employee will belt ride, undergo training on belt riding and manifest the capacity to perform this activity. The letter further requests TEBA to inform the applicant for employment that 'should an applicant below not fulfil the conditions he will be returned to the area where he comes from'. In other words, if the employee does not pass the heat tolerance screening and belt riding test or does not obtain a certificate of fitness, the employee will not be able to work in Target 1 Shaft (where belt riding is the mode of transport). This letter applies to so-called payroll 2 employees which the applicant contended constitute the bulk of the individual respondents. According to the applicant, payroll 2 employees are not provided with a standard letter of employment by the applicant as this is done by TEBA. When employees are transferred from other operations of the applicant to Target 1 Shaft, they are informed that they will be required to belt ride and be trained accordingly.

[7] In summary therefore, the applicant argued that the employees are not allowed to strike because it is a term and/or condition of service that employees use the conveyor belt system as the mode of transport in Target 1 Shaft. If regard is had to the referral form LRA 7:11, it is clear that the dispute that was referred to the CCMA concerns a demand that the employer 'must stop using conveyor belt as a mode of transport for man riding'. The respondents denied that "belt riding" is a condition of service and accordingly, they are entitled to strike over this issue.

[8] The applicant further argued that the dispute was not properly conciliated because NUM obtained a certificate of outcome without having set down the dispute for conciliation and obtained a certificate of outcome without the knowledge of the applicant. The applicant further argued that the dispute has been settled between the parties with reference to the minutes of the meeting held on 11 November 2011 during which management was informed that they must buy two 50 seat busses in the new financial year. It was further agreed at this meeting that management will conduct a proper investigation and revert back to the union. It was also agreed that relevant information will be furnished to doctors on request in respect of all occupational related illnesses and accidents. Lastly, the applicant submitted that there is no practical

alternative to the conveyor belt system for transporting employees to and from their place of work. The applicant is therefore unable to meet the demand to stop using belt riding as a mode of transport.

The 'belt riding' dispute

[9] The belt riding dispute arose soon after a new Branch Committee of the NUM was elected. It is clear from a reading of the papers that the belt riding dispute - at least at the time of the meeting on 11 November 2011- only concerned a narrow point namely the fact that there were instances of intermittent stoppages of the conveyor belt. The dispute was not over the safety of belt riding, as is alleged by NUM in the answering affidavit. (I will return to this aspect herein below.) The second issue discussed at the meeting was the concern raised by NUM that belt riding is not taken into account in assessing whether any injuries are work related. From the minutes it does not appear that the parties discussed the safety of belt riding. Only these two issues were accordingly discussed prior to the strike notice having been issued.

[10] The unsigned minutes of the meeting of 11 November 2011 between the applicant's management and the Branch Committee records the following under'(b) Belt Riding':

> 'NUM mentioned that 50/2 belt was standing today. The appreciated management's efforts to ensure that the belts are more reliable than before.
>
> They requested management to buy two 50 sitter busses that would be used to ferry employees to the working places underground. The busses must be bought in the new financial year. Management will do a proper investigation regarding the NUM's request and revert to the union.
>
> Stated that all illnesses and incidents that are related to belt riding could be classified as occupational illnesses/ accidents.
>
> Management mentioned that all occupational related illness and accidents are being investigated and relevant information is furnished to Doctors on

request.'

[11] Although the minutes are unsigned, NUM does not take issue with the correctness of the minutes in respect of the belt riding issue. In fact, in the answering affidavit, NUM admits the correctness of the minutes and only takes issue with the minutes in so far as it relates to the training of shop stewards. The remainder of the minutes and particularly that which relates to the belt riding issue therefore remains uncontentious. This being the case, it can therefore be accepted that the only two issues in respect of the belt riding was the two issues as recorded in the minutes of 11 November 2011.

[12] As already pointed out, the applicant submitted that the belt riding issue was settled between the parties on the basis that the applicant will investigate purchasing the two fifty seater busses to replace the belt riding prior to the beginning of the next financial year. According to the applicant, the matter is currently being investigated by the mine's senior engineer, Mr Alwyn Jordaan. In respect of the second issue, the applicant likewise argued that the matter was settled in that management had undertaken to ensure that all relevant information including information relating to an employee's use of the conveyor belt system during the course of his or her employment would be made available to the Occupational Health Centre for the purpose of evaluating whether injuries are work related or not. NUM denied that the dispute was settled.

Referral of the dispute

[13] NUM referred a mutual interest dispute to the CCMA. In the LRA7:11, NUM demands that 'the employer must stop using conveyor belt as a mode of transport for man riding'. Conciliation was set down for 18 October 2011. On 15 October 2011, the applicant and NUM agreed to postpone the conciliation meeting whilst the parties attempt to resolve the dispute. A letter was sent to the CCMA confirming the arrangement. The conciliation meeting was accordingly postponed by mutual agreement but without having set down the conciliation meeting NUM obtained a certificate of non-resolution on 15

December 2011.

[14] The parties met again on 16 January 2012 during which meeting NUM requested that the applicant agree to a mass meeting of their members. It was during this meeting that the deponent of the founding affidavit - Mr Mantje (the Human Resource Leader at the Target Mine in the Free-State Province) noticed on the agenda a reference to a certificate of non-resolution. It was the first time that the applicant became aware of the fact that a certificate was issued.

[15] According to the applicant, management had not yet had an opportunity to finalise the investigation into the merits of a bus system. However, preliminary findings were that the bus system, which has to meet stringent regulations for underground trackless mobile machinery, would not meet the operational requirements of the applicant to transport employees effectively to their workplace. In brief, it is stated that an 18 seater bus will take approximately 2 hours to do a return trip and because the decline shaft accommodates one way traffic transporting only, transporting approximately 700 workers per shift, will result in a turnaround of 17 hours. This, the applicant submits is unsuitable. NUM suggests in the answering affidavit that the applicant can make use of UV trucks that are modified to transport employees and submits that this will be a safer and more viable option. In response, the applicant states that there are no 50-seat vehicles available which comply with the necessary standards and exigencies of the underground environment. The so-called UV vehicles can furthermore only carry 6-7 persons safely and is therefore also not a viable option.

The safety issue

[16] It is strictly not necessary to decide whether belt riding is unsafe as alleged by NUM in the answering affidavit. Firstly, the safety of belt riding was not a dispute between the parties at the meeting preceding the referral of the dispute to the CCMA. Secondly, it is not alleged in the papers that the employees intend to embark on strike action because belt riding is unsafe. If

this was the case, the issue before this Court would have been very different. The issue before the Court is the dispute about whether belt riding is a term and/or condition of service. The answer to this question will determine whether it is a strikeable issue. In respect of the safety issue it should be pointed out that an employee in any event has the right, within reasonable justification, to leave any workplace when it appears to that employee that the place of work poses a serious danger to the health or safety of that employee. See in this regard section 23(1) of the Mine Health and Safety Act[3] (hereinafter referred to as "the MHSA"). Furthermore, NUM (as a registered trade union with members at the mine) can refer any safety concerns to an inspector appointed in terms of the MHSA. In terms of the MHSA, inspectors have far reaching powers to investigate any allegations and concerns in respect of safety in mines.[4] They also have broad powers to suspend any act or practice that endangers the health and safety of any employee at the mine.[5] The Act further specifically provides that if there is cause for concern on health or safety grounds, the inspector *must* investigate any matter referred to it if requested to do so by (i) a registered trade union with members at the mine; (ii) a health and safety representative or health and safety committee at the mine; or (iii) if there is no health and safety representative or health and safety committee at the mine, an employee at the mine.[6] No facts were placed before the Court to indicate that such a report has been made to an inspector in terms of the MHSA.

[17] In the replying affidavit, the applicant persists with its claim that the belt riding method of transport is safe. In this regard, it was submitted that over the past two years there have only been six incidents associated with the belt riding system. Of the six incidents, only two necessitated sick leave. Furthermore, of these six incidents five incidents were caused by the employee failing to

3 Act 29 of 1996.
4 In terms of section 47 of the MHSA Mine Health and Safety inspectorate is established. An inspector may enter any mine at any time without warrant or notice and may inspect any machinery (section 50). The inspector may also seize an machinery or any part of it. In terms of section 54 the inspector has the power to deal with dangerous conditions and may give any instruction necessary to protect the health and safety of persons at the mine including but not limited to an instruction that the performance of any act or practice at the mine or a part of the mine be suspended or halted (section 54(1)(a) of the MSHA.
5 *Ibid*.
6 Section 60(3)(b)(i) – (iii) of the MSHA,

follow the correct procedures in utilising the belt riding system. It appears from these six incidents that none of the employees lost a limb or was incapacitated.[7] It is further estimated by the applicant that should 1000 employees make two trips daily this would equate to 600 000 trips per year or 1 200 000 over two years (assuming that every employee work 300 days per year). Given the six incidents over the aforementioned period, the safety record therefore amounts to one incident per 200 000 trips or 99,9995% none of which resulted (according to the papers) in a serious injury.

[18] It is further common cause that the applicant has a Code of Good Practice in place as required by section 9 of the MHSA. This Code sets out safety procedures that must be followed by employees using belt riding as a mode of transport. The Department of Mineral Resources has been supplied with such a code of practice. I will now turn to the central question in this matter.

Is the belt riding system part of an employee's terms and/or conditions of employment?

[19] The applicant contended that belt riding is a term and condition of employment of every employee who works in Target 1 shaft. NUM disputed this and argued with reference to Annexure AM2 that it merely constitutes 'a communication to TEBA of the applicant's wishes and not a letter of employment from TEBA to a prospective employee stating, amongst other things, that employment at the mine shall be conditioned upon the use of the conveyer belt'. In the replying affidavit, the applicant persists with the contention set out in the founding affidavit namely that it is a condition of employment. In further support of this contention, the applicant attaches to the replying affidavit examples of assessment declarations. These declarations clearly indicate the criteria and standards for such competency.

[20] All employees are required to undergo an assessment at a training centre on surface when they are assigned to Target 1 Shaft. This assessment consists

7 The following injuries were sustained: (i) Matlhakwane lost his nail of his little finger; (ii) W Penning sustained a confused left knee; (iii) D Sangozi suffered a laceration of his nose bridge; (iv) N Molelekoa suffered a confused neck muscle; and (v) J van Staden injured his neck muscles and (vi) E Pretorius suffered a laceration on his head after he slipped and fell on the conveyor belt.

of a practical and a theoretical assessment. Each employee is also required to go though the said assessment annually when he or she returns from annual leave. According to the applicant, it is implicit from the declaration made by each employee that, by signing the assessment declaration, he or she accepts that the belt riding system is a term and condition of his or her employment. The salient part of this declaration reads as follows:

> 'I hereby declare that I am familiar with **The Belt Riding** activity instructions and that I will apply these as part of my duties when riding on the belt conveyor.'

[21] On behalf of NUM, it was argued that this evidence (referring to the assessment declaration) constitutes new evidence which the applicant has sought to introduce in the replying affidavit and argued that these documents ought to have been included in the founding affidavit so as to give the respondents a fair opportunity to react thereto. According to NUM, the applicant ought to have foreseen that there was always going to be a dispute about whether the belt riding system is a term and/or condition of employment. The applicant argued that it could not have foreseen that the respondents would deny that the belt-riding was a term and condition of the individual respondents' contracts and argued that the applicant should therefore be allowed to rely on the assessment declarations attached to the replying affidavit.

[22] It is trite that an applicant must set out its case in the founding affidavit as complete as is necessary to make out a *prima facie* case. See in this regard *Juta & Co Ltd v De Koker*[8] where the Court held as follows:

> 'In the light of the aforegoing I was of the view that sufficient allegations were contained in the founding affidavits to establish *prima facie* that passages in the affected work constituted an infringement of copyright in respect of the copyright work. I emphasise that it was but necessary for the applicants to make out a *prima facie* case in this respect. Clearly, once regard was to be had to the evidence following upon the founding affidavits, that *prima facie* case might be destroyed or the applicants might at the end of the day have been in the position

8 1994 (3) SA 499 (T) at 508 B-D.

that they had failed to show on a balance of probabilities that there was any such infringement.'

[23] The applicant must therefore stand or fall by his founding affidavit. (See also in this regard *Director of Hospital Services v Mistry*.[9]) An applicant will generally therefore not be allowed to introduce a new matter in reply. The applicant will especially not be allowed to introduce a new cause of action in the replying affidavit that supplants the cause of action contained in the founding affidavit. This rule is, however, not inflexible. The Court may allow an applicant to set up an additional ground for relief arising from the respondent answering affidavit. See in this regard *Juta & Co Ltd and Others v De Koker and Others*:[10]

> 'In the light hereof the principles stated in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) are I consider applicable. The headnote to that case sets out accurately the principle enunciated by Miller J and is in the following terms:
>
> "In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a

9 1979 (1) SA 626 (A) at 645 H 636 E: 'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J *in Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny". Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds for the application in the replying affidavit"(per Van Winsen J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260.) It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar. I am not losing sight of the fact that, in the absence of an averment in the pleadings or the petition, a point may arise which is fully canvassed in the evidence, but then it must be fully canvassed by both sides in the sense that the Court is expected to pronounce upon it as an issue. (See the recent judgment of Holmes JA in *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714.) But that situation did not arise in this case; respondent's counsel expressly confined his argument to the issue on the papers before the Court, that is, to the issue as to whether the respondent had delayed unreasonably in taking action during the initial period of applicant's suspension. The question as to what happened after 13 April 1977 was not canvassed by the parties and the Judge was, as he conceded in his judgment, left in the dark. Nevertheless, no doubt because he feared that the applicant was being penalised and had suffered an injustice, he made an order granting him the relief for which he had asked and then, to balance the scales of justice, ruled that there should be no order as to costs as the case had been decided on an issue not raised by the parties. Those orders cannot stand.'

10 1994 (3) SA 499 (T) at 510 F-510 H and 511 D-F.

> distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom."

…

The material in respect whereof the respondents objected could not, in my view, create any prejudice as far as the respondents were concerned, particularly if they were granted the opportunity should they so wish to file further affidavits to deal therewith. To the extent that the replying affidavits did contain new matter the Court has a discretion to allow such material to remain in the replying affidavit, giving a respondent an opportunity to reply thereto should special or exceptional circumstances exist - *Shephard v Tuckers Land and Development Corporation* F *(Pty) Ltd (1)* 1978 (1) SA 173 (T) at 177G-178A.'

[24] The Court in *Fick v Walter and Another* set out the circumstances in which the court will allow an applicant to include new material in the replying affidavit:[11]

'On the other hand, I do not share Mr *Raubenheimer's* view that the material contained in the replying affidavit constitutes new matter, and I decline to strike out any of the paragraphs therein contained. I agree with Mr *Seale* that what plaintiff was attempting to do in the replying affidavit was to explain the terms of his founding affidavit. In this regard, I would refer to the case of *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543 E, where Mullins J said:

> "I do not read this Rule as implying that a deponent to an affidavit can in no way depart from the terms thereof. If this were so, a party could not, in a supplementary affidavit, vary or explain the terms of a founding affidavit. *This is a matter of frequent occurrence, more particularly where it is not sought to withdraw or vary factual allegations, but only to amplify or amend legal conclusions or submissions, which are frequently incorporated in an affidavit, in order*

11 2005 (1) SA 475 (C).

to clarify a cause of action.

Even if it is intended to vary or amend facts, I can see no objection thereto.

[12]A witness giving evidence on oath in Court frequently retracts a statement, or qualifies or changes his evidence. Whatever effect it may have on his credibility, he cannot be precluded from giving such evidence. Why should the deponent of an affidavit be in a different position?

Insofar as Rule 28(1) is concerned, I read this Rule as meaning nothing more than that the provisions of the Rule may not be used to amend an affidavit. It does not, for example, preclude a deponent from filing a supplementary or replying affidavit explaining, varying or even retracting statements made in his original affidavit.'

In any event, even if I were to strike out all or some of the paragraphs from the said replying affidavit, it would make no difference to the decision which I have reached in this matter.'

[25] In *Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim and Others*[13] the Court pointed out that, although the principle is that the Court will not allow an applicant to supplement an application in the replying affidavit in order to cure a defect in the founding affidavit, it has a discretion to either strike out the new matter or allow the respondent to file a second set of answering affidavits to deal with the new matter.

'That there is this principle supporting the argument emerges from *Schreuder v Viljoen*, 1965 (2) SA 88 (O). In this case it was held that:

> "A Court should not permit an applicant in motion proceedings, where it is not certain on the application as a whole that the respondent has no defence, to supplement his application in his replying affidavit in order to cure the defect where the application does not disclose a cause of action and the respondent has taken an objection *in limine* against it: the whole application should be dismissed."

…

I find it unnecessary to decide whether the applicant's replying affidavit sets out a new cause of action against the second and third respondents or merely raises new matter. In either event I have, I consider, a discretion either to strike out what I would call the new matter (or direct that the applicant cannot rely upon it) or to permit it to stand but give the respondents an opportunity of

12 Court's emphasis.
13 1976 (4) SA 58 (T) at 63 A-64 A.

filing a second set of answering affidavits so as to deal with the new matter. Both remedies stem from the general principle of our law of procedure that

> "... an applicant should set out in his petition or notice of motion and supporting affidavits a cause of action and, since in application proceedings the affidavits constitute not only the pleadings but also the evidence, such facts as would entitle him to the relief sought".

(*Kleynhans v Van der Westhuizen, N.O.*, 1970 (1) SA 565 (O)).

On p. 568 De Villiers, J., goes on to state the following:

> "Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion (cf. *Mauerberger v Mauerberger*, 1948 (3) SA 731 (C); *De Villiers v De Villiers*, 1943 T.P.D. 60; *John Roderick's Motors Ltd*. v *Viljoen*, 1958 (3) SA 575 (O); *Berg v Gossyn* (1), 1965 (3) SA 702 (O); *Van Aswegen v Pienaar*, 1967 (1) SA 571 (O)), but may do so in the exercise of its discretion in special circumstances (cf. *Bayat and Others v Hansa and Another*, 1955 (3) SA 547 (N); *Schreuder v Viljoen*, 1965 (2) SA 88 (O)). Once such a discretion has been exercised in favour of an applicant a Court of appeal will only interfere if it comes to the conclusion that the Court *a quo* has not exercised its discretion judicially.,' application. Even after the latter affidavit had been filed respondent's opposition to applicant's request that the Court in the exercise of its discretion should allow the new matter to remain in the replying affidavit, was not unreasonable. Applicant was in effect asking for an indulgence and at no stage offered to pay respondent's wasted costs up to that stage."

(See too *Herbstein and Van Winsen, supra* at p. 75, from which it appears that the principle also applies to the making out of a new case in a replying affidavit)."

[26] I have carefully perused the papers. I am of the view that no reason exists why I should not allow the applicant to refer to the safety declarations in its replying affidavit:

i. I am not persuaded that the applicant could have anticipated at the time the founding affidavit was drafted that the respondents would place it in dispute that belt riding was a term and/or

condition of employment particularly in light of the discussions that were held between the parties on 11 November 2011.

ii. It is not denied that belt riding has been the method of transport in Target 1 Shaft since the date of establishment of the mine during the mid-90's.

iii. If regard is had to the material attached to the replying affidavit, it constitutes in my view no more than material that further supports or amplifies the case that was already made out in the founding affidavit, namely that it is a condition of employment that employees will belt ride and undergo training in belt riding. The assessment declarations in no way seek to withdraw or vary any factual allegations already made in the founding affidavit. The applicant is also not seeking to introduce a new cause of action or to vary the cause of action set out in the founding affidavit. It is clear from the founding affidavit that it was the applicant's case from the outset that belt riding constitutes a condition of employment. It is specifically stated in the founding affidavit that employees, when they are transferred to other operations of the applicant to Target 1 Shaft, are informed that they will be required to belt ride and be trained accordingly.[14]

iv. The assessment declarations are not attached to support a new cause of action nor are they attached to cure a defect in the founding affidavit.

v. There was no application on behalf of the respondents to be granted an opportunity to file a second set of answering affidavits to deal with the new documents attached to the replying affidavit. I am therefore not persuaded that the respondents are prejudiced.

14 Ad paragraphs [9]; [22.1] and [23] – [27] of the founding affidavit.

vi. I have also taken note of the fact that this matter was brought before this Court as a matter of urgency and lastly that the reasons for not having attached the assessment declarations to the founding affidavit are properly explained.

[27] I am satisfied on the papers that the applicant has made out a case that belt riding is an express term and/or condition of employment. Terms and conditions of employment are regulated in terms of negotiations between the COM and organised labour (including NUM). The agreement precludes the possibility of a strike in respect of employees' terms and conditions of employment during the currency of the agreement. In the event it is concluded that the strike in support of the demand that belt riding be stopped will be unprotected. The Rule Nisi is therefore confirmed.

[28] One further point must be made. Even if I am wrong in concluding that the documents referred to above support the conclusion that belt riding is an express term and/or condition of employment, there are ample undisputed facts before this Court to support the conclusion that belt riding constitutes, at the very least, a tacit term or condition of employment:

i. Firstly, the documents referred to support a conclusion that, although belt riding may not be expressly included in a formal agreement, the parties accepted that belt riding is a condition of employment.

ii. Secondly, it was not disputed that employees are informed that they must belt ride and that they must be trained accordingly.

iii. Thirdly, when employees are transferred to Target 1 Shaft they are informed that they will be required to belt ride and be trained accordingly.[15]

iv. It is common cause on the papers that the belt riding practice

15 Ad paragraph [9] of the founding affidavit. In response the respondents do not deny or dispute the practice. What is disputed is the fact that the use of the conveyer belt constitutes a condition of employment (ad paragraphs [14] – [16] of the answering affidavit).

has been in existence since the establishment of the mine in the mid-90's. Employees have therefore, for a period of approximately 19 years used this system as a mode of transport in Target 1 Shaft.

[29] In light of these facts, I am therefore of the view that a compelling inference[16] may drawn that, on a balance of probabilities, belt riding constitutes, at the very least, a tacit condition of employment. See in general: *EC Chenia & Sons CC v Lamé & Van Blerk* where the Court confirmed that a tacit agreement is to be inferred from conduct:[17]

> ' Generally speaking, a tacit agreement is one where either the offer or the acceptance, or both, is/are to be inferred from conduct. An express agreement, on the other hand, is one where both these elements of the contract were expressed in words, either orally or in writing.'

In *Sewpersadh and Another v Dookie,*[18] the Court had the following to say about t the test to be applied in order to determine whether a term constitutes a tacit term:

> 'As regards the nature of the test to be applied to determine whether an inference may be drawn on the particular facts, that a tacit contract has been concluded, I respectfully agree with the dictum of Comrie J in *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk* [2000] 4 All SA 412 (C) C at 419*b* - *c*, where he stated the following:
>
> > the idea of a compelling inference appeals to me; a compelling inference derived from proof on a balance of probabilities of unequivocal conduct usually in a business setting.
>
> Taking this dictum into account, as well as other authorities which are discussed by the learned author, Christie (supra) at 85 formulates the D test as to whether a tacit agreement has been concluded, as follows, with which I respectfully agree:
>
> > (I)n order to establish a tacit contract, it is necessary to prove, by the preponderance of probabilities, conduct in circumstances which are so unequivocal that the parties must have been satisfied that they were in

16 See in this regard: *Sewpersadh and Another v Dookie* 2008 (2) SA 526 (D) herein below.
17 [2006] JOL 16965 (SCA) at para 9.
18 *Sewpersadh at* paras 26 and 27.

agreement. If the Court concludes on a preponderance of probabilities that the parties reached agreement in that manner, it may find the tacit contract established.'

[30] I do not find it necessary, in light of the above findings to deal with the remaining grounds relied upon by the applicant in support of its contention that the strike is unprotected.

[31] In the event the following order is made:

'The Rule Nisi granted on 15 February 2012 is confirmed.'

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AC BASSON J

Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT:	Advocate Snijders
	Instructed by Brink Cohen Le Roux Incorporated
FOR THE RESPONDENTS:	Advocate DN Ntsebeza SC, Advocate M Zondo
	Instructed by Finger Phukubje Incorporated Attorneys