THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable
Case no: J 371/17

In the matter between:

KOORNFONTEIN MINES **Applicant**

And

NUM OBO MEMBERS **Respondent**

Heard: **20 February 2017**
Delivered: **21 February 2017**
Edited: **24 May 2017**

EX TEMPORE JUDGMENT

MOSHOANA J: In this matter, yesterday I had issued an order wherein I can repeat the order – The application to interdict the strike was dismissed and I made no order as to costs. And I had indicated to the parties that the reasons would be provided in court today. And here are my reasons:

This is an application to interdict an intended strike action which is to commence at 6 AM on the 21st of February 2017. The application is opposed by the respondents. The issue of urgency and compliance with section 68(2) has been dealt with and it is worth not mentioning at this stage. What remains is whether the applicants are entitled to a relief contemplated in section 68(1)(a) of the Labour Relations Act. In terms of section 68(1)(a) the following obtains:

"In the case of any strike or lockout or any conduct

> in contemplation or in furtherance of a strike or lockout that does not comply with the provisions of this chapter, the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain any person from participating in a strike or any conduct in contemplation or in furtherance of a strike, or any person from participating in a lockout or any conduct in contemplation or in furtherance of a lockout."

10 Therefore, as the provisions of the section are very clear, any strike that does not comply would be interdictable.

The law relating to strikes

The starting point would be section 64(1) of the Labour Relations Act which provides as follows:

> "Every employee has a right to strike and every employer has a recourse to lock out."

I am omitting from the quotation the subparagraphs (a), (b) and (c) and further. The requirements… or rather I am omitting (c) and further, but would quote (a) and (b). It provides:

20 > "If the issue in dispute has been referred to a council or to the commission as required by this act; and -
>
> (i) a certificate stating that the dispute remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the

dispute, has elapsed since the referral was received by the council or the commission; and after that -

(b) In the case of a proposed strike, at least 48 hours' notice of the commencement of the strike in writing has been given to the employer, unless -

(i) the issue in dispute relates to a collective agreement to be concluded in a council in which case notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation that is party to the dispute in which case notice must have been given to that employers' organisation."

These are what may be termed the procedural steps before an employee can exercise the right to strike. Therefore, if an employee does not meet the procedural steps, then the provisions of section 64 would not have been met. Section 2(13) defines an issue in dispute as to mean, in relation to a strike or a lockout, a demand, a grievance or the dispute that forms the subject matter of the strike. Therefore, in terms of section 64(1)(a) there must be either a demand or a grievance or a dispute that forms the subject matter of the dispute that must be referred.

Section 64(4) provides a special dispensation, as it were, for

disputes about unilateral change to the terms and conditions of employment. Such dispensation is that the employee may require the employer not to implement the change to the terms and conditions of employment; or if the terms and conditions of employment have been changed, to restore those terms that had applied before the change. In terms of the provisions of the section, the employer is obliged to comply within 48 hours of the service of the referral. Such statutory obligation means that an employee may elect to approach this court to compel compliance or resort to power play in order to compel compliance.

Section 65 places limitation on the right to strike. Of importance in this judgment is the provisions of section 65(1)(c) which reads as follows:

> "No person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or a lockout if
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law."

It is clear to my mind that the requirements of the law are such that if a dispute is one that a party has a right to refer, either to arbitration or to this court for adjudication in terms of the LRA or any other employment law, then the employee has no right to strike over that issue. Employment law, as mentioned in the subsection I have

just read, came as a result of the 2014 amendments. And section 2(13) defines employment law to mean the LRA, which is the Labour Relations Act, or any other act which is falling under the administration of the Minister of Labour. The Basic Conditions of Employment Act is such act.

Section 77(3) of the Basic Conditions of Employment Act grants the Labour Court concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic conditions of employment constitutes a term. To my mind, section 65(1)(c) is specific. It states that a party must have a right to refer to the Labour Court and/or arbitration. Section 77(3) does not create such a right of referral. All it does is to give the court jurisdiction to hear and determine any matter concerning a contract of employment; such that if an employee elects to refer the unilateral change of terms and conditions to this court, this court has powers to hear it and determine it in terms of section 77(3). Section 65(1)(c) is not an absolute limitation.

In section 65(2)(a) the following obtains:

> "Despite subsection (1)(c), a person may take part in a strike or a lockout or in any conduct in contemplation or in furtherance of a strike or lockout if the issue in dispute is about any matter dealt with in sections 12 to 15."

A further limitation appears in section 65(3) which reads as follows:

> "Subject to a collective agreement, no person may

take part in a strike or a lockout in any conduct in contemplation or furtherance of a strike or lockout -

(a) If that person is bound by -

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute or any determination made in terms of chapter 8 of the Basic Conditions of Employment Act and that regulates the issue in dispute during the first year of that determination."

A brief factual synopsis follows – The employees of the applicant acquired a right to 25 days' paid leave. The relevant part of the contract reads as follows:

"You will be entitled to 25 working days per annum of which 21 consecutive days must be taken per year. The remainder may be accumulated in cash or taken at a later date."

The literal meaning of this clause is that: in a leave cycle an employee can accumulate four days. So, if an employee accumulates a number of four days, he or she is entitled to encash them or take them as leave days. Therefore, in relation to the encashment, employees of the applicant were entitled to accumulate and encash at

a later stage as per this clause or a term of the contract. Employees continued to reap the benefits of their bargain until when the payroll no longer processed the leave encashment submitted.

In a meeting of the joint forum held on the 26th of May 2016, the first respondent raised an issue that payroll no longer processes the leave encashment. It was in this meeting that the General Manager of the applicants stated that management were told to no more make the payments, because it is not their policy to encash leave and it is against the law as in section 21 of the Basic Conditions of Employment Act.

The union, NUM, expressed unhappiness to such an act. And in that meeting the management undertook to investigate the aspects of unhappiness and revert at a later stage. Indeed in a meeting of 15 July 2016 management reported that the leave encashment was placed on moratorium due to business financial constraints. On 11 August 2016 NUM raised an issue of unilateral changes to the conditions of employment. Management responded thereto by stating:

1. The moratorium was because of the financial constraints.
2. The legal constraints as placed by section 21 of the Basic Conditions of Employment Act.

On 24 November 2016 the union issued an official dispute notification. They stated the following:

> "We are therefore informing you that we are in dispute with regard to leave encashment agreement."

They made certain... they proposed a solution to the demand or the concern that they had and reserved their right to refer the same dispute to the CCMA as the deviation, as they called it, or unilateral change to terms and conditions of employment as advised by their Legal Department. The applicant acknowledged the notification of the dispute on the 26th of November 2016.

On 23 December 2016 the dispute about unilateral change, as advised, was referred to the CCMA. On 21 January 2017 the dispute was enrolled for conciliation at which point a point in *limine* was raised by the applicant to the effect that the dispute was referred out of time and therefore the CCMA lacked jurisdiction. A ruling was issued on the 31st of January 2017 dismissing that point and a non-resolution certificate was issued.

On 15 February 2017 the applicant launched a review application against the ruling on jurisdiction and the issuing of the certificate. On 16 February 2017 the union issued a notice within the contemplation of section 68(1)(b). Following that, a letter indicating an intention to approach this court was issued by the applicant followed by the present application.

Basis for the interdict

Five grounds were mentioned by Mr Bekker for the applicants. In this judgment I would deal with all the five grounds and whereafter I would reach a conclusion.

The first ground related to: In the submission by Mr Bekker, the true nature of the dispute is that of benefits; and in their

submission, since the issue of benefits is regulated by section 186(2)(b) of the Labour Relations Act, this is not a matter that the employees can go on strike about. It is indeed the duty of this court to determine the true nature of the issue in dispute. Having had regard to the material background, I am persuaded that the true dispute is that of unilateral change to the terms and conditions of employment as opposed to the one relating to benefits. Therefore, I reject the contention that this is a benefits dispute.

The second ground related to the prohibition by section 65(1)(c); such that the matter or the dispute in itself ought to be referred to arbitration as opposed to be resolved through power play. Since I have found that this is not a benefit dispute, it cannot be a dispute that ought to be referred to arbitration. This is the unilateral change to the terms and conditions of employment within the contemplation of section 64(4) and the employees have an election. They have elected to resolve that dispute through power play. As I have pointed out already, section 77(3) does not give a right to refer. Accordingly, this ground is also rejected.

The third ground related to the strike notice being defective. Mr Bekker submitted that the strike notice is not very clear in that it does not require or it does not give an indication of what is required of the employer to do in order to resolve the dispute. He made reference to various authorities of this court dealing with a strike notice that is unclear in which event it would affect the protection of the strike. However, if regard is had to the notice itself, it is very clear. We as the

union raised a concern that you have changed the terms and condition and we have referred a dispute in terms of section 64(4) which states that: if you have implemented, then you must restore. And if you have not implemented, you should not continue to implement. That is clear as daylight. And therefore, it is my view that the strike notice is clear. It requires restoration of the status quo; i.e. the payment of the accumulated leave in terms of clause 25 of the employment contract.

The fourth ground: Mr Bekker submitted that the demand is unlawful. This was premised on the basis that the employees cannot ask the employer to breach the provisions of section 21 of the Basic Conditions of Employment Act. The Basic Conditions of Employment Act is provided or it is enacted, as it were, to deal with the basic or minimum conditions of employment. And if parties to an employment enter into an agreement where the terms and conditions are even more improved, there is nothing wrong with that. The provisions of section 4 of the Basic Conditions of Employment Act provides as follows:

> "A basic condition of employment constitute a term of any contract of employment, except to the extent that -
>
> a) any other law provides a term that is more favourable to the employee."

Now, the provision for the encashment of the accumulated leave provides a favourable condition, as it were, to the employees. And if they had managed to bargain for that, there is nothing unlawful about. In fact, in terms of section 64(4), employees are entitled to

demand restoration of the unilaterally changed terms and conditions of employment. So, to my mind, the demand is not unlawful.

Lastly, he raised the issue of the arbitration. Mr Bekker submitted that the employer party, the applicant before me, decided on its own to refer a dispute to arbitration; not the same issue in dispute, I hesitant to say. The employer decided to create its own dispute and refer it to arbitration whereafter it then sought to approach this court and indicate that the issue in dispute is pending before an arbitration proceedings and therefore, the employees cannot exercise their right to strike. I cannot agree.

The only provision that would bar or limit the right to strike is when there is an arbitration award in terms of section 65(3) that deals with the issue in dispute. Not when a party, like the employer in this case, decided on its own to refer a dispute, seeking some form of a declaratory order from the CCMA. Such does not prevent the employees to continue with a strike that comprise with the provisions of section 64(4). Those are the reasons for the order that I had made.

- - - - - - - - - - - - - -

On behalf of applicant:	Adv Bekker
On behalf of respondent:	(No annotations)
Date of judgment:	2017-02-21

DIGITAL AUDIO
RECORDING TRANSCRIPTIONS
No: 86 Cnr Juta & Melle Street, Arbour Square, 6th Floor Braamfontein, JHB
TEL / FAX 011 339 4362 FAX: 086 726 6628

TRANSCRIBER'S CERTIFICATE

This is to certify that, **insofar as it is audible**, the aforegoing is a true and correct transcript of the proceedings recorded by means of a mechanical recorder in the matter of:

KOORNFONTEIN MINES *v* NUM OBO MEMBERS

CASE NUMBER:	J371/17
RECORDED AT:	Labour Court
DATE HELD:	2017-02-21
ORDER TO TRANSCRIBE:	Judgment
TRANSCRIBER:	Ms M Brits
DATE COMPLETED:	2017-03-22
NUMBER OF CD/AUDIO FILES:	1
NUMBER OF PAGES:	11

REPORT ON RECORDING

None

DIGITAL AUDIO
RECORDING TRANSCRIPTIONS
No: 86 Cnr Juta & Melle Street, Arbour Square, 6th Floor Braamfontein, JHB
TEL / FAX 011 339 4362 FAX: 086 726 6628