

SOUTH AFRICA / JUDGMENT

UASA- The Union and Others v Lonmin Platinum (JS 1193/09) [2011] ZALCJHB 107; (2012) 33 ILJ 1491 (LC) (5 December 2011)

[2011] ZALCJHB 107

COURT

Labour Court Johannesburg

BEFORE

Boqwana

CASE / FILE NUMBER

JS 1193/09

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 1193/09

In the matter between:

UASA - THE UNIONFirst Applicant

AC MARX AND OTHERSSecond and Further Applicants

and

LONMIN PLATIMUN COMPRISING

WESTERN PLATINUM LIMITED AND

EASTERN PLATINUM LIMITEDRespondent

Heard on: 07 - 11 November 2011, and 21 November 2011

Delivered on: 05 December 2011

BOQWANA AJ

Introduction

The applicants seek an order declaring that an oral agreement was concluded between the first applicant ('UASA') and the respondent ("Lonmin") on 02 November 2007 on behalf of the second and further applicants ('individual applicants') who are also members of UASA in the category C4 and C5 bargaining unit, to the effect that overtime would be calculated on the basis of Total Cost to Company ('TCTC') remuneration package.

In the event that the court finds that an oral agreement existed between the parties, the applicants seek rectification of a written agreement ('wage agreement') concluded by the parties on 09 November 2007 to reflect and give effect to the terms of the oral agreement.

During the course of September 2007 to November 2007, UASA and Lonmin engaged in wage negotiations after which a wage agreement, culminating from these negotiations, was concluded between the parties and signed on 09 November 2007 for the duration of three years, effective from 01 October 2007 until 30 September 2010.

It is the applicants' case that an oral agreement was entered into during the process of wage negotiations to the effect that overtime would be calculated on the basis of TCTC remuneration package. The existence of such an agreement is denied by Lonmin.

It is common cause between the parties that at least prior to 1 October 2007, overtime was calculated on the basis of a method known as a Basic 2 formula. Lonmin continued to pay overtime on the basis of the Basic 2 Formula even after the wage negotiations of 2007. It is Lonmin's alleged failure to effect the change on how to calculate overtime that led the applicants to seek enforcement of an oral agreement allegedly concluded on or about 02 November 2007.

The applicants have set out their claim in the statement of claim as follows:

'7.3 During the said wage negotiations Lonmin tabled a proposal to the effect that, in future, remuneration for C4 and C5 employees be calculated on a Total Cost To Company ("TCTC package") in terms of which employees would be able to structure their packages according to their personal requirements ("the proposal").

7.4 During the wage negotiations UASA specifically enquired into the basis of the calculation of overtime for C4 and C5 employees should the proposal be accepted.

7.5 Lonmin undertook to calculate overtime (for C4 and C5 employees) based on 100% of the TCTC package and no longer in accordance with the "Basic 2 formula".

7.6 UASA was mandated to accept the proposal on the basis that the calculation of overtime on the aforesaid basis was more beneficial to the C4 and C5 employees than the "Basic 2 Formula".

7.7 On or about 2 November 2007 UASA accepted the proposal as a result of an oral agreement to the effect that remuneration and overtime for C4 and C5 employees would be calculated based on the TCTC package came into being ("the overtime agreement").

8.1 (sic) On or about 9 November 2007 and at or near Marikana UASA and Lonmin, both represented by duly authorised representatives, concluded a written agreement regarding the review of wages and other conditions of employment (“the wage agreement”).

8.2 (sic) A true copy of the wage agreement is annexed hereto as ANNEXURE “B” and the terms and conditions thereof are incorporated herein as if specifically pleaded.’

On these grounds, the applicants seek enforcement of the alleged oral agreement for the duration of the wage agreement; being from 01 October 2007 to 30 September 2010 alternatively for as long as the Total Cost To Company remuneration package remains operative.

The existence of the oral agreement is denied by Lonmin. The case regarding the existence on an oral agreement mainly focused on the evidence presented by the applicants’ witnesses regarding a question that was asked by Johannes Scholtz (‘Scholtz’) who was UASA’s chief negotiator and later and more clearly by Frans Botha (‘Botha’) to Anthony Steen (‘Steen’) who was leading Lonmin’s negotiating team.

In brief, the evidence adduced by the applicants is as follows: Lonmin proposed to move C4 and C5 employees out of the officials bargaining unit into management ranks which would result in UASA losing bargaining rights to negotiate conditions of employment on behalf of their members in this bargaining unit. UASA would only retain rights to represent members in disciplinary hearings and such forums. This proposal did not go down well with UASA and was later abandoned by Lonmin. Part of the proposal was to move C4 and C5 employees to a TCTC remuneration structure. This would enable employees to structure their individual packages.

During the period of July and August 2007, UASA sent various correspondences to all C4 and C5 Lonmin Platinum employees known as ‘Mini Bulletin’ firstly, detailing Lonmin’s proposal to move C4 and C5 employees to management payroll and also listing ‘management proposals’. It is worth noting that overtime calculations were not part of the management proposals listed on any of the bulletin from UASA to the employees affected.

Scholtz testified that calculation of overtime was also not on their demands or on their ‘wish list’ presented to Lonmin as it was not an issue before the wage negotiations. Scholtz alleged that overtime was not on the list of their demands because TCTC proposal was not from UASA but from management. However, by the time negotiations started in September 2007, UASA was aware of Lonmin’s proposal to change the pay structure.

It was Scholtz’ testimony that in one of the meetings he sought clarity from Steen as to how overtime would be calculated. He could not remember if he used the words overtime. His question to Steen was something like:

‘Do I understand you correctly that everything that is inside the current package will now be calculated on the total cost to company package and he said yes’.

Although Scholtz could not recall the wording of the question asked from Steen, but the thrust of the question was whether overtime was going to be calculated based on the TCTC remuneration package. Steen's answer to that question was 'Yes'. A couple of days later, presumably on or about 02 November 2007, during the recess there was uncertainty amongst some within the UASA's negotiation team on whether or not the question of overtime was clearly put to Steen by Scholtz. Botha then requested permission from Scholtz, during the caucus, to ask the question again to Steen when negotiations resumed.

I must pause here to point out that there was some contradiction between Scholtz and Botha's evidence regarding when these events took place. Botha seemed to suggest that uncertainty in the caucus was on the same day that Scholtz asked the question to Steen whilst Scholtz seemed to suggest that it was on a different day. According to Botha the question to Steen by Scholtz was asked earlier on 02 November 2007. I will however not concern myself with the credibility of the witnesses and contradictory evidence presented at this absolution stage.

Of importance is that both Botha and Scholtz testified that Botha asked for permission from Scholtz if he could raise the question of overtime with Steen again. Scholtz gave Botha the necessary permission once negotiations resumed and Botha specifically asked Steen whether overtime, standbys, call outs 'and all such stuff' would be paid on TCTC and Steen answered 'Yes'. This took place on or about 02 November 2007. This is the crux of what UASA alleges constituted an oral agreement.

Throughout the evidence there was special reference to clause 4.5 of the wage agreement. This is apparently the only reference to overtime in the entire agreement and according to the applicants it records the 'understanding' between the parties on how the issue of overtime was to be treated. Clause 4.5 reads as follows:

'4.5 The contract of employment will reflect the operational and compensation for standby, overtime, shift work and current continuous

operations. These elements are not part of the TCTC remuneration rate to be reflected in the annexure and will be paid in addition to the TCTC package.'

There was some concession from the applicants' witnesses that this clause said nothing about how overtime would be calculated. In fact it expressly excluded overtime and other elements from the TCTC remuneration rate. Scholtz however, testified under cross

examination that he understood this clause to mean that overtime would be calculated on the basis of TCTC.

Special reference was made to clause 10.2 of two particular contracts of employment. One contract concluded between Lonmin and Mr JNH Noeth ('Noeth') who was also a witness for the applicant in these proceedings. Noeth's contract of employment was signed by him on 22 February 2008. (That is approximately three months after the conclusion of the wage agreement). Clause 10.2 of Noeth's contract of employment states that:

‘10.2 Compensation for such arrangements or hours will be done in accordance with the prevailing company policy, procedure or practise and will be in addition to the TCTC as detailed in the schedule.’ (My own emphasis)

Similar to Noeth’s contract, clause 10.2 in Mr RW Lonn (‘Lonn’) contract reads the same except with reference to ‘amended policy reading with clause 6.1.’ Lonn’s contract of employment was concluded between Lonn’s and Lonmin on 05 March 2008. Clause 6.1 provides that Lonmin operates on a total cost to company remuneration philosophy.

The applicants’ case is that the amended policy referred to in the second contract relates to the new calculation of overtime (which is TCTC). Applicants allege that Lonmin reneged on amending this policy to reflect this change. The applicants’ witnesses testified that UASA requested this amended policy from the Lonmin on numerous occasions to no avail.

The amended policy referred to is dated March 2009 and does not reflect overtime calculated on TCTC instead it describes what Basic 2 means. Applicants allege that Lonmin acted in bad faith as they had understood that Lonmin agreed on 02 November 2007 that overtime would be paid on TCTC.

Applicants’ witnesses testified that UASA was approached by its members late December 2007 complaining that overtime was still calculated in accordance with the old rate of Basic 2. This was taken up with Vusi Sampula (‘Sampula’) who is an Employee Relations Manager at Lonmin and who was also part of the Lonmin wage negotiating team. According to the applicants Sampula agreed with UASA that an undertaking was made by Lonmin to calculate overtime based on TCTC at a meeting in December

2007. Sampula then undertook to resolve the matter when Steen came back from leave.

When Steen was confronted with the situation he denied that there was such an undertaking. Various discussions ensued between UASA and Lonmin and the matter remained unresolved. A dispute was then referred to the CCMA for interpretation of the collective agreement but later withdrawn when it became apparent that the real issue was whether or not an oral agreement existed. The applicants then decided lodge a claim before this court.

Application for the Absolution from the Instance

At the end of the applicants’ case Lomnin applied for absolution from the instance. Mr Grundlingh, counsel for the applicants, submitted that it is not competent for this court to consider an absolution from the instance at this stage because this type of application is normally brought before the respondent opens its case but in this case Lonmin had already started with the evidence of Poena Prinsloo (‘Prinsloo’).

At the commencement of the trial, the parties had agreed that Prinsloo who is Lonmin’s witness, would be called first (before the applicants began with their case) as he was going overseas and would not be available to give evidence during the course of the trial. The court granted leave for this witness to testify first.

Mr Van As, Lonmin's counsel, submitted that Prinsloo's evidence must be ignored by the court for the purposes of the absolution application, in that it was done without prejudice by Lonmin and without attracting any evidentiary burden. He argued that it would not be fair to UASA for Prinsloo's evidence to be taken into account.

I am inclined to agree with Mr Van As that calling Prinsloo first was merely done for convenience and by agreement between the parties. In my view nothing prevents the respondent from bringing an application for absolution after the applicant has closed its case. In that regard, I see no reason why the court should not consider Lonmin's application for absolution.

Lomnin has sought absolution from the instance in respect of the applicants' claim based on the following grounds:

UASA has not shown that it has the requisite locus standi or authority to enforce the oral agreement on behalf of the individual applicants;

UASA has failed to prove the existence of the oral agreement.

The principles applicable

This court has previously affirmed that the test applied in absolution applications is the following:

'... whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'¹

In the case of *Black v John Snow Public Health Group*,² Molahlehi J, referring to an approval of this test by Harms JA in *Gordon Lloyd Page and Associates v Rivera and Another*,³ held as follows:

'This implies that a plaintiff has to make out a prima facie case –in the sense that there is evidence relating to all the elements of the claim –to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972

(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91–2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93).' (My own emphasis)

The Learned Judge went further to say:

'The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'

In order to avoid absolution, the applicants would have to lead evidence that shows a *prima facie* existence of the oral agreement.

The first point advanced by Lonmin is that the oral agreement cannot be a collective agreement because the LRA and more specifically section 23 states that collective agreements must be reduced to writing. This principle was confirmed by Molahlehi J, in the case of *South African Post Office Ltd v Communication Workers Union and Others*.⁴ Applicants' counsel agreed with this proposition.

Lonmin submitted that since the agreement in question is not a collective agreement, the presumptions that flow from section 23 of the LRA regarding the union's authority to conclude collective agreements binding to its members are not applicable in this instance. Accordingly, UASA cannot implicitly or automatically act and conclude an oral agreement on behalf of the individual applicants without the necessary authority. Lonmin proposed that no authority flows automatically in common law to UASA by virtue of UASA being a registered trade union negotiating on behalf of its members.

It would therefore be necessary for UASA to establish, either based on the law of agency that each of the individual applicants properly mandated it to act on their behalf or that the oral agreement, properly construed, was a *stipulatio alterum* agreement for the benefit of the individual applicants, which benefit the individual applicants subsequently accepted.

According to Lonmin, no evidence has been brought before this court, nor has it been pleaded that UASA had the requisite authority to conclude the oral agreement on behalf of its members. Secondly, there is no evidence presented to suggest that the individual applicants accepted the benefits that flowed from the alleged oral agreement.

Mr Grundlingh argued that Lonmin is precluded from raising the issue of UASA's authority at this point. He submitted that this ought to have been raised in the pleadings and in the pre-trial minute. He further pointed out that nowhere was this issue brought to the applicants' attention as being in dispute nor was it ever put to any of the applicants' witnesses. The applicants were thus caught by complete surprise.

I disagree with Mr Grundlingh's proposition. In my view, this is a point of law that can be raised at any stage of the proceedings. Mr Van As agreed that this should have ideally been raised by way of an exception. Failure to do so by Lonmin, will only affect a cost order, should Lonmin be successful in its application for absolution. In that regard, costs would then be limited to costs of an exception.

On the issue of UASA's authority, Mr Grundlingh advanced an argument that parties had agreed that the individual applicants listed in annexure "A" of the statement of claim are paid up members of UASA. He further argued that UASA is a registered trade union, who has been a collective bargaining agent, recognised by Lonmin for many years. It is inconceivable that UASA would act outside or without getting the necessary mandate from its members. Mr Grundlingh accepted that presumptions flowing from the LRA are not applicable in this instance, however he

proposed that it must be accepted that UASA is entitled to negotiate on behalf of its members and has the necessary capacity to conclude oral contracts on their behalf.

I accept that UASA is entitled to conclude contracts on behalf of its members. However, this contract is different in that it is an oral agreement and as such it was imperative for UASA to lead evidence that it had the requisite authority to conclude an oral agreement for its members.

I am also not satisfied that the individual applicants accepted benefits that flowed from the alleged oral agreement. It is strange that individual contracts did not incorporate the benefits flowing from the oral agreement. I disagree that Clause 10.2 is an indication of an existence of an oral agreement. Applicants allege that they had a bona fide belief that company policy would be amended. No evidence was placed that Steen specifically agreed that the policy would be amended to reflect the change in overtime calculation. In fact after Steen's alleged positive answer the matter was not discussed any further.

Both Noeth and Lonn signed contracts of employment without the elements of the oral agreement being reflected. The individual contracts of employment were checked and approved by UASA's legal department. It does not make sense why UASA would not insist that contracts of employment should incorporate the alleged oral agreement.

It is also important to note that Both Noeth's and Lonn's contracts of employment were signed some months after the alleged oral agreement was concluded. It does not make sense how those could establish the existence of an oral agreement concluded on 02 November 2007. Reference to a policy that was to be amended in future does not, in my view, establish the existence of the oral agreement that was allegedly concluded on 02 November 2007. Accordingly, I find that UASA has not shown any prima facie evidence that it had authority to conclude the oral agreement for its members.

Even if I am wrong on this point, I am not convinced that essential elements necessary to conclude a contract have been met by UASA.

The evidence before me does not show the existence of an agreement in that nothing shows that an offer was made by Lonmin and accepted by UASA. More importantly, there was no evidence as to when that contract would come into existence and when was it communicated to the individual applicants. In fact, the applicants' witnesses in their own version testified that overtime was not on their list of demands presented to Lonmin at the beginning or during wage negotiations. This is surprising, if one has regard to the allegations in the pleadings that TCTC proposal tabled by Lonmin was to be accepted on the basis that overtime was calculated on TCTC package. If that was so, this would have been tabled as a proposal or a demand upfront and evidence would have been led in support of the averments in paragraphs 7.3 to 7.7 of the statement of claim.

It is also surprising that none of the bulletin to C4 and C5 employees by UASA referred to this issue at all. Communication to members listed proposals from management but for some strange reason overtime calculation was not mentioned as a benefit that UASA sought as a quid pro quo to the TCTC proposal or as a benefit it later procured for its members.

Mr Grundlingh submitted that one cannot divorce this alleged contract from the process of the wage agreement. This does not help the applicants' case. I find it hard to believe that in the midst of wage negotiations there was this lone oral agreement, whilst everything else had been reduced to writing, which oral agreement did not feature in any of the correspondence or feedback bulletin to members.

This is even harder to believe when parties expressly agreed in unequivocal terms in clause 4.7 of the wage agreement that the balance score card bonus, which was also previously calculated in terms of Basic 2 was going to be calculated on a TCTC basis. If that clause found itself in the wage agreement, what stopped the parties from reducing the terms of the overtime calculations in writing.

I agree with Mr Van As that the LRA sets out a clear framework that allows a trade union to conclude collective agreements that would bind its members. It would be strange for this court to accept statements made during wage negotiations as agreements without any concrete and tangible evidence placed before it. This is not to say that oral agreements cannot be concluded from time to time between unions and management. However in those circumstances unions would have to rely on common law and fulfil the common requirements. What presents a greater difficulty for the applicants in this case is that the alleged oral agreement was concluded in the midst of wage negotiations, where terms and conditions culminating from that agreement were reduced to writing and a written agreement signed.

I also find it strange that the applicants seek enforcement of this oral agreement from 01 October 2007 instead of 02 November

2007. It is clear that 01 October 2007 was chosen to run concurrently with the wage agreement, which means the oral agreement could not find its location outside the wage agreement. I must also state that no evidence was led on what the commencement date of this oral agreement would be.

Conclusion

In conclusion, the applicants have not been able to show any prima facie evidence in terms of which the court might find in their favour. The applicants have accepted that the oral agreement alleged could not be a collective agreement for the purposes of section 23 of the LRA and accordingly the presumptions flowing from the LRA are not applicable. In this regard it is also important to note that section 213 of the LRA defines a binding agreement as: 'written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions...'

The applicants' witnesses failed to lead any evidence to show that UASA had the necessary authority to act as an agent for individual applicants, nor was there evidence that the individual applicants accepted the benefits flowing from the concluded oral agreement by incorporating those in their individual contracts of employment.

In any event no prima facie evidence was led to show the essential elements of an oral agreement had been met.

In view of my findings it is not necessary to deal with the issue of rectification. In the circumstances, Lonmin must succeed with its application for absolution.

Costs

With regards to costs both parties submitted that neither of them would ask for costs in view of the ongoing relationship between the parties.

I therefore make the following order:

Absolution from the instance is granted.

No order as to costs.

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

For the applicant: Adv. R Grundlingh

Instructed by: Bester & Rhoodie Attorneys, Pretoria

For the respondent: Adv M Van As with Adv A Snider

Instructed by: Cliffe Dekker Hofmeyer Inc, Sandton

1See Minister of Safety and Security v Madisha and Others (2009) 30 ILJ 591; Black v John Snow Public Health Group [2010] 4 BLLR 374 (LC); Claude Neon Lights (SA) Ltd v Daniel 1976

(4) SA 403 (A) at 409G-H

2Black v John supra at paragraph 37

3 2001

(1) SA 88 (SCA) at 92H-93A.

4(2010) 31 ILJ 997 (LC) at paras 17 and 18

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