

57/86

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

NATIONAL UNION OF MINeworkERS

First Applicant

MALEFETSANE NTSIHLELE AND OTHERS

Second to Ninth
Applicants

NATIONAL UNION OF MINeworkERS

First Applicant

EZEKIEL MODISE AND OTHERS

Second and further
Applicants

and

HARTEBEESTFONTEIN GOLD MINING

COMPANY LIMITED

Respondent

CORAM: RABIE, CJ, JANSEN, HOEXTER, JJA, GALGUT et

NICHOLAS, AJJA

HEARD: 24 March 1986

DELIVERED: 27 March 1986

J U D G M E N T

NICHOLAS, AJA :

This

This case concerns questions of law stated by the industrial court purporting to act under s. 17(21)(a) of the Labour Relations Act No 28 of 1956 ("the Act").

Section 17 deals with the establishment and functions of the industrial court. It provides in ss. (21):

"(21)(a) The industrial court may, of its own motion, or at the request of any party to any appeal or other proceedings before the industrial court reserve for the decision of the Appellate Division of the Supreme Court of South Africa any question of law which arises in any such appeal or proceedings, and shall state such question in the form of a special case.

(b) The question so stated may be argued before the Appellate Division, and that Division shall give such decision and may make such order as to costs as it thinks just.

(c)

(c) If any such special case is stated at the request of any party other than the registrar, he shall lodge with the registrar of that Appellate Division such security for any costs that he may be ordered to pay as the said registrar may determine.

(d) Pending the decision of that Appellate Division on any question of law reserved in terms of paragraph (a), the industrial court shall defer its decision in the matter in connection with which the special case was stated."

The questions of law were reserved in a document (hereinafter referred to as "the document") reading as follows:

In

IN THE INDUSTRIAL COURT

In the matter between -

(10)

NATIONAL UNION OF MINeworkERS AND OTHERS

Applicants

and

HARTEBEESTFONTEIN GOLD MINING
COMPANY LIMITED

Respondent

Having considered the request of the respondent which is supported by the applicants herein the Industrial Court in terms of section 17(21)(a) of the Labour Relations Act, 1956 reserves the questions of law as stated hereunder for decision of the Appellate Division of the Supreme Court: (20)

"1.1 Has the Industrial Court, seized of this matter in terms of Section 46(9), the power to reinstate an employee notwithstanding the valid termination of an employee's common law contract of employment?

1.2 Can the single act of an employer consisting of the dismissal of workers engaged in a strike, constitute an unfair labour practice? (30)

1.3 Can an employer's dismissal of employees engaged in a strike alternatively his failure or refusal, consequent on dismissal, to continue them in employment and to accord them the benefits of employment, constitute a labour practice within the meaning of those words in the definition of an "unfair labour practice" in section 1 of the Act?

(10)

1.4 Could the dismissal of the workers in this case constitute an unfair labour practice, taking into account the following agreed facts:

1.4.1 The Individual Applicants were employees of the Company at the time of the termination of their contracts of employment. They were employed in terms of Annexure "A1" hereto as read with the recognition agreement between the Union and the Chamber of Mines annexed hereto, marked "A2".

(20)

1.4.2 The Union is an unregistered trade union.

1.4.3 The company is a public company which carries on business as a gold mining operation.

(30)

1.4.4 During April, 1985, the Union submitted certain demands regarding wages and terms and conditions of employment to the Chamber of Mines ("the Chamber") in respect of gold mines. The Chamber of Mines is an employer organisation of which the Company is a member. The Chamber is authorised to, and does, negotiate on behalf of its members on issues such as wages and conditions of employment. (10)

1.4.5 As a result of the demands, negotiations took place between the Union and the Chamber on the 13th and 14th June, 1985. The Chamber and the Union were, however, unable to reach consensus and on the 14th June, 1985, the Union declared a dispute with the Chamber on the question of wages. On the same date, the Union applied for the establishment of the conciliation board, which application was not opposed by the Chamber. (20)

1.4.6 The application for a conciliation board was granted on the 18th June 1985 and on

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the 24th June 1985 the conciliation board met. The conciliation board was, however, unable to resolve the dispute and was formally discharged. The outcome of the proceedings before the conciliation board was reported in writing to the Minister of Manpower.

(10)

1.4.8 On the 3rd August, 1985, the Union decided to proceed with a strike at, inter alia, the Company's mine on the 28th August, 1985 in order to induce the Company to pay higher wages.

1.4.9 Thereafter, an improved offer was made to the Union by the Chamber on behalf of the Company's holding company, ANGLO VAAL, in terms whereof an increase of 10% in the holiday allowance was offered.

(20)

1.4.10 On the 21st August, 1985, the First Applicant announced that it was postponing the proposed strike until the 1st September in order to consider inter alia the offer made on behalf of ANGLO VAAL.

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1.4.11 On the 28th August, 1985 the Union again met with the Chamber and conveyed to the Chamber its rejection of inter alia the offer made on behalf of ANGLO VAAL.

1.4.12 The Company implemented its improved offer and increased the holiday allowance with effect from 1st September, 1985, despite the Union's rejection of such offer. After the rejection of the Company's offer, the Union decided to proceed with its strike on the 1st September, 1985.

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1.4.13 Prior to the commencement of the strike, the Company warned all its employees that if they engaged in a strike, they might be dismissed. On the 1st September, a number of employees of the Company, including the Individual Applicants, went on strike.

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1.4.14 During the 2nd and 3rd September, a number of the Company's employees, including some of the Individual Applicants, were dismissed.

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1.4.15 Thereafter, on the 3rd September, the Union suspended the strike and requested its members to return to work. The Company has refused to reinstate those employees, including certain of the Individual Applicants, who were dismissed during the strike.

(10)

1.4.16 The Union and the Individual Applicants contend that the Company dismissed the Individual Applicants because of the latter's participation in a legal strike.

The Company disputes this and contends that the contracts of the Individual Applicants came to an end for other reasons, for example, resignation, desertion, or gross misconduct arising out of their intimidation of other employees. For purposes of the reference in terms of Section 17(21)(a) of the Labour Relations Act, 1956, (as amended), the parties are assuming that the Company dismissed the Individual Applicants because of their participation in a legal strike; the parties are

(20)

(30)

also assuming, without the company admitting, that the economic welfare of the Individual Applicants has been prejudiced or jeopardized by their dismissal. The disputed facts referred to earlier in this sub-paragraph, will be determined by the Industrial Court after the reference to the Appellate Division has been completed."

(10)

DATED at PRETORIA this 14th day of FEBRUARY 1986.

(Sgd) D B Ehlers
PRESIDENT: INDUSTRIAL COURT

(Sgd) P E Roux
DEPUTY PRESIDENT

(20)

(30)

(The "Others" among the applicants are said to be former employees of Hartebeestfontein Gold Mining Company Limited ("Hartebeestfontein")).

When the matter was called, the Court raised two preliminary questions: Was "the document" in the form of a special case? Did it contain all that a case stated under s. 17(21)(a) should contain?

Provision is made in rules of court and in a number of statutes for the submission to a court of questions of law "in the form of a special case". See for example, rule 49(10) of the Uniform Rules of Court; proviso (i) to Appellate Division Rule 5(4)(c); s. 3(3) of the Admission of Persons to the Union Regulation Act, No 22 of 1913;

S.

s. 26(1) of the Workmen's Compensation Act, No 30 of 1941;

s. 20 of the Arbitration Act, No 42 of 1965; and s. 30(1)(b)

of the Stamp Duties Act, No 77 of 1968. In none of them is

"special case" defined, presumably because the expression

has an accepted meaning. Mozley & Whiteley's Law Dic-

tionary, (7th ed.) says s.v. "Special Case" that it is

- "1. A statement of facts agreed to on behalf of two or more litigant parties, and submitted for the opinion of a court of justice as to the law bearing upon the facts so stated."

Stroud's Judicial Dictionary (4th ed.) states that

"A special case is a written statement of the facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law ... It is also known as a case stated."

This

This meaning is reflected in rule 33 of the Uniform Rules of Court. It provides in sub-rule (1) that the parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the Court, and in sub-rule 2(a) that "such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon".

It is, therefore, implicit in the expression "in the form of a special case" that there should be a statement of the facts agreed by the parties. In terms of s 17(21)(a) something more is required. The industrial court has power to reserve for the decision of the Appellate Division a question of law which arises in proceedings before it. It is only

such

such a question which can properly be reserved - this Court does not answer whatever questions the industrial court may choose to put to it. The question must not be an abstract or academic question. Courts of law exist for "the settlement of concrete controversies, not to pronounce upon abstract questions, or to advise upon differing contentions, however important." (Per INNES CJ in Geldenhuis & Neethling v Beuthin 1918 AD 426 at 441).

Consequently in order to enable this Court to determine whether the questions of law reserved do or do not arise in the proceedings, the industrial court should set out in the special case something which shows what has arisen, and how it has arisen. Cp. Windsor Rural District Council

v Otterway and Try, Ltd (1954) 3 All E.R. 721 (Q.B.D.) at
723.

There is nothing in "the document" to show how
the questions of law arose. It does not even appear how
the industrial court came to be "seized of this matter in
terms of Section 46(9)" as stated in question 1.1.

The Court was informed from the Bar, however, that a dispute arose
out of the dismissal of some of the respondent's em-
ployees which is referred to in para 1.4.14, and that this
dispute was referred to the industrial court, not in terms
of para (a) of s. 49(b) (that is, via a conciliation board),
but in terms of para (d) which provides -

"(d) Notwithstanding the provisions of
paragraph (a) ... the parties to the

dispute

dispute may agree to report to the Minister that ... they are satisfied that ... they will not be able to settle the dispute, and on receipt of such a report, the dispute shall forthwith be referred to the industrial court for determination."

There is nothing in "the document" which refers to the pleadings which presumably were delivered in terms of the "Rules for the conduct proceedings of the industrial court" made under s. 17(22) of the Act. Rule 6 provides (so far as is relevant to the present matter):

"6(1) Proceedings relating to a dispute or matter referred to in section 17(11) (a) of the Act shall be instituted in the court by an applicant by the delivery of a notice of application specifying the nature of the relief applied for, and such notice shall be

supported

supported by -

- (a) a statement of case containing a summary of the facts and conclusions of law on which the relief sought is based;
- (b) documents, if any, containing particulars in support of the relief sought;
- (c) a list specifying the books and documents in the applicant's possession or under his control which relate to the application or which the applicant intends to use in the proceedings or which tend to prove or disprove the case of the applicant or any other party.

(2)(a)

- (b) Any party opposing the granting of the relief prayed for in the application shall -

- (i) within the period of 14 days referred to in paragraph (a)(ii) give notice in writing to the registrar and to the applicant that he intends to oppose the

application

application and shall state an address or addresses at which he will accept service of all documents in the proceedings;

(ii) within 14 days after the expiration of the period of 14 days referred to in paragraph (a)(iii) deliver a statement of his defence which statement shall -

(aa) traverse the allegations contained in the applicant's application;

(bb) contain a summary of the facts and conclusions of law on which the defence is based;

(cc) be supported by documents, if any, containing particulars in support of the defence;

(dd) be supported by a list mutatis mutandis as referred to in subrule (1)(c);

(iii) together with such statement of defence, deliver a counter-ap-

plication

plication, if any, and the provisions of subrule (1) shall mutatis mutandis apply in respect of such counter-application.

- (c) The applicant may, within 14 days after delivery by the respondent of his statement of defence and his counter-application, if any, deliver a replication and a statement of defence in relation to such counter-application and the respondent may, within 14 days after delivery by the applicant of his statement of defence in relation to the counter-application, deliver a replication in relation to such statement of defence."

(Section 17(11)(a) which is referred to in rule 6(1) provides that the industrial court shall perform the functions which a court of law may perform in regard to a dispute or matter arising out of the application of the provisions of the laws administered

administered by the Department of Manpower Utilization.)

There is no reference in "the document" to a notice of application, or a statement of case, or a statement of defence delivered in terms of this rule. Consequently this Court does not know the nature of the relief applied for, or the facts which were admitted, or the allegations of fact which were in issue, or the conclusions of law on which the relief sought was based or those on which the defence was based. As a result it does not appear whether the questions of law which the industrial court purported to reserve arose on the pleadings. Nor does it appear, if they did not so arise, how they arose, if at all.

One gathers that what happened was that at the

beginning

beginning of the proceedings before the industrial court, and before any evidence was led, the legal representative of Hartebeestfontein, supported by the applicants, requested the industrial court to reserve the questions in terms of an application which was handed in, presumably so that they could obtain guidance as to the way in which the case was to be presented. If that is so, the questions could hardly be said to have arisen in the proceedings.

It appears that the industrial court had reservations as to whether the question of law as framed in para 1.4 of "the document" was a proper question to reserve, and in this Court counsel indicated that they would not seek an answer to that question.

In

In my view the remaining questions (i.e. those stated in paras 1.1, 1.2 and 1.3) are not proper questions. They are abstract questions which call for a general answer, and are not specifically related to the dispute (whatever that may be) with which the industrial court is seized. It was presumably for that reason that in regard to these questions no facts at all were set out.

Faced with this difficulty, counsel for Hartebeestfontein sought to cobble up a proper special case by amending the word "employee" to read "an individual applicant", "employer" to read "Hartebeestfontein" and "a strike" to read "the strike referred to in para 1.4.13", and by reading the facts set out in paras 1.4.1 to 1.4.15

inclusive

inclusive as if they had been stated with reference to the first three questions. I do not think that this Court can countenance such a procedure. In terms of s. 17(21)(a) the statement in the form of a special case is a matter for the industrial court, and it is not within the province of this Court to reformulate it. Cp. Jamaludin v Principal Immigration Officer 1918 TPD 58, and Midkon (Edms) Bpk v Departement van Gemeenskapsontwikkeling en Owerheidshulpdienste, 1983(4) SA 78 (T) at 83 D-F.

In any event I do not think that, if the course proposed were to be adopted, the criticisms of "the document" as a "special case" would be met.

Sub-paras 1,2 and 3 of para 1.4 deal with the

parties

parties. Sub-paras 13,14 and 15 relate to the strike on 1 September 1983 and the dismissal of a number of employees on the two following days and Hartebeestfontein's refusal to reinstate them. The remaining sub-paragraphs are only of historical interest. It is not clear how questions 1, 2 and 3 arise from or relate to the facts in sub-paras 13, 14 and 15. One does not know the nature of the relief applied for by the applicants, or what is the relevance of an "unfair labour practice".

In my opinion these proceedings are fatally defective: "the document" is not "in the form of a special case"; it does not appear therefrom that the questions "arose" in the proceedings before the industrial court;

and

and the questions reserved, as framed, are abstract questions, of a kind upon which the Court does not pronounce. There will consequently be no order on the questions reserved. It is of course open to the parties to approach the industrial court again, in order that appropriate questions of law may be reserved in due form.

The question was raised in argument whether para (d) of ss. 21 did not indicate that a question of law should be reserved only at the conclusion of the evidence, when all the facts could be found or agreed. In the view which I take of the matter it is unnecessary to consider this question.

No order will be made in regard to the questions

reserved

reserved and there will no order as to costs.

H C NICHOLAS, AJA

RABIE, CJ	}	Concur
JANSEN, JA		
HOEXTER, JA		
GALGUT, AJA		