REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 59/2012

Not Reportable

In the appeal of:

UASA	**First Appellant**
	(First Applicant in Court *a quo*)
A C MARX AND OTHERS	**Second and Further Appellants**

and

LONMIN PLATINUM COMPRISING WESTERN PLATINUM AND EASTERN PLATINUM LIMITED	**Respondent**
	(Respondent in Court *a quo*)

Heard: **18 March 2014**

Delivered: **19 August 2014**

Summary: *Locus Standi* is a question of law and can be raised at any stage of the proceedings- Trite principle union having authority to negotiate on behalf of members. Court *a quo* erring in holding the contrary. Absolution from instance. Absolution from instance may be decided on the basis of reasonable inferences. Appellants failing to prove the existence of oral agreement. Inference drawn from the written agreement that no oral agreement was concluded. Court *a quo* finding upheld. Absolution from instance granted.

CORAM: WAGLAY JP *et* NDLOVU, JA *et* MOLEMELA AJA

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an appeal, with leave of the Court *a quo*, against the whole of the judgment of the Labour Court (Boqwana, AJ) granting absolution from the instance.

[2] The appellants raised numerous grounds of appeal but these can be condensed into the following three grounds: firstly, that the Court *a quo* erred by not finding that the respondent was precluded from challenging *locus standi* or authority of the first appellant to conclude an oral agreement with the respondent for and on behalf of the second and further appellants concerning the formula for the calculation of overtime, as the respondent had not raised this challenge before the closing of the appellant's case. Secondly, that the Court *a quo* erred in finding that the first appellant lacked such *locus standi* or authority and therefore erred in granting absolution form the instance. Thirdly, that the court *a quo* erred in finding that the appellants had failed to prove the existence of such an oral agreement on a *prima facie* basis and therefore erred in finding this to be the basis for granting absolution from the instance.

Background facts

[3] Prior to 1 October 2007, the overtime of all employees categorised as C4 and C5 employees of the respondent was calculated and paid according to a method known as the "Basic 2 formula". During the period September to November 2007, the appellants and respondent engaged in wage negotiations. During these negotiations, Mr Scholtz was the chief negotiator of the appellants and Mr Steen was the chief negotiator of the respondent. The appellants' version is that on 2 November 2007, the first appellant accepted the respondent's proposal that in future, remuneration for C4 and C5 employees would be calculated on the total cost to company ("TCTC") formula and not the basic 2 formula. Two days later, i.e. on 4 November 2007, Mr Steen repeated this proposal to another member of the first appellant's negotiating team, *viz* Frans Botha. On 9 November 2007, a written wage agreement was concluded, in terms of which it was agreed that C4 and C5 employees would be employed on a TCTC package.

[4] Following the conclusion of the wage agreement, all C4 and C5 employees of Lonmin, of which the second and further appellants formed part, were presented with a written contract of employment ("the employment contract") for their signature.

[5] The salient terms of the employment contract were to the following effect:

(i) The respondent operates on a TCTC remuneration philosophy;

(ii) The employee undertakes and agrees to work shift arrangements, overtime and outside of normal working hours whenever it is deemed necessary by the respondent or the requirements of the business require these arrangements to be worked, subject to the respondent consulting with the employees and the first appellant. The employee may not unreasonably withhold his/her labour from the respondent. Compensation for such arrangements or hours would be done in accordance with the amended company policy read with procedures or practice set out in clause 6.1 and would be in addition to the TCTC.

[6] The employees signed the employment contract. The appellants assert that the employees signed the contract in the *bona fide* belief that the amended company policy referred to in clause 10.2 of the employment contract would reflect the correct terms of the overtime agreement insofar as the calculation of overtime for C4 and C5 employees was concerned.

[7] During or about 2009, the respondent adopted a Human Capital Policy on overtime, standby duties and "call outs". This policy came into effect on 1 July 2009. Overtime payment and the rate at which compensation would be calculated, are dealt with in clause 4.3 of the said policy. On the issue of overtime payment in respect of C4 and C5 employees, clause 4.3 made no reference to the calculation of overtime for C4 and C5 employees on the basis of a TCTC package.

<u>Proceedings at the Labour Court</u>

[8] The appellants eventually referred a dispute to the Labour Court pertaining to the overtime agreement. The appellants formulated the following legal issues for determination:

(i) whether the overtime agreement was concluded between the first appellant and the respondent and, if so, whether the second to further appellants were, in terms of the overtime agreement, entitled to payment of overtime calculated on 100% of the TCTC package;

(ii) whether it was necessary for the wage agreement to be rectified in order to reflect and give effect to the terms of the overtime agreement, and if so, whether the wage agreement was susceptible to rectification under the circumstances.

[9] The respondent disputed that any overtime agreement was concluded and contended that there was no change in the calculation of overtime. The respondent thus continued to pay the second to further appellants in accordance with the basic 2 formula. At the close of the appellants' case, the respondent applied for absolution from the instance on two grounds, *viz* that

(i) the first appellant had not shown that it had the requisite *locus standi* or authority to conclude the overtime agreement on behalf of the individual appellants; and

(ii) that the first appellant had failed to prove the existence of the overtime agreement.

[10] On the *locus standi* issue, the Court *a quo* held that the first appellant should have *prima facie* shown, based on the law of agency that each of the individual appellants properly mandated it to act on their behalf, or that the oral agreement, properly construed, was a stipulation *alteri* agreement for the benefit of the individual appellants, which benefit the individual appellants subsequently accepted. The Court *a quo* accepted that the first appellant was entitled to conclude contracts on behalf of its members, but held that the agreement under consideration was different in that it was an oral agreement. It further found that

it was imperative for the first appellant to lead evidence that it had the requisite authority to conclude an oral agreement for its members.

[11] It is apposite to quote verbatim from the Court *a quo*'s judgment pertaining to the issue of the *prima facie* existence of the oral agreement and the inferences drawn. It found as follows:

> '[41] 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.
>
> [42] 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.
>
> [43] 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.
>
> [44] 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.
>
> [45] 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.

[47] 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.

[48] 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.

[49] 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.'

Analysis of evidence and submissions

[12] On the question of *locus standi*, there is no doubt that an issue pertaining to a party's standing in civil proceedings is a point of law. It is trite that a point of law can be raised at any stage of the proceedings. The fact that such a point of law was not identified by the parties as an issue to be decided in their pre-trial minutes does not in itself preclude any party from raising it; neither is it binding on the court. The first ground of appeal therefore fails.

[13] The question is whether the Court *a quo* erred in finding that the first appellant lacked such *locus standi.* The context in which the discussions held on 2 November 2014 took place must never be lost sight of, i.e., that the discussions were within the context of wage negotiations in which the first appellant, as a registered union recognised by the respondent, was entitled to represent its members. The assertion that an oral agreement was allegedly reached on that particular day of the wage negotiations should not have any bearing on the union's authority to represent its members. A union's authority to represent its members should not be compartmentalised in such a manner that it is perceived to have authority only in respect of discussions that eventually culminate in a written collective agreement being concluded. After all, collective bargaining does not always culminate in a collective agreement.

[14] On the acceptance of the trite principle that a union has the authority to represent its members during wage negotiations, I am of the view that the Court *a quo* erred in finding that it was imperative for the appellant to actually lead evidence that it had the requisite authority to conclude the alleged oral agreement for its members. It thus also erred in the findings it made on agency. See *Blyvooruitzicht Gold Mining Co Ltd v Pretorius.*[1] However, nothing much turns on this conclusion as it was not dispositive of the matter. In my view, the appellants still had to come home on the *prima facie* existence of the oral agreement pertaining to overtime and this it did not do, for reasons set out hereunder.

[15] In *Gordon Lloyd Page & Associates v Rivera and Another,*[2] the court stated that "a plaintiff has to make out a *prima facie* case- in the sense that there is

[1] [2000] 7 BLLR 751 (LAC) at para 12.
[2] 2001 (1) SA 88 (SCA) at 92G.

evidence relating to *all* the elements of the claim- to survive absolution because without such evidence no court could find for the plaintiff" (my emphasis). It is trite that a party relying upon an oral agreement for the purposes of absolution from the instance must prove the following: (i) the date and place of the contract; (ii) the parties to the contract; and (iii) the terms of the contract. See *CGEE Alsthom Equipments et Enterprises Electriques, South African division v GKN Sankey (Pty) Ltd*.[3]

[16] There was no clear evidence pertaining to the terms of the oral agreement. Under cross-examination, Scholtz testified that the calculation of overtime was encapsulated in the wage agreement. This was, however, not borne out by the wage agreement.

[17] In his testimony, Scholtz relied on clause 4.5 of the wage agreement and not on the oral agreement, as the basis for his contention that the individual appellants were entitled to overtime calculated on TCTC. Under cross-examination, Scholtz testified that Botha made enquiries as to the calculation of overtime in order to properly understand the draft wage agreement.

[18] The following evidence by Mr Scholtz Vol 3 on p202, who was the key negotiator for the appellants, is significant:

> 'If I remember correctly, when we went back after the recess process I cannot recall that I specifically said overtime, call outs, blah, blah, blah, whatever is in the package. My question to Anthony Steen was: do I understand you correctly, that everything that is inside the current package will now be calculated on the cost to company package and he said yes, and that was, we did not debate it because there was a lot of other issues that we need to get out of the way into the process because there was all these other issues that we still needed to negotiate, like for instance, the sick leave policy and stuff like that.'

[19] The extract referred to above does not establish the existence of the oral agreement, let alone its terms. Absolution from the instance is apposite on that ground alone.

[3] 1987 (1) SA 81 (A).

[20] In the case of *De Klerk v ABSA Bank Ltd and Others,*[4] the court stated as follows:

> 'The correct approach to an absolution application is conveniently set out by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another*2001 (1) SA 88 (SCA) at 92E - 93A:
>
> '[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel*1976 (4) SA 403 (A) at 409G - H in these terms:
>
> ". . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but 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. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2)1958 (4) SA 307 (T).)"

[21] In the case of *Ruto Flour Mills (Pty) Ltd v Adelson (2)*[5], the court explained the test in the following terms:

> 'At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is: 'Is there evidence upon which a reasonable man *might* find for the plaintiff?'
>
> If the defendant does not call any evidence but closes his case immediately, the question for the Court would then be: 'Is there such evidence upon which the Court *ought* to give judgment in favour of the plaintiff?' <u>If the evidence is not only not convincing, but actually found by the trial Court to be an utter fabrication or, if it be a fact that it is too vague and contradictory to serve as proof of the question in issue then it would be evidence on which a reasonable man</u> would not find, and the Court would be perfectly justified in granting absolution from the instance at the close of the case for the plaintiff.' (cases omitted)

[22] Although the "reasonable man" formulation was criticised, the court in *De Klerk's* case, *supra*, as clouding the issue, this does not detract from the fact that

---

[4] 2003 (4) SA 315 (SCA) at p 323C.
[5] 1958 (4) SA (T) at 309D – F

evidence found to be too vague and contradictory does not pass muster when determining whether a *prima facie* case has been made.

[23] In *Gandy v Makhanya,*[6] it was stated as follows:- It follows, in my opinion, that in order to avoid absolution at the close of his case, a plaintiff need not necessarily persuade the court hearing the application that there exists an actual preponderance of probability in his favour. In my view, the test at this stage of the trial is to be stated as follows: the court will refuse the application for absolution from the instance unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends."

[24] In the case of *Gordon Lloyd Page & Associates v Rivera and Another,*[7] the court endorsed reliance on inferences at the stage of absolution from the instance.

[25] It is clear from the above authorities that an application for absolution from the instance may be decided *inter alia* on the basis of reasonable inferences. Mr Grundlingh, on behalf of the appellants, criticised the Court *a quo* for having considered probabilities. He had no quarrel with the trite principle that reasonable inferences may be drawn. The extract of the Court *a quo's* judgment speaks for itself and the inferences that it drew are self-evident. The existence of the written wage agreement that was subsequently signed on 09 November 2014 is a common cause fact. The same applies to its content. Nothing precluded the Court *a quo* from drawing inferences from these common cause facts. Although four of the appellants' witnesses stated in their evidence in chief that Mr Steen agreed that TCTC would be applied to overtime, cross-examination revealed vagueness on this aspect. This is especially so when one considers that Scholtz, being the chief negotiator, conceded that he was still seeking clarification on this aspect even after 02 November 2007, being the date on which the oral agreement was allegedly concluded.

[26] The following exchange during Scholtz's cross-examination is also telling:

> 'Mr Snider: Only one remaining question for this witness. Mr Scholtz, I just want to refer you once again to the agreement, the corrected agreement and

---

[6] 1974 (4) SA 853 (N) at 856B.
[7] *Supra* at 92H.

particularly clause 14 on page 37 of Bundle A. This clause says that this agreement, these ten pages, constitutes the entire agreement between the parties and no representation not contained herein shall be of any force between the parties?

Mr Scholtz: Yes, I see that.

Mr Snider: So I put it to you that if you want to make something, if you want to bargain and negotiate something and the particular terms of the contract it needs to be in this agreement?

Mr Scholtz: I just want to understand that clearly, can you please put it to me?

Mr Snider: What I am putting to you is that, if you negotiated something?

Mr Scholtz: Yes.

Mr Snider: If something has been agreed between the parties?

Mr Scholtz: Yes.

Mr Snider: In relation to the subject matter of this agreement?

Mr Scholtz: Yes.

Mr Snider: It needs to be in this agreement, not outside the agreement?

Mr Scholtz: That is correct.' (My emphasis).

[27] The preamble of the written agreement entered into after the wage negotiations states as follows: "The Company and UASA engaged in discussions regarding the remuneration of employees traditionally part of the "Officials" category of employees with the view to restructure the remuneration of CU employees, determine increases to remuneration for all official category staff and to conclude a three year wage agreement. While many of the issues could be resolved during the discussions, some (e.g. performance management and a new incentive scheme) requires further work with both parties committed to work together and make the in-principle agreement a sustainable reality."

[28] I have already alluded to the fact that the high water mark of the evidence of the appellants' witnesses did not *prima facie* establish the existence of the oral agreement as it did not address all the required elements of the oral contract. I have referred to Mr Scholtz's concession on aspects that are not incorporated in the written wage agreement. The contents of the wage agreement speak for themselves, in particular the preamble, the non-variation clause as well as clause 4.5 of the agreement,[8] from which it is evident that overtime is not calculated on the basis of TCTC. When all these circumstances are taken into account, it is clear that when considering the application for absolution from the instance, the Court *a quo* was not limited to oral evidence but was also entitled to draw inferences from other facts, including the common cause facts as borne out by the documentary evidence.

[29] The context in which the alleged oral agreement was concluded is also important, in my view. The wage agreement entered into on 9 November 2007 was a product of a collective bargaining process, was reduced to writing and therefore constituted a collective agreement. Clause 4.5 of the wage agreement seems incongruous to the alleged oral agreement. When everything alluded to above is considered, there remains only one reasonable inference: that no oral agreement could have been concluded on 2 November 2007 during a collective bargaining process but without being made to form part of the ensuing collective agreement that was signed on 9 November 2007. The Court *a quo*'s conclusion, based on inferences, that the appellant failed to establish a *prima facie* case showing the existence of the oral agreement pertaining to overtime cannot be faulted. The Court *a quo* correctly granted an order of absolution from the instance. It cannot be said that the Court *a quo* exercised its discretion granting absolution from the instance capriciously or on wrong principles or for unsubstantial reasons. It follows that the appeal on this ground stands to fail. However, the appellant has been successful on the issue of *locus standi* even though it has no impact on the overall outcome of the appeal as it is not dispositive of the issue. Under the circumstances, justice and equity dictates that each party must pay its own costs in respect of the appeal.

---

[8] Clause 4.5 provides: "The contract of employment will reflect the operational need and compensation for standby, overtime, shift work and current continuous operations. These elements *are not* part of TCTC remuneration rate to be reflected in the annexure and will be paid in addition to TCTC package."

[30] In the result, the following order is granted:

<u>Order:</u>

1. The appeal succeeds only in respect of the finding that there was no *prima facie* evidence proving the appellant's *locus standi*.

2. The order of the Court *a quo* is set aside and replaced with the following:

   2.1 The respondent's point *in limine* on *locus standi* is dismissed.

   2.2 An order of absolution from the instance is granted.

   2.3 There is no order as to costs.

3. No order of costs is granted in respect of the appeal.

M.B. Molemela AJA

I concur.

Waglay JP

I concur.

Ndlovu JA

APPEARANCES:

FOR THE APPELLANTS: Adv R Grundlingh

Instructed by Bester & Rhoodie Attorneys

FOR THE RESPONDENT: Adv M van As

Instructed by Cliffe Dekker Hofmeyer INC