IN THE LABOUR COURT OF SOUTH AFRICA HELD AT JOHANNESBURG
CASE NO. J880/99

In the matter between:

CLEANRITE DROOGSKOONMAKERS Applicant and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

1st Respondent

TRANSPORT AND GENERAL WORKERS UNION 2nd Respondent

M NALEDI & OTHERS Further Respondents

JUDGMENT

In March 1999, 10 workers at a Rustenberg dry-cleaner embarked on what their union led them to believe was a protected strike. Their employer disagreed and applied to have the strike declared unprotected. This difference of opinion can be explained by what may be termed The Mystery of the Two Certificates. Like most good mysteries, not all aspects could be solved B certainly not on affidavit.

The Applicant operates a dry-cleaning business in Rustenberg. The majority of its employees are members of the Transport and General Workers Union (the union), the Second Respondent.

On 26 October 1988, the union referred a dispute to the CCMA on behalf of its members. It described the dispute in the following terms
Management applying delaying tactics by demanding to negotiate on new LRA (sic: BCEA) Act 75 of 1997, we have been trying unsuccessfully to negotiate wage increments but management refuses to negotiate wage increases, saying they have given workers their increment but there is no proof.

On 22 January 1999 the parties met at a conciliation meeting chaired by Advocate Mogatusi, a part time CCMA commissioner. This resulted in the conclusion of a written agreement in the following terms

1. Both parties agreed to settlement.
2. That a meeting be held by both parties on 4 February 1999.

3. Both parties to submit agenda by the last week of January 1999.

4. The meeting shall be in terms of the recognition agreement entered into by both parties.
5. The meeting/agenda will be open and will not restrict items of discussion to the wage negotiation only.

On the same day the Commissioner issued a certificate stating that the dispute referred to conciliation on 26 October 1998 concerning refusal to bargain was resolved.

The meeting was held on 4 February 1999. Precisely what transpired is not certain. However, it is common cause that the meeting was not a success. According to the applicant, the union walked out of the meeting after the applicant refused to discuss the reinstatement of workers who had been retrenched in March 1998.

This dispute had been the subject of arbitration by the CCMA who had found the dismissal to be unfair and awarded the workers six months salary as a compensation. On the union's version, the meeting broke down when the applicant refused to deal with the demand for a wage increment of 45% plus four weeks bonus. The applicant stated that it had refused to negotiate on wages for 1998 (the source of the original dispute) but was willing to negotiate on 1999 wages.

On 22 February, an official of the union, Mr Chauke, wrote to Advocate Mogatusi stating that as the applicant had violated the agreement concluded at the CCMA, the CCMA should now issue a certificate stating that the matter remains unresolved as the union's members wished to go on a protected strike.

On 23 February 1999, the commissioner issued a further certificate bearing the same reference number as the initial dispute stating that the dispute referred for conciliation on 12 February 1999 concerning refusal to bargain B section 64(2) and 134 of the LRA remains unresolved as at 23 February 1999.

Commissioner Mogatusi's explanation of how the second certificate came to be issued

differs from that of the union. In an affidavit filed on the return day, she states that some four weeks after the issue of the first certificate she received a phone call from Mr Chauke of the union in which he requested a certificate of outcome indicating that the matter remained unresolved be issued. At the time, she did not have easy access to the documents and she therefore relied on the information of the said Mr Chauke that a certificate of outcome was never issued. She goes on to say that at the time that she issued the second certificate she genuinely believed that no previous certificate had been issued and, had she remembered that she had previously issued a certificate of outcome, she would not have issued the second certificate. She therefore attributed the fact of the second certificate to her reliance upon Mr Chauke's statement that no certificate had been issued previously. As the Commissioner's affidavit was only seen by the parties on the return day, the Court did not receive Mr Chauke's response.

The following day, 24 February, the union gave the applicant 48 hours notice that its members would strike over the unresolved matter of mutual interest in which you violated the agreement reached between us at the conciliation of 22 January 1999. The applicant's response was that any strike action would be unprotected.

The employees commenced to strike on 1 March and, following several ultimatums to return to work, were dismissed for participation in an unprotected strike on 5 March 1999. The fairness of those dismissals is not an issue that is before the court in these proceedings. However, it would appear that as a result of the issue of the second certificate, the employees believed that their strike was protected.

The employees picketed the applicant's premises during the strike and the picketing continued after the dismissal. On 5 March, the applicant gave notice of its intention to bring an urgent application to have the strike and, in consequence the picket, declared unlawful. In its papers it alleged that that the picketing had been accompanied by threats of violence and other unlawful action which was prejudicing the applicant's business.

The second respondent opposed the application. It raised objections at the outset on grounds of urgency and it also argued that the court had no

jurisdiction to entertain the application as the employees had now been dismissed. Both points failed. I held that the papers contained sufficient allegations of financial loss and potential violence to make out a case of urgency and that the applicant had proceeded to court with appropriate haste. In addition, I ruled that the dismissal of the employees did not deprive this court of jurisdiction because the definition of a strike included actions by persons who are or have been employed by the same employer or by different employers.

Mr Moshoana, for the union and its members, then sought to argue that the strike was protected on the basis that the commissioner had issued the second certificate declaring that the dispute had not been resolved and that thereafter the union had given the required 48 hours notice for the strike. He argued that the second certificate stated that the dispute had been referred on 12 February and there were no indications in the papers that there had not been a second referral. Mr Pio, for the applicant, pointed out that the applicant had not received any papers of the second referral, as its should have, and that it was unlikely that a dispute would have been declared unresolved within 11 days of it being referred without the applicant knowing about the dispute.

I gave a *rule nisi* setting aside the second certificate, declaring strike action to be unlawful and restraining the union and its members from unlawful conduct while picketing.

The CCMA was called upon to investigate the circumstances in which the second certificate came to be issued and to place these before court on the return day and to explain why an order of costs should not be granted against it. The affidavit by Advocate Mogatusi was filed in response to this. However, there was no appearance on behalf of the CCMA on the return day.

On the return day, Mr Moshoana did not persist with his argument based on the validity of the second certificate. He appeared to accept that it could not be salvaged. Instead, he contended that the first certificate was invalid because it did not relate to the dispute referred by the union. He argued that the dispute referred to conciliation by the union had not been settled and that the union was entitled to proceed to strike once the 30 days contemplated by Section 64(1)a(ii) (or any agreed extension) had expired. The meeting of 4 February was therefore merely a continuation of the statutory conciliation. This argument was based on the proposition that the dispute referred to conciliation was, in fact, a wage dispute and therefore the commissioner's characterisation of the dispute in the certificate as a refusal to bargain rendered the certificate invalid. He said that I should have regard for the underlying nature of the dispute in line with the approach of the Labour Appeal Court in YYY.

Mr Moshoana's argument founders on two difficulties. Firstly, the certificate of the Commissioner that the dispute has been settled remains valid until such time as it is set aside by the Labour Court in review proceedings. No such proceedings have been instituted. The second respondent could have instituted such proceedings by way of a counter-application in this matter but has not done so.

No order can be given setting aside the second certificate until the CCMA has been served with papers and called upon why such an order should not be granted. In contrast, the applicant's founding papers placed the CCMA on terms to justify the second certificate.

In addition, the argument does not square with the conduct of the second respondent.

It is evident from the papers that the second respondent and its members were of the view that a settlement had been struck at a conciliation meeting bringing

to an end the dispute that had been the subject of the referral to the CCMA. This attitude is also evident in the terms of the second respondent's letter to the CCMA on 22 February 1999, its strike notice of 24 February and its approach to the CCMA. It is clear that the Commissioner used the phrase Arefusal to bargain loosely not so to refer to a dispute under Section 64(2) but to indicate that the dispute over wages and other conditions of employment had proceeded beyond a stage at which the employer was refusing to deal with the issue at all.

Accordingly, I remain of the view that the strike action was unlawful and that the order should be confirmed.

It should be added that the applicant was only partially successful in the relief sought in this application. It sought an order declaring that the pickets staged by the union and its members did not comply with section 69 of the Labour Relations Act. In addition it sought an order authorising the South African Police Services to bring these pickets to an end. I refused to grant the latter part of the relief sought. That a picket does not comply with the Labour Relations Act does not mean that it is unlawful; it is quite possible to stage what is commonly referred to as a picket without any lawful conduct even though the picket is not protected by section 69. Accordingly the relief granted in this regard was confined to unlawful actions such as threats of violence that may occur during the picket.

The CCMA was called upon to show why it should not be ordered to pay the costs. In her affidavit, Commissioner Mogatusi stated that the second certificate had been issued because of her reliance upon the word of the union official and that it had been issued without deliberate intent to harm either party. As the act or omission was

made in good faith it had not been intended to cause any harm, she suggested, the CCMA should not be ordered to pay costs. I cannot agree with this contention. The issue of a certificate of outcome in terms of Section 135 (5) of the LRA is an administrative decision that has considerable significance for the parties to a dispute. In the present case, the issue of the second certificate led the members of the union to believe that they had acquired the right to stage a protected strike. It is inappropriate that a decision of this type should be issued without hearing the views of both parties. The Commissioner failed by relying upon the assurance of the union official that there had not been a previous certificate. It was her responsibility to verify the position before issuing the certificate. I accordingly believe that it is appropriate that the CCMA should be jointly liable with the union for the costs of the applicant.

I accordingly make a final order on the following terms:

1. 1. The certificate issued by the commissioner of the first respondent, Advocate Mogatusi, in terms of Section 135(5) of the Labour Relations Act on 23 February 1999 is set aside;
2. 2. The combined acts of the third and further respondents in refusing to work with the collective intention of compelling the Applicant to concede their demands from 1 March 1999 does not comply with the provisions of Chapter 4 of the Labour Relations Act 66 of 1995 and therefore constitutes an unprotected strike;
3. 3. The pickets of the second, third and further respondents at the premises of the applicant are not protected by the provisions of Section 69 of the Labour Relations Act;
4. 4. Interdicting the second, third and further respondents from instigating, inciting, participating in or continuing in any unlawful action in respect of the strike which commenced on 1 March 1999;
5. 5. Directing that the first respondent, the CCMA and the second respondent, the Transport and General Workers Union, pay the costs of this application jointly and severally, the one paying the other to be absolved.

BENJAMIN A. J.