



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no:JA 42/19

In the matter between:

CHIEF INSPECTOR OF MINES

Appellant

and

ASSMANG (PTY) LTD

Respondent

Heard (via ZOOM):12 November 2020

Delivered: By email to the parties

CORAM: DAVIS JA, COPPIN JA et MURPHY AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal with the necessary leave against the judgment of the Labour Court (Moshwana J) in which the appellant's point *in limine* in an appeal to that court brought in terms of s 58(1) of the Mine Health and Safety Act¹ ("MHSA") to the effect that a conclusion by the appellant that a certain incident occurred at a "mine" was not an appealable decision, was dismissed.

Background facts

- [2] On Friday 13 June 2014, a security guard, Mr C Ngobeni, employed by a contractor of the respondent, was fatally injured when a heavy-duty truck collided with him at the intersection of the R577, a public provincial road, and

¹Act 66 of 1995.

a road leading to the respondent's mining operation at Dwarsrivier, in the vicinity of Steelpoort and Lydenburg in the Limpopo Province ("the accident").

- [3] The following day, Mr. L.E. Morogorwane, an inspector of the Mine Health and Safety Inspectorate of the Department Mineral Resources, Limpopo Province ("the Inspectorate"), who visited the site of the accident, formed the view that the incident was a "mine accident" and issued a report on the matter together with an instruction as envisaged in section 54(1) of the MHSA, ostensibly, to protect the health and safety of persons at the "mine", i.e. referring to the respondent's premises.
- [4] Section 54(1) empowers such an inspector, if he has reason to believe that any occurrence, practice, or condition at a mine endangers, or may endanger, the health and safety of any person at the mine, to give any instruction necessary to protect the health and safety of those persons. This includes, but is not limited to an instruction that operations at the mine be halted (s54(1)(a)), that the performance of any act or practice at the mine be suspended, or be performed subject to specified conditions (s54(1)(b)), or that the employer takes specified steps to rectify the occurrence, practice or condition (s54(1)(c)).
- [5] The respondent took exception to this, being of the view that the inspector had erroneously concluded that the accident had occurred at a "mine" as defined in section 102 of the MHSA and in the Mine Health and Safety Regulations ("the regulations"). On 7 July the respondent escalated its complaint to the principal inspector, Mr SH Jivhuho, who, effectively confirming the view that the accident occurred at a "mine" as defined in the MHSA and regulations, issued a notice to the effect that the Inspectorate intended to conduct an inquiry as envisaged in section 65 of the MHSA into the accident, but provided no reasons for the decision.
- [6] Section 65 of the MHSA, inter alia, empowers the appellant to direct an Inspector "to conduct an inquiry into any accident or occurrence at a mine that results in the death of any person." (Emphasis added)

- [7] The respondent appealed to the appellant in terms of section 57 of the MHSA against the decision of the principal inspector, Mr Jivhuho, to conduct the intended inquiry.
- [8] Section 57 provides, inter alia, that “any person adversely affected by a decision” of an inspector may appeal against that decision to the Chief Inspector of Mines (i.e. the appellant). In terms of subsection (3), after having considered the grounds of the appeal and the inspector’s reasons for the decision, the Chief Inspector of Mines is required to (as soon as practicable) to: (a) confirm, set aside, or vary the inspector’s decision; or (b) substitute any other decision for the decision of the Inspector.
- [9] On 12 December 2014, Mr. Morogorwane filed a further report setting out his reasons for concluding that the accident was a “mine accident”, and that decision formed the basis for the inspectors’ conclusion that an inquiry in terms of section 65 of the MHSA should be instituted.
- [10] In a letter dated 20 January 2015 the Chief Inspector (i.e. the appellant) informed the respondent that its appeal had been considered and that it had been decided that the section 65 inquiry should proceed. In response to a request from the respondent for reasons for his decision, the appellant provided written reasons in a letter dated 18 February 2015.
- [11] The portion of the letter relevant for these proceedings reads as follows: “... My decision of 19 December 2014 regarding the above-mentioned appeal is based on the following grounds:

1. Factual grounds

1.1 The deceased was working on the shift at Dwarsrivier mine during the time of his death;

1.2 The accident happened on the Dwarsrivier mine’s plant access road, approximately 8 m away from the R577 public road; and

1.3 The deceased was killed in an accident that involved a truck which was being used at Dwarsrivier mine.

2. Legal grounds

2.1 The deceased was an employee of Dwarsrivier mine as per the definition of an “employee” in section 102 of the MHSA;

2.2 The plant’s access road where the accident happened is a mine as per the definition of a “mine” in section 102, item (A) (ii) of the definition;

2.3 Section 65 (1)(a) of the MHSA requires that an inquiry be conducted into any accident or occurrence at a mine that results in the death of any person....”

[12] On 20 April 2015, the respondent, relying on section 58 of the MHSA, instituted appeal proceedings in the Labour Court against the decision of the appellant.

[13] Section 58 (1) of the MHSA provides that: “any person adversely affected by a decision of the Chief Inspector of Mines, either in terms of section 57(3) or in the exercise of any power under this Act, may appeal against the decision to the Labour Court.” In terms of subsection (3) the Labour Court must consider the appeal and has the power to confirm, vary or set aside the Chief Inspector’s decision.

[14] Shortly before the hearing was to commence in the Labour Court, the appellant raised a point that the decision, which is the subject of the appeal, was not appealable. Having heard argument on this preliminary point on 18 February 2019 the Labour Court dismissed it in the judgment which is the subject of this appeal.

[15] It was submitted in that court on behalf of the appellant that there was no “decision” as contemplated in section 58(1) of the MHSA. According to the argument, to be appealable it must be shown that the decision of the appellant adversely affected a person’s rights, and that the respondent has not shown that to have been the case in this instance.

[16] In rejecting that argument, the Labour Court held that the decision in question was appealable. It held that the inspector “had formed a belief that the accident happened on a mine, hence his invocation of the powers in terms of

section 54” and that the appellant treated that belief as a decision because he accepted and considered the appeal brought by the respondent in terms of section 57 of the MHSA. The Labour Court reasoned that that must have been the case otherwise the appellant would not have exercised his appeal powers in terms of section 57. The Labour Court also referred to the letter of the appellant of 20 January 2015, in which he had informed the respondent that its appeal had been considered and that it had been decided that an inquiry in terms of section 65 of the MHSA should proceed.

[17] The Labour Court held that the classification of the accident as a “mine accident” was not merely a preliminary step in coming to a decision, but was in fact a decision that served as “a trigger for the exercise of the powers contemplated in section 65” and was “a jurisdictional requirement for the application of the section.”

[18] That Court also held that such a decision had a “direct and immediate effect” on the respondent and that it was appealable for all the aforementioned reasons. It commented that a contrary conclusion, namely, that the accident did not in occur at a mine, would be advantageous as it would obviate the holding of the inquiry envisaged in section 65.

[19] In this Court, the appellant’s counsel did not strongly persist with the contention that the determination by the Principal Inspector, confirmed and reinforced by the appellant, that the accident occurred at a mine, was not a decision as contemplated in section 58(1), but he argued in essence, that even if it was a decision, it was not (practically) appealable before the conclusion of the inquiry, because it was tentative and the section 65 inquiry could still have as one of its objects determining whether the accident in fact occurred at a mine.

[20] This argument that the determination that the accident occurred at the mine was not a decision as contemplated in s 58(1) of the MHSA, clearly has no merit. The fact that the issue could still have been inquired into, does not detract from the fact that it was an effective decision. Section 58(1) provides that a decision of the appellant, either in terms of section 57(3), or in the

exercise of any power under the MHSA, may be appealed against the Labour Court. In this instance, there was clearly a decision by the appellant in terms of section 57(3), or one made in terms of the exercise of the appellant's powers in terms of the MHSA, inter alia, to direct that the inquiry in terms of section 65 be conducted into the accident.

[21] Part of the reason, at least, why the appellant initially appeared to wrestle with this aspect, seemingly, emanates from the adoption of an approach that conflated the concepts of appealability and standing, that are distinctly discernible from section 58 (1) of the MHSA.

[22] In respect of standing, the section provides that "any person adversely affected" by a decision of the appellant, as contemplated in that section, may appeal against the decision to the Labour Court.

[23] Counsel for the appellant argued, essentially, that the respondent was not "adversely affected" as contemplated in that section, because it had not shown that its rights had been affected. According to this argument, even though the section does not expressly refer to rights, it must be interpreted as referring only to rights that had been affected. Counsel went as far as arguing that the word "rights" had to be read into the section.

[24] This argument also does not bear scrutiny. The wording of section 58(1) is clear and unambiguous. It does not confine the adverse effects to rights, and does not exclude, but clearly contemplates that such adverse effects may also relate to interests, falling short of rights.

[25] No rational basis was suggested why the section only gives persons whose rights were adversely affected by the decisions contemplated there, the necessary standing. Generally, standing has never been confined only to those whose rights had been adversely affected, but is also extended to those who have a sufficient or substantial interest in the remedy sought. For present purposes reference to section 38 of the Constitution of the Republic of South Africa, 1996, which deals with enforcement of rights in the Bill of Rights, suffices as an example.

[26] In insisting that the “adverse effects” were to be limited to rights, the appellant’s argument was apparently drawing from the definition of “administrative action” in section 1(i) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), which refers to a decision taken by an organ of state, as contemplated there, which “adversely affects the rights of any person.” But that definition is not applicable here. The issue for determination in this matter does not require establishing whether the “decision” contemplated in section 58(1) of the MHSA is “administrative action” as defined in the PAJA, nor does it involve the application of the PAJA. Further, section 58(1) of the MHSA does not provide either expressly, or impliedly, that only decisions that meet the definitional requirements of “administrative action” in the PAJA are appealable.

[27] In support of the appellant’s argument on the issue of appealability, counsel referred to the decisions of the Supreme Court of Appeal (SCA) in *Grey’s Marine*² and *Bonitas*,³ both of which are distinguishable. In the former, the SCA was dealing with administrative action as defined in PAJA and as contemplated in s 33 of the Constitution. In *Bonitas*, the SCA was dealing with the question whether the decision of the Registrar of Medical Schemes in terms of s4 of the Medical Schemes Act 131 of 1998 was appealable in terms of s49(1) of that Act to order an inspection, and held that it was not appealable as an appeal would undermine the very nature and object of the investigation contemplated in s4, because the investigation contemplated there required swift action and the element of surprise was vital to its effectiveness. However, the SCA, perhaps paradoxically, also expressed the view that the decision could be reviewed on the grounds of legality, because it may be arbitrary or irrational. But would a legality review of that decision also then not undermine its effectiveness?

[28] Even though *Bonitas* at first blush seems applicable, it is not. The provisions of the Medical Schemes Act under consideration there differ materially, both substantially and in wording, from the provisions of the MHSA under

²*Grey’s Marine Hout Bay(Pty)Ltd and others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) particularly para 23.

³*Bonitas Medical Fund v Counsel for Medical Schemes and Another* [2016] 4 ALL SA 648 (SCA) (“*Bonitas*”).

consideration here. There is also a marked difference between the order to investigate considered there and the decision to conduct a section 65 inquiry dealt with in this instance. It is apparent from *Bonitas* that the nature of the investigation contemplated there was decisive.⁴

[29] In the MHSa the inquiry contemplated in section 65 is distinguished from an investigation in terms of that Act. It may be combined with an investigation, since an investigation may be converted into an inquiry (s66(1) of the MHSa) and it may even be held after an investigation has been completed (s 66(4)). It is an extensive formal process that, significantly, does not rely on the element of surprise for its effectiveness. The inquiry is to be held in public (s 68), and any of the persons listed in section 69 of the MHSa may participate in it (s69). A record of the evidence given at the inquiry is to be kept (s72(a)) and upon its conclusion the person presiding must prepare a report of the findings, recommendations and any remedial steps (s72(b)).

[30] Section 58(1) (like section 57(1) of the MHSa) does not confine the decisions contemplated there only to those that adversely affect the rights of persons, but is broad, and, albeit impliedly, also includes those decisions of the appellant made in terms of section 57(3) and those made by him in the exercise of any power under the MHSa, that adversely affects interests, and perhaps even legitimate expectations.

[31] As the Labour Court also observed, perhaps in a slightly different context, sections 57(1) and 58(1) employ the same wording. The appellant apparently accepted, when dealing with the respondent's appeal to him (which effectively was about the very decision to conduct a section 65 enquiry), that the respondent was "adversely affected" by that decision, as contemplated in section 57(1). He never stated otherwise on that point and entertained the appeal. To now raise a contrary argument in an appeal to the Labour Court, in terms of section 58(1) which employs the same words, is curious.

[32] It is also significant that the word "decision" is not defined in the MHSa, unlike in the PAJA where the word "decision"(contemplated in the PAJA) is defined.

⁴See *Bonitas* (above) paras 9 and 10.

The word bears its ordinary dictionary meaning in section 58(1) of the MHSA, namely, to determine an issue, or to conclude regarding an issue. It was necessary for the appellant to conclude on whether the accident occurred at a mine before he could resolve that the section 65 inquiry should proceed. And he could only do all of this in the exercise (or purported exercise) of his powers under the MHSA. This is also apparent from the appellant's letter of 20 January 2015, where he furnishes reasons for his decision. It is further clear from the letter that he took into account facts and the law in coming to the conclusion that the accident occurred at a mine. That is clearly a decision as contemplated in section 58(1) of the MHSA. In any event, the respondent is appealing against the appellant's decision which was rendered in terms of section 57(3) of the MHSA, and section 58(1) specifically provides that such decisions are appealable.

[33] It is apparent from section 65 and the related provisions in the MHSA that the holding of the inquiry envisaged in section 65 in respect of the accident would of necessity involve the respondent in a lengthy and invasive process. In terms of section 70, for example, the person presiding at such an inquiry has extensive powers of summoning persons to appear as witnesses at the inquiry and/or to produce books and documents, and to question persons under oath or affirmation. The inquiry may also have the effect of laying the necessary foundation for other possible decisions concerning mine health and safety that could affect the respondent adversely (sections 65-72).

[34] As was held in the Labour Court, the decision that the accident occurred at a mine, as defined in the MHSA, is a key jurisdictional fact. Unless the accident occurred at a mine, the appellant would have no power in terms of the MHSA to order that an inquiry as envisaged in section 65 be instituted. It is also unquestionable that a successful appeal against that decision could be advantageous for the State and all involved as it would obviate the holding of an inquiry that could be invasive and costly.

[35] To summarise, properly and purposively constructed, section 58(1) of MHSA deals with the aspects of appealability and standing, distinctly. It gives standing to any person adversely affected by the kind of decision of the

appellant that is contemplated in that section. The respondent is undoubtedly a person that is so affected. The decision the respondent is appealing against is clearly appealable to the Labour Court in terms of that section.

[36] In the appellant's heads of argument counsel purported to raise, for the first time, for decision by this Court, an issue relating the form that the appeal envisaged in section 57(3) of the MHA should take. However, counsel correctly seems to have abandoned those submissions and did not raise or refer to them in his oral argument as it was not an issue in the Labour Court. According to the record in the Labour Court the parties had agreed to the form of proceedings in that forum.

[37] In the result, the appeal is dismissed with costs, such costs are to include the cost of two counsel, where two counsel were employed.

LABOUR APPEAL COURT

P Coppin

Judge of the Labour Appeal Court

Davis JA and Murphy AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Mr. MJ Ramaepadi SC

Instructed by the State Attorney
(Johannesburg)

FOR THE RESPONDENT:

Mr R Itzkin

(Heads of argument having been drawn by
Mr A Myburgh SC and Mr R Itzkin)

Instructed by Edward Nathan Sonnenberg
Attorneys

LABOUR APPEAL COURT