

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA  
HELD IN JOHANNESBURG**

**CASE NO: DA25/2001**

In the appeal between:-

**BILLITON ALUMINIUM SA LIMITED**                      **Appellant**

and

**NATIONAL UNION OF METAL WORKERS  
OF SOUTH AFRICA**                                      **Respondent**

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**JUDGEMENT**

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**ZONDO JP**

**Introduction**

- [1] This is an appeal from a judgement of the Labour Court in an application brought by the appellant for an order declaring a secondary strike planned by the respondent to take place in two sites from which the appellant operates in Kwa – Zulu Natal unprotected and interdicting “**the respondent and its members ... from promoting, inciting, instigating and participating in the proposed secondary strike against the**

[appellant]” and for the payment of costs. The Labour Court dismissed the application but made no order on costs. The judgement of the Labour Court is reported as **Billiton Aluminium SA Ltd v NUMSA (2001) 22 ILJ 2434 (LC)**. An application for leave to appeal was made. The Court a quo granted the application for leave to appeal but simultaneously made another order in these terms: **“Pending the outcome of the appeal and by way of interim relief, the respondent and its members are interdicted and restrained from promoting, inciting, instigating and participating in the proposed secondary strike against the applicant.”** No order as to costs was made in the application for leave to appeal. The appellant now appeals to this Court against the whole of the judgement and order of the Court a quo dismissing the application.

### **The facts**

- [2] The appellant, Billiton Alluminium SA Limited, is a registered company. The respondent is the National Union of Metal Workers of South Africa, (hereinafter referred to simply as **“the union”** or **“the respondent”**). The union has members who are employed by the appellant as well as others employed by a company called SAMANCOR Limited, (hereinafter referred to simply as either **“Samancor”** or **“the primary employer”**). BHP Billiton owns 100% of the appellant’s shares and 60% of Samancor’s shares. The remaining 40% of Samancor’s shares are owned by Anglo American.

- [3] The appellant manufactures aluminium at two sites in Richards Bay, Kwa-Zulu Natal. The one site is Hillside Smelter, the other Bayside Smelter. Samancor is involved in the business of mining chrome and manganese ore and the conversion thereof into chrome alloys and manganese alloys respectively. Samancor's chrome ore is converted into chrome alloys at four sites. These are at Witbank, Middelburg, Krugersdorp and Steelpoort. It employs about 6500 employees of whom about 4000 are employed in the chrome division. About 2000 of the 4000 are employed in the chrome mines at Eastern Chrome in Steelpoort and Western Chrome Mines in Rustenburg.
- [4] A dispute arose between Samancor and the union about wages and terms and conditions of employment of the union's members employed by Samancor. On the 14th October 2001 the union's members employed by Samancor commenced a strike in respect of the dispute. On the 17<sup>th</sup> October 2001 the respondent notified the appellant that the appellant's employees at the Hillside Smelter and Bayside Smelter would engage in a secondary strike in support of the primary strike at Samancor. The secondary strike was going to take the form of a total withdrawal of labour. After attempts by the appellant to get the respondent to call the secondary strike off had failed, the appellant brought the application referred to earlier in the Labour Court to effectively have the secondary strike declared unprotected and interdicted.

### **The constitutional and statutory framework**

[5] Before dealing with the merits of this appeal, it is necessary to set out the constitutional and statutory framework within which it must be considered. Sec 23(1) of the Constitution of the Republic of South Africa No. 108 of 1996 (“**the Constitution**”) provides that that “**(e)veryone has the right to fair labour practices**”. Sec 23(2)(a),(b) and (c) provide that “**(e)very worker has the right –**

- (a) **to form and join a trade union;**
- (b) **to participate in the activities and programmes of a trade union; and**
- (c) **to strike.”**

From sec 23(2) it is clear that the Constitution makes no distinction between a primary strike and a secondary strike. Sec 23(5) provides that “**(e)very trade union, employers’ organisation and employer has the right to engage in collective bargaining**”. Sec 23(5) goes on to provide that national legislation “**may be enacted to regulate collective bargaining**”. It is generally accepted that the right to strike is an integral part of collective bargaining.

[6] Secondary strikes are regulated by the provisions of sec 66 of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”). Sec 66 has six subsections. Subsection 1 defines a secondary strike as meaning “**a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the**

registered scope of that council, have a material interest in that demand”.

[7] Subsection (2) reads thus:- **“No person may take part in a secondary strike unless ...”**

**“(a) the strike that is supported complies with the provisions of sections 64 and 65;**

**(b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers’ organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement, and,**

**(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.”**

Subsection (2) lays down a general rule about secondary strikes and one exception to the general rule. The general rule is that secondary strikes are precluded. The first part of ss(2) reads: **“No person may take part in a secondary strike unless...”**. The word **“unless”** introduces an exception to the general rule. The exception is that a secondary strike is permitted where the three conditions stipulated in (a),(b) and (c) of sec 66(2) have been met.

[8] It is common cause that in this matter the first two conditions were met. What is in issue is whether the third condition laid down in sec 66(2)(c) has been met. The appellant’s attack on the respondent’s secondary strike

is that the secondary strike will be in breach of the provisions of sec 66(2)(c). The respondent contends that that condition has been met.

### **The parties' contentions**

- [9] The appellant's case, as set out in the founding affidavit, was that the proposed secondary strike was in contravention of sec 66(2)(c) because **“the nature and extent of the secondary strike [at the appellant] will not be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the employer (SAMANCOR)”**. The appellant submitted that the secondary strike at the appellant's premises would not be proportional to the primary strike in that it would have no effect on the business of Samancor. The appellant also stated that there were no business dealings whatsoever between the appellant and Samancor and that the two work in unrelated sectors. The appellant also emphasised that it has no shares in Samancor but that it is wholly owned by BHP Billiton which in turn owns 60% of the shares in Samancor. The appellant pointed out that, while there may be some **“nexus”** between the appellant and Samancor in terms of shareholding which is that they have a common shareholder in BHP Billiton - that **“nexus”** did not have an effect on Samancor's business. It also pointed out that neither the appellant nor BHP Billiton is directly involved in the day to day running of Samancor and, therefore, is unable to determine the outcome of the dispute between the respondent and Samancor.

- [10] The appellant stated that, if it was not granted the relief it sought, it would

be severely prejudiced because it would be left with no alternative but to close down its operations at the two smelters if the secondary strike continued for any period of time. The appellant stated that, once the smelters had been closed, their re-commissioning would cost the appellant well in excess of a billion rand.

[11] The appellant also stated that its manufacture of aluminium was on a continuous basis from the stage of the commissioning of a plant until it no longer operates as an aluminium manufacturing plant. The appellant estimated that it would require approximately R700 million to re-commission the Hillside Smelter alone if it closed down as a result of the secondary strike. It said that the loss that it would suffer as a result of the closure would be in excess of R 2 billion in income at the Hillside Smelter alone. The appellant also stated that it would be unable to continue its business without its artisans and this would bring the plant to a halt within a few days. The appellant also said that such losses as it would suffer as a result of the strike would not be recoverable.

[12] The respondent delivered an answering affidavit in support of its opposition. In par 10.3 of the answering affidavit the deponent to the answering affidavit alleged that it was common cause that the appellant is the majority shareholder in Samancor. This allegation formed the basis of what the respondent offered as its defence to the appellant's case. The respondent then stated that the shareholders of a company are able through their capital investment to wield control and power over the company in which they are shareholders. The respondent submitted in par

10.4.3 of the answering affidavit that **“the primary strike at SAMANCOR will result in a depreciation of the capital investment of the appellant as the majority shareholder”**. It further said that a secondary strike at the appellant’s plants would have the effect of putting pressure on it to intervene in the primary strike in order to protect the value of its capital investment. It said that the purpose of the secondary strike was to exacerbate the capital loss in order to pressurise the appellant as the majority shareholder in Samancor to intervene in order to resolve the primary strike.

- [13] In par 10.4.6. the respondent said that, although the appellant may not be involved in the day to day running of Samancor, the issue at stake is one of capital funding in which the appellant has a real and substantial interest and thus an incentive to use its influence over the collective bargaining process between Samancor and the respondent’s members. In par 10.4.7 the respondent submitted that another effect of the secondary strike at the appellant would be to provide **“support and solidarity”** to the employees involved in the primary strike and thereby strengthen that strike. In par 10.4.11 the respondent submitted that the reasonableness of the effect is dependent on the strength of the causal connection between the primary employer and the secondary employer and also upon the possible extent of the direct or indirect effect. The respondent then states at par 10.4.12 that **“in deciding this question the court should have regard to the following factors:-**

**10.4.12.1 whether the secondary employer has a minority or controlling share in the business of the primary**

**employer;**

**10.4.12.2    whether there is a direct relationship in terms of shareholding or whether the shareholding relationship is attenuated, i.e the share trail between the primary and secondary employer passes through one or more intermediary company(ies). (sic)**

**10.4.13        it is submitted and I am advised that in this case the effect is reasonable in that the relationship is clearly of a substantial and direct nature.”**

### **The merits of the appeal**

[14] The respondent’s contention that the condition prescribed by sec 66(2)(c ) has been met has as its main basis the assertion that the appellant is the majority shareholder in the primary employer and that, by virtue of that relationship between the two, pressure will be put on the appellant to intervene in the primary dispute and get the primary employer to settle it. It is necessary to point out that in the founding affidavit the appellant had, as the applicant in the Court a quo, alleged that it had no shares in the primary employer. It was in the answering affidavit that the respondent denied this allegation and alleged that the appellant was the majority share - holder in the primary employer. In the replying affidavit the appellant stood by its version as set out in the founding affidavit. This has created a dispute of fact between the parties. I shall assume in the respondent’s favour that it is also a material dispute. In the light of this it is necessary to determine the version on the basis of which this matter must be decided.

[15] There is no indication in the judgement of the Court a quo that any of the

parties requested in the Court a quo that this dispute of fact or any other dispute of fact in the papers be referred to oral evidence. On appeal we were not informed that such a request had been made. Accordingly, the disputes of fact in the papers must be dealt with in accordance with the approach set out in **Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** at 634 H – 635C.

[16] The general rule in terms of Plascon Evans that, if final relief is sought in motion proceedings and there is a material dispute of fact, it is on the basis of the version of the respondent party in the Court of first instance that the matter must be decided is subject to certain exceptions. One of the exceptions is where the version of the respondent is a bare denial or is so far fetched or untenable that the court would be justified simply to reject it on the papers. In this matter the union had an opportunity in its answering affidavit to produce proof of its allegation that the appellant was the majority shareholder in the primary employer, especially because not only did they know that the appellant's case was that it had no shares in the primary employer but, also, because they knew that this related to a very important part of their case. The union did not furnish such proof and was content simply with a bald allegation. The appellant would have been unwise to deny that it had shares in the primary employer if in fact it did have them because the falsity of its denial could easily be exposed and the appellants' officials would have known this very well. It is, therefore, difficult to think that they would have taken the risk of making a statement that could be so easily proved to be false.

[17] The appellant did not just state that it did not own any shares in the primary employer but it went on to state that its only connection with the business of the primary employer was that its sole shareholder was the majority shareholder in the primary employer. To the extent that the union may have denied this allegation, its denial was a bare denial. Accordingly, I am of the view that, applying the Plascon – Evans approach, the appellant's version that it had no shares in the primary employer is the version that should form part of the basis on which this matter must be decided.

[18] The conclusion I have reached above that this matter must be decided on

the basis that the appellant does not own any shares in the primary employer – let alone being the majority shareholder - disposes of the respondent's main case. This is because the respondent's real case was based on the assertion that the appellant is the majority shareholder in the primary employer and, because of that, will intervene in the primary dispute to protect its capital investment or capital funding. Indeed in par 10.4.5 of the answering affidavit the deponent thereto stated that the purpose of the proposed secondary strike **“is to exacerbate the capital loss in order to pressurise the [appellant] as the majority shareholder of SAMNCOR to intervene in order to resolve the primary strike”**. In par 10.4.6 of the answering affidavit it was said on behalf of the respondent that **“the issue at stake is one of capital funding in which the [appellant] has a real and substantial interest and thus an incentive to use its influence over the collective bargaining process between SAMANCOR and the respondent's members”**. In par 10.4.11 it was submitted that **“the reasonableness of the effect [of the secondary strike] is dependent on the strength of the causal connection between the primary employer and the secondary employer and also upon the possible extent of the direct or indirect effect”**. The respondent then itself went on to state in par 10.4.12 that in deciding the strength of the causal connection between the primary employer and the secondary employer, the court should have regard to:-

- (a) **“whether the secondary employer has a minority or controlling share in the business of the primary**

**employer”;**

**(b) “whether there is a direct relationship in terms of the shareholding or whether the shareholding relationship is attenuated i.e the share trail between [the primary employer] and the secondary employer passes through one or more intermediary company(ies)”.sic.**

The factor mentioned in (a) must be decided against the respondent since I have already concluded that this matter must be decided on the basis of the version that the appellant has no shares in the primary employer. The factor in (b) must also be decided against the respondent because there is no evidence that there is any company in which the appellant owns shares which in turn owns shares in the primary employer. The appellant does not own any shares in BHP Billiton which is the company that is the majority shareholder in the primary employer. Accordingly, the appellant cannot put pressure on BHP Billiton to intervene in the primary dispute and get the primary employer to settle the primary dispute because the tail cannot wag the dog.

[19] I have noted that the respondent has in its heads of argument conceded that the statements in the answering affidavit that the appellant was the majority shareholder in the primary employer was incorrect. It is there stated that BHP Billiton is the sole shareholder in the appellant and the majority shareholder in the primary employer. It is further stated that this was clarified in the respondent’s heads of argument at the hearing in the Court a quo. This may be so but the difficulty is that the respondent’s case was almost wholly based on this incorrect statement. Indeed, the effects that the respondent relied upon as the effects that the secondary strike would produce were the effects that were based on the appellant being the majority shareholder in the primary employer. They were not the effects that would result if the appellant’s sole shareholder was the majority shareholder in the primary employer. No factual basis was laid for the latter case.

[20] What the respondent should have done after it realised that the statement

by the deponent to the answering affidavit was incorrect was to supplement its case by way of a supplementary affidavit because this change of the factual basis of the case was fundamental. The case that the respondent had to argue after realising the incorrect statement on which its main case was based was the one to the effect that BHP Billiton is able to exercise control over its subsidiary companies. But that is not the case that the appellant was called upon to answer in the answering affidavit. In the answering affidavit the appellant was called upon to answer the case that it was the majority shareholder in the primary employer and, because of that, was able to wield power and control over the primary employer. It met that case head on.

[21] An example of the difficulties arising from the respondent's approach in seeking to argue a case based on facts that are different from those on which its case was based in the answering affidavit is to be found in the fact that in its heads of argument before this Court, it stated that from its point of view the purpose of the secondary strike was to put pressure on the appellant (via its relationship with the holding company, BHP Billiton) to intervene in the primary strike in order to protect the value of BHP Billiton's capital investment in the primary employer. It also said in its heads of argument that BHP Billiton **"thus has the power and incentive to influence the outcome of the primary collective bargaining dispute between [the respondent] and [the primary employer]"**. That is not what the respondent says in its answering affidavit. In its answering affidavit the respondent says in par 10.4.5 that the purpose of the secondary strike is **"to exacerbate the capital loss in order to pressurise [the appellant] as the majority shareholder of [the primary employer] to intervene in order to resolve the primary strike"**. It said in par 10.4.6 of the answering affidavit that **"the issue at stake is one of capital funding in which the [appellant] has a real and**

**substantial interest and thus an incentive to use its influence over the collective bargaining process between [the primary employer] and the respondent's members".** It is, therefore, clear that almost the respondent's entire case on the papers was based on the appellant being the majority shareholder in the primary employer. In my judgement once the respondent had admitted that the appellant's statement that the appellant had no shares in the primary employer was correct and that its own version that the appellant was the majority shareholder in the primary employer was factually incorrect, that was almost the end of the respondent's case.

- [22] The respondent also sought to defend the secondary strike on another basis, namely, an alleged trading relationship between the appellant and Samancor. In this regard it stated that Samancor makes a product called **"paste"** which it sells to the appellant for the purpose of making what the respondent referred to as electrodes. The respondent alleged that almost every week **"paste"** is loaded on to trucks **"at Ferrovelt, a business unit of Ferrometals which is one of the SAMANCOR plants"** on strike. The respondent alleged that the **"paste"** is transported in trucks which have the names, **"Bayside Aluminium"** and **"Hillside Aluminium"**, emblazoned on them. The respondent also alleged that a company known as **"Alusaf"** also supplied paste to the appellant. The respondent alleged that Alusaf is **"a SAMANCOR company that falls under the Manganese Division"**. The respondent also submitted in the answering affidavit that the secondary strike would have a direct effect on Samancor's business in that the trade of paste from both Ferroveltdt and

Alusaf would be detrimentally affected and cause Samancor financial loss.

[23] The appellant had this to say in reply:-

- (a) Ferroveldt is not a business unit of Ferrod Metals but is a joint venture between Highveld Steel and Samancor and Ferroveld supplies plus/minus 50% of its paste to various Samancor works or plants which include Samancor (Meyerton), Ferro Chrome (MidSteelpoort);
- (b) the transportation of the paste from Ferroveld to its customers is made by independent transport companies;
- (c) Corsair is used to transport paste to Durban Harbour for exports;
- (d) Ferroveld does not sell any paste to either Hillside Aluminium or Bayside Aluminium;
- (e) Hillside Aluminium does not purchase any paste from Ferroveld nor does Bayside Aluminium nor do they have any business dealings whatsoever with Ferroveld;
- f) neither Hillside Aluminium nor Bayside Aluminium has any transport trucks which have the name **“Hillside Aluminium”** or **“Bayside Aluminium”** **“emblazoned”** on the sides.

(g) there is no Samancor company called “**Alusaf**” but its name was previously “**Alusaf Limited**” but was changed in about 1997 into its present name.

[24] I am of the view that the version put up by the respondent is not one that is so untenable or that is so inherently improbable or far fetched that it would be justified to simply reject it on the papers. For this reason, and applying the Plascon – Evans approach, it seems to me that the matter must be decided on the basis of the respondent’s version. That, therefore, means that it has to be accepted, for purposes of the determination of this appeal, that Samancor makes a product called “**paste**” which it then sells to the appellant and the latter uses that product to make “**electrodes**”. The respondent’s version is also that every week the “**paste**” is loaded on to trucks “**at Ferrovelt**”. However, the difficulty with this part of the respondent’s case in this matter is that the information placed before the Court is not sufficient to justify a conclusion that, based on the paste issue, the nature and extent of the proposed secondary strike may possibly be reasonable. No indication has been given as to the size or quantity of the paste that is transported from the primary employer to the appellant. No indication has been given as to how many workers employed by the appellant have something to do with the paste. The indication is that the paste is transported from the primary employer to the appellant weekly. On this information I am unable to conclude that the nature and extent of the secondary strike may possibly be reasonable. If I cannot reach such a conclusion, I cannot go on to find that the condition prescribed by sec

66(2)(c) has been met. Since that condition has not been met, the proposed secondary strike would be unprotected.

[25] It follows that the appeal must succeed. As to costs, the appeal was argued on the basis that costs should follow the result. I propose to make an order of costs on that basis.

[26] In the premises I make the following order:-

1. The appeal is upheld with costs.
2. The order of the Court a quo is set aside and replaced by the following one:-

**“(a) The respondent is hereby interdicted from calling for or instigating anyone of the applicant’s employees to participate in the secondary strike in respect of which a written notice was given by way of a letter from the respondent to the appellant dated 14 October 2000 in support of a primary dispute then existing between the respondent and SAMANCOR.**

**b) The respondent is ordered to pay the applicant’s costs”.**

Zondo JP

I agree.

Davis AJA

I agree.

Du Plessis AJA

Appearances:

For the Appellant: Adv. M.S.M. Brassey SC

Instructed by: Denyz Reitz Inc, Durban

For the Respondent: Adv. J.G. Van Der Riet SC

Instructed by: Cheadle Thompson & Haysom Inc

Date of Judgement: 20 November 2003