REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO. JA11/2011

Reportable

In the matter between:

TOGETHERNESS AMALGAMATED WORKERS UNION OF SOUTH AFRICA (TAWUSA) — Appellant

And

BAFOKENG RASIMONE PLATINUM MINES JOINT VENTURE — First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION — Second Respondent

THULANI DUBE N.O. — Third Respondent

Summary: Appeal against costs order. Appellant initially opposed confirmation of rule *nisi*. Later withdrew opposition, without tendering costs. On return day rule *nisi* confirmed with costs. Held: The LC properly exercised its discretion on costs.

Delivered: 13 December 2013

Coram: Waglay JP et Ndlovu JA et Musi AJA

JUDGMENT

NDLOVU JA

Introduction

[1] The appellant (the third respondent in the Court *a quo*) is a registered trade union known as Togetherness Amalgamated Workers Union of South Africa ("the appellant" or "the union"). The first respondent (the applicant in the Court *a quo*) is Bafokeng Rasimone Platinum Mines Joint Venture, an unincorporated joint venture between Rustenburg Platinum Mines Limited, a member of the Anglo Platinum Group, and Royal Bafokeng Resources (Pty) Limited ("the company"), carrying on mining operations in Rustenburg, North West Province. The Commission for Conciliation, Mediation and Arbitration ("the CCMA") and Mr Thulani Dube ("the commissioner") are cited herein as the second and third respondents respectively, but only as interested parties with no relief being sought against them, which was the similar situation in the Court a quo.

The issue

[2] The only issue in this appeal is whether the Labour Court properly exercised its discretion when it awarded a costs order against the union in a matter in which the union had opposed (but later withdrew its opposition) an application instituted by the company against the union and its members who were employed by the company. The appeal comes to this Court with the leave of the Court *a quo*.

Factual background

[3] The company had some 3200 employees of its total workforce. It is common cause that in terms of a collective agreement, known as the Anglo Platinum Employee Relations Recognition Agreement, concluded between the company and three specified registered trade unions (excluding the appellant) the company's recognition policy was that a trade union seeking recognition in the workplace had to have employee members constituting at least 40% of the company's total workforce. The appellant alleged that since it had 1250 members employed by the company, which was in excess of the required 40% threshold, it was therefore entitled to organisational rights in terms of the Labour Relations Act, 1965,[1] and the collective

[1] Section 23 of Act 66 of 1965

agreement[2]. The company disputed the appellant's averment in this regard and even what the appellant alleged were verified figures of its membership.

[4] On 2 February 2010 the union referred a dispute to the CCMA for conciliation. The dispute was characterised by the union as "Organisational rights – s 22(1) (4) of the Labour Relations Act". The conciliation process failed to resolve the dispute and, on 23 February 2010, the commissioner issued a certificate of outcome to that effect and, in addition, endorsed on the certificate that the dispute could then be referred for a strike action. On 24 March 2010 the union gave notice of an intention to embark on a strike action on 29 March 2010, but which did not materialise. On 1 April 2010 the union issued a further notice advising the company that the strike would start on 7 April 2010. The strike action was actually commenced on 8 April 2010.

[5] According to the company, its representative at the conciliation meeting had pointed out to the commissioner that this dispute, in fact, involved an alleged refusal to bargain[3] which was supposed to be referred for an advisory award before a strike notice could be issued[4]. According to the company, the union had, however, undertaken not to allow its members to embark on the strike action but to engage with the company on the matter.

[6] As stated already, the strike action was commenced by the union members on 8 April 2010. According to the company, the industrial action was accompanied by acts of violence and intimidation on the part of the union members.

[7] At this stage the company sought to challenge the validity of the certificate of outcome aforesaid and the lawfulness of the strike action. Before it did so, the company's attorneys of record, on 8 April 2010, faxed a letter to the union pointing out that the certificate of outcome was "erroneously granted" and that the strike action was therefore not protected. On 9 April 2010 the union responded and contended that the strike action was protected. Thereafter the parties appeared to attempt to resolve the dispute amicably through a verification process of the union membership in the company's workplace. However, the process proved unsuccessful. In the meantime the strike action continued unabated. On 21 April

[2] Clause 6.2.1 of the collective agreement, at 33 of the indexed papers
[3] In terms of section 64(2) of the LRA
[4] In terms of section 135(3)(c) of the LRA

2010 the company then issued a notice[5], advising the union that it would be approaching the Labour Court on an urgent basis for an interdict against the strike action.

[8] Indeed, on or about 21 April 2010 the company approached the Labour Court on an urgent basis seeking an order in the following terms[6]:

> 1. Directing that the forms and service provided for in the rules of this Court be dispensed with and that this matter be dealt with as one of urgency in terms of Rule 8;
>
> 2. That a *rule nisi* do issue, calling upon the Respondents to show cause on 21 May 2010 why an order should not be issued in the following terms:
>
>   2.1 That the certificate issued by the Second Respondent under case number NWRB 227-10, dated 23 February 2010 ("FA8"), authorising the Third Respondent to embark on strike action on the issue in dispute be reviewed and set aside;
>
>   2.2 That the strike action by the Third Respondent's members be declared to be unprotected and unlawful for want of compliance with Section 64(2) of the Labour Relations Act, 1995 (*"the LRA"*);
>
>   2.3 That the members of the Third Respondent employed by the Applicant be interdicted and restrained from participating in the said unlawful strike;
>
>   2.4 That the Third Respondent, its office bearers, officials and members be interdicted from encouraging the current strike or to participate therein;
>
>   2.5 That the Third Respondent be ordered to pay the costs of this application.
>
> 3. That the orders in 2.3 and 2.4 above operate as *interim* interdicts with immediate effect pending the return day.
>
> 4. Alternative relief"

[9] The company's urgent application was set down for hearing on 23 April 2010 at 12h00. On that day the Court *a quo* granted the rule nisi and interim relief in terms of paragraphs 1, 2 and 3 of the order prayed, referred to above, save that the return date was changed to 4 June 2010. In addition thereto, the Court issued further directions numbered paragraphs 4 to 7, as follows:

[5] In terms of section 68(2) of the LRA

[6] In terms of section 68(1) of the LRA

"4. The 3rd Respondent is directed to instruct its members employed by the Applicant that the strike is unlawful, that they should discontinue the strike and return to work.

5. The 3rd Respondent is to serve and file its answering affidavit by the 7th of May 2010.

6. The Applicant is to serve and file its reply, if it so wish (sic) by 12 May 2010.

7. The costs of the application to date are reserved for determination on the return date."

[10] The union opposed the interdict application and filed its answering affidavit whereby it denied that the certificate was erroneously granted and submitted that the company's application was without merit. However, prior to the return day, the union filed a notice of withdrawal of opposition "except for costs", which reads thus:

> "Kindly take notice that the Third Respondent hereby withdraws its opposition to the application due to the applicant agreeing to the verification process.
>
> Kindly take further notice that the Third Respondent is however opposed to the costs order against its kindself and argument in this regard shall be tendered in the hearing of this matter should it be necessary."

<u>Grounds of appeal</u>

[11] The grounds of appeal relied upon by the union can be summarised as follows:

11.1 The Court *a quo* erred in failing to consider that the dispute was not about the refusal to bargain but about organisational rights, which was clearly indicated in the CCMA documents.

11.2 Had the Court *a quo* properly considered that the dispute was about organisational rights, it would have found that the dispute did not necessarily have to be referred for an advisory award before the union members could embark on a protected strike action.

11.3 The Court *a quo* erred in failing to find that the union had achieved the 40% threshold and was therefore entitled to organisational rights in the company's workplace in terms of the collective agreement.

11.4 The Court *a quo* erred in failing to consider that the union's opposition to the company's urgent application was not unreasonable, mala fide and frivolous.

Analysis and evaluation

[12] As stated already, on 23 April 2010 the Court *a quo* granted the rule nisi and, on the question of costs, directed that "[t]he costs of the application to date are reserved for determination on the return date." Given the union's withdrawal of its opposition to the confirmation of the rule nisi, the Court *a quo*, on the return day confirmed the rule nisi on an unopposed basis, without giving reasons. Notwithstanding the union's 'caveat' in the withdrawal notice that its withdrawal was "except for costs", the Court *a quo* confirmed the rule nisi with costs.

[13] In terms of the LRA the Labour Court is a court of law and equity[7] and may make an order of costs "according to the requirements of the law and fairness"[8]. As such, when exercising its discretion on the question of costs, the Court must always pay due regard to the requirement not only of the law, but also of fairness to both sides. On this basis, it follows, in my view, that when a party withdraws an action, application or defence, as the case may be, such withdrawing party should tender the costs incurred by the other party, unless there is a compelling reason for the withdrawing party not to do so[9]. Otherwise, it would be unfair to the other party which would have incurred costs as a result of the said action, application or defence, now sought to be withdrawn.

[14] In the present instance the union sought to withdraw its opposition against confirmation of the rule nisi, but without tendering costs. No explanation was offered by the union as to why it should not pay the company's wasted costs. In my view, the union ought to have tendered such costs. For this reason alone, I would dismiss the appeal.

[15] In any event, it seems to me that the union had no reasonable prospects of success on the merits of its opposition to the company's urgent application. The substantive issues which the union constantly raised in relation to its opposition

[7] Section 151(1) of the LRA. In terms of section 167(1) the same position applies to the Labour Appeal Court.
[8] Section 162(1)
[9] Compare Rule 41(1) of the Uniform Rules of Court which applies to the high courts. It should be noted, however, that rule 41(1) is based on the requirement of 'law' and not on 'law and fairness' as applicable in the labour courts.

against confirmation of the rule nisi were rendered irrelevant by its withdrawal of that opposition. It is noted that the essence of the union's complaint at the CCMA was that the company was refusing to recognise it (the union) as a collective bargaining agent of its members employed by the company. This is precisely how the concept of 'refusal to bargain' is defined in the LRA.[10] More importantly, section 64(2) of the LRA provides that "[i]f the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection(1)(b) or (c)" [i.e. the strike notice].

[16] Therefore, it did not matter how the union had elected to characterise the dispute at the time of its referral to the CCMA, but what mattered was what the real dispute between the parties was. I am satisfied that in the present matter the real dispute between the parties was the alleged refusal to bargain. In *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another,*[11] this Court (*per* Zondo AJP, as he then was) stated, in part, as follows[12]:

> '[62] The position is … that a party cannot change the nature of the dispute. I would add that the conciliating commissioner is also bound not to change the nature of the real dispute between the parties. If he did, the party that seeks to take the matter further would not be bound by a wrong description of the dispute but would have a right to take further the true dispute that was referred to conciliation and to give a correct description of the dispute. What the parties are bound by is the correct description of the real dispute that was referred to conciliation.

[17] It is further noted that prior to the company instituting the urgent application it had, on 8 April 2010, written a letter to the union warning it about the fact that the certificate of outcome, which the union relied upon for its strike action, was "erroneously granted" for the reasons stated in the letter and that, therefore, the certificate was invalid and the strike action unprotected. The union would not budge. Again, on 21 April 2010, the company warned the union by another letter that it (the company) was then approaching the Labour Court for an urgent interdict. Still, the union members did not stop the strike. As a final resort, the company instituted the urgent interdict proceedings.

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[10] Section 64(2)(a)(i) of the LRA

[11] (2000) 21 ILJ 142 (LAC). See also *Sondorp and Another v Ekurhuleni Metropolitan Municipality* [2013] 9 BLLR 866 (LAC), at par 51

[12] *Driveline Technologies*, at par 62

[18] It is common cause that the dispute was not referred for an advisory award but, instead, the commissioner issued the certificate of non-resolution of the dispute and in terms of which the commissioner indicated that, as the next step, the union could embark on a strike action. Hence the company sought a Court order, on an urgent basis, stopping the strike action by the union members. This is the urgent application by the company which the union initially opposed and later withdrew its opposition to without tendering the wasted costs.

[19] For these reasons, I am satisfied that the learned Judge *a quo* properly exercised his discretionary power, in terms of section 162(1) of the LRA, when he awarded costs against the union as he did. The appeal, in my view, must fail. However, having regard to the requirement of law and fairness to both parties, there should, in my view, be no order as to costs in this appeal.

<u>The order</u>

[20] In the result, the following order is made:

1. The appeal is dismissed.

2. There is no order as to costs in the appeal.

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Ndlovu JA

Waglay JP and Musi AJA concur in the judgment of Ndlovu JA

<u>Appearances:</u>

For the Appellant: Mr S Morwane (union official)

For the respondent: Advocate PG Seleke

Instructed by: Webber Wentzel Attorneys, Johannesburg