



REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA35/2013

In the matter between:

CONCOR PROJECTS (PTY) LTD t/a

CONCOR OPENCAST MINING

Appellant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER COMFORT

MOKABANE NO

Second Respondent

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION ("AMCU")

Third Respondent

N TITANA & FURTHER RESPONDENTS

Fourth Respondent

Heard: 19 November 2013

Delivered: 13 February 2014

Summary: Binding effect of a collective agreement to non-signatories trade unions - requirements restated- respondent's members not identified in the collective agreement- requirement not met- distinction between collective agreement and sectoral determination - sectoral determination not a collective agreement- employees entitled to bargain higher wages than those provided in the sectoral determination. Appeal dismissed with costs.

CORAM: WAGLAY JP, C J MUSI *et* MOKGOATLHENG AJJA

JUDGMENT

C J MUSI AJA

- [1] This appeal – which is brought with the leave of this Court – is against the judgment of the Labour Court (Lagrange J).
- [2] On 17 October 2012, the appellant sought and was granted interim relief, on an urgent basis, by Bhoola J to the following effect:

‘2. A rule *nisi* is issued calling upon the respondents to show cause, on the 15th November 2012 at 10:00 or soon thereafter, why a final order should not be granted in the following terms:-

2.1 Reviewing and setting aside the certificate of outcome (LRA Form 7.12) issued by the second respondent under the auspices of the first respondent on 9 October 2012 under case number MP5994 – 12;

2.2 Declaring the strike which commenced at approximately 17h00 on 15 October 2012 to be unprotected and unlawful;

2.3 Interdicting and restraining the fourth to further respondents who are members of the third respondent from

2.3.1 Participating in the strike referred to in paragraph 2.2 above;

2.3.2 Engaging in various acts of misconduct and violence whilst participating in the said strike;

2.3.3 Preventing other employees of the Applicant from tendering their services in terms of their contracts of employment;

2.3.4 Intimidating, harassing or threatening the safety of and/or property of the Applicant or any other person in the Applicant’s employ or furthering the Applicant’s business who is not participating in the strike;

2.3.5 Victimising and/or inciting any non-striking employees to join the said strike and/or to engage in acts of misconduct and violence in furtherance of the strike;

2.3.6 Damaging and/or destroying any Company property, including setting fire to company and private vehicles;

2.3.7 Using insulting, inflammatory and defamatory language against members of the Applicant's management through phone calls, strike banners and placards;

2.3.8 Carrying dangerous weapons to intimidate and/or threaten and/or incite any non-striking employees and members of the Applicant whilst protesting;

2.3.9 Being within a 5km radius or distance suitable determined by the Honourable Court of the Vlakfontein site of the Applicant and/or not being allowed, within the context of this prayer, within any gate or access route of the Applicant;

2.3.10 Obstructing vehicles and persons from entering and leaving the Applicant's Vlakfontein premises;'

[3] On the return day, the matter was argued before Lagrange J, who made the following order:

'[31] In the circumstances, I find that:

31.1 Neither the provisions of the National Negotiating Forum for the Civil Engineering Industry, Substantive Collective Agreement of 30 July 2012, nor the Sectorial Determination 2: Civil Engineering Sector, South Africa, prohibit the third and further respondents from embarking on protected strike action, provided the provisions of s 64 of the LRA have been complied with.

31.2 The settlement agreement concluded between the applicant and the third respondent on 3 July 2013 was concluded on the basis of a common mistake between the parties on the effect of the Sectorial Determination and in consequence is invalid and unenforceable.

31.3 The dispute over the refusal to negotiate should have been referred to advisory arbitration under section 64(2) of the LRA as it concerns a dispute over appropriate bargaining levels and, or alternatively, bargaining units.

31.4 The strike which commenced on 15 October 2012 was unprotected because the provisions of section 64(2) of the LRA had not been complied with.

[32] Accordingly, the third and further respondents are interdicted from participating in a strike either in respect of the dispute referred to the CCMA under case number MP4283-12 on 11 June 2012, or in respect of the dispute referred to the CCMA on 21 August 2012 under case number MP3994-12, until and unless the provisions of section 64(2) of the LRA have been complied with.

[33] The applicant must pay half the respondent's costs.'

- [4] The appeal is only against paragraphs 31.1, 31.2 and 33 of the above order.
- [5] The appellant conducts the business of open cast mining in Vlakfontein, Mpumalanga. It is a member of the South African Federation of Civil Engineering Contractors (SAFCEC), which is an employers' organisation. SAFCEC on the one hand and the Building, Construction and Allied Workers Union (BCAWU) and the National Union of Mineworkers (NUM) on the other hand entered into a collective agreement in respect of conditions of service and wages. The agreement was renegotiated on an annual basis at the National Negotiating Forum for the Civil Engineering Industry (NNF). The third respondent (Association of Mineworkers and Construction Union (AMCU)) is not a party to the collective agreement. It however has members who are employed by the appellant.
- [6] On 12 March 2012, AMCU addressed a letter to the appellant wherein it set out its wage proposals for 2012/2013. On 20 April 2012, AMCU again submitted a proposal to the appellant to negotiate wages and service conditions with it.
- [7] By letter dated 26 April 2012, the appellant responded that it was unable to consider any of AMCU's proposals because:

'Concor Mining is an opencast contracting concern and forms part of the civil engineering construction sector and as bulk earthmovers we resort under the wage determination for Civil Engineering and Construction Industry. An agreement is in place for the said industry and is negotiated regularly on a national basis to cover wage increases and changes in conditions of employment. The current Agreement in the industry runs until 31 August 2012 and the process of negotiating the new agreement has commenced recently with the major unions and the civil engineering industry, of which Concor Opencast Mining, by definition, forms part of.'

- [8] AMCU was not satisfied with the response and indicated, by letter dated 7 June 2012, that the agreement does not cover a substantial number of its demands and hence its insistence to negotiate with the appellant on those issues.
- [9] On 11 June 2012, AMCU referred a mutual interest dispute under case number MP4283/12 to the Commission of Conciliation Mediation and Arbitration (CCMA). The matter was set down for conciliation on 3 July 2012. At the conciliation proceedings, AMCU, represented by Mr Mahlomuza, withdrew the dispute. The withdrawal was recorded on a pro forma settlement document used by the CCMA and reads as follows:
- 'The applicant voluntarily withdraws the referral and abandons the dispute against the respondent in settlement of his/her case at the CCMA with the full knowledge that he/she will not be able to proceed with this dispute at a later stage.'
- [10] Despite the withdrawal, AMCU persisted with its attempts to negotiate with the appellant. By letter dated 27 July 2012, AMCU reiterated its stance that the collective agreement does not cover all its demands and it proposed dates on which the negotiations, pertaining to its demands, should take place.
- [11] On 14 August 2012, the appellant reiterated its view that it was bound by the Sectorial Determination and could therefore not negotiate with AMCU.
- [12] On 21 August 2012, AMCU referred the same mutual interest dispute to the CCMA. The matter was set down for conciliation on 11 September 2012.

During the conciliation proceedings, Mr Swart, the Human Resources Director of the appellant, explained to Mr Nxumalo, AMCU's official, that the appellant is prepared to negotiate with AMCU on issues that were not negotiated between SAFCEC and the representative unions on a national level. The parties agreed that Nxumalo would submit a revised list of demands with proposed dates for negotiations. The parties agreed that the period of conciliation should be extended for 14 days in order to give them an opportunity to resolve the dispute amicably.

- [13] The parties met on 3 October 2012 but deadlocked because the appellant only wanted to negotiate on issues falling outside the ambit of the Sectorial Determination and agreements reached at NNF level. AMCU on the other hand indicated that the appellant's business fell within the mining sector and not the civil engineering sector.
- [14] The conciliation proceedings were held on 9 October 2012. The dispute remained unresolved and the commissioner issued a certificate to that effect. The appellant contended that the certificate was erroneously issued because the matter was supposed to be referred to advisory arbitration as it was a dispute concerning a refusal to bargain.
- [15] On 9 October 2012, AMCU issued a purported strike notice to the effect that its members will commence with the purported strike as of 12 October 2012 at 06H00.
- [16] The purported strike did not commence on 12 October 2012. The parties met under the auspices of the CCMA on 15 October 2012. The appellant argued that the CCMA does not have jurisdiction because the Bargaining Council for the Civil engineering Industry has jurisdiction over the matter. According to the appellant, the parties agreed on 15 October 2012 that the CCMA would render a jurisdiction and refusal to bargain ruling on 18 or 19 October 2012 and that AMCU would not call upon its members to embark on any action pending the ruling. The CCMA issued its ruling on 16 October 2012 to the effect that it had jurisdiction to entertain the matter and it further directed the

parties to reconvene on 17 October 2012 in order to attempt to resolve the dispute.

- [17] AMCU members commenced with the purported strike on 16 October 2012, which resulted in the appellant approaching the Labour Court on an urgent basis for the declaratory and interdictory relief.
- [18] The court *a quo* comprehensively examined the mechanisms in the Labour Relations Act 66 of 1995 ("The LRA") by which agreements may be imposed on non-party unions. He concluded that none of them are applicable in this matter.¹ It further found that the Minister of Labour promulgated the substantive agreement as a determination within the perimeters of the Basic Conditions of Employment Act 75 of 1997 (BCEA), as such those determinations establish the minima below which employer and employee parties cannot contract.
- [19] The court *a quo* also found that the settlement agreement was founded upon a common mistake and AMCU could therefore disregard it.
- [20] Mr Pretorius, on behalf of the appellant, argued that the collective agreement as set out in the sectoral determination is binding on AMCU in terms of section 23(1)(d) of the LRA alternatively that there is a longstanding practice in the sector of extending collective agreements by way of sectoral determinations. He submitted that it would be in the interest of orderly collective bargaining at sectoral level if such agreements should be made binding on non-parties provided that it makes it clear that it does so and that the unions who are party to the agreement are the majority at the workplace. He further argued that there was no common mistake because that was not the union's case. In respect of the costs, he argued that there was no rational reason to order the appellant to pay half of AMCU's costs. According to him, the worst case scenario for the appellant should have been no order as to costs.

¹ La Grange J discussed sections 23, 32 and 43 and 44 of the LRA. It is not necessary to reproduce or discuss any of those sections in this judgment because the appellant relies on section 23(1)(d) only in this appeal. That section will be discussed later in this judgment.

[21] Mr Cassim, on behalf of the third and fourth to further respondents, argued that section 23(1)(d) of the LRA is of no assistance to the appellant. He supported the court *a quo*'s finding in this regard. He submitted that reliance on the "settlement agreement" and the principle of *res judicata* is misplaced because it was signed based on a common mistake. He submitted that the appellant was successful on a narrow ground and was unsuccessful on two separate and distinct grounds on which it sought relief. He pointed out that the appellant did not make out a case for the interdictory relief that it sought in paragraphs 2.3.1 to 2.3.10 of the notice of motion.

[22] The right to strike and the right to engage in collective bargaining are constitutionally entrenched rights.² Collective bargaining implies a right on the part of those who engage in it to exercise economic power against their adversaries.³ The right to strike and the right to engage in collective bargaining are interrelated. In *SATAWU v Moloto* the importance of the right to strike is set out as follows:

'The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading explicit limitations into them, and when legislative provisions limit or intrude upon those rights restrictive of the right if the text is reasonably capable of hearing that meaning.⁴ [footnotes omitted]

[23] The LRA contains substantive and procedural limitations on the right to strike. This Court has made plain that:

'There is no justification for importing into the LRA, without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express.'⁵

² See Sections 23(2)(c) and 23(5) of the Constitution of the Republic of South Africa, 1996.

³ See *In re: Certification of the Constitution of the Republic of South Africa* 1996 (3) SA 744 (CC) at para [64].

⁴ *SATAWU and Others v Moloto* 2012 (6) SA 249 (CC) at para 43.

⁵ *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC) at para [28].

It is through this prism that the appellant's attempt to limit the third, fourth and further respondents' right to strike should be viewed.

[24] SAFCEC, BCAWU and NUM entered into a substantive collective agreement on 30 July 2012. The previous collective agreements were promulgated by the Minister of Labour in terms of section 56 (1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) as Sectoral Determination 2: Civil Engineering Sector, South Africa (the Sectoral Determination). The sectoral determination applies to every employer and employee in the Civil Engineering Sector, excluding any employee who is employed as a manager or in a position more senior than that of a manager.

[25] Section 23(1)(d) of the LRA on which the appellant relies reads as follows:

'A collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if

- (i) the employees are identified in the agreement;
- (ii) the agreement expressly binds the employees and
- (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

[26] It is clear that all three conditions in section 23(1)(d) must be fulfilled before the agreement can be binding on employees who are not a party to the agreement. This is so because the word "and" is used at the end of the second condition.

[27] Members of AMCU are not identified in the agreement. The agreement does not state that it binds employees who are not members of the trade unions that are signatories to the agreement. The reliance on section 23(1)(d) is therefore misplaced.

[28] Mr Pretorius submitted that a practice has developed in the civil engineering sector that the collective agreement negotiated at national level is extended to all employers and employees in the sector by the promulgation of a sectoral determination. The agreement is therefore an amendment to the sectoral

determination. Sectoral Determination 2, so the argument went, is therefore the collective agreement. Sectoral Determination 2 identifies all the employees, expressly binds them and the majority of the employees at the appellant are members of NUM.

[29] In my judgment, this argument is without force. A sectoral determination is not a collective agreement. Collective agreements and sectoral determinations are separate legal instruments governed by two different Acts (the LRA and the BCEA) and they have different purposes.

[30] A collective agreement is a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and on the other hand, one or more employers or one or more registered employer's organisations or one or more employers and one or more registered employers' organisations.⁶

[31] A sectorial determination is not an agreement between a trade union/s and employer/s or employer organisations. It is a determination that is done by the Minister of Labour in terms of Chapter eight of the BCEA. Before making a sectoral determination for employees in an area or sector the Minister must direct the Director-General: Labour to investigate conditions of employment in the sector and area concerned.⁷ The Director-General: Labour may question any person who may be able to give relevant information or may require, in writing, that any person with relevant documents to produce same.⁸ The Director-General must compile a report after the investigation and submit a copy thereof to the Employment Conditions Commission. The commission must then prepare a report containing recommendations on the matters which should be included in a sectoral determination for the sector and area.⁹ The Minister then makes a sectoral determination after considering the Commissioner's report.¹⁰ The sectoral determination may in respect of the sector and area concerned set minimum terms and conditions of employment.

⁶ See section 213 of the LRA.

⁷ Section 52 of the BCEA.

⁸ Section 53 of the BCEA.

⁹ See Section 55 of the BCEA.

¹⁰ See Section 54 of the BCEA.

[32] It is clear that a sectoral determination is not a collective agreement. The LRA and the BCEA do not provide for the extension of a collective agreement to non-parties by way of promulgation of a sectoral determination in terms of the BCEA. The application of Sectoral Determination 2 to all employees and employers in the civil engineering sector is only a determination of minimum wages and conditions of service in the civil engineering sector. This does not preclude employees from bargaining for wages and conditions of service that are higher than those stipulated in the sectoral determination. This is so because:

‘Wage determinations and sectoral determinations usually regulate only minimum terms and conditions of employment and sectoral determinations, by their very nature, are concerned with basic conditions of employment, this would mean that employees can still embark on strike action in support of actual or better terms and conditions of employment.’¹¹ I agree.

[33] There was no legal impediment against AMCU bargaining at plant level. It therefore had the right to use its strike weapon when faced with a refusal to bargain. Because the dispute concerned a refusal to bargain, AMCU had to have an advisory award in terms of section 135(3)(c) before it issued its strike notice.¹²

[34] Mr Pretorius submitted that having regard to the purpose of the LRA, the long standing practice in the civil engineering and bargaining at sectoral level there is no legal impediment to the collective agreement binding non-parties provided it makes it clear that it does so and that the unions who are party thereto are the majority in the workplace. In my view the court *a quo* addressed this issue correctly and trenchantly when it said:

‘I am of the view that Concor is asking the court simply on the basis of general provisions of the LRA which reflect a policy bias in favour of sectoral

¹¹ See Basson *et al* Essential Labour Law 4th Edition at page 295 para 17.5.6.

¹² See section 64(2) of the LRA which read “If 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). A refusal to bargain includes a refusal to recognise a trade union as a collective bargain agent. In terms of section 135(3)(c) the commissioner must determine a process to attempt to resolve the dispute which may include making a recommendation to the parties, which may be in the form of an advisory arbitration award.

bargaining, to impose a restriction on collective bargaining and the right to strike which is not provided for in the LRA, and any attempt to read this into the LRA would fall foul of the principle mentioned in *Plascon Decorative*.’

- [35] The appellant argued that the “settlement agreement” was not concluded on the basis of a common mistake. This was said because AMCU raised the following defences in relation to the “settlement agreement”. Firstly it contended that Mahlomuza signed a withdrawal of dispute and not a settlement agreement and secondly that the said Mahlomuza had no authority to enter into a settlement agreement. The appellant submitted that if Mahlomuza never intended to sign a settlement agreement, there could never have been a common mistake.
- [36] That was only part of AMCU’s case. It stated other reasons for the withdrawal in its answering affidavit. Firstly it stated that the appellant created the impression by way of its letter dated 26 April 2012 that any referral of a dispute to the CCMA would make no sense because of the sectoral bargaining. Secondly that Mahlomuza appended his signature to the document because the parties agreed that AMCU would meet with SAFCEC in order to discuss and explore the appellant’s contentions regarding the sectoral determination. AMCU also stated that the appellant laboured under the wrong legal impression and conveyed its views to AMCU and it was never within the contemplation of the parties that AMCU would not be entitled to refer a fresh referral to the CCMA.
- [37] The appellant denied the foregoing and contented that the terms of the “settlement agreement” are clear and unambiguous that the dispute was settled and that AMCU could not refer it again.
- [38] Whether one calls the document a “settlement agreement” or a withdrawal is of no moment. The veritable question is whether both parties laboured under a common mistake about the sectoral determination and its effect on AMCU’s demands.
- [39] It is undisputed that the appellant and its attorneys were of the view that any industrial action would be unprotected because of the collective agreement

that was part of the sectoral determination. The appellant informed AMCU that the sectoral determination constituted a binding collective agreement. AMCU was convinced, before the signing of the “settlement agreement” that they may not negotiate with the appellant on matters covered in the Sectoral Determination 2. They wanted to negotiate on demands not covered by the sectoral determination.

[40] I am in agreement with the court *a quo* that the inescapable conclusion is that AMCU and the appellant laboured under the wrong impression that the sectoral determination prevented the parties from negotiating at plant level on issues governed by the sectoral determination when it signed the document. In *Dickenson Motors (Pty) Ltd v Oberholzer* it was said that:

‘An agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation can be set aside, formally if necessary or treated as set aside and as invalid without any process or proceedings to do so.’¹³

I agree with the court *a quo* that Mahlomuza would not have withdrawn the dispute had he known that the sectoral determination was no bar against negotiating with the appellant at plant level. I might as well add that the appellant would not have taken the stance that it took had it known what the correct legal position was.

[41] In my view, it would be totally unfair to hold AMCU to an “agreement” that was clearly entered into based on a common mistake and thereby denying it and its members their constitutional right to strike. The court *a quo* was correct in disregarding the “settlement agreement”.

[42] The court *a quo* said the following with regard to costs:

‘On the matter of costs, the applicant has only succeeded on one of its grounds and accordingly I think it is only just and equitable for it to pay some of the respondent’s costs.’

¹³ 1952 (1) SA 443 (AD) at 450C-E.

- [43] A costs order is pre-eminently a decision that is in the discretion of the court *a quo*. This Court will not easily interfere with such discretion.¹⁴ It is clear that the court *a quo* considered that the appellant was successful on only one of its grounds and conversely that the third and fourth and further respondents were substantially successful in defending the matter. The appellant did not make out a case for the relief sought in prayers 2.3.2 to 2.3.10 of notice of motion.
- [44] In my judgment the court *a quo* exercised its discretion judicially and upon considering the correct principles. It considered the requirements of the law and equity. There is no reason to interfere with the costs order.
- [45] The costs of this appeal should be borne by the appellant. Such costs should include the costs occasioned by the employ of two counsel. This matter was complex and the appellant also employed senior counsel.
- [46] The court *a quo* did not expressly discharge the rule *nisi*, although the implication of its order has that effect. Part of the rule *nisi* should be discharged and only paragraphs 2.2 and 2.3.1 thereof should be confirmed. The court *a quo*'s order should be amended for the sake of clarity.
- [47] I accordingly make the following order:
- 47.1 The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.
- 47.2 The order of the court *a quo* is amended by inserting the following sentence at the end of paragraph 32 of its judgment "Therefore only paragraphs 2.2 and 2.3.1 of the rule *nisi* are confirmed, the rest of the paragraphs are discharged."

C. J. Musi AJA

I agree.

¹⁴ *Caxton and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A).

Waglay JP

I agree.

Mokgoatheng, AJA

APPEARANCES:

FOR THE APPELLANT:

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FOR THE THIRD, FOURTH AND

FURTHER RESPONDENTS:

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