REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 2773/12

In the matter between:

CONCOR PROJECTS (PTY) LTD T/A CONCOR OPENCAST MINING	**Applicant**
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER C MOKABANE (*N.O.*)	**Second Respondent**
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION ("AMCU')	**Third Respondent**
N TITANA AND FURTHER RESPONDENTS (AS PER ANNEXURE "A" TO THE FOUNDING AFFIDAVIT	**Fourth to further respondents**

Heard: **24 January 2012**

Delivered: **05 February 2012**

Summary: (Strike interdict – final – refusal to bargain – settlement agreement void in view of common mistake between parties - sectoral determination does

not bar strike action – union not a party to collective agreement on substantive conditions – no bargaining council established at time of dispute – s 64(2) not complied – strike unprotected until then).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Concor projects (Pty) Ltd, brought an application to interdict a strike due to commence on 18 October 2012, which the third respondent union, the Association of Mineworkers and Construction Union ('AMCU') and its members, who constitute a majority of the applicants employees at its Vlakfontein opencast mining site, were embarking on.

[2] An interim interdict was granted on 17 October 2012 which was extended again by agreement on 15 November 2012 to 24 January 2013. On the return day, the applicant sought the confirmation of the rule which had been issued previously.

Material facts

[3] Briefly, in March 2012 AMCU submitted wage demands for the 2012/2013. The company response on 26 April 2012 was that the proposals could not be entertained 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 the 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 in the process of negotiating new agreement has commenced recently with the major unions in the civil engineering industry, of which Concor Opencast Mining, by definition forms part of."

[4] The Company however undertook to forward AMCU's proposals to the employers' organisation for the sector, the South African Federation of Civil Engineering Contractors ('SAFCEC'). The Sectoral determination in question, entitled Sectoral Determination 2: Civil Engineering Sector, South Africa, was promulgated by the Minister of Labour in terms of section 56 (1) of the basic conditions of employment act, 75 of 1997. The determination consists of 29 detailed provisions governing minimum wages and other conditions of employment. The terms of the sectoral determination did not emanate from the Department of Labour, but from the substantive agreement negotiated by the parties to the National Negotiating Forum for the Civil Engineering Industry ('the NNF'), which the Minister then promulgated as a sectoral determination.

[5] The agreement which the applicant was referring to was a substantive collective agreement ('the NNF agreement') concluded between SAFCEC, Building Construction and Allied Workers Union ('BCAWU') and the National Union of Mineworkers ('NUM'), under the auspices of the NNF. The third respondent was not a party to the substantive agreement. The substantive agreement set out agreement on certain issues such as minimum wage rates, provident fund contributions, leave provisions and the National Skills Accord. It was concluded on 30 July 2012 and is due to continue for at least a year, or until amended once the year has expired.

[6] AMCU's initial response to its rebuff by Concor, was to state that a number of its demands did not appear to be "covered by SEFCAC", and proposed negotiations with Concor should commence. On 11 June 2012 under case number MP 4 to 83/12 AMCU referred a "mutual interest" dispute to the CCMA. The matter was set down for conciliation on 3 July 2012 and at the conciliation the settlement agreement was concluded although the settlement agreement does not mention the names of the parties or the

CCMA case number neither party disputes the conclusion of the document. The agreement was recorded and the pro forma settlement agreement document used by the CCMA. The substance of the agreement set out in paragraph 5 of the form under the heading "withdrawal of dispute" stated:

> *"The applicant voluntarily withdraws the referral and abandons the dispute against the respondent in settlement of his/hers case at the CCMA with the full knowledge that he/she will not be able to proceed with this dispute at a later stage."*

[7] Concor regarded this as the end of the matter, but on 27 July 2012 AMCU addressed another letter to Concor headed "Wages Negotiations". The letter proposed dates for wage negotiations prefaced by the following introduction:

> *"Subsequent to our demands sent to the company and the meeting held at SAFCEC offices and crew would like to maintain its position of representing its members on all issues including those of mutual interest. We therefore like to inform the company that SAFCEC does not cater for our members in terms of wages negotiations as neither the represent the mining sector nor the interests of our members at Concor Mining in Vlakfontein where we ensure a the majority of membership. "*

[8] Concor's response was to repeat its view that it resorted under the sectoral determination and that substantive negotiations are dealt with on a national basis. It asked AMCU to advise the basis of its request. This led to the second dispute referral dated 21 August 2012 in which it described the dispute as: "Company is refusing to bargain for wage its negotiation period 2012/2013". The date of the dispute was identified as 27 July 2012 which was the date it resubmitted its previous demands. The applicant's human resource director Mr J Swart stated in the founding affidavit that, at the conciliation on 11 September 2012, he explained to the union official Mr V Nxumalo:

> *"45.1 That since the applicant is essentially a bulk earthmoving business, the applicant is bound by sexual determination to;*

45.2 That the applicant was willing to negotiate with AMCU in respect of issues that did not form part of sectoral determination to; and

45.3 That AMCU would revise their list of demands in accordance with the sectoral determination."

[9] The Conciliation was extended and correspondence was also exchanged in which AMCU recorded its view that there was no law compelling AMCU to accept what Concor and the other unions had negotiated through SAFCEC, which was not a Bargaining Council. Concor conceded this but insisted that it was bound by the substantive agreement, and would only negotiate on issues not set out in that document. By 3 October 2012 the parties were deadlocked and AMCU had indicated its intention to ask the commission to issue a certificate of outcome. Concor pointed out that since the dispute concerned a refusal to bargain, the matter should be referred to advisory arbitration if AMCU did not withdraw the dispute.

[10] On 9 October 2012 a certificate of outcome was issued and on the same day AMCU issued notice of its intention to embark on strike action. Despite the certificate of outcome been issued a further meeting was convened under the auspices of the CCMA. According to the company it was agreed that the union would not take any steps to embark on strike action until the Commissioner had issued a ruling on a jurisdictional question and the refusal to bargain. A ruling was issued on 16 October 2012 in terms of which the arbitrator found that the CCMA did have jurisdiction to entertain the dispute and directed the parties to reconvene at the CCMA on the 17th October. The arbitrator's ruling did not deal with the dispute over the refusal to bargain, but only addressed the question of whether or not the CCMA or a bargaining Council had jurisdiction over the dispute. Concor had contended that a bargaining Council for the sector had jurisdiction, but the arbitrator correctly found that it was merely in the process of being established and therefore the CCMA had jurisdiction over the dispute.

[11] By the time the return day arrived the Bargaining Council for the Civil Engineering Industry (‘the BCCEI’) had been registered on 7 December

2012. This was set out in a supplementary affidavit filed by the applicant. The applicant also referred in the supplementary affidavits to a memorandum of understanding entered into in September 2010 by the same parties to the substantive agreement. In terms of clause 4.2 of that memorandum, issues tabled for collective bargaining which were not reflected in the sectoral determination or on which no agreement had been reached would be transferred for negotiation at the level of the bargaining Council (at that stage yet to be established).

<u>The parties' submissions</u>

Concor's case

[12] When Concor applied for interim relief it did so on the basis that the strike should be interdicted pending the outcome of a review of the second certificate of outcome issued by the second respondent on 9 October 2012. The grounds of review relied upon may be summarised as follows:

12.1 Concor and its employees were bound by the sectoral determination and the Commissioner should have ruled that it was not required or permitted to bargain with AMCU because the sector made use of centralised bargaining. Concor submits that because it is bound by a bargaining arrangement at sectoral level, it cannot be compelled to bargain on a second level with AMCU. It points out that section 1 (d) (ii) of the LRA identifies one of the purposes of the LRA to be the promotion of collective bargaining at sectoral level. If it succumbed to AMCU's demands that would undermine this purpose of the act and would be destructive of industrial peace which it identifies as the very purpose of collective bargaining. It identified AMCU's approach as reckless and opportunistic.

12.2 Secondly, Concor argued that the Commissioner should have investigated whether he had jurisdiction in view of the previous settlement agreement, as the dispute before him was essentially the same dispute which had been settled on 3 July 2012.

AMCU's case

[13] AMCU argued that it was not prevented from calling a strike under section 65 (3) (a) read with section 23 (1)(a) and (d) of the Labour Relations Act 66 of 1995 ('the LRA'). It was not a party to the substantive agreement and its members were not identified nor expressly bound by the agreement, which are the only grounds on which AMCU and, or alternatively, its members could be bound under the act.

[14] AMCU further pointed out that there was no statutory mechanism for extending the substantive agreement to non-parties in the absence of a bargaining or statutory Council in the sector.

[15] On the question of the settlement agreement, it contended that either the settlement agreement had merely constituted a withdrawal of the dispute referral and that is what the organiser who signed the agreement thought he was confirming or, alternatively, he had no authority to enter into the settlement agreement, or because he accepted the representations made by Concor in its letter of 26 April 2012 that referring the dispute to the CCMA would serve no purpose because of the sectoral determination, and because the parties had agreed that the union would meet with SAFCEC to explore Concor's contentions about the sectoral determination.

[16] Concor did not deny that it had made the representations mentioned. Even though Concor disputed AMCU's claim that the organiser lacked authority, it did concur that he had signed the document because the parties had agreed to meet for the reason stated by AMCU. Concor reaffirmed that Concor's position "...was clear at the time of the conclusion of the settlement agreement, namely that AMCU and the applicant was (*sic*) bound by the provisions of the collective agreement and the sectoral determination."

Evaluation

The binding nature of the sectoral determination and substantive agreement

[17] The LRA provides three mechanisms by which agreements may be imposed on non-party employees and, or alternatively, non-party unions.

[18] The first mechanism is set out in section 23 which describes the legal effect of collective agreements. Broadly speaking, in terms of section 23 (1)(a),(b) and (c), parties to a collective agreement including employer organisations and trade unions are bound by virtue of being parties to the agreement either in so far as the provisions apply to them or in so far as the agreement regulates the terms and conditions of employment or the conduct of employers towards their employees or vice versa. Further, in terms of section 23(1)(d), employees who are not members of registered unions which are party to the agreement can still be bound provided they are identified in the agreement, it expressly binds them and the registered trade unions in question enjoy a majority membership of the employer's workforce in the workplace. The substantive agreement makes no mention of non-members of the union parties to that agreement nor is there any provision in that document which can be interpreted to expressly bind them. AMCU was also not a party to the agreement. Consequently none of the provisions of section 23 can be relied on to establish that AMCU or its members employed by Concor are bound by the substantive agreement.

[19] The second mechanism is provided by section 32 of the act which permits a bargaining Council to request the Minister of Labour to extend its collective agreement to non-parties falling within the registered scope of the Council if, within the extended scope of the agreement, the majority of employees are employed by members of employer organisations which are party to the council, and the majority of employees are members of union parties to the council. Even though a Bargaining Council was established after the parties could not resolve this dispute, no agreement of the Council has been extended yet. Accordingly, the provisions of section 32 are inapplicable to the facts of this matter.

[20] The third mechanism is provided by sections 43 and 44 of the LRA. Section 43 (3) provides for the extension of a collective agreement concluded in a statutory Council on the same basis as section 32. Section 44 (1) allows a collective agreement concluded in a statutory Council to be treated as if it were a recommendation made by the Employment Conditions Commission under section 54 (4) of the BCEA. The Minister may then promulgate the agreement as a determination under the BCEA subject to certain conditions. It must be emphasised however that in terms of section 43 (1), the subject matter of such agreements does not include agreements on general terms and conditions of employment but only a limited range of subject matter relating to dispute resolution functions, training and education schemes and the establishment of various benefits schemes. Turning to the facts of this case, there was no statutory Council in existence before the establishment of the Bargaining Council, so this provision can have no application. In any event, the terms of the substantive agreement would appear to fall outside the subject matter of agreements which can be extended in terms of either section 43 (3) or 44 (1).

[21] In this instance, when the minister promulgated the substantive agreement as a determination, he did so within the parameters of the BCEA and not the LRA. Section 55 (4) (a) and (b) of the BCEA read:

> *"(4) a sectoral determination may in respect of the sector and area concerned-*
>
> *(a) set minimum terms and conditions of employment, including minimum rates of remuneration;*
>
> *(b) provide for the adjustment of minimum rates of remuneration;..."*

[22] Section 51 (1) of the BCA provides that the Minister may "...make a sectoral determination establishing basic conditions of employment for employees in a sector and area." In interpreting s 51(1), It is important to bear in mind that a 'basic condition of employment' as defined in section 1 of the BCEA means "a provision of this act or sectoral determination <u>that stipulates a minimum term or condition</u> of employment" (emphasis added).

It is patently clear from the above that in so far as sectoral determinations are binding, they are binding in the sense that they establish minima below which employer and employee parties cannot contract.

[23] It was argued that because the approach of AMCU would be inimical to the promotion of sectoral bargaining, Concor was entitled to be protected from industrial action seeking to compel it to bargain at a lower level, and this would amount to an infringement of its rights to fair labour practices in terms of section 23(1) of the Constitution of the Republic of South Africa, 1996.

[24] Concor is undoubtedly in a difficult position, but if its sectoral bargaining position is complicated by AMCU's organisation of its Vlakplaas site, and if that undermines its aim of negotiating only at sectoral level, is that sufficient justification in law to impose a strike ban on AMCU and its members? If one has regard to the provisions in the LRA which permit the extension of agreements, it is clear that it does envisage situations in which parties to centralised bargaining at sectoral level can effectively prevent protected strike action, which is aimed at establishing plant or site level bargaining. But those situations are confined to the ones outlined above. The difficulty Concor has is that it is asking the court to recognise as inviolate a bargaining arrangement which does not fall under any of the provisions mentioned. It was made clear in the decision of the LAC in ***Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC)** that any attempt to infer implied restrictions on the right to strike indirectly is likely to fail:

> *"...[T]here 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."*[1]

[25] 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 facour of sectoral 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

[1] at 329, [28]

read this into the LRA would fall foul of the principle mentioned in *Plascon Decorative.*

The settlement agreement

[26] Before the conciliation meeting on 3 July 2012, Concor clearly articulated the view that the existence of the sectoral determination and the substantive agreement precluded it from negotiating with AMCU unless AMCU became a party to the sectoral bargaining arrangements. The organiser who signed the settlement agreement also signed it in the belief that the sectoral determination rendered the referral to the CCMA pointless. It is difficult to escape the conclusion that he and the applicant laboured under the same common mistake about the applicability of the sectoral determination and its effect on AMCU's dispute. In *Dickenson Motors (Pty) Ltd v Oberholzer 1952 (1) SA 443 (AD)*

> *"The £291 was paid under a common mistake in regard to a matter which was vital to the transaction and if either of them had been aware of the true position the transaction would not have gone through. In Huddersfield Banking Company Ltd. v. Henry Lister & Son Ltd., 1895 (2) Ch. 273, LINDLEY, L.J., states the proposition,*
>
> *"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."*[2]

[27] On the common cause facts, there can be little doubt on that if the AMCU organiser who signed the settlement agreement had been aware of the real significance of the sectoral determination, he would not have withdrawn the dispute, and that the withdrawal was prompted by the representations made by the applicant about the determination's effect on AMCU's attempt to bargain at a site level. Consequently, I think the respondents were entitled to disregard the settlement agreement.

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[2] At 450C-E

The effect of s 64(2) of the LRA

[28] When the second respondent handed down his jurisdictional ruling made by the second respondent, he should have issued an advisory award on Concor's refusal to negotiate with AMCU in terms of s 64(2). To date he has not done so and is still seized with the matter. Compliance with the subsection is a pre-requisite step that must be completed before either party can embark on protected industrial action. For this reason the strike embarked on by AMCU and its members is not protected until such time as the second respondent has discharged his function and issued the advisory award.

Constitutional claim

[29] This also indirectly raises the somewhat faintly argued point raised by Concor that its right to fair labour practices would be infringed if AMCU was permitted to strike to compel it to bargain at two levels. In formulating the LRA, the legislature deliberately avoided perpetuating an adjudicated remedy for bargaining rights disputes. Such a remedy had evolved, albeit precariously and with a great deal of unpredictability, under the pre-1996 unfair labour practice regime. To try and enforce an unfair labour practice claim on the basis that it is unfair to require Concor to negotiate other than at sectoral level, would require an attack on the constitutionality of the unfair labour practice provisions of the LRA itself, for failing to provide such a remedy. A constitutional challenge based on the assertion of a right to unfair labour practice, which is not provided for in s 186 of the LRA, would have to proceed by way of a challenge to the statute's supposed limitation of the right to fair labour practices.[3] Concor has not attacked the statute, which it ought to have done if it wished to seriously pursue its constitutional claim.

[3] See ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*** **2004 (4) SA 490 (CC)** at [22]-[26] and ***Zondi v MEC for Traditional and Local Government Affairs & Others*** **(2005) (3) SA 589 (CC)** at [99].

Costs

[30] 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 respondents' costs.

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 Sectoral 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 2012 was concluded on the basis of a common mistake between the parties on the effect of the Sectoral 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 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 respondents' costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: GC Pretorius, SC assisted by F Venter instructed by Cowan Harper Attorneys

THIRD AND FURTHER RESPONDENTS: N Cassim, SC assisted by S Collet instructed by Larry Dave Attorneys