**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: JR 663/2011

In the matter between:

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| **SOUTH AFRICAN POST OFFICE LIMITED** | Applicant |
| and | |
| **COMMISSIONER L NOWOSENETZ *N.O.*** | First Respondent |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | Second Respondent |
| **SOUTH AFRICAN POSTAL WORKERS UNION** | Third Respondent |
| **COMMUNICATION WORKERS UNION** | Fourth Respondent |

**Heard:** **28 June 2012**

**Delivered:** **17 October 2012**

**Summary: Review Application – material error of law – dispute between minority trade union and employer about applicable representivity threshold for organisational rights - what is the effect of novation on a representivity threshold agreed in a collective agreement**

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**JUDGMENT**

**MASHER, AJ**

**Introduction**

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act"), to review and set aside the award of the first respondent ("the commissioner")issued under case number GATW 7037-10 (HO1570/10) and dated 14 February 2011.The third respondent ("SAPWU") opposes the application.

**Background facts**

[2] This matter has a long and unfortunate history. I set out the facts relevant to this application below.

[3] Between 14 June 1996 and 19 January 2011, the applicant and the fourth respondent ("CWU") concluded four collective agreements in which the parties agreed to variousrepresentivity thresholdswhich were required in order for any registered trade union to be accorded the organisational rights referred to in sections 12, 13 and 15 of the Act.From the record of the arbitration proceedings and the papers filed in this application, SAPWUdoes not dispute that the applicant and CWU, as the majority trade union at the workplace, were entitled to agreeto these representivity thresholds.

[4] Two collective agreements are directly relevant for purposes of the issues in dispute in this application. They are the Procedural and Recognition Agreement concluded on 31 January 2008 ("the 2008 agreement") and the Procedural and Recognition Agreement concluded on 19 January 2011 ("the 2011 agreement").

[5] The 2008 agreement provides as follows in clause 3.2:

> 'The Union shall be recognised if it upholds the threshold of 30% + 1 of the employees in the bargaining unit who are members of the union.'

[6] In mid-2009, SAPWU approached the applicant and requested certain organisational rights. At the time, the applicant declined to grantthese organisational rights to SAPWU.

[7] SAPWU accordingly,referred an organisational rights dispute to the second respondent (the "CCMA") in late 2009.A settlement agreement was concluded to settle this dispute on the basis that 30% + 1 was the required threshold for the exercise of the organisational rights referred to in sections 12, 13 and 15 of the Act. At the time, it was agreed that SAPWU's membership exceeded this threshold.

[8] However, SAPWU was not granted the organisational rights referred to in sections 12, 13 and 15 of the Act. It appears that the reason for this was that notwithstanding the signature of the settlement agreement, the applicant formed the view that the representivity threshold for purposes of the organisational rights referred to in sections 12, 13 and 15 of the Act was in fact 40% + 1. The basis for this was an agency shop agreement that had previously been concluded between the applicant and CWU and which provided for this threshold.

[9] In May 2010, the applicant launched an application in the Labour Court to set aside the settlement agreement.

[10] InJune 2010,SAPWU referred a further dispute to the CCMA relating to the "interpretation/application" of the settlement agreement. CWU subsequently also referred a dispute to the CCMA.

[11] The two referrals to the CCMAwere consolidated and the parties to these disputes (the applicant; SAPWU and CWU) held a pre-arbitration conference in which it was agreed that the following issues were to be decided by the commissioner:

> '3.1 Whether the threshold for representativeness is 30% + 1 as per the Procedural and Recognition Agreement dated 31 January 2008, or 40% + 1 as per the Agency Shop and Threshold Agreement dated 1 November 2001.

3.2 Whether the same organizational rights enjoyed by the Second Respondent *(*CWU*)*can be enjoyed by the Applicant *(*SAPWU*)*as per the Procedural and Recognition Agreement dated 31 January 2008.

3.3 Whether the Procedural and Recognition Agreement (Amendment 1 of 2011) dated 19 January 2011 will supercede and amend all other previous threshold agreements.

3.4 Whether the Applicant *(*SAPWU*)*is entitled to exercise any organizational rights currently, in terms of the Procedural and Recognition Agreement (Amendment 1 of 2011) dated 19 January 2011.

3.5 Whether the Applicant *(*SAPWU*)*can retrospectively enjoy organizational rights from the date that the Applicant *(*SAPWU*)*attained the 30% + 1 threshold.

3.6 Whether the Second Respondent *(*CWU*)*is a majority union.'

[12] In terms of their pre-arbitration minute, the parties also agreed that:

'1.4 The First Respondent *(*South African Post Office Ltd*)* shall withdraw the entire Labour Court Application lodged under case number J1941/10 aimed at setting aside the settlement agreement concluded with the Applicant *(*SAPWU*)* on 6 May 2010.

1.5 The Applicant *(*SAPWU*)* and the First Respondent *(*South African Post Office Ltd*)* agreed to set aside the settlement agreement entered into on 6 May 2010.'

[13] On 19 January 2011, the applicant and CWU entered into the 2011 agreement, which dealt, *inter alia*, with the threshold for the exercise of the organisational rights referred to in sections 12, 13 and 15 of the Act, and set the threshold at 40%+1.

[14] The 2011 agreement provides as follows in clause 3.2.3:

'The Company and the Union, who represent a majority of the employees (50% + 1) in the bargaining unit, where this agreement will apply, hereby establish a threshold of representativeness of 40% + 1 ("Threshold") for the purpose of any union seeking to exercise one or more of the organisational rights referred to in section 12, 13 and 15 of the LRA.'

[15] The 2011 agreement also provides as follows in clause 14.2:

'This Agreement will also amend and supersede any threshold of representativeness that is contained in any other previous agreement.'

[16] After having considered the matter at the arbitration, the commissioner ordered as follows:

1 'The threshold of representativeness during 2009/2010 at all times material to when the Applicant *(*SAPWU*)* applied for organisational rights from the First Respondent *(*South African Post Office Ltd*)* in terms of section 21 of the LRA, was 30% + 1 as provided for in the recognition agreement between the First *(*South African Post Office Ltd*)* and Second Respondent (CWU) dated 31 January 2008;

2 The organisational rights which accrued to the Applicant *(*SAPWU*)* were in terms of section 12, 13 and 15 of the LRA;

3 The threshold in the 2011 agreement between the First *(*South African Post Office Ltd*)* and Second Respondent *(*CWU*)* supersedes all other previous threshold agreements but it does not operate retrospectively nor does it affect the attainment by the Applicant *(*SAPWU*)* of the threshold that was valid as at November 2009, which was 30 + 1;

4 The Applicant *(*SAPWU*)* can retrospectively enjoy organisational rights from the date that it attained a 30% + 1 threshold being 9 November 2010 or earlier if it is able to verify this with the First Respondent *(*South African Post Office Ltd*)*.'

**Grounds of review**

[17] The applicant contends that the commissioner's finding is unreasonable, unjustifiable and/or irrational, and that the commissioner failed to apply his mind to material issues, focused upon irrelevant considerations, ignored relevant considerations, committed errors of law, and exceeded his power in his final determination.

[18] In support of the above grounds, the applicant relies primarily on the following submissions:

18.1. At the time of the arbitration, the 2011 agreement had superseded all previous agreements by novation, and thus SAPWU's claim was academic, or alternatively, was novated.

18.2. Alternatively, organisational rights cannot practically be exercised retrospectively, rendering the award reviewable.

[19] The applicant also applied for condonation for the late filing of the record of the arbitration proceedings.

[20] During the hearing of this application, counsel for SAPWU conceded that the 2011 agreement is valid and that clause 14.2 of that agreement constitutes a novation of the representivity threshold contained in previous collective agreements between the applicant and CWU. SAPWU's primary submissions in opposing the review application are that notwithstanding the concessions made, the novation does not apply retrospectively, and the 30%+1 threshold contained in the 2008 agreement applies when determining SAPWU's right to organisational rights at November 2009. Counsel for SAPWU also argued that organisational rights, specifically in respect of the deduction of trade union subscriptions, can practically be implemented retrospectively because it only requires the quantification of an amount of money to be paid to SAPWU. Counsel for SAPWU accordingly argued that no valid ground of review exists, and that the review application should be dismissed.

[21] SAPWU did not oppose the condonation application in respect of the late filing of the arbitration record.

**Analysis**

[22] Having considered the submissions and arguments made by counsel for the applicant and SAPWU respectively, it is clear that the following questions are fundamental to determining this review application:

22.1. Whether clause 14.2 of the 2011 agreement, read with clause 3.2.3 of the 2011 agreement, constitutes a novation of the representivity threshold that existed immediately prior to the conclusion of the 2011 agreement;

22.2. If such a novation has occurred, then:

22.2.1. Whether the novation applies*vis-à-vis* third parties who are not party to the 2008 agreement or the 2011 agreement; and

22.2.2. What the effect of the novation is on the representivity threshold applicable at November 2009.

[23] The principles of novation are firmly established in our law.

[24] In ***Swadif (Pty) Ltd v Dyke N.O,***[1]**Trengove AJA** held as follows with regard to the existence and consequences of a novation:

> 'When parties novate they intend to replace a valid contract by another valid contract (Wessels, Law of Contract in SA, 2nd ed vol 2, paras 2370 – 2379; Caney, *op cit*., p 2, *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (AD) at p 337; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at p 307).'

[25] Furthermore, it is settled in our law that parties can, through a novation, vary one obligation in an "old contract" and replace it with another obligation, leaving the other terms intact. In ***Tauber v Von Abo*,**[2] **Van Rensburg J** described novation as follows:

> 'Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation.'

[26] In applying these principles to the present matter to determine whether a novation has occurred, it is necessary to consider the wording of the 2011 agreement. Clause 14.2 of the said agreement provides that the 2011 agreement 'will also amend and supersede any threshold of representativeness that is contained in any other previous agreement'.In my view, the wording of the 2011 agreement clearly

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[1]1978 (1) SA 928 (AD) at 940G-H.
[2] 1984 (4) SA 482 (E) at 485C.

discloses an intention to replace any existing representivity threshold with a new one. Accordingly, any representivity threshold in existence at the time the 2011 agreement was concluded was novatedby the provisions of the 2011 agreement.

[27] The next question that arises, pertains to whether the novation of obligations between two contracting parties, can have an impact on the rights of a third party to whom a contractual provision has had application. In particular, where a collective agreement between two contracting parties sets a representivity threshold that applies in respect of third parties and a novation occurs which varies that threshold, it is necessary to determine whether the obligations in relation to those third parties would be impacted by the novation; or whether novation only has application to pre-existing obligations between the contracting parties themselves.

[28] It is settled in our law that a novation abolishes not only the obligations between the contracting parties, but all obligations arising from a novated contract, including obligations that apply to parties other than the contracting parties. In this regard, in**Caney,**[3]the learned author stated the following:

> 'The general effect of novation is to extinguish the debt asked by payment. This is so even if the debt be founded on a judicial decision. All privileges and accessories vanish with it.
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> Hence:
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> (i) if one of several debtors in solidum contracts a novation, his co-debtors are released with him from the old debt;
>
> (ii) if one of several creditors in solidum contracts a novation, he releases the debtor from liability to the other creditor or creditors in solidum;
>
> (iii) obligations accessory to the debt, for example, suretyships are extinguished with it (the accessory cannot exist without the principal);
>
> (iv) securities, hypothecs and pledges are released; but not so if they are renewed, and then preference dates from the time it was originally

[3]The Law of Novation at 33.

constituted in so far as it relates to the original amount, but no more, of the obligation. If an intervening security has been cancelled, but the cancellation is held null and void, it is restored to its former ranking and if a bond ranking before it has been in the meantime novated, it loses its priority;

(v) interest ceases to run;

(vi) stipulations for penalties fall away;

(vii) default is purged: eg if the debtor be in default with delivery, so that the risk of injury is now on him, and the debt be then novated by a fresh stipulation for delivery, the risk is transferred again as though he were not in default.

Novation bars relief by way of condictio indebiti in respect of the novated obligation.'

[29] In**Du Bois *et al***,[4] the learned authors state the following:

'The effect of a novation is to discharge not only the original obligation, but also all accessories to it, such as interest, penal charges, suretyships and pledges, unless these are actually renewed.'

[30] On the basis of these principles the effect of the novation in the present matterwas to novate the previousrepresentivity threshold and replace it with a new threshold.

[31] It follows that:

31.1. The effect of the novation of the previous representivity threshold is that, at the time when this matter was before the commissioner, the threshold applicable to the dispute before the commissioner was the one contained in the 2011 agreement. The commissioner was required to apply this threshold in making his award; and

31.2. The representivity threshold at the date that the commissioner made his awardwas 40% + 1.

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[4] Wille's Principles of South African Law, 9th Ed at 839,

[32] In failing to find that the novation had the effect of replacing therepresentivity threshold that was applicable immediately prior to the conclusion of the 2011 agreement with the threshold contained in the 2011 agreement,and then applying the threshold in the 2008 agreement, the commissioner committed a material error of law.

[33] In the circumstances, the arbitration award falls to be reviewed and set aside.

[34] In light of my finding in relation to the applicant's first ground of review, it is unnecessary for me to deal with the applicant's second and alternative ground of review.

[35] I have also considered the applicant's application for condonation of the late filing of the record of the arbitration proceedings. I am satisfied that the applicant has proper reasons for the late filing of the record of the arbitration proceedings, and in the circumstances, that the condonation application should be granted.

**<u>Order</u>**

[36] I, therefore, make the following order:

36.1. The application for the condonation of the late filing of the record of the arbitration proceedings is granted.

36.2. The arbitration award of the first respondent under case number GATW 7037-10 (HO1570/10) dated 14 February 2011 is reviewed and set aside.

36.3. The order in the arbitration award is replaced with an order in the following terms:

36.3.1. The provisions of the 2011 agreement novated therepresentivity threshold contained in any collective agreements concluded between the South African Post Office Limited and the Communication Workers Union prior to the conclusion of the 2011 agreement;and

36.3.2. The 40% + 1 representivity threshold contained in the 2011 agreement, applies to SAPWU's request for the organisational rights referred to in sections 12, 13 and 15 of the Labour Relations Act 1995.

36.4. No order is made in respect of costs.

Masher AJ

Acting Judge of the Labour Court



**Appearances:**

For the Applicant: Advocate F Boda

Instructed by: Routledge Modise Inc. practising as Eversheds

For the Third Respondent: Advocate D Brown

Instructed by: Medupi Lehong Incorporated