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

Not Reportable

Case no: J 764/15

In the matter between:

**ASSMANG (PTY) LTD** **Appellant**

and

**THE CHIEF INSPECTOR OF MINES** **Respondent**

**Heard**: **18 February 2019**

**Delivered**: **22 February 2019**

**Summary: A statutory appeal – interpretation of the section giving the right to appeal. Where a Chief Inspector entertains an appeal and emerges with an outcome – such amounts to a decision within the contemplation of section 58 of the Mine Health and Safety Act (MHSA). Such a decision is appealable in terms of the section. Held: (1) The respondent's point *in limine* is dismissed (2) The costs are costs in the appeal.**

---

**JUDGMENT**

**MOSHOANA J**

Introduction

[1] This is an appeal, brought to this Court in terms of the provisions of section 58 (1)[1] of the Mine Health and Safety Act[2] (MHSA). In terms of section 58 (2), the appeal must be lodged within sixty days of the date that the Chief Inspector's decision was given. The appeal *in casu* was lodged outside the sixty days' period. The appellant had sought condonation for the late lodgement of the appeal. The condonation application stands unopposed. However, that application was not before me yet, when I entertained the point *in limine*, details of which would be set out later in this judgment. Mr Myburg SC, appearing for the appellant urged me to consider it and make a ruling on it. I avoided doing so before I resolve the point *in limine*. The matter was allocated to me from the trial roll as the parties had already agreed that the appeal would be entertained as a rehearing and evidence would be received by a trial judge. The appeal itself is opposed by the respondent.

The point *in limine*

[2] The appeal was lodged through a notice filed with the Registrar of this Court on 20 April 2015. On 19 February 2016, the parties held a pre-trial conference and filed a minute thereof on 12 May 2017. At paragraph 12 of the said minute, it is recorded that the parties do not envisage that a preliminary point would be raised. I pause to mention that had the parties recorded that the point now raised, was to be raised, this point would

[1] (1) Any person adversely affected by a decision of the Chief Inspector, either in terms of section 57 (3) or in the exercise of any power under this Act, may appeal against the decision to the Labour Court. (3) The Labour Court must consider the appeal and confirm, set aside or vary the decision.
[2] Act 29 of 1996.

have been heard in a motion court in terms of the provisions of the Practice Manual. On 11 February 2019, barely seven days before the hearing of the re-hearing appeal, the parties held a further pre-trial meeting. It was in this meeting that the respondent intimated, for the first time, that it intended to raise a preliminary point to the effect that the decision maker's decision is not appealable. Parties recorded the terms of the preliminary point in a supplementary minute. They also agreed that the appeal rehearing would be postponed to be entertained after the determination of the preliminary point.

Background facts

[3] In light of the fact that the merits of this appeal may still be entertained by this Court at a later stage, it is unnecessary for the purposes of this judgment to punctiliously set out the facts of the appeal. A brief narrative of the facts will suffice.

[4] On or about 13 June 2014 an incident happened where a pedestrian was fatally struck by a truck. Following that, a call was placed by an official of Dwarsrivier Mine to the Inspector of Mines at the Limpopo Department of Mineral Resources (DMR). An inspection was conducted by an official of the DMR. Following an inspection, a section 54 instruction was issued. Consequently, the appellant took a view that the incident had been erroneously classified as having occurred at a mine as defined in the MHSA. On 7 July 2014, the appellant escalated the matter to the Principal Inspector.

[5] Later on, the Principal Inspector issued a section 65 inquiry notice. The Principal Inspector invoked the provisions of section 65 because he was of the view that the incident occurred at the Mine. Aggrieved by this view ("decision"), the appellant exercised its right of appeal within the contemplation of section 57 of MHSA. On 19 December 2014, the respondent wrote to the applicant and advised that he considered the appeal and concluded that the appellant cannot state with certainty that

the accident did not occur at the appellant's mine. The appellant sought reasons for the outcome. One of the legal grounds exposed by the respondent was that the plant's access road where the accident happened is a mine as per the definition of a mine in section 102, item (a) (ii) of the definition. The appellant was aggrieved by this outcome and sought to exercise its right in terms of section 58 (1) of MHSA.

Evaluation

[6] The quibble between the parties is not that some decision was made, which is capable of aggrieving the appellant, but that a decision within the contemplation of section 58 (1) did not arise, thus, this Court cannot exercise its appeal powers. The respondent contends that no decision adversely affecting the appellant was made. On the other hand, the appellant contends that such a decision was made. The MHSA does not define what a "decision" is as employed in the Act. The dictionary[3] meaning of the word decision is the action of deciding a contest, dispute, etc.; settlement, a final (formal) judgment or verdict.

[7] There is no doubt in my mind that the parties before me had, at a point, a contest. One of the hotly contested issues was whether the fatal accident happened at the Mine or on a public road. If the accident happened at a place, which is not a mine as defined, the provisions of the MHSA cannot be invoked. Differently put, a section 65 inquiry is only reserved for incidents that occurred at the Mine. The respondent's counsel correctly conceded that if the accident did not happen at the Mine, then, the provisions of the MHSA cannot be invoked.

[8] This contest, that the accident did not happen at the Mine, gravitated through a number of stages. In the first instance, when the accident landed in the hands of the Principal Inspector, he formed a belief that the accident happened at the Mine, hence his invocation of the powers in terms of section 54. It may well be so that the Principal Inspector, only

[3] Shorter Oxford English dictionary Volume 1

formed a belief and did not take any decision, however for the purpose of this judgment, this issue is a red herring. It is clear to me though, that the respondent, the Chief Inspector, treated such as a decision, hence he accepted and considered an appeal in terms of section 57[4].

[9] It must follow that what the respondent entertained on appeal was the decision of an inspector, otherwise, he ought to have refused to exercise his appeal powers in terms of the section. He can only entertain on appeal, decisions of an inspector and nothing more. Although a submission was belatedly made that a decision contemplated in subsection (3) was not taken, it is common cause between the parties that on 20 January 2015, the Chief Inspector sent a letter to the appellant stating that the appeal had been considered and that it had been decided that an inquiry in terms of section 65 of the MHSA should be initiated.

[10] It is also common cause that that amounted to the Chief Inspector's dismissal of the appeal (and confirmation of the Principal Inspector's decision that the incident occurred at the mine). I am unable to agree with the respondent's representative that this is tantamount to a wrong legal concession. To that extent, it was submitted, that this Court is not bound by such a concession. I do not see this as a legal concession, but as an admission of fact. The question whether the appeal was decided upon, is a question of fact and not of law.

[11] I was actually astonished to hear a submission that a decision in terms of section 57 (3) was not made in the circumstances where there is a letter which records that: *"I have considered both your appeal and the Principal Inspector of Mines' representations."* Further a letter signed by the respondent recording thus: *"My decision of 19 December 2014 regarding the above-mentioned appeal is based on the following grounds."* The Chief Inspector further recorded that he perused certain documents during his consideration of the appeal. For these reasons, I remain

[4] (1) Any person adversely affected by a decision of an inspector, or at whose instance a decision of an inspector was taken, may appeal against that decision to the Chief Inspector.

unpersuaded that the respondent did not take a decision in terms of subsection 3. On the admitted facts, the Chief Inspector confirmed the decision of the Principal Inspector, thus taking action in terms of subsection (3) (a) of the MHSA.

[12] One understands why the *volte face*. A concession that the respondent exercised powers in terms of subsection 3 would have instantaneously thrown the argument that the decision is not appealable into the dungeon. Section 58 (1) anticipates two types of decisions that may be brought on appeal before this Court. The first is where there is a decision in terms of section 57 (3). The second is where an exercise of any power has happened. There is no doubt in my mind that the first instance has occurred. In fact, it is common cause and the prevarication does not help the respondent's case.

[13] Having happened factually, it is completely unnecessary for the Court of appeal to determine whether the decision taken is one contemplated in terms of the section. The issue whether the decision adversely affects the appellant is beyond question. As proof that the appellant was adversely affected, it lodged an appeal in terms of section 57. I have no doubt in my mind that the decision of the Chief Inspector has legal effect. One of its obvious legal effect is the invocation of the MHSA, in particular undergoing an inquiry in terms of section 65.

[14] The phrase adversely affected simply means being aggrieved, hurt, ill-treated, impaired, injured or wronged. It can never be seriously argued that the appellant was not hurt by the classification that the accident happened at the Mine, thus an inquiry must ensue. When the Chief Inspector considered the appeal under section 57, no issue was raised by him that the appellant could not have been adversely affected by the decision of the Principal Inspector, thus the decision of the Principal Inspector was not appealable. As correctly submitted by the appellant's representative, the legislature designed a bespoken appeal process. The

stages it follows are (a) the decisions of inspector are appealable to the Chief Inspector, (b) should a party fail to overturn the decision of the Chief Inspector, the next tier is the Labour Court.

[15] The respondent relied heavily on decisions dealing with the phrase *direct and external legal effect*. I am unable to agree with a submission that the classification of the incident as a mine accident has no direct and external legal effect. This classification to my mind has direct and immediate consequences for the appellant. Absent this classification, a section 65 inquiry cannot ensue. There is no doubt in my mind that during the inquiry, the appellant would be behooved to prove amongst others that it did not contravene or fail to comply with the provisions of the MHSA, something it may not be behooved to do if the accident is found to have happened outside the mine as defined.

[16] I also do not agree with a submission that the classification of the accident being a mine accident is a preliminary step towards a decision. It is a decision that serves as a trigger for the exercise of the powers contemplated in section 65. It is a jurisdictional requirement for the application of the section. It is a separate and independent decision, and if made, it has direct and immediate effect on a party. The three authorities[5] relied upon by the respondent's counsel becomes obsolete in this regard. It is unnecessary, in my view, to entertain any argument as to whether those authorities are distinguishable or not. There is no dispute that on 19 December 2014, the Chief Inspector did something about the contest of the appellant, therefore, section 57 (3) (a) was definitely invoked. The Chief Inspector sourced his powers to consider an appeal, as he factually states he did, from section 57 of the MHSA. There is no other place that he can source such powers and it has not been alleged in the papers before me, nor argued, that he sourced the powers elsewhere.

[5] *Nedbank Ltd v Master of the High Court, WLD and others* 2009 (3) SA 403 (W); *Strauss and others v The Master and others N.O* 2001 (1) SA 649 (T) and *Council for Medical Schemes and Another v Bonitas Medical Fund* 2015 (5) SA 577 (GP)

[17] Even if I were to assume, which assumption I am not making, that what happened was not an exercise of power in terms of subsection 3, I still do not require to traverse the path towards establishing that the decision is one as contemplated in section 58 (1) or not. I did not hear the respondent's counsel to argue that the Chief Inspector did not exercise any power contemplated in the MHSA. For instance, section 49 (1) (a) – (k) sets out an array of the functions of the Chief Inspector. Whichever way one looks at it, by writing to Mr Mtshengu of the appellant, the Chief Inspector was performing a function in terms of the MHSA. In so doing, he made a conclusion that there was no certainty that the accident did not happen at the mine and most importantly invoked the provisions of section 65. Using its supervisory appeal powers, this court can keep the Chief Inspector in check in so far as the exercise of the functions is concerned.

[18] In terms of section 65, the Chief Inspector is empowered to instruct an inspector to conduct an inquiry into any accident that occurred at a mine that results in the death of any person. Again, this exercise of power is subject to an appeal by the Labour Court. Once the power is exercised, the exercise itself attracts the Court's appeal powers. It is not required for the inquiry to be concluded before an aggrieved party lodges an appeal. The doctrine of ripeness does not find application in this bespoken appeal process. If the Court adopts this view, it again becomes unnecessary to peep into the pith of the power so exercised with a view to determine whether it is or is not a suitable decision to attract the appeal powers of this Court.

[19] I may mention that the inquiry contemplated in section 65 moves from a premise that an incident happened at the mine. It is not envisaged in section 65 that an inspector can inquire into whether an incident happened at the mine or not. By so doing, he or she might be putting his or her own jurisdictional power into question. Section 65(1) clearly and expressly states that the inquiry is into the incident itself and not whether

the jurisdictional facts to conduct an inquiry exist or not. Such an inquiry would be like putting the cart before the horse. The cart must be pulled by the horse and not the other way round. To enable the investigations, the incident must have happened at the mine as defined.

[20] On this basis also, I would have found that an appeal lies on the actions of the Chief Inspector. The Chief Inspector has certainly made a final decision on the issue whether the accident happened at the Mine or elsewhere. As to the attributes of a final decision, I can do no better than to refer to the judgment of *Zweni v Minister of Law and Order*[6]. In there, Harms AJA had the following to say:

> A 'judgment or order' is a decision which, as a general principle has three attributes, first the decision must be final in effect and not susceptible of alteration by the Court of first instance; second it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings[7].

[21] There is no doubt in my mind that the decision of the Chief Inspector has all of the three attributes. The question whether the accident happened at the Mine is central to a number of considerations. Chief amongst them is whether any of the provisions of the MHSA may be invoked, particularly the ones aimed at holding an inquiry into the incident. A determination by an appeal court that the accident happened at the Mine would open the way for the inquiry to happen. Put differently, confirm the decision by the Chief Inspector to instruct the holding of an inquiry. Conversely, a decision that the accident did not happen at the Mine would nip in the bud, as it were, an unnecessary inquiry into the accident using the procedures contemplated in the MHSA. This would dispose of at least a substantial portion of the relief claimed – being the accident did not

[6] 1993 (1) SA 523 (A)

[7] This approach was warmly received by the Constitutional Court in Cloete and Another v S; Sekgala v Nedbank Ltd [2018] ZACC 6 delivered on 19 February 2019.

happen at the mine therefore section 65 inquiry is unnecessary. Therefore, the decision of the Chief Inspector has final jurisdictional effect, and is thus appealable[8].

[22] In summary, it is my view that an appeal lies in this matter. The respondent has exercised powers in terms of section 57 (3). Also, the respondent has exercised powers in terms of the MHSA and such an exercise is subject to the appeal powers of this Court. The decision of the Chief Inspector has final jurisdictional and legal effect. Accordingly, the preliminary point is bound to fail.

Further conduct of this appeal

[23] Had this preliminary point not been belatedly sprung into the mix, this court would have dealt with this matter, as a trial matter, in the week of 18-22 February 2019. Strictly speaking, the matter is not partly heard before me. Given the fact that this matter commenced almost four years ago, I indicated to the parties that the Registrar may be approached to give the parties a preferential date to deal with the appeal. Such may imply that one of my brothers or sisters may be seized with this appeal in a year or so to come. However, I am prepared to consider this matter as being partly heard before me and as such hear it during the last week of this term or next term. However, if there is any objection from any of the parties for me to hear the matter, then the Registrar would enroll it in the normal roll before any of my brothers and sisters.

[24] In the results, I make the following order.

Order

1. The preliminary point is hereby dismissed.

[8] See Jacobs v Baumann No 2009 (5) SA 432 at 436G.

2. The costs are costs in the appeal.

_____

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

| | |
|---|---|
| For the Applicant: | Adv T F Mathibedi SC appearing with Adv M J Ramaepadi (who made all the submissions in court) and Adv S B Nhlapo. |
| Instructed by: | State Attorney, Johannesburg. |
| For the Respondents: | Adv A Myburg SC appearing with Adv R Itzkin |
| Instructed by: | ENS Africa, Sandton. |