IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No:J 1250/2018

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Applicant**
and	
UASA THE UNION	**First Respondent**
SOLIDARITY	**Second Respondent**
NATIONAL UNION OF MINEWORKERS	**Third Respondent**
WESTERN PLATINUM (PTY) LTD	**Fourth Respondent**
EASTERN PLATINUM (PTY) LTD	**Fifth Respondent**
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Sixth Respondent**
COMMISSIONER E HAMBRIDGE N O	**Seventh Respondent**

Heard: **26 March 2019**

Delivered: **3 April 2019**

Summary: Urgent application to review arbitrator's award in respect of a dispute concerning organisational rights.

JUDGMENT

GUSH, J

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[1] The applicant in this matter seeks an order to review the award of the seventh respondent (the arbitrator) in which award the seventh respondent granted organizational rights to the first second and third respondents and determined the manner in which these organizational rights were to be implemented.

[2] The matter was first enrolled as an urgent application on 13 December 2018 at which stage the presiding judge struck the matter from the roll due to lack of urgency; ordered that the costs were to be costs in the review and set the matter down to be heard on 26 March 2019.

[3] The fourth to sixth respondents did not oppose the application. I shall refer to the fourth and fifth respondent collectively as "Lonmin".

[4] In its notice of motion, the applicants sought an order firstly reviewing and setting aside the seventh respondents arbitration award; alternatively referring the matter back for determination *de novo* and secondly staying the execution and enforcement of the award pending the outcome of the review application.

[5] Regarding the first part of the order, the parties agreed that in the event the Court should find that the award was reviewable, the dispute was to be referred back to the sixth respondent to be heard by a Commissioner other than the seventh respondent (arbitrator) and not simply be set aside.

[6] As far as the second part of the order was concerned, I indicated to the parties that I would expedite the judgment so as to obviate the necessity for argument regarding whether the execution or enforcement of the award should be stayed.

[7] Despite the voluminous record and bundles of documents, the issue in question is relatively straightforward. The pertinent background to the application is that the first, second and third respondents, all registered trade unions, together as a coalition notified Lonmin that they sought to exercise the organizational rights as set out in sections 12, 13 and 15 of the Labour Relations Act (the Act).[1] I shall refer to the first, second and third respondents as "the coalition". All these unions had previously enjoyed a measure of

[1] Act 66 of 1995 as amended.

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recognition by Lonmin. Lonmin had terminated its collective agreements with the coalition and this had led to the section 21 notification by the coalition that it was seeking to exercise the above organizational rights.

[8] These sections deal with “trade union access to the workplace” (s12); “deduction of trade union subscriptions or levies” (s13) and “leave for trade union activities” (s15). The parties were unable to resolve the issue and the sixth respondent appointed the seventh respondent at the request of “the coalition” to arbitrate and determine the dispute.

[9] At the arbitration, the request for organizational rights by the coalition was opposed by both Lonmin and the applicant in this matter.

[10] Prior to the commencement of the arbitration, the parties entered into a pre-arbitration agreement and recorded the agreement in a minute. In this minute, the parties specifically agreed that for purposes of the arbitration that commenced on 18 October 2018, the membership of the coalition was determined agreed and recorded in the minute. In particular, it was specifically agreed between the parties that the membership figures as at 31 October 2017 would be accepted for the purposes of the arbitration.

[11] The seventh respondent in her award concluded that the Coalition had established that it represented a “substantial number of employees in the workplace, who fall within categories C and D. This is especially so relative to the number of employees in those categories are represented by [the Applicant].

[12] The first ground of review raised by the applicant relates to the acceptance by the seventh respondent that the workplace consists of “Eastern Platinum Limited and Western Platinum Limited (the Marikana Operations) which excludes its Limpopo operations and the Brakpan Refinery.” The applicant argued that “the workplace” did not include those workers employed in the C and D bands.

[13] The Act specifically provides that “the trade union or trade unions acting jointly” wishing to exercise organizational rights must give notice of this

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intention in respect of a "workplace".[2] A "workplace" is defined in the Act as "the place or places where the employees of an employer work".[3] Despite the applicant's argument before this Court, it is clear from the documentation that at the time the matter was arbitrated, the seventh respondent directly recorded what comprises the workplace for the purposes of the arbitration.

[14] The second ground of review dealt with the applicant's contention that the arbitrator had erroneously relied on and had misapplied the test set out in the matter of *McDonald's Transport Upington (Pty) Ltd v AMCU and Others*[4]. The essence of the applicants second ground of review, however, was based on the averment that the arbitrator had relied on the membership of the coalition as at 31 October 2017 and had not taken into account the Constitutions of the members of the coalition that provided that members who did not pay their subscription fees would cease to be members of that union.

[15] Mr. Franklin, on behalf the coalition, argued that on a strict interpretation of the Constitution of each of the members of the coalition, it was not an inescapable conclusion that the membership of each member of the Coalition had been reduced by the number of members who had not paid their subscriptions.

[16] Both parties however appeared to lose sight of the fact that in preparation for the arbitration and "**for the purposes of the arbitration**" they had expressly agreed that the membership numbers of both the coalition and the applicant and had recorded those numbers in the agreed minute.

[17] I am satisfied in those circumstances that the arbitrator was entitled to take into account the employment figures the parties had agreed on for the purposes of determining the dispute. It would make no sense for the parties to agree on the membership figures, place that agreement before the arbitrator and then seek to deviate from it by disputing what they had expressly agreed. It might well have been a different proposition had the either party disputed the number of members.

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[2] See: section 21 of the Act.
[3] See: Section 213 of the Act.
[4] (2016) 37 ILJ 2593 (LAC).

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[18] I am satisfied that the arbitrator, in the circumstances, properly dealt with the challenge raised by the applicant in respect to the figures and that this ground of review is without merit. The arbitrator's application of the *McDonald*[5] judgment does not alter the relevance or importance of the agreement the parties reached prior to the commencement of the arbitration expressly **for the purposes of the arbitration**.

[19] The applicant's third ground of review is based on an averment that the arbitrator did not take into account the provisions of section 21(8)(b)(iv), viz "the organizational history at the workplace or any other workplace of the employer". Mr Hollander who appeared for the applicant correctly in my view did not pursue this ground in argument. It is clear from the award and the substantial documentation placed before the seventh respondent that she had taken into account all the background information which included the organizational history at Lonmin's workplace.

[20] The applicant's fourth and final ground of review was based on an averment that the arbitrator misunderstood the significance of the number of employees and the categories into which they fell as recorded in the pre arbitration minute. This ground of review is similar to the first ground of review argued by the applicant. It is premised not only on the applicant's misunderstanding of what constitutes a workplace, but also the applicant's apparent disregard of the agreement reached concerning the number of employees represented in the various categories as set out in the pre-arbitration minute. There is no doubt that the arbitrator concluded, based on the figures contained in the pre-arbitration minute, that the coalition had succeeded in establishing that it represented a substantial number of employees within the workplace albeit specifically within categories C and D.

[21] In 2014, the Act was amended by the inclusion of section 21(8C). This section specifically grants the arbitrator appointed to determine a dispute over organizational rights, to grant "the rights referred to in sections 12, 13, or 15 to a registered trade union or, two or more registered trade unions acting jointly,

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[5] Id n 4.

that does not meet thresholds of representativeness established by a collective agreement …"[6]

[22] This confers upon the arbitrator a discretion. In exercising her discretion in terms of this section, the arbitrator properly and in compliance with this section took into account the rules of interpretation in considering the extent of her discretion and has set out clearly the basis upon which she exercised that discretion in her award.

[23] At the outset the applicant confirmed that it relied upon section 145 of the Act in seeking to review the seventh respondent's award. The test on review has been repeatedly set out by the courts. In *Goldfields Mining South Africa (Pty) Ltd (Kloof) Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [7] the Labour Appeal Court (LAC) held:

> '[17] In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.
>
> [20] …The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence'?[8]

[24] Applying the test enunciated by the LAC in Goldfields it is clear that the arbitrator satisfies all the requirements. In particular, the arbitrator was

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6 Section 21(8 ((a) –(c) of the Act

7 [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

8 The *Sidumo* test.

required to exercise her discretion and to do so reasonably. In order to find that the arbitrator's award is reviewable, it would be necessary to show that she exercised her discretion capriciously, in a manner amounting to misconduct or gross irregularity. I am not persuaded that the applicant has established that the arbitrator in this matter did so.

[25] The arbitrator's conclusion firstly that the coalition represented a substantial number of employees in the workplace is eminently one which another decision-maker could reasonably have arrived at based on the significant amount of evidence placed before her. Secondly, it is abundantly clear that the arbitrator clearly and substantially understood the nature of the dispute before her and the relevant issues she was enjoined by the Act to consider.

[26] In the circumstances and for the reasons set out above, I am not persuaded that the award of the arbitrator is reviewable.

[27] There are two distinct parts to the order granted by the arbitrator. The first finding was that the coalition represented a substantial number of employees in the workplace and was accorded the organizational rights set out in sections 12, 13 and 15 of the Act. The second part of the order concerned the manner in which these organizational rights were to be implemented. Counsel for the applicant indicated that the applicant had not challenged this part of the order in its review. That being so and having found that the award of the arbitrator is not reviewable; there is no need for this Court to deal with this issue.

[28] As far as costs are concerned, the parties agreed that it was not necessary to deal with the issue of costs separately and in any event the order of Mabaso AJ made it clear that the costs, when the original urgent application was struck from the roll, were to be "costs in the review". Given the nature of the dispute and the on-going relationship between the parties. I am of the view that an order for costs would be inappropriate.

[29] I therefore make the following order:

<u>Order</u>

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1. The applicant's application is dismissed;

2. There is no order as to costs.

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D H Gush

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Advocate L Hollander
Instructed by:	LDA Attorneys
For the Respondent:	Advocate A Franklin SC
Instructed by:	Bester and Rhoodie Attorneys