IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO:

JA14/01

In the appeal between

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA **1ST APPELLANT**

THE PERSONS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION **INDIVIDUAL APPELLANTS**

AND

HIGHVELD STEEL AND VANADIUM CORPORATION LTD **RESPONDENT**

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal against a judgement and order granted

by the Labour Court, per Ngcamu AJ, on the 4th October 2000 interdicting certain employees of the respondent from embarking upon a certain strike that was imminent at the time. The first appellant in this matter is the National Union of Metal Workers of South Africa. I shall refer to it in this judgement as **"the union".** The second and further appellants are members of the union who are employed by the respondent. The respondent is a registered company. It is engaged in the business of the mining and processing of steel and vanadium products in Ga-Rankua, North West Province.

[2] The respondent recognises two trade unions for the purpose of collective bargaining. They are the first appellant and the Mine Workers Union. Although the respondent falls within the jurisdiction of the Metal, Engineering Industries Bargaining Council, it is exempted from collective agreements concluded in that council. It has its own in-house forum where it bargains with the two unions annually.

[3] In terms of an established practice within the respondent, once the respondent has reached an agreement with the two unions on amendments to be made to terms and conditions of employment for the duration of a particular 12 month period, it and the two unions formulate a document which reflects the terms of their agreement.

They call such an agreement a house agreement Such a document is then issued and publicised in the form of a brief. It is also sent to the council referred to above. It is not clear why such document is sent to the council as well but it seems that it is to inform the council that the parties have reached an agreement.

[4] The respondent and the union held their negotiations for the period July 2000 to June 2001 during the middle of the year 2000. Two of the meetings were held on the 6th and the 20th June 2000. No agreement was reached at that stage. A dispute arose between the parties on amendments to be made in the house agreement in respect of wages and other terms and conditions of employment for such period. On the 7th July 2000 the union referred the dispute to the Metal and Engineering Industries Bargaining Council. A dispute meeting was held on the 17th July 2000. The parties failed to reach agreement at that meeting.

[5] On the 31st July 2000 the parties held a further meeting. The respondent's version is that at this meeting the parties concluded an agreement which settled the dispute. It attached to its founding affidavit a document marked annexure **"SNM2"** as the document that reflected the terms of the agreement reached between the parties. That document is not signed by the parties. It is a brief which was prepared by the respondent as reflecting the parties'

agreement.

[6] The appellants dispute the allegation that at the meeting of the 31st July 2000 an agreement was reached between the parties settling the dispute. They also deny the respondent's allegation that annexure **"SNM2"** reflects an agreement between themselves and the respondent. The union further states that annexure **"SNM2"** was circulated by the respondent without first showing the document to it. It appears that the parties did reach an agreement that the wage increase would be 6,5% but each party has a different understanding of the wage level on which such increase would be superimposed in respect of monthly paid employees. The respondent's position is that such increase was to be calculated on the basis of reduced hours. The union denied that it was ever agreed that such would be the method of calculation. According to the respondent, if the method of calculation adopted by it is used, the effect thereof is that the increase which the monthly paid employees will get becomes 3.9%.

[7] On the 17th August 2000 the council issued a certificate of outcome to the effect that the dispute remained unresolved. The respondent complains that such certificate was issued despite it having advised the council that it was of the opinion that no dispute existed between the parties. Apparently the certificate was issued on the

insistence of the union.

[8] On the 27th September 2000 the union issued a letter to the respondent which, according to par 14 of the respondent's founding affidavit, was **"a notice of intention to proceed with strike action with effect from 07h00 on 3 October 2000".** The third paragraph of that letter reflected what the bone of contention between the parties at that stage was. It reads thus:-

> **"Your claim that, last year the company made mistake in calculating reduction of hours in respect of staff, and as a result your company is going to rectify the mistake and the members falling in that category will suffer loss of earnings. Effectively they will receive increase which in terms of your interpretation will represent 3.9% and not 6.5% is not acceptable and it is the area that keeps us apart. Members in this category are severely prejudiced."**

The further paragraph was simply to the effect that this category of employees had to be treated in the same manner as the previous year. It seems that, on the respondent's version, to treat the staff in the same manner as in 1999 would be to perpetuate the alleged mistake which it maintained it had made in respect of the 1999/2000 period.

[9] The letter prompted the respondent to bring an urgent application in the Labour Court to interdict the planned strike on the basis that such strike would be an unprotected strike. The reason advanced by the respondent as to why such strike would be an unprotected strike was that the dispute had been resolved and there was no dispute to go on strike about. There were two alternative bases advanced why such strike would be unprotected. The first alternative was that **“the issue giving rise to this dispute is regulated in a collective agreement binding on the respondents.”** It was submitted that a strike over such an issue was precluded by the provisions of sec 65(1)(a) of the Labour Relations Act 66 of 1995 (Act NO 66 of 1995) (**“the Act”**). The second alternative basis was that **“the dispute between the parties concerns the application of a collective agreement, alternatively the interpretation of a collective agreement”.** It was submitted on behalf of the respondent that s 24 as read with s65(1)(c) of the Act precluded a strike over such a dispute or issue.

[10] After hearing argument the Labour Court gave a judgement in which it found that the strike would be an unprotected strike. It granted a final order declaring the impending strike not to be in compliance with the

requirements of the Act and interdicting both participation and promotion of such strike and ordering the present appellants to pay the costs jointly and severally the one paying, the others to be absolved. The basis of the order of the Labour Court was simply that the issue in dispute between the parties was the manner of application of the agreed wage increase. It said such issue had not been referred to conciliation and, because of that, the strike would be unprotected.

[11] The implication in the judgement of the Labour Court is that the requirement of sec 64(1)(a) of the Act had not been complied with. Sec 64(1) requires that a dispute or issue in dispute be referred to the Commission for Conciliation, Mediation and Arbitration (**"the CCMA"**) or to a bargaining council with jurisdiction, for conciliation before the Act may confer the right to strike. In order to be able to say that, the Labour Court must have accepted the version of the respondent as opposed to that of the appellants, that the dispute that had been referred to the Council for conciliation had been resolved.

[12] Before us Mr Barrie, who appeared for the respondent, indicated that, in opposing the appeal, he would not pursue the contention that the dispute had been resolved. That is the ground of challenge to the strike which appeared in par 8.1 of the founding affidavit. He also indicated that he would not pursue the first alternative

ground of challenge, namely, that **“the issue giving rise to the dispute is regulated in a collective agreement”** and that a strike over such an issue was precluded by the provisions of sec 65(1)(a). He indicated that the reason why he could not pursue those grounds was that there were material disputes of fact which could not be resolved on the papers relating to whether or not an agreement had been reached between the parties and on whether or not, if such agreement had been reached, it resolved the dispute.

[13] It does not appear that in the Court a quo interim relief was sought nor does it appear that there was any request for the referral of any issues to oral evidence. Before us no such requests were made either. In those circumstances, since it is final relief that is being sought, the union’s version (that is the version of the respondent in the Court a quo) must be relied upon unless it is far fetched or is untenable. This means that this matter must be decided on the basis that no agreement was reached between the parties. The Court a quo ought also to have decided the matter on the basis of the union’s version and not on the basis of the version of the applicant in the Court a quo as there were material disputes of fact.

[14] It is against the above background that the only ground which Mr Barrie pursued in support of his contention that

the strike was unprotected must be considered. His contention was that **“the dispute between the parties concerns the application of a collective agreement, alternatively the interpretation of a collective agreement”.** He submitted that a strike over such a dispute was precluded by the provisions of sec 24 read with sec 65(1)(c) of the Act.

[15] Sec 65(1)(c) of the Act provides that no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if **“the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act.”** Sec 24 deals with disputes about collective agreements. The provisions of sec 24(1) read thus:-

> **“24 (1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.”**

Ss (2) provides that: **“(I)f there is a dispute about the interpretation or application of a collective agreement**, **any party to the dispute may refer the dispute in writing to the Commission if -**

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.”

[16] It is necessary to determine what the issue in dispute is in this matter. On the appellants’ version the issue in dispute is the dispute that was referred to the council for conciliation. That was a dispute about a wage increase and other terms and conditions of employment. On the respondent’s version the issue in dispute is the application of a collective agreement. Such application of the agreement relates to the manner in which the increase must be calculated. It is clear that, when it comes to the wage increase, both parties had agreed in principle that the increase should be 6,5%. On the respondent’s version such increase was to be calculated on the basis of the reduced hours.

[17] It seems to me that any agreement on a percentage for a wage increase without an agreement on the basis for its calculation is no agreement at all because, depending on the manner of its calculation, the parties may be contemplating completely differing increases in monetary terms. In those circumstances it would seem that there can be no doubt that the appellants would be entitled to resort to a strike and that sec 65(1)(c) would have no application. In any event since the matter must be decided on the appellants' version, there is no room for deciding the matter on the basis that there is an alleged agreement because that is not the appellants' version. The appellants' version is that there is no agreement. If there is no agreement, that is the end of the respondents' opposition to the appeal.

[18] Mr Barrie sought to circumvent this conclusion by the following reasoning:

In terms of section 213 **"dispute"** includes **"an alleged dispute".** The respondent alleges that there is a dispute between the parties about the interpretation of an alleged agreement. There is thus an alleged dispute. Therefore section 24(2) of the Act is applicable. The answer to this argument is this. The definitions in section 213 are prefaced by the phrase:**" unless the context otherwise indicates".** The context of section 24 (2) indicates, in my view, that what is required for the section to be applicable

is a real dispute of the nature set out, not merely an allegation of a dispute of that nature by one party on the one-sided assumption that there is an agreement. It must be common cause that there is an agreement before there can be a dispute (albeit an alleged dispute) about its interpretation or application. This important factor is absent in this case. A court will not interpret or apply an agreement which may not exist.

[19] In any event, even if there was room to deal with the matter on the basis that there was an alleged agreement, I am of the view that Mr Barrie's submission has no merit. What is an alleged agreement? Mr Barrie presented his argument on the basis that an alleged agreement is where parties are in dispute about whether or not there is an agreement. The question which arises in such a case is: how can there be a dispute about the application or interpretation of an agreement between parties who are at loggerheads about the existence of the very agreement itself? This question arises because sec 24(2) of the Act on which Mr Barrie relied to contend that the appellants had a right to refer the issue in dispute in this matter to arbitration requires there to be **"a dispute about the interpretation or application of a collective agreement."**

[20] Mr Barrie laid emphasis on a scenario where two parties

have a dispute about whether a certain agreement applies to certain people or to a certain category of people. He submitted that that is a dispute about the application of such an agreement. In my view that scenario is different from the one we have in this matter. In that scenario there is an agreement and the question is whether or not such agreement applies to a particular category of persons. In this matter Mr Barrie's argument is not premised on there being an agreement. It is premised on there being a dispute about whether or not there is an agreement. That is a totally different scenario.

[21] Furthermore ss(1) of sec 24 requires a collective agreement to provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. It provides that the procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, through arbitration. It is clear from this that sec 24 cannot apply unless there is a collective agreement. A dispute about whether there is a collective agreement is not enough to trigger the operation of sec 24. The result of this conclusion is that it cannot be said that there was a dispute about the application or interpretation of a collective agreement between the parties. That being the case, the only ground on which the respondent opposed the appeal must fail with the result

that the appeal must succeed. As to costs, both parties presented their argument on the basis that costs should follow the result both on appeal and in the Court a quo.

[22] In the result I make the following order:-

1. The appeal is upheld with costs.
2. The order of the Court a quo is set aside and is replaced by the following one.

   "**1. The application is dismissed with costs.**"

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RMM Zondo

Judge President

I agree

_____

K. van Dijkhorst

Acting Judge of Appeal

I agree

_____

R.G. Comrie

Acting Judge of Appeal

Appearances:

For the appellants	:	Mr GJ Doble
Instructed by	:	Cheadle Thompson & Haysom
For the respondent	:	Mr Pak le Roux
Instructed by	:	Brink Cohen Le Roux & Roodt Inc
Date of argument	:	19 June 2001
Date of Judgement	:	14 September 2001