THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case no: J 1902 /16

In the matter between:

SASOL MINING (PTY) LTD **Applicant**

and

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION (AMCU) **First Respondent**

EMPLOYEES WHOSE NAMES ARE LISTED IN

ANNEXURE "A" **Second Respondent**

Heard: **21 October 2016**

Delivered: **25 October 2016**

Summary: Sasol entered into a collective agreement with majority trade unions to settle wage and other disputes. AMCU persisted with strike action after date of collective agreements. Sasol sought an interdict to declare ongoing strike action unprotected and in breach of sections 65(1)(a), 65(1)(b) and 65(3)(a)(i) of the LRA. Collective agreement was not extended as provided for in section 23(1)(d) of the LRA and the strike remains protected.

JUDGMENT

PRINSLOO,J

Introduction:

[1] The Applicant approached this Court on an urgent basis for an order *inter alia* declaring the strike the Second to further Respondents (the Respondents) have embarked on to be unprotected as from 10 October 2016, alternatively 14 October 2016, in accordance with the provisions of section 65(1)(a) and or 65(1)(b) of the Labour Relations Act[1] (LRA).

[2] The application is opposed.

[3] The parties are in agreement that the matter is urgent and that it requires the urgent intervention of this Court.

Brief background:

[4] The background facts are undisputed. The Applicant recognised the First Respondent (AMCU) as a bargaining agent at the Secunda mining operations and during August 2016 AMCU held 25,7% representation at the Secunda mining operations.

[5] In June 2016 the Applicant commenced wage negotiations at plant level and engaged the recognised trade unions in the workplace, namely NUM, Solidarity, CEPPWAWU, SACWU and AMCU. AMCU participated in the wage negotiations and presented its demands.

[6] The undisputed trade union representation figures at the Secunda mining operations are NUM 7,10%, Solidarity 13,8%, CEPPWAWU 39,7%, SACWU 2% and AMCU 25,78%. There is 13,54% of employees who are not members of any trade union.

[7] On 5 August 2016 the Applicant concluded a wage agreement (the wage agreement) with NUM, Solidarity, CEPPWAWU and SACWU. It is not disputed that the wage agreement was concluded with the majority of trade unions (combined 60,72%). This agreement included agreements on a wage increase, service increment, living out allowance, shift allowance, 13th cheque and medical aid. The agreement further provided that the

[1] Act 66 of 1995.

parties would establish a 'Joint Working Committee' (JWC) to address concerns in respect of production bonus, underground allowance, minimum wage and housing allowance.

[8] AMCU did not sign the wage agreement as its demands were not met. On 22 August 2016 AMCU issued a strike notice as per section 64 of the LRA, notifying the Applicant that strike action would commence on 25 August 2016 at 07:00 and that the strike relates to matters of mutual interest, wages and other conditions of employment. It is common cause that the strike that commenced on 25 August 2016 was protected.

[9] On 30 August 2016 and by agreement between the Applicant and AMCU, a final order was issued by this Court, interdicting certain conduct by the striking employees. It is common cause that the order granted on 30 August 2016 is still enforceable.

[10] On 14 October 2016 the Applicant and NUM, Solidarity and CEPPWAWU concluded an addendum (the addendum) to the wage agreement. It is not disputed that the addendum was concluded with the majority of trade unions (combined 60,6%). The addendum provides that all other demands made by the unions during the course of the 2016/2017 wage negotiations and which had not been addressed or dealt with in the wage agreement, may also be referred to the JWC within a period of three months from date of signature of the addendum.

[11] The wage agreement and the addendum are collective agreements.

[12] The AMCU members are still striking and on 18 October 2016 the Applicant approached this Court on an urgent basis for an order *inter alia* declaring the strike to be unprotected as from 10, alternatively 14 October 2016.

<u>The Applicant's case</u>

[13] The Applicant seeks that the ongoing strike at its Secunda mining operations be declared unprotected as from 10 October 2016, alternatively 14 October 2016 and that the Respondents be interdicted from continuing

with the strike in furtherance of their demands as per their strike notice issued on 22 August 2016.

[14] The basis upon which the relief is sought is that the wage agreement (dated 5 August 2016) and the addendum (dated 14 October 2016) have been extended to non-unionised employees and to the Respondents in terms of the provisions of section 23(1)(d) of the LRA. Notwithstanding the extension of the collective agreements, the strike continues.

[15] The wage agreement deals with the following demands made by AMCU: wage increase, service increment, living out allowance, shift allowance and 13th cheque. The extension of the wage agreement to the Respondents means that the strike action in relation to these issues is unprotected and in breach of section 65(1)(a), 65(1)(b) and 65(3)(a)(i) of the LRA.

[16] The addendum deals with the following issues in the strike notice: medical aid, family responsibility leave and travel allowances. The extension of the addendum to the Respondents means that the strike action in relation to these issues is unprotected and in breach of the LRA.

The Respondents' opposition

[17] The Respondents dispute that there is a valid extension of the wage agreement and that the protected strike action has become unprotected. This is so because the Applicant's purported extension of the said agreements does not comply with the requirements of section 23(1)(d) of the LRA.

[18] The Respondents' case is that a collective agreement creates rights and obligations for the parties to the agreement and to extend such an agreement to non-parties, section 23(1)(d) imposes strict requirements that must all be met in order for a collective agreement to be extended.

[19] In respect of the wage agreement it is the Respondents' case that it was not validly extended under section 23(1)(d) of the LRA as the wage

agreement did not make express provision for employees who are not party to the agreement, to be bound.

[20] In respect of the addendum it is the Respondents' case that it is not valid, but should the Court find that it is a valid collective agreement and that it had been extended, the strike still remains lawful and protected. This is so because the Respondents' other demands, covered by the wage agreement, are still lawful demands because the wage agreement was not extended under section 23(1)(d) of the LRA and for as long as those demands remain unresolved, the strike remains lawful and protected.

[21] It is common cause that the addendum does not extend the wage agreement.

The issue

[22] The question is whether the collective agreements concluded on 5 August 2016 and 14 October 2016 were extended to the Respondents as contemplated in section 23(1)(d) of the LRA and whether the ongoing strike action is protected or not.

[23] If the wage agreement was indeed extended to the Respondents, the strike action in relation to the issues provided for in the wage agreement, is unprotected and in breach of the LRA. If that is the case, it would be necessary to consider the addendum and the question whether the addendum was extended in terms of section 23(1)(d).

[24] If the wage agreement was not extended to the Respondents, it means that there are unresolved demands made by AMCU that could still be pursued by way of strike action and the strike remains protected. In that instance it would be the end of the matter.

[25] In my view the wage agreement concluded on 5 August 2016 should be the point of departure.

Legal principles

Section 23(1)(d) of the LRA:

[26] Section 23(1)(d) of the LRA permits the parties to a collective agreement to extend their agreement to employees who are not parties to the agreement, either because they are members of a trade union(s) not party to the agreement or because they are not members of any trade union, provided that the employees are identified in the agreement, the agreement expressly binds them and the trade union(s) party to the agreement comprise a majority of employees in the workplace.

[27] If a collective agreement meets the conditions set out in section 23(1)(d)(i) to (iii) of the LRA, the agreement binds all employees in the workplace by operation of law.

[28] If a collective agreement has been extended to non-parties, it binds those parties and the legal effect is that section 65(1)(a) or 65(3)(a)(i) of the LRA will apply. No person would be allowed to strike if bound by a collective agreement that prohibits a strike or that regulates the issues in dispute. The extension of collective agreements to non-party employees effectively denies them the right to strike in respect of the issues regulated by the collective agreement.

[29] The right to strike is a fundamental constitutional right. In *NUMSA and others v Bader Bop and another*[2] the Constitutional Court observed:

> 'That right [the right to strike] is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in s 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place.'

[2] (2003) 24 ILJ 305 CC.

[30] The limitations imposed by section 65(1)*(a)* on the exercise of a right to strike arise in circumstances where a trade union, on behalf of its members, contracts out of the right to strike by entering into a collective agreement that prohibits a strike in respect of the issue in dispute. Similarly, section 65(3)*(a)*(i) has its roots in contracting out, in the sense that it prohibits strikes in circumstances where a binding collective agreement regulates the issue in dispute.

[31] However, *in casu* AMCU is not party to the collective agreement and this justification does not necessarily apply. The issue is whether the collective agreements were indeed extended in terms of section 23(1)*(d)* to non-members of the party unions, namely the employees who are members of AMCU and the 13,5% non-unionised employees.

[32] In *Association of Mineworkers and Construction Union and others v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd and others*[3] the Labour Appeal Court held that:

> 'Section 23(1)*(d)* of the LRA expressly allows for employees, who are not members of the trade unions who are party to the collective agreement, to be bound by the agreement if the requirements or conditions stipulated in that section are met. Those employees must be identified in the agreement, which must specifically bind them and the trade unions, who are party to the agreement, must have as their members the majority of the employees employed by the employer in the workplace'.

Analysis

[33] The Applicant's case is that the wage agreement and the addendum were extended and therefore the ongoing strike action became unprotected. As already indicated, the first question to be considered is whether the wage agreement was extended to non parties in terms of section 23(1)(d) of the LRA. If it was not extended, the strike remains protected as the addendum did not extend the wage agreement and does not provide for the issues as set out in the wage agreement.

[3] (2016) 37 ILJ 1333 (LAC) at para 119

[34] The question is: does the wage agreement comply with section 23(1)(d) of the LRA?

[35] The Applicant places reliance on clause 1.1 of the wage agreement for its argument that the requirements of section 23(1)(d) of the LRA had been met. The Applicant's case is that it is evident from clause 1.1 that it was the intention of the parties that the wage agreement would be binding upon all employees in the bargaining unit, the employees are identified and they are expressly bound. The agreement was concluded by the majority trade unions.

[36] Clause 1.1 of the wage agreement reads as follows:

> 1.1 Scope of the agreement
>
> This agreement applies and will be implemented to all permanent employees who fall within the MSP Miner / Artisan and MSP Operators (Level A-E including U) bargaining units, NPE's and learnerships.

[37] It is further the Applicant's case that the wage agreement was extended to the striking members of AMCU on 10 October 2016. On 10 October 2016 the Applicant's attorney of record addressed a letter to AMCU's attorney of record and the relevant part of the letter reads as follows: *"You are hereby notified that Sasol is extending the wage agreement as agreed to between Sasol, Solidarity, NUM, SACWU and CEPPWAWU on 5 August 2016, to cover all the AMCU members (all employees as defined in the collective agreement) including those who are currently on strike.*

This extension will be effective from 10 October 2016 at 12:00."

[38] AMCU disputes that the wage agreement was extended, as provided for in section 23(1)(d) of the LRA. It is not disputed that the wage agreement was concluded by the majority trade unions and the attack *in casu* is not in respect of section 23(1)(d)(iii).

[39] AMCU's case is that for a collective agreement to be extended to non-parties and to meet the requirements under section 23(1)(d)(i) and (ii), the

collective agreement must expressly state that it binds employees who are not members of the trade unions that are signatories to the agreement. The requirements of section 23(1)(d)(ii) must be met in the agreement itself.

[40] It is further AMCU's case that a collective agreement cannot be extended in terms of section 23(1)(d) by a unilateral determination and notification to this effect by the employer party, as the Applicant purported to do in the letter of 10 October 2016.

[41] In my view there is merit in AMCU's argument. I say so for the following reasons. Firstly, the front page of the wage agreement contains a description of all the parties that entered into the agreement, namely Sasol and NUM, Solidarity, CEPPWAWU, SACWU and AMCU and the last three pages provide for the signatures of the said parties. In this agreement the scope is defined to be applicable and implemented to all permanent employees who fall within the MSP Miner / Artisan and MSP Operators (Level A-E including U) bargaining units, NPE's and learnerships.

[42] It is evident from the wording of the scope of the agreement that it would apply to all permanent employees in the defined bargaining units and this was so on the understanding that all the trade unions would be party to the agreement. The definition of the scope must be read in the context that the scope was defined when participation by AMCU was anticipated.

[43] When AMCU refused to sign the wage agreement, it did not apply to AMCU members they did not become party to the agreement.

[44] The Applicant's argument is that clause 1.1 of the wage agreement is a clear intention of the parties that the agreement would be binding upon all employees in the bargaining unit. This could be so had all the parties signed the agreement, but when it was not signed by AMCU and the non-unionised employees, more was required to extend the agreement. The scope clause defines the scope of the agreement as it would apply to the parties to the agreement and the scope clause is not tantamount to an extension.

[45] The wage agreement could only be extended to the Respondents if the agreement expressly binds employees who are not members of any trade union or members of the trade unions not party to the agreement. Apart from the Respondents who are members of a trade union not party to the agreement, the Applicant has 13,5% non-unionised employees who are also not party to the agreement.

[46] Although the wage agreement purports to identify the employees as 'all permanent employees' within a defined scope, there is nothing in the agreement that expressly binds employees who are not members of any trade union or members of the trade union not party to the agreement. Mr Kennedy for the Respondents argued that the wording of the scope could include all permanent employees as defined, but it is at its best ambiguous and needs further interpretation. The agreement however has to be express and has to state that it extends to non-parties. It cannot extend by way of interpretation as that would fall short of the requirement that the agreement has to bind non-party employees expressly.

[47] Section 23(1)(d)(ii) is clear. It requires the agreement to expressly bind employees who are not members of any trade union or members of the trade union not party to the agreement. This principle was confirmed by the Labour Appeal Court in *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA and others*[4] when it held that reliance on section 23(1)(d) was misplaced where the agreement does not state that it binds employees who are not members of the trade unions that are signatories to the agreement.

[48] What section 23(1)(d)(ii) requires is for the agreement to expressly bind employees who are not party to the agreement. Non-parties cannot be bound as contemplated in section 23(1)(d) by implication, association or subjective interpretation of the agreement.

[49] There is nothing in the wage agreement that expressly binds employees who are not members of any trade union or members of the trade union

[4] (2014) 35 ILJ 1959 (LAC) at paras 25 – 27.

not party to the agreement. To say that it binds all permanent employees in the defined scope, is not enough to satisfy the requirements of section 23(1)(d)(ii).

[50] In my view the Applicant was aware of the fact that the wage agreement, concluded on 5 August 2016, did not expressly bind the employees who are members of AMCU and it is for this reason that the Applicant's attorneys addressed a letter to AMCU's attorneys on 10 October 2016 purporting to extend the wage agreement with effect from 10 October 2016 at 12:00. It was through this letter and on 10 October 2016 for the first time that the Applicant raised the issue of extension of the wage agreement.

[51] Section 23(1)(d) is clear that the agreement should expressly bind the parties and there is no provision in the LRA that allows an employer party to extend a collective agreement in the manner the Applicant attempted to do. Extension of the agreement should be express in the agreement and cannot be done unilaterally outside the terms of the agreement.

[52] Section 23(1)(d) of the LRA effectively provides for the right to strike to be limited in circumstances where a collective agreement is extended in the manner provided for in the said section and where all the requirements of section 23(1)(d) had been met.

[53] It is trite that unless a statute expressly limits rights, a court should avoid an interpretation that has that effect. In *Bader Bop*[5] the Constitutional Court has held that if a statute is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. The right to strike is a fundamental right.

[54] The right to strike can be limited by the extension of a collective agreement if all the requirements of section 23(1)(d) had been met. *In casu* I am not satisfied that the wage agreement expressly binds non parties, thus all the requirements of section 23(1)(d) had not been met and the right to strike

[5] 2003) 24 ILJ 305 CC at para 37.

cannot be limited where a collective agreement has not been extended expressly.

[55] It follows that the ongoing strike action remains protected and the Applicant's application has to fail. In view of this finding, it is not necessary to deal with the other issues raised by the parties.

[56] Mr van As for the Applicant and Mr Kennedy for the Respondents submitted that no cost order should be made and I see no reason to disagree.

Order

[57] In the premises, I make the following order:

1.1. The application is dismissed;

1.2. No order as to costs.

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Connie Prinsloo

Judge of the Labour Court

Appearances

For The Applicant : Advocate M J van As

Instructed by	: Johanette Rheeder Inc Attorneys
For the First and Second	
Respondents	: Advocate P Kennedy SC and Adv N Lewis
Instructed by	: Larry Dave Attorneys