IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No.: **JA 34/09**

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Appellant (First Respondent in Court *a Quo*)
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	Second Appellant (Second Respondent in Court *a quo*)

and

ESKOM HOLDINGS (PTY) LTD	First Respondent (Applicant in Court *a quo*)
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
COMMISSIONER ALLI N.O.	Third Respondent
SOLIDARITY	Fourth Respondent

JUDGMENT

DAVIS JA:

INTRODUCTION

[1] This appeal concerns the question of whether a dispute between an employer and a registered trade union over a failure to agree on the

terms of a minimum service agreement can be referred to compulsory arbitration in terms of section 72 of the Labour Relations Act, 66 of 1995 (LRA). The parties are as cited above.

[2] On 26 September 2000, **Basson J** found that the only forum which is competent to intervene in disputes about minimum services is the Essential Service Committee (ESC) and hence the LRA did not provide that the failure to agree on the terms of a Minimum Service Agreement (MSA) was a dispute on a matter of mutual interest which could be referred to conciliation to the Commissioner for Conciliation, Mediation and Arbitration (CCMA). On 1 June 2009, leave to appeal against this judgment was granted by **Basson J**.

ESSENTIAL FACTS

[3] Respondent operates in an industry that was designated as an essential service in September 1997. Respondent and appellants have been unable to conclude a MSA. In June 2007, appellant sought to refer the failure to agree on the terms of a MSA as a dispute on a matter of mutual interest to the CCMA for conciliation, failing which a referral of the dispute to compulsory arbitration.

[4] Respondent raised an objection to the referral of the dispute to conciliation on the basis that the CCMA lacked jurisdiction to entertain

the dispute. The relevant CCMA commissioner decided that the CCMA did have the necessary jurisdiction to conciliate the dispute.

[5] Appellant then applied to review this ruling. When the matter came before **Basson J,** it was agreed that the following legal question was to be determined:

> *"Do the disputes arising within a designated essential service, which may be referred to the CCMA for conciliation and, if unresolved, to arbitration, include a dispute over a failure to conclude an agreement on the terms of a minimum service agreement?"*

The court *a quo* upheld the review application on the basis that the CCMA lacked the necessary jurisdiction to deal with the dispute. In order to answer this question, it is necessary to turn to the applicable legislation.

THE LEGISLATIVE FRAMEWORK

[6] Section 65(1) of the LRA which is central to the right to strike provides as follows:

> *"(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-*

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) 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;

(d) that person is engaged in-

(i) an essential service, or …."

[7] The key to the present dispute is the scope of the prohibition against striking for any person engaged in an *"essential service".* The identification and determination of whether part or all of the service falls within the definition of an essential service is the task of the ESC.

THE ESC

[8] Section 70(2) provides that:

"*The functions of the essential services committee are-*

(a) to conduct investigations as to whether or not the whole or a part of any service is an essential service, and then to decide whether or not to designate the whole or a part of that service as an essential service;

(b) to determine disputes as to whether or not the whole or a part of any service is an essential service; and

(c) to determine whether or not the whole or a part of any service is a maintenance service."

[9] Section 73 expands on the scope of a dispute as set out in section 70(2)(a) by providing that disputes over whether particular employees or employers are engaged in an essential service, which has already been designated as such, will also be determined by the ESC.

[10] Section 72 gives the ESC the power to ratify minimum service agreements. The section reads as follows:

"72 Minimum services

The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service, in which case-

(a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and

(b) the provisions of section 74 do not apply."

[11] Section 74 then provides a dispute resolution mechanism for disputes arising in essential services. It provides as follows:

"74 Disputes in essential services

(1) Any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer to dispute in writing to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction.

(2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.

(3) The council or the Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission."

THE JUDGMENT OF THE COURT *A QUO*

[12] In concluding that the CCMA lacked jurisdiction to deal with the present dispute, **Basson J** made the following key findings:

1. Collective agreements regarding MSA's, which the ESC may ratify in terms of section 72 of the LRA, do not include awards on the terms of the MSA.

2. There appears to be a deliberate policy choice taken by the legislature to exclude from the powers of the ESC the power to ratify "awards" that provide for a minimum service.

3. The only forum which is competent to intervene in disputes about essential services, including disputes about minimum services, is the ESC.

4. Therefore, there is no statutory basis to provide that the CCMA has jurisdiction to hear the present dispute.

[13] The key finding of **Basson JA** was based on the wording of section 72 which only allows for the ratification of a "collective agreement" which provides for a minimum service. In terms of section 213 of the LRA, a collective agreement is defined as:

> "a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –
>
> (a) one or employers;
>
> (b) one or more registered employers organisations; or

(c) one or more employers and one or more registered employers organisations. “

[14] By contrast, section 72 excludes from the powers of the ESC, the power to ratify an “award” which would provide for the minimum service which falls within the scope of a service designated as essential.

[15] Accordingly, the section cannot bear the weight of appellant’s contention. Hence, **Basson J** found that, if the failure to agree on the terms of the MSA was referred to the CCMA for conciliation and in particular if it failed, it would result in compulsory arbitration and hence the generation of an award. The very wording of section 72 would not empower the ESC to ratify this award, because an award is to be distinguished from a collective agreement, as defined in section 213. In turn, the ESC can only ratify a collective agreement and thus has no jurisdiction to deal with or ratify awards of this nature.

[16] Mr. **Kennedy,** who appeared on behalf of the appellant, submitted, in effect, that the court *a quo* had been beguiled by a formalistic approach to collective agreements. The arbitration of an interest dispute was essentially a substitute for the collective bargaining process which results in the collective award. Accordingly, the arbitration award which is the outcome of an interest dispute, is the substantive equivalent of a collective agreement. On this basis therefore, section 72 could be read to include the ratification of an award. This approach would prevent

the surprising conclusion that the legislature deliberately chose not to provide a dispute resolution mechanism for disputes over MSA's.

[17] The conclusion reached by the court *a quo* and urged upon us by Mr. **Sutherland,** who appeared together with Mr. **Boda** on behalf of the respondents, was that the LRA does not provide a dispute resolution mechanism to deal with the problem which is confronted in the present dispute. In his view, that is the only plausible conclusion which follows from the clear wording of the legislation as set out above.

A RIGHT TO STRIKE

[18] This Court has recognised that the constitutional right to strike should not, in the absence of express limitations, be restrictively interpreted. **Chemical Workers Industrial Union vs Plascon Decorative (Inland) (Pty) Ltd** (1999) 20 ILJ 321 (LAC) at paras 27 – 28. In this judgment the Court referred to the emphasis placed by the Constitutional Court on the importance of the right to strike. See in re: *Certification of the Constitution of the Republic of South Africa* 1996 [10] BCLR 1253 (CC) at para 66 **Cameron JA** (as he then was) then went on to say at para 28:

> *"This is of course not to say that striking should be encouraged or unprocedural strikes condoned but only that there is no justification for importing into the LRA, without any visible textual*

support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express".

[19] As noted earlier, section 65 (1)(d) of the LRA does prohibit persons striking if he or she is engaged in an essential service. The very purpose of a MSA thus is to exempt workers who would otherwise be classified as rendering an essential service, from the prohibition to strike. Accordingly, the existence of the MSA limits the categories of employees designated as rendering an essential service, from the restriction imposed by section 65 (1)(d) on the right to strike.

[20] Viewed within the context of this dispute, the inability of the appellants to conclude a MSA with the first respondent means that the legislative restriction upon striking continues for a category of employees who, were such a MSA to exist, would fall outside of this agreement and thus could exercise their constitutional right to strike. The *impasse* between the parties means that they are now prohibited from doing so because they still fall within the scope of the prohibition set out in section 65 (1)(d).

[21] When the dispute is so classified, the question arises as to whether the LRA was silent about so clear a dispute relating to the scope of a restriction upon the constitutionally entrenched right to strike. In particular, the question must be asked why the clear wording of section 74 of the LRA does not apply to these disputes. Sub-section (1) thereof provides *"[a]ny party to a dispute that is precluded from participating in*

a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission if no council has jurisdiction. "

[22] Section 74(4) provides that, if the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission.

[23] **Basson J** was clearly aware of the implications of section 74. What the learned judge says thereof is instructive:

> *"I am in agreement with the submission that, on the face of it, section 74 of the LRA does not limit the type of dispute that may be referred to the CCMA for compulsory arbitration and that, at least, on the face of it, a dispute about the conclusion (and/or ambit) of a minimum service agreement may (on a reading of this section) be referred to the CCMA as a dispute over which parties may not strike and which may therefore be subjected to compulsory arbitration".* (at para 32).

Notwithstanding this formulation, the learned judge went on to conclude:

> *"The argument, however, no matter how compelling and sound, taking into account the purpose of the LRA which is, inter alia, to allow for the speedy resolution of labour disputes, does not, in my view, provide a*

solution to the undisputed fact that section 72 only allows for the ratification of a "collective agreement" which provides for a minimum service and not for the ratification of an "award". (at para 34).

[24] Significantly, the learned judge elided past the express wording of section 74 to rely exclusively on section 72 in order to come to the conclusion that the CCMA does not have the necessary jurisdiction. There is no reason provided for failing to reconcile section 72 with section 74. Yet, the express wording of section 74 would appear to facilitate the resolution of a dispute concerning a party, who wished to negotiate a MSA, the absence of which precluded the party from participating in the strike because it is said that the party is engaged in an essential service.

[25] Once the MSA has been concluded however, then the dispute will be resolved, in that the relevant party could participate in a strike, free of the prohibition of section 65 (1)(d) because of the existence of the MSA. In other words, the failure of the parties to agree to a MSA has given rise to a dispute, the consequences of which are to preclude a category of workers from participating in a strike. Section 74 provides for a clearly defined mechanism to deal with such an *impasse*.

[26] In summary, by seeking to reconcile section 65, 70 and 74, no additional limitations are placed on the right to strike, save where these are expressly so provided by the LRA. In addition, the interpretation that I have adopted gives clear effect to the wording of the various

sections rather than, in effect, eliding over the implications of section 74 to resolve the problem exclusively in terms of section 72.

For these reasons therefore, ***the appeal is upheld with costs***.

The order of the court *a quo* is substituted with the following order:

> ***"1. Applicant's application to review and set aside the decision of the CCMA is dismissed.***
>
> ***2. It is declared that the CCMA has jurisdiction to deal with the dispute arising from a failure to agree on the terms of the minimum service agreement.***
>
> ***3. Applicant is ordered to pay the respondents' costs."***

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DAVIS JA

I agree.

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PATEL JA

I agree.

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HENDRICKS AJA

APPEARANCES:

For the appellant: P. Kennedy SC

Instructed by: Cheadle Thompson & Haysom

For the Respondent: R. Sutherland S.C, F.A. Boda

Instructed by: Cliffe Dekker Hofmeyr

Date of Hearing: 28 May 2010

Date of Judgement:24 August 2010