REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

Case No: JA 22/10

In the matter between:

UASA – THE UNION	**Appellant**
and	
IMPALA PLATINUM LIMITED	**First Respondent**
NATIONAL UNION OF MINEWORKERS	**Second Respondent**
JH CONRADIE N.O.	**Third Respondent**

Heard: **13 September 2011**

Delivered: **06 March 2012**

Corum: Davis JA, Tlaletsi JA and Sandi AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against a judgment of the court *a quo* which dismissed an application brought by appellant to have a private arbitration award set aside on review. With leave of the court *a quo,* appellants have approached this court on appeal.

Factual Background

[2] On 23 July 1997, first and second respondent, which, at all material times represented the majority of employees employed by first respondent, entered into a threshold agreement in terms of section 18 of the Labour Relations Act 66 of 1995 ('LRA'). This agreement created three bargaining units, one category comprising employees in job categories 2 – 8 and ungraded employees, a second category of artisans and miners and a third category of officials. This agreement established a threshold of 35% representativity by a registered trade union within the defined bargaining unit for the exercise of organisational rights.

[3] On 23 March 1998, first respondent entered into a series of recognition agreements with trade unions which had attained the 35% threshold in one or other of the bargaining units, including second respondent. It appears that subsequent thereto, appellant obtained recognition in the second bargaining unit as well as in the third bargaining unit.

[4] The recognition of appellant continued until 30 October 2006 when first respondent, second respondent and appellant concluded a new recognition agreement. In terms of this agreement, the parties agreed that there would be a single bargaining unit comprising all employees in job categories A3 – A5. In terms of clause 4.1 of this agreement, it was agreed that:

> '[T]he company recognizes the union (NUM) and association (UASA) as the collective bargaining representative bodies of all employees in the… bargaining unit provided that the parties meet the representivity thresholds agreed from time to time and contained in a threshold agreement.' The agreement would terminate 'if the union/association fails to meet the representivity level as determined by the threshold agreement as amended from time to time.'

[5] It is common cause that, at all material times, in excess of 50% of employees in the single bargaining unit were members of second respondent and that 7% of employees in the bargaining unit were members of appellant. In other words, appellant had approximately 2000 members out of the 27000 employees in the bargaining unit.

[6] On 28 March 2007 first and second respondent concluded a bilateral threshold agreement. In terms of this agreement NUM (being the majority union in the workplace) and first respondent agreed to conclude a collective agreement that established a "threshold of representativeness in accordance with the provisions of section 18 of LRA." The threshold for the grant of organisational rights to a trade union would now to be 50% plus one membership within the bargaining unit. It was further agreed that this agreement would replace the 1997 threshold agreement and that trade unions that were currently entitled to organisational rights which did not meet the threshold, would be afforded three months to do so, failing which their rights would be terminated on 30 days' notice.

[7] On 2 April 2007, first respondent gave appellant three months' notice in which to meet this threshold. On 11 May 2007, appellant declared a dispute in this regard in terms of clause 20 of the 2006 recognition agreement. The essence of this dispute turned on appellant's contention that clause 4.1 of the 2006 recognition agreement contemplated that a trilateral and not a bilateral threshold agreement would be concluded, which implied that appellant had to be involved in the conclusion of any such agreement. Following a dispute resolution meeting on 22 June 2007, on 27 June 2007, appellants' referred the dispute to the CCMA, the dispute being described as concerning the interpretation/application of a collective agreement in terms of section 24 of the LRA. It was common cause that appellant had invoked the provisions of clause 20 of the 2006 recognition agreement in proceeding in this manner.

[8] On 4 July 2007, first respondent gave appellant notice that its organisational rights were terminated as from 31 July 2007. On 19 July 2007, appellant launched an application in the Labour Court for urgent interim relief, pending the outcome of the CCMA referral.

[9] In its answering affidavit, first respondent repeated its tender of private arbitration which was finally accepted by appellant on 24 July 2007. It was further agreed that the award would be final and binding 'subject to either parties' right to approach the Labour Court to review the award on appropriate grounds.'

[10] On 27 July 2007, the parties held a pre-arbitration conference where it was agreed that a dispute existed between the parties, "that the exact dispute will be defined in pleading"' that would be exchanged and the arbitrator would preside over the arbitration. On 8 August 2007, the parties held a second pre-arbitration conference where it was agreed that appellant would amend its statement of case and that the arbitration proceedings would be subject to the Arbitration Act 42 of 1965.

[11] Subsequent thereto, appellant delivered an amended statement of case to which first respondent delivered a statement of defence.

[12] These documents presented competing interpretations of clause 4.1 of the 2006 recognition agreement. These differences can be summarised thus:

(i) Appellant pleaded that clause 4.1 provided that it and second respondent would obtain immediate recognition and that such recognition would continue until it failed to meet the threshold of representation, 'agreed from time to time' between all three parties to the agreement.

(ii) By contrast, first respondent pleaded that, in terms of clause 4.1, organisational rights were only extended to trade unions which met the requirements of the 2007 threshold agreement and that it was permissible in terms of section 18 of the LRA for first and second respondents to conclude a bilateral threshold agreement, in that second respondent was the majority union.

The Arbitration

[13] The arbitration was conducted on 14, 15 and 17 August 2007, in which both parties were represented by senior counsel. After hearing argument, the arbitrator (third respondent) dismissed an exception raised by first respondent against appellant's amended statement of case. This order necessitated the hearing of evidence regarding the surrounding circumstances relating to clause 4.1 of the 2006 recognition agreement.

[14] After hearing this evidence, third respondent issued an award in terms of which he dismissed appellant's claim.

[15] On 13 September 2007, appellant launched a review application, together with an application for urgent interim relief, pending the final determination of a review application.

[16] On 18 September 2007, the urgent application was heard and an order of interim relief was granted by Moshoana AJ, in terms of which, first respondent was effectively prohibited from 'derecognising' appellant, pending the final determination of the dispute.

[17] On 15 March 2010 Basson J, in the court *a quo,* dismissed the application for review, essentially on the following grounds:

> 'I accept that the arbitrator articulated the (second) dispute with reference to section 18 of the LRA. I also accept that the arbitrator found that section 18 of the LRA did not sanction the conclusion of the threshold agreement between the company and NUM. What I do not accept is the submission that the arbitrator in deciding the matter on the broader basis namely that the parties must have intended a bilateral threshold agreement, the arbitrator strayed beyond his jurisdiction. He was, after all, given the jurisdiction to interpret clause 4.1 which he did. The arbitrator was, in my view, entitled to rely on the background circumstances to find that UASA's interpretation of the collective agreement to contemplate a tripartite agreement was incorrect and that its contention that the bipartite agreement constituted a repudiatory breach of the collective agreement was therefore incorrect. Although the company's pleaded case did not rely on the common understanding point, the introduction of the point was fully ventilated. Moreover, it certainly cannot be said that the arbitrator had ventured beyond the jurisdiction conferred in the arbitration agreement.
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> The arbitrator, as already pointed out, stayed well within the boundaries of his jurisdiction, which was to interpret whether or not the company breached the recognition agreement. I am thus of the view that the arbitrator was entitled to decide the matter as he did. I am also in agreement with the submission that the pleadings played their ordinary

> roll in the arbitration process. No new disputes were introduced by the amendment. Moreover, the non – pleaded issue was fully ventilated before the arbitration without any objection. In so far as this has been done, and with no objection forthcoming on behalf of UASA, it can hardly be concluded that UASA suffered any prejudice. At the very least it can be concluded that the parties, through their conduct during the argument, tacitly agreed to the arbitrator's terms of reference being extended to include the common understanding point.'

It is against this decision that appellant has approached this court on appeal.

Appellant's case

[18] Mr Grundlingh, who appeared on behalf of appellant, conceded that the review was based on section 33(1) of the Arbitration Act, that is that third respondent had exceeded his powers; hence the ambit of the review was limited. However, Mr Grundlingh submitted that, in the evidence placed before the court *a quo*, third respondent had ventured beyond the jurisdiction conferred on him in terms of the arbitration agreement. That agreement, in effect, indicated that the parties had accepted that the exact dispute which would be dealt with by way of arbitration, would be defined by the pleadings.

[19] In Mr Grundlingh's view, appellant's case as pleaded was clear. It pleaded that the threshold agreement as envisaged in section 4.1 of the 2006 recognition agreement would have to be tripartite, in particular the proviso contained in clause 4.1, namely that the parties meet the representativity threshold 'as agreed from time to time' before that threshold agreement could be triggered. First respondent had pleaded that section 18 of LRA permits an employer and the majority union to conclude a threshold agreement governing organisational rights. It pleaded further that the appellant was not a party to the 2007 threshold agreement by virtue of

section 18 (1) of the LRA which did not require it to be a participant, in that its members were not the majority of the employees employed by the first respondent. Furthermore, the 2006 agreement provided for organisational rights which were extended only to parties which met the requirements of the threshold agreement as enforced in terms section 18 of the LRA.

[20] In summary, Mr Grundlingh submitted that first respondent's case was that the validity of the 2007 threshold agreement was to be located within the provisions of section 18 of the LRA, which permits an employer and the union enjoying majority representation in the workplace to agree on the threshold of representation that a union must meet before it could enjoy organisational rights in the workplace.

[21] Notwithstanding this pleaded case, third respondent did not rely on section 18 of LRA. Instead he found:

> 'I do not need to enter into the controversies raised by her reliance on s18 (Ms Simon who testified on behalf of first respondent). Ms Simon's inappropriate reliance on s18 did not make the threshold agreement invalid. Whatever her motivation was, a solid basis for the agreement was that UASA had, in terms of the recognition agreement, agreed that the employer and NUM were entitled to proceed the way they did.'

Relying on correspondence which had been generated by Mr Kruger, the divisional manager of appellant, third respondent found that, when appellant concluded the recognition agreement, 'it intended the expression "as agreed" to mean "as agreed between the employer and NUM". This is also the employer's intention'.

[22] Appellant's case can be reduced to the following: by deciding the matter on a broader basis of common understanding of an agreement as opposed to the provisions of section 18 of the LRA which had been specifically pleaded by first respondent, third respondent had exceeded his powers and therefore strayed beyond his jurisdiction. For this reason,

he had committed an irregularity which justified the setting aside of his award in terms of section 33 of the Arbitration Act, which permits such interference on the grounds of misconduct, gross irregularity or excess of powers.

Evaluation

[23] In order to evaluate these submissions, it is necessary to return to the case as pleaded by appellant, which appears from the amended statement of case which was placed before third respondent. In para 9 thereof appellant states as follows:

> 'The operative clause by which recognition was conferred (clause 4.1 of the agreement) states that the 'company recognizes the union [i.e. NUM] and association [i.e. UASA] as the collective bargaining representative bodies for all employees and the applicable bargaining unit provided that the parties meet the representivity thresholds as agreed from time to time and contained a threshold agreement.'

In paragraph 10, the following is pleaded:

> '10. The said clause means and was understood to mean that:
>
> 10.1 UASA together with the NUM would obtain immediate recognition from the employer as a collective bargaining representative within the bargaining unit.;
>
> 10.2 the recognition would continue until:
>
> 10.2.1 a party failed to meet the threshold of representation;
>
> 10.2.2 'agreed from time to time' between all three parties in a threshold agreement.'

In para 11, appellant avers that clause 4.1 of the 2006 recognition agreement is unambiguous. The exact pleaded paragraph reads:

‘11. Clause unambiguous

The meaning above assigned to clause 4.1 unambiguously derives from-

11.1 a proper construction of the clause;

11.2 as read in the context of the agreement as a whole;

11.3 and in the context of such evidence it is admissible to place the agreement within its contextual matrix.’

Then follows an alternative to para 11 in which, insofar as it is relevant to this dispute, reads as follows:

‘12.1 Insofar as clause 4.1, so interpreted, might be deemed to be ambiguous, either on the basis that, given the privos (sic), no immediate recognition is conferred or on the basis that a Threshold Agreement can be concluded by more bilateral consensus, then UASA states that the meaning assigned above derives from-

…

12.2.5 the exchanges, oral and written, between the parties in the course of negotiating the recognition agreement, and the stances adopted in the course of such negotiations, and the understanding shared between the parties immediately prior to the conclusion of the agreement;…’

[24] While it is correct to contend that first respondent referred in its pleadings to section 18 of the LRA to justify its interpretation of the 2006 recognition agreement, it was also its case that it denied the interpretation contended for by appellant, namely that clause 4.1 was unambiguous and that the notice of termination constituted a clear breach of the particular clause.

[25] In summary, the precise issue which was placed before third respondent, as an arbitrator was to determine whether the meaning of the phrase, contained in clause 4.1, namely ‘as agreed from time to time’ meant that the threshold agreement provided for a bilateral as opposed to a trilateral

agreement. That was the precise dispute that third respondent was called upon to determine. Indeed, in paragraph 11 of its pleadings, appellant pleaded that clause 4.1 was unambiguous and that such unambiguity derived, inter alia, from 'the context of such evidence, it is admissible to place the agreement within its contextual matrix.' Further, in paragraph 12.2.5 of its amended statement, appellant suggested, as an alternative to para 11, that the meaning of the clause could be gleaned from surrounding circumstances in which included:

> 'the exchanges, oral and written, between the parties in the course of negotiating the recognition agreement, and the stances adopted in the course of such negotiations, and the understandings shared between the parties immediately prior to the conclusion of the agreement.'

Significantly, appellant discovered a letter of 27 July 2006 which was contained in the common bundle of documents which had been placed before third respondent. Third respondent found support for his conclusion in the manner in which Mr Kruger in this correspondence had acknowledged that first and second respondents could set this threshold. Significantly, when Mr Kruger was cross-examined over the contents of this letter, appellant's senior counsel did not object, but rather re-examined the witness upon completion of the cross-examination.

Conclusion

[26] The exact case, which came before third respondent and, which first respondent was required to meet, was whether clause 4.1 of the recognition agreement justified appellant's contention that there was a trilateral agreement in place and that no exclusion of appellant could take place prior to compliance with this trilateral agreement. That first respondent might have raised section 18 of the LRA to justify its interpretation did not mean that third respondent was restricted to examining the implications of section 18 as opposed to discharging the

overall obligation placed upon him, namely to interpret the contents of clause 4.1. of the 2006 agreement. Not only does this emerge from the case as pleaded but also from the conduct of the parties, in particular appellant's conduct during the proceedings before third respondent.

[27] In summary therefore, there is no basis by which to justify the conclusion that third respondent exceeded his powers in arriving at an interpretation of clause 4.1. He performed the task of interpreting the clause, as he was required to do. That interpretation then provided an answer to the dispute between the parties. Accordingly, there is no basis by which to interfere with his decision.

[23] For these reasons, the appeal is dismissed with costs, including the costs of two counsel.

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DAVIS JA

I agree,

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Tlaletsi JA

I agree,

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Sandi AJA

APPEARANCES

For the appellant: R Grundlingh

Instructed by : BESTER & RHOODIE ATTORNEYS

For the respondent: Anton Myburgh SC with Omphemetse Mooki

Instructed by : EDWARD NATHAN SONNENBERGS ATTORNEYS