INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 50/2015

In the matter between:

LONMIN PLATINUM LTD **Appellant**

and

NATIONAL UNION OF MINEWORKERS **First Respondent**

COMMISSION FOR CONCILATION,

MEDIATION AND ARBITRATION **Second Respondent**

ROB MACGREGOR N.O. **Third Respondent**

Heard: **19 May 2016**

Delivered: **28 February 2017**

Summary: Point in *limine* raised that dispute referred to CCMA already adjudicated by the Labour Court – Labour Court ordered cancellation of union organisational rights upon failure by union to prove representativity by certain date – employer cancelling union organisational right on the basis that the resolutive condition in the court order had been met – Union referring a collective agreement dispute to CCMA which upheld employer's contention – commissioner approaching the matter in the wrong footing – commissioner not bound by parties description of the nature of the dispute – commissioner must determine the true issue in dispute in light of the facts of the case - issue

in dispute is a factual one about whether in terms of the court order and within the time stipulated therein union objectively proves that it had not lost its majority. Commissioner failing to determine the true issue in dispute – Labour Court's judgment upheld – appeal dismissed.

Coram: Musi, Sutherland JJA *et* Murphy AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appeal is against an order of Lagrange J in the Labour Court reviewing and setting aside a ruling by a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) that a dispute referred to the CCMA could not be adjudicated because that dispute had been disposed of by an earlier order of the Labour Court. Lagrange J remitted the matter for adjudication.

[2] The controversy derives from these circumstances:

2.1. The appellant (Lonmin) has employed members of the first respondent (NUM) for many years and continues to do so.

2.2. For many years, NUM enjoyed recognition as a collective bargaining partner in terms of a recognition agreement. The recognition of that status was dependent upon NUM maintaining a membership of 50%+1 in the relevant bargaining units. Failure to do so entitled Lonmin to terminate the agreement on notice.

2.3. The labour relations environment of the platinum mining industry experienced considerable turmoil from 2012 onwards which included the advent of a rival trade union vying for the allegiance of the workers.

2.4. In 2013, Lonmin took up the stance that NUM had lost its majority membership status. Notice was given to cancel the recognition on that premise. A question arose about whether Lonmin had properly complied with the provisions of the recognition agreement relating to a notice of termination.

2.5. NUM responded to the notice by launching an urgent application to interdict the cancellation. The underlying point of dispute was whether the majority status of NUM had been lost. The papers filed in that application are not before this Court, and ostensibly were not before the review court. The litigation was settled and a consent order was composed by the parties which Basson J made an order on 28 May 2013. The text of that order is the fount of the critical controversy which arose in the subsequent arbitration before the third respondent, the review application that followed and ultimately in this appeal.

2.6. Time passed. On the critical date, 16 July 2013, Lonmin, basing its stance on the non-fulfilment of the terms of the order, regarded the recognition agreement as terminated, and acted accordingly.

2.7. That stance of Lonmin had been anticipated by NUM, who on 26 June 2013, about three weeks before the termination date, did two things.

2.7.1. First, it referred a dispute to the CCMA. A copy of the standard referral form contains a narrative of the engagement between the parties. From this narrative, the nature and substance of the dispute that was referred has to be divined. That exercise is performed hereafter.

2.7.2. Second, NUM launched another urgent application. Fortuitously, that application (like the later review application, the subject of this appeal) was heard by Lagrange J. The relief sought was an interim interdict to prevent de-recognition pending the resolution of the dispute referred to the CCMA. This urgent application was heard on 15 July 2015, the day before the termination date. The application was dismissed on the grounds of an absence of

urgency. The judgment of Lagrange J is included in the record before this Court, which is alluded to in the arbitrator's ruling, which ruling was later reviewed by Lagrange J.

2.8. Bereft of interim relief, NUM proceeded to exhaust its remedies before the CCMA. However, when the arbitration was convened, Lonmin argued that the CCMA should not hear the matter. The premise advanced was articulated as a lack of jurisdiction. The factual basis was that, so ran the contentions, the effect of the order granted by Basson J was that NUM could not have the controversy about the de-recognition, effected on 16 July 2013,"re-visited".

2.9. The arbitrator held that he could not hear the matter. The rationale in the arguments advanced to the arbitrator and the arbitrator's own rationale for his conclusions, as evidenced in the ruling, shall be addressed hereafter.

2.10. Aggrieved by that outcome, NUM sought a review of the ruling. The matter came again before Lagrange J, who upheld NUM's view, set aside the ruling and ordered that the matter be remitted to the CCMA for a fresh hearing.

2.11. Lonmin seeks to overturn that outcome in this appeal and, in effect, restore the arbitrator's ruling.

<u>What was the dispute resolved by the order of Basson J and what was the dispute referred to the CCMA?</u>

The order of Basson J

[3] The order of Basson J reads thus:

> '(1) The 90-day period contemplated in terms of clause 12.1 of the recognition agreement will run from 16 April 2013 until 16 July 2013.
>
> (2) If the applicant [NUM} is unable to prove that it is sufficiently representative in terms of the recognition agreement by 16 July 2013, then the recognition agreement terminates on 16 July 2013.

(3) The applicant and any other interested party is entitled to inspect the stop order revocation forms of its members and former members from 1 May 2012 to 1 May 2013. The respondent [Lonmin] will place all copies with an independent firm of attorneys in Rustenburg where same may be inspected. The parties will agree the identity of the independent form of attorneys by Tuesday 30 May 2013 for inspection by Friday 31 May 2013.'

[4] The first task is to interpret the order of Basson J. What an order of Court means is what it says, understood in the relevant context. Orders, contracts and statutes all are subject to the same species of scrutiny.

[5] The problem phrase is to be found in paragraph 2. The formulation is deceptively straight forward: an exactly ascertainable event shall occur (ie termination of the agreement) unless another event occurs (ie the inability of NUM to prove it is sufficiently representative). This is an example of a certain event occurring subject to a resolutive condition.

[6] However, how does one detect that the resolutive condition has occurred? What does 'unable to prove" mean? To whom must proof be tendered? This language might spark a belief that some impartial entity ought to examine the purported proof and pronounce a verdict. When one speaks of "proof", the paradigm that is ideally imagined is one that involves an arbiter. However, it cannot be seriously thought that a role for third party was contemplated. Ordinarily, a union has to convince an employer that it has the requisite representativity to obtain the recognition in question. That norm is evident from part A of chapter III of the Labour Relations Acts 66 of 1995 (LRA) which regulates the procuring of organisational rights. Thus, when the order requires the union to "prove" representativity, it must, in this context, be read to mean "satisfy the employer". The terms of the recognition agreement and the provisions of the LRA support that understanding. This understanding of the phrase was accepted by both parties in the hearing of the appeal.

[7] The upshot is that the resolutive condition required NUM to convince Lonmin by 16 July that NUM still had the requisite numbers of members or suffer a termination of the agreement. But that arrangement is pregnant with other

questions. Section 21 of the LRA provides for a procedure to resolve disputes about whether a union may demand certain organisational rights. As regards representativity, an arbitration may be embarked upon to determine the correctness of an allegation of representativity. This suggests that the employer is not at large to accept or reject such a claim but ought to accord or refuse rights based on an objective and, thus, accurate assessment of the facts. It is no part of Lonmin's case that it was entitled to regard the condition as having failed simply at its whim.

[8] It follows, in my view, that when the order of Basson J directed NUM to prove to Lonmin its representative status by a deadline, it was implied that Lonmin must address the facts objectively. However, what ought to occur if Lonmin, *bona fide*, concludes the condition has failed, and NUM, *bona fide*, believes it has been satisfied?

[9] The importance of this point is that the order of Basson J could not be understood to dispose of any dispute of fact about whether the resolutive condition had, objectively, been met. What it did do was no more than order the cancellation of the agreement subject to the proof of NUM's membership status satisfying the representation threshold.

What dispute was referred to the CCMA?

[10] The question upon which the arbitrator had to rule in the *in limine* debate was whether the dispute referred to him was distinguishable from the issue resolved by the order of Basson J. However, in order to address that question, it was essential to first decide what had been resolved by the order of Basson J and what had been referred to the CCMA. In the absence of clarity about that, it would be, axiomatically, impossible for him to deal effectively with the argument *in limine* that the issue before the CCMA and the issue before the labour Court were the same, or that the relief sought was the same.

[11] What was referred to the arbitrator in the standard form 7.11, was a rambling narrative. An arbitrator is not bound by a party's description of the supposed dispute and is required to enquire into it and ascertain objectively the nature of

and substance of the dispute.[1] In the ruling, no reference is made to the referral *per se*, which is a pity, as shall be demonstrated below.

[12] The record before the arbitrator consists of the referral, a notice by Lonmin that it would raise the point *in limine*, and related affidavits by the parties focussed on the *in limine* debate. What the arbitrator does is offer a narrative of the arguments presented in the *in limine* debate. In the ruling, the arbitrator records that Lonmin argued that the sole "dispute" (ie the "same" dispute in both proceedings) was "about a cancellation of a recognition agreement". This description is correct, but in my view, because it is so broad, it is unhelpful. It is tantamount in civil litigation to saying two disputes are the same because they involve a breach of the same contract; perhaps a beginning, but plainly insufficient to conclude the enquiry because self –evidently, that labelling does not inform a court of what is the forensic issue at stake.

[13] NUM fared little better. Its stance was that the dispute was about the interpretation and application of a collective agreement; ie a dispute regulated by section 24 of the LRA. NUM amplified its contention by stating it was about "non-compliance" with the recognition agreement; this can be fairly understood to mean that the terms of the recognition agreement permitting cancellation were not met. If this was what NUM really referred to the CCMA, it would be in deep trouble, because, plainly, the consent order overtook that point; ie, the relationship as regards compliance with the recognition agreement about cancellation for the reason of loss of a majority was novated and thereafter regulated exclusively by the terms of the consent order.

[14] The arbitrator concluded that the dispute before him was about an interpretation and application of a collective agreement. He held the issue before Basson J was that same issue. In his words, he could not "go behind that judgment". It seems to me that the arbitrator took NUM at its word as to the argument advanced on its behalf. If this premise was indeed the correct understanding of the dispute referred; ie, about a breach of the recognition

[1] See: *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC*); CUSA v Tao Ying Industries* (2008) 29 ILJ 2461 (CC) at para 66; *NUMSA (Sinuko) v Powertech Transformers (DFM) and Others* (2014) 35 ILJ 954 (LAC) at paras 16 –21.

agreement, then *res judicata* is indeed a proper defence and the arbitrator is wholly correct.

[15] However, it seems to me, despite what was argued on behalf of NUM at the arbitration, that the true dispute referred is not about the collective agreement at all. What is in dispute is a factual dispute about whether NUM met the terms of the court order; ie did it, objectively, within the time stipulated, prove that it had not lost its majority. This is the proper interpretation of the referral, which, as I have mentioned, was not alluded to at all in the ruling: the text in paragraph 9 of the referral reads:

> 'Lonmin has persistently claimed that thousands of employees who were previously members have revoked such membership and have joined AMCU. NUM was informed, although not by written notice, that the 90 day period for the purposes of de-recognition in terms of clauses 5.1.4, 6.1.5 and 12 of the recognition agreement would commence on 18 April 2013. During the running of the 90 day period….Lonmin purported to bring forward the date for the derecognition from 16 July 2013 to 31 May 2013. In the circumstances and on 28 May 2013 NUM launched an urgent application in this court and sought an order interdicting Lonmin from cancelling or terminating the recognition agreement and ordering Lonmin to make available to NUM copies of all stop orders and notices of revocation given by NUM's members in terms of clause 5.3.1 of the recognition agreement for the period 1 May 2012 to 1May 2013.on the date of the hearing and at court NUM and Lonmin agreed on an appropriate order which was made an order of court. In response to this court order dated 28 May 2013, Lonmin provided copies of the notices to CTH. On 3 June 2013, approximately 13,000 notices (provide in boxes and in no particular order) were delivered to the offices of CTH. Only 12,097 of those notices pertained to the period 1 May 2012 to 1May 2013 in respect of the issues relevant to this application. The balance of the notices were in respect membership sought in respect of other trade unions. After having obtained the notices we have been able to peruse them. We have come across serious defects on the vast majority of the notices. We submit that Lonmin is not entitled to terminate the recognition agreement in these circumstances.'

[16] What does this amount to? A lot of background is given to contextualise the exercise undertaken to verify the validity or invalidity of the revocation notices.

The critical point is made that the basis upon which Lonmin thinks NUM has lost its majority is wrong. Therefore, the referral "submits" Lonmin cannot terminate the agreement. One can quibble about this terminology, but it is plain that what is put up as the dispute is the fulfilment or non-fulfilment of the terms of the court order.

[17] It is true that NUM did not *argue* the case made out in the referral and, bizarrely, misled the arbitrator, but the fact that the argument on behalf of NUM failed to grasp the true dispute referred is not *per se* an insurmountable obstacle to divining the true dispute from the factual matrix as presented, a critical duty of an arbitrator. Had the arbitrator first determined this aspect, he would have been in a position to deal lucidly with the point *in limine.* Instead, it seems that the proceedings were propelled, prematurely, into the debate over the point *in limine* without performing the first task, and misled by the argument on behalf of NUM, the arbitrator reached a mistaken conclusion. The arbitrator must thus be held to have approached the matter in a manner that diverted him from his core function: ie, to determine the true dispute.

[18] The upshot is this: the order of Basson J disposed of the controversy about an alleged breach of the recognition agreement by Lonmin. An order ensued that cancelled the agreement subject to "proof" of majority status by 16 July. The order axiomatically could not dispose of any factual dispute about whether "proof" had been adduced and on time. The dispute referred to the CCMA is exactly that; ie a claim that proof was adduced but that Lonmin improperly ignored it. It must be borne in mind that what is being addressed here are the allegations made by NUM, and the merits or demerits of such allegations are irrelevant to this judgment. In other words, what is alleged is that Lonmin is in breach of the order. This is what the referral means, and what, on the factual allegations, the arbitrator ought to have based his ruling.

The Review

[19] The review was premised on the disputes not being the same and that the order of Basson J did not dispose finally of any issue. Lagrange J, in para [11]

of the judgment refers to NUM's submission; significantly, this submission correctly identifies the real point:

> 'NUM argues that it was not asking the CCMA commissioner to determine the same issue that Basson J decided. The Court merely set out the preconditions for the termination of the agreement, it did not have to decide if the precondition of proving representativeness was actually met. Proof that the precondition was indeed satisfied could only have been proof of an event that occurred subsequent to Basson J's decision. That question is quintessentially a matter of confirming if the threshold of representativeness was met in terms of the collective agreement the application of which Basson J's decision had confirmed.'

Lagrange J then concluded at [13]:

> 'If the CCMA were to interrogate the validity of the termination and if the arbitrator concludes that NUM had in fact established its representativeness before the deadline imposed by the court, then it would mean it had met the precondition and the resolutive event had not occurred and consequently the agreement remained in place. In my view this would not amount to revisiting anything decided by Basson J or amount to arriving at a decision in conflict with the court order.'

[20] The view adopted by Lagrange J is wholly correct. Accordingly, the appeal must be dismissed.

The Remittal of the dispute and mootness

[21] In argument, allusions were made to the inevitable lapse of time between 16 July 2013 and the time this appeal was heard in May 2016. It was suggested that the probabilities were that, whatever the accurate picture might have been of NUM presence almost three years ago, it was unlikely to be so now. Implicit in that contention is a realistic appreciation that once the recognition agreement had been cancelled, irreparable harm was done to NUM's erstwhile position. Upon this foundation it was hinted that the 2013 controversy may now be moot. However, these circumstances are mere speculation without a proper factual basis laid out on affidavit. This Court

cannot address such concerns. Nothing however inhibits such circumstances being ventilated upon a proper basis, if one exists, in the arbitration about the dispute referred, and in a debate about what appropriate relief ought to be granted, if NUM has indeed suffered an injustice.

Costs

[22] In my view, given the contribution of the arguments to the arbitrator by NUM constituting a major source of the confusion resulting in the ruling, and as the review court made no costs order, it is appropriate for this court to follow suit.

The Order

[23] The Appeal is dismissed.

[24] The order of the Labour court is confirmed.

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Sutherland JA

Musi JA and Murphy AJA Concurring

APPEARANCES:

FOR THE APPELLANT:	Adv Michael Van As
	Instructed by Cliffe Dekker Hofmeyr
FOR THE RESPONDENT:	Adv Andrew Redding SC,
	Instructed by Cheadle Thompson and Haysom