**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**REPORTABLE**

Case no: JA 52/2019

In the matter between:

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| **ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION** | **Appellant** |
| and | |
| **UASA -THE UNION** | **First Respondent** |
| **SOLIDARITY** | **Second Respondent** |
| **NATIONAL UNION OF MINEWORKERS** | **Third Respondent** |
| **WESTERN PLATINUM (PTY) LTD** | **Fourth Respondent** |
| **EASTERN PLATINUM (PTY) LTD** | **Fifth Respondent** |
| **THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION** | **Sixth Respondent** |
| **COMMISSIONER E HAMBIDGE N.O.** | **Seventh Respondent** |

**Heard:** **20 August 2020**

**Delivered: 13 November 2020**

**Summary:** *Trade union—Membership— Unions seeking organisational rights must prove memberships ---Failure to provide memberships depriving arbitrator of factual basis to determine level of representivity*.

**Coram: Davis JA, Coppin JA and Kathree-Setiloane AJA**

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**JUDGMENT**

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KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Gush J) dismissing the appellant's ("AMCU") review application against the arbitration award of the seventh respondent ("arbitrator") in which she awarded organisational rights referred to in section 12[1], 13[2] and 15[3] of the Labour Relations Act 66 of 1995 ("LRA") to the first, second and third respondents ("Coalition").

Background

[2] The facts in this matter are largely common cause. For many years, the third respondent, National Union of Mineworkers ("NUM"), was the majority union at Eastern Platinum Ltd and Western Platinum Ltd ("Lonmin"). On AMCU becoming the majority union, it concluded a recognition agreement with Lonmin on 14 August 2013 ("2013 Recognition Agreement") which constituted a threshold agreement as contemplated in s 18[4] of the LRA.

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[1] Section 12 of the LRA deals with access to the workplace of any office-bearer or official of a representative trade union in order to, inter alia, recruit, communicate, and hold meetings with employees.

[2] Section 13 of the LRA deals with the deduction of trade union subscriptions and levies from the wages of an employee who is a member of a representative trade union.

[3] Section 15 of the LRA deals with leave for trade union activities during working hours for purposes of performing the functions of an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated.

[4] Section 18 of the LRA provides:

'**Right to establish thresholds of representativeness**

(1) An employer and a registered trade union whose members are a majority off the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude

[3] In the 2013 Recognition Agreement, Lonmin and AMCU agreed as follows:

> 'Any other trade union having membership representation of at least 30% of all employees within the recognition unit will be afforded the rights set out in section 12 and 13 of the Act.'

and

> 'The parties agree that any other trade union having membership representation of at least 40% of all employees within the recognition unit will be afforded rights set out in section 12, 13, 14 and 15 of the Act and collective bargaining rights. Collective bargaining rights so obtained shall be for categories A to C4.'

[4] On conclusion of the 2013 Recognition Agreement with AMCU, Lonmin terminated its prior recognition agreement with NUM.

[5] In August 2014, Lonmin entered into limited organisational rights agreements with UASA and Solidarity, respectively. It cancelled both these agreements with effect from 5 November 2017.[5]

[6] A coalition was formed between NUM, UASA and Solidarity for purposes of seeking organizational rights at Lonmin. The Coalition made a request to Lonmin, in terms of section 21 of the LRA, to be granted organisational rights referred to in sections 12 , 13 and 15 of the LRA.

[7] Lonmin did not grant the Coalition the requested organisational rights. Consequently, on 1 March 2018, the Coalition referred an organisational rights dispute to the CCMA for conciliation. The conciliation was unsuccessful, and the Coalition referred the dispute to arbitration.

<u>The Arbitration Proceedings</u>



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a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisation's rights referred to in sections 12, 13 and 15.

(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.'

[5] Lonmin did not enter into a limited organizational rights agreement with NUM.

[8] The arbitration hearing took place from 18 to 22 October 2018. At the arbitration proceedings, the Coalition sought organisational rights in terms of section 21(8C)[6] of the LRA on the grounds of a significant interest or a substantial number of employees in the workplace.

[9] On the first day of the arbitration hearing (18 October 2018), the parties concluded a pre-arbitration minute in terms of which they reached the following agreement:

> '2 Agreed numbers
>
> 2.1 The current total permanent workforce at Lonmin's Marikana Operations which excludes Limpopo operations and the Brakpan Refinery, is 22689 of which:
>
> 2.1.1 18969 are AMCU members:
>
> 2.1.2 1067 were NUM members as at 31 October 2017;
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> 2.1.3 735 (263) were Solidarity members as at 31 October 2017; and
>
> 2.1.4 475 were UASA members as at 31 October 2017.
>
> 2.2 There are currently 3247 employees in categories C and D at Lonmin's Marikana Operations of which:
>
> 2.2.1 1002 are AMCU members
>
> 2.2.2 225 were NUM members as at 31 October 2017;
>
> 2.2.3 686 were members of Solidarity as at 31 October 2017;
>
> 2.2.4 417 were members of UASA as at 31 October 2017.

[6] Section 21(8C) of the LRA provides:

'Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12 , 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if –

(a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and
(b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace.'

2.3 There were a further 62 employees in category C and D who are currently members of AMCU of which:

2.3.1 8 were members of NUM as at 31 October 2017.

2.3.2 27 were members of Solidarity as at 31 October 2017;

and

2.3.3 27 were members of UASA as at 31 October 2017.'

[10] It was common cause that the workplace constitutes Lonmin's Marikana Operations and excludes the Limpopo Operations and the Brakpan Refinery.

[11] The arbitrator issued her award on 31 October 2018 in terms of which she granted organisational rights referred to in sections 12, 13 and 15 of the LRA to the Coalition. In granting these rights to the Coalition, the arbitrator acknowledged, that "it was not in dispute that the workplace consists of Eastern Platinum Limited and Western Platinum Ltd (the Marikana Operation) which exclude its Limpopo Operations and Brakpan Refinery".

[12] She concluded that the union membership numbers that she was required to consider were as follows as per the minutes of the pre-arbitration agreement:

'Accordingly, I am satisfied that the Union membership numbers as presented hereunder, can be relied upon.

**Agreed numbers as per the arbitration minute:**

Current total workforce at Lonmin: 22689 of which 18969 are AMCU members;

As at 31 October 2017: 1067 - NUM members;

As at 31 October 2017: 735 - Solidarity members;

As at 31 October 2017: 475 UASA – members.

Currently 3247 employees in categories C and D at Lonmin.

1002 are AMCU- members;

As at 31 October 2017: 255 NUM - members;

As at 31 October 2017: 686 Solidarity - members;

As at 31 October 2017: 417 UASA - members.

**As to the position in relation to categories C and D**

31% of employees in C and D categories: AMCU – members;

41% of employees in C and D categories were historically members of the Coalition Union's as at 31 October 2017.'

[13] In finding that the Coalition represented a substantial number of employees in the workplace and affording them rights referred to in section 12, 13 and 15 of the LRA, the arbitrator concluded as follows:

'I am inclined to find that the Coalition has made out that it represents a substantial number of employees in the workplace, which fall within categories C and D. This is especially so relative to the number of employees in those categories who are represented by AMCU.

As to whether the Coalition represents a significant interest in the workplace, I find there is no need to express an opinion thereon.'

In the Labour Court

[14] Dissatisfied with the award, AMCU sought an order in the Labour Court, on a semi-urgent basis, *inter alia*, reviewing and setting aside the arbitration award and substituting it with an order dismissing the Coalition's application for organisational rights. Alternatively, that its organisational rights dispute be referred back to the CCMA for determination before another arbitrator.

[15] The application was opposed by the Coalition. Lonmin elected not to oppose the review application but rather to abide by the decision of the Labour Court.

[16] On 3 April 2019, the Labour Court dismissed the review application with no order as to costs. In doing so, it reasoned as follows:

'[P]rior to the commencement of the arbitration, the parties entered into a pre-arbitration agreement and recorded the agreement in a minute. In this minute, the parties specifically agreed that for purposes of the arbitration that

> commenced on 18 October 2018, the membership of the Coalition was determined, agreed and recorded in the minute. In particular, it was specifically agreed between the parties that the membership figures as at 31 October 2017 would be accepted for purposes of the arbitration.'[7]

[17] Later in the judgment, the Labour Court expressed the view that both parties appeared to have lost sight of the fact that in preparation for the arbitration and "**for the purposes of the arbitration",** they had expressly recorded their agreement, on the membership numbers of both the Coalition and [AMCU] in the pre-arbitration minute.[8] In the circumstances, the Labour Court held that:

> '[T]he Arbitrator was entitled to take into account the employment figures the parties had agreed on for purposes of determining the dispute. It would make no sense for the parties to agree on the membership figures, place that agreement before the arbitrator and then seek to deviate from it by disputing what they had expressly agreed to. It might well have been a different proposition had either party disputed the number of members.
>
> I am satisfied that the arbitrator, in the circumstances, properly dealt with the challenge raised by [AMCU] in respect to the figures and that this ground of review is without merit. The The arbitrator's application of the MacDonald's judgment does not alter the relevance or importance of the agreement the parties reached prior to the commencement of the arbitration expressly f**or the purposes of the arbitration**. '[9]

[18] In relation to AMCU's final ground of review namely, that the arbitrator misunderstood the significance of the number of employees and the categories in which they fell as recorded in the pre-arbitration minute, the Labour Court held as follows:

> 'This ground of review is similar to the first ground of review argued by [AMCU]. It is premised not only on [AMCU's] misunderstanding of what constitutes a workplace, but also [AMCU's] apparent disregard of the agreement reached concerning the number of employees represented in the various categories as set out in the pre-arbitration minute. There is no doubt that the arbitrator

[7] Labour Court Judgment at par 10.
[8] Labour Court Judgment at para 16.
[9] Labour Court Judgment at para 17.

concluded, based on the figures contained in the pre-arbitration minute, that the coalition had succeeded in establishing that it represented a substantial number of employees within the workplace albeit specifically within categories C and D.'[10]

[19] The appeal lies against the judgment and order of the Labour Court with its leave.

Test on Review

[20] The test on review is well established. It is whether "the decision reached by the arbitrator is one that a reasonable decision-maker could not reach?"[11]

The Parties' Contentions

[21] AMCU's primary contention on appeal is that the Labour Court erred in dismissing its review application because the decision of the arbitrator was not reasonable as contemplated in *Sidumo*[12] as she, amongst other things, applied the wrong test in determining whether to grant organisational rights to the Coalition. It argues that the test that the arbitrator ought to have applied is whether or not the Coalition represents a substantial number of employees in the workplace. However, it is clear from the arbitration award that for purposes of determining this question, the arbitrator considered the number of members the Coalition had in the C and D categories only as at 31 October 2017. She proceeded from a finding that relative to AMCU, the Coalition has a substantial number of members in the C and D categories and came to the incorrect (and unreasonable) conclusion that the Coalition has a substantial number of members in the workplace. The arbitrator's decision was unreasonable for the further reason that she determined the representivity of the Coalition based on its membership as at 31 October 2017, whereas she was required to determine this as at 18 October 2018 (date of commencement of the arbitration hearing). Accordingly, AMCU contends that the Labour Court erred in endorsing the

[10] Labour Court Judgment at para 20.
[11] *Sidumo and Another v Rustenburg Platinum Mines Limited & others* (2007) 28 ILJ 2405 (CC) (*"Sidumo"*)
[12] *Sidumo* (as above)

arbitrator's finding on the mistaken view that that is what the parties agreed to in their pre-arbitration agreement.

[22] To the contrary, the Coalition argues that the arbitrator applied the correct test as set out in section 21(8C)(b) of the LRA and understood precisely what constituted the workplace. It argues that the reference in the last three lines of the arbitration award to "[members] who fall within categories C and D" is merely descriptive suggesting that the Coalition has a substantial number of members in those categories as opposed to the workplace as a whole. Additionally, the arbitrator was entitled to accept the membership numbers of the Coalition as at 31 October 2017. Accordingly, it argues that the decision of the arbitrator is one that a reasonable decision-maker could have reached, hence the Labour Court was correct in dismissing the review application against it.

Analysis

[23] It is common cause that the Coalition did not meet the thresholds of representativeness established by the 2013 Collective Agreement in terms of section 18 of the LRA. Before granting the Coalition the rights referred to in sections 12,13 and 15 of the LRA, the arbitrator was required, in terms of section 21(8C)*(b)* of the LRA, to determine whether the Coalition represents "a significant interest, or a substantial number of employees in the workplace". The word "workplace" is defined in section 213 of the LRA as follows:

> '(c) In all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.'

[24] It is common cause that the workplace in regard to which the Commission's determination had to be made was Lonmin's Marikana Operations (Eastern and Western Platinum) and excluding the Limpopo Operations and the Brakpan Refinery. The workplace was not employees who fall within categories C and D. This notwithstanding, the arbitrator found that the Coalition represents a

substantial number of employees in the workplace, who fall within categories C and D.

[25] Although the Coalition has a substantial number of members in categories C and D, this cannot suggest that the Coalition represents a substantial number of members in the workplace overall. Such an approach is unsustainable on the overall membership numbers as per the pre-arbitration agreement. Of the 22689 employees in the workplace, only 2277 were Coalition members as at 31 October 2017. This is a mere 10% as compared to AMCU's 18969 members which constituted 84% of the workplace as at 18 October 2018. The Labour Court accordingly erred in upholding the arbitrator's factual conclusion that the Coalition represents a substantial number of employees in the workplace, who fall within categories C and D.

[26] Moreover, the Labour Court ought to have recognised that these were the membership numbers of the Coalition at 31 October 2017 and not 18 October 2018. As already alluded to, the arbitrator was required to determine the membership of the Coalition as at 18 October 2018 (date of commencement of the arbitration hearing). Although the pre-arbitration minute, recording the agreed membership of the Coalition as at 31 October 2017, was before the arbitrator at the arbitration hearing, there was no agreement between the Coalition and AMCU as to the Coalition's membership as at 18 October 2018. The Coalition had to therefore establish its membership as at that date.

[27] Crucially, without the Coalition's membership numbers as at 18 October 2018, the arbitrator was simply in no position to determine whether the three minority unions, acting jointly, represented a substantial number of employees in the workplace as contemplated in section 21(8C)*(b)* of the LRA. The arbitrator, however, adopted the view that the agreed membership as at 31 October 2017 reflected the Coalition's current membership as at 18 October 2018. In arriving at this conclusion, she reasoned as follows:

> 'Based on the above, it is therefore my finding that although the membership numbers of the Coalition date back to 31 October 2017, such is reliable in that those employees who have been dismissed or resigned or have dual membership have been disregarded for purposes of establishing

representativeness of the three minority Unions. Also, the matter was referred for conciliation as early as March 2018 and the arbitration was previously postponed by the CCMA on 12 June 2018 due to the unavailability of some representatives and the matter was thereafter re-enrolled for 7 and 8 August 2018. On 7 August 2017, I had dismissed a point in limine raised by Lonmin and declined a request for postponement brought by AMCU. When the matter came before me on 18 October 2018, I understood there was an agreement on membership numbers enjoyed by the Coalition, but on 22 October 2018, a point in limine was raised in relation of thereto. It is simply not practical to re-embark on a verification exercise every time a matter is rescheduled for arbitration, as such may become a delaying tactic. '

[28] However, this was not the agreement between the parties as recorded in the pre-arbitration minute. Moreover, the membership of the Coalition as at 31 October 2017 could not have been the membership a year later, in October 2018. To the extent that the Coalition's membership numbers were disputed by AMCU at the outset, and that the Coalition had failed to provide the arbitrator with its membership numbers at the commencement of the arbitration hearing, the arbitrator was required to invoke her powers under section 21(9)[13] of the LRA to *inter alia* make the necessary enquiries to determine the Coalition's membership. She failed to do this.

[29] Although AMCU had accepted that as at 31 October 2017, none of the members of the three minority unions (NUM, Solidarity and UASA) that formed the Coalition had received resignation forms from their members, this does not support the inference, contended for by the Coalition, that the membership of each of the minority unions remained the same a year later. The membership figures as at 31 October 2017 cannot be relied on by the Coalition to show its level of representivity as at 18 October 2018.



[13] Section 21(9) of the LRA provides:
(9) In order to determine the membership or support of the registered trade union, the commissioner may –
(a) make any necessary enquiries;
(b) we appropriate, conduct a ballot of the relevant employees; and
(c) take into account any other relevant information.

[30] Nor, for that matter, can it rely on the *ex post facto* resolutions taken by the executive committees of Solidarity and NUM respectively, to the effect that Lonmin's employees who had failed to pay their union subscriptions (for whatever reason) remain members of the respective unions pending the outcome of the organisational rights dispute. Notably, by the time these resolutions were taken by Solidarity and UASA on 6 August 2018 and 11 October 2018, respectively, the membership of those members, who failed to pay their membership subscriptions, had terminated automatically by operation of the unions' respective constitutions – and could not be revived by these resolutions.

[31] The arbitrator was, therefore, correct in finding that on a strict interpretation of the constitutions of Solidarity and UASA, by the time their resolutions were passed, the membership of those members who ceased to pay their trade union dues, had already terminated. This notwithstanding, she found that it is "not for an employer or another union to second-guess or interfere in the internal arrangements of a union". The arbitrator cited *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union & others*[14] in support of this finding. However, as persuasively contended by AMCU, she erred in doing so because, in that case, this Court specifically differentiated between the scenario in which employees are seeking to be represented by a union in litigation proceedings, and that in which a union is seeking organisational or collective bargaining rights.[15] Additionally, *MacDonald's* is not authority for the proposition that, in the context of an organisational rights dispute, the employer or another union cannot challenge the internal arrangements of the union where it disputes their membership.

[32] Where minority unions are seeking to establish their entitlement to organisational rights, they must prove their membership. This is a factual question. Thus, were it impermissible for an employer or another union to challenge the internal arrangements of minority unions by disputing their membership, then it will be open to these unions to pass *ex post facto*

[14] *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union & others* (2016) 37 ILJ 2593 (LAC) ("*MacDonald's*).
[15] *MacDonalds* at para 35.

resolutions, as Solidarity and UASA have done in this case, to artificially preserve or inflate their union membership for purposes of being granted organisational rights. This would be untenable.

[33] Fundamentally, in the circumstances where members as at 31 October 2017 ceased to be members thereafter by operation of the law, AMCU was fully entitled to challenge the internal arrangements of the Coalition by disputing its membership. Moreover, that some members of Solidarity changed from stop orders to debit orders, whereas the majority did not do so as at 31 October 2017, supports the inference that they (the majority) accepted the termination of their membership as they did not wish to remain members of Solidarity. Consequently, the *ex post facto* resolutions, taken by Solidarity and UASA respectively, ought to have been rejected by the arbitrator as they do not prove that the Coalition's membership as at 31 October 2017, remained current as at the commencement of the arbitration hearing (18 October 2018).

[34] The Labour Court effectively replicated the arbitrator's error in finding that prior to the commencement of the arbitration, the parties entered into a pre-arbitration agreement in which "it was specifically agreed between the parties that the membership figures as at 31 October 2017 would be accepted for the purposes of the arbitration". On the basis of this error, the Labour Court found that the arbitrator was entitled to take into account the employment figures which the parties had agreed on for purposes of determination of the dispute. It accordingly found this ground of review to be without merit.

[35] The Labour Court erred in arriving at this conclusion. A perfunctory reading of the pre-arbitration minute by the Labour Court would have readily clarified that the agreement was limited to the Coalition's historical membership numbers as at 31 October 2017 and AMCU's current membership numbers as at 18 October 2018. Crucially, in this regard, the Coalition has furnished no explanation for why it was unable to furnish documentary proof of its membership as at the time of the referral of the dispute to the CCMA on 1 March 2018, alternatively 18 October 2018. In the circumstances, the Coalition did not discharge its onus to prove its membership numbers at the commencement of the arbitration hearing.

[36] All things considered, the Labour Court erred in failing to find that the conclusion arrived at by the arbitrator, that the parties had agreed to the Coalition's membership numbers as at the date of the arbitration hearing, and that the workplace constituted employees who fall within categories C and D, was so unreasonable that no reasonable arbitrator would have arrived at such a decision.

Remedy

[37] At the hearing of the review application in the Labour Court, the parties agreed that in the event that the court found that the arbitration award was reviewable, the dispute was to be referred back to the CCMA to be heard by a new commissioner. This notwithstanding, during argument in the appeal, counsel for AMCU submitted that an appropriate order should be that the arbitration award is substituted with an order that the Coalition's organisational rights dispute is dismissed.

[38] In view of the passage of time between the arbitration hearing which took place from 18 to 22 October 2017 and the hearing of the appeal, it would be just and appropriate for this Court not to remit the dispute to the CCMA for reconsideration. In particular, because we are in as good a position as the CCMA to make a determination on the outcome of the dispute, as all the facts required to do so, are before us. This approach is consistent with one of the core objectives of the LRA which is to provide an effective and speedy resolution of labour disputes.[16]

[39] For all these reasons the appeal succeeds.

Costs

[40] I consider it to be just and equitable not to make a costs award against the Coalition as it has an ongoing collective bargaining relationship with AMCU.

[16] Section 1(d)(iv) of the LRA.

Order

[41] In the result, I make the following order:

1. The appeal is upheld with no order as to costs.

2. The order of the Labour Court is set aside and substituted with the following order:

"*1. The first, second and third respondents' application to be granted organisational rights referred to in sections 12, 13 and 15 of the Labour Relations Act 66 of 1995 is dismissed with no order as to costs.*"

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F Kathree-Setiloane AJA

DM Davis JA and P Coppin JA concur:

APPEARANCES

| | |
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| FOR THE APPELLANT: | Mr L Hollander<br>Instructed by Larry Dave Incorporated Attorneys |
| FOR THE FIRST, SECOND AND THIRD RESPONDENTS: | Mr R Grundlingh<br>Instructed by Bester & Rhoodie Attorneys |