THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J3627/18

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
LIST OF AFFECTED NUM MEMBERS	**Second to further Applicants**

and

ANGLO GOLD ASHANTI LIMITED	**First Respondent**
ANGLO GOLD ASHANTI HEALTH (PTY) LTD	**Second Respondent**

Heard: **11 October 2018**

Delivered: **19 October 2018**

Summary: **Section 197(6) of the LRA agreement is a collective agreement in terms of section 123 – when concluded with trade unions with majority representation in the workplace pursuant to negotiations or consultation process and can be extended in terms of section 23(1)(d).**

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] The crisp issue for determination in this urgent application is whether an agreement concluded in accordance with section 197(6) of the Labour Relations Act[1] (LRA) is a collective agreement capable of extension in terms of section 23(1)(d) of the same Act.

[2] The first applicant, the National Union of Mineworkers (NUM) is one of the trade unions recognised by the first respondent, Anglo Gold Ashanti Limited (Anglo Gold). The second to further applicants (applicant employees) are the members of NUM who are in the employ of the second respondent, Anglo Gold Ashanti Health (Pty) Ltd (the Hospital) which is part of Anglo Gold's business units that fall within the South African Region. On 21 May 2018, Anglo Gold issued a notice in terms of section 189(3) of the LRA, to commence a process of consultation in terms of section 189A of the LRA in respect of all its underground and surface units, including the Hospital.

[3] It is important to mention that the ongoing consultation process is conducted in accordance with the collective agreements between Anglo Gold and trade unions NUM, AUSA, Solidarity and AMCU (organised labour), respectively, known as the Labour Relations Recognition and Procedural Framework Agreement ('Recognition Agreement'). In terms of the Recognition Agreement, a Regional Steering Committee constituted by the members of organised labour acts as its constative and advisory forum. The consultation process is facilitated by the Commission for Conciliation Mediation and Arbitration (CCMA) in terms of section 189A(3) of the LRA.

[4] During the consultation held on 4 June 2018, the sale of Anglo Gold's distressed assets, including the Hospital, in order to potentially keep some of the jobs of the affected employees was discussed and accepted. Anglo Gold managed to secure a buyer, JMCA Phodiclinics (JMCA) and concluded a sale agreement that would enable a transfer of the Hospital as a going concern.

[1] Act 66 of 1995 as amended.

However, the transaction was subject to a section 197(6) agreement as JMCA did not wish to take transfer of all employees in the employ of the Hospital.

[5] On 4 October 2017, a meeting was held between the respondents, JMCA and organised labour specifically to sign the section 197(6) agreement in order to give effect to the sale of the Hospital. NUM advised the plenary that it agrees with the agreement in principle but sought an indulgence to secure a mandate from its members. NUM members objected to the section 197(6) agreement for reasons I deem unnecessary to mention herein. However, NUM advised the respondents that, even though it was not going to sign the section 197(6) agreement, it would participate in the implementation thereof in order to enable the transfer to be effected on 12 October 2018.

[6] On 5 October 2018, the applicant employees disrupted the briefing session which sought to finalise the A-list (employees to be transferred) and B-List (employees to be retrenched), threating to boycott the implementation of the section 197(6) agreement. Thereafter, the applicant employees embarked on an unprotected strike. The respondents approached this Court for an order interdicting the unprotected strike. This Court, issued a *rule nisi* on 9 October 2018, returnable on 12 December 2018, granting the respondents interim relief.

[7] In these proceedings, the applicants seek an order interdicting the dismissal of the applicant employees on 11 October 2016.

Legal principles and application

[8] The employees would ordinarily transfer automatically to the new employer in terms of section 197(2) and the old employer would be substituted by the new employer as the employer in respect of all contracts of employment in existence immediately prior to the transfer, except where there is an agreed variation in terms of section 197(6) which states:

> ‘(a) An agreement contemplated in subsection (2) must be in writing and concluded between –

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).'

[9] In *SAMWU and Another v SALGA and Others*,[2] the court aptly expounded the reference to parties that must be consulted in terms of section 189, stating that:

> 'Section 197(6) contemplates the variation of the consequence of the substitution of the transferee employer for the transferor contemplated by section 197(2), and establishes the means by which any variation might be achieved. The subsection requires any variation to be in writing, and concluded between the transferor, the transferee, or the two of them acting jointly on the one hand, and "the appropriate person or body referred to in section 189(1), on the other." Section 189(1) establishes a hierarchy of parties that must be consulted prior to any dismissal effected for a reason related to an employer's operational requirements. The parties who are entitled to be consulted rank as follows – a person required to be consulted in terms of a collective agreement, a workplace forum, and a registered trade union whose members are likely to be affected by the proposed dismissals, and the employees likely to be so affected.
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> In the context of retrenchment procedures, this Court has held that section 189(1) defines a hierarchy of entities and that there is generally no obligation

[2] [2010] 8 BLLR 882 (LC); (2010) 31 ILJ 2178 (LC) at paras 6 to 7.

> on an employer to consult with a person or body placed any lower in the hierarchy… In other words, the person or body that ranks first in the defined hierarchy has the exclusive right to be consulted on the terms of any proposed retrenchment. In the present instance, of course, the right is not one of consultation – section 197(6) defines a hierarchy of bargaining partners'. (Emphasis added)

[10] In the present case, the applicants have no qualm with the above construction. They could not, even if they wanted to, because the sale of the Hospital and the impugned section 197(6) agreement are the products of the ongoing section 189A consultation process in accordance with section 189(1)(a).[3]

[11] The applicants are, however, unwavering in their submission that the section 197(6) agreement is not a collective agreement in terms of section 123 and therefore could not be extended to bind its members in terms of section 23(1)(d). This contention is pegged on the assertion that the Hospital is a workplace and that NUM is a majority trade union in the workplace.

[12] The respondents' dispute that the Hospital is a workplace. Counsel for the respondents submitted that NUM is opportunistic in merely alleging that the Hospital as a workplace without engaging the definition or demonstrating that the Hospital is independent. In *Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and Others*,[4] referred to by the respondents, the Constitutional Court held that the definition of 'workplace' is more focused on employees as a collective and that a location is relatively immaterial. In that regard it was stated:

> '[27] The first part of the definition creates a default rule that, regardless of the places, one or more, where employees of an employer work, they are all part of the same workplace. The second part superimposes a

[3] Section 189(1)(a) states: 'When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult… any person whom the employer is required to consult in terms of a collective agreement; . . .' In this instance, the collective agreement is the Recognition Agreement.

[4] [2017] 7 BLLR 641 (CC) at para 24.

proviso in the form of an exception - regardless of how many places where employees work, different "operations" may be different workplaces only if they meet the criteria the definition specifies. The key is whether an operation is independent - not where it is located. Yet again, no significance is attached to the "places" where employees work, since the term features in both parts of the definition. Each independent operation, which constitutes a separate "workplace", may itself be at one or more separate locations.

[28] Hence the proviso determines not so much whether separate physical places of work are separate workplaces, but rather whether independent "operations", however geographically dispersed, are separate workplaces. The pivotal concept is independence. If there are two or more operations and they are "independent of one another by reason of their size, function or organisation" then "the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation". This is a test of functional organisation, and not geography or location.' (Emphasis added)

[13] In the present case, the Hospital is one of Anglo Gold's business units affected by the restructuring within the South African Region which is the subject matter in the Section 189A consultation process underway. The respondents are adamant that the South African Region is a workplace with 7620 employees and that NUM is a minority union, representing only 32.5% of the total number of employees. It is telling that NUM raises the issues of workplace right at the end of the negotiations and when the section 197(6) agreemnt has already been concluded with the majority trade unions.

[14] Counsel for NUM submitted that the section 197(6) agreement is not a collective agreement capable of extension in terms of section 23(1)(d) of the LRA irrespective of the consultation process that preceded it and undertaken specifically within the context of collective bargaining relations. In *National Union of Metalworkers of South Africa (NUMSA) obo Members v South*

African Airways SOC Ltd and Another,[5] the LAC held that an agreement which meets or satisfies the requirements set out in section 213[6] constitutes a collective agreement and as such retrenchment agreement between an employer and a trade union settling a retrenchment dispute is therefore a collective agreement.

[15] In this instance, similarly, the section 197(6) agreement between the respondents and JMCA as employers and majority unions to opt out of section 197(2) transfer is a collective agreement as it was informed by their mutual interest to save some of the jobs in the Hospital. The new employer made it a condition of the sale transaction that the transfer of employment contracts as going a concern should not be automatically and that was acceptable to all the parties to the section 197(6) agreement.

[16] The applicants are ill-advised in thinking that the contracts of employment of the applicant employees would still be transferred automatically once the deal is off as contended by their counsel. Conversely, instead of saving some jobs, as contemplated in the section 197(6) agreement, all employees in the employ of the Hospital would be retrenched.

[17] In *SAA*[7], the LAC referred with approval to the Constitutional Court's judgment in *Chamber of Mines* where it was held that 'there was nothing in the definition to support the appellant's contention that only collective agreements resolving "matters of mutual interest" could be extended under section 23(1)(d). That phrase covers both interest and rights disputes. A matter of mutual interest is one in which employee and employer parties have a material and simultaneous interest relating to the employment relationship.'

[5] [2017] 9 BLLR 867 (LAC).
[6] Section 213 states '"collective agreement" means 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 by one or more registered employers' organisations; or one or more employers and one or more registered employer's organisations.'
[7] Supra n 5.

[18] The applicants are not overtly challenging the majoritarianism principle contained in section 23(1)(d). In any event, the Constitutional Court has confirmed, on several occasions, that the right to extend collective agreements to non-parties is consistent with the principle of majoritarianism aimed at promoting orderly collective bargaining.[8] Pertinently, in *SAA* the LAC stated:

> 'The short answer to the contention that the Constitutional Court limited itself to instances of collective bargaining, is that the principle of majoritarianism finds expression in section 23(1)(d) as well as in section 189(1) and 189(A) of the LRA. The application of section 23(1)(d) of the LRA to the process set out in section 189 of the LRA is necessary and justifiable to ensure orderly and peaceful consultation process aimed at minimising dismissals and contributing to economic viability. To allow a situation where a minority party would, right at the end of the consultation process, not be bound by a product of a legitimate and fair process, particularly where it was part of that process, would lead to chaotic situations. It would be difficult, if not impossible, for a consultation process under section 189 of the LRA to be concluded.' (Emphasis added)

[19] In the present case, the section 197(6) agreement cannot be excised from the ongoing section 189A consultation process between Anglo Gold and organised labour, including the NUM. Clearly, the negotiations contemplated in section 197(6)(a) were undertaken within the context of section 189A consultation process. In my view, the reasoning in *SAA* is applicable in this instance as the application of section 23(1)(d) to the process set out in section 197(6) is equally unassailable in the light of the fact that a circumscribed transfer in terms of section 197 would absolutely minimise retrenchments and contribute to economic sustainability of both the new and old employers.

[20] It is therefore impermissible for NUM to seeks to bail out from the section 197(6) engagement under the pretext of a business unit based

[8] *Chamber of Mines supra* n 4 at paras 41 to 58; *SAA supra* n 5 at paras 34 to 39; *Transport and Allied Workers Union of South Africa v PUTCO Ltd* 2016 (4) SA 39 (CC) at para 61; *Association of Mineworkers and Construction Union (AMCU) and Others v Royal Bafokeng Platinum Limited and Others* (2018) 39 ILJ 2205 (LAC) paras 19 to 24;

majoritarianism. In fact, in *Chamber of Mines*, it was NUM that correctly labelled this approach a facade or 'something of a phantom' as AMCU, like NUM in this instance, impugned the application of the majoritarianism principle to a sector-wide agreement under section 23(1)(d) when it also sought to enforce its majority at each individual mine. No wonder NUM mounted a tepid assail in this regard.

[21] Recently, the LAC, in *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Ltd and Others*,[9] emphasised the importance of collective agreements in the scheme of the LRA and the fact that they are allowed to trump its provisions. It was pertinently stated:

> 'The voluntary nature of our labour relations system is held together by collective agreements. Collective agreements are part of the package. The gains made by collective bargaining which lead to collective agreements should not be unravelled easily. The risk, of course, being that the unravelling of one thread might lead to the destruction of the entire garment.'[10] (Emphasis added)

Conclusion

[22] To sum up, I am satisfied that the impugned section 197(6) agreement is a collective agreement in terms of section 123, capable of being extended in terms of section 23(1)(d).

Urgency

[23] I accept that the matter is urgent hence I have dealt with it as such. The parties to the impugned section 197(6) agreement could not have waited for a hearing in due course before they could avail themselves to the indulgences that were collectively bargained. Whilst still on this point, I hasten to mention that the respondents abandoned their non-joinder *point in limine* in respect all the other parties to the impugned section 197(6) agreement. They have since

[9] (2018) 39 ILJ 2205 (LAC) at paras 24 and 25.
[10] *Supra* at para 26.

filed their confirmatory affidavits in support of the respondent's opposition and I was advised by counsel for the respondents that they would abide by the Court's decision.

Costs

[24] On the issue of costs, it is well known that costs do not necessarily follow the result in this Court, especially if the parties are in a persisting relationship as typified in the present case.

[25] In the circumstances, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant:		Advocate C Orr
Instructed by	:	Cheadle Thompson and Haysom
For the Respondent:		Advocate A Myburgh SC
Instructed by:		Fasken, incorporated as Bell Dewar Inc.