REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 354/13

In the matter between:

UASA **First Applicant**

AMCU **Second Applicant**

and

BHP BILLITON ENERGY COAL SOUTH AFRICA LTD **First Respondent**

NATIONAL UNION OF MINEWORKERS **Second Respondent**

Heard: **1 March 2013**

Delivered: **5 March 2013**

Summary: Urgent application – organisational rights – LRA s 18. Minority unions applying to interdict employer and majority union from changing thresholds for organisational rights in collective agreement. Earlier agreement between minority unions and employer made a CCMA award and certified in terms of LRA ss 142A and 143. Dispute about application of collective agreement to be decided by CCMA. Interim relief granted pending such determination.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicants are minority trade unions at the workplace of BHP Billiton Energy Coal South Africa Limited (BECSA). They wish to declare a new threshold agreement entered into between BECSA and the majority union, the National Union of Mineworkers (NUM), declared null and void.

[2] The applicants are UASA and the Association of Mineworkers and Construction Union (AMCU). They have formed a coalition for the purposes of establishing organisational rights at BECSA. NUM and BECSA have concluded a new threshold agreement that will have the effect of raising the threshold for organisational rights, thus making it more difficult for the coalition to obtain those rights. The threshold agreement is due to come into effect tomorrow, 2 March 2013. The coalition has brought this application on an urgent basis. They ask the Court to have that agreement "(the 2013 threshold agreement") declared null and void; and to declare a settlement agreement between the coalition and BECSA dated 5 March 2010 valid and binding. That settlement agreement, in turn, confirms the terms of an earlier threshold agreement dated 2005 ("the 2005 agreement") valid and binding.

[3] The respondents, BECSA and NUM, oppose the application. They argue that they are entitled to amend the threshold agreement by virtue of the provisions of section 18 of the Labour Relations Act.[1] NUM also takes issue with the question of urgency.

[4] The applicants' case is based on two contentions: firstly, that the settlement agreement remains valid and binding ("the settlement agreement point"); and secondly, that the 2013 threshold agreement is in any event *ultra vires* s 18 of the LRA because it purports to define the "workplace" as BECSA's operations overall and not, as before, its individual operations ("the workplace point").

[1] Act 66 of 1995 (the LRA).

Background facts

[5] BECSA owns, operates and manages a number of coal mines and related facilities in South Africa. It also manages a number of coal mines and related support facilities that are owned by its subsidiaries.

[6] The applicant unions, as a coalition, have enjoyed organisational rights at BECSA's various operations since 2005 in accordance with the 2005 threshold agreement between BECSA and the majority trade union, NUM. NUM has a majority membership of about 62% across BECSA's operations.

[7] The threshold agreement specifically allows coalition forming:

> "4.1 For the purposes of meeting the thresholds as required in this agreement unions may form coalitions as contemplated in the Labour Relations Act.
>
> 4.2 If a coalition is formed, the coalition and not the individual unions will be recognised and/or granted union rights."

[8] In order to acquire organisational rights as defined in sections 12, 13 and 15 of the LRA for a specific operation, the coalition must establish membership of a minimum of 15% of employees in the bargaining unit at that specific operation. "Operation" is defined as any business site at which employment is provided, including mines.

[9] The coalition referred a dispute about organisational rights to the CCMA in December 2009. That resulted in a settlement agreement reached at the CCMA between the coalition and BECSA on 5 March 2010. The settlement agreement includes the following terms:

> "1. The respondent [BECSA] commits to the organisational rights they have entered into with the coalition of AMCU/UASA (in accordance with the threshold agreement of 2005, clause 3.1.1[2] read with clause 4 and also the IR policy of 2007 clause 4.2).
>
> 3. The respondent acknowledges the coalition's rights to organisational rights with specific reference to access and the right to call mass meetings.

[2] The parties were *ad idem* that the reference to clause 3.1.1 is erroneous. That refers to a 30% threshold for collective bargaining rights. The reference should have been to clause 2.1, providing for a 15% threshold for organizational rights.

These meetings shall be called under the banner of the coalition and shall not be called by individual members of the coalition.

7. It is agreed in principle that with regards to clause 3 of the threshold agreement, the coalition shall be consulted/negotiated with on matters of mutual interest exclusive of those that the national bargaining structures have jurisdiction over."

[10] The settlement agreement was made an award of the CCMA in terms of section 142A of the LRA on 30 June 2010 and certified in terms of section 143 of the LRA on 27 July 2010.

[11] The industrial relations policy provides that, in accordance with section 18 of the LRA, BECSA and the majority union (currently NUM) will agree on threshold levels applicable to recognition and participation in collective bargaining structures in accordance with sections 12, 13 and 15 of the LRA. It also provides for a dispute resolution mechanism. If the dispute is not resolved internally, it must be referred to the CCMA.

[12] On 31 January 2013 BECSA informed the coalition that it had concluded a new threshold agreement ("the 2013 agreement") with NUM. The key features of the 2013 agreement are the following:

12.1 With effect from March 2013 recognition of any trade union in BECSA will be based on the total union membership at asset level (i.e. BECSA as a company) and no longer by operation.

12.2 Organisational rights under sections 12, 13 and 14 of the LRA, which the coalition currently enjoys, will require 30% representation at asset level and not 15% per operation.

[13] The coalition formed the view that the settlement agreement giving effect to the 2005 threshold agreement remains valid and enforceable until set aside, as it was made an award of the CCMA and certified as such. It is also of the view that the settlement agreement – and thus the 2005 threshold agreement – is a valid, binding and enforceable contract.

[14] On 6 February 2013 the coalition's attorneys wrote to BECSA and declared a dispute in terms of the IR policy. In terms of that policy, the parties had to resolve the dispute within 10 days. They could not do so

and the 10 days expired on 20 February 2013. The coalition launched this urgent application on 21 February 2013 and it was set down for hearing on 1 March 2013.

Evaluation / Analysis

[15] Before dealing with the merits with the dispute, I need to consider the question of urgency.

Urgency

[16] BECSA did not take issue with the question of urgency. The NUM did. Mr *Fourie* argued that the coalition had been aware of the 2013 threshold agreement since 31 January, but only launched the application three weeks later for hearing on 1 March 2013, the day before the agreement is due to take effect. He argued that the internal dispute resolution mechanism prescribed in the IR policy is not part of a binding collective agreement; and that the coalition ignored the peremptory provisions of the same policy that provides that unresolved disputes must be referred to the CCMA.[3]

[17] I shall deal with the question of referral to the CCMA under the heading of jurisdiction. With regard to urgency, though, I cannot agree with the submission made on behalf of NUM. Had the coalition not followed the internal dispute resolution steps set out in the IR policy, the respondents may well have been heard to complain that it should have done so and that an application to this court would have been premature.

[18] I agree with Mr *Halgryn*, for the coalition, that it was compelled to first of all exhaust internal remedies. They invoked the internal dispute resolution mechanism by way of a letter to BECSA on February 2013. They also sent a copy of this letter to NUM on 18 February 2013. They asked NUM to agree to suspend the implementation of the 2013 threshold agreement for an agreed period of time and to agree on dates for the filing of papers to eliminate the need to approach this Court on an urgent basis. No agreement could be reached. The coalition then brought the application on

[3] Or private dispute resolution, which is not relevant to this application.

the day that the ten days prescribed in the IR policy expired. The application could not be brought sooner, i.e. before first exhausting the internal dispute resolution remedy contained in IR Policy and it could not be brought any later, as the termination date is the 2nd of March 2013.

[19] I accept that the matter should be heard on an urgent basis. BECSA and NUM have filed comprehensive answering affidavits and the coalition has replied. All of the parties have engaged counsel and they have, commendably, prepared full argument in the time available to them. The matter is ripe for hearing.

Jurisdiction: Interim or final relief?

[20] Mr *Halgryn*, for the applicants, brought the Court's attention to the fact that the internal dispute resolution mechanism contained in clause 5 of the IR Policy provides that:

> "Any dispute affecting a group of employees will be dealt with as follows:
>
> …
>
> …
>
> If the dispute is not resolved within the ten day working day period, the dispute must be referred to the either the CCMA or a private dispute resolution agency."

[21] On the face of it, the dispute in this case is one that affects a group of BECSA's employees and thus the question arises if this dispute has to be referred to the CCMA, there being no agreement to refer the dispute to an agreed private dispute resolution agency.

[22] Mr *Halgryn* submitted that whereas the CCMA has the jurisdiction to adjudicate the interpretation or application of a collective agreement, it has no jurisdiction to pronounce on the validity of a collective agreement.

[23] I find myself unable to agree with this distinction. The parties agree that the threshold agreements, as well as the settlement agreement confirming the 2005 threshold agreement, are collective agreements. Section 24 of the LRA regulates disputes about collective agreements. It provides that every collective agreement must provide for a dispute resolution

procedure about its interpretation or application, as the parties in this case have done. Although he cites no authority for the proposition, Clive Thompson[4] states that:

> "A collective agreement may, like any other agreement, also be determined for fundamental breach. Any dispute about the termination of an agreement would be arbitrable under s 24."
>
> And
>
> "Collective agreements are legally binding instruments. Any dispute over the interpretation or application (which would include enforcement) of a collective agreement is a rights dispute, and a resort to power to settle differences is not permitted".

[24] I agree with Prof Thompson's interpretation. It seems to me that the CCMA – and not this Court – has jurisdiction to arbitrate the question whether the 2005 threshold agreement, read with the settlement agreement, must be applied and enforced.

[25] As Mr *Myburgh* pointed out, the essential substance of the applicants' case is that BECSA's termination of the organisational rights granted to them in terms of the settlement agreement is unlawful – it being on this basis that the ultimate relief sought by the applicants is a declarator that the settlement agreement ought to be complied with. This is the *main* dispute, with the *issues* in dispute being the settlement agreement point and workplace point.[5]

[26] Once it is accepted that the settlement agreement constitutes a collective agreement – as Mr *Halgryn* did -- then the main dispute is simply about the lawfulness or otherwise of the termination of or non-compliance with a collective agreement. This is the quintessential 'interpretation or

[4] Clive Thompson, "Organisational rights and collective bargaining" in Thompson & Benjamin *South African Labour Law* (Vol 1, Service no 41, 2000) AA1-140-141.

[5] See regarding this classification: *Johannesburg City Parks v Mphahlani NO & others* [2010] 6 BLLR 585 (LAC) at paras 14-15; *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council & others* [2010] 6 BLLR 594 (LAC) at paras 11-12; *SAOU & another v The Head of Department, Gauteng Department of Education & others* [2011] 7 BLLR 720 (LC) at paras 37-38.

application' dispute in terms of section 24, in respect of which the CCMA has jurisdiction.[6]

[27] In the process of arbitrating the main dispute, the CCMA would have jurisdiction to make a determination on the issues in dispute, i.e. the settlement agreement point and the workplace point.

[28] The workplace point boils down to the contention that the settlement agreement (and thus the organisational rights granted in terms thereof) could not have been terminated lawfully through the conclusion of an invalid threshold agreement.

[29] The CCMA has jurisdiction to consider and determine this issue because: (a) the workplace point is an issue in dispute, as opposed to being the main dispute (over which the CCMA has jurisdiction); (b) the focus of this issue in dispute remains on the settlement agreement; and (c) in the process of determining a dispute within its jurisdiction, the CCMA has the power to decide all ancillary issues (including issues that it would typically not have the jurisdiction to decide on their own).[7]

[30] In relation to the latter point, the following *dictum* of the LAC in *SACCAWU v Speciality Stores Ltd*[8] warrants mention:

> 'Based on the considerations set out above it must be concluded, with respect, that the court *a quo* erred in coming to the conclusion that the Labour Court had the exclusive competence to determine what a "workplace" was in the dispute between the parties in regard to the appellant's alleged organizational rights. The commission has the competence, in terms of s 21, to determine any dispute which prevents the conclusion of a collective agreement in terms of s 21(3) of the Act. This finding makes it unnecessary to deal with the other aspects raised in the original application and on appeal.'

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[6] Cf *NUCW v Oranje Mynbou & Vervoer Maatskappy Bpk* [2000] 2 BLLR (LC) para 9.

[7] See in addition to the judgments cited above, *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) at paras 60-62.

[8] (1998) 19 *ILJ* 557 (LAC) para [34].

[31] By parity of reasoning, the CCMA, in dealing with a section 24 dispute within its jurisdiction, has the power to determine any issue which gave rise to the termination of the collective agreement.

[32] In the result, this Court only has the jurisdiction to grant interim relief in this matter, as the main dispute falls to be finally determined by the CCMA in terms of section 24.

[33] Mr *Halgryn* submitted that, if the Court finds that the CCMA does have the jurisdiction to adjudicate the validity of collective agreements, then the Applicants seek the following interim relief:

> "An order interdicting and prohibiting the First Respondent from implementing the new threshold agreement pending the outcome of the adjudication of the lawfulness and validity of the settlement agreement and of the lawfulness and validity of the new threshold agreement in the CCMA, if it is found that this is a dispute which may be adjudicated by the CCMA, or any other forum agreed to by the parties.

[34] In these circumstances, I must consider the requirements for interim relief.

The requirements for the granting of interim relief

[35] The requirements for the grant of an interim interdict are well known: a *prima facie* right; irreparable harm; balance of convenience favouring the grant of relief; and the absence of a satisfactory alternative remedy.[9]

[36] In order to establish a *prima facie* right, an applicant must provide *prima facie* proof of facts that establish the existence of a right in terms of the substantive law.[10] A strict legal right to interim relief must be established, not simply a moral or equitable right.[11]

[37] The test applicable to the resolution of factual disputes in applications for interim relief is that set in *Webster v Mitchell*[12].

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[9] Prest *The Law and Practice of Interdicts* (1st ed) at 50-51.

[10] *LAWSA* vol 11 (1st re-issue), para 317; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

[11] Prest at 52.

[12] *Supra.*

The status of the settlement agreement

[38] The parties agree that the settlement agreement is a collective agreement – in this case, between BECSA and the coalition, and not between BECSA and NUM (the majority union) as in the case of the 2005 and 2013 threshold agreements.

[39] BECSA and NUM contend that, because it is a collective agreement, it is capable of termination like any other.

[40] There are two difficulties with this submission. Firstly, the certification of the settlement agreement cannot be overlooked. Secondly, the question is whether BECSA and NUM can agree to terminate a collective agreement between them when that agreement (the 2005 agreement) was converted into a settlement agreement to which NUM was not a party; and that settlement agreement was certified.

[41] Section 142A of the LRA provides that:

> "The Commission may, by agreement between the parties ... make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award."

[42] In this case, the coalition referred a dispute between them and BECSA to the CCMA. The resultant settlement agreement revived the 2005 threshold agreement and specified that BECSA "commits to the organisational rights they have entered into with the coalition of AMCU/UASA (in accordance with the threshold agreement of 2005...)", i.e. 15% membership per operation.

[43] It is that agreement that was made an arbitration award. The fact that the underlying 2005 threshold agreement, as well as the settlement agreement itself, are collective agreements, cannot, in my view, detract from the fact that there is a binding arbitration award that binds BECSA and the coalition. And that award was certified in terms of s 143(3). The effect of that subsection is that the award may be enforced "as if it were an order of the Labour Court".

[44] NUM is not bound by the award; but BECSA is. In *Tony Gois t/a Shakespeare's Pub v Van Zyl & others*[13] this Court held that the certification of an award does not convert it to an order of the Labour Court. It remains an arbitration award, albeit it one that can be enforced as if it were an order of the Labour Court. But, in the circumstances of this case, the fact remains that the settlement agreement is now an arbitration award that is final and binding upon the coalition and BECSA.

[45] There appears to be nothing to prevent NUM and BECSA from entering into new agreements *inter se.* However, in the face of the extant arbitration award, BECSA cannot, on the face of it, enforce new thresholds contrary to those contained in the arbitration award against the coalition.

[46] On this basis, it appears to me that the applicants have established at least a *prima facie* right for the interim relief sought pending arbitration before the CCMA. I will nevertheless consider the arguments pertaining to the effect of s 18 of the LRA and the dispute about the "workplace" in this context.

Collective agreements, s 18 of the LRA and the definition of 'workplace'

[47] The respondents have, understandably, placed much emphasis on the principle of majoritarianism that underlies the collective bargaining regime codified in the LRA.

[48] As the LAC put it in *Kem-Lin Fashions CC v Brunton & another*:[14]

> 'The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism. Some of them

[13] [2003] 11 BLLR 1176 (LC).

[14] [2001] 1 BLLR 25 (LAC) para [19].

are sections 14(1); 16(1); 18(1); 25(1) and (2); 26(1) and (2); 32(1)(a) and (b); 32(3)(a), (b), (c) and (d) and 32(5); 78(b).'[15] (Emphasis added.)

[49] Section 18 reads as follows (under the heading 'right to establish thresholds of representativeness'):

'(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational 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.'

49.1 The word 'workplace' is, in turn, defined in section 213 as follows:

'(a) in relation to the public service …

(b) .....

(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'. (Emphasis added.)

49.2 Brassey[16] comments as follows on section 18:

'It permits a union or group of unions that have recruited the majority of employees in a workplace to introduce, by agreement with the employer, a new threshold for the acquisition of those rights that the statute confers on unions which can demonstrate "sufficient representativeness". The new standard will then apply to third parties who seek to exercise statutory rights provided it is universally applicable to all unions. One object of the section is to enable the parties to put a numerical figure to the otherwise somewhat indeterminate concept of "sufficiently representative" for which the stipulated sections (12, 13

[15] At para 19.

[16] Brassey *Commentary on the Labour Relations Act* (revision service 2, 2006 at A3-23-24).

> and 15) provide. But the primary object of the section is to promote workplace majoritarianism, that is, the system under which a single union or group of unions enjoy exclusive rights or representation within a workplace. …
>
> There is no obligation on the union to demand new thresholds or on the employer to agree to them. The matter is left to be determined in the process of collective bargaining. If the employer refuses to agree to a union proposal, however, the union can call its members out on strike over the issue.
>
> … An agreement establishing new thresholds of representation simply substitutes a new standard for the old one of sufficient representation; it says nothing about the employer's right to act unilaterally. If the union wants to prevent an employer from granting rights to unions who fail to meet the threshold, it must, by collective bargaining, extract a commitment from the employer to this effect.'[17]

[50] That is exactly what BECSA and the NUM did in this instance. Ordinarily, they could have agreed to raise the threshold, as they purported to do in January 2013 with effect from tomorrow, 2 March 2013. But these are not ordinary circumstances. BECSA is bound by the arbitration award that, in turn, compels it to abide by the 2005 threshold agreement that gives AMCU and UASA, acting in coalition, organisational rights based on 15% membership per operation. That agreement cannot bind NUM, but it does bind BECSA.

[51] The related dispute concerns the definition of 'workplace'. Whereas the 2005 agreement assigns organisational rights based on a threshold of 15% per operation, the 2013 agreement intends to do so based on 30% membership across all of BECSA's operations taken together.

[52] Brassey goes on to say this about the definition of 'workplace':

> 'The "workplace" is the organising moment for various rights under the Act. It determines the constituency within which organisational rights are asserted (Chapter II) and a workplace forum can be established (Chapter V).
>
> … <u>In the private sector the nature of a "workplace" is a question of fact</u>. If the employees all work in one place, it is the workplace: if they are divided

[17] At A3-23 – A3-24.

into separate branches or depots, the separate locations can each be a workplace. Deciding whether two locations are separate workplaces entails an examination of the extent to which they operate independently of each other, which in turn entails a consideration of the size, function and organisation of each. Geographical separation will be important, but will not always be decisive. A single workplace might embrace depots in adjoining towns, factories that share a common fence might yet be separate workplaces; and cases will occur in which employees are working in the same building but are in different workplaces because they are in separate divisions. Employees might share a workplace though they never see each other: they might, for example, be software designers who work from home but keep in touch by computer and so share a sort of "virtual reality workplace". The simplicity of the criteria by which workplaces are determined can help to keep demarcation disputes to a minimum but cannot eliminate them entirely.'[18] (Emphasis added.)

52.1 In *Speciality Stores*,[19] the LAC held as follows:

'It must also be kept in mind that the definition of a "workplace" in s 213 of the Act is preceded by the qualification that it bears that meaning "unless the context [of the Act] otherwise indicates". As pointed out by Thompson *Current Labour Law 1997* at 4, the context of determining a proper workplace in terms of the Act in a lock-out dispute may well be different from the context for determining a workplace in an organizational rights dispute. The possibility of different determinations of a workplace, in different contexts, is one contemplated and accepted in terms of the Act itself.'[20]

[53] Given the nature of section 18 and the agreements flowing from it, it is, of course, ordinarily permissible for the parties to a threshold agreement to enter into a new agreement or amend the existing agreement and, in so doing, increase the threshold for the grant of organisational rights. This is

[18] At A9-35 – A9-36.

[19] Para 3.4.4 above.

[20] At para 29.

what occurred, as Mr *Myburgh* pointed out, in *United Association of South Africa – The Union v Impala Platinum Ltd & others*[21].

[54] As I have remarked above, though, these are not ordinary circumstances. NUM and BECSA can enter into and amend agreements in terms of s 18. What BECSA cannot do, given the binding arbitration award of 5 March and 30 June 2010, is to enforce new thresholds as against AMCU and UASA without their consent as long as that award stands. But I say so only in the context of finding that the coalition has established a *prima facie* right, though open to some doubt, for the interim relief they seek; it is for a CCMA arbitrator to delve into and make a finding on the merits in terms of s 24 of the LRA.

Conclusion

[55] For these reasons, I find that this Court does not have jurisdiction to rule on the merits of the main dispute. That dispute must be referred to arbitration. I am satisfied, though, that the applicants have established a *prima facie* right for the interim relief sought pending that arbitration. They have no alternative remedy pending the resolution of the dispute and the balance of convenience clearly favours them.

Costs

[56] There is an ongoing relationship between all four parties before court. This interim order will not finally determine the dispute between them. In these circumstances, and taking into account the requirements of both law and fairness, a costs order is not appropriate.

Order

[57] The respondents are interdicted and restrained from implementing the threshold agreement dated 30 January 2013 pending the outcome of the

[21] [2012] 7 BLLR 708 (LAC).

determination of the dispute about its application or validity by the CCMA or a private forum agreed upon by the parties.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Leon Halgryn SC
	Instructed by Bester & Rhoodie.
FIRST RESPONDENT:	Anton Myburgh SC
	Instructed by Edward Nathan Sonnenbergs.
SECOND RESPONDENT:	Greg Fourie
	Instructed by Cheadle Thompson & Haysom.