



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT

Case no: J 2773/12

In the matter between:

**CONCOR PROJECTS (PTY) LTD T/A
CONCOR OPENCAST MINING**

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER C MOKABANE (N.O.)

Second Respondent

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION (“AMCU”)**

Third Respondent

**N TITANA AND FURTHER
RESPONDENTS (AS PER ANNEXURE
“A” TO THE FOUNDING AFFIDAVIT)**

**Fourth to further
respondents**

Summary: (Leave to appeal – failure to refer a matter to oral evidence – leave refused – Costs – even though another court might have made a different award – exercise of discretion not improper – leave refused)

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE, J

Introduction

- [1] The applicant in this matter, Concor projects (Pty) Ltd, has applied for leave to appeal against the judgement in this matter handed down on 4 January 2013. The applicant requested that the matter be set down for an oral hearing, but on perusal of the application and the parties submissions, I am satisfied that the application for leave to appeal can be determined on the papers. Moreover, as the matter relates to pending industrial action, I believe it would be undesirable to delay the determination of the application longer than necessary. By 19 March 2013, the parties had filed their submissions on the application for leave to appeal.
- [2] In my judgement, I found that the third and further respondents could not embark on protected strike action against the applicant because the Commissioner conciliating the dispute had not issued an advisory award in terms of section 64 (2) of the Labour Relations Act 66 of 1995 ('the LRA') and issued an interdict prohibiting strike action until such an award had been issued. I also ordered that the applicant should pay half the respondents costs.
- [3] The applicant now seeks leave to appeal, not against the order granted, but on the basis that the Court ought to have found that there was a dispute of fact which could not be resolved on the papers over whether or not a settlement agreement had been concluded when the dispute giving rise to the strike action had first been referred to the CCMA for conciliation. It has also appealed against the order of costs.

Appeal against court's failure to refer disputes of fact to oral evidence

- [4] In my judgement, I found that the settlement agreement, in terms of which the dispute was withdrawn, was concluded on the basis of a common misapprehension on the part of both parties that they were bound by a sectoral determination, which supposedly had the effect of preventing workplace level bargaining. Consequently, I held that the respondents were entitled to disregard that settlement agreement.

- [5] The applicant contends that I ought to have referred factual disputes about the events leading to the settlement agreement to oral evidence as they could not be determined on the papers. It contends that the respondents alleged that there was no settlement of the dispute, but merely a withdrawal of the dispute, whereas it had alleged that the dispute was finally settled and not merely withdrawn. The settlement agreement read:

"WITHDRAWAL OF DISPUTE

The applicant voluntarily withdraws the referral and abandons the dispute against the respondent in settlement of his/her case at the CCMA with the full knowledge that he/she will not be able to proceed with this dispute at a later stage."

- [6] The applicant does not dispute the finding that the agreement was concluded on the basis of a common mistake, but contends that the Court ought to have determined, only after hearing oral evidence, whether or not the agreement was merely an agreement to withdraw the dispute, though reserving the right to refer it again, or if it also entailed a final settlement of the dispute. Given my finding that the respondents were entitled to resile from the agreement on the basis that it was concluded under a common misapprehension about the legal effect of the sectoral determination, I do not see how a determination of the factual dispute mentioned by the applicant would have affected the outcome I arrived at, and it was not necessary to determine that dispute in order to reach the conclusion which I did.
- [7] On that basis, I cannot see any reason why another court might find it necessary to refer the dispute over the finality of the withdrawal to oral evidence. Accordingly, the application for leave to appeal on the question whether or not the Court should have referred matters to oral evidence is dismissed.

Appeal against the order of costs

- [8] The applicant contends that I erred in ordering it to pay half the respondents' costs, whereas I ought to have either made no cost award at all. I ordered the applicant to pay half the respondents' costs on the basis

that it only succeeded in obtaining an interdict on one narrow ground out of a number of grounds.

- [9] An order of costs is a discretionary matter on which leave to appeal is not readily granted.¹ Further, section 162(1) of the LRA, which requires an order of costs to accord with the requirements of the law and fairness, entails a value judgment on which views may legitimately differ.² I do not believe that even though another Court might come to a different conclusion in making an order of costs, that my decision entailed an improper exercise of my discretion.

Order

- [10] In the light of the above, the application for leave to appeal against the judgment in this matter handed down on 4 January 2013 is refused.



R LAGRANGE, J
Judge of the Labour Court of South Africa
22 March 2013
(In chambers)

¹ See *Ex Parte Neethling and Others* 1951 (4) SA 331 (A), at 335A-E followed in *Shoprite Checkers (Pty) Ltd v CCMA and others* 2009 (3) SA 493 (SCA) at 502,[32].

² See *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and another* 1999 (4) SA 799 (W) at 805G-H.