THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

Reportable

JR2052/13

In the matter between:

NATIONAL UNION OF MINEWORKERS Applicant

and

COMMISSION FOR CONCILIATION MEDIATION,

AND ARBITRATION First Respondent

ROB MAC GREGOR *N.O.* Second Respondent

LONMIN PLATINUM Third Respondent

Heard: 16 April 2015

Delivered: 29 April 2015

Summary: (Jurisdiction - interpretation of recognition agreement - conditional court order - CCMA determination of representativeness not in breach of *res judicata* principle)

JUDGMENT

LAGRANGE J

Background

[1] On 26 June 2013, the applicant union in this matter, NUM, referred an interpretation and application dispute to the CCMA claiming that the employer, Lonmin, had transferred NUM members to AMCU in breach of the recognition agreement between itself and Lonmin. This had the effect of reducing NUM's membership to the below 50% in the bargaining unit and Lonmin had relied on this to terminate the agreement on 90 days notice to NUM. On the same day, NUM launched an urgent application to stay the termination of the agreement and to reinstate the stop orders of transferred NUM members pending the outcome of the dispute referred to the CCMA. Previously, on 28 May 2013, Lonmin and NUM had agreed to a Court order in terms of which the 90 day notice period stipulated in clause 12.1 of the recognition agreement would only expire on 16 July 2013. In terms of the same order, the recognition agreement would terminate on that date if NUM was unable to prove that it was sufficiently representative by that stage.

[2] The urgent application to stay the termination of the agreement beyond 16 July 2013 pending the outcome of the interpretation and application dispute was dismissed for lack of urgency on 15 July 2013. In terms of the Court order of 28 May 2013, in the absence of any of them being unable to prove that it was sufficiently representative, the recognition agreement would have terminated on 16 July 2013.

[3] The relief sought in the CCMA referral was for the employer to be compelled to revoke the cancellation of the agreement because it was not entitled to do so on the basis of the notices of NUM membership resignations as the majority of those purported resignations were invalid.

[4] At the CCMA arbitration proceedings, Lonmin raised an *in limine* objection that the dispute over the cancellation of the recognition agreement was *res judicata* in view of the Court order of 28 May 2013 in terms of which it terminated on 16 July 2013.

The arbitrator agreed that the Court order of 28 May 2013 had finalised the status of the recognition agreement. He also agreed that remarks made by myself in the course of dismissing the second application for want of urgency did not confer any power on the CCMA to entertain the dispute, and were in any event obiter. Consequently, the arbitrator found he did not have the power to consider the dispute. It is this jurisdictional ruling that NUM seeks to set aside on review.

Grounds of review

[5] As the ruling is a jurisdictional one, the only question for the Court to determine is whether, objectively speaking, the arbitrator was correct.[1]

[6] NUM's grounds of review may be summarised as follows:

6.1 the disputes before the Labour Court and the CCMA were not the same;

6.2 the arbitrator failed to realise the conditional nature of the Court order of 28 May 2013 wherein it was ordered:

> *"If the applicant 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."*

[7] Lonmin disputes the significance of the fact that, part of the order was phrased in a conditional form. It submits that, effectively, that part of the order was only provisional in the sense that it set out a resolutive condition. Consequently, if the condition was not met, the effect of the order was to finally terminate the agreement on 16 July 2013. Thus, by the time it came before the CCMA to decide if the recognition agreement could be validly terminated, that had already occurred in terms of the Court order. It contends that the arbitrator was simply wrong to treat the matter as *res judicata*. Implicit in Lonmin's argument is that NUM failed to prove its representativeness by 16 July 2013.

[1] See *SA Rugby Players Association & others v SA Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC) at paras [40]-[41].

[8] Both parties rely on the well established principles of *res judicata* most recently reaffirmed in the SCA judgment in ***Prinsloo NO and Others V Goldex 15 (Pty) Ltd and Another*** [2], where the court stated:

> *"[23] In our common law the requirements for res iudicata are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg Evins v Shield Insurance Co Ltd1980 (2) SA 814 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties."*[3]

[9] Lonmin obviously concurred with the arbitrator's ruling and reasoning. It submitted that if NUM was correct, the outcome of an arbitration would entail revisiting the Court's conclusion that the agreement would terminate on 16 July 2013 in the absence of NUM demonstrating it was sufficiently representative before that date. Furthermore, a finding by an arbitrator that NUM was sufficiently representative in terms of the recognition agreement immediately before 16 July 2013 could not undo the fact that NUM failed to demonstrate its representativity before the deadline it had agreed with Lonmin, which had been encapsulated in the Court's order. There was no longer a recognition agreement to interpret after that date.

[2] 2014 (5) SA 297 (SCA)
[3] At 305

[10] Lonmin argued that NUM cannot circumvent the termination of the recognition agreement in the Court order by revisiting the issues under the auspices of an interpretation and application dispute. The only way in which the union could have avoided the termination on 16 July 2013 would have been if it had met the condition by proving the sufficiency of its membership prior to that date. If Lonmin had refused to accept such proof, the union could have pressed its claim through contempt proceedings.

[11] 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 pre-condition 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.

[12] The collective agreement provides no internal dispute resolution mechanism for disputes over its interpretation and application, and accordingly either party was entitled to refer the dispute to the CCMA for arbitration under s 24 (2)(a) of the Labour Relations Act, 66 of 1995 ('the LRA').

[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 pre-condition 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.

[14] Practically speaking, the value of the CCMA making such a determination two years after the time that representativeness had to be determined for the purposes of deciding if the agreement was validly terminated in 2013 is obviously debatable, given that it is the current status of NUM's membership that will matter going forward. Nonetheless, I am persuaded that the issue before the arbitrator was not

the same issue before the Court and that in determining if the union had satisfied the membership requirement for retaining recognition, he would not have been deciding the same issue decided by the Court, but would be deciding if the union had failed to satisfy the Court's requirement for non-cancellation of the agreement.

Order

[15] The second respondent's ruling to the effect that he had no jurisdiction to determine the dispute before him in CCMA case no HO 2492-13 dated 07 August 2013 is reviewed and set aside.

[16] It is declared that the CCMA does have jurisdiction to determine whether or not the applicant had established by 16 July 2013 that it was sufficiently representative in terms of the recognition agreement to prevent the valid termination of the recognition agreement by that date.

[17] The matter is remitted back to the first respondent to be set down before a senior commissioner other than the second respondent for hearing.

[18] No order is made as to costs.

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R LAGRANGE

Judge of the Labour Court

Appearance

For the Applicant: **A Redding, SC**

Instructed by: **Cheadle, Thomson & Haysom Inc.**

For the third Respondent: **M Van As**

Instructed by: **Cliffe Dekker Hofmeyr Inc.**