Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J2584/16

In the matter between:

UASA – THE UNION	**First Applicant**
THE NATIONAL UNION OF MINEWORKERS	**Second Applicant**
and	
ANGLO AMERICAN PLATINUM LTD	**First Respondent**
THE ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION (AMCU)	**Second Respondent**
SIBANYE RUSTENBURG PLATINUM MINES (PTY) LTD	**Third Respondent**
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA)	**Fourth Respondent**
TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA (TAWUSA)	**Fifth Respondent**

Heard: 7 November 2016

Delivered: 9 November 2016

Summary: (Urgent – final or interim relief – invalidating collective agreement – agreement concluded with majority union – agreement extended to non-signatories members)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant unions in the matter UASA and NUM, had applied on an urgent basis to prevent the employer ('Anglo') from giving effect to a wage agreement which it reached with the majority union, AMCU. The specific relief sought is firstly, to have the agreement between AMCU and Anglo declared unlawful and of no force and effect, and also to declare the extension of that agreement to members of non-signatory unions unlawful. In the alternative, the applicant unions seek an interdict preventing and from giving effect to the agreement pending the finalisation of any dispute consequent upon that agreement.

[2] At the hearing of the matter the parties agreed that the matter could proceed on the basis that the applicants were seeking final relief. For the sake of finality, the respondents agreed not to contest the urgency of the application, though I have serious reservations whether the application was brought timeously.

[3] The applicant unions and AMCU amongst other unions are party to a recognition agreement ('ERRA') with Anglo. UASA and NUM claim that the court has no jurisdiction to interpret the provisions of ERRA because such disputes must be resolved by arbitration and consequently until that is done in terms of the dispute resolution process of ERRA, the applicability of the wage agreement cannot be determined. In the course of argument,

it was conceded that the lawfulness of the wage agreement is not a matter to be determined by arbitration but by the court.[1]

Background to the dispute

[4] Collective bargaining in terms of the agreement is conducted in a central bargaining forum (CBF). Unions are represented in the CBF based on two distinct formulas. Under the 1st formula any union having 30% representation in what are called "operators or supervisors recognition units" across the group is entitled to one representative in the CBF. In addition, a union having 50% in an operator's unit or supervisory unit at each particular operational units is entitled to another representative for each operators or supervisors unit in which it meets that membership threshold. Operators and supervisors' units referred to employees in grades A1 to B7 and C1 to D1 respectively. The effect of the structure means that the representation of unions in the CBF is not strictly speaking *pro rata* to their total membership at the mine.

[5] Nonetheless, it was common cause that AMCU represented nearly 75% of operators and 13% of supervisory staff, whereas the applicant unions represented approximately 23% of operators and over 75% of supervisory staff across the whole workforce. It is important however to mention that bargaining for employees in operators units and supervisors units took place in the CBF and not in discrete bargaining forums for those different occupational groupings.

[1] See also Aviation Union of Southern Africa & others v SA Airways SOC Ltd & others (2015) 36 ILJ 3030 (LC) at 3037, para [17] and the footnote 14 where the following authorities are mentioned:

> "National Union of Metalworkers of SA & others v Highveld Steel & Vanadium Corporation Ltd (2002) 23 ILJ 895 (LAC); [2002] 1 BLLR 13 (LAC) at paras 19-20. See also Brassey Commentary on the Labour Relations Act (RS 2/2006) at A3-44, who says this about the reach of the phrase 'interpretation or application' in s 24(2): '… its compass is very wide. What is not covered, however, is a dispute over the existence of the agreement as a legal instrument — over whether, in other words, the agreement was concluded and is legal and valid.'"

[6] Without belabouring the detail of the negotiations, the following outline of events is useful to contextualise the evolution of this application. From 19 July to 25 August 2016, five negotiation meetings took place at the CBF with all parties present. At the last meeting AMCU declared a dispute in terms of the dispute resolution procedure in the recognition agreement on the basis of reaching a deadlock.

[7] Two more meetings of the CBF took place attended only by UASA and NUM. At the seventh meeting on 16 September NUM expressly declared a dispute. The facilitators, who were appointed in terms of the collective bargaining procedure, were clearly of the impression that the ordinary negotiation process had come to an end and that both NUM and UASA were also in the dispute resolution phase. It is important to mention at this juncture that immediately after NUM announced that it was going to officially declare a dispute, UASA echoed NUM's complaint that Anglo was negotiating in bad faith and that UASA was "also on deadlock" and that they would join NUM in the "other CBF forum". The facilitators then expressly stated that their understanding was that the CBF had come to an end, that there was one dispute running with AMCU and they assumed that UASA and NUM "will follow the dispute procedure and terror dispute in terms of the procedure." The management input after these comments by the facilitator ended on the basis that management would wait for the dispute declarations before matters could be taken further. Both facilitators then expressed the view that the CBF negotiation process had come to an end and further meetings would focus not on rehashing ground already covered in the negotiations but on dispute resolution.

[8] After that meeting, only NUM formally declared a dispute in a letter dated 19 September in which it set out its wage demands and expressed the hope that ERRA would be followed. In terms of clause 7.3.4.7 of ERRA, disputes arising in the CBF had to be dealt with in terms of the dispute resolution procedure. That procedure provides that the referral of the dispute must be made to the chairperson of the relevant participative forum, who must convene a meeting to facilitate the speedy resolution of the dispute. In the event the relevant forum cannot resolve it in 14 days of the dispute, it must be referred to the National Steering Committee,

subject to the right of parties to extend the initial 14 day period by another 14 day period. In the event the dispute goes to the National Steering Committee and it is unable to resolve it within 14 days, parties may follow the statutory dispute resolution mechanisms of the Labour Relations Act, 66 of 1995 (the LRA').

[9] ERRA only provides for two types of "participative forum": a central participative forum and an operational unit participative forum. The structure of the central participative forum is not, on the face of it, a replication of the CBF structure as it has its own distinct composition. However, for the purposes of dispute resolution, it is clear that only the central participative forum that could be the relevant one for the purpose of processing a dispute arising in the course of centralised bargaining.

[10] Following the meeting on 16 September NUM and UASA each met in a separate meetings with Anglo and then jointly met with the company on 27 September. At that meeting it does seem that the common understanding between the two unions and Anglo was that the agreement would be finalised in a plenary session of the CBF. Between then and 26 October a number of meetings took place between Anglo and AMCU, or Anglo and either or both NUM and UASA. Anglo characterises these as dispute resolution meetings, whereas the applicants describe them as bilateral meetings, which they claim was a common practice in the negotiation process.

[11] It is common cause that although separate meetings took place, the same proposal was made by Anglo to the different union parties. On 18 October AMCU and Anglo signed the wage agreement, though it is claimed that AMCU had done so subject to the unwritten condition that its members had to ratify it. There is some dispute whether it was indeed the case that the signature of the agreement by AMCU was conditional, but nothing turns on this. In any event, on 24 October Anglo met with both the applicant unions and advised them that in principle it had reached agreement with AMCU. It provided them with unsigned copies of the agreement. Anglo requested NUM and UASA to revert to it by 26 October 2016 on whether they accepted or rejected the agreement.

[12] The written answer provided in an email late on 26 October by UASA on behalf of both itself and NUM was equivocal. Firstly, it announced that it had drafted a counterproposal previously conveyed to Anglo in an email of 18 October, which the unions intended circulating to all parties and formally presenting to the CBF. Secondly, the applicants appear to be mystified why the provisional agreement with AMCU had any bearing on the negotiations in the CBF. Thirdly, UASA said it was duty bound to obtain a properly informed mandate in light of the information in the provisional agreement with AMCU and required sufficient time to obtain such a mandate. The two unions then called upon Anglo to convene a "properly constituted" CBF forum on 28 October 2016. On the same day, AMCU confirmed its members' acceptance of the offer. Anglo, relying on the terms of the agreement, imposed it on all employees falling within the occupational categories covered by the agreement.

[13] On 29 October 2016, UASA issued a written declaration of a dispute arising from the provisions of the recognition agreement. It accused Anglo and AMCU of concluding an agreement contrary to the provisions of the recognition agreement by concluding it outside the CBF. It contended that by doing so it rendered this agreement unlawful and formally invoked the dispute resolution process in terms of clause 8.4 of ERRA.

[14] The clauses relied on by Anglo to impose the wage agreement on the members of non-parties were clauses 8, and the provisions of the peace obligation contained in section N of the agreement. Clause 8 simply extends the agreement to all employees of Anglo in specified bargaining units whether or not they were members of AMCU at the time the agreement was concluded. The provisions of the peace obligation prohibit any party to the agreement and the members of AMCU from embarking on industrial action in relation to a host of substantive issues including those agreed upon between AMCU and Anglo. Clause 32 specifically provides that the agreement is entered into for and final settlement of all demands and proposals "made by the parties during the negotiation processes" clause 33 prohibits AMCU or its members from calling for engaging in any industrial action relating to matters regulated in the agreement or which formed part of the proposals and counterproposals in the preceding

negotiations. For the purposes of the agreement the term party refers to AMCU and Anglo.

Merits

[15] There are two essential strands to the applicant's argument in support of its claim that the agreement is invalid. Firstly, it contends that it was unlawful of AMCU and Anglo to conclude the agreement because it was not done within the CBF. Secondly, the applicants believed they were entitled to the exhaustion of any dispute procedure invoked as a result of the negotiations before any agreement could be concluded in the CBF.

[16] In this regard, the applicants rely on a number of provisions in the CBF namely clauses 7.1.1, 7.3.1 and 7.3.3.4 and 7.6, which state:

"7 CENTRAL COLLECTIVE BARGAINING STRUCTURE

7.1 Introduction

7.1.1 The parties accepted that a central collective bargaining structure is required to prevent fragmented negotiations on substantive issues, which include wages and conditions of employment. The structure will be called the Central Bargaining Forum.

...

7.3 Central Collective Bargaining Forum

7.3.1 Objective

7.3.1.1 The objective of the central collective bargaining forum is to facilitate collective bargaining on substantive issues such as wages and terms and conditions of employment.

...

7.3.3 Meetings

...

7.3.3.4 Any agreements reached in the Central bargaining forum shall be reduced to writing and signed by all parties.

(emphasis added)

[17] It is clear that the object of the bargaining structure erected under ERRA was designed to try and ensure that all negotiations take place at a centralised level in one forum at which all the union parties that qualify for collective bargaining representation are present. It is also clear that, even if I ignore for the moment UASA's claim that it was not a party to any dispute arising from the negotiations until it served its letter on 29 October, there is no evidence that the formal disputes declared by AMCU or NUM were referred to the central participatory forum as envisaged by the dispute resolution process. It is equally true that none of the disputes declared in the course of the negotiation process ever went to the national steering committee, which is the last internal forum under the dispute procedure which must attempt to resolve a dispute. Consequently, I agree that the dispute procedures contained in ERRA were not concluded or followed. As far as the disputes declared by AMCU and NUM are concerned, the subsequent steps followed by the parties to resolve that appeared to consist of further bilateral meetings rather than following the agreed dispute procedures in ERRA. In the case of the belated formal dispute declaration by UASA which directly concerns the subject matter of this application, that dispute has also not yet been processed in terms of the dispute resolution mechanisms in the agreement. I will deal with the implications of this non-compliance below.

Is the agreement concluded between Anglo and AMCU in breach of ERRA and therefore unlawful ?

[18] When pressed on this issue, *Mr Grundlingh*, who appeared for the applicants, contended that on a proper interpretation of ERRA, only a collective agreement which *all parties to the CBF* had signed would comply with ERRA. The principal reason advanced for this, in keeping with the general objectives of the agreement to facilitate bargaining in a single forum, is that clause 7.3.3.4 required all parties to the forum to be signatories before an agreement could be reached. Anglo contends that the plain meaning of that clause is simply that if an agreement is reached in the CBF it must be reduced to writing and signed by the parties to the agreement. In order to interpret clause 7.3.3.4 to mean that no agreement

could be reached in the CBF unless every party represented in that forum signed that agreement requires the agreement to be interpreted to mean that no collective agreement could be reached without an absolute consensus amongst all unions represented in the CBF.

[19] The provisions governing participative forums expressly forbid voting and promote consensus decision-making.[2] Furthermore, clause 6.8.4 in the section dealing with decision-making in participative forums states:

> "There is no voting procedure in the participative forums and parties should try and reach consensus."

The deadlock breaking mechanism for participative forums requires the chairperson of the forum to process the dispute in accordance with the dispute procedure.

What is noteworthy is that, similar provisions are absent from the provisions regulating the CBF which contain no reference to consensus decision-making nor contains prohibitions against voting. It is also important to notice that even in the participative forums, there is no absolute requirement that matters must be resolved by absolute consensus. If there is none, the dispute process must be invoked to break the deadlock. If it had been the intention of the parties to ERRA that agreements in the CBF could only be reached by consensus, it is difficult to explain why provisions similar to those set out in the provisions governing the participative forums were not included.

[20] It is naturally possible in terms of the structure of the CBF that consensus on the terms of an agreement could be reached between unions having the majority of employee representatives in the CBF and the employer. Could 7.3.3.4 mean that despite such a majoritarian consensus, the agreement is deemed not to have been reached at the CBF unless and until any dissenting unions also append their signature to such an agreement? To my mind that would mean attaching a decisive deliberative weight to the act of signing the agreement itself, so that no agreement can actually be said to have been reached in the CBF until

[2] Clauses 6.6.2.2, 6.6.6.5 (in respect of the Central participative forum) and 6.7.2.2 and 6.7.4.3 (operational unit participative forums)

even dissenters had signed it. The alternative interpretation is that an agreement can be concluded on the basis of votes in the CBF and the parties which reached agreement must sign the agreement in confirmation of its conclusion. The former interpretation appears to be unnecessarily strained in my view and the more plausible meaning is that the act of signing the agreement is merely confirmatory and not deliberative.

[21] That being the case, I am of the view that it is not necessary for a consensus to be reached before an agreement can be concluded in the CBF.

Does it matter that the agreement with the majority union was concluded in a bilateral meeting rather than in the CBF?

[22] ERRA seeks to promote centralised collective bargaining in a single forum. Further, clause 7.2.2 states:

> "Unions which have Collective Bargaining/Subtantive Negotiation Rights in terms of Clause 6.3 above will be entitled to and required to bargain together in the Central Collective Bargaining Forum."

For the first five meetings this is what happened. Once AMCU declared a dispute, the dispute procedures were supposed to have been followed. It is difficult to see how the requirement to bargain together can be enforced once the dispute procedure is invoked. It follows as a matter of logic that ERRA envisages that if bargaining in the CBF fails, the dispute arising from the failure of the bargaining can result in a resolution being found outside the bargaining forum. A contrary interpretation would mean that the dispute resolution process would be never be capable of resolving a bargaining dispute, because no compromises or trade-offs to settle the dispute (which in truth is still a bargaining process *albeit* with a greater focus on resolving an impasse) could be reached outside the CBF itself.

In this case after the combined negotiations in the CBF broke up when AMCU declared a dispute a resolution in the form of an agreement between Anglo and the majority union, AMCU was reached in a bilateral meeting rather than in formal dispute proceedings. There is no question that this settled the dispute AMCU had declared. Does it mean it is invalid

in law because it was reached after the CBF process could not continue once the dispute was declared? Nothing in ERRA suggests that agreements concluded after the CBF process breaks down as a result of a dispute declaration are necessarily invalidated because they were not concluded in that compulsory bargaining forum, even though the agreement reached resolves the dispute. Moreover such an interpretation would be inimical to the object of having a separate dispute resolution process. There is also nothing in ERRA which appears to require an agreement reached after a dispute is declared must be referred back to the CBF for ratification, though such formalities might be desirable.

[23] Does it not matter though that the dispute procedure was invoked but not actually utilised? It seems to me that it is possible even if a formal dispute resolution process is invoked that the actual resolution of the dispute might still occur outside the dispute resolution forum itself. For example, assume the dispute resolution procedure is invoked but before the first meeting takes place in terms of that dispute procedure the disputant parties resolve their differences. The dispute is nonetheless resolved and no purpose would be served to continue with a dispute resolution process in the absence of an ongoing dispute. The validity or legitimacy of the settlement the disputant parties might reach in such circumstances would not be derived from the forum in which it was reached but in the fact that they concluded an agreement which put an end to the dispute. Of course, it might be otherwise where the parties are expressly bound to *conclude* dispute settlements exclusively under the auspices of a particular forum. But the right to refer a dispute to a dispute procedure does not necessarily entail that the dispute can only be resolved in the dispute resolution proceedings.

[24] In this case, AMCU and Anglo settled their dispute after CBF process could not continue because of the invocation of the dispute process, even though it was not used. The exact status of the ongoing bilateral meetings with UASA and NUM is indeed open to interpretation, but the parties to the CBF had ceased to bargain together from the time AMCU declared a

dispute. Once AMCU's dispute was settled, that effectively also ended the prospect of further meaningful negotiations in the CBF. In the absence of ERRA containing provisions which clearly entail a waiver of AMCU's and Anglo's right to conclude an agreement extending its terms to employees who are not members of AMCU, I cannot see how Anglo could be legally prevented from unilaterally imposing the terms of that agreement on NUM and IMATU's members.

Were NUM and AUSA not entitled to prevent the imposition of the AMCU agreement while they had a pending dispute which had yet to be processed through the dispute procedure?

[25] The first and primary difficulty with the applicants' contention in this regard is that, once again there is no express provision in ERRA prohibiting the conclusion of any agreements unless all parties to the CBF concur.

[26] Secondly, there is nothing that prevented AMCU settling its dispute before NUM and UASA did. Whilst I do not agree with Anglo's submission that clause 32 of the wage agreement, which declares that the agreement is a full and final settlement of all demands and proposals made by parties during the negotiation process, is binding on UASA and NUM as unions by virtue of section 23 (1) (d) of the LRA. This is because that section only permits a collective agreement to be extended to the employees who are non-members of the majority union. Nonetheless, the mere fact that UASA and NUM are not themselves bound by the extended agreement, is of little practical consequence because their members are bound by the extension of the agreement under s 23 of the LRA. Because the extended agreement effectively determines the conditions under which UASA and NUM will work for the duration of the agreement and limits their rights to embark on industrial action or make demands in conflict with the agreement, the two unions' hands are effectively tied as they cannot continue to advance collective bargaining demands on behalf of those members.

[27] The practical consequence is that there can be no meaningful dispute resolution process pursued with the object of securing a different wage

agreement following the extension of the AMCU-Anglo agreement to employee members of non-party unions. Accordingly, even if UASA and NUM can in principle insist on the dispute resolution process being implemented, the result is a foregone conclusion and would be an exercise in futility. In any event, I am not satisfied that an interpretation of the text of ERRA can support the suggestion that the existence of a pending dispute arising from the same negotiations can prevent the conclusion of a settlement that can be extended to all employees, thereby overshadowing the issues in the pending dispute by determining the final outcome of the negotiation process.

Conclusion

[28] In light of the above, I am not satisfied that the applicants have demonstrated a clear right to set aside the wage agreement as unlawful on the basis that it was not concluded in the CBF.

Order

[29] The application is dismissed.

[30] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	R Grundlingh instructed by Bester & Rhoodie Attorneys
FIRST RESPONDENT:	A Myburgh, SC instructed by Edward Nathan Sonnenbergs Inc.
THIRD RESPONDENT:	D Masher of Edward Nathan Sonnenbergs Inc.