IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA108/2019

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION (AMCU)	**Appellant**
and	
UASA – THE UNION ON BEHALF OF ITS MEMBERS	**First Respondent**
SOLIDARITY ON BEHALF OF ITS MEMBERS	**Second Respondent**
NATIONAL UNION OF MINEWORKERS (NUM) ON BEHALF OF ITS MEMBERS	**Third Respondent**
WESTERN PLATINUM LIMITED	**Fourth Respondent**
EASTERN PLATINUM LIMITED	**Fifth Respondent**
REGISTRAR OF LABOUR RELATIONS	**Sixth Respondent**

Heard: **25 May 2021**

Delivered: **29 June 2021**

Coram: **Waglay JP, Savage and Molefe AJJA**

JUDGMENT

SAVAGE AJA

Introduction

[1] This appeal, with the leave of this Court, is against the judgment and orders of the Labour Court (Whitcher J) delivered on 24 June 2019 which declared invalid and unenforceable the agency shop agreement ('the agreement') concluded on 24 April 2019 between the appellant, the Association of Mineworkers and Construction Union ('AMCU'), and the fourth and fifth respondents, Western Platinum Limited and Eastern Platinum Limited ('the employer'). The Labour Court ordered that the employer be interdicted from deducting any agency fee in terms of the agreement in favour of AMCU from the wages of the members of the first, second and third union respondents, UASA, Solidarity and the National Union of Mineworkers (referred to collectively as "the union respondents"), and to refund all deductions made.

[2] At the outset of the hearing, the appeal was reinstated and the late filing of the notice of appeal was condoned. This followed the appeal having been deemed to have been withdrawn in that the record was not filed within the 60-day period provided in Rule 5(8) of the Rules of this Court, with no extension having been granted in terms of Rule 5(17). The respondents did not oppose either application. The appellant's attorney explained that the delay in filing the notice of appeal and the record arose in that the order of this Court granting leave to appeal on 27 February 2020 was not received. Following its receipt, the necessary steps were taken to file both the notice of appeal and the record, as required, although this was more than five months late.

Background

[3] Section 25(3) of the Labour Relations Act 66 of 1995 ('the LRA') provides that:

> 'An agency shop agreement is binding only if it provides that –
>
> (a) employees who are not members of the representative trade union are not compelled to become members of that trade union;..."

[4] AMCU, the majority union in the bargaining unit at the employer's Marikana Operations ("the bargaining unit"), concluded the agency shop agreement ('the agreement') with the employer on 24 April 2019. In terms of the agreement, the employer would deduct an agency fee from the wages of all employees within the bargaining unit. Clause 7.1 of the agreement provided that:

> The parties agree that employees who are not members of any trade union shall not be compelled to be a member of AMCU. '

[5] It is this clause which is the subject of the dispute between AMCU and the union respondents. The union respondents sought on an urgent basis that the Labour Court declare the agreement invalid and unenforceable and that all agency fee deductions in favour of AMCU be refunded. This relief was sought on the basis that the agreement contained no provision that employees who are not members of AMCU but members of another trade union are not compelled to become members of AMCU. Instead, it only referred to employees who are not members of any trade union.

[6] The Labour Court agreed and granted the relief sought. The Court took the view that it was not barred by section 24(2) of the LRA from considering the validity of the agreement in that the dispute was not concerned with the interpretation and application of the agreement but with the validity of the agreement having regard to the strict requirements of section 25.

On appeal

[7] In issue on appeal is whether the Labour Court had the requisite jurisdiction to consider the dispute having regard to section 24(2) of the LRA; and whether the agency shop agreement between AMCU and the employer complied with the provisions of section 25(3) or not. It was contended for AMCU that clause 7 of the agreement substantially complied with section 25, with the result that the agreement is binding. Furthermore, that since section 24(2) requires that disputes concerned with the interpretation and application of a collective agreement be arbitrated by the Commission for Conciliation Mediation and Arbitration ('the CCMA') and the dispute concerned the interpretation and

application of the agreement, the Labour Court lacked the requisite jurisdiction to determine the matter.

[8] The respondent unions opposed the appeal on the basis that the Labour Court held the necessary jurisdiction to consider the validity of the agreement, which was a matter distinct from one concerned with the interpretation or application of an agreement. Furthermore, the agreement was invalid and enforceable in that there had not been compliance with the mandatory requirement of section 25(3).

Evaluation

[9] Section 24(2) states that:

> 'If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if -
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> (a) the collective agreement does not provide for a procedure as required by subsection (1);
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> (b) the procedure provided for in the collective agreement is not operative; or
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> (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.'

[10] This Court in *National Union of Metal Workers of SA & others v Highveld Steel and Vanadium Corporation Ltd*[1] found that where the issue in dispute concerns whether there exists an agreement or not, section 24 does not apply. This was so in that section 24 pertains to the interpretation and application of an agreement, in circumstances in which the validity and enforceability of that agreement is not disputed. In the current matter, a dispute exists as to whether the agreement complies with the mandatory requirements of section 25(3)(a). As such it is the validity of the agreement that is in issue. The matter does not concern an interpretation or application of the issues detailed in section 24(2)*(a)*

[1] [2001] ZALAC 11; 2002 23 ILJ 895 (LAC) at para 20.

to (*c).* As such, the Labour Court was correct in finding that it held the requisite jurisdiction to determine the application before it.

[11] Turning to section 25(3), from the language of the provision, it is apparent that an agency shop agreement is binding only if it provides that employees who are not members of the representative trade union are not compelled to become members of that trade union. This is a mandatory provision. The agreement entered into between AMCU and the employer indicated only "*that employees who are not members of any trade union shall not be compelled to be a member of AMCU*". The clause made provision only for employees who are not union members. It made no provision for employees who are members of other unions and failed to provide that such employees were not compelled to become members of AMCU. It followed that the agreement did not comply with the mandatory requirements of section 25(3). Consequently, the Labour Court did not err in declaring the agreement invalid and unenforceable given its non-compliance with section 25(3), in interdicting the deduction of agency shop fees from the union respondents' members and in ordering the return of fees deducted.

[12] For these reasons, the appeal cannot succeed. There is no reason in law or fairness why an order of costs should not follow the result in this matter.

Order

[13] For these reasons, the following order is made:

1. The appeal is dismissed with costs.

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SAVAGE AJA

Waglay JP and Molefe AJA agree.

APPEARANCES:

FOR APPELLANTS:	A. Cook
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FOR FIRST TO THIRD RESPONDENTS:	R. Grundlingh
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