IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 1605/07

In the matter between:

BHP BILLITON ENERGY COAL SOUTH AFRICA LIMITED	APPLICANT
AND	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	1ST RESPONDENT
ELIAS LEKGWATHI N.O.	2ND RESPONDENT
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	3RD RESPONDENT
NATIONAL UNION OF MINEWORKERS	4TH RESPONDENT
UNITED ASSOCIATION OF SOUTH AFRICA	5TH RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] 1This is an application to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number MP2675-07 and dated 3rd June 2007. The application includes the review and setting aside of the

variation ruling purportedly issued by the Commissioner under the same case number MP2675-07 and dated 4th July 2007.

[2] The third respondent opposed the application on a qualified basis.

Factual background

[3] The applicant is a coal mining company which was prior to 2003 known as Ingwe Colliers Ltd. It owns and manages various coal mines. Before 2003, the industrial relations structures and processes at the applicant's mining operations and other facilities were primarily regulated, and took place, at mine level in terms of collective agreements entered into at each mine or facility. This applied also to the mines and facilities managed by the applicant.

[4] The third respondent (AMCU) had, for some time, the majority of its members employed in the B-level job grades at the applicant's Douglas Colliery. Consequently a recognition agreement in terms of which AMCU was recognized for the purposes of collective bargaining in respect of its members in the B-level job grades at the Douglas Colliery was concluded. This agreement also granted AMCU various organizational rights.

The Ingwe Forum

[5] The respondents, AMCU, NUM and UASA, agreed with the applicant during 2003, to establish a centralised bargaining forum, known as the "Ingwe Forum.", whose sole purpose was to facilitate collective bargaining including at the Douglas Colliery.

[6] The structure and functioning of the Ingwe Forum was to be formalized in the document known as the "Industrial Relations Policy' ("IR Policy"). The IR Policy was also supposed to regulate the granting of organisational rights and collective bargaining rights within the Ingwe operations. However, the document was not yet formally adopted at the commencement of the 2003 wage negotiations. It would appear that the parties nevertheless informally proceeded with their negotiations within the frame work of the document in respect of the operations, mines and facilities covered by the Ingwe Forum. The agreement concluded arising from these negotiations was applicable for the period 1st July 2003 to 30th June 2005.

The Threshold Agreement

[7] One of the issues which the parties had apparently envisaged would have been addressed by the IR Policy concerned the degree of representivity that would be required of a union, before it could be allowed to participate in the forum. Because of failure to reach an agreement on the threshold, the NUM referred a dispute to the first respondent (the CCMA) concerning this issue. The conciliation having failed the matter was referred to arbitration.

[8] The parties reached an agreement prior to the conclusion of the arbitration proceedings. In terms of this agreement, a union would be entitled to participate in collective bargaining at the Ingwe operations covered by the Ingwe Forum, if it represented at least 30 per cent of all employees employed by the Ingwe operations within the A, B and C levels. It was further agreed that a union

would be entitled to bargain collectively at an operation in respect of issues of specific relevance to that operation provided that it enjoyed the 30 percent representivity. This agreement was made an award of the CCMA.

[9] On 11th March 2005, the applicant concluded a threshold agreement with the NUM in terms of which the representivity requirements were regulated.

[10] The implementation of the IR Policy effective from 1st July 2005, entailed the determination of which unions would be entitled to organisational rights and/or collective bargaining rights, as envisaged in the IR Policy. The NUM was the only union that had the required degree of representivity to participate in the Forum. However, both AMCU and UASA were entitled to certain organisational and other rights within various operations.

[11] A further agreement was concluded between the applicant and the NUM in terms of which it was agreed that the applicant would formally inform the various unions that were recognised previously, of the termination of their rights arising from the previous recognition agreements, as these agreements had been superseded and supplanted by the provisions of the IR Policy and the threshold agreement. In this respect AMCU was duly informed that it would no longer enjoy the rights that it may have acquired under mine-level recognition agreements and that it would not be entitled to collective bargaining rights at the Ingwe Forum as its union membership did not meet with requisite representivity. AMCU was nevertheless entitled to organisational rights at Douglas Colliery and Middelburg Mines.

[12] In terms of clause 4 of the Threshold Agreement, two unions could form a coalition with the view to achieving the threshold through their joint membership. It was for this reason that AMCU and UASA formed a coalition and it was also on the basis of this agreement that the two unions applied formally for membership of the Ingwe Forum for purposes of the 2005-2007 wage negotiations. They were formerly recognized by the Forum on 14th July 2005. And during this round of negotiations the applicant reached an agreement with the unions including AMCU and UASA acting together as an as an *"alliance"*.

The period 2006 and 2007

[13] The IR policy was amended during the course of 2006. The amendments included the change of the name Ingwe Forum to the BHP Billiton Energy Coal SA Limited Forum (BECSA). The amendments also abolished collective bargaining at operational level. At the time of the amendment AMCU was not a party to BECSA which consisted of the applicant and the NUM. However UASA was, invited and joined BECSA pursuant the proposal to do so by NUM.

[14] At a meeting held during February 2007, AMCU queried why they were not permitted to join BECSA. Having failed to resolve this issue with the applicant, AMCU referred a dispute to the CCMA which was then scheduled for a hearing on 14th May 2007. The outcome of the arbitration hearing was that the applicant was ordered to include AMCU in the negotiations process.

Grounds of review

[15] The applicant's challenge to the arbitration proceedings and the award is based on several grounds which can be categorized under the following heading, (a) gross-irregularity in the conduct of the proceedings, (b) non-joinder of NUM and UASA, and (c) failure to the record the proceedings.

[16] **Gross irregularity:** Under this heading the complaint of the applicant is that the commissioner:

- Refused to afford it the opportunity to cross-examine AMCU's representative on the evidence he presented;
- Failed to afford the applicant the opportunity to peruse the bundle of documents which the respondent had presented during the proceedings;
- Refused to afford the respondent's representative the opportunity to present oral evidence which he had requested;
- Did not require that evidence presented before him be presented under oath;
- Misconceived the entire dispute and the nature of the threshold agreement in particular in relation to the provisions of section 18 of the Labour Relations Act 66 of 1995 (the LRA).

[17] **Non-joinder:** The applicant contended that NUM and UASA should have been joined in the arbitration proceedings.

[18] **Additional grounds:** The complaint under this heading concerns the manner in which the CCMA dealt with the variation of the award.

[19] **Absence of proper record:** The applicant contends that the Commissioners failed to record or keep a proper record.

The arbitration award

[20] It would appear from the reading of the award that the Commissioner formulated the issue for determination to be:

> *"Whether the action of BECSA, NUM, and UASA by excluding AMCU during the negotiation of downscaling and other issues of collective bargaining Forum and Wage Agreement are unlawful or in contravention of the Collective Bargaining Forum and Threshold Agreement, or not."*

[21] In the first paragraph under the heading "ANALYSIS OF EVIDENCE AND SUBMISSIONS," the Commissioner confirms the above formulation of the issue that was before him. However, in the second paragraph of the same heading he formulates the issue as concerning whether or not the applicant and the NUM have complied with the provisions of section 18 of the Labour Relations Act 66 of 1995 (the LRA). In the subsequent sentence the Commissioner seems to suggest in his conclusion that the case of AMCU was based on the alliance or coalition agreement. In this regard the Commissioner finds that the joint membership of UASA and AMCU was 30%. It would appear from the reading of the award that this is what influenced the Commissioner to

order the applicant to *"engage AMCU with all the negotiations" and to allow AMCU "to be a party to any proceeding (sic) in the interest of their members."*

Evaluation of the award

[22] As stated earlier AMCU opposed the review application on a qualified basis. In this respect AMCU contended that in as far as the conclusion on the facts were concerned the decision of the Commissioner was correct. It however conceded that the formulation of the relief was inappropriate. This did not according to AMCU call for the setting aside of the award but for its rectification.

[23] AMCU suggested that the award of the Commissioner be corrected and formulated along the following lines:

> *"1. The Threshold Agreement is not binding during the period of the Applicants' (sic) unequal application of thereof to UASA and AMCU by inviting UASA to participate in the BECSA Forum while ANCU was not afforded the same right.*
>
> *2. Any collective agreements concluded in the BECSA Forum during the period of the unequal application of the Threshold Agreement, are therefore null and void from the outset."*

[24] AMCU was indeed correct to concede that the award of the Commissioner was inappropriate in that the essence thereof was to impose on the applicant the duty to bargaining, a concept that is not applicable in our law. In other words the effect of the Commissioner's award was that the applicant was compelled to

negotiate with AMCU. Therefore the Commissioner in making his award exceeded his powers and thereby committed gross irregularity which rendered his the award reviewable.

[25] In my view this matter turns mainly around the issue of joinder which I will revert to later in this judgment. Before dealing with this issue I need to deal briefly with the complaint that the Commissioner did not allow the applicant to cross-examine AMCU's representative.

[26] In terms of section 138 of the LRA the Commissioner has the power and authority to conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

[27] In the unreported case of *Sondolo IT (Pty) Ltd v Gordon Howes and others case number JR321706*, the Court in dealing with the provisions of section 138(1), per AC Basson J held that:

> *"Section 138(1) of the LRA thus places two distinct but related obligations on the commissioner. The first is to determine the manner in which the arbitration will be conducted. This discretion will be exercised bearing in mind the legislative instruction to determine the dispute fairly and quickly. Secondly, the commissioner must deal with the substantial merits of the dispute. In dealing with the matter the commissioner may rule on the evidence which may be presented to the arbitration and may*

also restrict the range of issues on which the parties are required to give evidence."

[28] The Court went further to quote with approval from the decision in *Moloi Euijen v CCMA & Another (1997) 18 ILJ 1372,* where the Court held that power in section 138 (1) includes the power to decide what evidence will be allowed or disallowed.

[29] It would seem to me that in the present instance, the Commissioner in exercising his powers in terms of section 138 of the LRA decided to consider the matter on the basis of the submissions and the bundle of documents as submitted by the parties including the heads of arguments. It is therefore understandable why, as the Commissioner records in his award, the proceedings were not electronically recorded. The Commissioner cannot be faulted for adopting this approach particularly regard being had to the facts of this case which are simple, straight forward and largely common cause. The facts which were common cause and upon which the dispute largely depended on concern, (a) the threshold agreement concluded between the NUM and the applicant, (b) the invitation of UASA to join the BECSA and (c) the exclusion of AMCU from the negotiation process and participation in BECSA.

[30] I now return to the issue of non joinder of NUM and UASA. The issue of whether a party should have been joined in any proceedings before a Court or an arbitration received attention in the recent decision of the Supreme Court of

Appeal in the case of *Gordon v Department of Health (337/2007) [2008] ZASCA 99*. In that case the SCA held that

> *"The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.*"

The Court went further (at para [9]) to say:

> "*In the Amalgamated Engineering Union case (supra) it was found that 'the question of joinder should not depend on the nature of the subject matter but on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim the relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties that have a legal interest in the matter and must be joined."*

[31] The issue that then arises in the present matter is whether NUM and UASA had a legal interest in the determination of the issue which was before the Commissioner. The issue as formulated by the Commissioner was whether the action of BECSA, NUM, and UASA by excluding AMCU during the negotiation of downscaling and other issues of collective bargaining forum and wage agreement were unlawful or in contravention of the agreement concluded at BECSA and the threshold agreement. The other issue as formulated by the Commissioner in his analysis is whether or not the applicant and the NUM had complied with the provisions of section 18 of the LRA. In the 7.11 referral form AMCU states the desired outcome as being:

> *"TO COMPEL THE EMPLOYER NOT TO IMPLEMENT THE AGREEMENT CONCLUDED BETWEEN INGWE (BECSA), NUM AND UASA IN THE ABSENCE OF AMCU.*
>
> *TO START AFRESH ALL DISCUSSION AND ALL COLLECTIVE (sic) MATTERS WHERE AMCU MEMBERS ARE ALSO AFFECTED WITH AMCU PARTICIPATING IN THESE DISCUSSIONS."*

[32] Section 18 of the LRA reads:

> *"(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."

[33] AMCU argued that the arbitration award was as a result of the applicant not applying the threshold agreement equally to UASA and AMCU. In other words the relief sought by AMCU was not directed at NUM and UASA. I do not agree with this contention because the relief sought by AMCU was to set aside or render in effective an agreement to which NUM and AUSA were parties. There seem to be no doubt that both NUM and UASA had a substantial and legal interest in the implementation of the very agreement which AMCU challenged and sought to render ineffective or prevent its implementation. This attack was not only directed at the applicant but also to NUM and UASA.

[34] The other issue which the Commissioner formulated in his analysis, relates to the issue of whether or not the applicant and NUM complied with the provisions of section 18 of the LRA. In this regard NUM has a substantial interest not only because it was a party to the agreement that established BECSA but also because it was NUM that proposed to BECSA that UASA be invite to join BECSA and participate in the negotiations.

[35] It is therefore my view that NUM and UASA should have been joined in the proceedings before the Commissioner as at that stage there existed potential prejudice which subsequently materialized with the issuance of the award. The prejudice arose because NUM and UASA had a direct and substantial interest in the determination of the dispute concerning lawfulness or contravention of the collective agreement concluded between the applicant, NUM and UASA. The other interest that NUM had was the legality of the threshold agreement. The Commissioner's award effectively undermined the threshold agreement in that it gave AMCU the right to participate in BCSA when it did meet the required threshold of 30% as provided for in the threshold agreement.

[36] In my view the Commissioner's award stands to be reviewed. In the light of the above, I also see no reason in law and fairness why costs should not follow the results.

[37] In the premises I make the following order:

(i) The arbitration award of the Second Respondent under case number MP2675-07 and dated 3rd June 2007 is reviewed and set aside.

(ii) The matter is remitted back to the First Respondent for arbitration afresh and to be placed before a Commissioner other than the Second Respondent.

(iii) The Third Respondent is to pay the costs of the Applicant including those of the application to stay the enforcement of the arbitration award.

Molahlehi J

Date of Hearing : 25th June 2008

Date of Judgment : 29th January 2009

Appearances

For the Applicant : Adv Alex Freund SC

Instructed by : Brink Cohen Le Roux Inc

For the Respondent: Adv R Venter

Instructed by : Gerhard Bester Attorney