IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J1905/09

In the matter between:

SOUTH AFRICAN POST OFFICE LTD	APPLICANT
AND	
COMMUNICATION WORKERS UNION	FIRST RESPONDENT
RESPONDENTS REFERRED TO	
IN ANNEXURE "A"	SECOND TO
	FURTHER RESPONDENTS

JUDGMENT

Molahlehi J

Introduction

[1] The applicant, the South African Post Office Limited, a company incorporated in terms of the laws of South Africa and generally responsible for the distribution of mail and other related services throughout the country, brought an urgent application to interdict the Communication Workers Union (CWU) and its members from continuing with its strike action. CWU represents in excess of 75% of employees in the bargaining unit at the applicant's workplace.

[2] On the 3rd September 2009, Van Niekerk J made a rule nisi returnable on 11th September 2009, in terms of which amongst others CWU and its members were

interdicted and restraint from participating in any strike or work-stoppage at any of the applicant's premises.

Background facts

[3] It is common cause that CWU referred a mutual interest dispute concerning "*salary anomalies"* to the CCMA during April 2009. CWU has over a period of time on behalf of its members complained and demanded that the applicant should address the issue of the alleged salary anomalies. The applicant's stance at the time the dispute was declared and at the conciliation proceedings was that no salary anomalies existed at its workplace, the issue having been previously addressed through collective agreements.

[4] The parties having failed to reach consensus during the conciliation, the commissioner issued a certificate of outcome in terms of the Labour Relations Act 66 of 1995. Thereafter, the CCMA offered to assist further with mediation in terms section 150 of the Labour Relations Act. The parties accepted the offer of mediation by the CCMA and in addition agreed that the process would include the substantive wage negotiation for the 2009/2010, an issue which was not part of the referral of the dispute as formulated in the 7.11 referral forms.

[5] In the course of the CCMA mediation the parties produced a daft settlement agreement. It is apparent that the parties' plan when they left the CCMA offices on the 28 August 2009, was that the settlement document would be signed on Tuesday, 1st September 2009.

[6] On the 31st August 2009, CWU proposed certain amendments to the document which the applicant accepted.

[7] There is a disagreement between the parties as to what was agreed when they left the CCMA offices on the 28th September 2009. The version of the applicant is that an agreement was reached regarding both the substantive issues which were subject of the mediation. The applicant further contended that CWU undertook to call off the strike. In fact the applicant contended that the undertaking to call off the strike action came subsequent to its specific request in that regard and was made on the 28th August 2009. Another point made by the applicant in this regard is that it had proposed that a joint press conference be held at the CCMA offices in the afternoon where a call would have been made calling on CWU members to resume duties. That proposal was declined by CWU because it was, according to the applicant, concerned that it was inappropriate and unprocedural for its members to learn of the outcome of the settlement discussions through the media, including the abandonment of the strike.

[8] CWU on the other hand disputes that an agreement was reached including that it undertook to call off the strike. The general secretary of CWU, Mr Gallant Roberts, in denying the averment of the applicant that an undertaking was made to call off the strike states:

> *"3. I admit that I attended the meeting referred to in paragraph 9.9 of the founding affidavit. I deny that I stated that we called off the strike, and dispute the submission that the right to strike has been abandoned. The negotiating teams reached consensus on terms that we would be willing to recommend to our principals. We conveyed*

to the applicant's negotiating team that we were committed to persuading our members to accept the consensus and were optimistic of achieving this. I indicated that if our members endorsed the consensus reached by the negotiating teams, a final agreement would be signed and the strike would be called off. I did not abandon the right of CWU and its members to continue with the strike and nor did anyone else"

[9] Returning to the sequence of events, it is common cause that CWU issued a written communiqué to its provincial secretaries informing them about the outcome of the engagement with the applicant. The communication reads as follows:

"To: CWU Provincial Offices

Attn: Provincial Secretaries

Date:- 28 August 2009

Subject Matter:- Consensus on Salary Anomalies and Salary Increment

Dear Comrades

CWU and SAPO have finally reached a consensus on the issues as per subject matter above. The leadership wish to thank our National Negotiating team members, the leadership and members from their respective provinces and staff members for the commitment; sacrifices, determination and unity demonstrated prior and during the strike action against SAPO.

The document is circulated to all provinces in order ofmembers to be given a report on the consensus reached, and the agreement will he signed on Tuesday .September 2009.

Annexure referred to on the draft agreement is meant for simplifying the effect of salary adjustments per job categories, and will be sent to provinces soon.

We call upon all our members to resume work as from Monday 31 August 2009, and plant stewards are expected to make arrangements with management to grant time for report back sessions.

We are optimistic that our members will endorse the consensus reached. For any queries please do not hesitate to contact any of the negotiators.

Yours Comradely

Gallant Roberts

General Secretary."

[10] CWU further posted on its website a notice confirming with its members that they were expected to *"resume work"* on 31 August 2009. The communiqué in this regard reads as follows:

"Annual General Salary Increment

The parties have agreed to a 7% annual salary increment to all CWU members in the Bargaining Unit, with workers earning the highest in a given job rate getting 5% pensionable increment and 2% as a lump sum"

[11] The communiqué goes further under the heading *"Eradication of Salary Anomalies"* to say*:*

"CWU and the employer have also agreed that Salary anomalies within the South African Post Office must be eradicated once and for all, and a

process and timeframe of three years have been endorsed by parties to that effect. CWU members on the lowest levels will get a salary rate adjustment of between 7% and 10%."

[12] And in addition to indicating how the issue of the Labour Brokers including the leave vacation granted for those who had been on strike, the communiqué under the heading *"Resumption of work"* states:

"CWU have emerged victorious on the critical matter of eliminating what CWU members will be expected to resume work on the 31st August 2009 to get a report regarding the consensus reached and to endorsing the agreement."

[13] In the same way as CWU did to its provincial secretaries, the applicant also issue a memorandum to all the employees dated 28th August 2009, wherein it states:

*"**Final update on protected strike: End of strike action***

The South African Post Office and Communications Workers Union (CWU) have reached an agreement that puts an end to the protected strike. Both parties will sign the agreement, early next week. The detail of the agreement will be circulated later.

"We expect normal operations to be in full swing by Monday 31st August, with workers returning from 29" August. Both the Group CEO and I, as well as the executives would be remiss if we did not take the time to thank everyone who has selflessly worked on finding a resolution during this trying period. Words are not enough to express our gratitude, especially to those staff members who are part of the bargaining unit but continued to come to work" said John Wentzel in today's Videoconference at NCC.

Security and Investigations is commended for their sensitivity in managing the process. "Even at times when the crowd was hurling

abusive comments, non-striking Sapoans maintained their professionalism," concluded Wentzel the legacy of the strike will not disappear quickly so we now need to turn our attention to eliminating the backlog and regaining the trust of customers who have been badly affected during the strike."

Legal principles

[14] The key issue in this matter is whether or not the parties had reached an agreement in terms of which the dispute concerning the issue of the salary anomalies at the applicant's workplace was resolved. The fact that the agreement was not signed is of little significance. What is important is the consideration whether the objective facts and the circumstances of this case support the contention that an agreement was reached regarding in particular the issue of salary anomalies. The other issues which were considered during the facilitation process are irrelevant including the wages because these were not part of the referral of the dispute to the CCMA.

[15] In my view for the reasons setout below the objective facts in this matter support the contention that an agreement which resolved the issue in dispute was reached between the parties.

[16] Generally speaking the terms of a collective bargaining agreement is an outcome of a negotiation process which may have been conducted on the basis of bilateral engagement between the parties or facilitated by a third party as was the case in the present instance when the CCMA intervened in terms of section 150 of the Labour Relations Act. One of the features of a negotiation process be it in the form of a bilateral engagement or facilitation, is that of regular breaks or

adjournments either for parties to consider the other party's position or proposal. The adjournment is generally to afford an opportunity to a party or parties to either refresh or obtain a mandate from their respective constituencies. The mandate sought during the adjournment may be for various reasons. In a strike situation an adjournment may be sought to refresh the mandate or to authorize acceptance of a proposal which the other party may have put forward. For unions it may also be to refresh the mandate to continue with the strike action where the deadlock still exists.

[17] In certain instances even though the negotiators may have a broad mandate to settle, they may before confirming the acceptance of the proposal of the other party seek an adjournment in order to confirm and receive the ratification from their constituency. However, ratification is not always a prerequisite for a valid collective agreement. It is therefore not unusual for the negotiators to conclude and finalize a collective agreement without having to go back to the constituency for ratification or endorsement thereof. It is also common practice in negotiations that a party may indicate to the other party that in principle an agreement is concluded but that its validity and enforceability depends on the endorsement by the constituency. In other words parties may conclude an agreement which is conditional on the ratification by their respective constituencies. The coming into existence of such an agreement would be conditional on the formal endorsement of it by the constituency. Thus similar to a commercial agreement, parties in a collective bargaining process may exchange offers, counter offers and finally in that process reach an agreement by

way of accepting whichever the last offer may have been made. An offer may be accepted orally, or by signature of the proposed agreement or through conduct. When a collective agreement is concluded by way of conduct the action related to such acceptance must indicate the unequivocal intention to be bound by the agreement. And finally, one essential requirement of a binding collective agreement is that the rights and obligations of the parties should be expressly defined therein.

[18] The definition of a collective agreement in section 213 of the Labour Relations Act does not require that such an agreement to be signed. The part of section 213 of the Labour Relation relating to the issue under consideration reads as follows:

> ***"collective agreement"*** *means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –*
>
> *(a) one or more employers;*
>
> *(b) one or more registered employers' organisations; or*
>
> *(c) one or more employers and one or more registered employers' organisations;*

[19] In *Ceramic Industries t/a Betta Sanitaryware (1998) 11 BLLR 1120 (LC)*, the Court, held that an agreement need not be signed by all the parties to it in order to satisfy the requirements of a "*collective agreement*" in terms of section 213 of the Labour Relations Act. In *Diamond & Others v Daimler Chrysler & another (2007) 3 BLLR 197 at para 27* Cele AJ, as he then was, said:

"[27] In opposition to the submissions by the applicants, the second respondent has correctly referred me to two decisions of this Court. In NUMSA & others v Hendor Mining Supplies [2003] 10 BLLR 1057 (LC) at paragraph 30 Jammy AJ found the letter from the national organiser of CWU to the company purporting to confirm the terms of agreement reached by parties to constitute a collective agreement. In Samancor Ltd v NUMSA & others (2000) 21 ILJ 2305 (LC) at paragraph 30, Jammy AJ found that even if CWU official was theoretically unauthorised, the agreement was subsequently ratified through the conduct of properly authorised union official and was thus a binding collective agreement. It must follow therefore, that an agreement does not have to be signed by all parties to it, for it to satisfy the requirements set out in section 213 of the Act as a collective agreement. In casu, NUMSA and the first respondent agreed on the transfer of services of the applicants to the second"

[20] A situation similar to the current matter arose in *Blyvooruitzicht Gold Mining Company Ltd v Pretorius [2000] JOL 6358 (LAC),* where the employee both at the Court a quo and on appeal argued that the monitoring committee was not constituted as envisaged by the retrenchment agreement. The monitoring committee consisted of representatives from five trade unions and management. It would seem in essence this constituted a negotiating committee in some form. The responsibility of that committee was to discuss progress and specific cases in the retrenchment process. The employee's proposal that instead of retrenching him he should be demoted to a lower position was rejected by the committee. In the Court a quo it was found that the decision of the employer to discuss the matter with the committee was fatally flawed. The Court a quo

found that the employer should have discussed the matter with the full-time shop steward. The Labour Appeal Court in upholding the appeal and setting aside the judgment of the Court a quo observed that:

> *"[12] There is no merit in the point that the union representative who conducted the discussion on behalf of UASA had not been mandated by the respondent. When a trade union conducts negotiations of this kind, it represents the interests of employees. It acts as their spokesperson. It does not act as the agent of any one of them (Amalgamated Engineering Union v Minister of Labour 1949 (4) SA 908 (AD) at 913). A union's obligations in situations of collective bargaining derive from principles of representative governance rather than principles of agency (cf Sarah Christie Majoritarianism, Collective Bargaining and Discrimination (1994) 15 ILJ 708)."*

[21] The issue of the mandating process and the authority for union representatives to conclude an agreement without necessarily having to go back to members before accepting an agreement received attention in the case of *Ngcobo and others v Blyvooruitzicht Gold Mining Company Ltd [1999] JOL 4892 (LC),* in which the Court was asked to infer from the testimony and the conduct of the applicants that they had agreed to termination of their services. Although in that matter the Court dealt with the dispute concerning retrenchment, the principle enunciated therein is apposite the present matter. In this respect De Villers AJ had this to say:

> *"[37] I am satisfied, on a balance of probabilities, that the respondent and the union agreed that the work done by the applicants should*

be outsourced and thus that the applicants are bound by that decision."

[22] The Learned Judge went further to say:

> *"[54] The applicants, who agreed in response to questions put to them in the pre-trial conference and at the hearing that they were members of the union and that the union was their representative at the time, are bound by the agreements between the respondent and the union and to the representations made on their behalf by the union to the respondent, even if they did not give a specific mandate the union, both in terms of the ordinary rules of agency and in terms of the principle of collective bargaining and majoritarianism."*

[23] The basis for a union's authority to conclude an agreement on behalf of its members according to *Grogan, Workplace Law 3ed 1998 at 203,* is based on the principle of *"majoritarianism."* Implied in the principle of *"majoritarianism"* is that the union leadership as representatives and not as agents of members may take binding decisions which may not necessarily be supported by the membership or other structures of the union as seem to have been the case with the Gauteng region in the present matter. This principle is well enunciated in the case of *Ramolesane and another v Andres Mentis and another (1991) 12 ILJ 329 (LAC) at 336A, where Van Schalkwyk J* had the following to say*:*

> *"By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also."*

[24] The principle that a union in a collective bargaining process does not represent its members or other structures of the union as an agent was followed in the case of *Mhlongo & others v FAWU & another [2007] 2 BLLR 141 (LC),* where the Court had this to say:

> *"[14] The union was not an agent of the applicants as one would terminate the authority of an attorney. CWU representation is based on the principle of majoritarianism. The employer negotiates with the majority unions. If employees are members of CWU, the employer is not required to negotiate with individuals employees in addition to negotiating with CWU. The applicants now want the company to deal directly with them whilst remain members of CWU. The employer is entitled to refuse to deal with them directly."*

[25] In *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA & others (2007) 28 ILJ 642 (LC),* the Court was faced with an issue very similar to the one in the present instance. In that case the Court had to deal with the right to strike after the expiry of 60 days in response to the retrenchment. The pertinent question which the Court had answer in that case, related to the issue as to when can it be said that the provisions of section 189A (9) of the Labour Relations Act applies. Section 189A (9) deals with the notice of the commencement of a strike in matters involving retrenchments. After analyzing when it could be said that there is a dispute between the parties, the Court made the following important observation which, in my view, is apposite the present matter:

"[29] What is apparent is that as the existence of a dispute is not always a simple and determinable event, it underscores the proposition I made earlier, namely that it is important that, if parties arrive at a point where the one or the other forms the view in its mind that it is now in dispute with the other, it should say so and do so in the clearest of terms possible so as not to leave any doubt, as I said, about what it is in dispute about and what resolution it demands."

[26] Another important observation which the Court made earlier to the above quotation is that:

[27] . . . I believe that it is always a requirement that, if anyone of the parties is in dispute with the other, such dispute should be stated clearly and not be clothed in such a way that, objectively viewed, the other side does not know that it is in dispute at all. I am firmly of the view that parties should not conduct themselves in any manner which may lead to a situation where the other side is left in doubt as to whether there is a dispute between them in relation to a particular issue. Likewise I hold the firm view that, if a dispute has arisen between parties, not only must the dispute be clearly stated and identified but also the outcome, or the solution, which a party requires to resolve the dispute should be unambiguously stated. The fact that a party is unhappy cannot be allowed to form the basis of that party later on alleging that it was, as a matter of fact, in dispute with the other side. I am of the view that a dispute only arises when the parties in fact express their differing views and assume different positions in relation to a specific factual complex. The mere fact that one party may be unhappy about a particular state of affairs does not give rise to a dispute."

Analysis and arguments

[27] The essence of the applicant's case is that the parties concluded an oral agreement whose terms were set out in the unsigned settlement document. The signing ceremony of the document was to happen at some latter date. It was through this agreement, the applicant contended, that the issue in dispute was resolved and that CWU and its members' right to continue with the strike fell away.

[28] Mr Pretorius for the applicant argued that an oral agreement which received the approval of the branches of CWU, except for the Gauteng branch, was concluded and brought an end to the dispute. He argued further that based on the conduct of CWU, particularly when regard is had to the communication dated 28th August 2009, the only probable conclusion to draw is that the dispute was resolved.

[29] A further point made by Mr Pretorius is that, it is not clear whether the complaint of the Gauteng branch of CWU is related to wages or not. Although the unsigned agreement included wages, the issue of wages was never part of the dispute referred to the Commission and therefore CWU could not strike on that issue. In this regard Mr Pretorius argued that the dispute was entirely unclear and undefined to can form the subject matter of the right to strike. As concerning the position taken by the Gauteng branch of CWU he argued that their position was unsustainable as they were bound by the decision taken by the majority.

[30] Mr Van der Riet, for CWU argued that, the real issue was whether or not CWU had abandoned its right to strike, and that in that respect the onus was on the applicant to prove the abandonment of that right. He further argued that the applicant's case was contradictory in that at one level they pleaded that there was an oral agreement between the parties and at another level there was a draft agreement.

[31] CWU does not dispute the existence of the unsigned agreement, neither its contents. Mr Van der Riet however argued that that agreement was between the negotiating teams of both parties, and that the expectation was that the draft needed to be endorsed by CWU members before it could be said to be binding.

[32] In my view the objective facts and circumstances of this case, supported by the probabilities point strongly to the conclusion that an oral agreement whose terms are contained in a written documents was reached by the parties. The agreement put to rest the dispute concerning the wage anomalies at the applicant's workplace including the wage increase issue, a matter which CWU was not entitled to take strike action on because it was not part of the dispute that it had referred to conciliation. The contention of CWU that there was no agreement is unsustainable for a number of reasons. Those reasons are set out in the applicant's head of argument as follows:

> *"24.1 There were no outstanding issued in dispute when the parties parted on 28August.*

24.2 CWU submitted limited amedments to the agreement which management accepted: to all and purposes negotiations were at end at this point.

24.3 CWU's own written communication clearly conveyed that consensus had been reached and agreement would be signed.

24.4 No mention was made of acceptance of the settlement being conditional on the general assent of CWU members.

24.5 The majority of CWU member returned to work after the consensus was announced."

[33] The complaint of the Gauteng branch does not assist the case of CWU because of the majoritarian principle which in this case provides that the Gauteng branch is bound by the decision of the negotiating team and other branches of CWU. It is clear that the other branches had no difficulties with what the negotiating team had done. The unchallenged evidence indicates that members in the other branches returned to work in their numbers after they were advised by management that an agreement was reached and their union having advised the provincial secretaries about the same. It may also be that the reason for returning to work was because some of the members of CWU may have also seen the information about the agreement on CWU's own website. Through the website notice CWU informed not only its members that the strike was over but also other stakeholders about the outcome of the strike. In any event the authorities cited above indicates that the negotiating team as representatives and not agents

of CWU members was entitled to conclude the agreement on behalf of the members without having to go back to them for a mandate.

[34] The other aspect which strengthens the case of the applicant in addition to the fact CWU had itself announced that an agreement was reached, is the fact that neither itself nor its members objected when they received the communication from the applicant indicating that an agreement was reached in particular regarding the wage anomalies. It should also be noted that the representatives of CWU at the last meeting included the general secretary and the deputy president. And also of importance in this analysis is the fact that since submitting the amendments, CWU, never, indicated its opposition or rejection of what is contained in the document, in particular in relation to the issue of salary anomalies.

[35] The sentence in CWU's letter that says: *"We are optimistic that our members will endorse the consensus reached,"* carries very little weight when weighed against all other facts of this case including the other aspects of communication contained in the same letter. It is even so when regard is had to the fact that there was no reaction from CWU and its members after the applicant issued its communiqué about the outcome of negotiations. In any case I agree with Van Niekerk J in the ex tempore judgment in the urgent applicant of the same matter when he observed:

> *"The word 'endorse', however is equally capable of meaning to declare approval of or support for (see Oxford Dictionary of English 2nd Edition 2003)."*

[36] It is quite strange if the version of CWU is to be believed that firstly their members not only did they not react when they saw the communiqué but also that following the same they still reported for duty in their numbers. It is also strange that the shop-stewards never raised the alarm bells with CWU when they saw the applicant's communication stating that an agreement was reached. It is also hard to belief that CWU never respondent to the applicant to say that the communication they had sent circulated at the workplace was in correct because according them the agreement was still to be finalized. This is even more so when regard is had to the amendments to the agreement sent by CWU, which were incorporated without much ado by the applicant.

[37] Accordingly for the above reasons, I am of the opinion that the probabilities favour the conclusion that an agreement resolving the dispute and bringing an end to the right to strike was concluded between the parties.

Order

[38] In the premise the following order is made:

(i) The parties concluded an agreement in terms of which the dispute that gave rise to the strike action was resolved.

(ii) The rule nisi made by the Court on 4th September 2009 is confirmed.

(iii) There is no order as to costs.

Molahlehi J

Date of Hearing : 11th September 2009

Date of Judgment : 22nd September 2009

Appearances

For the Applicant : Adv P Pretorius SC with Adv R Lagrange

Instructed by : Eversheds

For the Respondent: Adv Van der Riet SC

Instructed by : Cheadle Thompson & Haysom Inc