CONSTITUTIONAL COURT OF SOUTH AFRICA

Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited and Others

Case CCT 233/20

Date of hearing: 6 May 2021

Date of judgment: 12 November 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 12 November 2021 at 11h00, the Constitutional Court handed down judgment in an application for leave to appeal against the whole judgment and order of the Labour Court and Labour Appeal Court. The Labour Court found a number of intended secondary strikes by members of the first applicant (AMCU), in support of a primary strike at Sibanye Gold Limited (Sibanye), to be unprotected. This decision was appealed before the Labour Appeal Court which dismissed the application, holding instead that the matter was moot. While the dispute is no longer live and the primary strike has ceased, this matter comes before this Court as a dispute regarding the proper interpretation of section 66(2)(c) of the Labour Relations Act 66 of 1995 (LRA).

On 21 November 2018, AMCU commenced a wage strike against Sibyane which persisted for a number of months (primary strike). On 20 and 21 February 2019, with the primary strike ongoing, AMCU served its notice of a secondary strike on the respondents, which are 10 mining companies operating in different mineral sectors. The notice provided for the secondary strikes to commence on the night shift of 28 February 2019, and to continue during all other shifts until 7 March 2019. It would involve all AMCU members employed by the respondents.

Objecting to the anticipated secondary strikes, the respondents launched separate urgent applications before the Labour Court in terms of section 66(3) of the LRA. The Labour Court consolidated the applications in the gold sector, and the applications in the platinum

sector, with each sector being heard separately but ruled on collectively. All of the respondents argued that the secondary strike would have no direct or indirect impact on the business of the primary employer, Sibanye. Instead, as the secondary employers, with no power to influence Sibyane's decision to accede to AMCU's demands, they would suffer significant financial harm. Thus the secondary strikes could not be considered to be reasonable. AMCU, on the other hand, argued that the secondary strikes were reasonable because the respondents and Sibyane were all members of the Minerals Council and therefore had the ability to place pressure on fellow members in the collective bargaining process. The respondents refuted that claim on the basis that membership was voluntary and that they concluded separate wage agreements to one another.

The Labour Court accepted that the procedural requirements in section 66(2)(a) and (b) of the LRA had been fulfilled. The application to declare the strike unprotected therefore turned on the requirement of reasonableness in section 66(2)(c) of the LRA. The Labour Court held that the test for reasonableness was ultimately a proportionality assessment to determine whether the harm caused by the secondary strike to the secondary employer was proportional to the impact on the business of the primary employer. In this case, the Labour Court, citing *SALGA v SAMWU* [2007] JOL 20251 (LC) and *SALGA v SAMWU* [2011] JOL 27055 (LAC), held that the harm was not proportional and declared all of the secondary strikes unprotected.

Aggrieved, AMCU approached the Labour Appeal Court. However, by then the primary strike had already been resolved. Despite AMCU's argument that exceptional circumstances existed for the hearing of the matter based on a significant point of law, being the interpretation of section 66(2)(c) of the LRA, the Labour Appeal Court held that the interpretation was already settled in law, and proceeded to dismiss the appeal on account of its mootness.

Before the Constitutional Court, AMCU submitted that mootness was not an absolute bar to the hearing of this matter. The core of AMCU's submissions was that the interpretation of section 66(2)(c) of the LRA by the Labour Courts, which imputes a proportionality assessment that takes into account the harm suffered by secondary employers, does not accord with the language of the provision. AMCU promoted the interpretation applied in *Billiton Aluminium SA Ltd v National Union of Metalworkers of SA* (2001) 22 ILJ 2434 (LC) and *Hextex v SA Clothing and Textile Workers Union* (2002) 23 ILJ 2267 (LC), which prioritise the effect of the secondary strikes on the business of the primary employer rather than the harm to the secondary employers. The second respondent, in essence, submitted that to exclude the proportionality assessment would ignore the distinction created by the LRA between primary and secondary strikes. The third, fourth, sixth, seventh, eighth and tenth respondents submitted that AMCU's interpretation would deprive the secondary employer, an innocent bystander, of the protections accorded to it by the LRA.

The first judgment (majority) penned by Pillay AJ (with Khampepe ADCJ, Madlanga J, Majiedt J, Mhlantla J, Tlaletsi AJ and Tshiqi J concurring), held that the matter is moot, but that it would nevertheless be in the interests of justice for leave to appeal to be granted.

It considered that a decision of the Constitutional Court would clarify the approach to secondary strikes for the parties and others in the labour relations community.

The first judgment noted that collective bargaining plays a role in remedying inequality, discrimination and poverty in the workplace and consequently, courts must be cautious when interpreting, applying and limiting the right to strike. It held in its interpretation of section 66(2)(c) of the LRA, that, in relation to the primary employer, a secondary strike must have an effect, and that, in relation to a secondary employer, the secondary strike must be reasonable. The first judgment interpreted the phrase "reasonable in relation to" in section 66(2)(c) to import proportionality in assessing reasonableness. It held that because secondary employers do not have the same procedural safeguards, such as conciliation and more than seven days' notice of the intended strike that primary employers have, proportionality and reasonableness are shields to safeguard secondary employers. They are needed to preserve the equilibrium that section 66(2)(c) seeks to establish. Further, the first judgment determined that the principle of proportionality derives, not only from the reasonableness requirement in section 66(2)(c) of the LRA, but also from the Constitution and international law.

In relation to the secondary strikes in the present matter, and purely for the sake of practical illustration, the first judgment held that they were unreasonable, primarily, for having no effect on Sibanye as the primary employer. Additionally, they would have been unreasonably destructive in relation to their impact on the secondary employers.

The first judgment dismissed the appeal against the judgments of the Labour Court and the Labour Appeal Court, except insofar as the costs orders were concerned. The costs orders were reversed, with the first judgment holding that, in light of the parties' mutual interest in the matter, it would be equitable for each party to pay its own costs.

The second judgment, penned by Jafta J, agreed with the order in the first judgment to grant leave to appeal and to set aside the costs orders in the Labour Court and Labour Appeal Court. It however held that had the matter not been moot, the appeal on the interpretation of section 66(2)(c) should have succeeded.

It held that the interpretation of a statute constitutes a process of determining what Parliament meant in a particular provision by attaching the words used in the provision in question. Words which do not appear in the provision cannot be added to the provision under the guise of interpretation, as the importation of words into a statutory provision falls outside the scope of interpretation.

Moving from this premise, the second judgment held that section 66(2)(c) does not expressly limit the right to strike by imposing a proportionality standard for determining the harm caused by the secondary strike upon the business of the primary and secondary employers. On the contrary, the express limitations in section 66(2)(a), (b) and (c) must be interpreted restrictively so as to have the least intrusion into the right to strike.

The second judgment held that the purpose of section 66(2)(c) is to regulate the exercise of the right to participate in a secondary strike, the sole purpose of which is to drive the primary employer back to the bargaining table. The impact that the secondary strike might have on the business of the secondary employer is of no relevance to the bargaining process between the primary employer and its workers. Section 66(2)(c) requires only that the secondary strike be reasonable in relation to the business of the primary employer. This would be so if the secondary strike has a possible direct or indirect effect on the business of the primary employer.

In conclusion, the second judgment held that this interpretation of section 66(2)(c) is consonant with section 39(2) of the Constitution, the demands of section 3 of the LRA and with the International Labour Organisation's position to the effect that secondary strikes should be subject only to the requirement that the primary strike be lawful.

The third judgment, penned by Theron J, concurred in the first judgment except on the issue of whether multiple secondary strikes at distinct places of employment can be aggregated for purposes of the inquiry in terms of section 66(2)(c) of the LRA (the aggregation issue).

The third judgment found that the aggregation issue does not concern whether section 66(2)(c) prohibits multiple secondary strikes, at distinct places of employment, from simultaneously occurring. Accordingly, the third judgment held that the Labour Court made no finding in this regard. Rather, the Labour Court held that, for purposes of the section 66(2)(c) inquiry, a court cannot aggregate secondary strikes to assess the cumulative effect of those strikes on the business of the primary employer.

The third judgment held further that the Labour Court was correct in making this finding. It held that this is so for two reasons. First, the use of the singular "secondary strike" in section 66(2)(c) was deliberate, and indicates that a court must assess a single secondary strike, and thus a single secondary employer, in the section 66(2)(c) inquiry. The third judgment explained that this conclusion is fortified by the context of section 66(2)(c). In particular, section 66(3) provides that "a secondary employer may apply to the Labour Court for an interdict to prohibit or limit *a secondary strike* that contravenes subsection (2)". Since a secondary employer would have no standing to apply to interdict a secondary strike at a different place of employment, "secondary strike", as it appears in section 66(3), cannot be construed in the plural. Accordingly, in terms of trite principles of statutory interpretation, "secondary strike", as it appears in section 66(2)(c), also should not be construed in the plural.

Second, if secondary strikes can be aggregated for purposes of the section 66(2)(c) inquiry, this would denude the protection that provision offers secondary employers, and thus frustrate the purpose of the provision. The third judgment explained that this is so because, by aggregating secondary strikes for purposes of the section 66(2)(c) inquiry, a secondary strike which, on its own would be prohibited by section 66(2)(c), could be found to be lawful.