IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 63/2020

ACTOM (PTY) LTD	**Appellant**
and	
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ("NUMSA") OBO ITS MEMBERS	**First Respondent**
MEHHLOMELELE Christopher MELLO NO	**Second Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION ("CCMA")	**Third Respondent**

Heard: **21 September 2021**

Delivered: **10 December 2021**

Coram: Waglay JP, Davis JA and Kubushi AJA

JUDGMENT

DAVIS JA

Introduction

[1] This appeal concerns a dispute about whether project bonuses have been forfeited by members of the first respondent as a result of industrial action. The appellant conducts business*, inter alia*, as a construction company. It was one of the significant contractors involved in the construction of a power station on behalf of Eskom SOC Ltd ("Eskom") in the vicinity of Lephalale in the Limpopo Province. The project is commonly known as the Medupi Project, ('the project').

[2] As part of the regulation of employment relations on the project, there was a collective agreement concluded in respect of the project, between representative trade unions and the various employers, as represented by two employers' organisations, being the South African Federation of Civil Engineering Contractors (SAFCEC) and the Construction Engineering Association of South Africa (CEA(SA)). This collective agreement was concluded in 2010 and was known as the Project Labour Agreement ("PLA"). The first respondent was an actual party to the agreement, and the appellant was bound to the agreement by virtue of its membership of SAFCEC.

[3] The PLA stipulated that all employees were to be employed at the construction site of the Medupi power station on the terms set out in one of two pro-forma 'Limited Duration Contracts.' During the latter part of 2014, the appellant employed 562 employees at the Medupi Project. The first respondent represented the majority of the employees.

[4] It is common cause that the first respondent's members embarked upon an unprotected strike action on 25 June 2014. On 1 July 2014, the first respondent's members went on a national strike and only returned to work on 28 July 2014. The first respondent's members, then again went on an unprotected strike on 7 August 2014.

[5] As the first respondent's members refused to provide undertakings that should they return to work they would comply with the terms and conditions of employment and not continue striking, they were not allowed back on the premises until such time as

a Memorandum of Understanding was concluded. This occurred on 16 August 2014. Thereafter, the first respondent's members resumed their employment duties on 18 August 2014.

[6] On 3 September 2014, the appellant provided representatives of the first respondent with a letter informing them that their members would not be paid their project bonuses from December 2013 to August 2014. This was a result of the first respondent's members having been involved in an unprotected strike on 7 August 2014.

[7] The first respondent, on behalf of its members lodged a dispute with the third respondent in which the second respondent was appointed and arbitrated the dispute. The essence of the first respondent's case was that their members should have only forfeited their project bonuses for the month during which its members embarked on the unprotected industrial action.

[8] The dispute turned on the meaning of aspects of clause 13.25 of the PLA which reads thus:

> '13.25 Project Bonus
>
> 13.25.1 A Project Bonus equal to 15 hours' wages will accrue to each employee for each completed month worked on the Project for an individual Contractor. (15 hours' times the normal rate of pay).
>
> 13.25.2 The Project Bonus will only be paid by the contractor upon demobilisation and not in the event of fair dismissal, resignation or abscondment. Payment will be calculated at the rate of pay applicable on date of demobilisation.
>
> 13.25.3 The Project Bonus will only be paid to the employee, provided that during his/her period of employment in the event the individual:
>
> 13.25.3.1 is not absent without consent;

13.25.3.1.1 if the individual is absent without consent on one occasion within a calendar month, the individual will lose half of the project bonus hours for that month (7.5 hours)

13.25.3.1.2 if the individual is absent without consent on a second occasion within a calendar month, the individual will lose the remaining half of the project bonus hours for that month (7.5 hour)

13.25.3.2 does not participate in any disruption or unprotected industrial action;

13.25.3.2.1 The individual will not lose project hours if the individuals return to work within the cooling off period (as detailed in the annexure)

13.25.3.2.2 If the unprotected industrial action takes place as a result of provocation and this provocation is not acknowledged and an undertaking made to investigate / address the cause of the unprotected industrial action, such unprotected industrial action shall not result in the individuals losing their project bonus.

13.25.3.2.3 Rolling unprotected industrial action (where employees embarking on unprotected industrial action return to work only to go out of further unprotected industrial action as the result of the same event) will result in the individuals losing their project bonus in terms of PLA.'

[9] The second respondent issued an award in which he engaged with the interpretation of clause 13.25. His reasoning bears detailed repetition:

'The meaning of these two provisions (clauses 13.25.3 and clause 13.25.3.2) of the agreement is in my view clear and straight forward. The two clauses simply mean that an employee's entitlement to project hours is dependent on the condition that an employee does not during the period of his/her employment participate in industrial action. There is no factual or legal basis to infer that the clauses should be interpreted to mean that the forfeiture is limited only to the month in which the employee participated in an unprotected industrial action. If the drafters intended that employees who participated in unprotected industrial action be entitled to be paid a portion of their project bonus in the year in which they participated in such unprotected industrial

action, they would have expressly said so, just as they did in the case of absence from work without permission and refusal to work agreed overtime…

I see no contradiction between what clauses 13.25.3 and 13.25.3.2 mean, and what the parties intended when entering into the agreement. The intention of the parties was clearly to discourage participation in unprotected industrial action. The parties thus agreed on a more severe sanction for participation in unprotected strike than absence from work without permission. The reason for this is obviously that the impact of an unprotected strike on the employer's business is always more severe than when an individual employee is absent from work without permission. That employees are strongly discouraged from engaging in unprotected strikes is clearly evident from the preamble of the agreement, especially when regard is had on paragraphs 2.1 and 2.2 of the agreement. The two clauses provide that parties must commit themselves to the promotion of industrial peace and use of proper channels and procedures in resolving their differences. I do not see how this construction of the agreement offends the objects and purpose of the Labour Relations Act.

I therefore find that clause 13.25 of the project bonus does not provide for forfeiture of project bonus for the month in which an employee participated in an unprotected strike.

Clauses 13.25.3 and 13.25.2 expressly state that an employee who participates in unprotected industrial action shall not be paid project bonus.

The applicant's members are therefore not entitled to be paid project bonus for January to August 2014.'

[10] Following this award, the first respondent brought an application to review and set aside this award.

Judgment of the court *a quo*

[11] The court *a quo,* albeit in a brief *ex tempore* judgment, upheld the first respondent's application for review, finding that the only period during which the members of the

first respondent were not entitled to a production bonus was when the strike occurred; that is August 2014. Accordingly, the appellant was ordered to pay the project bonuses which had accrued from 1 December 2013 to 31 July 2014.

The appeal

[12] The appellant contends that the court *a quo* erred in not following the judgment of Snyman AJ in *Civil and Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 2005 (LC) where the learned judge interpreted clause 13.25 of the PLA to the effect that where employees embarked upon an unprotected strike action, they forfeited their entire project bonus for the year, even if such strike action occurred only in a single instance.

[13] In his judgment, Snyman AJ at para 51 summarised his interpretation of clause 13.25 as follows:

> 'All of the above leaves me convinced that when considering the clear language of clause 13.25.3, the context provided by the actual objectives of the LRA and the PLA itself, and with a generous helping of common sense and logic, the result that must follow when objectively interpreting this clause is that where employees embark upon unprotected strike action, they forfeit their entire project bonus for the year, even if it is only a single instance.'

Evaluation

[14] This appeal thus depends wholly on the interpretation of clauses 13.25 and particularly whether the finding of the second respondent that the intention of the parties to discourage participation in unprotected industrial action justified a reading of the clause that leads to a justification of a forfeiture of the entire project bonus.

[15] Hence according to the second respondent's award, the appellant was entitled to invoke this clause and refuse to pay bonus payments for the period 1 December 2013 to 30 November 2014. It is common cause that the unprotected strike took place on 7 August 2014 and that strikers resumed duties on 18 August 2014. To recapitulate

the second respondent had held that, although clause 13.25 was silent about the degree of forfeiture which would apply in the event of unprotected strike action, 'the parties thus agreed on a more severe sanction for participation in unprotected strike action than absence from work without permission.'

[16] While clause 13.25.3.2.3 made it clear that, in the event of rolling unprotected industrial action, that the 'project bonus in terms of the PLA' will be forfeited, there is no similar provision in the case of other forms of unprotected industrial action. The clause is silent in this regard. The key question therefore is whether the words as employed in clause 13.25 can justifiably bear the weight of the intention of the parties as divined by the second respondent.

[17] The key to unravelling the consequences of employees participating in unprotected strike action is to be found in the wording of clause 13.25.1 which provides for an accrual of a project bonus equal to 15 hours' wages for each completed month worked on the project. The use of the word 'accrue' is significant. The word 'accrue' has a clear meaning, being a right to which an employee is legally entitled, albeit that payment takes place after the date of accrual. See *CIR v Peoples Stones (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A).

[18] Once the word 'accrue' is so defined, it follows that prior to the commencement of unprotected industrial action, a project bonus may have accrued to the employees concerned; that is, they had a legal entitlement to the bonus prior to the event which is stipulated to trigger a forfeiture. Only the period from December 2013 to July 2014 is in dispute, and the question is whether from an engagement with the text of the clause and thus the express wording employed by the parties, the appellant was justified in regarding the project bonus for that period as being forfeited.

[19] Turning to the consequences of this approach to this appeal, the appellant had already paid the project bonuses from September 2014 to December 2014. Given the interpretation of clause 13.25.1 as set out above, the appellant cannot disregard the legal entitlement of the employees, who participated in unprotected industrial action,

that is to the project bonus which accrued prior to the date of the industrial action on which they had embarked.

[20] Absent an express provision in clause 13.25 to the effect that there would be no entitlement to the bonus for the entire calendar year during which the unprotected industrial action took place, the appellant was thus obliged to recognise the employees' right to the project bonus until the commencement of the industrial action in August 2014. That means that, while the appellant was entitled to refuse to make payment of the project bonus during the month of August 2014, it could not ignore the legal entitlement to the project bonus for the period of 'accrual'; that is between 1 December 2013 to 31 July 2014.

[21] For these reasons, the finding of the court *a quo* that the appellant was obliged to pay the bonuses from 1 December 2013 to 31 July 2014 cannot be disturbed.

[22] The appeal is dismissed. There is no award as to costs.

_____

Davis JA

Waglay JP and Kubushi AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv Van As
	Instructed by Fluxmans INC Attorneys
FOR THE FIRST RESPONDENT:	Adv Orr
	Instructed by Ngako Attorneys