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Whether a workplace policy automatically forms part of or can otherwise be construed as a collective agreement

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and Tasreeq Ferreria – Candidate Attorney

Issue

Whether the Commission for Conciliation Mediation and Arbitration (the **"CCMA"**) was correct in finding that the National Union of Mine Workers of South Africa ("**NUMSA**") was entitled to organisational rights by interpreting Harmony Gold Mining Company's ("**Harmony Gold**") Employee Framework policy (the "**ERF policy**") as a collective agreement for purposes of section 24 of the Labour Relations Act 66 of 1995 (the "**LRA**").

Facts

The above issue was considered by the Labour Court (the "**LC**") in the case of *Harmony Gold Mining Company v National Union of Metalworkers of South and Others* (2024) JR2084/19. The facts of the matter are briefly as follows.

NUMSA referred an organisational rights dispute (in terms of sections 12, 13 and 14 of the LRA) to the CCMA after Harmony Gold refused to grant them organisational rights on the basis that they did not meet the thresholds for same. NUMSA however argued that they met the requirement for "sufficiently represented" in terms of the ERF policy.

In its award, the Commissioner found, among others, that "*it had jurisdiction in terms of section 24 of the LRA, to deal with the interpretation an application of the ERF policy because the policy was not a standalone policy but rather part of their main collective agreement*". (our emphasis)

Dissatisfied with the outcome, Harmony Gold approached the LC, among others, to review the award on the grounds that –

"The CCMA had no jurisdiction to arbitrate the dispute and the Commissioner *misconstrued the nature of the dispute before him by finding that it concerned the interpretation or application of a collective agreement. The applicant argues that the* ***Employee Relations Framework policy (ERF policy) was not a collective agreement but a workplace policy*** *and that the dispute before the Commissioner was not one of interpretation or application of a collective agreement, as contemplated in section 24 of the LRA, but rather an organisational rights dispute under section 21".* (our emphasis)

Labour Court's Analysis

The LC found that the findings made by the Commissioner were based on his interpretation that the ERF policy was a collective agreement and he, therefore, concluded that the CCMA had jurisdiction to interpret and apply it.

As a result of the CCMA's findings, the LC had to determine, on review, whether the CCMA actually had jurisdiction by interpreting the ERF policy as a collective agreement in terms of section 24 of the LRA, as a finding that it did not would dispose of the entire application.

In determining the above issue, the LC referred to section 24 of the LRA. Section 24(1) of the LRA states that –

'every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement…'

Section 24(2) of the LRA states further that –

'if there is a dispute about the interpretation or application of a collective agreement (our emphasis)*, any party to the dispute may refer the dispute in writing to the Commission if-*

- *the collective agreement does not provide for a procedure as required by subsection (1)...'*
- *the procedure provided for in the collective agreement is not operative; or*
- *any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement'.*

What the above section makes clear is that it only applies to the interpretation and application of collective agreements and as confirmed by the LC, it *"does not confer the CCMA with jurisdiction to consider any other disputes"*.

Section 213 of the LRA defines a collective agreement as *'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'.

In deciding whether the policy was a collective agreement for purposes of the above sections, the LC stated, among others, that the ERF policy refers to itself as a policy and not an agreement. Moreover, the content of the clauses described it as a policy, and it was not concluded between Harmony Gold or any of its registered trade unions, but was prepared by Harmony Gold's employee relations department. Based on the above factors, the LC found that the ERF policy was not a collective agreement but a workplace policy.

The LC held further that there was no factual basis for the Commissioner to have found that ERF policy was part of the collective agreement given that no provision in the agreement stated that '*it has to be read together with, or part of a collective agreement*'. (Our emphasis)

Another argument raised by NUMSA was that the ERF policy should be binding because the parties consulted on the ERF policy before it was adopted. The LC was, however, of the view that not much could be made about this argument since no evidence was led to substantiate the point, but in any event *'consultation could not translate a clearly worded policy to mean or constitute something else'*.

In addition, NUMSA argued that the fact that the ERF policy was not signed by the parties does not mean that it is not binding. In response, the LC found that agreements (our emphasis) that are not signed or reduced to writing by parties *may* be binding. The ERP policy is however a policy and not an agreement. The signature argument was therefore not entertained.

Importantly, the LC held that nothing in the ERP policy suggested that it was intended to be a collective agreement. Based on the above, the LC held that the *"Commissioner's finding that he had jurisdiction on the basis that the ERF policy was a collective agreement, amounted to a material error of law"*, he misconceived the true enquiry before him and the award was one that a reasonable decision-maker would not make.

The award was, therefore, set aside and remitted back to the CCMA for determination by another Commissioner.

Importance of this case

This case highlights the different status afforded to different documents within the workplace and the consequences that flow from such status. A collective agreement provides parties with particular avenues of course which would not be available in the instance of a policy / procedure, introduced at the behest of the employer. It is important that all parties are cognizant of the consequences of how they introduce measures into the workplace (whether by way of a collective agreement or policy), given the consequences that may flow therefrom and that the terms of such documents clearly indicate what they are intended to be.



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile