IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(TRANSVAAL DIVISION)

JUDGMENT/UITSPRAAK
No. 74 VAN/OF 1993
CIRCULATE/VERSPREI
PRESIDENT: INDUSTRIAL COURT 21/5/93
PRESIDENT: NYWERHEIDSHOF

CASE NO: NH11/2/5846
NH11/2/5848

DATE: 21/5/93

In the matter between:

JOHANNA MASHIFANE AND 112 OTHERS — Appellants (Applicants in the court a quo)

and

CLINIC HOLDINGS LIMITED — 1st Respondent (1st Respondent in the court a quo)

JAKARANDA HOSPITAAL — 2nd Respondent (2nd Respondent in the court a quo)

and

MARIA HLABANE AND 50 OTHERS — Appellants (Applicants in the court a quo)

and

CLINIC HOLDINGS LIMITED — 1st Respondent (1st Respondent in the court a quo)

NEDPARK CLINIC — 2nd Respondent (2nd Respondent in the court a quo)

JOFFE, J

On 21 June 1990 Ms Jonanna Mashifane and 112 co-employees were dismissed from their employment at the Jakaranda Hospital. On 22 June Ms Maria Hlabane and 50 co-employees were dismissed from their employment at the Nedpark Clinic. The Jakaranda Hospital and the Nedpark Clinic fall within the group of hospitals controlled by the first respondent. The aforementioned employees sought relief in terms of the provisions of section 49(9) of the Labour Relations Act 28 of 1956 (as amended). Two separate applications were launched. They were heard together. Save in respect of certain of the applicants the industrial court held that their dismissal was not an unfair labour practice and the applications were dismissed. The unsuccessful applicants now appeal against the whole of the judgment of the court a quo.

In order to appreciate the dismissal of the appellants in its correct factual context it is necessary to set out the relevant facts in some detail.

All the appellants were members of the National Union of Public Service Workers (hereinafter referred to as "the Union"). The Union was at all relevant times represented by an official Mr S Baloyi. The appellants were all general employees at either the Jakaranda Hospital or the Nedpark Clinic.

On 5 January 1990 the Union directed a letter to the employer. In the letter a meeting is proposed to discuss seven issues which are stipulated in the letter. The first issue is an increase in basic salary to R600,00 per month and the second issue is a R60,00 per month across the board increase for all workers. A meeting was convened. It was held on 22 January 1990. At the meeting the Union was represented in addition to Mr Baloyi by Mr Radebe. It is common cause that the two issues alluded to above were discussed at the meeting. According to the minute of the meeting one of the directors of the employer stated that "he would like to study the wage structure in Pretoria and would also require a motivation for the increases from the Union". The Union was not able to immediately motivate the increase and indicated that it would require time to do so.

On 1 March 1990 and 13 March 1990 the Union wrote to the employer. The content of both letters is not clear. The purpose of both letters seems to be an enquiry as to the outcome of the study of the wage structure in Pretoria which the employer had indicated it wished to undertake. Other than for a letter requesting the Union to explain the content of its letter of 1 March 1990 (which the letter of 13 March 1990 served to do) the employer did not respond to the aforesaid letters. On 23 March 1990 a work stoppage occurred at the

Nedpark Clinic and the Jakaranda Hospital. In a letter dated 23 March 1990 directed by the employer to the Union the events of the day are set out. It appears according to the letter that Mr Baloyi who had met with the employer on that day informed the employer that the employees were dissatisfied with the increases allotted to them in January 1990. In evidence Mr Baloyi stated that the reason for the employees' dissatisfaction was the intimation to them by members of the nursing staff of the employer that their demands (I assume salary demands) would not be met. Mr Baloyi was able to persuade the workers to return to work. On 10 April 1990 and 25 April 1990 the Union directed letters to the employer calling for a resumption of the wage negotiation meetings. Subsequent hereto a meeting was held between Mr Baloyi and Mr Anderson, a director of the employer. At the meeting it was agreed that a meeting would be held on 17 May 1990 and that the Union's wage demands would be on the agenda of the meeting.

The meeting was held on 17 May 1990. When the matter was discussed the employer adopted the stance that the matter could only be considered after receipt of the written motivation from the Union. The matter was accordingly not taken any further. On 22 May 1990 the Union directed a letter to the employer. This letter was intended to serve as a written motivation for the increments proposed by it. The letter inter alia sets out the existing basic salary scale of general labourers. The scale ranged from R250,00 per month to R400,00 per month. The Union suggested in the letter that a

meeting be convened for 25 May 1990. On 24 May 1990 the employer responded hereto. It was pointed out that it was grossly unfair to expect a meeting on 25 May 1990 particularly in view of the long delay in providing the written motivation. The Union was further informed that Mr Anderson, who conducted negotiations on behalf of the employer with the Union was to be away from office from 30 May 1990 to 8 July 1990. As a result the employer was not able to investigate or respond to the motivation until after 8 July 1990. In an addendum to the letter the Union was informed that Mr Anderson's staff had been instructed to investigate the salary structure in his absence and it was suggested that Mr Baloyi contact Mr Anderson's office to make an appointment for further discussions on his return. The Union was not enthralled with the prospect of having to wait until 8 July 1990 to continue negotiations. A telephone conversation took place between Mr Baloyi and Mr Anderson. The upshot of this telephone conversation was a letter directed by the employer to the Union on 25 May 1990. In this letter Mr Anderson informed Mr Baloyi firstly, that Prof Wiehahn had been requested to make himself available for negotiations, and secondly, that the motivation was no more than a demand and thirdly that the employer would require a certain amount of time in order to investigate the effect salary increases would have on it. On 6 June 1990 a meeting was held between the Union and the employer. According to Mr Baloyi, Prof Wiehahn informed Mr Baloyi that the motivation was unsatisfactory. The meeting achieved nothing further. On 12 June 1990 the Union directed a further letter to the employer in an endeavour to provide the

employer with a motivation that it would find acceptable. The letter concluded with a confirmation of a meeting on 14 June 1990. This meeting did not take place. At the request of Prof Wiehahn the meeting was postponed till 20 June 1990. Precisely what occurred at this meeting is in dispute. Suffice it for present purposes to note that no agreement was arrived at in respect of the wage demands. On 21 June 1990 the employees at the Jakaranda Hospital and the Nedpark Clinic reported to work but did not commence work. On 21 June 1990 the employees at the Jakaranda Hospital were dismissed after been given various ultimata. Likewise on 22 June 1990 the employees of the Nedpark Clinic were dismissed. On 22 June 1990 the Union directed a letter to the employer. I quote the entire letter hereunder:

" Re: Wage negotiations - industrial action

With reference to our meeting on wage/salary negotiations with Prof Wiehahn and Mr Hurter of your office on 20 June 1990 at Unitas Hospital, lets advice thus:

In our meeting of 17 May 1990 appropos the above matter with Messrs Hurter, Anderson, Meiring we resolved that:

1. Prof Wiehahn together with other officials of the Clinic Holdings shall enter into wage negotiations with the Union despite Mr Anderson's absence from such talks.

2. NUPSW send in written motivation of the proposals.

" Thereafter, a meeting has been held with Prof Wiehahn where NUPSW was asked to clarify its motivation in writing again and NUPSW did that.

Another meeting was scheduled for 14 June 1990 but was postponed to 20 June 1990 for Prof Wiehahn's convenience. On 20 June 1990 wage negotiations meeting was indeed held wherein Prof Wiehahn and Mr Hurter raised the following points:

1. That they are not having a mandate to negotiate.

2. That they are only having a 'negative mandate'

3. That management cannot afford the R600,00 + 20% salary proposals by the Union.

4. That management was not in a position to mention a salary/ wage offer as opposed to Union proposals.

The Union representatives responded that:

1. They firmly believe that 20 June 1990 meeting was a meeting to enter into negotiations.

2. It is not the Union's responsibility that management has not organized/prepared itself for such negotiations.

" 3. The Union regarded that 'not having a mandate' is negotiations in bad faith.

4. Management's representative go back and redress their own affairs.

In the light of the above, we would like to advise thus:

As long as management shall be prepared to set a convenient date and seriously commit itself to enter into meaningful wage/salary negotiations instead of using delaying tactics such as 'not having a mandate', then workers shall be prepared to review their position with regard to the industrial action.

May you also be informed that workers at Nedpark Clinic have not left the premises on their own accord but were evicted by the security guards.

As for Prof Wiehann having contacted us with no success, we hereby inform that we were out of the office for other appointments. "

On the same day Prof Wiehahn responded to this letter. He responded by sending two facsimile transmissions to the Union. The first letter was received by Mr Baloyi on the morning of 22 June 1990 whilst the second letter was received on 25 June 1990. The first letter reads as follows:

" Wage negotiations - industrial action

Your fax of the 22nd June 1990 refers and please be advised as follows:

1. I have now been mandated by management to negotiate on behalf of all three hospitals of Clinic Holdings in Pretoria viz Jakaranda, Nedpark and Unitas. This mandate was given to me after our meeting of the 20th June 1990. The mandate includes a mandate on wages.

2. The management of Nedpark categorically and emphatically deny that workers were evicted from the hospital by the security guards on the 21st of June 1990.

3. Please contact me urgently to arrange a date to continue the negotiations on wages.

4. I hereby confirm that it is management's contention and firm stand that the negotiations are still continuing and

any industrial action on the part of the workers during this process of negotiation is illegal. Management therefore reserve its position with regard to the consequences of any such action. "

The second letter reads as follows:

" YOUR FAX OF THE 22ND JUNE 1990 : WAGE NEGOTIATIONS

1. Management rejects the accusation that the workers may be evicted from the hospital by the security guards on the 21st June 1990.

2. Management maintains that negotiations were still in process when the workers resorted to industrial action on the 21st and 22nd June 1990. The contention that the negotiation had been broken down by management is rejected. If they has broken down it was your union's doing.

3. Management wants the negotiation to proceed and therefore hereby confirms its willingness to arrange a date for further negotiations.

" 4. I shall not be available before Monday, 2nd July 1990. It is hereby proposed that we meet for further negotiations at Unitas hospital on that date. "

Finally it should be pointed out that negotiations between the Union and the employer did continue but only in respect of the Union members at the Unitas Hospital. This hospital also falls within the group of hospitals controlled by first respondent. These negotiations resulted in an agreement on salary being arrived at.

Reverting to the meeting of 20 June 1990, as already alluded to there is a dispute as to precisely what occurred at the meeting. The principal participants at the meeting were Mr Baloyi and Prof Wiehahn. They testified as to what occurred at the meeting. Appellant also adduced the evidence of three shop stewards who had been present at the meeting. Respondent adduced the evidence of Mr K Hurter who had accompanied Prof Wiehahn to the meeting. It is not necessary to deal with the evidence of all these witnesses. It will suffice for present purposes if reference is only made to the evidence of Mr Baloyi and Prof Wiehahn. According to Mr Baloyi, Prof Wiehahn arrived at the meeting together with Mr Hurter and a female person who was acting as secretary. Prof Wiehahn opened the discussions and stated that "he had no mandate. All he has is a negative mandate." By this Mr Baloyi understood that Prof Wiehahn had "an empty mandate". No offer was made on behalf of the employer by Prof Wiehahn in response to the Union's demands. According to

Mr Baloyi the meeting could not continue because the employer's negotiator did not have a mandate. Prof Wiehahn indicated that he was going to revert to the board of directors of the employer to obtain a mandate. No time constraints were mentioned in this regard. According to Prof Wiehahn he had a mandate to negotiate at the meeting of 20 June 1990. He testified that he had no mandate in respect of a particular amount of money. As he put it it was "'n redelike algemene mandaat". The following passages from Prof Wiehahn's evidence indicate the nature of the general mandate which he had and how he sought to execute it:

> " ... So binne die raamwerk van 'n algemene mandaat was dit my voorneme gewees om aan te gaan met die onderhandelingsproses, en ek wou vasstel wat min of meer die teikenbedrag sou wees van die vakbond, in die lig van die feit dat ek nie 'n behoorlike mandaat - van 'n behoorlike motivering gekry het van hulle eise nie. Dit is maar die normale proses of goeie onderhandelinge dat jy stop nie. Jy het nou - ek het nie op daardie stadium goeie motivering gekry nie en derhalwe was my strategie eintlik dan gewees om te kyk, nou maar goed, as ons bymekaar kan kom, wat sal dan die syfer wees, min of meer die teikensyfer wees wat die vakbond - vir die vakbond aanvaarbaar sal wees. "
>
> and

" Ek was van plan gewees net om te kyk of ons nie kan voortgaan met die volgende vergadering nie. Ek was nie van plan - ek het nie 'n behoorlike motivering gekry nie, en dit is gewees om te kyk of ek miskien by wyse van my raad en advies in die onderhandelingsproses vir hulle te kan help met - nou goed, met die motivering, jy weet en om te kyk min of meer watter teikensyfer ons kan kry. "

and

" Wel sover as my rekonstruksie van die gebeure kan herroep, meneer die president, het die vakbond toe gevra vir 'n koukus sover soos ek kan onthou. En ek en mnr Hurter is toe na mnr Bloch toe en mnr Bloch wat ook - hy is 'n uitvoerende direkteur van die maatskappy, vir hom was die bedrag - die eis van die vakbond totaal onaanvaarbaar gewees. Ons het toe sake bespreek daar en toe is ons terug na die kamer toe onderhandelingskamer toe. Ek het toe vir die vakbond net gesê die eis is onaanvaarbaar. Ons sal weer moet voortgaan met die onderhandeling op 'n ander basis. So dis sover as wat ek kan onthou wat my rekonstruksie was en toe is ons uitmekaar uit. "

In cross-examination Prof Wiehahn stated that he saw his role at that stage as that of a facilitator or a mediator. He testified further that his mandate was a general one "omdat ek nie geweet het

hoe lank mnr Anderson weg sou wees nie het ek die proses aan die gang gesit en my gedagte was om soos die proses gegaan en verloop het om dan uit te kom by 'n min of meer aanvaarbare ..."

As far as the expression negative mandate is concerned Prof Wiehahn could not recall using the expression. He suggested in cross-examination that Mr Hurter might have used the expression. Mr Hurter in turn denied that he had used the expression.

It is not necessary for purposes hereof to make a finding as to whether or not Prof Wiehahn or any other person stated that Prof Wiehahn had or held a negative mandate. On the facts it is clear on Prof Wiehahn's own evidence that he did not have a mandate to negotiate in the sense of making a counter-offer to the Union or for that matter agreeing to the demand made by the Union. On his evidence he merely sought to get the Union to reduce their demands unilaterally. As he himself put it, he saw himself in the role of a facilitator or a mediator. He certainly was not appointed by the Union and the employer to facilitate or mediate. He had a mandate to negotiate. None the less Prof Wiehahn sought to offer the Union advice and assistance. The Union wished to engage him in negotiation. They did not seek his advice nor did they want his assistance. Support for the view that Prof Wiehahn had no mandate to negotiate in the true sense of the word is to be found in the first paragraph of the first letter dated 22 June 1990, the content of which has already been alluded to above.

The presiding officer in the court a quo held that but for the fact that the Union agreed at the meeting of 22 January 1990 to supply the motivation there "might also have been a strong suggestion that this (that is the request for such a motivation) was a delaying tactic on the part of the company". He also held that the "company's handling of the wage demand may well have been clumsy and characterised by an Olympian hauteur, it may even have been unfair ..." These findings are charitable to the respondent. The attitude of the respondent appears to be characterised by Prof Wiehahn's attitude at the meeting of 6 June 1990 and 20 June 1990. At the first meeting a motivation was submitted. He stated that as far as management was concerned it was not acceptable in that its content was unsubstantiated. The impression is created that like an errant school boy the Union was sent home to re-do its homework and to produce it in a form acceptable to the respondent. The Union had placed a wage demand on the table and was entitled to expect that negotiations on it would follow once it had submitted the motivation that it had voluntarily undertaken to submit. Regard being had to the vague nature of the mandate which Professor Wiehahn had at the time of this meeting the inference arises that it clearly suited respondent not to continue with negotiations in the real sense of the word at that stage. Indeed this is exactly what Prof Wiehahn testified to in cross-examination as is set out above. The stance that Prof Wiehahn adopted at the meeting of 20 June 1991 reinforces the foregoing. As is stated in the New Labour Law by Brassey et al 151:

" There is nothing so subversive of collective bargaining, however, as to refuse to bargain entirely or to pretend to bargain without doing so, going through the motions with no intention of reaching agreement."

In Bleazard & Others v Argus Printing & Publishing Co Ltd & Others (1983) 4 ILJ 60 (IC) reference was made to an article "The Duty to Bargain in Good Faith" 71 (8) Harvard LR 1401 where the following is stated:

" Although the employer's (or the union's) state of mind may occasionally be revealed by declarations, ordinarily the proof (of bad faith bargaining) must come by inference from external conduct. Many kinds of evidence have been found convincing. The weight of any item depends on the circumstances. Stalling the negotiations by unexplained delays in answering correspondence and by unnecessary postponement of meetings indicates a desire not to reach an agreement with the union; so does sending negotiators without authority to do more than argue or listen, or repudiating the commitments made by the company's bargaining representative after it had led the union to believe that he had full authority to conclude an agreement. "

It appears from the facsimile transmission of 25 May 1990 that Mr Baloyi had been informed that Prof Wiehahn had been requested to make himself available for negotiations. In the context this could only be understood that Prof Wiehahn had authority to negotiate and conclude an agreement. On his own evidence Prof Wiehahn did not have such a mandate. Instead he adopted a rather superior and haughty attitude at the meetings of 6 June 1990 and 20 June 1990. This conduct constituted an unfair labour practice.

Seen against this background and despite the fact that the appellants commenced an illegal strike on 21 June 1990 we are of the view that the court can come to the assistance of the appellants. See in this regard National Union of Mine Workers v Haggie Rand Land (1991) 12 ILJ1022 and the article by Gauntlett and Rogers: "When all else has failed: illegal strikes, ultimatums and mass dismissals" (1991) 12 ILJ 1171 at 1178 where the following is stated:

> " However it has to be acknowledged that circumstances of an exceptional nature can and do arise where a dismissal consequent upon strike action is unfair, notwithstanding any illegality of the strike itself. These exceptional circumstances generally entail conduct on the part of an employer which is not merely unreasonable and unfair, but has led in an immediate sense to the strike action. It must appear that either the illegal strike action was indeed a

weapon of despair in the sense that no other route lay open to the work force or at least that the circumstances were such as to render reasonable the strike response."

Regard being had to the employer's conduct in the present matter as has been ~~said~~ set out above the applicants' reaction to strike would appear to be a reasonable response to the employer's conduct.

The appellants are entitled to relief on another basis.

The appellants were dismissed on 21 and 22 June 1990. Yet on 22 June 1990 in the two letters already alluded to, Prof Wiehahn unequivocally states that he has a mandate and that it is management's contention that negotiations are still continuing between the Union and the employer. In Chamber of Mines of SA v National Union of Mineworkers 1987 1 SA 668 (A) it was held that where one or other of two parties between whom some legal relationship subsists and who is faced with two alternative and entirely inconsistent causes of action or remedies the law will not allow that party to blow hot and cold. See also Administrator Orange Free State and Others v Mokopanele and Another 1990 3 SA 780, 788.

In the instant matter it appears that the employer was doing just that, namely, blowing hot and cold. On the one hand the employees are dismissed and on the other hand the Union is informed that negotiations are continuing. In the circumstances it appears

that the dismissal of the employees is entirely inconsistent with the subsequent letters written on 22 June 1990. In the result the dismissal of the employees cannot stand.

In the circumstances of this case it appears that a proper order would be for the reinstatement of the applicants. No evidence was led in the court a quo as to whether the individual appellants were able to in fact be reinstated. It would also appear that as a result of subsequent employment of other employees the respondent will have to institute some form of retrenchment program in respect of those employees that it employed in substitution of the applicants. In the result the reinstatement order which we propose making will only come into effect six weeks after the date of this order.

As far as costs are concerned it would appear that each party should pay their own costs of this appeal.

The following order is made:

1. The appeals under case numbers NH 11/2/5846 and NH 11/2/5848 are upheld and both orders by the Industrial Court under the aforementioned case numbers are set aside;

2. The dismissal of the Appellants, under both case numbers, is declared to have been an unfair labour practice in terms of the Labour Relations Act, No 28 of 1956 (as amended);

3. Respondents are ordered to reinstate those of the appellants, formerly employed by them, who wish to be reinstated in their employment on the same terms and conditions pertaining prior to the date of their dismissal, six weeks after the date of this order;

4. Each party is ordered to pay their own costs of this appeal.

CHAIRMAN OF THE LABOUR APPEAL COURT:
JUDGE OF THE SUPREME COURT OF SOUTH AFRICA

I agree.

ASSESSOR

I agree.

ASSESSOR