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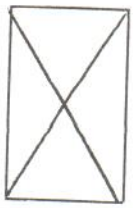

INDUSTRIAL COURT VERDICT

HELD AT **BLOEMFONTEIN**

CASE NUMBER **NH13/2/8213**

LABOUR APPEAL COURT VERDICT

DIVISION

CASE NUMBER

SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

CASE NO NH 13/2/8213

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

In the matter between

HOTEL, LIQUOR, CATERING, COMMERCIAL AND ALLIED WORKERS UNION — First Applicant

P. KOBUOE AND OTHERS — Second and further Applicants

AND

R & R DYEING COMPANY (PTY) LTD — Respondent

CONSTITUTION OF THE COURT

Prof A S Kelling — Additional Member

ON BEHALF OF:

Applicants — Mr P Maserumule of Tshabalala Maserumule Attorneys

Respondent — Mr S Snyman of Snyman Van der Heever & Heyns

PLACE AND DATE OF PROCEEDINGS

BLOEMFONTEIN 16 NOVEMBER 1994

JUDGMENT AND ORDER

This matter was referred to the Court with a view to an order in terms of Section 43 of the **Labour Relations Act** (No.28 of 1956 - as amended).

At the outset Mr Maserumule directed the Court's attention to the fact that fourteen of the Applicants as set forth in Annexure "A" (at 24 of the bundle and being numbered 1,3,4,5,7,8,23,24,26,29,30,31,32 & 33) were no longer Applicants in this matter as they were apparently in Respondent's employ (cf paragraphs 3.35.2 and 3.35.3 at pp 44 & 45 of the bundle).

As the overwhelming majority of averments and allegations concerning the events which have a bearing on the dismissals in question, are either denied or disputed by the opposing parties, this Court is of the opinion that oral evidence and cross-examination would be required with a view to a finding by the Court concerning such matters, the Court thus being unable to find in favour of Applicants for the purposes of this application as far as such aspects are concerned.

The question arises, however, as to whether the Court could come to Applicants' assistance in terms of this application essentially on the basis of the Respondent's version of the relevant events.

Respondent's version appears to be the following (see "Respondent's Answering Affidavit" at pp 31-44 of the bundle):

"3.14.3. On 24th June 1994, the daily search was carried out by one of the supervisors of the respondent, being Mr Ricardo Revecho. On the particular day one of the individual applicants, being Zelon Mokheseng was exiting the company premises through the main gate carrying a closed bag. In accordance with the normal search procedure, Revecho requested the said Mokheseng to open the bag in order that the same be searched. The said Mokheseng, upon being requested by Revecho to hand the bag to him, threw the bag at Revecho and as he opened the bag, Mokheseng punched at him.

3.15.3. As Revecho staggered back after being punched at by Mokheseng, a group of 9 employees joined in the attack on Revecho. Revecho tried to run away but slipped and fell whereupon the group of 9 employees, including Mokheseng pounded upon Revecho and kicked and punched him in the face and stabbed him in the back with a knife.

3.16.2 The Respondent states that the group of employees referred to in paragraph 3.15 above assaulted, kicked and stabbed Revecho for approximately 5 minutes whereafter the group dispersed and left the company premises.

3.16.3 Revecho was subsequently admitted to hospital and an assault case was reported to the South African Police under case number CR 202/06/94.

3.17.2 The respondent states that on 27th June 1994, being the Monday following the aforesaid assault which took place on Friday 24th June 1994, all of the employees who had been identified as being party to the assault which took place on Revecho were called by the respondent together with the 2 shop stewards of the first applicant to the office of Mr Raulito of the Respondent.

3.17.3 In the said office, an attempt was made to give the employees who perpetrated the assault on Revecho a notice to attend a disciplinary inquiry to be held on 28 June 1994 at the premises of a sister company of the respondent,

being Lien Fu Textile on 28th June 1994 at 10:00. It was explained to the said employees and the shop stewards that the disciplinary inquiry was to be convened on charges of insubordination and assault resulting from the assault which took place on Revecho as aforesaid.

3.17.4 A disciplinary inquiry notice was prepared for each individual employee who had participated in the assault on Revecho, being, Teboho Paulus Nthako, Zelon Mokheseng, Jacob Poonyane, Isak Mokheseng, Abraham Hlwempu, Charles Moetinyane, Joseph Fako, Jacob Tang and Justinus Sibea. Copies of the notifications to attend a disciplinary inquiry are annexed hereto, respectively marked annexures "JB1A" tot "JB1I".

3.17.5 The said shop stewards and the individual employees however refused to take or accept the charge sheets or sign for the same, and the charge sheets were endorsed to this effect as is reflected on Annexures "JB1A" to "JB1I" hereto.

3.18.2 The respondent states that neither the shop stewards nor the individual employees charged as aforesaid arrived at the disciplinary inquiry convened at the premises of Lien Fu Textile at 10:00 on 28th June 1994, as stipulated in the disciplinary inquiry notices.

3.18.3 At approximately 11:00 on 28th June 1994, the said employees together with the shop stewards were again called and a second notice to attend a disciplinary inquiry to be held on the same day at 15:00 was handed to the shop stewards and to each individual employee. A copy of this disciplinary inquiry notice, this time consolidated into one notice, is annexure "JB2" hereto.

3.18.4 Again, neither the shop stewards nor the particular employees refused to accept or take the disciplinary inquiry notice and the notice was endorsed to this effect as is apparent from annexure "JB2" hereto .

3.18.5. The Honourable Court's attention is drawn to the fact that the employees were specifically advised that in the event of them not attending the disciplinary inquiry at 15:00, the same will be continued in their absence.

3.19.3 The respondent states that in so far as paragraph 17 of the founding affidavit seeks to imply that the respondent disciplined employees indiscriminately for the assault on Revecho, the same is specifically denied. The respondent states that only those employees who could be positively identified by witnesses at the scene as being party to the assault, were charged and disciplined, being the employees referred to in paragraph 3.17.4 above. There was no question of "singling out" employees to be disciplined.

3.20.2. The respondent states that at 15:00 on 28th June 1994, the time on which the disciplinary inquiry was due to commence, all of the respondent's employees left the respondent's premises and arrived at Lien Fu Textiles.

3.20.3. The security guard at the gate, being Thomas Shibiya, informed such employees that only the employees who were called to attend a disciplinary inquiry and their representatives were allowed onto the premises. Furthermore, the other employees were advised that they were required to immediately resume their normal duties at the respondent's premises.

3.20.4 The employees charged with assault refused to enter the premises and proceed with the disciplinary inquiry without all the employees of the respondent attending the inquiry with them. Similarly, the other employees not involved in

the disciplinary inquiry refused to return to work and insisted on attending the disciplinary inquiry.

3.20.5 The respondent subsequently continued with the disciplinary inquiry in the absence of the said employees at which inquiry such employees were found guilty of insubordination and assault and were dismissed.

3.21.2. The respondent states that the employees referred to in paragraph 3.17.4 above were dismissed for insubordination and assault and were advised of their dismissal in writing on 28th June 1994. A copy of this dismissal notice is annexure "JB3" hereto.

3.21.3. Mr Jacob Poonyane, one of the employees charged with assault, approached the respondent after being charged and indicated his willingness to act as one of the respondent's witnesses in this matter. The said Jacob Poonyane was also responsible for the positive identification of all the other employees involved in the perpetrated assault. As a witness for the company, Mr Jacob Poonyane was not dismissed for assault, which is apparent from annexure "JB3" hereto.

3.21.4. With regard to the dismissal of the employees of the respondent not charged with assault on Revecho as aforesaid, the respondent sttes as follows:

3.21.4.2. Then on 9 May 1994, the respondent's employees embarked upon an illegal work stoppage to protest about shift work during the time when employees were alleged to have their lunch breaks. This work stoppage was resolved on the same afternoon of 9th May 1994 with the employees agreeing to work the particular designated shifts. All employees embarking upon the illegal work stoppage were however given a written warning for the same. A copy of the written warning was handed to the shop stewards on behalf of the employees embarking upon the work stoppage is annexure "JB4" hereto;

3.21.4.3. Wage negotiations with the first applicant ultimately commenced on 30th May 1994, and an agreement was reached at the commencement of the wage negotiations to the effect that the first applicant would undertake to ensure that no labour unrest or work stoppages would take place during the negotiation phase between the first applicant and the respondent. The Honourable Court is referred to annexure "JB5" hereto in this regard;

3.21.4.4 However, on 23rd June 1994, the Respondent received information that employees were intending to embark upon an illegal work stoppage at 12:00 and 12:30 on the same day, contrary to the undertaking not to do so. The first applicant was immediately called upon to ensure that its members refrain from the proposed action. A copy of a writing to this effect, dated 23 June 1994, is annexed hereto, marked annexure "JB6";

3.21.4.5 However on 27th June 1994 at approximately 12:45, the respondent's employees embarked upon an illegal work stoppage which lasted approximately 10 minutes. Employeees were again issued with a final warning on the same day for the particular work stoppage. A copy of this warning is annexure "JB7" hereto;

3.21.4.7 As such employees were embarking upon an illegal work stoppage and had refused to return to work despite an instruction to do so and having regard to the fact that all such employees had received two written warnings within a period of two months with regard to the same action, the said employees who

had embarked upon the illegal work stoppage were dismissed. A notice to this effect was handed to the shop stewards, copy of which is annexure "JB8" hereto. The first applicant was advised on the same day of this action taken against its members, in writing, in terms of annexure "JB8" hereto;

3.21.4.8. A meeting was convened with the first applicant on 29th June 1994 with regard to the termination of employment of all of the individual applicants. Annexed hereto, marked annexure "JB9", is a copy of a letter from the respondent to the first applicant confirming such meeting. However, after hearing the first applicant at the said meeting and after taking all circumstances into account, the respondent decided not to reverse its decision to terminate the employment of the individual applicants. Annexed hereto, marked annexure "JB10", is a copy of a letter by the respondent to the first applicant confirming this decision, ---."

3.33.3. It is apparent from the contents of this affidavit as set out above that the first applicant is either unable or unwilling to ensure that its members act in a conciliatory manner and comply with proper consultation processes.

3.35.2 The respondent --- invited applications to fill vacant posts at the respondent, in the second week of July 1994 in order to recommence its operations. Certain of the individual applicants, being Jackson Zondane, Joseph Potsisa, France Cutshwa,.Edward Moetinyane, Elias Ditaba, Johas Tsie, Johannes Sibiya, Anny Nkobolo, Selina Motlhabane, Joseph Mokati, Mattews Kajula, Maria Mohlabane and Jacob Poonyane commenced employment with the respondent on 18th July 1994 after having been fully interviewed by the respondent for the vacancies which existed at the respondent's business. Such employees were employed on condition that they sign the contract of employment which is annexure "JB11" hereto."

With regard to the Applicants who had been allegedly dismissed on account of "insubordination and assault", the Court finds that neither substantive nor procedural unfairness is apparent from the aforegoing. If Respondent's version of the alleged assault is true and correct, such conduct seems to have been particularly vicious, unjustifiable and intolerable. Regarding the contention that Respondent had relied solely on Poonyane's co-operation with a view to the identification of the perpetrators in question (see paragraph 3.21.3 **supra**), such contention is not necessarily true when one considers the contents of paragraphs such as 3.17.2, 3.17.3, 3.17.4 and 3.19.3 (**supra** and cf par 13 of Applicants' papers at 16 of the bundle). As to the possibility of procedural unfairness or the possibility of an individual Applicant having been dismissed unfairly, obviously the nature and the extent thereof could only be ascertained during relative proceedings in terms of Section 46, the granting of appropriate relief (if any) also obviously not of necessity being in the form of re-instatement.

The following matter to be considered is the dismissal of those Applicants who "... had on the third occasion in two months embarked upon an illegal work stoppage and had been called upon, on 28th June 1994, to immediately resume their duties which they refused to do", the respondent having "in the light of this blatant refusal and in the light of two prior written warnings for exactly the same offence, ... no alternative but to immediately terminate the employment of such employees" (par 3.25.3 at 15 of the bundle).

With reference to **Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union & Others** (1994) 15 ILJ 65 (A), the Court held as follows (art 74-75): "Counsel for Pact conceded, correctly in my view, that it would have been unfair, without more, to have summarily dismissed the employees. Such an extreme response would have been unfair, in my opinion, having regard to the following considerations:

1. Most of the 299 employees had given many years of service to PACT. Twelve of them had given in excess of 20 years' service; 32 had given in excess of ten years' service; and 122 in excess of four years' service.

2. The cause of the unhappiness related to a matter which was of legitimate concern to the employees in relation to their employment.

3. The employees had not acted in a manner threatening to the safety of PACT's personnel or property. ---

4. On the face of it the very unexpectedness and irrationality of the behaviour of the employees should have suggested to Bezuidenhout that something had gone wrong in the communication between the trade union and the employees. The suggestion should have been strengthened by the fact that the trade union was not associated with the strike.

5. The employees, according to Bezuidenhout and Van Deventer, were in an emotional state. They were described by Van Deventer as " 'n singende, senutergende massa werkers. As mentioned above, the court a quo found that they 'were restless and clearly emotional'.

6. The workers had been on strike for barely one hour.

In all of those circumstances fairness and good sense dictated that the employees should have been given a reasonable ultimatum. As it was put by Van Rensburg J in **Plaschem (Pty) Ltd v Chemical Workers Industrial Union** (1993) 14 ILJ 1000 (LAC) at 1006H-I: 'When considering the question of dismissal it is important that an employer does not act overhastily. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited.'

Before turning to consider the fairness of the ultimatum I would like to emphasize that whether an illegal strike may fairly be met with an immediate dismissal or whether fairness calls for an ultimatum or other appropriate action short of dismissal is an issue which can only be determined on the facts of the case. An illegal strike constitutes serious and unacceptable misconduct by employees."

Still bearing in mind this Court's comment **supra** concerning the fact that most of the facts material to the case in question appear to be in dispute, the above-mentioned considerations need to be related briefly to this case.

Regarding the first consideration, the years of service of the relative Applicants are not known to this Court and regarding the second consideration, it could hardly be said (on the strength of Respondent's version) that the apparent cause of the stoppage related to matters which were materially "of legitimate concern to the employees in relation to their employment". The facts set forth in the third- and sixth consideration appear to be materially similar to those relative to this particular case, whilst with reference to the fifth consideration, the Applicants concerned do not appear to have been in a similar "emotional state". With reference to the fourth consideration and the reproach on Applicants' behalf to the effect that Respondent had failed to consult with First Applicant before having dismissed the Applicants in question, it seems that the behaviour of the Applicants who were dismissed was on the face of it neither irrational nor unexpected, Mr Snyman having accused, on behalf of Respondent, First Applicant together with the other relative Applicants of harassment and it being "apparent

from the contents of this affidavit as set out above that the first applicant is either unable or unwilling to ensure that its members act in a conciliatory manner and comply with proper consultation processes" (par 3.33.3 at 43 of the bundle).

In the aforementioned Appeal Court-case the following was also held:

"In my opinion the most important considerations which should have been taken into account in determining the appropriate relief were the following (at 79):-

1. The illegal and unacceptable conduct of the employees which clearly constituted an unfair labour practice on their part, and also a breach of their employment contracts.

2. The overhasty dismissal of the employees which I have already held also constituted an unfair labour practice.

3. The substantial length of service of the majority of the employees.

4. The short duration of the strike at the time of the unfair dismissal.

5. The absence of prior improper conduct by the employees.

6. The likelihood that if a fair and reasonable ultimatum had been given to the employees the strike would have been of very short duration.

In my judgment the appropriate relief which should have been granted to the employees by the Industrial Court was, as it correctly held, one of reinstatement. The long service of the majority of the employees with PACT and their pension rights --- would have made it unfair and unjust for them to have been awarded compensation of one or even a few month's salary.---

I am further of the opinion that the Industrial Court should have marked its disapproval of the misconduct of the employees by refusing them any back-pay. In effect those of them who did not take up other employment at the same or a better wage will have lost almost one years' wages - a most substantial punishment to pay for a couple of hours of unlawful and ill-considered conduct. Nevertheless the principle is an important one. Employees and their unions must take into account the high risk which they run when the provisions of the law are flouted and the whole purpose of collective bargaining is subverted - for that is the inevitable consequence of an illegal strike."

Thus even in the event of the Industrial Court eventually granting Applicants a remedy in terms of Section 46(9), such event being questionable of course, the question remains as to the nature of the remedy and to the fact that even in the event of re-instatement in cases such as the one concerned, the refusal of back-pay by the Court is a reality (cf **supra**). Of relevance is also the following which appears in the above-mentioned Appeal Court-case (at 77-78): "In a number of decisions of the Industrial Court and the Labour Appeal Court it has been regarded almost as axiomatic that in the absence of special circumstances an unfair dismissal should have as its consequence an order for reinstatement ---. No reasons are furnished for those conclusions and, in my opinion, they are too widely stated. In every case the Industrial Court must make a reasonable determination. In some cases fairness and justice may dictate that reinstatement is the proper relief. In others compensation or some other form of relief may be more appropriate. A rule of thumb, even if applied on a prima facie basis, will tend to fetter the wide discretion of the Industrial Court (or the Labour Appeal Court). ---. In my

opinion the correct approach is to give due consideration to the relevant conduct of the parties and, in the light thereof, to decide upon the appropriate relief:---."

The granting of a remedy in terms of section 46(9) as mentioned above, will not only depend on oral evidence but is also questionable in view of the relevant sections as set out in the aforegoing. Also cf **Amcoal Colliery & Industrial operations Ltd v National Union of Mineworkers** (1992) 13 ILJ 359 (LAC); **Photocircuit SA (Pty) Ltd v De Klerk NO & Others** (1991) 12 ILJ 289(A); **Turner & Moore (Pty) Ltd and Paper Printing Wood & Allied Workers Union** (1992) 13 ILJ 1039 (ARB) and especially at 1043 I: "Relief is sometimes given to workers involved in illegal and unprocedural strikes. That happens when the strike is either merely technically illegal or unprocedural or when the employer can be said to have provoked the strike or to have acted unfairly"; **Manage & Others v Donn Products (Pty) Ltd** (1993) 14 ILJ 455 (IC) and especially at 462 and 463: "No employer can be expected to live for ever with intermittent work stoppages and strikes. ---. NUMSA and the workers were aware that the respondent took a serious view of these stoppages and had warned them of the possible consequences of their unlawful action, but the respondent's entreaties fell upon deaf ears. ---. The workers, engaged in an illegal and unfair strike --- and their demand that the notice which required applicant no. 3 to attend a disciplinary enquiry be withdrawn was manifestly unreasonable and a gross interference with management's prerogative. ---. Furthermore --- their insistence that applicant no.3 be represented at the hearing by no less than 15 employees was patently absurd and was calculated to obstruct the holding of the hearing".

As to the question of the alleged unfair re-employment, there is nothing sufficient before the Court to justify relief in favour of Applicants in terms of this application.

In view of the provisions of section 43(4)(b) of the Act in question and the aforegoing, this Court deems it expedient and reasonable not to grant the relief sought by Applicants, hereby dismissing the relative application.

There is no order as to costs.

This Court is furthermore of the view that the relative parties could resolve this matter satisfactorily amongst themselves without the intervention of the Court and with a view to a satisfactory long-term relationship based on what is known as **integrative bargaining** as opposed to **distributive bargaining**, the latter presupposing an adverserial relationship and the former essentially involving joint problem-solving and bargaining in a collaborative spirit with a view to beneficial effects for all concerned.

SIGNED AT BLOEMFONTEIN ON THIS 25 DAY OF NOVEMBER 1994.

PROF A S KELLING
ADDITIONAL MEMBER