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Case No 287/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL UNION OF MINE WORKERS Appellant

AND OTHERS (Respondents in the cross-appeal)

and

FREE STATE CONSOLIDATED GOLD

MINES (OPERATIONS) LTD - President Steyn Mine; President Brand Mine; Freddies Mine Respondent

(Appellant in the cross-appeal)

Coram: JOUBERT, HEFER, NESTADT, F H GROSSKOPF JJA et SCOTT AJA

Date heard: 15 August 1995

Date delivered: 21 September 1995

JUDGMENT

NESTADT, JA:

The broad issue in this matter is whether the dismissal of certain employees ("the individual appellants") for taking part in a stay-away constituted an unfair labour practice as defined in sec 1

of the Labour Relations Act, 28 of 1956 ("the Act") as it read in 1989.

The individual appellants (53 in number), being members of and represented by the first appellant, were employed on one or other of the respondent's three mines, namely President Brand, President Steyn and Freddies. In September 1989 they were, as a result of having participated in a stay-away on the 5th and 6th days of that month, dismissed. Contending that their dismissals constituted an unfair labour practice as defined in sec 1 of the Act, as amended, they together with the first appellant sought a declaratory order to this effect in the Industrial Court. In addition, orders that they be reinstated and compensated were claimed. The Industrial Court in a judgment reported in (1992) 13 ILJ 366 refused

the application. On appeal the Labour Appeal Court (Transvaal Division) by a majority held that the dismissals of those employed at President Steyn and Freddies constituted an unfair labour practice and that they should be reinstated (though without compensation and subject to a final warning for absenteeism being recorded against their work records). However, the appeal by those employed at President Brand was dismissed. One of the assessors, disagreed. His view was that all the dismissals were unfair. The judgment of the Labour Appeal Court is reported in (1993) 14 ILJ 341. What is before us (with the leave of the court a quo) is (i) a further appeal by those who were employed at President Brand against the dismissal of their application by the Industrial Court and by those who were employed at President Steyn and Freddies against what I term the qualified order of the Labour Appeal Court for their reinstatement,

and (ii) a cross-appeal by the respondent against the Labour Appeal Court's finding that the dismissal of employees at President Steyn and Freddies was unfair and its order that they be reinstated.

The background to the stay-away and the facts relevant to the dismissals are fully set out in the reported judgments of the courts below. For the moment, I emphasise the following:

(i) The stay-away was a country-wide one. More than a million employees are estimated to have participated in it. It had been called for by a workers' summit which was held on 27 August 1989. The stay-away was a protest against the 1988 amendments to the Act and the (white) general election. Such election took place on the second day of the stay-away, viz 6 September 1989.

(ii) The respondent became aware of the threatened stay-away. It, therefore, on 1 September 1989, warned employees on the three mines not to participate in the stay-away and in the case of President Brand that "severe disciplinary action would be taken against those who....absent themselves from work".

(iii) Nevertheless the stay-away took place. It was, however, limited in its scope. At President Brand, 3 370 employees out of a total work force of about 21 653, stayed away on 5 September. In the case of President Steyn the figure was 1 088 out of approximately 17 000 and in the case of Freddies, 155 out of approximately 14 200. On the second day of the

stay-away, namely, 6 September 1989 the number of those who did not work was slightly higher.

(iv) Employees who participated in the stay-away were not paid for the two days that they were not at work. In addition, however, they were disciplined. This took place in terms of the mines' separate but broadly similar disciplinary codes. They each draw a distinction between what is termed "absenteeism" and (illegal) "strike action". The recommended penalty for absenteeism is, in the case of a first offence, a warning, in the case of a second offence a severe (also called a final) warning and in the case of a third offence, dismissal (or termination). As far as illegal strike

action is concerned the recommended disciplinary action is dismissal save that in the case of Freddies the action to be taken is stipulated to be "in terms of agreements".

(v) There being no reference to stay-aways in the disciplinary codes, the respondent chose to charge those employees who participated in the stay-away with absenteeism. In accordance with the provisions of the disciplinary codes those who had a clean record for absenteeism received a warning. In respect of employees having a previous warning (for individual absenteeism) a second (or final) warning was imposed. And employees who had a second warning were, after a hearing, dismissed. It was not in dispute that such

persons' warnings as also their hearings were procedurally and substantively fair.

(vi) A total of 108 employees were in this way dismissed. And of those, 53 are, as I have indicated, involved in this appeal. As between the three mines, 44 are from President Brand, 6 from President Steyn and 3 from Freddies.

I have already said that the matter has to be decided on the basis of the definition of "unfair labour practice" as it read in 1989. Such definition (as introduced by sec 1(h) of Act 83 of 1988) was in somewhat different terms to its present form (as to which, see sec 1(a) of Act 9 of 1991). It included:

"(a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason

and not in compliance with a fair procedure".

There being no complaint against any procedural aspects of the dismissals, and the dismissals having followed on disciplinary action, the narrow issue that arises is whether the participation in the stay-away of those employees who had previous second warnings for absenteeism constituted a "valid and fair reason" for their dismissals. In particular, the matter turns on whether the dismissals were (substantively) fair.

Plainly, the individual appellants, by deliberately absenting themselves from work, committed a breach of their contracts of employment. I shall assume that at common law the respondent was therefore entitled to dismiss them. The enquiry does not, however, lie only within the field of contract. A dismissal can

be lawful in contractual terms and yet be unfair within the meaning of the unfair labour practice concept (Le Roux and van Niekerk: The South African Law of Unfair Dismissal, 294-296). But what is a fair reason (for a dismissal)? A helpful answer, in general terms, is that given by Cameron, Cheadle and Thompson: The New Labour Relations Act: The Law after the 1988 Amendments, at 144 - 145.

It is said:

> "A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship .... Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case - including the action with which the employee is charged - are considered."

Ultimately the task of the court is to pass a moral or value judgment (Media Workers Association of South Africa and Others vs Press

Corporation of South Africa Ltd 1992(4) SA 791(A) at 798 I and 802 A).

Before us, Mr Brassey, on behalf of the appellant, argued in the first place that participation in the stay-away was not an act of misconduct entitling the respondent to take any disciplinary action against the individual appellants; it was collective action in pursuit, by reasonable means, of a legitimate socio-economic interest, namely, to protest against the general election and the introduction of the 1988 amendments to the Act; these were matters which directly affected the workers; accordingly their absence from work was justifiable and so excusable. As appears from its reported judgment (354 C-D), the Labour Appeal Court rejected a similar argument. It did so for a number of reasons. In summary they were that the

stay-away was for a political purpose and in contravention of sec 65(1A) of the Act; it was in breach of agreements between the first appellant and the mines that there would be no recourse to industrial action until all procedures for the peaceful settlement of disputes had been exhausted; less harmful forms of protest were available; the mines could not afford a stay-away; and the respondent was not given formal notice that it was to take place (at 354 J - 356 H). In the result, it was held that the stay-away was not an appropriate form of protest action and that it was not legitimate; on the contrary it was "illegal, indiscriminate, damaging and unfair" (354 I).

I am not sure that I can entirely agree with this conclusion or the reasoning underlying it. Some of the criticism voiced against the judgment by Professor Thompson in a note in

(1993) 14 ILJ 315 has merit. I am, nevertheless, satisfied that the stay-away was illegitimate. Counsel rightly conceded that participation in it was, as the court a quo found (at 355 A), in contravention of sec 65(1A) of the Act. The disciplinary codes must be taken to have been respectively incorporated into employees' contracts of employment. And the respondent was, in my opinion, entitled to classify the stay-away as a species of absenteeism (though I will later, in a different context, have to return to this aspect of the matter). For these reasons alone the stay-away constituted an act of misconduct which justified the respondent in taking disciplinary action against those who participated in it.

This brings me to the second (alternative) argument on which Mr Brassey relied. It was that even if disciplinary action was warranted, dismissal was not; it was an inappropriate and therefore unfair sanction; this was because it was too drastic a remedy and in any event it amounted to unjustified selective action resulting in inconsistent treatment of those who stayed away. Undoubtedly, there are factors which militate against the argument. They are the following:

(i) Absenteeism was a major problem to the mines. It had serious consequences. Both productivity and safety were thereby adversely affected. In fact, the stay-away resulted in the three mines suffering substantial losses (353 E of the judgment a quo). To the knowledge of

employees, the mines' financial positions were such that they could not afford such losses. It was accordingly essential for the respondent to discipline and thus discourage absenteeism. In the words of Mr Cloete, the former personnel manager of President Brand and who was the respondent's main witness, "if we do not apply the disciplinary code...the incidents of absenteeism would increase...(T)he disciplinary code is there to be consistently applied". Mr Webster, one of the appellants' witnesses, largely agreed with this evidence.

(ii) The legality of the industrial action in question is often a critical factor in assessing the fairness of a dismissal. Indeed, the view has been expressed that as a matter of

public policy a court should not order the reinstatement of an employee who has participated in an illegal strike (Tshabalala and Others vs Minister of Health and Others 1987(1) SA 513(W) at 523 B). This case was, however, decided under the common law. And it is now clear that illegal strikers may enjoy protection against dismissal. But such a strike constitutes serious and unacceptable misconduct by employees (Performing Arts Council of the Transvaal vs Paper Printing Wood and Allied Workers Union and Others 1994(2) SA 204(A) at 216 E).

(iii) The effect of what I said earlier is that the stay-away amounted to illegal industrial action. It was not

embarked upon for the purposes of a strike as defined. If it was not a purely political protest, it had a strong political flavour. Its main thrust was directed not so much against the respondent but against the Government. Yet the aim was to cause harm to employers. The mines and other employers were therefore virtually made the scapegoats of what the appellants admitted was a deliberate "power-play". Not surprisingly, therefore, other less harmful forms of protest such as a petition or meeting or a brief work stoppage or even a one-day stay-away were eschewed. The result was that the stay-away went ahead (a) without formal notification to the respondent, (b)

contrary to the respondent's admonition that it should not be held, (c) in the knowledge that the individual appellants were acting contrary to the disciplinary codes, (d) in defiance of a court order prohibiting it (352 E and 356 I-J), and (e) in breach of the first appellants' undertaking (contained in the agreements referred to at 345 E, 346 B and 355 B) not to resort to industrial action until settlement procedures had been exhausted; that position had not been reached; negotiations were still taking place (350 C). And, of course, the individual appellants' participation was voluntary; there was no evidence of intimidation.

What has been stated are, I consider, aggravating features

of the appellants' conduct. Yet there is another side to the picture. It is the following:

(i) I leave open the question whether dismissal is only justified where the misconduct has the effect of destroying or irreparably harming the relationship between employer and employee or where the relationship is thereby rendered intolerable or futile (these being some of the tests which the industrial courts have applied). It is I think safe to say that what is at least required is that the misconduct be serious. After all, dismissal, as has often been said, is the ultimate sanction; a course of last resort.

(ii) The individual appellants were dismissed for (a third

offence of) absenteeism. In each case the previous two were for what is described as "individual absenteeism". They were not for participating in a stay-away. Indeed there is no evidence that the individual appellants had previously participated in a stay-away. One must therefore consider whether the stay-away on 5 and 6 September 1989 can properly be regarded as a case of absenteeism. I have already found that, for the purposes of deciding whether the disciplinary codes were breached, it can. But when it comes to the fairness of the sanction imposed, I think the position is different. The stay-away was no ordinary case of absenteeism. Its underlying cause was a sense of

grievance and frustration, not only with the Government, but with employers as well (349 E - H; 350 B). Its object was to protest and thus exert pressure. In the view of the court a quo (355 H-I), employees were entitled to protest (though not in the form of a stay-away). But in the perception of those who participated, the stay-away was a legitimate form of protest; they obviously regarded their absence as being for good reason. Any equitable assessment of the fairness of the dismissals must surely take these subjective, and in my view mitigating, factors into account. And the disciplinary codes themselves allowed for this. The progressive disciplinary measures provided for are stated

to be guidelines only; they are not to be applied rigidly.

(iii) The problem of whether an individualised, selective approach to discipline should be applied for collective misconduct is a difficult one (see Le Roux and van Niekerk, op cit, 116, 177-8, 183, 298 and 313-4). It may be accepted that consistency is not always required. In casu, however, I cannot but help feel that it was. Though it was left to each employee to decide whether to participate, their doing so resulted in collective action. And in the light of what has been stated in the previous paragraph, I do not consider that the individual appellants' previous offences for absenteeism were a sufficient basis for them being disciplined differently to

the others. Cloete testified that the respondent found the continued employment of those who stayed away but who were not on final warning for absenteeism "perfectly acceptable" despite their "serious misconduct".

(iv) The appellants are, as I have found, to be criticised for failing to exhaust the procedures for the settlement of disputes before the stay-away was decided on. On the other hand, this point must not be taken too far. To begin with, prior deadlock is not a sine qua non to subsequent industrial action (National Union of Metalworkers of SA and Others vs Macsteel (Pty) Ltd 1992(3) SA 809(A) at 817 H-I). The evidence for the appellants provides some explanation for their conduct.

Its effect was that it was considered anomalous that resort be had to the dispute procedures of the Act as amended when that was one of the matters that was being protested against (349 J). Moreover, employers had refused to abandon reliance on the 1988 amendments; they were, according to a Mr Schreiner, another of appellants' witnesses, "using (them) against us regularly and all the time" (350 B-D). His further evidence was that there was no alternative form of protest that would have been effective; less drastic ones had been resorted to in vain.

(v) It is not always necessary to warn an employee that his misconduct will or even might result in dismissal (the

Performing Arts Council case at 216 D-E). However, I agree with the court a quo (358 D-H) that in the present matter, as a question of fairness, the respondent was obliged to inform its employees that they might be dismissed. On the basis that employees of President Brand were on 1 September 1989 reminded that "severe disciplinary action will be taken against those who...absent themselves from work", it was held that they must have known that they stood the risk of dismissal if they took part in the stay-away. I have some doubt as to the correctness of this conclusion. But despite the individual appellants concerned not having testified in this regard, I fully agree with the court's

finding (359 H-J) that in the case of President Steyn and Freddies, an adequate warning of dismissal was not given.

(vi) Finally, account must be taken of a number of miscellaneous considerations. The stay-away was peaceful. Without wishing to minimise its harmful effects, its duration was moderate. The respondent was well aware that it was to take place. Several of the individual appellants had been in the service of the respondent for ten years and more. Bear in mind also that in most cases we do not know how long before the stay-away they received their previous warnings for absenteeism.

On behalf of the respondent, Mr Wallis, on the authority of the Media Workers case (at 800 C-G), rightly conceded that we were at large to decide afresh whether the dismissals were unfair. Counsel, however, strongly argued that they were fair. There is much to be said for this view. That is what makes this matter a difficult one. The need for the respondent to enforce discipline in the type of situation with which it was faced must not be under-estimated. Nor should the enforcement of a system of progressive discipline be undermined. And the individual appellants' motives, though perceived by them to be laudable, must be balanced against the fact that the stay-away constituted illegal industrial action. I have, nevertheless, come to the firm conclusion, on the basis of the cumulative weight of the factors referred to, that dismissal was an

excessive and therefore inappropriate response. It was too harsh a sanction. The circumstances of the stay-away make this an exceptional case. In my opinion, the preferable view is that of the dissenting assessor, viz, that all the participants in the stay-away should have been dealt with on the same basis. The individual appellants should rather have been issued with an appropriate further warning. Their absence having been caused by the stay-away, their misconduct was of substantially the same kind and degree as that of the others. This being so, it was inequitable to take their previous warnings, which were the basis of their dismissals, into account in the way they were. I find therefore that the dismissals were unfair.

It was not in dispute that in the event of the dismissals being set aside, the reinstatement of the individual appellants should

follow. This being so, the question of the date from which such reinstatement should be ordered and the terms thereof and the type of warning to be recorded against their records as also what compensation, if any, should be awarded arises. These matters were unfortunately not fully debated before us. It is therefore not appropriate that we should deal with them. What I propose to do is to adopt the course followed in the Performing Arts Council case (at 220-221) and order that, in the event of the parties themselves not being able to resolve these outstanding matters, they be decided by the Industrial Court. Seeing, however, the parties may be dissatisfied with this part of the order, it will be a provisional one in the terms which follow.

I make the following order -

(A) The order of the Labour Appeal Court is set aside and replaced by the following:

"1. The appeal against the dismissal by President Brand Mine, President Steyn Mine and Freddies Mine of those who participated in the stay-away on 5 and 6 September 1989 is upheld.

2. The order of the Industrial Court is set aside and replaced by the following:

'(a) The dismissal of the individual applicants is declared to have been an unfair labour practice.

(b) The respondent is directed to reinstate the individual applicants in their employment.

(c) No order is made as to costs.'

3. No order as to the costs of the appeal is made".

(B) If any dispute arises between any of the individual appellants and the respondent concerning the date of the individual appellants' reinstatement, the terms thereof, the type of warning to be recorded against their records, or what compensation, if any, should be awarded to any of them, such dispute shall be determined by the Industrial Court in terms of the provisions of sec 46(9) read with sec 17(11)(h) of the Labour Relations Act, 28 of 1956.

(C) Paragraph (B) of this order is provisional. The parties may within fourteen days hereof submit written argument against it becoming final. In the event of this not being done, it shall become final.

(D) The cross-appeal is dismissed.

(E) No order is made as to the costs of the appeal or of the applications for leave to appeal.

H H Nestadt
Judge of Appeal

Joubert, JA)
Hefer, JA) Concur
F H Grosskopf, JA)
Scott, AJA)