64/95

Case Nr 195/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN COMMERCIAL CATERING

AND ALLIED WORKERS UNION Appellant

and

OK BAZAARS (1929) LIMITED Respondent

CORAM: E M GROSSKOPF, SMALBERGER, NESTADT, HOWIE, MARAIS, JJA

HEARD: 8 MAY 1995

DELLIVERED: 30 MAY 1995

J U D G M E N T

E M GROSSKOPF, JA

In November 1990 the appellant ('the union'), having declared a dispute with the respondent ('the company') over its failure to pay a full annual bonus to workers who had participated in a strike during June and July of that year, applied to the industrial court for relief under section 17(11)(a) of the Labour Relations Act, No 28 of 1956 ('the Act'). The application was settled on the basis that the dispute would by consent be referred for an unfair labour practice determination under sec 46(9) of the Act.

On 15 July 1992 the industrial court declared the conduct of the company in refusing to pay an annual bonus for the twelve months ending 31 December 1990 to those of the union's members who had participated in the 1990 strike action to be an unfair labour practice. The company was accordingly directed to make payment to the affected employees of the bonus amounts which would, in the normal course, have been payable to them. However, it refused the union's prayer for interest on

such amounts.

The company took the determination on appeal to the Labour Appeal Court in terms of sec 17(21A) of the Act. The union cross-appealed against the refusal to award interest. The company succeeded on both appeal and cross-appeal. With the leave of the court **a quo** the union now appeals to this court.

The bonus which is in issue in this case has a long history. For many years the company has been paying an annual bonus to its employees. This is done on a purely voluntary and discretionary basis. Attempts by the union to have the bonus converted into a "thirteenth cheque" included in workers' conditions of service have (at least up to the time of the hearing of this matter) not succeeded. In 1978 or thereabouts the amount of the bonus was quantified at ten per cent of the employee's wages for every year of service with the company. This formula was retained in subsequent years.

In 1986/7 the company's workers threatened to

strike. The company handed a document to the union headed "Loss of Benefits for Strikers". Paragraph 6 of this document read:

> "Loss of bonuses. 5% of the 1987 bonus will be forfeited for every day on strike."

Nevertheless a strike ensued which lasted for thirteen weeks. At the end of the year the workers who had taken part in the strike forfeited their bonuses in accordance with the formula laid down by the company. Since then it has been the company's policy not to pay a full bonus to workers who participated in a strike during the year. Where the strike was legal, the above formula was applied. In the case of an illegal strike, the whole bonus was forfeited irrespective of the duration of the strike.

This policy has, however, not been applied inflexibly. In 1989 there was again a threatened strike. Prior to balloting a pamphlet was sent out, warning the workers **inter alia** that strikers would

forfeit their bonuses in whole or in part. The ballot went in favour of strike action. A date for the strike was set. However, before the arrival of the date the parties agreed to a last attempt at mediation. Some members of the union were not notified of this in time, and struck on the appointed date. The strike lasted only one day before the workers concerned were informed of the new developments. Mediation was successful. In these circumstances the company paid the striking workers their full bonuses, but included in their pay packets a notice explaining why the bonus was being paid despite the strike. The notice concluded as follows:

> "<u>However, please note that should you participate in any further strike or stayaway action at any future date, you will immediately make yourself liable to forfeiture of the annual bonus.</u>"

I turn now to the events leading up to the present dispute. In 1983 the company and the union signed a recognition agreement in terms of which the union was

recognized as the sole representative of union members who are permanent employees of the company, subject to certain irrelevant qualifications. Since then the union has been recognized as the sole collective bargaining repesentative of its members. In 1990 union members comprised between 9 000 and 10 000 of the approximately 23 500 non-managerial employees of the company.

The National Union of Distributive and Allied Workers ('NUDAW') has also been recognized by the company as the collective bargaining representative of its members. In 1990 they stood at 2 300 of the non-managerial employees of the company.

Once a year the company enters into separate negotiations with these two unions concerning wages and conditions of employment of their members. As a matter of practice and policy the company ensures that the terms and conditions of employees are standardized by extending to the other employees the benefits which a union obtains for its members.

In 1990 the annual negotiations between the union and the company broke down. Conciliation board meetings were then held, one of which was coupled with an attempt at mediation, but no settlement could be reached. In the ensuing strike ballot, 57 per cent of the union members voted in favour of a strike.

Before the ballot the company issued a pamphlet to union members in which, **inter alia**, it warned them that "if they take strike action they may lose their annual bonus in December." After the ballot the warning was repeated in stronger terms in a letter to the union dated 1 June 1990. Paragraph 10 of this letter read:

> "Those of your members who participate in strike action will forfeit their annual bonus in accordance with past practice and the terms and conditions of their employment."

The strike, which was legal, commenced on 4 June 1990 and continued for approximately seven weeks until a settlement was reached on 20 July 1990. Approximately 7 000 out of a total of 23 500 non-managerial employees

participated for most of the duration of the strike. Clearly, therefore, a substantial number of union members ignored the call to strike.

After settling with the union, the company resumed negotiations with NUDAW. A wage agreement was entered into with NUDAW which, as regards wages, was identical with that concluded with the union. The provisions of the settlement agreement were also extended to all non-managerial employees who were not members of either of the two trade unions.

On 24 October 1990 the company's board of directors resolved to give a bonus to non-strikers in accordance with the same formula as had been applied the year before. Strikers, in contrast, would be subject to the forfeiture of all or part of their bonuses. Subsequently it was decided that this would be on the same basis as before, viz, strikers would forfeit five per cent of the bonuses for every day that they took part in the strike. Since the strike lasted

more than 20 days, those who participated throughout obtained no bonus at all.

Before the Industrial Court a great deal of detailed evidence was led about the circumstances of the strike. A prominent part of the case related to the company's financial position: whether the company could afford the union's demands, and whether the union was reasonable, or even **bona fide**, in pressing demands which were, so it was alleged, clearly unaffordable. Moreover, although it was common cause that both employer and employees suffered severely as a result of the strike, the degree of suffering, particularly on the part of the company, was in dispute. And there was considerable debate on the question whether the strike had achieved anything worth- while for the workers. In view of the attitude of the union before this court it is not necessary to go into these matters in any detail. Reference will be made to some of them at a later stage.

Before us Mr Brassey, who appeared for the union, based his argument on two matters of principle. His main argument, as it developed during the hearing, was that, irrespective of the circumstances, it is always an unfair labour practice on the part of an employer to offer financial inducements to his employees to abstain from strikes. Alternatively, he argued, if such inducements are permissible, there should be no distinction between strikers and non-strikers. All employees of the same class, whether they took part in the strike or not, should be treated equally in either receiving or forfeiting the reward offered to induce them not to strike.

It was common cause before us that the definition of "unfair labour practice" as it appeared in sec 1 of the Act prior to its amendment by Act 9 of 1991 has to be applied in the present case. Mr Brassey did not rely on any of the specific provisions of the definition, but founded his argument on the general formulation,

viz, "any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee."

I deal first with the union's main argument. It proceeds from the general proposition that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes. See **National Union of Mineworkers v East Rand Gold and Uranium Co Ltd** 1992 (1) SA 700 (A) at 733 I-J. The freedom to strike is integral to the system of collective bargaining. The strike is the sanction that impels the parties to bargain collectively. If the workers were not free to strike, their bargaining power would lack credibility. See Brassey and others, **The New Labour Law**, 243, relying on **Crofter Hand Woven Harris Tweed Company, Limited, and Others v Veitch and Another** [1942] AC 435 at 463. Because of the vitally important purpose served by the strike, it was contended, nothing should be done

to disparage it.

The important role played by the freedom to strike in the system of collective bargaining can hardly be doubted. One should not, however, infer from the undoubted existence of the freedom to strike that an employer may not do anything to dissuade workers from striking. The ultimate object of collective bargaining is industrial peace. It is one of the ironies of collective bargaining that the attainment of the object of industrial peace should depend on the threat of conflict (Brassey and Others, **loc cit**). The reason for this dependence is a functional one. The freedom to threaten strike action and, if needs be, to carry out the threat, is protected because, in an imperfect world, the system of collective bargaining requires it. This does not mean that strikes are to be encouraged. On the contrary. It would be preferable in every respect if the bargaining parties could reach agreement without recourse thereto, and this is indeed recognized

by the Act (see, e g, sec 65). A strike, it has been said, "is a blunt instrument and one which damages the public, those who are striking and those against whom the strike is directed" (**Heatons Transport (St Helens) Ltd v Transport and General Workers Union** [1972] 2 All ER 1214 at 1233 h-i (NIRC)). Although this weapon should be available to workers, it is in everybody's interest that it be used as seldom as possible.

It is against this background that the issue of financial inducements to workers to abstain from striking should be seen. The threat of withholding a bonus from strikers, or the actual withholding thereof, does not affect workers' freedom to strike. That freedom remains undiminished. The only result is to increase the practical disadvantages to strikers which may flow from a particular strike action. When a strike is contemplated there are a number of conflicting considerations which are logically relevant to the decision whether to proceed or not. On the one hand

there are the potential advantages to be derived from a strike by way of increased wages, improved conditions of service, etc. The extent of these benefits, and the likelihood of obtaining them, have to be weighed against the disadvantages which would or could flow from strike action. Thus the striking workers would normally lose their wages for the duration of the strike. In addition they may face dismissal, lock-outs or other forms of retaliation by the employer, which may, depending on the circumstances, be lawful. A financial disincentive of the sort with which we are here concerned would make it more expensive for workers to strike, or, to look at it from the other side, more advantageous to stay at work. It may therefore in a particular case tilt the balance of expected advantages against striking - the worker may consider that he would probably lose more from striking than he would gain. In this way the financial disincentive might help to prevent a strike but this does not, in principle,

derogate from workers' freedom to strike if they consider it, on balance, to be in their best interest. In my view this result is not necessarily unfair in the sense contemplated by the unfair labour practice definition.

In argument it was further contended that an important objection to the non-payment of a bonus in a case like the present is that it is not self-regulating, like some forms of reprisal available to an employer. Thus a lock-out causes harm to an employer and it would be in his interest to end it as soon as possible. Non-payment of a bonus, on the other hand, it is said, redounds entirely to the employer's benefit. There is nothing to discourage him from using it as a weapon.

In my view the fallacy in this argument, assuming it to be valid in other respects, is that it ignores the broader picture. A strike, it must be assumed, is detrimental to the interests of the employer, otherwise

the workers would not gain anything by engaging in it. And this would be so despite the fact that the employer saves some money as a result of the strike, e g, by not paying wages. It is hardly to be imagined that this equation would be any different if, in addition to wages, the employer would save also the money that would otherwise have been paid as bonuses to striking workers. The employer would still want to prevent or end a strike, even if this meant that he would have to pay the bonuses, in whole or in part. It is true that, once the strike has run its course, the forfeiture of the bonuses causes the employer no further harm, but the same may be said of the forfeiture of wages. The point is that the forfeiture of the bonuses, like the forfeiture of wages, depends on the duration of the strike, which is something which the employer would wish to limit as far as possible.

In support of his argument Mr Brassey relied on a number of cases decided in the courts of the United

States of America, and in particular on the case of **National Labor Relations Board v Erie Resistor Corp. et al** (1963) 373 US 221. These cases concerned the interpretation of certain provisions of the National Labor Relations Act which differs substantially from our Act. Moreover, the facts in issue in the **Erie Resistor** case and other authoritative decisions are not on a par with those with which we are concerned. I consequently do not find these cases helpful.

Mr Wallis, who appeared for the company, contended that the union's argument really meant that every measure which served to change the balance of power between the employees and the employer in the latter's favour amounted to an unfair labour practice. However, he said, what the correct balance should be is a matter of policy which cannot properly be determined by an industrial court under its unfair labour practice jurisdiction. It is clear that this jurisdiction is not unlimited. See, for instance, Cameron **et al The New**

Labour Relations Act pp 96 - 106 (Chapter 5) and Thompson and Benjamin **South African Labour Law** para 32. As appears from the above sources the dividing line between matters which fall within the unfair labour practice jurisdiction and those which do not is somewhat blurred. In my view it is unnecessary to decide on which side of the line the present matter falls since, for the reasons given, I do not think that the provision of a financial inducement to workers to abstain from striking necessarily amounts to an unfair labour practice.

This conclusion does not, of course, mean that there may not be circumstances in which a particular inducement may be objectionable. As was stated in **National Union of Metalworkers of South Africa and Others v Macsteel (Pty) Ltd** 1992 (3) SA 809 (A) at 817 I, whether a labour practice is unfair must depend upon all the facts and circumstances of each case. And this, I consider, also answers an argument by Mr Brassey

that, if the forfeiture of the bonuses in the present case were to be permitted, many other forms of conduct by an employer might also be considered unobjectionable. Whether such conduct would be fair or unfair would depend on the circumstances in which it occurred.

I turn now to the present case. Mr Brassey did not contend that there was anything in its particular facts and circumstances which rendered the non-payment of the bonus to striking workers unfair. He relied entirely on the principle discussed above, which was said to be of general application. It is consequently not necessary to consider the evidence in any detail. In brief it showed the following. The company had a particularly strong interest in trying to avert a strike. Its financial position was parlous. The union pressed demands which it could not reasonably expect to achieve in the light of the company's financial position. The payment of a bonus was a discretionary act on the part

of the company. It did not form a part of the workers' agreed remuneration. Indeed, the union's attempts to have the bonus included in such remuneration had up to that stage not succeeded. The workers were warned that they faced forfeiture of the bonus if they participated in a strike. There is nothing to suggest that any of them were unaware of this. The strike continued for seven weeks, causing great loss to the company. In the final settlement the union accepted substantially less than it had claimed at the commencement of the strike. In these circumstances it seems somewhat anomalous for striking workers to claim a bonus granted in recognition of service during the year. The present case is, in my view, clearly one in which it was not unfair of the employer to withhold payment of the bonus from workers who had participated in the strike.

But then it may be said that the unfair labour practice committed by the company in the present case was not the actual forfeiture of bonuses, but the

threat to withhold bonuses in all cases of strike action, whatever their cause or nature. I do not agree. The question is whether the striking workers were treated unfairly. If the answer to that question is no, it would not in my view matter that the policy laid down by the company, if applied unreasonably, might prove to be unfair in other circumstances. In fact, as I have indicated above, the company has up to now applied this policy with some discretion and flexibility.

I turn now to the union's alternative argument, viz, that the company acted unfairly by discriminating, in the withholding or payment of bonuses, between workers who had taken part in the strike and those who had not ("the disparate treatment argument"). In this connection it was common cause that an employer should in principle treat like classes of employees alike. See, for instance, **National Union of Mineworkers v East Rand Gold and Uranium Co Ltd (supra)** at 736F - 737B;

Henred Fruehauf Trailers (Pty) Ltd v National Union of Metalworkers of S A & Others (1992) 13 ILJ 593 (LAC) at 599G - 601B and the appeal judgment in the latter case, **National Union of Metalworkers of South Africa and Others v. Henred Fruehauf Trailers (Pty) Ltd** (AD) unreported, judgment delivered 11 November 1994, p. 19-20. Now in the present case the company's non-managerial workers were alike in the respect that they did the same work and, by reason of the company's policy of standardization of wages, received the same wages. They differed in that some of them took part in the strike whereas others did not. This difference, it was contended, was irrelevant. All the workers formed a single bargaining unit and should have been treated the same. Assuming for the sake of this argument that the forfeiture of the bonus was permissible, the forfeiture should have been applied to all workers or to none.

This argument was presented on the assumption that

the main argument was rejected. In other words, one must assume for the purposes of this argument that the company's threat to withhold payment of the bonus to workers who had taken part in the strike was unobjectionable. On this assumption there was a clear and valid distinction between striking workers, who had forfeited their claim to a bonus, and non-striking workers, who were entitled to expect payment of a bonus. If this distinction is ignored, the result would be either that strikers and non-strikers alike would receive the bonus, or that none would receive it. The first alternative would make nonsense of the inducement to workers to abstain from striking. The second would be extremely unfair to workers who, relying on the inducement, stayed at work.

But then it may be argued that the inducement or threat should have been addressed to all the workers, i e, that the company's policy should have been to withhold the bonus from all workers whenever any of

them took part in a strike. The suggested justification for this argument is that all workers benefit (actually or potentially) from a strike, and consequently all should bear the disadvantages flowing therefrom. I cannot agree with this argument. It would in my view be unreasonable to deprive workers who did not strike of a bonus merely because some others, perhaps even very few, engaged in a strike with which the non-striking workers might have had no sympathy. In argument it was suggested that striking workers are, in a sense, the agents of those who do not strike. I suppose there may be cases in which this proposition is broadly correct, but the present is not one. Here more than two-thirds of the workforce did not strike. They consisted of union members, members of NUDAW, and workers who belonged to no trade union. They clearly did not authorize the strike and there is nothing to suggest that they approved of it. In the end they received the same benefits as the strikers, but these were not large

and may conceivably have been achieved even without a strike. There is nothing to suggest that the workers who did not strike subsequently regarded the strike to have been worth-while, and thus, even if only emotionally and **ex post facto**, made common cause with the strikers. To insist that they suffer the same disadvantages as those that befell the strikers would in my view be unconscionable. I do not think the disparate treatment argument can be sustained.

In the result I agree with the decision of the Labour Appeal Court that the company was entitled to withhold bonuses from the workers who had participated in the strike. It is therefore not necessary to decide whether, if the decision had gone the other way, the workers would have been entitled to interest on the bonuses. Both parties agreed that the order on this appeal should not carry costs.

The appeal is dismissed.

E M GROSSKOPF, JA

SMALBERGER, JA
NESTADT, JA
HOWIE,JA
MARAIS, JA
Concur