

616/88

N v H

THE SOUTH AFRICAN BREWERIES LIMITED

and

FOOD AND ALLIED WORKERS UNION AND 1595 OTHERS

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

THE SOUTH AFRICAN BREWERIES LIMITED

Appellant

and

FOOD AND ALLIED WORKERS UNION

1st Respondent

AND 1595 OTHERS

2nd to 1595th
Respondents

CORAM: CORBETT, CJ, VAN HEERDEN, SMALBERGER, MILNE,
et STEYN, JJA

Heard: 21 August 1989

Delivered: 26 September 1989

J U D G M E N T

SMALBERGER, JA :

The appellant (Breweries) is a public company which carries on the business of brewing. To this end it operates breweries and distribution depots at a number of premises throughout the Republic, and employs

a large labour force. The first respondent (the Union) is a registered trade union. The remaining respondents (the employees) are employed by Breweries at four of its Transvaal establishments. They are all members of the Union, which is recognised by Breweries as the sole collective bargaining agent of the employees at the establishments in question.

The following is a brief factual background to the present appeal. Over the period June to September 1987 negotiations were conducted between Breweries and the Union with regard to the wages and working conditions of all workers represented by the Union (including the employees) at Breweries' various establishments countrywide. An impasse was reached when the parties failed to agree on certain matters. This resulted in the employees refusing to work overtime from 14 September 1987. Prior to that date

...../3

they had regularly worked overtime when requested to do so. Breweries relied upon such overtime being worked for the purposes of its normal brewing and distribution operations. The refusal to work overtime occasioned substantial financial loss to Breweries because of lost production and the disruption of distribution. Breweries allege (and this is not denied) that the Union instigated or incited the employees to refuse to work overtime, and that the employees collectively decided to refuse to work overtime, with the intention of compelling Breweries to comply with certain of the Union's demands pertaining to wages and working conditions.

Consequent upon the employees' refusal to work overtime Breweries sought urgent relief in the Witwatersrand Local Division by way of notice of motion. The purpose of the application was to have

the employees' collective refusal to work overtime declared an unlawful strike in terms of s 65(1) of the Labour Relations Act 28 of 1956 (the Act). The application was dismissed with costs by **GOLDSTONE, J.**, but leave was granted to Breweries to appeal to this Court. The judgment of **GOLDSTONE, J.** is reported in 1988 (2) SA 723 (W).

The relevant portion of s 65(1) of the Act provides :

"No employee or other person shall instigate a strike or incite any employee to take part in or to continue a strike or take part in a strike or in the continuation of a strike, "

In terms of s 82(1)(b) of the Act a contravention of s 65(1) carries penal consequences.

The central issue in the present appeal is whether the collective refusal by the employees to work overtime in order to induce or compel Breweries to accept their employment demands constituted a strike as defined in s 1 of the Act. In terms of the definition:

" 'strike' means any one or more of the following acts or omissions by any body or number of persons who are or have been employed either by the same employer or by different employers -

- (a) the refusal or failure by them to continue to work (whether the discontinuance is complete or partial) or to resume their work or to accept re-employment or to comply with the terms of conditions of employment applicable to them, or the retardation by them of the progress of work, or the obstruction by them of work; or

(b) the breach or termination by them of their contracts of employment, if -

(i) that refusal, failure, retardation, obstruction, breach or termination is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and

(ii) the purpose of that refusal, failure, retardation, obstruction, breach or termination is to induce or compel any person by whom they or any other persons are or have been employed -

(aa) to agree to or to comply with any demands or proposals concerning terms and conditions of employment or other matters made by or on behalf of them or any of them or any other persons

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who are or have been employed; or

(bb) to refrain from giving effect to any intention to change terms or conditions of employment, or, if such a change has been made, to restore the terms or conditions to those which existed before the change was made; or

(cc) to employ or to suspend or terminate the employment of any person;"

As appears from the definition, a strike has three component parts. There must be an act or omission of the kind envisaged in (a) or (b); there must be collective action (in terms of (i)); and such action must be aimed at achieving one or more of the objects stated in (ii). To constitute a strike all three component parts must be present. It is common

cause in the present appeal that the conduct of the employees satisfied the requirements of (i) and (ii) of the definition. What is essentially in issue is whether the refusal to work overtime by the employees amounted to a refusal or failure by them "to continue to work" or "to resume their work" within the context of paragraph (a) of the definition. If it did, their conduct constituted an unlawful strike. A refusal or failure "to continue to work" implies a refusal to do work currently in progress. The phrase appears to envisage a so-called "down-tools" situation. It would not appear to be particularly apposite to overtime work following a normal shift. The phrase "to resume their work" may more aptly cover such a situation. For the purposes of the present appeal, however, I shall accept that both phrases embrace the notion of overtime work. The question remains whether

the refusal of the employees to work overtime brought their conduct within the relevant provisions of the strike definition. The answer to the question posed depends in my view upon the proper meaning to be ascribed to the word "work" where it appears in the phrases "to continue to work" and "to resume their work".

The Act does not define the word "work". As appears from the Shorter Oxford Dictionary, it is a word susceptible of a wide variety of meanings. Its usage and meaning in paragraph (a) of the definition are not uniform. It is used both as a noun and a verb. Its contextual setting determines its precise shade of meaning (e.g. the word appears to have a wider and more general connotation when used in the phrase "the retardation by them of the progress of work" than in the phrase "resume their work"). It would seem

that the word "work" in the phrases "to continue to work" and "to resume their work" encompasses, broadly speaking, that which a particular employee factually engages in within the ambit of what are considered to be his normal employment duties. The parties are agreed that it does not include work that it would be unlawful to permit an employee to do, i.e. illegal work. Thus the collective refusal by workers to perform illegal work, with whatever purpose in mind, can never amount to an unlawful strike. The word "work" probably does not embrace fields of activity falling outside a particular worker's recognised duties, but it is not necessary to decide the point. The word, being susceptible of more than one meaning, is clearly ambiguous. The cardinal issue, and the one that falls to be determined in the present appeal, is whether the word "work", in the phrases to which I have

referred, covers only activities which a worker is contractually obliged to perform, or whether it includes activities which a worker can be said to perform habitually (or normally or usually) even though he is not bound by contract to do so, e.g. voluntary overtime work regularly done. Breweries contend for the wider meaning; the respondents (the Union and the employees) seek to limit the meaning to contractual work. The vexed question of the proper meaning to be ascribed to the word "work" has given rise to conflicting decisions in certain Divisions of the Supreme Court. It has also been the subject of differing interpretations in the Industrial Court.

It is common cause in the present matter that the employees were not contractually obliged to work overtime. It is also not in dispute that they have in the past regularly worked overtime when required to do

so. A long-standing practice of working overtime could conceivably give rise to a tacit agreement between an employer and an employee that the latter will work overtime whenever required to do so. The employee would then be contractually obliged to perform such overtime. In the present matter the existence of any such tacit agreement has been expressly ruled out by Breweries' acceptance in its founding affidavit that the employees were not contractually bound to work overtime. If the concept of work in paragraph (a) of the definition of "strike" only encompasses work which an employee is contractually obliged to perform, the refusal to work overtime by the employees cannot constitute a strike as defined.

In arriving at his conclusion that the concept of work (in the phrases referred to in the definition of strike) should be limited to work which

an employee was contractually obliged to perform, the judge a quo relied, inter alia, upon the decision in R v Canqan and Others 1956(3) SA 366 (E) (which was followed in National Automobile and Allied Workers Union v CHT Manufacturing Co (Pty) Ltd (1984) 5 ILJ 186) and the views expressed by BROOME, J, in Plascon Evans Paint (Natal) Ltd v Chemical Workers Industrial Union and Others (1987) 8 ILJ 605 (D) (the Plascon Evans (1) case). The main consideration, however, which prompted his conclusion was the uncertainty and confusion which would arise if the word "work" was to include work habitually performed, whether under a contractual obligation to do so or not (1988(2) SA at 729 G-H).

In coming to contrary conclusions GALGUT, J, in Plascon Evans Paint (Natal) Ltd v Chemical Workers Industrial Union and Others (1988) 9 ILJ 231 (the

Plascon Evans (2) case) and MULLINS, J, in Bebel Investments (Pty) Ltd t/a East London Furniture Industries v Paper, Printing, Wood and Allied Workers' Union and Others 1989(1) SA 908 (E) were primarily swayed by the view that the definition of "strike" contemplated all manner of work habitually performed, whether of a contractual nature or not. Landman, AM, in Amalgamated Beverage Industries Ltd v Food and Allied Workers Union and Others (1988) 9 ILJ 252 concluded, inter alia, that it would be anomalous, and contrary to the legislature's intention, if overtime bans in respect of non-contractual work alone were excluded from the statutory conciliation process which the Act makes provision for, because they did not fall within the statutory definition of a strike.

The matter is fraught with difficulty. Strong arguments can be advanced in support of the

opposing points of view. I do not think that any assistance can be gained from the decision in R v Canqan and Others (supra). The accused in that case were convicted of striking in contravention of the relevant provisions of the Black Labour Settlement of Disputes Act 48 of 1953. The definition of "strike" incorporated into that statute is in practically identical terms to that in the Act. In the course of the judgment it was stated (at 367 F-G):

"It is common cause that at the time the notice was given to the appellants they were all in the employ of the company, and it was necessary, before any of them could be convicted, to show that they were failing to perform the work and to work the hours which in terms of their contract they were obliged to work."

In my view it is clear, on a proper reading of the above passage, in the context of the judgment as a

whole, that the entire passage reflects what was common cause. It does not represent a considered opinion after hearing opposing views. If it did the court could not have failed to give reasons for such opinion. **BROOME, J.** in the Plascon Evans (1) case approached the problem from the perspective of the individual employee in holding that a refusal to perform voluntary overtime did not amount to a strike as defined. This is not a correct approach. It loses sight of the fact that it is only collective action with one of the stated objects in mind that can amount to a strike. It is not disputed that an employee, provided he acts individually and independently of others, is always free to refuse to work voluntary overtime, for whatever reason. The same flawed approach underlies the reasoning of **CURLEWIS, J.** in Tiger Bakeries Ltd v Food and Allied Workers Union and

Others (1988) 9 ILJ 82. Both BROOME, J, and CURLEWIS, J, however, were mindful of the important requirement that a provision with penal consequences must be restrictively interpreted.

As pointed out by the judge a quo (at 727 B - C), the acts and omissions referred to in paragraphs (a) and (b) of the definition of "strike" do not only embrace breaches of contract. The legislature clearly had in mind that not only breaches of contract, but also certain specified conduct not amounting to breach of contract, would fall within the categories of conduct which would amount to a strike (provided the other requisites of the definition were satisfied). This consideration was held by GALGUT, J, in the Plascon Evans (2) case (at 241 H) to support an interpretation that the refusal "to continue to work" includes a refusal to do work which workers are not

contractually obliged to perform. It does not follow, in my view, that where two separate notions are encompassed within a single statutory provision, an ambiguous word in that provision must necessarily be interpreted to cover both. Thus even though the categories of conduct in paragraphs (a) and (b) of the definition of "strike" are not limited to breaches of contract, it does not follow that the word "work" must encompass activities falling outside those which an employee is contractually bound to perform. While it is important to have regard to the context in which the word is used, there are other canons of construction that have a bearing on its proper interpretation.

In my view the judge a quo (at 729 G - H) put his finger on the most important consideration for giving the word "work" a limited meaning - the vagueness that would be imported into the definition of

"strike", with resultant uncertainty and confusion, if the word were not confined to activities an employee is contractually obliged to perform, but were extended to cover work habitually (or normally or usually) performed. In the case of voluntary overtime work, where would one draw the line in determining whether it had been habitually performed? What criteria would one apply? How long would the practice of working overtime have to be established to make it habitual (or normal or usual)? With what frequency must it have occurred? Must it have endured for a week, a month or a year? How widespread would the practice have to be? Must it have permeated the whole work-force, or would it suffice if only part of the work-force engaged therein? In the latter instance, must it have prevailed amongst the majority or a substantial minority of the work-force? Must it have prevailed

in a particular factory or establishment, or in the industry generally? What if workers were required to perform overtime substantially in excess of the limited overtime previously done? As the judge a quo aptly remarked, the grey areas would be legion. The situation would arise where it would become difficult, if not impossible, for workers in given circumstances to determine, or to be advised, whether their collective refusal to work voluntary overtime could amount to an unlawful strike. Management would be faced with similar problems of assessment. An interpretation with such consequences is unlikely to accord with the legislature's intention, and should be avoided. As stated by BOTHA, JA, in Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk 1966(4) SA 434 (A) at 443 A:

"Ek meen dat aanvaar moet word dat die Wetgewer nie onsekerheid en verwarring in die

toepassing van sy verordeninge wil skep nie, en waar woorde dus vir verskillende betekenisse vatbaar is, moet daardie uitleg wat tot onsekerheid en verwarring by die toepassing van die betrokke wetsbepaling aanleiding gee, vermy word ten gunste van daardie uitleg wat sekerheid meebring."

GALGUT, J, in the Plascon Evans (2) case failed to have regard to the above considerations. In the Bebel Investments' case MULLINS, J, after referring to the uncertainty and confusion postulated by the judge a quo (GOLDSTONE, J), remarked (at 916 G - H):

"I do not, with respect, share these difficulties. Nor do I think it necessary to circumscribe the phrase 'usually or normally performed' just as it is not necessary or desirable to define the word 'practice', referred to above. What has to be decided is whether employees have failed or refused to continue to work, in the circumstances prescribed by the definition of

'strike'. Each case will depend on its own facts, and there is no need to lay down any criteria with regard to the length of time required to constitute what is usual or normal, or how many employees must be involved."

With respect to MULLINS, J, this begs the question. Before one can have regard to the facts of a particular matter it is necessary first to determine what meaning the legislature intended the word "work" in paragraph (a) of the definition to have - whether it intended its meaning to be confined to activities which an employee was contractually obliged to perform, or whether it was meant to have a wider meaning. The question of vagueness, and resultant uncertainty and confusion, is relevant to such determination. It is only once the meaning of the word "work" has been established that one has regard to the particular facts to determine whether there has been a refusal "to continue to work"

or "to resume their work". The proper legal interpretation of the word "work" cannot depend upon, or vary with, the facts of a particular case.

There are additional considerations why the word "work" should be narrowly interpreted. Under the common law no employee can be directly or indirectly compelled to perform work he is not contractually obliged to do, no matter whether in refusing to do such work he acts individually or collectively with others, and irrespective of the reason or purpose for such refusal. The right of workers to withhold labour they are not contractually obliged to perform is an important weapon they possess in the bargaining process that underlies the theory of modern labour law. It assists them to organise their labour power effectively in negotiations with their employer. They would be deprived of this right, at

least for a period of time, and their bargaining power would be correspondingly weakened, if the word "work" was interpreted to encompass voluntary overtime. There is a presumption against the deprivation of, or interference with, common law rights, and in the case of ambiguity an interpretation which preserves those rights will be favoured (Steyn: Die Uitleg van Wette : 5th Edition : pp 103-5). The remarks of REYNOLDS, JP, in R v Malinge and Others 1955(1) SA 345 (E) at 349 G that "(1)egislation to prevent strikes is a modern product to meet modern circumstances, and it is difficult to believe common law was ever intended to be used in these Acts intended to obviate unrest by machinery created by the Statutes, and so prevent this Act being applied" does not, and was never intended to, detract from the application of this general principle. The court was there considering whether

the word "law" in the phrase "any question of law" in the definition of labour dispute in s 1(v) of Act 48 of 1953 included a question of common law. It was not commenting on the applicability or otherwise of the above canon of construction in the interpretation of labour legislation. Furthermore, as the provisions of s 65(1) of the Act are penal in nature they must be strictly construed. A construction is therefore called for which does not render criminal conduct which at common law is perfectly lawful. This would be the inevitable consequence of including voluntary overtime in the meaning of the word "work". What is lawful at common law will become unlawful and subject to penal sanctions.

Although there are cogent arguments that can support a contrary view, the principles and considerations I have mentioned are to my mind

decisive, and justify the conclusion that the word "work" in the phrases "to continue to work" and "to resume their work" must be limited to mean work that an employee is contractually obliged to perform. I agree with the judge a quo that such interpretation will not frustrate the overall intention of the legislature or the purpose of the legislation (as to which see Trident Steel (Pty) Ltd v John NO and Others (1987) 8 ILJ 27 at 32/3). Furthermore, the worker loses no common law rights which can affect his negotiating position. Nor will the employer be prejudiced because he can protect himself from the consequences of a voluntary ban on overtime by contracting with his workers to do overtime, or supplementing his work-force where necessary. As previously mentioned, it is common cause that the employees were not contractually bound to perform overtime, and consequently their refusal to

do so did not constitute a refusal "to continue to work" or "to resume their work" within the meaning of those phrases in the definition of strike. Their conduct accordingly did not amount to an unlawful strike in terms of s 65(1) of the Act.

It was argued on appeal (albeit faintly), on behalf of Breweries, that the employees' conduct may have amounted to "the retardation by them of the progress of work" or "the obstruction by them of work" in terms of paragraph (a) of the definition of "strike". With retardation of the progress of work the legislature clearly had in mind a go-slow strike or work to rule, a situation where work is done, but at substantially reduced levels of activity and productivity. An obstruction (belemmering) of work covers acts designed to impede the natural progress of work e.g. conduct whereby other workers are prevented

from working or the operation of machinery is rendered less efficient. In my view a ban on voluntary overtime does not fall into either of these categories.

The respondents also sought in argument to rely upon the provisions of s 8(1) of the Basic Conditions of Employment Act 3 of 1983. However, in view of the conclusion to which I have come, it is not necessary to consider the submissions advanced in this regard.

In the result the appeal fails. As this has been in the nature of a test case, and as the parties have so agreed, there will be no order as to the costs of appeal.

JUDGE OF APPEAL

J W SMALBERGER

CORBETT, CJ)
VAN HEERDEN, JA)
MILNE, JA)
STEYN, JA)
CONCUR