

LABOUR APPEAL COURT

(TRANSCAAL DIVISION)

CASE NO 11/2/11189

DELETE WHICHEVER IS NOT APPLICABLE

1' REPORTABLE: ~~YES~~/NO.

2 OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

3 REVISED.

DATE 13.9.94

SIGNATURE

In the matter between :

**FOOD AND ALLIED WORKERS
UNION AND 120 OTHERS**

Appellant

and

**AMALGAMATED BEVERAGE INDUSTRIES
LIMITED**

Respondent

Coram: Nugent,J; D.G. John; K Satchwell

Hearing: 10 August 1994

Judgment: 14 September 1994

JUDGMENT

NUGENT J:

On 5 March 1992 the respondent dismissed the individual appellants from its employment. The appellants applied to the Industrial Court for relief in terms of section 46(9) of the Labour Relations Act 28 of 1956, alleging that the respondent's conduct in dismissing them constituted an unfair labour practice. Their application was dismissed, and this is an appeal against that decision.

The respondent is a manufacturer and distributor of soft drinks. It carries on business at various plants, one of which is situated in Benrose. The respondent has a fleet of trucks for distribution of its products, each of which is manned by a team which normally comprises a driver and three assistants. At the time which is relevant to this appeal, approximately 50 drivers and 150 assistants, who were referred to in the evidence as "crewmen", were employed at the Benrose plant. All the individual appellants, whom I will refer to for convenience simply as the appellants, were crewmen.

At the time which is relevant to this appeal, it was normal practice for a crewman arriving at work to place his personal identification card through an electronic scanner at the entrance to the premises. By doing so he was permitted access to the premises, and his arrival on the premises was automatically recorded. He would then change into his working clothes, and report for duty at a room which

was referred to in the evidence at times as the clock card room, and at times as the crew allocation room. Crewmen were required to report for duty by 07h30.

In the allocation room, crew coordinators would allocate teams to the various trucks, and the teams would then leave to make their deliveries. Trucks normally started leaving the premises shortly after 07h30, and continued doing so until about 09h00.

During 1991 the respondent had a manual system for recording products delivered and moneys received by each driver. However a considerable amount of theft was occurring, and the manual system was inadequate for exposing the culprits. To reduce the risk of theft, the respondent decided in about May 1991 to introduce a computerised system.

At first employees resisted the introduction of the new system. However in August 1991 the respondent and the union representing drivers and crewmen agreed that the new system would be supported by the employees concerned. Notwithstanding this agreement, drivers and crewmen at Benrose continued to resist its introduction. Resistance took the form of late-coming, absenteeism, go-slows, demands for extra crewmen per vehicle, and refusals to do additional deliveries.

The distribution manager at Benrose was unable to overcome this resistance, which resulted in his dismissal in January 1992. He was replaced on 18 February 1992 by a certain Mr van der Westhuizen, who was seconded from the respondent's East Rand plant.

On Monday 24 February 1992 the drivers at Benrose went on strike, and the crewmen soon joined them. The reasons which the employees gave for their refusal to work varied from time to time, but were essentially directed in one form or another at Mr van der Westhuizen. Whatever the ostensible reasons for the strike, according to the respondent's evidence the true reason therefor was again resistance to the introduction of the new system, and this evidence was not disputed.

The strike continued throughout that week, but by Friday it had been agreed that the employees would return to work on Monday 2 March 1992. The respondent requested the drivers to assist it in overcoming the backlog which had built up, by making deliveries on Saturday 29 February 1992, but all refused to do so, except Isaac Nthaba, a driver who had been employed in a temporary capacity during the strike.

It was the events which occurred at the commencement of the working day on Monday 2 March which resulted in the individual appellants being dismissed.

What occurred is best described by relating the observations which were made by various witnesses called by the respondent to give evidence in the court **a quo**.

Mrs Allsopp was an occupational health nurse employed by the respondent. Her clinic was situated some 30 metres from the crew allocation room, which in turn was located near the main entrance to the premises. Normally when she arrived at work she would find crewmen standing around the area, waiting to be allocated, and greetings would pass back and forth between them. On the day in question she arrived at the main entrance at about 07h25. She encountered what she described as "a lot of crewmen" gathered near the main entrance, and immediately felt that something was amiss as she did not receive the usual greetings.

A similar observation was made by the security manager, Mr Barnard, who arrived at work at 07h00. He also noted a large number of crewmen gathered in the vicinity of the allocation room. While this in itself was not unusual, what struck Mr Barnard was the absence of the usual jostling, horseplay and card games which occurred at that time of the morning. He asked his site commander what the problem was, and was told that the crewmen were dissatisfied with their working conditions.

Miss Birchfield, the acting assistant personnel manager, arrived at the main entrance at 07h42. Normally the trucks would by then have already started

moving out of the premises, and she was struck by the fact that none were doing so. She approached a group of drivers who were standing in the yard, and spoke to them to find out why nothing was happening. Just then she heard what she described as "cheering, shouting, just in general a large commotion." She turned towards the source of the sound, and noticed that the crew allocation room was filled with people. Believing that an unauthorised mass meeting was taking place, she walked towards the room, where she encountered a driver who was standing outside the room. She asked him what was happening. His reply was that a driver was being assaulted and "taught a lesson for having worked on Saturday".

Just then people started pouring out of the room. Miss Birchfield stepped back, and they streamed past her on both sides. When most of the crewmen had left the room, she entered it. She estimated that by that time about 100 people had emerged from the room.

Inside the room she saw Isaac Nthaba crouched in the far corner, in a pool of blood. Uprturned benches, chairs and crates were scattered around. Mr Nthaba's shirt had been ripped, and his shoes and socks were strewn around the room. He was covered in blood, which was pouring from a head wound.

The route manager and two crew coordinators were present, and she asked them to lie Mr Nthaba down while she sought assistance. Mrs Allsopp was summoned,

who examined Mr Nthaba. She then summoned an ambulance, and returned to render first aid.

When the ambulance arrived, oxygen and a drip were administered, and Mr Nthaba was wheeled to the ambulance on a stretcher. A number of crewmen were gathered outside the allocation room. Precisely how many is not clear, but the mood was sufficiently hostile to inspire fear in the minds of the ambulance attendants. Miss Birchfield and Mr Barnard heard some of the crewmen who had gathered outside singing as the stretcher was wheeled past. They were later told that the words being sung were to the effect "death to the traitor". According to Mr Barnard, as the ambulance drove away there was "cheering or jeering" from the crowd of crewmen.

Management immediately commenced enquiries in an attempt to establish what had happened, while the drivers and crewmen went about their duties. Later that day the drivers refused to complete their allocated deliveries, and work was cancelled for the remainder of the day.

On the following day the investigation by members of management continued. A number of meetings were also held with the shop stewards. They were asked to assist in identifying those who had been responsible for assaulting Mr Nthaba, but they declined to do so.

By 13h00 on that day the members of management who had undertaken the investigation had concluded that it was the crewmen who had been responsible for the assault, and the shop stewards were advised that a disciplinary hearing would be convened the following day. The shop stewards were asked to distribute notices to that effect to the crewmen, but they declined to do so.

A notice was accordingly placed on the notice boards, and read over the public address system. The notice was addressed to "Crewmen in Attendance on 2nd March 1992". It called upon them to "Attend a Disciplinary Enquiry/Hearing" the following morning in the canteen, and informed them that the charges which were to be investigated were "serious assault, mass insubordination and intimidation."

The hearing was duly convened the following morning. By then a list had been prepared which reflected the names of all crewmen who management believed had been on the premises at the time the assault occurred. It comprised the names of all crewmen whose personal identification cards had activated the electronic scanning device at the entrance to the premises that morning, and eleven others.

The electronic scanning device had only recently been installed, and it was explained in the evidence how it was possible for crewmen to gain access to the premises without their names being recorded by the device. The additional eleven names had been furnished by a crew coordinator, who had told management

that those crewmen had indeed been on the premises at the time the assault took place, notwithstanding that their names had not been recorded at the entrance. Two of these crewmen subsequently approached the personnel officer and informed him that they had not been at work on the day the assault occurred, and they were reinstated.

I should add that the recording device at the entrance had also recorded that certain of the employees had left the premises within a minute or so of having arrived. It was explained in evidence that if the card was passed through the scanner twice in succession, the device would first record an arrival, and then record a departure. The recordings which were made are accordingly consistent with the person concerned having passed his card through the scanner twice in quick succession, and do not necessarily mean that the person actually left the premises.

At the commencement of the disciplinary hearing, the names on the list were called out and the employees concerned were asked to acknowledge their presence.

All but thirteen of the crewmen whose names appeared on the list were present at the hearing. Before the hearing got under way, four of the crewmen present came forward and told the chairman that although they had been on the premises on the day in question, they had been temporarily assigned to perform duties in other departments. They were immediately excused from the hearing and no disciplinary steps were taken against them.

The hearing then proceeded, and in due course all the crewmen whose names appeared on the list (other than the four who had been excused) were found guilty of assault and intimidation. It seems that this finding was made at about 16h00. The chairman then announced that representations would be heard the following day with regard to the sanction which ought to be imposed. He said too that he would be available in the distribution office until 18h00 that evening, and that any employee who still wished to exonerate himself was free to approach him until that time. None of the appellants did so.

On the following day further representations were heard from the shop stewards, and the decision was taken to dismiss all the appellants.

It is not necessary for the purposes of this appeal to traverse the events which occurred at the hearing, or to consider the correctness of the decision which was reached. In effect, a retrial took place in the court *a quo*, on the question of whether adequate grounds existed to dismiss the appellants. In the pleadings the respondent denied the allegation that it had acted unfairly, and alleged that it was justified in dismissing the appellants as they had all participated in or associated themselves with the assault. What it meant by this was amplified in further particulars, in which it was alleged, *inter alia*, that all the appellants had either participated directly in the assault, or had **"made common cause with those who actually physically assaulted Nthaba by shouting encouragement to such**

persons, by adopting a hostile attitude towards Nthaba, by demanding that Nthaba be punished, by physically removing Sidney Nxumalo, the chairman of the shop stewards committee, from the clockcard room when he attempted to prevent the assault, by preventing Nthaba's escape and by colluding with one another to prevent the discovery of the identity of those who actually assaulted Nthaba..."

In argument before us it was accepted by the appellant's counsel that if it was found that each of the appellants had associated themselves with the assault in one or other of the forms alleged by the respondent, the dismissal was justified.

It was submitted by the appellant's counsel that the onus of establishing this was upon the respondent, and that the onus was to be discharged as a matter of probability. I have assumed for purposes of this appeal that that submission is correct.

There was no direct evidence linking any of the appellants to any particular act in relation to the assault, and the respondent's case was based on inference alone. None of the appellants gave evidence, either in the court *a quo* or in the course of the disciplinary hearing. The attitude adopted by the appellants throughout was that it was for the respondent to establish their complicity, and that no case had been made out against any of them which called for a reply.

The extent to which a party's failure to give evidence may properly give rise to an inference against him has received considerable attention from the courts.

What emerges from the decided cases is that his failure to do so cannot by itself constitute proof of what is alleged against him. Nevertheless the evidence against him, though not conclusive, may be such that an explanation would be expected if one was available. In such cases his failure to provide an explanation may be placed in the balance against him. The approach in civil cases is illustrated by the following extract from the judgment of Schreiner JA in **Galante v Dickinson** 1950 (2) SA 460 (A) at 465:

"It is not advisable to set down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant."

In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action. This was an issue which was raised in the court *a quo*, but in view of the conclusion to which I have come it is not necessary to deal with it in the present case.

The inference which the respondent seeks to draw from the evidence is that all the appellants were present at the time the assault took place, and either actively participated in the assault or at least supported and encouraged the actual perpetrators. It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn (**R v Blom 1939 AD 188 at 202-3**). In my view all the evidence in the present case is consistent with that inference.

The appellant's counsel submitted that the evidence shows no more than that most of the crewmen were present when the assault took place, and that this does not assist in establishing as a matter of probability the presence of any one of the appellants. The reasoning is undoubtedly correct, but in my view none of the evidence establishes that it was only a majority of the appellants who were present. The evidence is equally consistent with them all being there.

The electronic device at the entrance to the premises was activated by the personal identification cards of all but nine of the individual appellants sometime before the assault took place. The remaining nine were identified by the crew coordinator as having been present on the premises at that time, albeit that this evidence was hearsay. Accordingly there was evidence that all the appellants were on the premises at about the time the assault took place.

Furthermore, from about 07h30 it is normal for the crewmen to gather either in the allocation room or in the area outside it. Miss Birchfield saw no crewmen outside the allocation room from the time that she arrived until after the assault had taken place. Although the possibility was put to her that some of the appellants may have been in the canteen or in the changeroom, there was no evidence to suggest that any of them were.

The evidence was also that the crewmen normally acted cohesively as a group in matters which they considered to affect their interests. The assault upon Mr Nthaba had clearly been planned in advance, and the evidence suggests that it was general knowledge amongst drivers and crewmen that it was to take place. It would not be unusual in those circumstances for them all to have gathered for the event.

Miss Birchfield's evidence was that approximately a hundred crewmen streamed out of the allocation room immediately after the assault. When she entered the room some crewmen were still present. Again, her evidence is not inconsistent with the inference sought to be drawn by the respondent.

It was also common cause that while the assault was taking place, a shop steward who attempted to intervene was bundled out of the room by the others. There is no suggestion that any others who were present left at the same time. That the incident was not a spontaneous one, confined to only a few crewmen present in the room, is borne out by this, and by the general tumult which was heard by Miss Birchfield and the hostile atmosphere which prevailed when Mr Nthaba was being wheeled to the ambulance. All this is consistent with the inference that all those present either participated in the assault or lent it their support.

The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A)). In the present case however no alternative inferences have been advanced which have a foundation in the evidence. It was suggested in argument that one or more of the appellants may have been absent, or may have been unwittingly caught up in the events. This, however, is no more than speculation,

as there is no evidence to suggest that this is what occurred. In my view this is preeminently a case in which, had one or more of the appellants had an innocent explanation, they would have tendered it, and in my view their failure to do so must be weighed in the balance against them.

It was also suggested in argument that one or more of the appellants may have declined to offer an explanation because of intimidation, or from a sense of what was called "collegiality". Again, this is mere speculation, with no evidence to support it. Indeed in my view the evidence points the other way. I have already averted to the four crewmen who, in the presence of the remainder, exculpated themselves, apparently without fear of any consequences. There were another two who approached the personnel department before the proceedings commenced in the court *a quo* and explained that they had not been on the premises on the day in question. If there were others who were not present when the assault took place, or who were caught up in events against their will, I can see no reason to believe that they could not have done likewise.

In my view it is probable that all the appellants were indeed present when the assault took place, and either participated therein or lent their support to it.

It was accepted by the appellant's counsel that in those circumstances the decision to dismiss them was justified. In my view that concession was correctly made.

Had I been called upon to do so, I would in any event have concluded that the appellant's conduct justified their dismissal.

Accordingly in my view the appeal ought to be dismissed, and it is so ordered. Taking into account the principles outlined in **National Union of Mineworkers v East Rand Gold & Uranium Co Ltd 1992 (1) SA 700 (A)** at 739 A-G, in my view no order ought to be made with regard to the costs of this appeal.



R. NUGENT
Judge of the Supreme Court

I agree



for D.G. JOHN
Assessor

I agree



K. SATCHELL
Assessor