

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JA61/97

In the matter between

ICS GROUP LIMITED trading as DAIRYBELLE (BLOEMHOF	Appellant (Respondent in the Court <i>a quo</i>)
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and

NATIONAL UNION OF FOOD, BEVERAGE, WINE SPIRITS AND ALLIED WORKERS	First Respondent (First applicant in the Court <i>a quo</i>)
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LUCAS KUBU AND OTHERS	Second and Further Respondents (Second and Further Applicants in the Court <i>a quo</i>)
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JUDGMENT

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CONRADIE JA

¹This is an appeal in terms of section 17(21A)(a) of the Labour Relations Act,

28 of 1956 against a determination by the Industrial Court that the second and further respondents were unfairly dismissed. They were reinstated from the date of the determination but not awarded any compensation. I shall refer to them as the workers.

2When the appeal was due to be heard on 26 November 1997 the respondents applied for a postponement. There were two reasons for the application. They wished to deliver a notice of cross-appeal against the refusal of the Industrial Court to order retrospective reinstatement and also required time to reconstruct a record of certain evidence which had not been recorded. The postponement was granted. Costs were reserved.

3The workers were employed at the appellant's factory in Bloemhof. The first respondent was their collective bargaining representative. The factory produces butter, cheese and milk powder in a twenty-four hours per day, seven days per week operation. For this reason it had been agreed that the appellant might call upon its employees to work overtime and on Sundays and public holidays.

4Wage negotiations between the appellant and the first respondent failed. A conciliation board was then established to consider the dispute. Shortly before the board was to meet for the first time on 29 March 1996 the workers, or some of them, during the night shift of 27 March, embarked upon go-slow industrial action which continued and intensified on 28 and 29 March. A meeting was held on 28 March. The appellant's case is that management was informed at the meeting that the workers had decided no longer to work overtime, or on Sundays and public holidays; as for the go-slow, one of the shop stewards, Mr. Kubu, denied that there was a go-slow in progress. Kubu, who testified in the

Industrial Court, said, however, that he had merely raised with management the workers' objection concerning the selection of those expected to work overtime and that the question of go-slow industrial action had not even been raised by management.

5I am satisfied, on a preponderance of probabilities, that there was indeed a go-slow in certain areas of the factory. The minutes of the meeting of 28 March 1996 reflect, in my view sufficiently clearly, that management was troubled by and enquired about "proceedings on the cheese factory floor". Production analyses by Mr Potgieter demonstrated a marked drop in output during the three days in question. Furthermore, Mr. Surics, the appellant's human resources manager, telephoned the first respondent's regional organiser Mr. Matela, to inform him of the go-slow, at the same time asking him to investigate the allegations. Mr. Schlenter, the appellant's factory manager, also involved Matela who responded by letters to Surics and Schlenter, not that there was no go-slow, but that the go-slow had not been raised by management at the meeting of 28 March. This evasive response, together with the other factors, and the fact that the appellant on 29 March began bringing in replacement staff from its other factories, lead me to conclude that there had indeed been a go-slow. So does the consideration that the meeting of 28 March was called urgently. Whether it was called by the appellant or by the first respondent does not matter. The point is that it was a crisis meeting. This urgency was quite inappropriate to a consideration of what the first respondent says was discussed, namely the selection of workers for overtime and holiday shifts. I do not agree with the court *a quo* that the go-slow was a strike. Since the workers' representatives denied the very existence of the industrial action, obviously no demand was articulated. Nevertheless, whether the industrial action was or was

not a strike *stricto sensu*, it was conduct of a sort which entitled the appellant to exclude the collectively under-performing participants in it from the factory.

6After the exclusion of the workers (which the first respondent characterised as an illegal lockout), there was an attempt by the first respondent to arrange a meeting for 30 March 1996. Nothing came of that, nor did anything come of a meeting proposed for 1 April. However, on 2 April the parties did meet. While they were conferring, a crowd of workers outside the factory gate became restive. Some of the crowd stoned milk delivery trucks and a bus which were waiting for an opportune moment to enter the factory premises. Extensive damage was caused by this unfortunate break-down of control. Its aftermath, as we shall presently see, was the reason for the collapse of the settlement reached at a further meeting held on Wednesday 10 April 1996. At this meeting it was agreed that the excluded workers would be allowed to recommence work with the morning shift on Friday 12 April, the appellant having in the meantime phased out the substitute staff. Each worker was required to sign an undertaking that he or she would "commence... normal duties (including voluntary overtime when required) as soon as I am allowed to re-enter the company premises." This undertaking was accompanied by an ultimatum calling upon workers to sign the undertaking and notifying them that unless they did so by 08:00 on Thursday 11 April 1996, they would be dismissed.

7The ultimatum was not well received by the shop stewards. There was a reluctance to accept the ultimatum. Their attitude, which was not entirely unjustified, was that since the workers had already agreed to return to work the threat of an ultimatum was inappropriate. This resulted in a further delay and the issue of a further ultimatum in the same terms expiring at 06:00 on 13 April

1996 (the time at which the first shift was to recommence work) and attaching the same undertaking for signature by the workers. This time the undertaking was signed by everyone, but unknown to management, a storm was brewing about the agreement reached on 10 April.

8Management was adamant that it had at the meeting refused to accede to a union demand not to discipline those workers who had been identified as having been involved in the stone throwing incident on 2 April 1996. The first respondent's version of the meeting was that it had been agreed that those workers would not face disciplinary charges. I do not believe that one need resolve the difficult question of what in actual fact transpired at the meeting. It is clear that whether or not the appellant persisted with its stance that offenders would be disciplined, the first respondent's representatives believed that disciplinary charges would not be pressed. It may be that the appellant was brought under the impression that the union agreed with its position by the strong condemnation of violent strike behaviour in general expressed by its regional representative, Mr. Matabane. Nevertheless, it seems certain that the union did not interpret the discussions in the same way. The following day Matela faxed a letter to the appellant, probably in response to a telefax dated the same day enclosing a copy of the undertaking which union members were required to sign. In it he said:

"Our members do want to go back to work tomorrow after they have signed an undertaking as agreed yesterday. Copy thereof enclosed for your information, not the one which has an ultimatum which we agreed that it would not form part of the undertaking - plus 5 workers that no disciplinary measure will be taken".

9Moreover, as soon as the shift lists for the proposed return to work on 13 April came to its attention Matela, on behalf of the union, on 12 April faxed to Surics a message to the effect that the names of certain employees (who are mentioned in the telefax) were not on the shift lists provided to the union. The message was a cryptic one but it should nevertheless have been comprehensible - and alarming - to the appellant. During discussions at the venue for the meeting of the conciliation board on 12 April 1996, the question of disciplinary action against offending workers had been raised. It was, therefore, not a new complaint.

10The individual employees did not resume work on Saturday 13 April 1996. Again, there is a dispute about how this came about. According to Schlenter he was at the factory gate from five o'clock that morning. Not a single worker of the morning shift turned up for work. The respondents' version is completely different. All the workers turned up at the gate but were refused admittance by officials of the appellant. There were no shift lists, only the names of workers against whom disciplinary action was contemplated. Of the two versions I prefer that of the appellant. The probabilities strongly favour it. It defies understanding that the appellant, after having patiently negotiated the return of its workforce and having laid off its temporary workers, would for no discernable reason refuse them entry to the premises. It is much more likely that the early morning shift workers, incensed by what they thought was a breach of faith by management and inspired by a sense of solidarity with the workers whose jobs might be imperilled by disciplinary action, decided to stay away in protest.

11The appellant's reaction was one of dismay. Relations with the shop stewards were already strained. At one point, management even refused to negotiate with them as representatives of the workers. That attitude, fortunately, did not persist but it left scars which were opened up from time to time thereafter by what the appellant regarded as obstructive conduct by the shop stewards. So when there was this latest evidence of what appeared to be undisciplined behaviour, the appellant at 06:00 on Monday 15 April 1996 issued one last ultimatum. The appellant's exasperation with what to it was the workers' aberrant behaviour is palpable in the first paragraph:

"Despite your undertaking to commence normal duties and arrangements made to re-enter the premises from 06:00 on Saturday 13 April 1996, we note that you have once again chosen to disregard any agreements reached. This notice serves as an ultimatum that you are to re-enter the premises as indicated on the shift lists (provided to the shop stewards) commencing 06:00 on Tuesday 16 April 1996. If you fail to make yourself available within the time indicated on the shift list, you will be dismissed forthwith."

12Another, similar, ultimatum was issued later the same morning. Not one of the employees heeded it. By six o'clock the morning of 16 April 1996 another complicating factor had intervened. The appellant's employees had held a strike ballot the previous afternoon. The vote was overwhelmingly in favour of strike action. The appellant had always doubted the legality of the strike action not only because of the questionable balloting procedure, but because the conciliation board had not yet reported that deadlock in the negotiations had been reached. Anyway, it took the view that the individual respondents and

their co-employees had been dismissed prior to the commencement of the strike and that if they wanted to strike after having lost their jobs, that was their concern. The employees, on the other hand, having at first refused to return to work because they thought that the appellant had breached the terms of the settlement concluded on 10 April now remained away because they believed that they were legitimately out on strike. The whole thing had turned into an industrial relations nightmare.

13 Eventually there was another meeting on 24 April 1996. Each side restated its own position. No progress was made towards finding a solution. On 2 May 1996, the appellant wrote to "all dismissed members of NUFBWSAW", a letter reading as follows -

"Pleased be advised that the company is holding your previous position (prior to your dismissal on 16 April 1996) open until *12h00, Friday 10th May 1996*. If you fail to notify the company of your willingness to be employed by aforesaid time and date, the company's offer to employ you will fall away. The company will then be free to employ someone else in your previous position.

Kindly note that you will be required to enter into a contract of employment if you would like to work for the company. Such contract must be signed by both parties before the deadline of *12h00 on Friday, 10th May 1996*."

14 Immediately another dispute developed. The appellant maintained that the letter had been distributed to workers in the Boitumelong Township on 3 May 1996. The union said that the letter was regarded as "advertising jobs of our

members to Boitumelong Community." The appellant blamed the shop stewards for "barriers to communication." Meanwhile the union had referred the letter to its attorneys. As if there was all the time in the world, they wrote to the appellant asking whether it intended to re-employ rather than reinstate and saying that the dismissals were unfair in the first place and would be litigated unless all dismissed employees were reinstated by 10 May 1996. That, of course, was the return date of the re-employment offer. The appellant had already by fax transmission on 7 May warned the first respondent that the date would not be extended. It was not. And so while the union was arguing about this and that, the next calamity occurred. Its members lost their chance of getting back their jobs even if it was not on terms as favourable as they might have wished.

15The appellant only began filling the vacancies a month later, so that prompt settlement negotiations might have helped to restore the workers' jobs. But by the middle of August when settlement negotiations did resume the dispute had become very much harder to resolve, and in the end, despite the good offices of the member of the executive council for finance and economic affairs of North West and litigation in the Industrial Court, it remains unresolved to this day, nearly two years later.

16I do not believe that it can be maintained that the union, for some sinister reason of its own, fabricated the excuse of non-compliance with the settlement of 10 April in order to either keep the employees from returning to work or to justify their failure to have returned to work. The correspondence immediately after the event demonstrates that the union's concern, even if it was mistaken, was genuine. The letter of 14 April 1996 clearly sets this out. I quote the

relevant paragraphs which are 5, 6, 7 and 8:

" 5. You have on the morning of the 12 April told the Union delegation that met you at the Department of Labour that, you were no longer recognised (*sic*) the agreement we reached with you on the 10th April 1996 and that you were going to institute disciplinary action against some of our members for alleged misconduct on their part during the time of the lock out.

6. That was in stark contrast and a serious repudiation of the agreement we reached with you on the 10 April 1996 and also constituted a total disregard for commitments made by you.

7. The delegation immediately there upon telephoned the writer and the writer telephoned you from your Klerksdorp plant.

8. The writer indicated to you that it was against the agreement reached to continue to discipline those members but you insisted that you would proceed with the hearings."

17 Surics wrote back on 15 April 1996 denying that management had agreed to waive disciplinary action against offending union members. This denial was countered by a detailed response from Mr. Matabane, the first respondent's secretary general, dated 17 April 1996. At one point in the letter he expresses what I think was probably the crux of the difficulty. He says:

" The writer explained the union's position clearly and indicated that it was a condition that if your company decided to press on with the hearings then we would not be able to convince the workers to return

to work."

18These words were written after the dismissal but for the reason which I have given I do not think that one has to do here with an opportunistic justification for what had happened on the thirteenth. The probable explanation for the failure of the morning shift to report for work is that the workers felt aggrieved. The reason for their grievance could only have been the proposed disciplining of the stone-throwers.

19The workers were not in law entitled to withhold their services even if the appellant had acted in breach of the settlement agreement. The appellant's obligation (if there was one) to refrain from disciplining their co-members was not reciprocal to their obligation to tender their services. The remedy was misconceived. The proper procedure would have been to interdict the disciplinary proceedings, or better still, to have allowed them to run their course and then to have challenged their legality in the Industrial Court. In that way the jobs of a handful of people would have been jeopardised instead of more than two hundred. The respondents acted very foolishly in sacrificing the settlement for a purpose which could far more effectively have been attained in another way.

20The respondents were at fault in several respects. First there was the go-slow. It is always an insidious form of industrial action, all the more so in the present case because the workers' representatives denied that anything of the kind was occurring. The appellant thus had no room to negotiate and in my view acted properly in refusing to honour its side of the employment contract towards workers who were deliberately refusing to honour theirs. Secondly,

there was the violence. Although violence was in general terms condemned by spokesmen of the first respondent, the first respondent took up the cudgels on their behalf in seeking to ensure their exemption from disciplinary measures. The workers, also, did not dissociate themselves from the violence. On the morning of 13 April they demonstrated their solidarity with the alleged offenders. This demonstration of solidarity, and this is the third point, was itself a form of impermissible industrial coercion. Fourthly, there was the strike which was conceded by *Mr Buirski* for the respondents to have been illegal. The conciliation board had not reported that negotiations had reached a deadlock. Finally, it was foolhardy of the first respondent and the workers not to have taken up the offer of re-employment extended to them on 2 May. The workers could, if needs be under reservation of their rights, have litigated about their perceived entitlement to reinstatement while at the same time feeding themselves and their families.

21However, the appellant was also at fault. It already knew on 12 April, the day of the conciliation board meeting, that the first respondent was incensed about what it regarded as a breach of the April 10 agreement. The matter was discussed between Surics and the union delegation. It knew, therefore, at the time that it issued the ultimatum of 15 April, that the workers were not refusing to return to work for no reason other than to make mischief. I think that the appellant should at least have attempted to clear up the misunderstanding before issuing another ultimatum.

22At the time of the issue of the last ultimatum the appellant knew that a strike ballot was to be held. It could, of course, not have known whether the workers were going to vote in favour of strike action or not. But by the time the

ultimatum came to be enforced the morning of 16 April, the appellant knew that a strike had been called to commence later. If the workers had returned to work at 06:00 that morning and left again at 07:00 to start their strike, it would have been quite clear that the refusal to work was now because of strike action and that it should be dealt with on that footing. The appellant considered that it had pre-empted the strike by dismissing the workers before it commenced. That may be correct in law, but I do not believe that it can in the circumstances be said to have been fair. It had no reason to believe, at the time that it enforced the ultimatum, that the workers were staying away from work for any reason other than that they believed that they were out on strike. It should, from the commencement of the morning shift on 16 April, have treated the workers as though they were out on strike. That, in my opinion, would have been the fair thing to do.

23It follows that the appellant had committed an unfair labour practice and that the second and further respondents are entitled to be reinstated. I have detailed above why, in my view, the conduct of the workers deserve censure; fairness does not demand that they be retrospectively reinstated; the order of the court *a quo* is, in this respect also, correct.

24The costs of the postponement of the first hearing of the appeal should be paid by the respondents. They tendered these costs in their application for a postponement in order to lodge a cross-appeal. The inadequacy of the record is not in the circumstances a matter which should carry an adverse costs order.

1. The appeal and cross-appeal are dismissed with costs.

2. The wasted costs of the postponement of the appeal on 26 November 1997 are to be paid by the respondents.

3. Each of the second and further respondents is to present himself or herself at the premises of the appellant to advise it of his or her intention to resume employment within thirty days of the date of this order.

4. The appellant shall, in respect of each of the respondents who presents himself or herself as required in paragraph 3, give effect to the order of the court *a quo* within fourteen days of expiry of the said thirty days.

5. This order shall not operate with regard to any respondent not complying with the terms of paragraph 3.

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CONRADIE JA

I concur:

MYBURGH JP

I concur:

FRONEMAN DJP

Appearances: Mr H.H. Bell of Edward Nathan and Friedland Inc for the appellant

Mr P. Buirski instructed by Mlambo and Modise for the

respondents

Date of hearing: 20 February 1998

Date of Judgment: 11 March 1998

Internet site: (<http://www.law.wits.ac.za/labourcrt>)