

# **IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

## **JOHANNESBURG**

**In the matter between**

**Case No: JA 94/97**

**NATIONAL UNION OF MINeworkERS**

**Appellant**

**and**

**COUNCIL FOR MINERAL TECHNOLOGY**

**Respondent**

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### **JUDGMENT**

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[1] The first appellant is the National Union of Mineworkers (“NUM”). The second to thirteenth appellants (“the appellants”) are members of NUM who were dismissed on 21 July 1995 by the respondent, their employer, the Council for Mineral Technology (“Mintek”).

[2] During February 1995 a complaint was lodged with Mintek by the local leadership of NUM that Mr J Engelbrecht, Mintek’s head of security, had unlawfully removed scrap lancing from the premises of Mintek. Mintek, on investigating the complaint, found that Engelbrecht had written authorisation to remove the scrap. NUM was not satisfied with the explanation. After further discussions over a period of months, Mintek decided that on 12 June a grievance enquiry would be convened to address the issue. NUM refused to co-operate. Instead it demanded that Engelbrecht should appear before a disciplinary enquiry. Mintek rejected the demand. At a meeting of NUM members on 12 June it was resolved to occupy management’s offices until Mintek had agreed to the demand that disciplinary proceedings be instituted against Engelbrecht.

[3] On 13 June, 123 NUM members, employees of Mintek, occupied the thirteenth floor of management’s offices. The demand was conveyed to management. While management was considering the demand, the employees moved to the eleventh floor. On the eleventh floor, management’s response - a refusal to accede to the demand - was conveyed to the employees. The employees decided to continue their sit-in and to occupy the office of Mr D W J Van Vuuren, the manager, Human Resources. At about 10H15 about 40 of the employees took occupation of the office of Mr Van Vuuren. Four members of management

were held hostage: Van Vuuren, Mr S J Ramokgopa, the vice-president of Mintek, Mr J A Du Plessis, the industrial relations manager, and Mr J Nieuwenhuys, a recruitment officer who managed to escape during the course of the day. The remaining three hostages were confined to Van Vuuren's office until late that afternoon, when the sit-in ended.

[4] All those who participated in the sit-in, including those who held members of management hostage, faced individual disciplinary enquiries. Save for the twelve appellants, who were dismissed, the employees were given final warnings. Internal appeals were unsuccessful.

[5] In October 1995 NUM and the appellants launched an application in terms of s 43 of the Labour Relations Act, 28 of 1956 ("the Act") in the industrial court for interim relief. Detailed affidavits were filed by both sides. On 31 January 1996 the industrial court refused interim relief. The court described the sit-in as 'serious misconduct'. The hostage taking was regarded by the industrial court as 'totally unacceptable behaviour' and 'totally destructive of the employer/employee relationship'. The contention that the dismissal of the appellants was unfair because it was selective was rejected: 'Any selectivity which was applied in this matter was in my view based upon the availability of evidence in regard to participation in the hostage affair or active involvement in the promotion of the activities.'

[6] In terms of s 46(9)(b)(ii) of the Act NUM and the appellants were obliged to refer the dismissal dispute to the industrial court for final determination no later than 9 February 1996. The dispute was in fact referred to the industrial court on 26 March, forty six days late.

[7] In July 1996 NUM and the appellants delivered their statement of case. In its statement of defence Mintek pleaded over and averred that the industrial court had no jurisdiction to determine the dispute as the dispute had not been referred timeously.

[8] On 'good cause shown' the industrial court had the power to condone the late referral in terms of s 46(9)(b)(ii).

[9] On 8 September 1997 NUM and the appellants applied for condonation for the late referral of the dispute. The industrial court refused the application. It is against that refusal that NUM and the appellant appeal to this Court.

[10] It is accepted by the industrial court and the Labour Appeal Court that in considering whether good cause has been shown in an application of this kind, the approach in Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F should be adopted. Radebe a.o. v Protea Furnishers SA (Pty) Ltd (1994) 15 ILJ 323 (LAC) at 325G-326G; MM Steel Construction CC v Steel Engineering and Allied Workers Union of S A a.o. (1994) 15 ILJ 1310 (LAC) at 1311I-1321A; Oldfield v Roth N.O. (1995) 16 ILJ 76 (LAC) at 791J; Fundaro v McLachlan and Lazar (Pty) Ltd t/a M & L Inspection Services (1996) 17 ILJ 1183 (LAC)

at 1187I-J and 1192J; PPWAWU a. o. v A F Dreyer & Co (Pty) Ltd LAC case number JA35/97 at page 7. The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused: c.f. Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765A-C; NUM a. o. v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representatives lack of diligence or the insufficiency of the explanation tendered. Saloojee a o v Minister of Community Development 1965 (2) SA 135 (A) at 140H-141D; Buthelezi a o v Eclipse Foundries Ltd (1997) 18 ILJ 633 (A) at 638I-639A. Mr Pretorius, who appeared for the appellants, submitted that the Melane approach required adaptation in the light of the value that the Act accords to the proper ventilation of disputes. However, the Act also accords emphasis to the speedy resolution of such disputes. Accordingly, there is no justification for deviating from the Melane principles.

[11] The delay of forty six days was not trivial, nor was it excessive.

[12] The industrial court found that there was no explanation for the delay. The industrial court overstated the position. There was an explanation. The question is whether it was a reasonable and acceptable explanation. The explanation had as its origin a discussion which took place shortly after the dismissals, presumably in about September/October 1995, between Mr V Mjila, an NUM organiser, and Mr C Orr, NUM's attorney. In Majila's affidavit in the application for condonation he stated:

‘5. Shortly after the dismissal of the individual applicants I attended a

consultation with the individual applicants and the applicant's attorney Chris Orr. Mr

Orr recommended that we apply for an order in terms of s 43(4) of the Act. Mr Orr

explained that if the s 43 application were unsuccessful, we would launch an

application for a determination in terms of s 46(9) of the Act.’

Mjila went on to state that **based on that conversation** he thought that Mr Orr would refer the dispute to the industrial court and Mr Orr thought that Mjila, ‘an experienced trade unionist’, would refer the dispute. (It was only on 26 March 1996, when one of the applicants enquired from Mjila what progress had been made in the matter, that Mjila ascertained from Mr Orr that he had not referred the dispute to the industrial court. The referral document was immediately despatched to the industrial court.) Mr Orr filed an affidavit confirming the contents of Mjila's affidavit.

[13] The version of the conversation between Mjila and Mr Orr is unsatisfactory. It is said that ‘Mr Orr explained that if the s 43 application were unsuccessful, we would launch an application for a determination in terms of s 46(9) of the Act.’ Mjila, an experienced trade unionist, and Mr Orr, an attorney and member of a leading firm of labour lawyers, must have known that in terms of s 46(9) of the Act the dispute had to be referred to the industrial court for final determination within the prescribed period, even if relief had been granted in terms of s 43. A s 43 order is an interim order. It is straining credulity to suggest that Mjila and Mr Orr believed that only once the s 43 application had been determined would there be a requirement to refer the dispute to the industrial court in terms of s 46(9). The correct position is actually set out in the affidavit of Mjila in paragraphs 3 and 4:

‘3. The respondent (“Mintek”) dismissed the second to further applicants (“the

individual applicants”) on or about 13 September 1995. On 12 October 1995, the

union applied to the department of labour to establish a conciliation board in respect of this dispute. A conciliation established on 13 October 1995 was unable to resolve the dispute, and the period referred to in section 36(1) of the Act expired on 11 November 1995....

4. The 90 day period referred to in section 46(9)(b)(ii) of the Act expired on 9 February 1996. This dispute was referred to the industrial court for determination in terms of Section 46(9) of the Act on 26 March 1996.... The dispute was therefore referred to the industrial court a total of 46 days late.'

[14] The second difficulty that I have is that on the very terse exposition of the conversation between Majila and Mr Orr there is no reasonable basis for the misunderstanding. It is stated that 'we' would launch the application in terms of s 46(9). Who the 'we' was is not stated. Was it Majila and Orr, or Majila, the appellants, and Orr? And in any event it must have been Orr, as the attorney for the appellants, who bore primary responsibility for referring the dispute.

[15] Thirdly, why was it left uncertain who would refer the disputes? Without a timeous referral, the industrial court had no jurisdiction to determine the dispute. That much must have been known to Mjila and Orr.

[16] Even on the version that if the s 43 application were unsuccessful the dispute would be referred to the industrial court, there is no explanation for the failure to make enquiries after NUM and the appellants lost in the s 43 application. If Orr believed that Mjila would refer the dispute to the industrial court, why did he at no stage make enquiries about the referral? And if Mjila believed that Orr was to refer the dispute, why did he not make any enquiries until prompted to do so by one of the appellants?

[17] The lack of urgency with which this matter was approached by NUM and Orr is shown by the facts that it took three months after the referral of the dispute to the industrial court for the statement of case to be delivered and the application for condonation was signed only on 25 August 1997, more than a year after the statement of case had been delivered. The application for condonation, in regard to the explanation for delay, rested on the vague and improbable version of a conversation - a conversation which had taken place almost two years earlier. But what counts heavily with the Court is that the appellants appear to have been blameless. It is their representatives who acted negligently.

18] The explanation for delay is sufficiently cogent to warrant a consideration by this Court of the prospects of success.

[19] Mintek had a valid reason to dismiss all those employees who held members of

management hostage. The three members of management were deprived of their freedom of movement; they were allowed to use the toilet only under escort; food had to be sent to them during the course of the day; communication between them and their colleagues was cut; and the day was spent in a hostile and tense atmosphere. It is common cause, for example, that one of the appellants, Mr C Mbandazayo, said to Van Vuuren that he was 'a dead man'. All that is in dispute is whether that was said 'in a joking manner'. I can understand why Van Vuuren did not regard that threat as a joke. Even after the arrival of Mjila at Mintek's premises, the hostage situation continued. I agree with the industrial court in the s 43 proceedings that the misconduct was 'totally destructive of the employer/employee relationship'.

[20] Mintek, however, chose not to dismiss all forty employees. It dismissed only twelve of the forty. It is that selective dismissal that forms the basis of the appellant's case on the merits. The legal position was stated by this Court in Early Bird Farms (Pty) Ltd v M Mack case number JA 8/97 to be as follows:

'Like cases should be treated alike: NUMSA v Henred Fruehauf Trailers 1995 (4) SA 456 (A) at 463G-J. The respondent and Maziya were guilty of the same offence, the theft of chicken pieces. *Prima facie*, they should have received the same penalty. I say *prima facie*, because an employer may be justified in differentiating between employees, guilty of the same offence on the basis of differences in the personal circumstances of the employees (such as length of service and disciplinary record) or the merits (such as the roles played in the commission of the misconduct): National Union of Mineworkers and others v Amcoal Collieries & Industrial Operations Ltd (1992) 13 ILJ 1449 (LAC) at 1452I-1453B; The South African Law of Unfair Dismissal, PAK Le Roux & Andre van Niekerk, p111.'

21] Mintek justified the distinction between the appellants and the rest of the forty by alleging that the appellants either assumed an active leadership role or had otherwise played an active part in the detention of the members of management. Particulars of the conduct of the appellants were provided in the minutes of the disciplinary

enquiries which were attached to the appellants' founding affidavit in the s 43 application and summarised as follows in the answering affidavit:

'Lucas Kekana (FP 24). Evidence was led in the disciplinary enquiry which implicated Kekana in the plot to hold the management team hostage until the union's demands had been met. Inter alia, he was a member of the leadership on that day, he apparently was a minute taker during union caucuses, and was present on more than one occasion when it was stated that the managers were being held hostage, and was present when the door was locked and unlocked to allow persons in and out of the room. By his conduct, Kekana associated himself with the detention of the managers and it was appropriate to conclude that he actively furthered the objects of the conspiracy to detain us.

Dennis Koape (VP 25). The evidence led at the enquiry disclosed that Koape articulated the fact that the managers were held hostage and refused us permission to leave the room. Moreover, Koape unconvincingly testified that he was completely unaware of any restrictions on the freedom of movement of the managers at the time. Accordingly in his effort to deny what he could not have avoided being fully aware of he betrays his knowledge and association with the conspiracy to detain the managers.

Jonas Letswalo (VP 26). The evidence disclosed that Letswalo was an active member of the leadership on that day and was fully aware of the detention of the managers. He associated himself with that occurrence and his testimony that he was aware for the first time that there was any debate concerning hostage taking at the end of the day when the workers evacuated offices is incredible.

Lazarus Mabiletsa (VP 27). Mabiletsa was amongst the more influential leaders of the workers. He was active amongst the leadership on that day. He was fully aware of the detention of the managers, but did nothing whatsoever to disassociate himself with that conduct.

Philemon Majola (VP 28). The evidence led at the enquiry disclosed that Majola was a doorkeeper who inhibited access and egress from my office. He and Kodisang were variously on guard at the door for this purpose.

Timothy Mashebela (VP 29). The evidence disclosed that Mashebela was amongst those who objected to any of us going to the toilet, prevented me from opening the louvre windows, who seized Du Plessis's note of the events as they were taking place, roused the emotions of those present threatened the disruption of projects in the Pyro Metallurgy division, and by so doing promoted the object of the conspiracy to detain the managers, and to intimidate them during the period of detention.

Caswell Mbandazayo (VP 31). The evidence disclosed that Mbandazayo incited emotions, inter alia by the use of a whistle, and at one point threatened me by stating that I was a dead

man. Mbandazayo's concession that he said the words in a jocular mood are not only false, but totally inconsistent with the sombre and intimidating atmosphere at the time. At another point in time he threatened to throw me out of the window.

William Motapo (VP 33). Motapo was actively involved in the activities of the leadership on that day and was present throughout when attempts were made to reassert our freedom of movement. He associated himself with the others who were bent on detaining us and as such associated himself with their conduct.

Nendhouvhada (VP 34). Nendhouvhada was amongst those who spoke to the Star reporter, Malala, and confirmed that the managers were being held hostage. His testimony that we was ignorant of any detention of the managers is not worthy of credence.

Enoch Nhlapo (VP 35). The evidence against Nhlapo disclosed that he was fully aware of the plot to detain the managers and fully associated himself with it. Inter alia, it was he who in the debate concerning the extent to which we should be detained asserted that it was a "human right" to be allowed to go to the toilet. He stated inter. alia, that we would be detained for as long as it took to capitulate to their demands. His testimony that he was ignorant of any inhibition on the freedom of movement of the managers is not worthy of credence. He forbade us to eat in the diningroom and permitted only food to be sent to us. It was he who first used the word "hostage".

Victor Pheeha (VP 36). The evidence disclosed that Pheeha was amongst the more active members of the leadership on that day and fully associated himself with the detention of the managers. He was present throughout the day and spoke on behalf of the workers to us, and frequently addressed the workers. Inter alia, when the union organiser, Majila, was challenged with what was to be done about the detention of the managers, and he declined to answer, Pheeha likewise was in his company and likewise avoided giving us a direct answer. He was amongst those that spoke to the Star reporter which led to the report of our being held hostage being published.'

- 22] An aggravating factor for Mintek was that at the disciplinary enquiry some of the appellants denied that members of management were held hostage, a denial which could not withstand scrutiny. What Mintek did, in essence, was to draw a distinction between the foot soldiers, who merely occupied Van Vuuren's room, and the officers, the leaders, and those whose conduct was individually reprehensible
- 23] NUM and the appellants dealt with Mintek's allegations in the s 43 application, which formed the basis for the condonation application, in two ways:-
- (a) The founding affidavit of Pheeha contained no factual allegations, merely submissions which were made on the distinction drawn by Mintek during the



disciplinary enquiry between those dismissed and those given final warnings.

(b) In the replying affidavit the allegations of Mintek in the answering affidavit were generally denied in bald terms. So, for example, it was said in the founding affidavit in regard to Kekana, that 'Mr Kekana was dismissed merely because he was perceived as a leader of the actions on 13 June 1995.' Kekana's version of his role was not placed on record. In the replying affidavit of Pheeha, the allegations made by Mintek in its answering affidavit in regard to Kekana were denied. The denial was confirmed by Kekana in a confirmatory affidavit, which contained no factual allegations.

Another example is that relating to the appellant Koape. In the founding affidavit of Pheeha, Mintek's case against Koape was accurately summarised. The paragraph concluded as follows: 'It is submitted that the only distinguishing factor relating to Mr Koape is that he was perceived as part of the leader group.' Koape's version was not set out. Mintek's allegations in the answering affidavit in regard to Koape's role were denied in the replying affidavit. No confirmatory affidavit was made by Koape. It follows that Koape's version of his role was not before the industrial court in the s 43 proceedings. Some of the appellants denied specific allegations, for example, that one of the appellants was a door keeper. The denial was in bald terms. If that appellant was not the door keeper, one asks oneself what did he do in the room the whole day? Not a single affidavit was filed in which the role of the appellants was described. In short, there is no genuine dispute of fact, which should be resolved by the hearing of oral evidence in a trial, and the prospects of success must of necessity be assessed on the basis of what transpired during the disciplinary hearing.

25] When it came to applying for condonation, some eighteen months later, one would have expected NUM and the appellants to deal with the merits more convincingly. As a minimum, each appellant should have described his role in the hostage taking and provided particulars to show that this conduct was no different from that of the employees who were not dismissed. Counsel for NUM and the appellants would then have been in a position to argue that, on those facts, no distinction could justifiably be drawn between the twelve employees who were dismissed and the twenty eight who were not dismissed. What was done in the condonation application, instead, was to refer to the s 43 application: an application which had been dismissed by the industrial court with trenchant criticism of the conduct of the appellants.

26] The appellant's prospects of success remain as unconvincing as they were January 1996, when the s 43 application was dismissed.

27] The appeal is dismissed, with costs.

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Myburgh J P

I agree

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Froneman D J P

I agree

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Cameron J A

Date of Hearing: 4 August 1998

Date of Judgment: 17 August 1998

Counsel for Appellant: Adv P Pretorius assisted by Adv P R Jammy, instructed by  
Cheadle Thompson & Haysom

Counsel for Respondent: Adv A E Franklin instructed by Webber Wentzel & Bowens

This judgment is available on the internet at: <http://www.law.wits.ac.za/labourcrt>