

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

HELD AT JOHANNESBURG

Case no : JA 58/98

In the matter between :

MALUTI TRANSPORT CORPORATION LIMITED

Appellant

and

**MANUFACTURING, RETAIL, TRANSPORT AND
ALLIED WORKERS UNION**

First respondent

39 WORKERS

Second
respondents

OTHER WORKERS

Third
respondents

JUDGMENT

FRONEMAN DJP :

[1] During 1991 two groups of employees were dismissed by the appellant. The first

group ("the 39 workers") were dismissed on 5 November 1991. The second group of 317 workers ("the other workers") were dismissed a week later, on 12 November 1991. This appeal has a tortuous and long history (none of the parties, however, made any point of the long delay in bringing matters to a head) but it is nevertheless a sad commentary on the legal system that it allowed a period of more than 7 years to elapse before finality could be reached in this matter.

[2] The two groups of dismissed workers had been employed in the so-called self-governing territory of Qua-Qwa under the previous constitutional dispensation, that is, prior to 27 April 1994. Labour disputes in Qwa-Qwa were not governed by the then South African Labour Relations Act, no 28 of 1956 ("the old Act"), but by the Qwa-Qwa Labour Relations Act, no 13 of 1988 ("the Qwa-Qwa Act"). The terms of these statutes were, however, materially similar.

[3] The dismissed groups of workers initially challenged their dismissal by seeking *status quo* relief in the Qwa-Qwa Industrial Court. This was unsuccessful. They then took that decision on review to the Orange Free State Provincial Division of the then Supreme Court of South Africa (now the High Court) and this application was also unsuccessful, it being dismissed with costs on 29 November 1993. Thereafter an application was made to the industrial court in terms of section 48 of the Qwa-Qwa Act for an order declaring their dismissals to be an unfair labour

practice. This only occurred in 1996. The apparent explanation for the long delay in bringing the application was that the new provincial government, elected to power in 1994, appointed a commission of enquiry into the events surrounding the dismissal of the workers, but the commission's efforts eventually came to nought.

[4] So it came to be that the industrial court was called upon to pronounce its verdict on the dispute. The parties agreed that the court would initially determine only whether the dismissal amounted to an unfair labour practice and that the relief flowing from that finding would stand over to be determined later. In the event the industrial court found in favour of the two groups of dismissed workers, a finding which is now the subject of this appeal. The appealability of the finding is not in question.

[5] As is the case with many matters of this kind, the origin of the industrial action which eventually erupted in November 1991 is to be found in events which occurred a long time before that. These events have a bearing on the ultimate issue of the fairness of the dismissals, so reference to them cannot be avoided.

[6] For approximately twenty years, until December 1990, workers were paid an annual bonus equal to their salary as a "thirteenth cheque". This was not a contractual entitlement : whether it would be paid to them was within the

discretion of the appellant's board of directors. In December 1990 only half of the bonus was paid to the workers. The reason given was that the appellant was in financial difficulty.

[7] The failure to pay the full bonus caused great unhappiness and resentment. The workers, through the first respondent ("the union"), repeatedly raised their concerns about it at various meetings held with management during 1991. Management indicated that they would recommend payment of the full bonus, but the board remained unpersuaded and refused to change its stance on the issue.

[8] Into this volatile mix a further, racial, factor was added towards the end of 1991. During May 1991 the union and the appellant had reached a wage settlement for the 1991/92 financial year in terms of which the workers (all black) would get a general increase of 12%. However, on 25 October 1991 union representatives informed management that workers would no longer work overtime until two demands were met, namely payment of half of the bonus for 1990 and an immediate wage increase of 6,5%. The former had been declared the subject of deadlock in June 1991, but the declaration had been withdrawn and the parties continued to negotiate over the issue into October 1991. The latter related to an allegation by the workers that they had been discriminated against because white artisans had initially been appointed at a higher wage than their black

counterparts.

[9] Management of the appellant informed the workers that their demands could not be met and instructed them to work scheduled overtime shifts. The workers refused and imposed a ban on any overtime, including overtime over weekends as well as a refusal by technical staff to work at night. A meeting was held with shop stewards on 28 October 1991 in an attempt to resolve the issue, but it proved to be unsuccessful. On 29 October appellant's management issued a notice pointing out that it rendered an essential service and that it could not function effectively without overtime being worked (the inhabitants of Qwa-Qwa relied on the bus service to get to work in adjacent South African territory - there was no other public means of transport available). The notice warned that if the workers continued with their ban on overtime, resort would be taken to disciplinary action and a court interdict would be sought.

[10] The (interim) interdict was obtained on 30 October. It proscribed industrial action by the workers taking place without compliance with the procedures of a recognition agreement and the Qwa-Qwa Act, and prohibited workers from taking part in the refusal to work overtime.

[11] The appellant then selected 39 workers to work overtime over the weekend

preceding 5 November. A notice was issued warning the 39 workers that a failure to work overtime would be in breach of their terms and conditions of employment and would result in disciplinary action. The nature of the envisaged disciplinary action was, however, not spelled out in the notice.

[12] The notice and interim interdict was ignored. The 39 workers did not work overtime over the weekend and were dismissed, as a result, on 5 November. What followed can justifiably be called mayhem.

[13] Workers occupied the appellant's premises overnight and prevented access by management and other employees. Vehicles and equipment was damaged, sawdust was thrown into the fuel tanks of vehicles and brake fluid was drained from vehicles. A general strike by the other workers then ensued. They added one further demand to the two raised earlier : reinstatement of the 39 workers who had been dismissed for not working overtime. The strike brought appellant's operations to a complete halt.

[14] The appellant's management responded by sending a letter to the union on 6 November and issuing two notices to the employees on the same day. The letter invited the union to intervene, saying that if the strike continued serious disciplinary actions, including dismissals, would have to be considered. The notices urged workers to resume work and to follow the recognised dispute

procedure to resolve any dispute. It warned of “drastic action [that] would be taken” if this was not done.

[15] The workers paid no heed to these warnings. The strike continued on 7 November. Two further notices were issued to the workers on that day. Because of their later importance their terms are quoted in full :

“
QWA-QWA BUS CORPORATION
NOTICE TO ALL EMPLOYEES

As a result of your unfair and illegal action management has decided to :

1. Close the Corporation until 23 November 1991.

Employees must report at the Corporation on 23 November 1991 at 07h30. At this meeting employees will be informed about the future of the Corporation.

Those employees who were dismissed can collect the monies owed to them on 25 November 1991 at 10h00.

We confirm that there has been a collective refusal to work overtime, nightshift and after 17h00, notwithstanding the court interdict. The shop stewards and Union official has not been able to resolve this. This illegal and unfair action appear to be taking place with the consent of the shop stewards and Union official.

No undertaking could be given by the shop stewards or Union official to the effect that employees will return to work and work normally.

In the absence of this undertaking, and in the light of the employees conduct (illegal occupation of depot etc.), the Corporation will be closed as mentioned.

(Signed)

GENERAL MANAGER

7.11.91

DATE

(Initialed)”

The second notice reads :

“Issued on 7 November 1991 at 15h40

NOTICE TO ALL EMPLOYEES

1. All employees must vacate the premises before 16h30 on 7 November 1991 after which the Corporation will be closed as explained in the circular preceding this one.
2. Employees failing to vacate premises as requested, will be removed as instructed by the shareholders.

Signed by : **(Signed)**
GENERAL MANAGER

(Initialed)”

[16] In response to these notices the workers vacated the premises. They did not return to work until 23 November.

[17] At the request of the union a meeting was held on 8 November, attended by union officials, members of the board and management. The agenda reflected that union demands relating to the reinstatement of the 39 workers, the outstanding bonus, the court interdict and the implementation of salary adjustments were to be discussed. After the union restated these demands the board members requested a caucus before responding. The response was uncompromising : exception was taken to the manner in which the union handled the dispute; the interdict would stand until adjudication on 22 November; the 39 workers could apply for re-employment on Monday 11 November; the other workers had to resume employment on 11 November failing which their contracts of employment would be deemed to have ‘automatically terminated’ ; and the recognition agreement would also be deemed to have been revoked by the union

if employment did not resume on 11 November.

[18] The union complained that the issue of the arrear bonus had not been addressed and that there was no discussion of issues; it appeared that the meeting was being used 'merely to advise the union about decisions reached unilaterally'. The board responded that the situation first had to be normalised before anything further was discussed, a response which in turn elicited the reply from the union that it would be difficult to persuade the workers to return to work if the bonus issue is not resolved 'and consequently, the Board can then dismiss them as it wishes'. The Board, however, adhered to its view.

[19] The meeting, according to the minutes, ended without any agreement reached. The union, in conclusion, expressed concern about the time available to inform the workforce and community about the resumption of duties on Monday 11 November. The Board then resolved that :

- a)The issue of the community involvement cannot be addressed at this stage - VAT national stayaway is now history - most people desire to return to work;
- b)Because of the time factor and being on Friday, the Board acknowledged that the problem of getting hold of all employees will be experienced. As a result, it would appreciate any position of buses which will operate on 11 November 1991 (even if its 20 busses or more).
- c)The Chairman of the Board undertook to endeavour to get hold of the Chief Minister during the week-end and (illegible) the issue of securing additional funds with a view to paying the arrear bonus;
- d)It was agreed cognisance was taken of the intricacy of the situation of 39 dismissed employees and it was agreed that in the meantime they can come to work - their issue plus all other grievances cited - will be negotiated on 11 November 1991 at a meeting to be held at QTC Training Centre at 10h00.
- e)Failure by the workforce to resume normal duties from Monday 11 November 1991

will result in their service with the Corporation being terminated and monies due to them will be ready for payment within a reasonable time.”

[20] The workers did not return to work on 11 November. A meeting, however, was held on that day, attended by shop stewards of the union and members of the board and management. Management expressed the view that an agreement had been reached at the previous meeting on 8 November that normal operations would resume on 11 November, whilst negotiations would continue. The union officials disputed this. The chairman enquired whether operations would be restarted only after the issues relating to the disputed bonus and dismissal of the 39 workers were finalised, to which the union responded affirmatively. Three issues were then discussed, namely the payment of the bonus, reinstatement of the 39 workers and the damage to property during the strike by the other workers. No agreement was reached on any of these issues. After the discussion about the bonuses the appellant indicated that, (1) normal bus operations must resume before further negotiations could continue, (2) the position of the 39 workers would be handled once buses are running, and (3) that operations must start on the morning of 12 November, failing which the workers would be dismissed. The meeting ended with a discussion of when the workers would be paid in the event of a mass dismissal the next day.

[21] The workers did not return to work on 12 November either. They were then notified of their dismissal for failure to comply with the ultimatum to return to work

on that day.

[22] On 22 November the union wrote a letter to management stating that the workers would, in compliance with the appellant's notices to them on 7 November, report at the appellant's premises on 23 November. Management responded by reiterating that by reason of the events from 8 to 12 November the workers had been dismissed.

[23] The workers presented themselves at the appellant's premises on 23 November and tendered their services. Appellant refused their services, but invited them to apply for re-employment. The workers did not take up the invitation, but responded by engaging in unruly behaviour which led to another interdict against them, obtained in the High Court. The end result was that the workers lost their employment, which they sought to rectify by litigation more than 5 years later. They succeeded in the industrial court and the appellant seeks to overturn this finding on appeal.

[24] Mr Campbell, who appeared on behalf of the respondents on appeal, in his argument distinguished the position of the 39 workers from those of the other workers. The dismissal of the 39 workers was unfair because, he said, they were not afforded a proper hearing prior to their dismissal, nor did the ultimatum given to them indicate what the sanction would be if they did not comply with it. In

respect of the other workers, he contended that the 'cooling-off' notices given to the individual employees was an election by the appellant not to dismiss the other workers before 23 November, a position from which the appellant could not resile before that date.

[25] Mr Kennedy, who appeared for the appellant submitted that, given the history of the matter, the strike embarked upon by the workers was illegal; not functional to collective bargaining; flouted not only the peace clause in the applicable recognition agreement, but also the provisions of the court interdict; and was associated with misconduct of a reprehensible kind. With reliance on cases such as **National Union of Metalworkers of SA v Vetsak Cooperative Limited and others** 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A), **National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd** 1997 (4) SA 51 (SCA); (1997) 18 ILJ 439 (HC) and **Dube and others v Nasionale Sweisware (Pty) Ltd** 1998 (3) SA 596 (SCA); (1998) 19 ILJ 1033 (SCA), he submitted that the point had been reached where the process of negotiation had failed to resolve the impasse between the parties and termination of employment was justified.

[26] There is no doubt that the conduct of the workers leading up to, and including, the events on 7 November, cannot be condoned as acceptable behaviour. Even if one accepts that they were frustrated at the lack of a proper response to their

demands over a period of more than a year they were not justified in acting in the manner in which they did. The appellant was clearly entitled to bring matters to a head at that stage, but the crucial question remains whether it went about doing it in a proper manner.

[27] Prior to the dismissal of the 39 workers on 5 November they were given an ultimatum to work overtime. The ultimatum did not specify the sanction that would follow upon non-compliance. At the time when the 39 workers were instructed to work overtime it was known to the appellant that the entire workforce had decided not to work overtime. Following upon their failure to work overtime the 39 workers were dismissed without a further hearing.

[28] In **Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union and others** (1994) 15 ILJ 65 (A); 1994 (2) SA 204 (A), Goldstone J quoted with approval the following passage by Van Rensburg J in **Plaschem (Pty) Ltd v Chemical Workers Industrial Union** (1993) 14 ILJ 1000 (LAC) at 1006 H-I:

“When considering the question of dismissal it is important that an employer does not act overhastily. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited” (at 75 B-C (ILJ); 216 C-D (SA)).

Goldstone J did, however, qualify this by saying that

“whether an illegal strike may fairly be met with an immediate dismissal or whether fairness calls for an ultimatum or other appropriate action short of dismissal is an issue which can only be determined on the facts of each case” (at 75 D (ILJ); 216 E (SA)).

[29] In the present case, however, the appellant chose to issue an ultimatum. Its failure to state in the notice that it intended dismissing the 39 workers if they did not work overtime is a factor to be considered in assessing the ultimate fairness of the dismissal.

[30] The presiding officer in the industrial court found the dismissal of the 39 workers to be ‘indicative of inconsistent and unequal treatment’ in view of the fact that the appellant knew that not only the 39 workers, but the other workers as well, had indicated that they would not work the required overtime. Whilst this in itself is perhaps not sufficient reason to brand the dismissals as selective and unfair, it does raise a question about the procedure followed by the appellant in their dismissal. It is common cause that the 39 workers returned to normal work after the weekend. There was thus no urgency for dismissing them without a hearing. It is not clear why the 39 workers could not have been given individual disciplinary hearings. They were not chosen to work on a collective basis - why then dismiss them collectively and not individually? It is quite conceivable that individual hearings could have given some of them at least an opportunity to explain why they felt compelled not to work overtime, or to undertake to do so in the future. It is easy to be wise in hindsight, but it is difficult to escape the feeling

that such a course of conduct might have had more beneficial consequences than the immediate dismissal of the 39 workers had.

[31] Having regard to the above I am not convinced that the finding in the industrial court that the 39 workers were unfairly dismissed should be disturbed on appeal.

[32] Their dismissal was a major contributing cause to the general strike and misconduct by the other workers, but I have no doubt that that in itself would not have rendered the other workers' dismissal unfair. The only possible reason that could save the other workers from a fair dismissal is the effect of the 'cooling-off' notices issued on 7 November.

[33] There was some debate during argument on the legal effect of the 'cooling-off' notice or, rather, the correct legal 'pigeon hole' for it. It is at least arguable that when the workers left the premises in consequence of the notice they were no longer on strike and that their contract of employment was suspended until 23 November. This 'suspension' of the contract was, so Mr Campbell argued, consensual in nature and could only be undone by agreement as well. He submitted that it is clear from the minutes of the meetings that there was no agreement to this effect and therefore the unilateral notices issued by the appellant could not affect the dismissal of the other workers. Not so, countered Mr Kennedy: the 'cooling-off' notice was done within the appellant's (unilateral)

prerogative to issue instructions to workers in terms of the employment contract and, because of this, it could (unilaterally) change its mind later, provided that it did so fairly.

[34] In the sometimes strange world of an employment relationship governed at the same time by two legal regimes, the one based on the old Act's unfair labour practice jurisdiction, (which corresponds with the Qwa-Qwa Act in this regard) and the other one based on the common law contract of employment, unaffected by equitable considerations, I do not think it is always useful to try and cast events in contractual molds. What is lawful in contract may be unfair under the old and Qwa-Qwa Acts, and what is fair under these Acts may be unlawful in strict contract. What is important about the 'cooling-off' notice is that it unequivocally stated that the workers should leave the premises (which they did), and to return only on 23 November (which they also did). Was it fair for the appellant to require them to return to work earlier, in the way it sought to do so from 8 to 11 November?

[35] The principle of 'estoppel by election or waiver' (as it was called by Hoexter JA in **Chamber of Mines of SA v National Union of Mineworkers** 1987 (1) SA 668 (A) at 690 J) has been applied to labour law, both against a union (the Chamber of Mines case above) and an employer (**Administrator, Orange Free State & others v Mokopanele & another** (1990) 11 ILJ 963 (A)). The principle is based

on 'considerations of elementary fairness' (Chamber of Mines case at 690 J) and for this reason I do not agree with Mr Campbell's submission that once made, an election cannot be undone. Where fairness dictates it, and it causes no injustice to the other party, I see no reason why a party cannot change his or her mind (in a labour context) on this kind of issue (compare Mshumi & others v Roben Packaging (Pty) Ltd t/a Ultrapark (1988) 9 ILJ 619 (IC) at 625 G-I).

[36] In my view the two basic requirements (there may be more) for a fair renunciation or retraction of an earlier election would be that (1) a good reason exists for the change, and (2) that the other party is given timeous notice of the change so as to prevent that party from being prejudiced thereby. Where either one of these two requirements are not capable of being met the change of heart will not be given legal effect to. In the context of the present matter it means that the appellant had to show that a good reason existed why it considered it necessary for the workers to return to work on 11 or 12 November and not only on 23 November as indicated earlier in the 'cooling-off' notice. It also had to show that the workers had sufficient time and notice to return to work on 12 November.

[37] The latter aspect presents no problem. Both the union and shop stewards were given notice of the earlier expected return to work. On 8 October the union indicated that it might have problems informing the workers of the new ultimatum before 11 November, but the shop stewards did not raise this as a difficulty on 11

November. None of the workers testified that they were unable to get to work on 12 November, or that they did not know that the appellant required them to resume work on that day.

[38] Somewhat more problematic is the reason why the appellant required the workers to return earlier than that which they were told of on 7 November. It may be that the appellant considered that the 'cooling-off' period allowed in the notice was too long and would adversely affect its continued operations - that it was issued by mistake, in other words. If that was the real reason, the difficulty that arises is that the appellant tendered no evidence to this effect at the trial, nor did it even raise the issue as an item on the agenda for discussion at the meetings on 8 and 11 November. In addition there is no indication on record that it sought to continue its operations between 12 and 23 October by hiring replacement labour or the like in that period, something one would have expected them to do if they really were in dire operational straits.

[39] Another possible reason, suggested by the contents of the minutes, is that the decision was motivated by the union's uncompromising demands at both meetings, namely that there would be no work if the 39 workers were not reinstated and the bonus not paid. But to adopt that attitude would undermine the whole purpose of a longer 'cooling-off' period : to reflect on one's options when emotions have been brought under control and to consider the prospect of

losing one's employment in the cold light of day, perhaps urged to do so more carefully by circumstances at home. It is not possible to say, on the evidence on record, that the workers would not have relented in their demands before 23 November. The stark facts of possible unemployment may have struck home more forcibly the closer the day of 23 November approached. In addition, one would have expected evidence from the appellant to substantiate that this was indeed the reason for the change. There was none.

[40] The conclusion I therefore come to is that no good reason for the appellant's change of heart is demonstrated by the facts on record and in the circumstances its retraction of the earlier notice requiring the workers only to return to work on 23 October was not fair. It follows that its ultimatum to the workers to return to work earlier than 23 November was unjustified and that the subsequent dismissal of the workers for not doing so was unfair.

[41] I have not reached this conclusion without considerable hesitation. It goes against the grain to come to the assistance of the workers in the circumstances described above. The outcome is certainly not an endorsement of their behaviour; it is only a case of holding the appellant to the standards it set for itself and the workers by issuing the 'cooling-off' notice on 7 November. Their misconduct could have been dealt with in other ways, and it may yet still have a material effect on the relief that they are entitled to.

[42] In the result the appeal is dismissed with costs.

Froneman DJP

I agree,

Nicholson JA

Date of hearing :

May 1999

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Date of judgment :

Counsel for appellant :

Mr P
Kennedy

Instructed by :

Deneys Reitz (Sandton)

Counsel for respondent :

Mr J Campbell

Instructed by :

Attorneys Routledge - Modise

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