

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no : JA 45/98

In the matter between :

SOUTH AFRICAN UNION OF JOURNALISTS

Appellant

and

SOUTH AFRICAN BROADCASTING CORPORATION

Respondent

JUDGMENT

FRONEMAN DJP :

[1] The respondent (“the SABC”) recognised three trade unions as collective bargaining agents. One of them was the appellant (“the SAUJ”), the other two were the Media Workers’ Association of South Africa (“MWASA”) and the Broadcasting, Electronic Media and Allied Workers’ Union (“BEMAWU”). Non-unionised workers, about 1 371 out of a total of 4 560 employees, had their annual wage increases decided unilaterally by management, but wage negotiations were concluded separately with each of the three unions. The effects of separate collective bargaining led to the present dispute arising in 1996.

- [2] All three unions competed for members amongst all employees of the SABC. The members of the respective trade unions were not drawn only from a particular type or group of employees. The bargaining unit in respect of which wage negotiations took place was a flexible one and would only be fixed at the conclusion of an agreement, not at the commencement of negotiations. This meant that employees could, during negotiations, join a particular union , or move from one union to another, or resign from a union and be regarded as non-union members up to the date of the conclusion of a collective agreement with the union of which they had been members. If management had, prior to the conclusion of such an agreement, implemented a salary increase in respect of non-union members this meant that a former union member would receive a similar increase on resignation.
- [3] A feature of the multiple negotiations was that separate agreements with the respective trade unions were concluded, often on differing terms. The agreement did not necessarily afford equal benefits to employees - the unions would often attempt to negotiate exclusive benefits for their own members.
- [4] Unilateral changes in respect of wages were usually extended to non-unionised workers only after the annual wage negotiations with two major unions were completed. Where, however, negotiations with any of the unions became

protracted, these unilateral changes would be introduced by the SABC before final agreement with the union/s concerned. This meant that union members still involved in negotiations would know what non-unionised employees would receive and they could then, if they so wished, resign from the union and thereby become entitled to those benefits enjoyed by non-unionised workers.

[5] The recognition agreement between the SABC and the SAUJ provided that the latter would be recognised as a collective bargaining agent as long as it had at least 20% of employees as members in the particular defined bargaining unit. Should membership, however, drop below 20% the 'scope of the recognition unit' had to be renegotiated.

[6] None of the agreements with the unions prescribed a specific date by which annual wage increases had to be implemented. It was, however, customary to implement increases for non-members from the start of the new financial year, which, in 1996, was 1 March.

[7] The annual wage negotiations between the SABC and BEMAWU and MWASA were settled, respectively, on 27 March 1996 and 19 April 1996. On 22 April 1996 the agreement reached with MWASA was extended to non-union members. This meant that all employees, except those who were members of the SAUJ, received 12% wage increases with effect from 1 May 1996 and those with

housing subsidies received an increase in those subsidies effective from 1 March 1996.

[8] Negotiations between the SABC and SAUJ were less successful. On 16 April 1996 the SAUJ declared a dispute which led to unsuccessful mediation on 24 July 1996. During the mediation the SABC tabled its 'final offer', in essence the same as that which it had given to its other employees. The offer was open for acceptance until 16:00 on 31 July 1999. Failing acceptance by that time and date, any subsequent agreement would only have the date of the agreement as the implementation date.

[9] A meeting was held with SAUJ members on 26 July 1996 where those present confirmed that they were not prepared to accept the offer. A decision was taken to arrange for a strike ballot, which was held on 31 July 1996. Before the ballot was held a list of eligible members were agreed upon. There were 276 names on the list : only 171 cast their vote, 133 voting for strike action. The SABC insisted that there was no majority in favour of strike action, despite a number of members having resigned from the union prior to the ballot.

[10] On 1 August 1996 the SAUJ suggested renewed negotiations, but this was rebuffed. The SAUJ attempted a further strike ballot but the SABC resisted this. It was not held. During this period members of the SAUJ apparently became

aware that if they resigned they would be treated on the same footing as non-unionised employees and would receive the same benefits as those employees had received. This resulted in large-scale resignations.

[11] By 21 August 1996 SAUJ membership had dropped below the 20% mark and the SABC informed the union that if it did not restore membership to more than 20% within 30 days, their recognition would be terminated. On 29 August the SAUJ proposed that the dispute be settled on the basis of the SABC's final offer, but with an implementation date of 1 May 1996 and not the date of the agreement.

[12] The SABC refused, but made a counter-offer that the increases be backdated to 1 August 1996. The SAUJ was not prepared to capitulate to this extent. Instead its entire union leadership, bar one person, resigned on 10 and 11 September. Many other union members also resigned then in order to get their increases backdated to 1 May. On 11 September the SABC decided to unilaterally implement the increase as conveyed in its final offer, but backdated to 1 August (as suggested in the counter proposal of 30 August). This meant that the remaining SAUJ members received an inferior increase compared to other employees.

[13] On 27 September the SABC withdrew recognition of the SAUJ as a collective bargaining agent. The dispute was then referred to statutory conciliation in terms

of the Labour Relations Act, no 28 of 1956. Adjudication in the industrial court followed upon failure at the conciliation board. The SAUJ's application was dismissed in the industrial court. The present appeal was heard under the transitional provisions set out in the 1995 Labour Relations Act (no 66 of 1995).

- [14] Counsel for the SAUJ, Mr Van der Riet, submitted that the SABC unfairly penalised those employees who remained SAUJ members by unilaterally imposing its offer on 11 September and by backdating its implementation to 1 August, and not to 1 May as it did in respect of other employees. This, he submitted, undermined the integrity of the collective bargaining process (with reference to cases such as **Mutual and Federal Ins. Co. Ltd v Banking Insurance Finance and Assurance Workers' Union** (1996) 17 ILJ 241 (A) at 247; **National Union of Mineworkers v Vetsak Co-operative Limited** 1996 (4) SA 577 (A) at 588E; and **National Union of Mineworkers v East Rand Gold and Uranium Co. Ltd** (1991) 12 ILJ 1221 (A) at 1237C). What was required was a bargaining to impasse (compare **East Rand Gold and Uranium** case at 1237I - 1239D), which had not yet occurred, and the unilateral implementation of the offer on 11 September was thus indicative of bad faith bargaining.

- [15] The submission relied heavily on the evidence of Mr Heunis of the SABC to the effect that even after 30 August (when the SABC had indicated that it would backdate the offer to 1 August), he was of the view that negotiations had not yet

broken down and that there was still a possibility of resolving the dispute. The bad faith of the SABC was apparent because, so it was submitted, it was financially in the position to backdate the offer to 1 May, but did not do so. The only reasonable explanation for this was that it wished to penalise SAUJ's members for their membership of SAUJ.

[16] It seems to me that it is rather unrealistic for the SAUJ at this stage to argue that by 11 September an impasse had not yet been reached. By that stage the collective bargaining process had been, unsuccessfully, carrying on for more than five months. The SAUJ had threatened strike action at least twice and had given no indication prior to 31 July that it would accept the SABC's 'final offer', nor, later, that it would accept the SABC's extension of the implementation date. It never responded to the latter offer of 30 August, except to circulate a memorandum to its members rejecting the offer. Its leadership, and a large number of its members, resigned on 10 and 11 September. What was the SABC to make of this? I do not think good faith bargaining compelled them to wait until all the SAUJ's members had resigned before proceeding to the, in this instance, inevitable outcome of the power play between itself and the SAUJ. By 11 September it was clear that there would be no acceptance by the SAUJ, *as a genuinely representative partner in the collective bargaining process*, of the last offer of 30 August.

[17] Was it an unfair labour practice to implement the last offer unilaterally on 11 September? In my view it would only be an unfair labour practice under the 1956 Act if it could be said to have undermined the integrity of collective bargaining at the SABC. It must be remembered that the issue in dispute was about wages - the classical instance of an interest dispute, not a rights dispute - and thus susceptible primarily to the collective bargaining process and the power play that goes with it. If that kind of a dispute is not settled the economic power of the protagonists determine the outcome. It is then no answer to say that the winner could have afforded to be more lenient than it eventually was. If, in a wage dispute, an employer is capable of paying a bigger increase than it finally offers, and wins the resultant power play, a court may not interfere with the result solely because the employer could have afforded a larger increase. It is commercially rational (whatever one feels about its morality) for an employer to keep its wage bill as low as possible. In the present case the SABC profited, commercially, from not backdating the wage increases of SAUJ members to 1 May, but only to 1 August. The SAUJ, and its leadership, knew it was operating in a milieu of multiple collective bargaining units in competition with each other. If it decided to play hardball in order to secure possible extra benefits for its members, it had to accept the converse if it failed. Its pain was largely self-inflicted.

[18] The same applies to the SAUJ's loss of membership. By 21 August its membership had fallen below the 20% mark. It was once again largely the result

of its own actions. There was, and is, nothing to prevent it from renegotiating its standing as a proper collective bargaining agent with the SABC. It can and should do so without seeking the court's assistance.

[19] It follows that the appeal should be dismissed, with costs. It is so dismissed.

J C FRONEMAN DJP

I agree,

S S NGCOBO AJP

I agree,

C NICHOLSON JA

Date of hearing :

1 June 1999

Date of judgment :

Appellant's representative :

Mr J G Van der Riet
instructed by Cheadle Thompson and Haysom

Respondent's representative :

Mr S Reynecke
Instructed by Bowman Gilfillan Hayman
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