

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

CASE NO: JA22/00

In the matter between

3M SA (PTY) LTD

APPELLANT

AND

**SOUTH AFRICA COMMERCIAL 1ST RESPONDENT
CATERING AND ALLIED WORKERS UNION
GH MOLEKO AND 128 OTHERS 2ND AND FURTHER
RESPONDENTS**

JUDGEMENT

ZONDO JP

INTRODUCTION

[1] The second and further respondents instituted a claim in the Labour Court against the appellant, their employer, for the payment to them of wages

for the period commencing from the 23rd January 1997 to the 14th February 1997. The appellant defended the claim. Waglay J, who presided in the subsequent trial, found against the second and further respondents in respect of the period from the 23rd to the 31st January 1997 but in their favour in respect of the period from the 1st to the 14th February 1997. Consequently, he ordered the appellant to pay the second and further respondents such remuneration as each one of them would ordinarily have been entitled to for the period 1-14 February 1997. With the leave of the Court a quo, the appellant appeals against the order given against it in respect of this period. The second and further respondents have noted a cross-appeal against the order relating to the period from the 23rd to the 31st January 1997.

THE FACTS

[2] At all material times the appellant was the employer of the second to the 129th respondents. The second and further respondents were members of the South African Commercial Catering and Allied Workers Union ("**the union**") which is the first respondent. Towards the end of 1996 there existed

a dispute between the appellant and the respondents on a wage increase and other terms and conditions of employment of the second and further respondents. Conciliation of the dispute failed. In due course the union gave the appellant a strike notice as required by sec 64(1) of the Labour Relations Act, 1995 (**Act No 66 of 1995**) ("**the Act**").

[3] On the 17th January 1997 the second and further respondents commenced a protected strike in support of their wage demands. The strike took the form of a go-slow and an overtime ban. On the 20th January the appellant sent a letter to the union in which it stated:-

- (a) that the go-slow and overtime ban on which the second and further respondents had embarked constituted a strike as defined in sec 213 of the Act;
- (b) that it was not obliged to accept the second and further respondents' tender of partial services;
- (c) that "**Accordingly we hereby give you 48 (forty eight) hours**

notice that you are required to either tender your services fully i.e desist with the partial tender of services and retardation and obstruction of work, or failing that we do not require you to tender your services at all. ”

(d) in the last paragraph thereof: “If we do not have a written undertaking in this regard by 16h30 on Wednesday 22 January 1997 you will be excluded from our premises. ”

[4] In paragraph three of a memorandum addressed to the employees on the 21st January by its General Manager: Human Resources, the appellant stated that it was going to exercise the option of the exclusion of the workforce from the premises **“should this strike action not cease”** within 48 hours. In the fourth paragraph it said it was doing this in order to protect **“3M Company’s principle corporate value of ensuring continuous service to all our customers”**. On the 23rd

January the appellant informed the workforce that it would only pay for work that would actually have been done until the 31st January but said: **“The above only applies should strike action continue.”**

- [5] The respondents’ partial strike continued until the 5th February. On that day a meeting took place between the appellant and the union. At the meeting the second and further respondents tendered their services fully. The appellant did not accept the second and further respondents’ tender, stating that it would serve no purpose to do so. At the meeting B. Andrews, appellant’s human resources manager, stated in response to a direct question that there was no demand accompanying the exclusion of the second and further respondents from the appellant’s premises. In a letter dated the 6th February addressed to the union, the appellant rejected the respondents’ tender of their full services.
- [6] For its rejection of the tender, the appellant advanced the reason that it would serve no purpose in the resolution of the wage dispute to accept such

tender. The appellant was referring to the dispute which in its letter to the union it said had arisen **“from your failure to accept the company’s final offer at the conclusion of the negotiations.”** The appellant also said that it retained **“reasonable apprehension that your members would either persist with disruptive activity or merely resume strike action at a time favourable to them and prejudicial to the Company.”**

- [7] The appellant also stated that, should the union maintain that the appellant had instituted a lock-out, it would contend that such lockout was in compliance with the provisions of the Act. It referred the union to the provisions of sec67 (3) of the Act. This section is quoted later in this judgement. The appellant said it was not liable for the payment of the wages of the second and further respondents. On or about the 14th February the parties reached an agreement on the wage dispute. The parties also agreed that the second and further respondents resume their duties on the 17th February.

THE ISSUES

[7] Subsequent to their resumption of duties, the second and further respondents instituted a claim against the appellant in the Labour Court for the period from the 23rd January to the 14th February. The basis of their claim was that during the period from the 23rd January to the 5th February they were prepared to work, albeit whilst on a go-slow and without overtime and, from the 5th February to the 14th February, they had tendered their full services. The Court a quo held that the claim in respect of the period from the 23rd to the 31st January had prescribed. It upheld the claim in respect of the period from the 1st to the 14th February. The basis of the Court a quo's decision in respect of the second period was that the appellant's conduct in excluding the second and further respondents from the premises was part of an unprotected lock-out.

THE CROSS APPEAL-THE PERIOD FROM THE 23RD JANUARY- 5TH FEBRUARY

- [8] Since the cross-appeal relates to an earlier period than that of the appeal, I shall deal with it first. The Court a quo did not deal with the argument that the appellant was not obliged to pay the second and further respondents wages for the period from the 23rd January to the 5th February because their tender was not a tender of full services but a tender of partial services. Mr Reyneke, Counsel for the appellant, informed us that this occurred despite that argument having been presented to the Court a quo. Mr Reyneke's submission raises the defence conveyed by the maxim "**exceptio non adimpleti contractus**" which has been dealt with in a number of cases over decades in the course of the development of our law. Some of these are: **HAUMAN V NORTJE 1914 AD 312; VAN RENSBURG V STRAUGHAN 1914 AD 293; BK TOOLING V SCOPE PRECISION ENGINEERING 1979 (1) SA 391 (A); NATIONAL UNION OF TEXTILE WORKERS V JAGUAR SHOES (PTY) LTD 1987 (1) SA 39 (N); VALASEK V CONSOLIDATED FRAME COTTON CORPORATION LTD 1983 (1) SA 694 (N); COIN SECURITY (CAPE) (PTY) LTD V VUKANI GUARDS AND ALLIED WORKERS UNION AND**

OTHERS (1989) 10 ILJ 239 (C). This defence applies to those contracts which can be described as synallagmatic or reciprocal contracts. A contract of employment is accepted in our law as such a contract. The defence can only be used by a party to such contract who is sued for performance in terms of such contract when the other party to the contract has neither performed nor tendered to perform his or her reciprocal obligation. Such obligation is only reciprocal if it falls due prior to, or simultaneously with, the defendant's obligation (see **Jaguar Shoes, supra, at 45B**).

- [9] A defendant who has rejected the claimant's tender to perform or who has waived his right to performance can similarly not raise the defence successfully (**see Jaguar Shoes, at 45G**). A defendant who has prevented the claimant from performing his contractual obligation cannot rely on this defence to avoid or escape liability. In Jaguar Shoes it was held, correctly in my view, at 46H-I that a dismissal from employment excused an employee from having to render or tender his services pending the outcome of litigation about such dismissal.

[10] By tendering their services on the basis that they would perform their duties slowly (**i.e. go-slow**) which is not full or exact performance in terms of their contracts of employment with the appellant, the second and further respondents were tendering incomplete performance. Indeed, depending on the effect that their slow performance would have on the appellant's business, it could well be that the service they were tendering could be described as defective performance. A party to a contract is entitled to reject a tender of defective or incomplete performance and to demand complete and proper performance. That is what the appellant did in this case and it was within its rights to do so. During the events which gave rise to this litigation, the respondents' stance was that, because their go-slow and overtime ban were part of a protected strike, the appellant was obliged to accept their tender of partial or incomplete service. This contention was without merit. It is not justified by any provisions of the Act.

[11] Mr Vally, who appeared for the respondents, submitted that the second and further respondents

were entitled to payment of an amount of their wages which would take into account the fact that they had tendered their services albeit on the basis of a go-slow and without working overtime. He contended that the basis of this submission was that the conduct of the appellant in not allowing the second and further respondents to perform their duties, and, therefore, earn income, even on the basis of a go-slow, was unfair. He submitted that fairness was fundamental to the determination of this matter because fairness is what the Act and the Constitution of the Republic of South Africa, 1996 required.

- [12] In support of his submission Mr Vally referred us to sec 23(1) of the Constitution which specifically provides: **“Everyone has a right to fair labour practices”**. He further invoked sec 1(a) of the Act which provides that it is the purpose of the Act **“to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution”**. He also relied on the fact that sec 151 (1) and 167 (1) of the Act describe the Labour Court and this Court each as **“a court of law and equity”**.

[13] In further support of his submission on fairness, Mr Vally referred us to **Betha and Others v BTR Sarmcol, A Division of BTR Dunlop Ltd** 1998 (3) SA 349 (SCA) at 360F-361C, **Fulcrum Engineering v Chauke** (1997) 18 ILJ 679 (LAC), **National Union of Metal Workers of South Africa v Henred Fruehauf Trailers** 1995 (4) SA 456 (A) at 462F-H, and **Maluti Transport Corporation Ltd v The Manufacturing Retail Transport & Allied Workers Union and Others** (1999) 20 ILJ 2531 (LAC) at para 35. These cases do not assist Mr Vally because they were decided under the Labour Relations Act, 1956 (Act No 28 of 1956 (“**the old Act**”)) and the position then was governed by the extensive unfair labour practice jurisdiction of the industrial court. Mr Vally also relied upon **Chotabhai v Union Government** 1911 AD 13 at 23 for the proposition that there is a rule of construction that new legislation only repeals former legislation when it expressly says so. The Act came into operation for the most part on 11 November 1996. In Schedule 6 it repealed the old Act, and, with it, the unfair labour practice dispensation provided for in that Act. Accordingly

Mr Vally's reliance on that rule of construction is misplaced.

[14] Section 212 (3) of the Act originally read:

“ The transitional arrangements in Schedule 7 must be read and applied as substantive provisions of this Act.” Item 2 of Schedule 7 of the Act reads:

Item 2 Residual unfair labour practice

(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer or and an employee, involving-

(a) the unfair discrimination, either directly indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

(b) the unfair conduct of the employer

relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;

- (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;
- (d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.

(2) For the purpose of sub-item (1)(a)-

- (a) 'employee' includes an applicant for employment;
- (b) an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full enjoyment of all rights and freedoms; and

(c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination.”

[15] Sub-items (1)(a) and (2) of item 2 were repealed by sec 64 read with Schedule 2 of the Employment Equity Act 55 of 1998 with effect from 9 August 1999. However, in terms of sec 3 of Schedule 3 to the latter Act the items are to be regarded as unamended in the present case. It was not the respondents' case that a claim for wages such as the one in this case fell within the ambit of an unfair labour practice dispute relating to the provision of benefits as contemplated in item 2(1)(b) of Schedule 7.

[16] None of the arguments relied upon by Mr Vally provides a basis for the contention that either the Court a quo or this Court has power to adjudicate upon the claims made by the employees in the light of general consideration of fairness. In fact the description of the Labour Court and this Court as courts of equity does not add anything to the jurisdiction of these two Courts. These two Courts are superior Courts of law. The only fairness that

they apply in dealing with matters which come before them is such fairness as they are specifically required to apply in specific sections of the Act in respect of specific types of disputes as well as such fairness as every Court of law is required to observe in terms of the rules of natural justice. Examples of such sections are 185, 187, 188, 191, 192(2), 193, 194 and 162 (1). Save for sec 162 (1), all these sections relate to unfair dismissal disputes. Sec 162 (1) relates to orders of costs and obliges the Labour Court to have regard to the requirements of law and fairness in deciding whether to award costs. In fact the reference in the Act to the Labour Court and this Court as courts of equity (in addition to being courts of law) should be repealed because, while it adds nothing, it may cause unwarranted confusion. The Court a quo was not required to have regard to general considerations of fairness extraneous to the Act in adjudicating the second and further respondents' claim. Accordingly Mr Vally's submission falls to be rejected.

[17] Even if considerations of general fairness governed the determination of the second and further respondents' claim, I am of the opinion that this

would not assist the second and further respondents. The exceptio on which Mr Reyneke relied is based on considerations of fairness, namely, that it is unfair for a party to a contract who has neither performed his part of the contract nor tendered to do so to seek to compel the other party to such contract to perform his part in circumstances where the former's performance is already overdue or falls to be performed simultaneously with the latter's performance.

[18] In his heads of argument Mr Vally submitted that, because a protected strike was not a breach of contract of employment **(see sec 67(2) (a) of the Act)**, the appellant's reliance on the exceptio was misplaced. This submission, in effect, amounted to saying that section 67 (2)(a) of the Act had abolished the exceptio. The relevant portion of the provision reads:

**“ A person does not commit...a breach of contract by taking part in-
(a) a protected strike...”**

This submission fails to take account of the provisions of sec 67(3). Sec 67(3) reads thus:-

“Despite subsection (2), an employer is

not obliged to remunerate an employee for services that the employee does not render during a protected strike...” In my view the effect of these words is to retain the operation of the exceptio in circumstances such as those of this case. Accordingly, this submission also falls to be rejected.

[19] During argument before us counsel for the respondents also sought to support the claim for wages in respect of the period 23 January-5 February 1997 by the application of the provisions of sec 68(1)(b) of the Act. The provision reads as follows:

“In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this chapter, the Labour Court has exclusive jurisdiction-

(a)

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out,

having regard to-

(i) whether-

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out was premeditated;

(cc) the strike or lock-out was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out; and

(iv) the financial position of the employer, trade union or employees respectively."

[20] It is relevant to this argument to note that counsel for the appellant conceded in his heads of argument that the lock-out implemented by the appellant was an unprotected one. A claim for wages may, it would seem, qualify as compensation for any loss attributable to an unprotected lock-out. I find it unnecessary to determine to what extent sec 68(1)

(b) may affect the applicable rules of common law. However, what is clear is that, before sec 68(1)(b) can be invoked, the loss must be quantified, and in respect of the tender of partial performance during the period concerned, the respondents have made no attempt to do so.

[21] In the light of the above, the cross-appeal must fail.

THE APPEAL-THE PERIOD 6-14 FEBRUARY

[22] It is common cause that during this period the second and further respondents made a tender of their full services. This entailed that they would perform their contractual obligations normally and they would also work overtime. The appellant rejected the tender. The reason which the appellant gave at the time for rejecting the tender was that the second and further respondents' return to work would **"serve no purpose in resolving the dispute."** It did this in the meeting of the 5th February which has already been referred to above. In the same meeting, the appellant stated that there was **"no demand put to the workforce"** in connection with the exclusion of the

second and further respondents from the workplace. The union confirmed this in a letter dated the 5th February.

[23] In the second and third paragraphs of its letter of the 5th February addressed to the appellant, the union wrote *inter alia* in these terms:-

“We wish to confirm the following:

(1) That the union has once more reiterated that its members are willing to resume their normal duties (full services) and once again this was put forward as a proposal by the union to the company today.

(2) That the period from the 23rd January 1997 up to the date workers are allowed to resume their duties should be paid.

Both of these proposals were rejected by the company. The company has also confirmed that the lock-out is not accompanied by any demand to the union.”

[24] In a letter dated the 6th February the appellant

replied to the union's letter of the 5th February. It said this about the exclusion from the workplace and the presence or absence of a demand in connection therewith and about the second and further respondents' proposal to resume their duties:- **"The company believes that (the resumption of duties) will serve no purpose in the resolution of the dispute which arose from your failure to accept the company's final offer at the conclusion of the negotiations. Furthermore, the company retains a reasonable apprehension that your members would either persist with disruptive activity or merely resume strike action at a time favourable to them and prejudicial to the company" (Underlining supplied).**

- [25] On appeal the only ground on which the appellant attacked this aspect of the judgement of the Court a quo was that the tender of services by the second and further respondents was conditional. In support of this contention Mr Reyneke submitted that the basis on which the second and further respondents tendered their services was that they could resume their strike at any time after they had resumed

duties. He submitted that they made their tender conditional and that a conditional tender of services by an employee did not entitle the employee to payment of wages. In this regard Mr Reyneke relied on the first three sentences of paragraph 18 of the judgement in **Transportation Motor Spares v National Union of Metal Workers of SA and Others (1999) 20 ILJ 680 (LC) at 695 A-B.**

[26] Paragraph 18 of the judgement in the Transportation Motor Spares case reads thus:

“If workers who have commenced a strike seek to resume their work on the basis that they can still go out again later and resume the strike, the employer is under no obligation to allow them back at work. This is so primarily because the tender of their services is not unconditional. In terms of the law an employer’s obligation to pay wages to an employee who has not performed his duties is dependent upon the employee’s tender of services being unconditional. Quite apart from this, the employer is entitled at the stage of the proposed

return to work on the part of the strikers to lock them out until the dispute over which they had gone out on strike has been resolved. It is therefore up to the employer to enquire from the strikers when they seek to return to work, what the basis is for their return to work and to decide whether he will allow them to resume their duties or not and if he will, then on what terms they will be so allowed."

[27] The last of the first three sentences is correct. The balance of the passage requires qualification within the context of the present case. In the present case where there was no protected lock-out, the employer is obliged to accept the tender failing which he would be liable for wages if he did not accept the tender. Such a tender is not conditional.

[28] The reason why a tender by strikers to resume their work on the basis that they may later on resume their strike is not conditional is that, when strikers do that, they place themselves in the position in which they were prior to going out on strike. Prior

to the commencement of their protected strike, the employer would not, in the absence of a protected lock-out, be entitled to reject their tender simply because they had indicated that they would be going on a protected strike but would be so entitled if there was a lock-out. The position cannot be different when they have gone on strike but later tender their services on the basis that they may later resume their protected strike. In the light of the above the appellant's contention that the second and further respondent's tender was conditional falls to be rejected.

[29] The appellant's Counsel also submitted that the appellant was entitled to reject the tender because it had a reasonable apprehension that the second and further respondents would persist with **"disruptive activity"**. If this refers to the go-slow and overtime ban, there was no reasonable basis for such apprehension. If it refers to any

other conduct, that apprehension, too, was without any evidential basis. In those circumstances the appellant's appeal in respect of its claim for the period from the 6th to 14th February must fail.

COSTS

[30] The respondents were substantially successful in the Court below and an order for payment of the remuneration of the employees for the period 6th February to 14th February 1997 would also have amounted to substantial success in such Court.

[31] Counsel for the respondents argued that the appellant's conduct during the litigation we have been called upon to adjudicate ought to be penalised in the costs order we make. I disagree. In this Court the appellant has been substantially successful. It has reduced a period in respect of which remuneration is to be paid to the employees from 14 days to 9 days and it has successfully resisted the cross-appeal which would have had such remuneration increased by that due in respect of an additional nine days. In these circumstances it seems to me that the appellant is entitled to its costs of the appeal.

[32] In the result I make the following order:-

1. The appeal succeeds.
2. The order of the Court a quo is amended by the substitution of "6 February" for "1 February" in paragraph (i).
3. The cross-appeal is dismissed.
4. The respondents are ordered to pay the appellant's costs of the appeal and the cross-appeal jointly and severally the one paying, the others to be absolved.

RMM ZONDO
JUDGE PRESIDENT
I agree.

E.L. GOLDSTEIN
Acting Judge of Appeal

I agree.

D.M. DAVIS
Acting Judge of Appeal

Appearances:

For the Appellant:	Mr Reyneke SC
Instructed by:	Hofmeyr Herbststein & Gihwala Inc

For the respondent:	Mr Vally
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Instructed by: E.S. Makinta Attorneys

Date of hearing: 7th November 2000

Date of Judgement: 15th February 2001