

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 497/89

In the appeal of

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

1st APPELLANT

NAHAIM ALLIE AND OTHERS

2nd to 167th APPELLANTS

and

GEARMAX (PTY) LTD

RESPONDENT

Coram: HOEXTER, VIVIER, EKSTEEN et NIENABER JJA;

PREISS AJA

Date heard: Friday 8 March 1991

Date delivered: Tuesday 26 March 1991

J U D G M E N T

PREISS AJA

The appellant is the National Union of Metal Workers of South Africa (the union), a trade union registered in terms of the Labour Relations Act 28 of 1956 (the Act). Relief was claimed against the union in an urgent application launched by Gearmax (Pty) Ltd (Gearmax), the present respondent, a manufacturer of rear-drive axles and allied components at its plant in Uitenhage. The application, brought in the South-Eastern Cape Local Division, dealt with the alleged refusal of a number of employees of Gearmax to perform overtime work. The first respondent was the union. The 2nd to 167th respondents in

the court below fell into two broad categories. The one, constituted by the 2nd to 148th respondents, consisted of employees who had signed standard contracts of employment in terms of which they undertook "to work the ordinary hours and overtime hours required by the company", i e Gearmax. The other, consisting of the 149th to 167th respondents, had not agreed expressly to work overtime hours. The deponent for Gearmax stated in the founding affidavit that "they have always worked overtime as and when required by management in accordance with the business requirements of the company" and that a practice had thus developed "stretching over many years". In the answering affidavit of the union this allegation was denied, albeit baldly.

The refusal to perform overtime work first manifested itself on 1 March 1989. Thereafter discussions and negotiations

took place between the parties; they will be described in appropriate detail at a later stage. The discussions and negotiations came to naught. On 9 March 1989 Gearmax launched an urgent application ex parte and obtained the following relief:

"It is ordered:

1. That the forms and service provided for in the rules be dispensed with by the Court and that this matter be disposed of as one of urgency in terms of Rule 6(12).
2. That a rule nisi be issued calling upon the Respondent to show cause on 29 March 1989 why a final Order should not be granted in the following terms:

.../5

2.1 Declaring that the combined acts of the Second and Further Respondent employees in refusing or failing to work normal overtime with the intention of compelling the Applicant to accede to their demands constitutes an unlawful strike in terms of Section 65 of the Labour Relations Act No. 28 of 1956;

2.2 Interdicting and restraining the Second and Further Respondent employees from participating and continuing with the conduct set out in paragraph 2.1 above without first complying with the provisions of Section 65 of the Act and the provisions of the Applicant's Disputes Procedure:

2.3 Interdicting and restraining the Respondents from continuing to instigate or instigating

the strike referred to in paragraph 2.1 above
or inciting any of Applicant's employees to
take part in or to continue such a strike until
the provisions of Section 65 and the provisions
of the Disputes Procedure of the Applicant have
been complied with;

2.4 Ordering the First Respondent forthwith to take
full steps to ensure that its members employed
at the Applicant's Uitenhage premises observe:

2.4.1. The provisions of the Grievance Procedure
in force at the Applicant's Uitenhage
premises;

2.4.2 The provisions of the Labour Relations
Act and in particular that they discontinue
the ban on overtime until the provisions
of the Disputes Procedure and Act have

.../7

been complied with;

2.5 Ordering that the First Respondent and such
of the Second and Further Respondents who oppose
this application pay the Applicant's costs,
jointly and severally, the one paying the other
to be absolved;

3. That paragraphs 2.2, 2.3 and 2.4 operate as an interim
interdict pending the final decision of this
application."

(The rest of the order provides for modes of service and for
the anticipation of the rule nisi; it need not be further
considered.)

The rule nisi was extended until 29 March 1989 upon which

date it was confirmed against all the employees, namely, the 2nd to 167th respondents, on an unopposed basis. The union, on the other hand, gave notice of opposition, filed answering affidavits and opposed the confirmation of the rule on the extended return day. On 23 May 1989 Ludorf J confirmed the rule against the union in the following terms:

- "1. I declare that the combined acts of the second and further respondent employees in refusing or failing to continue to work normal overtime with the intention of compelling the applicant to accede to their demands, constitutes an unlawful strike in terms of Section 65 of the Labour Relations Act No. 28 of 1956.
2. I grant an interdict interdicting and restraining the first respondent from continuing to instigate the strike referred to in paragraph 1 above, or

inciting any of the applicant's employees to take part in or to continue such a strike until the provisions of Section 65 have been complied with.

3. The first respondent is ordered forthwith to take steps to ensure that its members employed at the applicant's Uitenhage premises observe:

- (a) The provisions of the Labour Relations Act and in particular that they discontinue the ban on overtime until the provisions of the Act have been complied with, and

4. The first respondent is ordered to pay the costs of this application."

The union applied for leave to appeal which was duly granted.

In argument before us two separate issues were canvassed in counsel's heads of argument. The first was whether the refusal

to perform overtime work constituted an illegal strike; it was abandoned at the stage of argument by the appellant's counsel, Mr Lang. The second issue was whether the Court a quo was correct in granting relief against the union on the ground that it had instigated the strike or incited the employees within the meaning of s 65(1) of the Act.

(a) THE LEGALITY OF THE STRIKE.

I need say little about this issue. It was abandoned by Mr Lang and, in my view, correctly. Insofar as the 2nd to 148th respondents are concerned, there was an express undertaking to work overtime. A strike, as defined in s 1 of the Act, includes a "refusal or failure... to continue to work..." on the part of any body or number of persons. In SA Breweries Ltd v Food and Allied Workers Union and Others 1990 (1) SA

92 (A) this court held that "work" in the above context must be limited to mean such work as an employee is contractually obliged to perform. It will be recalled that in the above case it was held that a collective refusal by employees to work overtime in order to induce or compel their employer to accept their employment demands where such employees were not contractually bound to perform overtime work could not amount to an unlawful strike in terms of s 65 (1) of the Act. The corollary is that such collective refusal by employees who are contractually so bound would amount to an unlawful strike. That was the situation in the present case in respect of the 2nd to 148th respondents.

In the former case (at 96 E - F), Smalberger JA went on to deal with the obligation of an employee who is tacitly bound to work overtime. The learned Judge said:

"It is common cause in the present matter that the employees were not contractually obliged to work overtime. It is also not in dispute that they have in the past regularly worked overtime when required to do so. A long-standing practice of working overtime could conceivably give rise to a tacit agreement between an employer and an employee that the latter will work overtime whenever required to do so. The employee would then be contractually obliged to perform such overtime."

I have already stated that the averment that the 149th to 167th respondents always worked overtime as and when required, as also the conclusion that " a practice stretching over many years has developed" were denied by the union in its answering affidavit. It seems to me that the existence of a tacit

agreement by these employees to work overtime was not admitted and was consequently unproved.

This conclusion, however, does not affect the second issue.

It is clear in my view (as, indeed, Mr Lang fairly conceded) that there was an unlawful strike by the 2nd to 148th respondents. The mere fact that other employees were not engaged in an illegal strike but were entitled to refuse to work overtime cannot avail the union if it had instigated or incited the collective action by those who were engaged in an unlawful strike.

(b) INSTIGATION OR INCITEMENT.

The concept of instigating or inciting a strike has its origin in s 65 (1) of the Act. It provides that "No employee or

other person shall instigate a strike or incite any employee to take part in or continue a strike or take part in a strike or in the continuation of a strike..." unless and until certain formalities are complied with. "Instigate" means to spur; urge on; stir up; stimulate; incite; foment; provoke (The Shorter Oxford English Dictionary). "Incite" comprehends something less. The latter word received judicial interpretation in the case of Dunlop South Africa Ltd v Metal and Allied Workers Union and Another 1985 (1) SA 177 (D), an action dealing with this section of the Act. Booysen JA adopted the reasoning of Holmes JA in S v Nkosiyanana and Another 1966 (4) SA 655 (A), where the components of "incitement" were considered. The learned Judge in the Natal court accepted the definition of Holmes JA and quoted his very words (at 188 E - F) in the following passage:

"Counsel were ad idem that an 'inciter' in criminal law is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime."

In the appeal before us, counsel's arguments were based upon an acceptance of the correctness of that definition. It is, in my view, an acceptable definition for the purpose of this

appeal, which, therefore, turns upon whether it was established that the union "reached and sought to influence the minds" of its members towards the refusal by them to perform overtime work.

On this issue the court a quo was faced with a dispute of fact on the papers. Ludorf J analysed the conflicting averments and came to the following conclusion:

"On a conspectus of all the evidence and despite the dispute raised on the papers, I am satisfied that the probabilities are overwhelming that the first respondent at least associated itself and made common cause with its members' illegal conduct."

The language employed by the learned Judge falls somewhat

short of the concept of instigating a strike or inciting an employee, within the meaning of the prohibition in s 65 (1) of the Act. I am of the opinion, nonetheless, that incitement on the part of the union was the real basis for this finding. I propose, therefore, in what follows, to analyse the sequence of events to assess whether it can be held, despite the apparent disputes of fact, that the union incited employees to refuse to perform overtime work or to continue in such refusal.

On 28 February 1989 Gearmax announced ad hoc wage increases for all hourly paid employees. It was a series of differentiated increases depending upon each employee's grade. In its notice to these workers Gearmax stated that the wage increase was being implemented "to help alleviate the ever-rising cost of living". This stated reason for the increase caused worker

resentment; workers, not unexpectedly, took the view that the increased cost of living affected everyone equally, and that any wage increase designed to meet the increased cost of living should be an "across the board" adjustment. Gearmax became aware of these rumblings because the offending phrase was deleted from a substitute notice issued on the same day, namely, 28 February 1989.

On the same day the union's shop stewards approached Gearmax for permission for the day shift members to be excused overtime that afternoon in order for them to attend a general meeting after normal working hours. Permission was granted. On the following day, representatives of Gearmax met with the union's shop stewards and a discussion was held relating to the apparent dissatisfaction of union members with regard to a differential increase. Gearmax was at pains

to state that no discrimination or unequal treatment was intended. Its attitude was that differential increases were in line with market-related forces which had the effect of higher-skilled employees being paid more than lower-skilled employees. This argument was not well-received by the shop stewards.

While the meeting between Gearmax and the union's shop stewards was still in progress, it was noticed that no members of the union were taking their normal tea break at 4 pm, the break which preceded an overtime shift. From that afternoon onwards members of the union comprising both day and night shifts refused to work overtime. In regard to this refusal it cannot seriously be disputed that there was collective action by union members. This is conceded by Mr M.I Songwigi, the chairman of the Shop Stewards Committee, in his affidavit in support

of the union's answering affidavit. Furthermore, other shop stewards, namely, Messrs Sineyi, Witbooi and Taai, together with Songwili, participated in the refusal to perform overtime work.

On 3 March 1989 a meeting was held between representatives of Gearmax and union shop stewards, Songwili and Witbooi.

In view of inferences which flow from the proceedings at this meeting, the minutes (save for a personal note at the conclusion of the record) are appended in full:

"MINUTES OF MEETING WITH NUMSA SHOP STEWARDS HELD IN

PERSONNEL OFFICE ON FRIDAY 3 MARCH 1989

MANAGEMENT

Messrs E.M Schutte (in the chair)

REPRESENTATIVES

G.R Conibear and A.H Timms.

NUMSA REPRESENTATIVES

Messrs I. Songwigi and K. Witbooi.

The chairman asked Mr Songwigi to confirm what his union members demand was.

Mr Songwigi replied that his members were demanding a 50 cents per hour across-the-board increase.

The chairman then asked Mr Songwigi whether his members were going to persist with their demand and if so, for how long were they going to persist?

Mr Songwigi replied that his members would persist with their demand until such time as the company granted them their 50 cents across-the-board increase.

The chairman advised the NUMSA representatives present that their members conduct was unlawful, in breach of their contracts of employment; unreasonable, and in the circumstances, constituted an unlawful strike.

The chairman requested that the NUMSA representatives present report to him at 6.00 pm that day, the feelings of dayshift and nightshift re. the continuation / rescinding of the overtime ban.

Mr Timms commented that Mr Songwigi had already stated earlier what the feelings of both dayshift and nightshift are i e they would continue banning overtime until such time as their demands are met.

The chairman then asked Mr Songwigi to reaffirm this,

which he duly did.

Mr Timms commented that, this morning 3/3/89, supervision on dayshift, when requesting the NUMSA members to work overtime, received a reply that they would continue to 'ban overtime' until such time as all Grade 2's were given a 50 cents increase as was the case with Grade 8's.

He added further that many NUMSA members used wording to the effect that it wasn't an overtime ban but they are all standing together."

The minutes indicate clearly that demands were being made by the shop stewards; Gearmax was informed that the overtime ban would continue until those demands were met. That this

was a union attitude, is a legitimate conclusion from the stand taken up by the shop stewards and by the fact that the workers who refused to work overtime were union members.

It is unlikely that the shop stewards would have adopted this attitude and persisted in their conduct without an indication from the union itself. Its regional secretary for the Uitenhage area, Mr J.C Harris, filed an answering affidavit. He denied emphatically that the union was taking any part in the refusal. He claimed that he was merely reporting what his members felt. Since it was not a union decision, so he contended, he was not prepared to persuade his members to return to work. He stated, nevertheless, that he would speak to them and try to arrange a return to work if Gearmax would make an across the board increase of 45 cents per hour. This offer was made

at a meeting on 7 March 1989 which was attended by shop stewards Songwiqui, Sineyi and Taai. What is most significant about Harris's attitude, is that he asserted vehemently and repeatedly that the strike was lawful, and that the workers were fully entitled to refuse to work overtime. This was repeated by him at the meeting on 7 March 1989, in the presence of the above-mentioned shop stewards. He made it clear to the representatives of Gearmax and the shop stewards present at that meeting that he would not intervene to call off the strike. In his own words,

"Voorts het ek gesê dat dit die ander Respondente vrystaan om te besluit om nie oortyd te werk nie, daar die besluit om wel oortyd te werk , n vrywillige een is. Ook het ek gesê dat ek nie bereid is om vir die ander Respondente te sê om wel oortyd te werk nie, daar ek geen reg gehad

het om so te doen nie."

Before proceeding to consider the role played by the union, I should mention that Songwigi denied under oath that he was present at the meeting of 3 March 1989. It appears clearly from the undisputed minutes of the meeting, that he was not only present but that he took a prominent part in the exchanges. What does one make of this significant departure from the truth? In my view, it does not necessarily lead to the inference that Songwigi, as head shop steward, was acting as the spokesman of the union itself, and had thereby committed the union to an instigation of the strike or an incitement of the employees. It serves, at least, however, to rob his ipse dixit (i e that the shop stewards of the union were not a party to the decision) of acceptance by the court. It is one of the features from which the true nature of the union's alleged participation

may be gauged.

The repeated emphasis by Harris that the strike was a lawful one is in my view significant. It is now common cause, as Mr Lang for the appellant correctly conceded, that the strike by the 2nd to the 148th respondents was illegal. It is inconceivable that members of the union, and, in particular, the shop stewards would not have regarded Harris's stated view as an assurance, if not an outright encouragement, to persist in the strike. Harris was a senior official of the union. By telling his members that the strike was lawful he was saying in effect that they had the union's backing and that their actions had the union's stamp of approval. It is unthinkable that Harris's firm stand would not have been conveyed by the shop stewards to the striking members. Since this was Harris's bona fide opinion there would have

been no reason for him to conceal it.

Harris attempted to create the picture of a spontaneous reaction by the employees in which the union had no part. He persisted in denying the union's participation while contending outspokenly that the strike was lawful. It may perhaps be going too far to state that the union, through Harris, incited the employees when first they refused to perform overtime work, but there can be no doubt that by the proclamation of the lawfulness of the strike, Harris incited his members "in the continuation of a strike" within the meaning of s 65 (1) of the Act.

Furthermore, he seems to have been vested with authority to claim a 45c per hour across the board increase, in which event the strike would have ended. Notwithstanding his attempts to distance the union from the strike, he must therefore be taken to have associated the union with the strike action

to the extent of having "reached and sought to influence the mind of the other person" towards the continuation of the strike.

My conclusion is that the protestation by the union that it had no part in the strike or its continuance was clearly hollow. In this matter actions spoke louder than words; the actions in my view established the necessary incitement.

It remains to deal with the question whether Harris's genuine opinion that the strike was a lawful one derogates from the above conclusion. In my view, it does not. A passage in the judgment by Booysen J in Dunlop South Africa Ltd v Metal and Allied Workers Union and Another (supra), at 188 I - 189 C is particularly apposite. The learned Judge says:

"It seems to me prima facie that the second respondent did reach and did seek to influence the minds of the employees towards the strike action on 17 August 1984.

Even assuming that he might have thought that the strike would be lawful, the fact remains that he, at a time when he knew that the employees were 'in a mood to strike', advised them that it would be lawful to do so. Coming from their union's secretary, it was a powerful inducement to strike. His reading of the pre-prepared letter, and in particular the last two paragraphs, was calculated to induce the employees to strike. It is true that he would possibly have lacked the necessary mens rea because he had been advised that such a strike would be lawful but the question is not whether he is guilty of a crime but whether he did incite an unlawful strike. It seems to me, having held that the strike was unlawful, that

it is clear, certainly at the prima facie level, that he did incite the strike and that he and the first respondent thereafter reached and sought to influence the minds of the other employees at the other factories of the applicant to strike unlawfully in sympathy with the Sydney Road factory strikers. It is of no comfort to the applicant, who is seeking an interdict against such strikes, that the respondents may genuinely believe them to be lawful."

Insofar as this reasoning is relevant to the present appeal, I regard it as correct. Harris's view, however genuinely held, cannot avail the union. It follows that in this application there was no real dispute of fact sufficient to preclude a finding on the merits without recourse to viva voce evidence. Accordingly, the appeal must fail.

The question of costs requires analysis. Mr Wallis, on behalf of Gearmax, the respondent, asked for the costs of two counsel. He argued that the issues, prior to Mr Lang's abandonment of the legal dispute, were complex. He stated further that labour relations constitute a burgeoning field of law and that decisions of this nature were important for both management and labour for the adjustment of their respective interests. Mr Lang, on behalf of the appellant, argued that this appeal, even before the issues were narrowed, was within the competence of a single counsel.

In my view, the issues were not involved. The legal contentions in regard to the legality of the strike were forced, and palpably indefensible. The court was left with a debate about factual averments where there is clear law regarding the approach

to be adopted. In all these circumstances, whatever the significance of the result for future industrial relations, the costs of one counsel will meet the case.

The appeal is dismissed with costs.



H.J. PREISS

HOEXTER JA)

VIVIER JA)

EKSTEEN JA) CONCUR

NIENABER JA)