

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

**Reportable: Yes
Of Interest: Yes**

CASE NUMBER J 1428/97

In the matter between:

STEEL MINING AND COMMERCIAL WORKERS UNION	First Applicant
H SEUTANE AND OTHERS	Second and Further Applicants
and	
BRANO INDUSTRIES (PTY) LIMITED	First Respondent
NJ OTTEN & BP ROACH	Second and Third Respondents

JUDGMENT

BASSON, J

[1] The second to further applicants (“the workers” or “the individual applicants”) were dismissed by the first respondent on 27 October 1997, allegedly for participating in an unprotected strike. It was agreed in terms of the pretrial minute that the applicants were not seeking any relief against the second and third respondents (the directors of the first respondent).

[2] The applicants alleged that the dismissal was both substantively and procedurally unfair.

[3] In terms of the applicants’ statement of case, the first respondent’s factory manager, Mr F Botha (“Botha”), on 27 October 1997 “harassed and intimidated” one of the applicants, Mr S Ngwenya, a shop steward of the first applicant (“Ngwenya” who died before the matter came to trial), and that this “threatened the whole workforce”.

[4] As a result of this incident, the whole workforce came together at their usual meeting place and

requested their shop stewards to phone the first applicant (“the union”).

[5] It was further contended in terms of the statement of case that a union official (Mr T Hlatshwayo, who represented the applicants in Court) then came to the reception area of the first respondent’s offices and met Botha there. Botha went to the directors’ offices. Because Botha allegedly took a long time, Mr Hlatshwayo had to leave but two other union officials, including one Mr Aubrey Ncube (referred to only as “Aubrey” in Court), stayed behind.

[6] Further, it was averred that Botha then ordered the said union officials to go to the workers. However, they allegedly found that the workers had already been dismissed for participating in an unprotected strike.

[7] In terms of the pretrial minute the applicants denied the first respondent’s claim that they went on an unprotected strike on 27 October 1997. The applicants also denied the averments that they were given two notices of which the last (an ultimatum) was extended before they were dismissed.

[8] In terms of the pretrial minute the applicants began. Three witnesses were called on their behalf, that is, three of the individual applicants, Mr P Zondo (“Zondo”), Mr H Seutane (“Seutane”, also a shop steward of the union) and Mr A Mogoba (“Mogoba”). No union official was called to testify.

[9] Zondo testified in support of the applicants’ version (set out above) and denied that the “meeting” between the workers on 27 October 1997 amounted to a strike.

[10] Further, he tried to persuade the Court that the “meeting” was a direct result of the fact that Ngwenya had been dismissed by Botha earlier that morning. Suetane’s evidence was to the same effect although he went further to state that he had actually seen the dismissal letter himself.

[11] However, this version stands to be rejected in favour of the respondent’s version that Ngwenya was not dismissed but was merely given a notice to attend a disciplinary hearing and suspended with full pay pending such hearing.

[12] Not only was the respondent’s version supported by its own documentary evidence (see the said notice of a disciplinary hearing, exhibit A38) but a letter of the union sent after the dismissal of the applicants (exhibit A44) referred to the “suspension” of Ngwenya. In fact, the applicants failed to produce the so-called dismissal letter.

[13] In the event, I am satisfied that Ngwenya was not dismissed by the first respondent but merely suspended. The question then immediately arises as to why the applicants sought to resort to exaggeration (if not fabrication) in regard to the conduct of the employer that allegedly gave rise to the “meeting”.

[14] Zondo and Seutane also tried to persuade the Court that the alleged manhandling of Ngwenya by Botha was a direct cause of the “meeting”.

[15] However, this very serious allegation was not made during Zondo’s evidence in chief but under cross examination for the first time. This allegation was also not contained in the pleadings which merely state that Botha had “harassed and intimidated” Ngwenya (*supra* at paragraph [3]). Further, this allegation was not made in any of the correspondence sent by the union to the first respondent subsequent to the dismissal of the applicants. In the event, I accept Botha’s evidence (which was never challenged during cross examination) that there was no substance to this allegation.

[16] In this regard Botha (who was the only witness for the first respondent) also gave evidence supported by contemporaneous notes and documents (exhibits A3 and A36 to A38) that Ngwenya had refused an instruction to count work in progress on the morning of 27 October 1997. He stated that this was a reasonable instruction as Ngwenya had been doing just that for three weeks. After failing to persuade Ngwenya to carry out this instruction, Botha went back to the office and prepared a notice to attend a disciplinary enquiry for refusal to obey a lawful instruction (an offence for which Ngwenya was previously charged together with Zondo). However, Botha saw Ngwenya was gathering other workers in groups and decided then to also suspend him. Botha then handed Ngwenya the said notice to attend a disciplinary enquiry which also noted that he was suspended with full pay up to the hearing (exhibit A38 *supra*).

[17] Suetane’s evidence lent some support to Botha’s version. Revealingly, Suetane testified that Botha had “harassed” Ngwenya by requiring him to do work which he was not qualified to perform and that that work was to count work in progress. In my view, the allegation of “harassment” contained in the applicants’ statement of case (*supra* at paragraph [3]) must be seen in the light of this evidence.

[18] In this regard, Botha also testified that he had introduced changes to the “disciplines and procedures” at the first respondent’s factory since starting his employment as factory manager in March 1997. It was also clear from questions put to Botha in cross examination that he was being accused of “inhuman or unjustified” actions even before the incident on 27 October 1997. Botha denied that he was guilty of such behaviour and this was never pleaded nor referred to in the opening statement of the applicants.

[19] In fact, Botha stated that it was the individual applicants who had previously acted unlawfully by embarking upon unprotected strike action on 26 August 1997 and 22 September 1997 (this was pleaded in terms of the first respondent's response). The first respondent's documentation and Botha's contemporaneous notes lent support to his version. Most tellingly, was an agreement entered into between the union and the first respondent on 27 August 1997 (exhibit A18 to A21) which reads, *inter alia*, that "[t]he union will further advise its members that in future no individual grievances will be pursued by any form of industrial action". Suetane was a signatory (as a witness) to this agreement. This he admitted but, unconvincingly, he tried to persuade the Court that he did not even know of this agreement nor of the "industrial action" referred to therein. This is highly improbable as he was a shop steward of the union at the time.

[20] I must pause to note that it is obvious from the discussion of the evidence thus far that the applicants' witnesses gave very unsatisfactory evidence. The witnesses were evasive and appeared to be intent on denying any knowledge of anything that could be construed to lend support to the first respondent's case even if such denial was implausible.

[21] Nowhere was this more obvious than in the denial by the applicants' witnesses that they had received the two notices on 27 October 1997.

[22] In this regard Botha testified that he had personally handed out the first notice (exhibit A40) to the individual applicants who were congregated outside the change rooms at 12H15 on 27 October 1997.

[23] This notice was headed : "To all employees who are partaking in unprotected strike action; re: your misconduct" and stated: "You are currently participating in an unprocedural and unprotected industrial action (strike/work stoppage). Your action which management believe is in support of a fellow employee who has been charged to appear at a disciplinary hearing is illegal. Management urges you to return to and continue to work as normal. As a result of your conduct you will not be paid for the time you are not working. Once you have returned to work management will meet with two representatives to discuss your action. These representatives may be shop stewards or others nominated by yourselves".

[24] Botha testified that after the workers failed to return to work he personally handed the second notice (exhibit A41) to the workers at 13H45.

[25] This notice was headed "ultimatum" and read: "As you have failed to respond to management's

earlier request that you return to work you are now and hereby given an ultimatum to return to work by no later than 15H00 today, failing this you will be summarily dismissed. It is not appropriate to embark upon unprotected industrial action in support of individual disciplinary matters. Your union has been informed accordingly”.

[26] Seutane (who was the most important witness as he was the only shop steward who testified and there was no evidence given by any union official) denied receiving any one of these two notices. In fact, he even went so far as to deny that he had received the dismissal notice (exhibit A42). However, when cross examined on the basis that the applicants do admit receiving the said dismissal notice, he tried to explain this discrepancy by claiming that he was illiterate and could not identify the said notice. This evidence was clearly false as he later admitted to having a standard 8 qualification.

[27] In this regard it must also be noted that in terms of paragraph 7.1 of the pretrial minute the union (the first applicant) admitted receiving a letter (exhibit A39) from the first respondent notifying the first applicant of the said industrial action on 27 October 1997. This letter reflected exactly the same information as contained in the first notice to the workers (exhibit A40 *supra* at paragraph [23]). It is therefore highly unlikely that the notices were not served on the individual applicants as they tried to persuade the Court to believe.

[28] In the event, on the basis of Botha’s evidence and the first respondent’s documentation referred to above, I am satisfied that the individual respondents had indeed received the notices referred to above. To hold otherwise I am required to reject Botha’s entire version as false and to find that the first respondent had falsified the entire paper trail referred to above. For the reasons already explained, the first respondent has, however, satisfied me that its version ought to be accepted.

[29] In fact, I am persuaded to accept the first respondent’s version that it was not with the intent to hold a mere “meeting” that the individual applicants downed tools on the morning of 27 October 1997 at around 10H00.

[30] It is more probable (and the evidence of Botha must be preferred for the reasons set out above) that the workers were upset when their shop steward (Ngwenya) was called to a disciplinary hearing for insubordination and was suspended as well. The workers accordingly gathered outside the changing rooms and demanded that the enquiry against Ngwenya be withdrawn and his suspension lifted. Management then faxed a letter to the union (exhibit A39 *supra*) and at 12H15 personally handed a notice (exhibit A40 *supra*) to the twenty workers who were gathering. After they failed to return to work an ultimatum (exhibit A41

supra) was handed out individually at 13H45. I also accept Botha's evidence that the ultimatum was orally extended from 15H00 to 15H30 after which the notice of dismissal (exhibit A42 *supra*) was handed to the workers.

[31] As far as the role of the union in these procedures is concerned, I accept Botha's evidence (supported by his contemporaneous notes) that at least one union official (Aubrey) attended at the first respondent's premises just after the first notice was issued.

[32] In fact, it was common cause that Botha had sent at least one union official to the workers (see the applicants' pleadings discussed above at paragraph [5]).

[33] Only the timing of Aubrey's intervention was placed in dispute in that the applicants contended that the union official(s) spoke to the workers only after they were dismissed for partaking in unprotected industrial action. However, also in regard to this matter the applicants' witnesses were vague and evasive, especially Zondo. As is explained above, I accept Botha's version in regard to the events on 27 October 1997 as being more probable, having regard to the documentary evidence (the letters and notices) and also the inherent deficiencies in the evidence presented by the applicants' witnesses.

[34] I therefore accept the first respondent's version that the union official (Aubrey) only arrived after the first notice had already been issued and that he went back to the workers on no less than three occasions but eventually informed management that he was unable to persuade them to come back to work, after which he left the premises even before the extended time of the ultimatum (at 15H30) had expired.

[35] The definition of a "strike" is contained in section 213 of the Labour Relations Act, 66 of 1995 ("the Act"): "[t]he partial or complete concerted refusal to work ... for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee ...".

[36] The contention that the applicants had congregated merely for the purposes of holding a meeting on 27 October 1997 stands to be rejected on the facts which present themselves in this matter (as is discussed fully above).

[37] The workers downed tools, congregated outside the changing rooms and demanded that the disciplinary enquiry against a shop steward (Ngwenya) be withdrawn and his suspension lifted before they were willing to go back to work.

[38] Clearly, this action amounted to collective industrial action within the definition of a strike (*supra* at paragraph [35]). The argument that the workers were merely guilty of misconduct in unreasonably exercising their “right” to hold a meeting therefore need not be dealt with.

[39] Section 68(5) of the Act provides:

“Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account”.

[40] The Code of Good Practice: Dismissal (“the Code”) in Schedule 8 of the Act largely codifies the legal principles that were developed in labour law jurisprudence under the previous Act. I am of the view that the provisions of item 6 of the Code, headed “Dismissals and industrial action” apply in a case such as the present, that is, a dismissal for participation in an unprotected strike.

[41] There is no merit in the argument put forward on behalf of the applicants that the provisions of items 3, 4 and 7 of the Code, headed “Dismissals for misconduct”, “Fair procedure” and “Guidelines in cases for dismissals for misconduct” apply in such case. Clearly these items deal with dismissals for individual misconduct whilst dismissal for participation in unprotected strike action is dismissal for collective misconduct which is dealt with separately under item 6.

[42] In fact, item 6(1) defines participation in a strike that does not comply with the provisions of Chapter IV of the Act as misconduct.

[43] It was common cause that the strike *in casu* did not comply with these provisions of Chapter IV and was accordingly an unprotected strike. In this regard it must be noted that the underlying dispute had not been referred to conciliation (section 64(1)(a) of the Act); no strike notice was given (section 64(1)(b) of the Act); and the issue in dispute (the allegedly unfair disciplinary action against a worker) stood to be arbitrated in terms of item 2(1)(c) of Schedule 7 of the Act (section 65(1)(c) of the Act).

[44] Item 6(1) states clearly that, like any other act of misconduct, participation in an unprotected strike does not always deserve dismissal. The substantive fairness of such dismissal must be evaluated in the light of the facts of the case, including:

- (a) the seriousness of the contravention of the Act;
- (b) attempts made to comply with the Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

[45] As far the seriousness of the contravention of the Act is concerned it was clear that many provisions of Chapter IV had been flaunted by the individual applicants. The dispute that gave rise to the strike was never referred for conciliation, no strike notice was given and the dispute was a non-strikeable dispute (*supra* at paragraph [43]). Further, no attempts at all had been made to comply with the Act.

[46] No doubt the strike was in response to conduct on the part of the first respondent. Botha admitted as much when he denied that his conduct was inhumane but conceded that the changes which he had introduced to disciplinary and procedural matters had precipitated the strike. This conduct of the employer culminated in the disciplinary action taken against a shop steward of the union on 27 October 1997.

[47] However, the conduct on the part of Botha was not as serious as the applicants wanted the Court to believe. There was no dismissal of the said shop steward by the employer. The “harassment and intimidation” complained of did not consist of an assault on the shop steward. The mere fact that the employer took legitimate disciplinary steps against the shop steward precipitated the strike. This conduct cannot be branded as unjustified.

[48] In the event, I am satisfied that there was no unjustified conduct on the part of the employer which triggered the unlawful and unprotected strike action.

[49] In regard to the procedural fairness of the dismissal, item 6(2) of Schedule 8 of the Act provides: “Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them”.

[50] See in this regard also the judgment in *Performing Arts Council (Transvaal) v Paper Printing and Allied Workers Union and others* (1994) 15 ILJ 65 (A) at 76B (*per* Goldstone JA):

“In my judgment a fair ultimatum in the circumstances of this case should have been of sufficient duration to have enabled -

a)PACT to have ascertained what had gone wrong and caused the employees to behave as they did either by direct enquiry from the employees, the shop stewards, Motau or some other representative of the trade union;

b)The employees time to cool down, reflect and take a rational decision with regard to their continued

employment, and for that purpose to seek advice from their trade union”.

[51] The notices handed out at 12H15 and at 13H45 (exhibits A40 and A41- *supra* at paragraphs [23] and [25]) were not criticised during argument, and rightly so. The first notice explained clearly that the action complained of was an unprotected and unlawful strike and called upon the workers to return to work. The second notice was an ultimatum which set out in clear and unambiguous terms that the workers would be summarily dismissed if they do not return to work by 15H00. The 15H00 deadline was then extended orally to 15H30.

[52] At least one union official (Aubrey) was given time to consult with the workers between the hours of 12H15 and 15H30, a duration of more or less 3 hours. The union official reported back to management on three occasions but eventually stated that he could not persuade the workers to return to work and left even before the deadline expired.

[53] The time given for the strikers to reflect was short. The industrial action lasted for about six hours and the time to reflect (in terms of the second notice or ultimatum) was only about 1 1/4 of an hour (before it was extended with a further 1/2 hour).

[54] However, in my judgment the first respondent cannot be criticised for acting over-hastily.

[55] The purpose of granting the strikers an opportunity to reflect is clear: management must enquire from the strikers or their representatives what had caused the strike and the strikers must have time to cool down and to make a rational decision in consultation with their trade union to either comply or reject the ultimatum. In other words, reasonable efforts must be undertaken to persuade the strikers to return to work.

[56] *In casu* both of these requirements were met. Management issued no less than two notices stating very clearly the reason for the strike (in management’s view). After the first notice was issued a trade union official consulted with the strikers and there was no indication in the evidence that the reason for the strike was ever put in dispute by him. Further, the union official was granted the opportunity of consulting and reporting back on no less than three occasions. Eventually, it was the union official who reported that the strikers refused to go back to work and he left even before the extended deadline expired. In doing so, the representative of the strikers made it clear that there was no need for having more time to consult and advise the strikers.

[57] After all, both the parties concerned are obliged to make reasonable efforts to persuade the strikers to

return to work. See in this regard Grogan J “Acting on the Ultimatum” (1995) 11 (5) *Employment Law* at 106: “An ultimatum is not merely a mechanical procedural step which entitles an employer to sit back and watch the clock. It places an obligation on *both* the employer and the strikers’ representatives to make *reasonable efforts* to establish why the strikers are not responding and to seek to persuade them to do so” (emphasis supplied).

[58] I also believe that the conduct of the first respondent during the strike must be evaluated against the background of previous incidents of industrial unrest and unprocedural industrial action which established a pattern in this regard in the preceding two months (see the discussion and the settlement agreement referred to at paragraph [19] above).

[59] In the event, I find that the first respondent has shown that the dismissal of the individual applicants for participation in an unlawful and unprotected strike was both substantively and procedurally fair.

[60] For the sake of completeness, I refer to the criticism by the applicants of the first respondent’s offer to afford the representatives of the dismissed workers another opportunity to meet with management to state their case “before finally processing” their dismissal on the day after the dismissal (see exhibit A42, the letter of termination of services).

[61] I do not believe that this was an effort to apply the principles of fairness in individual dismissal cases to the collective dismissal of the individual applicants, although I see very little value in discussing a dismissal which was so clearly a *fait accompli*. It is clear, however, that this was done in a further attempt to act fairly and therefore cannot make the dismissal unfair.

[62] The legal representative for the first respondent, Mr Todd, indicated that he would not press for an order as to costs. I agree.

[63] Even though the applicants can legitimately be criticised for placing a version before Court that stands to be rejected, the first respondent’s conduct was not above reproach.

[64] I was particularly concerned about Botha’s evidence to the effect that management was not prepared to speak to the representatives of the workers during the strike provided that they first return to work. This attitude was also reflected in the first notice (exhibit A40 quoted at paragraph [23] above).

[65] This hardened attitude was completely at odds with management’s obligation to, in fairness, take all

reasonable steps to persuade the strikers to return to work during the strike action. Fortunately for the first respondent, I accepted the evidence (in the absence of evidence by any union official) that management did indeed consult with a union official and that it was the union representative himself who ended the consultations with the strikers.

[66] I make the following order:

The application is dismissed. There is no order as to costs.

BASSON J

On behalf of the applicants: Mr T Hlatshwayo of STEMCWU.

On behalf of the respondents: Mr C Todd of Bowman Gilfillan Inc.

Dates of hearing: 13, 14 and 15 September 1999.

Date of judgment: 17 September 1999.