

VIC & DUP/JHBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 10 JUNE 1998

CASE NO. J1314/98

In the matter between:

SIMBA (PTY) LIMITED

Applicant

and

FOOD AND ALLIED WORKERS UNION

AND OTHERS

Respondents

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REASONS FOR JUDGMENT

Date of Hearing: 9 June 1998

Date of Judgment: 10 June 1998

On behalf of Applicant:

Adv A I S Redding

Instructed by: Deneys Reitz

On behalf of Respondents:

Adv van der Riet

Instructed by: Cheadle Thompson & Haysom

LANDMAN J:

[1] The applicant in this application is Simba (Pty) Limited, a company which carries on business as a manufacturer and distributor of potato chips, fritos and Niknaks (corn products).

[2] The first respondent is the Food and Allied Workers Union which is a registered trade union recognised by the applicant. The second to further respondents are employees of the applicant whose names are reflected in Annexure A to the papers.

[3] This application comes by way of urgency. The applicant seeks certain relief which is set out in its notice of motion. This relief includes an application for a rule nisi and, pending the return day, an interim interdict. The interim interdict is sought in terms of paragraph 2.6 of the notice of motion. It reads as follows:

"That an order is sought directing that the provisions of paragraphs 2.3 and 2.4 shall operate with immediate effect as an interim order pending the return day of this application".

[4] Paragraph 2.3 seeks to interdict and restrain the first

and second to 380th respondents from promoting, inciting, instigating or participating in any unprotected strike action by refusing or failing to work shift times and lunch and tea-breaks as scheduled by applicant from time to time provided the shift times and lunch and tea-breaks are scheduled in accordance

with the provisions of the Basic Conditions of Employment Act, 3 of 1983, and any applicable collective agreement.

[5] Paragraph 2.4 seeks an order that the second to 380th respondents perform all their lawful obligations in terms of their contracts of employment and to comply with the staggered lunch and tea-breaks scheduled from time to time in accordance with the Basic Conditions of Employment Act and any applicable collective agreement.

[6] It is necessary to deal very briefly with the facts which have been set out in the founding affidavit. In doing so I note that an opposing affidavit has been filed at very short notice. It does not deal comprehensively with all the matters which the respondents might have sought to raise but it appears to have been sufficient in the circumstances.

[7] The applicant and FAWU have concluded a national substantive agreement which has been reduced to writing. Clause 3.6 which deals with tea and meal-breaks is a term of that agreement. It reads as follows:

"All employees are entitled to a two x 15 minute tea-breaks per

day. The present arrangement of staggered breaks at plants will not change without consultation between the parties. All employees are entitled to a one x 30 minute lunch-break per day."

It seems to me clear that the parties have entered into an agreement which is a material term of the conditions of employment, that all the employees are entitled to two x 15 minutes tea-breaks per day and to a lunch-break of 30 minutes per day. At the time this was entered into the tea-breaks were staggered in terms of a schedule which had been drawn up by the applicant in terms of its managerial prerogative. However, the applicant agreed that it would not exercise its prerogative to change the scheduling of those tea-breaks and the lunch-break without consultation.

[8] The applicant decided for various business reasons that it would move from a staggered tea-break involving two shifts to a three shift system (the three staggered break system). It motivated this change in a letter which appears to be undated but which is attached as "PT15" to the papers. In essence the document states that the rationale for changing from a two to a three break system is threefold - to prevent waste and financial loss, to increase productivity and to improve level of service to the employees. It then sets out the loss that has been experienced and the fact that the current spillage cost of the applicant is approximately R15 000 a day. Various

other details are given but it is unnecessary for me to canvass them.

[9] One of the questions which needs to be decided is whether Simba consulted in terms of its undertaking as found in the national substantive agreement before introducing the three staggered break system.

[10] It was contended on behalf of the respondents that consultation had not been exhausted. However, for purposes of an interim interdict, I am satisfied that prima facie, although possibly open to some doubt, there has indeed been proper consultation and that the applicant was entitled to implement its three staggered break system when it sought to do so early in June of this year.

[11] When the system was introduced the employees declined to heed it. Their refusal to do so has been characterised by the applicant as an unprocedural strike. This characterisation is derived from the submissions made in the application, more particularly paragraphs 8.2 to 8.5 which read as follows:

The applicant submits that the second to further respondents' conduct constitutes a strike as defined in section 213 of the Act.

8.3 The applicant submits that the second to further respondents' refusal or failure to continue, alternatively to resume work when they are required to in terms of the scheduled

lunch and tea-breaks constitutes a refusal to work or the retardation or obstruction of work.

8.4 The applicant submits further that the aforementioned conduct is for the purposes of remedying a grievance which second to further respondents have or resolving a dispute which they have in respect of the scheduling of lunch and tea-breaks which is a matter of mutual interest between the second to further respondents and the applicant.

8.5 The applicant submits that the action taken by the second to further respondents does not comply with the provisions of sections 64 of the Act as the second to further respondents have not referred the issue in dispute to the Commission for Conciliation, Mediation and Arbitration as is required in terms of section 134 of the Act, read together with section 64(1) of the Act. It is submitted that this honourable court has exclusive jurisdiction to grant an interdict restraining participation in such strike action in accordance with the provisions of section 68(1) of the Act".

[12] I accept on the papers that there is a collective refusal to obey an instruction to comply with the three staggered break system and that this constitutes a breach of contract and a refusal to work. It is also common cause that none of the steps which are required to precede a procedural strike had been embarked upon and therefore it must be accepted that, if

there is indeed a strike, it is an unprocedural one.

[13] This then brings me to the question whether or not the actions of the second to further respondents constitute a strike as defined in the Labour Relations Act, 66 of 1995. Section 213 defines a strike as:

"The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime worked, whether it is voluntary or compulsory."

Although the definition of a strike does not refer to the concept of an "issue in dispute", this concept, which is referred to inter alia in section 64(1) of the Act, also enters the picture. In terms of section 213 "issue in dispute" means, in relation to a strike or lockout, the demand, the grievance or the dispute that forms the subject matter of the strike or lockout.

[14] Under the Labour Relations Act, 28 of 1956, strikes were defined in a slightly different manner. In the South African Security Employers Association v TGWU and Others (2) 1998 (4) BLLR 436 LC my Brother Zondo J made the following observations

in regard to the distinction between the new definition of a strike and the previous definition. He says at page 440:

"An enquiry as to what the issue in dispute is between the parties in a matter such as this one must begin with the definition of the phrase 'issue in dispute' which is contained in section 213 of the Act. Section 213 of the Act defines 'issue in dispute' in relation to a strike or lockout as meaning 'the demand, the grievance or the dispute that forms the subject matter of the strike or lockout'. The particular wording of the definition of the phrase 'issue in dispute' is an attempt in so far as it includes a demand, grievance and dispute to ensure that such problems as were encountered under the old Act in determining the phrase 'matter giving occasion for the strike' in section 65 of that Act, read with a definition of strike which, when paraphrased, was a collective refusal by employees to work in order to compel the employer to agree to their demands or proposals, do not arise under the new Act. An example of such problems is where employees collectively refuse to work but did not make any demand or proposal to the employer. The result was that such workers were said not to be on strike because they had not made any demand on the employer, yet for all intents and purposes, such workers were on strike even though they might not have told the employer what they were demanding. There can be no doubt that the workers in such situation would have had a grievance of

some sort which have caused them collectively to refuse to work and that that conduct would normally be understood by most people to constitute a strike."

[15] The question of what constitutes a strike has been dealt with in a case which is more familiar to the parties, the matter of Simba (Pty) Ltd v Food and Allied Workers Union 1997 (18) ILJ 558 (LC), also a judgment of my brother Zondo J. Here the court was of the opinion that the refusal to take a staggered lunch break did not constitute a retardation of work as work in the definition of a strike did not include work, the performance of which beyond a certain time or at a particular time would be illegal. Du Toit et al The Labour Relations Act, 1995, 2nd ed. comment on this decision at p.194. They say:

"The court's reasoning on this point, if not its overall conclusion, must be questioned. The mere fact that work is being performed contrary to a law or collective agreement ought not, we believe, to place it beyond the purview of the strike definition. Employees are always entitled, as the court noted in the South African Breweries case (above) individually and independently to refuse to perform both voluntary and 'illegal' work. It is only when a concerted refusal to work is coupled with a specific intent, namely, to remedy a grievance or resolve a dispute, that it qualifies as a strike."

I do not agree with the criticism which has been levelled at

the Simba case in the abovementioned quote.

[16] It has also been held in this court that even if it is common cause that there was a work stoppage, the question is whether that concerted work stoppage was done for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee. See Flora Line v SASTAWU 1997 (9) BLLR 1223 LC at 1224E-F.

[17] Du Toit et al continue their commentary on the Simba v FAWU case by saying the following:

"A preferable basis for the decision is that the employees did not refuse to work 'for the purpose of remedying an agreement of resolving a dispute'. The dispute was a consequence of the refusal to work and not the catalyst. The employees were simply exercising collectively their right to refuse to work and were not using refusal as an economic lever to extract concessions from the employer. However, if they had refused to work the staggered lunch break arrangements until such time as an independent grievance or dispute was remedied or resolved, their action would have amounted to a strike, notwithstanding that the work was being performed contrary to the Basic Conditions of Employment Act."

In my opinion the passage which I have just cited is applicable to these circumstances. In this particular case the dispute which has arisen by the refusal of the

employees to work the staggered break system was a consequence of their refusal to work caused by the introduction of the staggered break system and was not its catalyst. I have examined the papers carefully to determine whether or not there is a demand, a grievance or a dispute which the second to further respondents require to be resolved. I regret that I am unable to find any evidence of anything other than a concerted refusal to work. The employees have raised no complaint; they have articulated no demand. It may well be, as was submitted by Mr Redding, who appeared on behalf of the applicant, that possibly the employees are upset about the fact that there was a retrenchment and that as a result of the retrenchment it is necessary to introduce various measures, such as the staggered break system in order to compensate for a lack of manpower. If that is the case, then it has not been shown to be such on the papers, and remains merely speculation.

[18] In my opinion, therefore, it has not been shown that the conduct of the employees, as set out in the papers, constitute as strike as defined in the Act for the reasons which I have given above. Consequently I am of the view that a rule nisi should not be issued and that an interim interdict cannot be issued and that the application should be dismissed with costs.

DATED AT JOHANNESBURG ON THIS 15th DAY OF JUNE 1998

JUDGE A A LANDMAN