IN THE INDUSTRIAL COURT OF SOUTH AFRICA

NH 11/2/12113

In the matter between

PIET JELE & 115 OTHERS — Applicants

and

ALPHA METAL PROCESSORS — Respondent

CONSTITUTION OF THE COURT

Adv W F Maritz — Additional Member

On behalf of the Applicants

Mr A K Ntleko
National Union of Metalworkers of South Africa

On behalf of the Respondent

Mr M J Welmans
Masterstaff Manpower Management (Pty) Ltd

Places and Dates of Proceedings

Ermelo	18,19 May 1993
Bethal	8,9 September 1993
Nelspruit	1 October 1993

JUDGMENT/UITSPRAAK
No. 17 VAN/OF 1994
CIRCULATE/VERSPREI
PRESIDENT: INDUSTRIAL COURT
PRESIDENT: NYWERHEIDSHOF

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JELE & ORS — Applicants

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DETERMINATION

This is an application in terms of section 46(9) of the Labour Relations Act for the reinstatement of the applicants who were dismissed subsequent to a general stay-away on 3 and 4 August 1992.

For the sake of convenience I will use the evidence of Victor Louw, the managing director and group general manager of the respondent and that of his production manager Cronje as a framework for the summation of the events relevant to the case and introduce, for determination, the issues raised in the evidence of the applicants.

In considering the merits it is necessary not only to have regard to the events in August 1992 which directly resulted in the dismissal of the applicants but it is also necessary to refer to those in the months that preceded that.

The respondent, made up of two corporate entities: Alpha Metals No.1 and Alpha Metals No. 2, is a member of a group of companies.

Before the dismissals there were about 80 workers in Alpha 1 and the balance of about 30 in Alpha 2. After the dismissals the organisational structure was revised and at the time of this hearing there were 64 in Alpha 1 and 42 in Alpha 2.

At the time the respondent acquired ferrous and non-ferrous scrap materials from mining operations and Eskom power stations. It processed the scrap and produced mild steel which it supplied on contract.

Its operation comprised the removal of the scrap from the mines and power stations it served, the recovery of the metal and the supply of its quota to the local foundry and time was of the essence in each of the phases of that operation.If the respondent, on a same day basis, failed to produce and deliver the committed tonnages it was in default of its contracts.

On the removal side the respondent had lost its contract with Rand Mines.On the supply side the respondent had built up a relationship with Middelburg Steel over a period of 11 years. Middelburg Steel had relied on it as its sole supplier of mild steel but when it could not supply its full quota Middelburg Steel had, in fact, contracted with an additional

supplier. The respondent was concerned that the business could be lost completely if timeous supplies in terms of its contract could not be guaranteed.

The company worked a five day week with work only being undertaken on a Saturday or after hours when there was a shortfall. As overtime wages had to be paid this was not a preferred solution.

This evidence stands uncontradicted and it is accepted that in this situation the company was vulnerable to any form of work stoppage whether through stay-aways or more directed industrial action and any loss of business impacted adversely on its profitability.

The workers were represented by the National Union of Metalworkers of South Africa and there were annual negotiations regarding conditions of employment.The first meeting on conditions of employment for the next year was held on 4 February 1992 and the respondent increased wages by the amount of its offer at that meeting with effect from 1 February 1992.The unilateral wage adjustment did not suit the Union which refused to accept that as the final increase and further talks were scheduled. The respondent proposed 14 April, 4 May and 1 June 1992 as meeting dates. The Union countered with 21 April, 7 May and 11 June 1992.The company rejoined with 27 April, 7 May and 11 June.The Union did not keep the April date

but a meeting was eventually held around 20 May 1992. It is apparent that there were postponed meetings and accusations of deliberate stalling from both sides.

The original Union demand had been for R2,00 per hour across the board. This would have resulted in an almost 100% increase in the case of some employees and would have represented an average increase of about 75%.

The respondent pleaded poverty but the Union and workers refused to accept its explanations.

From statistics introduced by the respondent, uncontradicted by the applicants, it appeared that production had been adversely affected during the period of the wage negotiations and was particularly bad in May and June 1992 when it had fallen as low as 800 tonnes. Although Louw blamed the attitude of the workers for the drop in production he conceded in cross-examination that no disciplinary proceedings had been taken against any worker in respect of that. Louw stated that it was considered that any such action was likely to have strained the worker relationship even further and the company had preferred to attempt to make up for lost production. He reiterated that it was not cost effective to make up the production at overtime rates.
There had been stay-aways during 1992. This loss of production exasperated the situation. Appeals to the workers met with no positive response.

The company had a running cash shortage of R400 000 and during the year its financial management was taken over by one of the other companies in the group. From the statistics placed before the court the company was in a survival situation before the August stay-away.

After a meeting with the shop stewards on 3 July 1992 the company, on 12 July 1992, following a report by the auditors made a formal offer of an across-the-board increase of 4%.

The union and workers did not appreciate the financial pposition of the respondent and this was not accepted. The workers started picketing the company premises during lunch times and before work. The respondent took exception to this form of industrial action and demanded that the union desist. The respondent agreed to meet for further wage negotiations on 5 August 1992 provided that the union and workers stopped all industrial action. This included the picketing referred to.

During the week before the stay-away on 3 and 4 August the shop stewards produced a letter from COSATU.

Jele, who was one of the witnesses called on behalf of the applicants, was the spokesman and handed over the letter. He testified that the letter had been left on the Wednesday whilst the company testimony suggested that it had been presented on the Thursday.

It is common cause that there was a meeting on the Thursday to discuss the situation and that Louw had presided at the meeting.

As confirmed in evidence by the union organiser, Mathibela, the objectives of COSATU were politically motivated and Louw had pointed out that the respondent could not resolve the inequities complained of. Louw was told that NUMSA supported COSATU and consequently its members were called upon to support the mass action.

The respondent, as it had done with the stay-away on 16 June, indicated that it was prepared to operate with a skeleton staff. In that way one essential operational area could at least be kept going.

Although both Jele and Mathibela maintained in this court that the workers were, in principle, prepared to work Jele was intent on bringing in the possibility of personal circumstances of individuals which might prevent them from doing so. He insisted that the situation was not necessarily the same in the different townships where staff lived.

Mathibela, on the other hand, adopted a more general approach contenting himself with relying on the general situation which put pressure on persons to support the action planned by COSATU and their own Union.

This last was the approach that prevailed in this court as only two persons were called from the ranks of the shop stewards and one of those, Masizwa, was called for a specific purpose, about which more later.

Louw said that at the meeting the company had offered to assist with transport and even accommodation. The company offered to provide transport at a particular point on the outskirts of the township as generally done when overtime was worked. The shop stewards reported that the workers would not be there.

A major issue that arose at the meeting was that whilst the COSATU letter had conceded the operation of the no work, no pay rule it requested employers not to take any disciplinary action against workers. It is clear that the Alpha workers expected this demand to be accepted. It was the company attitude that not only would workers who stayed away not be paid but that disciplinary action would be taken against them.

On Friday Cronje handed a copy of a notice setting out the attitude of the company to each of the shop stewards, made sure that they understood the contents thereof, and instructed them to relay it to the workers.

That notice read as follows:

> *This notice serves as a document pertaining to Management's policy towards strikes, boycotts, stayaways and work stoppages.*
>
> *If an employee stayed away from work without permission the sanction applied is a written warning. However if an employee stays away from work due to his participation in strikes,stoppages or boycott actions management views this in a very serious light and it will be regarded as a refusal to carry out a lawful instruction.*
> *Therefore if an employee does participate in such actions, management will not hesitate to apply strict disciplinary actions which may include termination of employment.*

The workers were not happy at the warning about disciplinary action as they claimed that that was not in line with previous company policy.In spite of the notice the shop stewards confirmed that as the workers had been called upon to stay away they would do so.

Louw claimed that the company had given warnings for previous stayaways. Although he claimed that management made sure that persons understood warnings and those who received them were asked to sign I understood him to say that these warnings had been put in pay envelopes or on notice boards.

Although Jele agreed that there had been some disciplinary enquiries held where the shop stewards had represented the employees he denied that anyone had received final warnings in respect of previous stay-aways.

To show that it had previously issued warnings forms reflecting final warnings for a number of persons were handed in but these referred to illegal strike action and were issued on 11 October 1991 or 11 November 1991 with a validity of 9 months. These did not include all the workers and there is no evidence that the company considered each indiviudal case separately and I have come to the conclusion that I should ignore those warnings.

Although Louw stated in evidence that disciplinary action was being considered with respect to the June stay-away no evidence of written warnings on personal files in respect of the previous stay-aways was produced and this lack of formal warnings in the company records supports the applicants' contention that the company had previously been content only to apply the no work no pay rule and had not taken any formal disciplinary steps against its workers for stay-aways. In this regard the court does not accept that the placing of a warning either in the pay envelope of an employee or on a notice board without the necessary prior formal disciplinary proceedings can constitute a valid final warning.

The court accepts the evidence of the respondent that the notice given by the workers about the stay-away did not give it enough time to effectively counter the action in terms of its operational needs.

It did, however, mount a recruitment drive in Middelburg taking on a variety of persons able to provide their own transport. On the first day there was mainly an issue of gear and only some production was achieved. By the end of the week production had been stabilised but the recovery of scrap was not up to speed yet.

Starting up on 3 August 1992 had been difficult. The pipes on gas cutting equipment had been cut. Trucks had been left switched on and their batteries were consequently flat. The engine of the crane gave in because the hydraulic pump burnt out as a result of a blockage caused by waste cloth that had been introduced into the oil reservoir. The cost of repairing the crane was R17 000.

Normally all gas valves were shut off at the end of the day but at the week-end the gas had been left on and the gas tank had to be refilled. Five tonnes of oxygen had been lost and had cost R16 000 to replace.

On the morning of 5 August 1992 the workers reported for work but were kept outside the gate. When Louw arrived the shop stewards were summoned to see him.

He handed out notices that they were to report to the premises at 15H15 on that day for disciplinary hearings. They were to be charged with *unauthorised unlawful absenteeism.*

The notices stated further that they could be represented by shop stewards and could present evidence in their own defence.

The workers were not in favour of disciplinary action - they wanted to resume work immediately. Louw told them that they would not be allowed onto the premises to resume work until after the disciplinary proceedings had been finalised.

The respondent had engaged temporary workers, wanted to retain them until after the disciplinary hearings and would not allow the staff onto the premises while these workers were still there.

According to Louw the intention was to give the workers a final warning only as the company did not then believe that it could afford to dismiss all the workers and train a new complement.

Evidence was tendered as to why it was difficult to train new workers and I accept that the company had not at that time decided to dismiss its workforce but was intent on asserting its right to discipline its employees in line with its stated policy.

The Union organiser Mathibela put in an appearance on that morning, not in response to the crisis, but to attend the scheduled further wage negotiations. He was present at dicussions with the shop stewards.

Management refused to talk about wages until the situation had been normalised and wanted Mathibela to deal with the disciplinary actions. Mathibela stated that due to pressure of work he would be unable to deal with that before 11 August 1992.

Although it is uncertain what role Mathibela would have played in the disciplinary proceedings except as an adviser the shop stewards took that date up as the first date on which the workers would be prepared to participate in the hearings claiming that it would be necessary to consult with each individual worker.

Management was insistent that the hearings be held immediately. It stated that it was paying the staff for that day and that it could not afford to wait till 11 August 1992 to return to normal.

Mathibela left and the shop stewards were informed that the company would not be prepared to give the workers longer than 24 hours. They were accordingly told that workers should put in an appearance for the enquiry the next day.

Management wanted the workers to appear in groups of five. This was not agreed to by the shop stewards as they felt that it should be done on an individual basis.

On the morning of 6 August 1992 Louw again saw the shop stewards. They reported that the workers were now prepared to be heard in groups of five but not before 11 August 1992 as they needed time to prepare.

The respondent took the view that the workers had refused to be disciplined at the time that they turned down the 24 hour postponement and had insisted that the hearings not take place before the 11 August 1992.

Louw kept in touch with his partners and the consensus on the management side was that there should either be disciplinary hearings or dismissal would follow.

On the Thursday the workers were told that they were dismissed and could report to get their pay on the Friday, 7 August 1992.

Louw said that the document had been given to the shop stewards but did not remember whether it had been given to each worker.

The dismissal letter was dated the 6 August 1992 and read as follows:

DISMISSAL: YOURSELF

This is to notify you that you are dismissed from Alpha Metals.

BACKGROUND OF REASONS

1. *You will recollect that the company appproached its workforce prior to the stay-away/strike action and you were asked what your intentions were.*

2. *To this you replied that you were adamant to join in regardless of what happened.*

3. *The company made its policy clear to you namely: no work no pay and disciplinary action which could include dismissal.*

4. *On your return on Wednesday 5 August 1992 you were notified through your shop stewards as well as the union that disciplinary enquiries were to be conducted.*

5. *You refused to partake in the enquiries and said that you had received too little notice and demanded one weeks notice and that you refuse to appear in groups of five.*

6. To this the company offered to postpone the enquiries 24 hours until today and to deal with it on an individual basis.

7. Today you conceded to disciplinary enquiries in groups of five but maintained your position that it should be conducted on Tuesday 11 August 1992

8. The company cannot concede to this request because it is paying you the days that you do not work pending the disciplinary enquiry. Besides this you were aware of the company's intention to conduct disciplinary enquiries prior to the mass action.

9. The company has once again postponed their decision until 08:00 today to give you the opportunity to reconsider your position. Despite this you still refused to partake in the disciplinary enquiries.

10. Further to this you were given a final warning for participation in a stay-away on June 16 1992.

11. You are also aware of the company's dissatisfaction regarding the industrial action that you have been embarking on for the last month or more namely the toy-toy on the company's premises prior to work and at lunch times despite various warnings to stop. From this the inference is drawn that you did deliberately and intentionally impose as much harm as possible to the company.

12. The company has now no alternative to dismiss you for refusing deliberately to put your labour to the disposal of the company.

RIGHT TO APPEAL

Employees who feel that they have been treated unfairly can appeal to the managing director within three working days in which case they must submit their reasons in writing. Late applications will not be considered unless good cause can be shown.

APPLICATION FOR RE-EMPLOYMENT

The company will start re-employment on Monday 10 August 1992 at 08:00. Employees who do not apply for re-employment before Tuesday 11 August 1992 at 08:00 will not be considered for re-employment.

It is convenient to consider the procedures adopted by the respondent up to this point.

At the pre-trial conference the parties had framed the issues up to this stage for decision in the following terms.

Did the respondent's action by refusing access to the individual applicants pending their disciplinary hearings about absenteeism on the 3rd and 4th August 1992 consitute an unfair labour practice

Whether the dismissals of the individual applicants were fair and reasonable and according to a fair procedure

Although respondent may previously not have taken any disciplinary action against workers who stayed away it was certainly entitled to do so and, having warned its employees about its policy before the August stay-away, it resolved to do so when they reported back for duty.

An employer is entitled to suspend employees pending disciplinary hearings and, although Louw did not particularly regard it as a suspension, that was the effect of his action in not allowing the applicants in when they returned on the Wednesday. (At the time the union accused the respondent of instituting a lock-out but this line was not pursued and I have consequently not afforded it further consideration.)

There was, in addition, a sound practical reason for keeping the workers out. The respondent had taken on temporary staff and allowing any contact between them and the workers was probably an invitation to trouble.

The respondent was entitled to take into account in this regard the relationship with its workers at that time.

There was a suggestion on behalf of the applicants that the relationship with management was reasonably good but the court comes to the conclusion that there was at the very best a strained relationship. Workers would not accept the company position that it was unable to give better wage increases and had shown that they were quite prepared to vent their spleen in any way that came to hand.

This is demonstrated by the picketing which was continued in spite of the discomfiture of the company and by the acts of what can only be described as sabotage perpetrated on the Friday afternoon before the Monday of the stay-away, acts which were clearly intended to make it as difficult as possible for the respondent to continue with its operations.

Louw indicated that the workers would be paid for the time until the hearings had been completed and that suspension cannot be considered to be unfair.

Disciplinary action is the prerogative of the employer and the employees were obliged to accept that decision and present themselves at the appointed time.

The notices to appear at disciplinary hearings were given to and discussed with the shop stewards. They adopted the attitude that it was not reasonable to expect the workers to attend enquiries on that day or the next.

In this court it was still the evidence of Jele that the workers needed additional time as they came from various townships and it would have been necessary for the shop stewards who were to represent them to consult on an individual basis. Even though the respondent wished to deal with the workers in groups of five there was no evidence of any intention at that time to charge them with anything but the unauthorised stay-away and such a charge would clearly have had to be adjudged on an individual basis. The shop stewards would have had a formidable consultation burden and the 24 hours which the company wished to offer would have been inadequate.

It is only natural that the workers would wish to consult with the union organiser to determine the basis on which they should conduct their cases. It was clearly the fact that Mathibela had said that he would not be available before 11 August 1992 which prompted the choice of that date and the consequent refusal to participate in any disciplinary enquiries before that date.I do not accept that Mathibela had so many pressing affairs as to make it impossible to deal with a crises on an immediate basis. An extended time can only be justified on the basis of a defence that each individual would seek to show that although he was willing he was unable to come to work on that day.

The fact that the shop stewards had indicated to management before the stay-away that workers would not be coming to work suggests that the workers had decided

to support the COSATU call and if they had decided on concerted action reference to the the circumstances of individuals would be irrelevant.

Although there was some dispute about whether buses were running no effort was made to show that there had been personal circumstances or a specific condition in any township that had prevented any particular individuals from coming to work and the evidence of Mathibela that it must be accepted that there was considerable pressure on individuals to conform also supports the contention that the reference to individual problems was no more than a red herring introduced in an effort to hedge their bets.

The way in which the hearing in this court was run did not seek *ex post facto* to make the point that responsibility for the decision to stay away should be judged on an individual basis.

I come to the conclusion that in spite of the professed availability in principle the workers were *en masse* supportive of the stay-away and no one had had any intention of coming to work.

The attitude and consequent actions of the respondent should also be considered in the light of its operational requirements. It could not allow the two worker groups to meet. Yet, even if it declared a suspension without pay, it would have meant accepting

that there would be no return to normality in operations for several days longer. The financial position of the respondent was such as to have made that prospect an unattractive one to Louw.

In all the circumstances I find that it was not unreasonable for the respondent to have insisted that the hearings go ahead by the Thursday.

The applicants were out of order in not being prepared to attend hearings at the appointed time. It has not been suggested that the failure to appear amounted to an illegal strike and I will not deal with it on that basis.

The respondent had stated in its notice that the enquiries would go ahead in their absence if they failed to show and could correctly go ahead and impose such sanction as was appropriate.

The charge levelled at the workers was one of *unauthorised unlawful absenteeism*.

The notice issued prior to the stay-away warned that any stay-away which was due to the participation of the worker in concerted action would be*regarded as a refusal to carry out a lawful instruction*, seemingly indicating that this would be an aggravating feature.

Based on the prior demand of the respondent that the workers come to work on the Monday there was cause to charge them with that as a substantive offence and warning them that such a refusal could be construed as a repudiation of their service contracts.

When it became apparent that they would not appear they could have been warned that a failure to appear would be interpreted as further demonstrating an intention to repudiate their service contracts.

Taking everything into consideration there was justification for the respondent even to have charged the workforce with the specific acts of sabotage and to have alleged that they had acted in common cause in that.Based on operational considerations a finding against the applicants on such a charge could have merited dismissal.

Based on the letter of dismissal this is what the workers were dismissed for.

I do not accept that that is what they were charged with. Workers should succinctly be warned in advance of the full extent of the allegations against them.

In addition management took into account an alleged *final warning* which on the evidence before me was not justified.

On the above I find that the respondent was unfair and that the dismissal of the applicants constituted an unfair labour practice.

I should note that I do not accept that the fact that the respondent noted that the workers could lodge an appeal can save it from this finding.

With regard to the period after dismissal the parties framed the dispute as follows:

Whether it was fair for the employer not to re-employ the applicants on 10 August 1992.

As will appear from what follows this should refer to *reinstatement* and not *re-employment*.

Considering the fact of a finding that the dismissal constituted an unfair labour practice this enquiry is academic although it could be answered in the negative with reference to the decision in

Borg Warner SA(Pty) Ltd v National Automobile & Allied Workers Union (1991) 12 ILJ 549 (LAC)

as followed in in this province in

BHT Water Treatment(Pty) Ltd v Maritz,NO & Others (1993) 14 ILJ (LAC) 676 at 687.

It is, however, necessary to consider the events which followed for another reason.

There were meetings subsequent to the dismissals at which there were negotiations for the re-instatement of the workers.

NUMSA and the workers insisted on unconditional reinstatement whilst the company attitude was that they had done wrong and needed to be chided for that. The company furthermore insisted on assurances about future conduct and wished to make that a condition.

Other than that the company was prepared to re-employ on the same terms and conditions as before, even fully recognising service.

It was not in dispute that the Union was set against persons having to apply again because it believed that that left it open for the company to re-employ on a selective basis.

Moses Masizwa, a shop steward, was called in evidence and claimed that he had actually applied for re-employment but had been turned away.

Although I accept his evidence that he would have been unable to complete a new application form without assistance I reject the claim that he was chased away. I am satisfied that he did not seek re-employment.

The union would not back down from its insistence on re-instatement and was determined not to see this offer of the company accepted and I am persuaded that Maziswa acted in support of this.

I acccept the evidence that the offer of re-employment was a genuine one and that those of the dismissed employees who did apply were re-employed.

Having found that the applicants had been unfairly dismissed it is accepted that serious consideration must be given to their reinstatement.

The fact that the respondent had invited the workforce to apply for re-employment even at the time of the dismissals and had repeated this invitation after negotiations with the union are factors which support the plea for re-instatement.

It appears, however, that the initial invitation was motivated by the knowledge that it would take some time to train new staff and the serious implications that might have on production and the financial position of the respondent.

The offer of re-employment made during the course of subsequent negotiations was conditional in that the respondent was seeking asssurances about the future conduct of the workers.

The conduct of the workers prior to the dismissal was such that it is my view that had the respondent followed a proper procedure in charging them their dismissal could have been justified.

It was therefore to my mind fair for the respondent to demand re-assurances about their future conduct and the refusal to accept anything but an unconditional re-instatement militates against re-instatement at this point.

After the dismissals in August the respondent had employed temporary workers. Louw produced summaries of tonnages produced over the period and commented on some of the statistics.The plant was capable of processing 3000 to 3500 tonnes per month but due to shortages of scrap this was actually unattainable.

Although the lowest production ever was experienced in October 1992 when many of the temporary workers had not returned production had generally improved and had averaged 1200 - 1400 tonnes p.m..It had peaked in August 1993 when they had processed 3115 tonnes. As noted before this had been achieved despite a reduction in the total staff.

This post-dismissal experience supports the contention of the respondent that the workers had during the period of the wage negotiations deliberately been undermining the production effort and had therefore

substantially contributed to the financial straits in which the respondent had found itself.

Re-instatement would have the effect of burdening the respondent with a workforce which had demonstrated a total lack of empathy for its financial position and of its operational needs in exchange for one which appears to have enabled the management to turn the business around.

The applicants had an opportunity to resume their work and there was no suggestion that a condition of that re-employment was that they would have had to drop their demand for re-instatement. Had they therefore still felt aggrieved it remained open to the union to have pursued that issue in this court in spite of the re-employment.

In the circumstances re-instatement of the applicants is not appropriate.

As the respondent by its offer of re-employment within days of the dismissal had enabled the applicants to escape the consequences of the dismissal and so mitigate their damages any award of compensation in respect of the period after 10 August 1992 is not justified.

This leaves for consideration only the days between the dismissal and the date on which the re-employment was on offer and was turned down.

The behaviour of the workforce was such that I have come to the conclusion that I should not consider any compensation for that period either.

As to the considerations see

Performing Arts Council of the Transvaal and Paper Printing & Allied Workers Union & Others 722/92,16/93, 121/93 (AD)(unreported) at p38 *et seq*

In the circumstances the determination of the court is that

1. The dismissal of the applicants was procedurally unfair and constituted an unfair labour practice

2. For the reasons set out the applicants are not re-instated and no award of compensation is made.

3. There is no award of costs.

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ADV. W.F. MARITZ

ADDITIONAL MEMBER.