NUMSA

COVER SHEET

☒ INDUSTRIAL COURT VERDICT

HELD AT **PRETORIA**

CASE NUMBER **11/2/13878**

☐ LABOUR APPEAL COURT VERDICT

DIVISION

CASE NUMBER

☐ SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

☐ AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

Case No. 11/2/13878

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

HELD AT : PRETORIA

In the Matter Between :

National Union of Metalworkers of SA and ors — Applicants

and

Uniross Batteries (Pty) Ltd — Respondent

CONSTITUTION OF THE COURT

Mr G D Maytham — Additional Member

FOR THE APPLICANT:

Mr F Motsepe of National Union of Metalworkers of SA

FOR THE RESPONDENT:

Adv J F Mullins instructed by Borchardt and Hansen Inc

PLACE AND DATES OF HEARING:

PRETORIA : 19 to 21 September 1994, 25 to 27 January 1995 and 10 August 1995

16 August 1995

JUDGMENT

This is an application for the determination of a dispute in terms of Section 46 (9) of the Labour Relations Act, 28 of 1956.

The Dispute

The dispute arises out of the dismissal of participants in a legal strike which followed upon a dispute over a wage increase.

The evidence shows that during 1991 the employees and management had discussions on the future of the respondent company. After a joint examination of the financial position of the company, the employees agreed to accept a wage freeze. The agreement was recorded and signed by management and representatives of the employer.

The year following this agreement, the 1st Applicant wrote to the respondent on 25 May 1992 and suggested that a meeting be held to discuss wage increases. The letter contained the union's demand for an increase of 25% in wages, a moratorium on retrenchments and other issues which have not figured to any extent in the dispute.

A meeting was eventually held on 30 June 1992 at which the union and management were represented. A recording of those proceedings and of subsequent meetings was made. The recordings have since been transcribed. The accuracy of the transcriptions is not in dispute.

The unions demands were presented to the meeting by Sihlangu. Polack the managing director of the respondent and Lemmer (a consultant) represented the company. A number of graphs were presented to the meeting by Polack. These graphs reflected the turnover, sales and expenses of the company.

The stance taken by both parties has altered little from the stance taken at that first meeting. Sihlangu pointed out that the workers had forgone an increase in salary during the previous year in sympathy with the financial situation in which the company found itself. This had caused severe suffering.

Polack and Lemmer attempted to persuade the union that the company was in an even worse financial position than it had been during the previous year and that the respondent could not afford an increase in wages, in fact it would be compelled to retrench further workers shortly.

Doubts were expressed by the Union regarding the authenticity of the respondent's statements in regard to its financial situation. The union was invited by management to appoint its own auditor to audit the respondent's books in order that it might satisfy itself in regard to the state of the company's finances and the accuracy of the graphs. This offer was repeated on a number of occasions despite the union's rejection of the offer early in the proceedings.

On 8 July an application was made by the union for the appointment of a conciliation board. Subsequent to this appointment, a further attempt was made by the applicant and the respondent to reconcile their differences at a meeting held on 17 August 1992. This was unsuccessful.

The Strike

A strike ballot was held by 1st applicant on 31 August 1992. A majority voted in favour of strike action. The respondent was notified that the strike would commence on 1 September 1992. On 1 September 1992, twenty five of the workers went out on strike.

The respondent notified the 1st applicant that any of the strikers who wished to work would be allowed access to the factory provided they undertook not to intimidate or interfere with workers on the premises. Toilet facilities were also offered to the strikers.

Respondent then engaged twenty temporary contract workers. On Friday 11 September the respondent invited the union to meet with management. On this occasion the union was represented by Moerane. Moerane was not familiar with most of the events which had preceded the meeting, only having had a five minute briefing from Sihlangu in this connection.

The meeting, seemingly, became very heated but there was basically very little shift in the attitudes of the parties. At its conclusion an ultimatum was given by the respondent's management in the following terms:

> "Let me now make a point that I think is important to make. The Company has now spent months, we started on 30 June on this issue. The Company has spent hours and hours in order to try and give you the facts that are involved. The Union is not prepared to consider those facts. It doubts the facts. The Union is not prepared to take up the offer of the Company of verifying the facts.
>
> And the company must now make it quite clear that unless it is able to resolve this issue and go back to normal by Tuesday morning at the normal starting time, the Company must advise the Union that it will terminate the contracts of the employees."

Moerane, thereafter asked for an opportunity to discuss the matter with the "caucus". He met with the shop stewards and returned after fifteen minutes, requested an opportunity to see the workers and returned again after ten minutes. That which occurred thereafter is also important. I quote from the transcript of Moerane's statement:-

> "Okay. we've got a full mandate. You have indicated to us that if our members are not coming back on Tuesday, they will be dismissed. The Union is prepared actually to resolve this matter and we are still prepared to resolve this matter. And we have taken what you have said to our members even if though they can come in you're still going to reduce the costs in the foreseeable future you might also retrench people so, along those lines they do not see their way clear. However they say if you are to dismiss them Tuesday because they are not prepared to come back in here if they are not given any increment, then you should prepare whatever is due to them on Tuesday. They are definitely not coming back without any increments."

On Tuesday 15 September 1992 the workers assembled at respondent's premises. After the first two workers had received their payments, dissatisfaction became apparent in regard to the amount being paid. This developed into an argument between Sihlangu and management as to whether the workers had decided to terminate their services. The argument concerned the payment of a severance package. Later management took a firm line stating that the workers had been dismissed as that is what was decided by both parties on the Friday. It was stated that if any of the dismissed employees wished to reapply for employment, they were welcome to do so the following day.

The Main Issues in the Dispute

The Bona Fides of the Respondents Financial Crisis.

The applicants have contended throughout the dispute that they do not accept that the respondent was in financial crisis. There are references in the recorded discussions to falsified audited accounts and of the fact that a drop in orders or deliveries was not apparent from the trucks which were delivering materials and taking away products.

The actual financial standing of a company is an important consideration where strikers are dismissed. The following is quoted from the judgment of Combrink J in *Black Allied Workers Union and others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 at 973 B:

> "If the respondent wished to justify dismissing the employees engaged in their

> lawful strike it might have done so on the basis of the operational requirements of the enterprise if its financial circumstances truly warranted that step. It would then have been required to negotiate bona fide with the appellant on the financial impact of the strike, alternatives to the termination of the services of the strikers and related matters. Only if that process proved fruitless would the respondent have been justified to terminate the services of the employees. It would then have done so not on the grounds of misconduct but for reasons of genuine economic necessity after following a fair procedure."

The use of a financial criterion to judge the fairness of an employers dismissal of legal strikers had also previously found support in ***Perskorporasie van S A Bpk v Media Workers Association of S A*** (1993) 14 ILJ 938 (LAC) at 950 E.

The learned Nugent J made a thorough assessment of factors to be considered in assessing the fairness of the dismissal of legal strikers in ***Cobra Watertech v National Union of Metalworkers of South Africa*** Case 11/2/12119 in which judgment was delivered on 19 April 1995. The judgment has since been reported but the reported text is unfortunately not yet available to me. I quote from a copy of the typed judgment :-

> "I doubt whether it is possible to formulate a ready test to determine in what circumstances it might be fair to resort to dismissal even if it is desirable to do so. In the present case it suffices to say that striking per se has not been regarded in the decided cases as a sufficient ground for dismissal and I share that view. While the circumstances which may

> justify this step cannot be determined in vacuo, it would seem to follow from the reasons underlying this conclusion that financial considerations alone will seldom prevail."

In the light of these authorities, it becomes necessary to examine the financial state of the company as at the commencement of the strike to determine whether in fairness there were financial considerations which were serious enough to warrant the dismissal of the workers and if not whether such financial considerations coupled with other factors warranted the dismissal or whether financial factors were not sufficiently serious to have warranted dismissal on those grounds.

Audited financial statements of the company for the period 1983 to 1993 were produced to this court. The earlier statements are not of much significance. The 1989 figures are significant despite the fact that the financial statement for that year covered a period prior to the emergence of factors which led to the dispute. The financial year of the company altered in 1990 from a period covering the calendar year to a period covering the Income Tax year. The financial statements for 1991 therefore cover a 14 month period ending on 28 February 1991. There is no financial statement for the calendar year 1990 alone.

The 1991 figures compared to the 1989 figures show an increase in the turnover of the respondent but if that increase is averaged out over a period of twelve months it amounts to a marginal increase of approximately R 300 000 (From R 9.7M to R 10M). Profit for the same period was down from R 303 000 to R 183 000. The bank overdraft shows a massive increase for the period from R 384 000 to R 1 682 032 with an equivalent expenditure increase to meet the growing interest charges on the overdraft.

The effect of previously granted salary increases had not yet shown its full effect in the salary expenditure for 1991 because salary increases had been implemented less than a year previously. Salary expenditure constitutes a very large proportion of the total expenditure and is by far the largest expenditure item reflected in all of the financial statements. The company would appear to have been in or heading for financial trouble in February 1991. The agreement on a wage freeze was signed in October of 1991.

The graphs maintained to monitor company performance showed a steady decline in sales between February 1991 and June 1992. The audited financial statement for the 1992 year was not available at the time but an examination of that statement confirms the decrease. The

1992 financial statement when it became available reflected a greatly deteriorated situation. Turnover was down by R 1,5M and profit had fallen from R 183 000 to R 9 915. The bank overdraft at 28 February 1992 stood at just under R 2M. The full effect of previously granted salary increases is shown in the total salary increase from R 999 526 (for 14 months) to R 1 422 840 for the 1992 tax year. The Directors remuneration, I note shows a significant drop over the same period from R 359 750 to R 202 027. The statement also reflects a number of new unsecured loans by the directors to the company amounting to approximately R 160 000.

With deteriorating sales, there appeared to be little hope of recovery if my interpretation of the figures is correct. Polack stated that the order book for new business reflected a dismal future outlook. Turnover for subsequent months would seem to bear this out. Turnover for June and July of 1992 were at an all time low of R 580 000 and R 541 000 respectively.

In order to provide security for the overdraft, I am told that the directors mortgaged their own homes. As a result an overdraft increase to R 1.5M was allowed by the bank. When the overdraft rose beyond that figure, Polack sold the only asset (a piece of fixed property)in a company

Chevalco (Pty) Ltd. The sale produced an amount of R 800 000 which was devoted to reducing the overdraft.

There appears to be little doubt that if the trends continued the company would have faced bankruptcy. I accept Polack's evidence that the prospect of a strike in those circumstances was devastating. The company, already damaged by a failure to obtain orders and an inability to compete overseas due to quality problems, could not, in my view, have closed down production for an extended period without running into more (perhaps terminal) financial difficulties. Polack himself stood to loose everything, with some of his personal assets securing the company's debts and the rest invested in the company's future.

The hiring of temporary contract labour to see out the strike was seen as a last ditch interim measure. Twenty employees were engaged in this way. Polack stated that the first two weeks after the engagement of the temporary workforce was chaotic. Everyone of the employees who were not on strike, was engaged in training and there was an initial downturn in productivity. By the end of the third week however production began to increase dramatically. This confirmed what Polack had suspected was happening during the 1991/92 period. He had suspected that production was purposely being kept down to put pressure on the company to reengage the previously retrenched workers. Suddenly with an inexperienced work force, production targets were being met and exceeded. This proposition needs to be examined as it is an important aspect of worker attitudes prior to the strike.

There were dramatic increases in turnover in the months following the dismissal. This was achieved with a smaller labour force. A comparison of the periods September to August reflects that the 1991/92 total for turnover was R 7 686 312 and the 1992/93 turnover R 9 530 889 (An increase of 24 % with a labour force reduced by 20%). An increase in turnover can of course result from factors other than increased production but there is nothing which indicates that the nature of the operation has changed. Polack states that the increase is attributable mainly to increased productivity and I accept this. Audited financial statements for 1993 and 1994 indicate that there are still financial difficulties but unlike 1992, there appears to be reason for optimism.

Disclosure of Information

Where a company finds itself in a situation where there is a likelihood that its future or that of the employees will be adversely affected, there is a duty upon it to make a disclosure of relevant information to the employees. Without such disclosure the employees are unfairly faced with a virtual fait accompli if a time arises where their future earnings or employment becomes threatened. (See ***S A Commercial Catering and Allied Workers Union v Southern Sun Hotel Corporation (Pty) Ltd and others*** (1992) 13 ILJ 132 (I) at 151 C. Although the duty to disclose information is usually associated with retrenchments, one of the points made in this matter was that there had been inadequate disclosure of information relating to the financial position of the respondent. It was argued that had the financial position of the company been known and had Moerena been in possession of an audited financial statement, the strike would have been averted. I have grave doubts in regard to Moerena's ability to have waved an audited financial statement before the eyes of the strikers in the emotional climate which existed on 11 September and thereby accomplish a miraculous turnaround in their attitudes. The strikers had up until then, according to the first applicant, been unable to appreciate the trends indicated by graphs placed in the workplace and discussed regularly at weekly Friday meetings with management. The union had already refused the offer to send in its own auditors to verify the information given by the company in regard to its financial situation and had shown little interest regarding the figures reflected on the graphs.

What the evidence of Polack shows, is that since the agreed wage freeze in 1991, graphs showing productivity against targets set to maintain viability and graphs showing sales and expenditure were on continual display and updated regularly. This was admitted by the applicant's witnesses. Production was a key feature of the weekly meetings with employees, chaired by Polack. The problems relating to the viability of the enterprise were examined during the year and this is also confirmed by the applicants' witness. When the discussion on increases took place on 30 June 1992, the same graphs, which had been referred to throughout the year were used to illustrate the company's inability to afford an increase in wages. The demand at that stage was never for further information. There was really only one issue. Either increases would be discussed or there was a dispute. Later either increases would be paid or the workers would not return to work.

No mention of an audited financial statement being required by the union was ever mentioned until the final meeting on 11 September. Moẹrena at the same meeting expressed his contempt for any financial statement which had or would be supplied by stating that even an audited financial statement would not be believed as the respondent would have told its auditors to present the picture which they would want to present to the workers. This failure to supply a financial statement has now been made the focal issue by Moerena. If he had had that piece of paper oon the 11th, he states, the strike would have been over. I reject that.

Such information as it was necessary to supply was being supplied by the company on an ongoing basis. Had there been any doubt about the accuracy of the figures reflected by the company in the graphs or in the report furnished by Polack on 3 July, the 1st applicant was at liberty to appoint its auditors to investigate. This offer was rejected by 1st Applicant in its letter of 3 July but despite that the invitation was repeated several times. The content of the letter from the Union on 3 July makes it clear what the central issue was:-

> "We therefore wish to reiterate that our next round of negotiations will be based on how much is the company prepared to offer and not something else. If the company is not sharing the same understanding, should advise as a matter of urgency so as to know whether we are in deadlock or not.

The Dismissal

The strike had continued for a period of 10 days when the meeting was called by respondent. There had, since the beginning of the dispute, been no shift in the stance of the parties. The respondent's business was in financial crisis due mainly to deliberate low worker production. The strike presented a dire threat to the future of the operation and the workforce had displayed no apparent interest in the financial situation of the company. At the final meeting after delivery of the ultimatum to return on the 15th the attitude of the strikers is reflected in the transcript of the record quoted in full above. If they did not receive an increase in pay they would not return to work and the employer should prepare to pay them off. A clear offer of reemployment was made to the strikers on the day of their dismissal.

DETERMINATION

The dismissal of the strikers in the circumstances described was not an unfair labour practice. The application is dismissed. There is no order as to costs.

G D Maytham

ADDITIONAL MEMBER