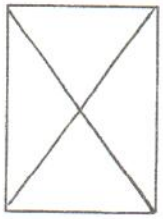
Thabethe

# COVER SHEET



INDUSTRIAL COURT VERDICT

HELD AT **DURBAN**

CASE NUMBER **NHN13/2/3927**

LABOUR APPEAL COURT

DIVISION

CASE NUMBER

SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: NHN 13/2/3927

IN THE MATTER BETWEEN:

L THABETHE & OTHERS

APPLICANTS

and

BRUNSWICK DOWELLS (PTY) LTD

RESPONDENT

## CONSTITUTION OF THE COURT

ADVOCATE A DEYZEL

SENIOR MEMBER



ON BEHALF OF APPLICANT:

MR A M MGENGE
A M MGENGE & ASSOCIATES
DURBAN



ON BEHALF OF RESPONDENT:

MR T E VOGEL
VOGEL & ASSOCIATES
DURBAN

DATE AND PLACE OF PROCEEDINGS:

30 JANUARY 1996 - DURBAN

# JUDGMENT

The applicants applied in terms of section 43 of the Labour Relations Act, 1956 ("the LRA") for an order reinstating them in the respondent's employ pending the determination of the dispute that exists between them.

The relevant facts are inter alia the following:

1. The respondent is a manufacturer of timber products.

2. During the period September 1994 to June 1995 eleven workers including the nine applicants were in the respondent's employ.

3. During February 1995 the applicants or some of them appointed a labour consultant, Mr Mgenge of A M Mgenge and Associates, to represent them.

4. On 23 February 1995 Mr Mgenge wrote a letter to the respondent with the following contents:

   *"We would like to inform you that we are representing a majority of your employees.*

   *Kindly receive a proposal of working conditions and the wage proposals for 1995/6 as follows:*

   1. *Increase should be R35 per week over and above present minimum wage across the board.*

   2. *Provident fund should be available.*

   3. *Protective clothing should be available, 2 pairs per person each and every six months.*

*4. Grievance procedure be available for the workers.*

*All proposals are negotiable, and you are kindly requested to advise us with a convenient date for a meeting to negotiate the above said points."*

4. The respondent's manager, Mr McClure, consulted the eleven workers employed by the respondent but none of them would acknowledge that they were represented by Mr Mgenge. As a result the respondent did not respond to the letter.

5. On or about 13 February 1995 five of the applicants and another worker, Bheki Gumede applied for the establishment of a conciliation board to consider a dispute about the respondent's alleged "refusal to negotiate working conditions and wages". The said five applicants ("the male applicants") were Mzikayifani Patrick Gumede, ("Patrick") Hansford Thengezwe Mkhize ("Hansford"), Nkosana Wiseman Thabethe ("Wiseman"), Shayezakhe Nicholas Khabane ("Nicholas") and Bhekukufa Linos Thabethe ("Linos").

6. A conciliation board meeting was held on 05 April 1995 but it is in issue whether the dispute was resolved or not. On the respondent's version it was agreed that Mr Mgenge only represented the six employees mentioned above and that the respondent would negotiate with Mr Mgenge about the wage reviews relating to those six employees. The applicants however denied that the dispute was resolved.

7. A negotiation meeting was held in Mr Mgenge's offices on 15 May 1995 and the matters referred to in Mr Mgenge's letter dated 23 January 1995 were on the agenda. According to the respondent agreement was reached on the issues

regarding the provident fund, protective clothing and grievance procedures. It however refused to consider equal across the board increases "as wages needed individual attention not a collective remedy." The applicants denied in the replying affidavit that any agreement was reached.

8. At Mr Mgenge's request a further meeting was scheduled for 20 June 1995. He did not attend this meeting. In the replying affidavit it was alleged that it was arranged telephonically that the meeting be adjourned, but on the respondent's version no such arrangement was made.

9. Bheki Gumede was retrenched during June 1995.

10. After 20 June 1995 the respondent unilaterally decided on the wage increases to be applicable to the male applicants. Patrick was "promoted" and given an increase of R30-75 per week. Wiseman and Nicholas were each given an increase of R20-50 per week. Linos and Hansford however received no increases.

11. The respondent and Mr Mgenge had a further meeting on 03 July 1995 but it does not appear from the papers what was discussed during this meeting.

12. On 04 July 1995 Mr Mgenge faxed a letter to the respondent. Its contents were the following:

*"We refer to the meeting between the parties on Monday 03 July 1995. Please be advised that since the parties have failed to reach agreement we assume that a deadlock had been reached. In the circumstances we have no option but to take further steps against you without further notice."*

13. On 10 July 1995 the male applicants applied for the establishment of a conciliation board to consider the respondent's "refusal to reach wage demand". A conciliation board meeting was held on 02 August 1995 but the dispute was not resolved.

14. About two weeks later and by letter dated 15 August 1995 Mr Mgenge informed the respondent that a strike ballot would be held at his offices on 18 August 1995 at 17h00 and that the respondent was welcome to send an observer.

15. Mr Mgenge faxed a further letter to the respondent on 16 or 21 September 1995. This letter read as follows:-

*"Further to the strike ballot held on Friday 18 August 1995, we would like to inform you that a majority of the workers have voted in favour of the strike. In the circumstances there is no option, strike is imminent. If you want to come out with a reasonable offer we are quite prepared to have a meeting to try and resolve the dispute in good faith."*

16. This was followed by another letter sent to the respondent on 26 September 1995, the contents of which read as follows:-

*"You are kindly informed that since you refuse to co-operate, we would like to inform you that you (sic) have no alternative but to go on strike.*

*Your co-operation will be highly appreciated."*

17. The strike commenced on 26 September 1995 when all the applicants embarked upon a "sit-in" at the respondent's premises.

18. On the same day the respondent wrote to Mr Mgenge. In the letter it was alleged that the male applicants had threatened the female applicants to join them and that the strike was illegal.

19. At 11h50 the respondent's management issued a warning to the striking workers. The warning read as follows:

*"Management deplores the action taken by employees in refusing to work and informs you that this constitutes a material breach of your employment contract and could warrant your dismissal.*

*Management also deplores the acts of intimidation which took place on 26 September 1995 and you are warned that the acts are illegal and are to cease immediately failing which management reserves its right to take whatever legal action may be necessary to prevent further acts of intimidation taking place.*

*Management states that after an approach by management to ascertain your grievances, your further refusal to work necessitates disciplinary action and this notice therefore constitutes a written warning that all employees must be back at work by 14h00 today.*

*You are hereby warned that there will be no pay while you refuse to work and employees are free to return to work at any stage before 14h00 today."*

20. None of the striking workers returned to work by 14h00 and at 14h30 a second warning was issued. The second warning read as follows:-

*"Management notes with regret that the employees have failed to take note of the first written warning to return to work by 14h00.*

*If employees fail to return to work by 07h30 on 27 September 1995 it may result in those employees not receiving the next wage increase as management will use that money to assist in recovering the losses now incurred. Employees must realise that failure to service customers will cause losses and losses in turn could cause retrenchments.*

*You are again informed that there will be no pay whilst you continue to refuse to work and, again, you are invited to return to work before 07h30 on 27 September 1995.*

*Failure to respond to this notice will lead to further disciplinary action."*

21. The striking workers once again failed to heed the warning and this led to a third warning being issued on 27 September 1995. This warning read as follows:-

*"Management regrets that employees have ignored the two written warnings to return to work.*

*You have legal channels which you can follow if you have a dispute with the company in terms of the Labour Relations Act and the action taken by you constitutes a breach of contract and is not the correct action to take.*

*This notice now constitutes the third written warning that should you not return to work by 07h30 on Friday 29 September 1995 you will face further disciplinary action which could include dismissal.*

*You are again informed that you will not be paid for the period that you have not worked and again you are invited to return to work before 07h30 on 29 September 1995."*

22. Mr Mgenge was informed of these warnings inter alia by means of a letter addressed to him on 28 September 1995 which read as follows:-

*"The five employees of the company have been on strike since Tuesday 26 September 1995. They have ignored three warnings to return to work*

*Please be advised that these five (male) employees will be dismissed if they fail to heed the final ultimatum return time of 07h30 on Friday 29 September 1995. In any event Hansford Mkhize and Linos Thabethe are suspended pending further investigations into intimidation, performance and behaviour."*

23. Although the applicants did not return to work on 29 September 1995 they were not dismissed at that stage. It does not appear from the papers whether the suspension of Hansford and Linos was lifted but in view of what happened during the meeting referred to in paragraph 24 below I assume in the respondent's favour that it was lifted.

24. On 04 October 1995 the respondent's representatives and Mr Mgenge met at Mr Mgenge's offices in an attempt to end the strike. During this meeting the respondent alleged that the female employees had been intimidated to participate in the strike. The respondent also explained why Hansford and Linos had not received wage increases. Mr Mgenge suggested that the said two employees be given an increase and that that may lead to the end of the strike. After a caucus

the respondent offered to increase the wages of the two employees by R0,25 per hour. The respondent however stated its intention to suspend both employees. In the case of Linos the suspension would have been pending a disciplinary hearing relating to charges of intimidation and other "unbecoming behaviour" during the strike. Mkhize would have been suspended pending consultations regarding the termination of his employment for operational reasons. Towards the end of the meeting Mr McClure referred to a letter in which the respondent's banker expressed concern about the fact that the respondent had exceeded its overdraft facility.

Mr Mgenge was advised that the strike was threatening the existence of the respondent and that an ultimatum would be issued to the striking workers to return to work on 09 October 1995 or face dismissal. Mr Mgenge indicated that he would convey the respondent's offer to his clients.

25. On 05 October 1995 the respondent issued an ultimatum to the striking workers. The ultimatum read as follows:

*"Management has warned you on three occasions that your failure to return to work is unacceptable and that you could face dismissal if you fail to remedy the breach. You are hereby warned, as discussed with Mr Mgenge, that should you not return to work by 07h30 on Monday 09 October 1995, you will be dismissed."*

26. On the same day the respondent received a letter from Mr Mgenge. In the letter the following was stated:-

*"1. The dismissal threats is no longer tolerated by the workers.*

2. *Workers are prepared to commence their ordinary duties on Monday the 9th of October 1995 provided if they will get:*

   *(a) their increase of R36-00 per week across the board.*

   *(b) protective clothing and provident fund.*

27. When the applicants did not return to work on 09 October 1995, they were dismissed.

28. By letter dated 09 October 1995 the respondent informed Mr Mgenge of the dismissals of his clients and offered to consider re-employing them on application.

29. Two of the female applicants (it does not appear from the papers who they were) returned to work some time prior to 23 October 1995 but none of the others had applied for re-employment prior to that date. The respondent then employed a new work force.

It does not appear from the papers what the precise reason for the applicants' dismissal was. The wording of the ultimatum creates the impression that they were dismissed because they had breached the terms of their contracts of employment; in other words for striking. The minutes of the meeting held on 04 October 1995 which was annexed to the answering affidavit however creates a different impression. The relevant portion of the minutes reads as follows:-

"5.2 *Mr McClure said that he was giving a final ultimatum to the workers to return to work by the start of shift on Monday morning 09 October 1995 or face dismissal.*

*5.3 Mr McClure tabled a letter from the Standard Bank threatening foreclosure of the corporation owing to exceeding of financial facilities (overdraft).*

*5.4 Mr Mgenge read the letter and retained a photo copy.*

*5.5 Mr Vogel advised that the strike, whether legal or illegal now threatened the very existence of Brunswick Dowells. He said that Mr Mgenge should advise his client employees of the economic situation.*

*5.6 Mr Vogel said that the economic situation rendered the ultimatum of dismissal real and valid."*

It appears from these minutes that the applicants were dismissed for operational reasons and particularly because the respondent was of the view that the existence of the business was threatened.

If the applicants' services were terminated merely because they were on strike that was prima facie unfair. There are indications that the respondent regarded the strike as a breach of contract warranting disciplinary action. In the first warning as well as in the ultimatum the respondent indicated that it regarded the strike as a breach of contract. As appears from the three warnings, the respondent regarded the warnings as disciplinary measures. This is explained by the fact that the respondent regarded the strike as unlawful and illegal and the question arises whether the respondent's view in this regard was correct or not.

Section 27(4) of the Constitution of the Republic of South Africa, Act No 200 of 1993 ("the Constitution") provides that workers shall have the right to strike for the purpose of collective bargaining.

It is so that section 33(1) of the Constitution provides that the rights entrenched in Chapter 3 may be limited by law of general application and that it was trite law at the time of the enactment of the Constitution that a strike, whether countenanced by the provisions of section 65 of the Labour Relations Act, 1956 or not, constituted a breach of an employment contract. See **WALLIS LABOUR AND EMPLOYMENT LAW at 48; NTE v CHEMICAL WORKERS UNION 1990 (2) SA 499 (N), (1990) 11 ILJ 43 (N) and PERSKOR v MWASA AND OTHERS (1991) 12 ILJ 86 (LAC) at 103.** To still regard the right to strike as a breach of contract and therefore unlawful would in my view be contrary to the spirit, purport and objects of Chapter 3 of the constitution, matters which a court must have regard to when interpreting any law and when applying and developing the common law and customary law. See section 35(3) of the Constitution; **NHLRWU v P E HOTELS GROUP t/a THE EDWARD HOTEL 1995 ILJ 877 (IC) and AZAWU AND OTHERS v GORDON VERHOEF AND KRAUSE AND ANOTHER** unreported judgment in Case No: NHN 11/2/6990. It would also negate the essential content of the right to strike and in terms of section 33(1) a limitation on the right to strike may not have that effect.

Subject to the limitations placed thereon by section 65 of the LRA, the right to strike is not in conflict with the LRA. The only effect that section 33(5) of the Constitution has on the right to strike is that a strike not countenanced by section 65 of the LRA, remains illegal. Such a strike would still constitute a breach of contract. See

AZAWU AND OTHERS v GORDON VERHOEF AND KRAUSE AND ANOTHER supra.

The view that a legal strike does not amount to a breach of an employment contract may seem to be in conflict with the law of contract, but it is in my view not possible to interpret the Constitution in any other way. The conclusion is inescapable that the Constitution has the effect of importing into employment contracts an implied term that the employees has a right to strike for the purpose of collective bargaining subject to the limitations placed thereon by section 65 of the LRA and subject to such limitations which the parties may agree upon provided that it is permissible in terms of the Constitution.

Whether the applicants in the present case were guilty of a breach of contract therefore depends on the answer to the question whether the strike was countenanced by the provisions of section 65 of the LRA.

As it appears from the summary of facts set out earlier in this judgment the five male applicants applied for the establishment of a conciliation board to consider a dispute relating to their collective demand for a wage increase, the dispute was considered by a conciliation board and the period envisaged by section 36(1) of the LRA had expired prior to the commencement of the strike. Their participation in the strike was therefore countenanced by the provisions of section 65 of the LRA.

The respondent's view that the strike was illegal was based on the premise that the majority of its workers had not voted in favour of the strike. Section 65 however does not provide for such a limitation on the right to strike. Section 65(2) only provides that no trade union and no office bearer, official or member of such union may call or

participate in a strike unless the majority of the members of such union in good standing in the undertaking have voted by ballot in favour of such action. The section does not contain any requirement that a ballot should be held before non-unionised employees who are parties to a dispute may participate in a strike in support of a collective demand which forms the subject matter of the dispute.

The applicants alleged in their papers that Mr Mgenge represented all of them, that the demand in respect of which the strike was called, was for an across the board wage increase for all of them and that all of them were parties to the dispute. The respondent's denial that this was the case, cast more than just some doubt on the applicants' version. The respondent's averment that it was agreed during the conciliation board meeting of 05 April 1995 that Mr Mgenge only represented the male applicants and that the wage increases for those applicants would be negotiated with him was not dealt with in the replying affidavit. Only the five male applicants applied for the establishment of a conciliation board in respect of the wage dispute. In the circumstances this application must be approached on the basis that the four female applicants were not parties to the dispute that gave rise to the strike.

Insofar as the male applicants went on strike in support of a collective demand that their wages be increased, the strike was in my view countenanced by section 65 of the LRA and did not constitute a breach of contract. Although their representative Mr Mgenge might have intended to negotiate also on behalf of the female applicants it was never specifically conveyed to the respondent that a demand was made in respect of wage increases for them. It is therefore not necessary to consider what effect such a demand would have had on the legality of the strike action of the male applicants.

The strike was caused by the respondent unilaterally implementing wage increases in respect of three of the male applicants despite having knowledge that they and the other two male applicants wanted to bargain collectively for wage increases. When Mr Mgenge did not attend the meeting that was arranged for 20 June 1995, the respondent should at the very least have negotiated directly with the male applicants. The respondent also caused the strike to be prolonged by raising irrelevant issues such as the performance of Hansford and Linos and persisting with its stance that they should be treated differently. In this regard the respondent alleged that these two had been demoted without any loss of pay and that they had accepted it prior to the wage negotiations. What they did not accept was that they would be discriminated against when the wage increases were considered. Their demotions was not a collective issue and the respondent should have dealt with it separately. In effect the respondent did not bargain with the male applicants collectively. If the strike was jeopardising the financial viability of the respondent and this has not been shown on the papers, dismissal was not a measure of last resort. The obvious alternative was to deal with the wage demand of the male applicants on a collective basis. To the extent that the dismissal of the male applicants was for operational reasons the respondent also failed to consult them on alternatives to dismissal.

In the papers the respondent made the bald allegation that the five male applicants intimidated the female applicants to participate in the strike. This happened on the first day of the strike i.e. 26 September 1995. The allegation that all five male applicants were involved is improbable in the light thereof that in a letter addressed to Mr Mgenge on 26 September 1995 the respondent only alleged that Linos had intimidated other workers. At the meeting of 04 October 1995 the respondent also

indicated that only Linos would be facing charges of intimidation if the strike was resolved.

In my view insufficient doubt had been cast on the prima facie case that the dismissals of the male applicants for striking or for the alleged operational reasons was unfair. They are accordingly entitled to interim reinstatement. This does not prevent the respondent to terminate the employment of any of them for other fair and valid reasons if such reasons exist.

If the female applicants were participating voluntarily in the strike that would not have been countenanced by the provisions of section 65 because they were not parties to the dispute in respect of which application had been made for the establishment of a conciliation board. The respondent alleged however that they were intimidated to participate in the strike. The respondent's representative said at the meeting of 04 October that the male employees "had forced the (female) working employees to participate in the strike under dire threats." If that was the case the respondent should have taken disciplinary action against the intimidators. To have dismissed the female applicants knowing that they were intimidated and without consulting them on alternatives to dismissal was prima facie unfair.

The respondent alleged that four of the applicants were re-employed after their dismissal but that two of them again left its employment. Patrick Gumede and Florence Mncwabe were mentioned as two who had been re-employed but it cannot be ascertained from the papers who the other two were. It can also not be established from the papers who had again left the respondent's employ and for what reasons.

In the circumstances I propose to only reinstate the applicants for a limited period. Hopefully the parties will see fit to provide the court with more information when an extension of the order is considered. The order will not have retrospective effect because most of the applicants (it is not clear who) had not applied for re-employment despite the respondent's indication that that would be considered.

I accordingly make the following order:

1. In terms of section 43 of the Labour Relations Act, 1956 the applicants are reinstated in their employ with the respondent on terms and conditions no less favourable than those which governed their employment at the time of their dismissal on 09 October 1995.

2. The order in paragraph 1 shall operate with effect from the day after the handing down of this judgment and shall operate for a period of 30 days from that date.

DATED AT DURBAN ON THIS 14th DAY OF FEBRUARY 1996.

ADVOCATE A DEYZEL
MEMBER
INDUSTRIAL COURT - DURBAN