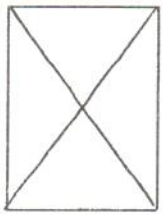
United Workers Union

COVER SHEET



INDUSTRIAL COURT VERDICT

HELD AT **PRETORIA**

CASE NUMBER **11/2/15931**

LABOUR APPEAL COURT

DIVISION

CASE NUMBER

SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

Case No 11/2/15931

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

HELD AT : PRETORIA

In the Matter Between :

United Workers Union of South Africa First Applicant

H M Ngwenya and 80 others Second and further Applicants

and

O.T.K. (KO-OP) Ltd Respondent

CONSTITUTION OF THE COURT

Mr G D Maytham Additional Member

FOR THE APPLICANT:

Mr D van der Westhuizen of van der Westhuizen and Associates

FOR THE RESPONDENT:

Adv H Haycock instructed by MacRobert de Villiers Lunnon and Tindall

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PLACE AND DATES OF HEARING:

PRETORIA: 10 to 18 April 1995, 12 to 15 June 1995, 4 and 5 September 1995 and 18 and 19 January 1996.

29 January 1996

JUDGMENT

This dispute is before this court for a determination in terms of Section 46 (9) of the Labour Relations Act, 28 of 1956. The dispute relates to the dismissal of the second to eighty-second applicants during their participation in a strike at the respondent's premises on 16 August 1993. The number of and the identity of the strikers who were dismissed is disputed. This will be resolved before proceeding further.

The Applicants

The applicants' statement of case identifies the applicants as the United Workers Union of South Africa, H M Ngwenya and 80 others. The 80 others are listed in an Annexure to the applicant's statement of case.

There is no dispute regarding the *locus standi* of the union (UWUSA), (1st Applicant). The respondent in its pleadings denied that the applicants listed in the annexure had all been dismissed for participation in the strike which gave rise to this dispute. It also denied the involvement of certain of the listed applicants, in proceedings before the Conciliation

Board in 1993.

A bundle of sworn statements, purporting to be statements from the applicants, was handed in at the commencement of the proceedings. In these declarations the applicants purport to confirm the accuracy of the statement of case prepared by UWUSA (1st Applicant). There are sixty one of these declarations. The difficulty with these statements was that the first names of the applicants and in some cases their surnames, differed from the names reflected in the Annexure to the statement of case. In respect of a substantial number of those names reflected in the Annexure, no statement had been submitted.

This raised doubts as to whether the Union had a mandate to cite all 80 of the applicants and further doubts as to whether all of the listed applicants wanted to or intended to participate in these proceedings. It did not appear at that stage as if the first applicant would be able adequately to clarify the question of the identity of the workers involved in this dispute and the reservations of the respondent regarding the correct citing of the applicants appeared *prima facie* to be justified.

In order to achieve clarity and some degree of consensus regarding the identity of the applicants, the respondent was

ordered in terms of section 17 (18) (a) to produce a list of persons who had been dismissed by it as a result of the strike action. This the respondent did. This list has been marked Exhibit K.

The list prepared by the respondent was examined by the 1st Applicant and its representative and was accepted as being, with minor reservations, a list of the persons who had been involved in the dispute.

I accepted the list, Exhibit K, as being the most reliable available list of those persons who participated in the dispute before the conciliation board. It was still open to question whether all of those persons wanted to participate in these proceedings. For the purposes of these proceedings I regarded (at the time of the submission of Exhibit K) the 71 names as the maximum number of persons who could have participated in these proceedings. The respondent generously agreed to go further than that and to accept that Exhibit K was a list of applicants. My acceptance of them all was still subject to them wanting to participate. The 1st Applicant accepted that position, again with certain reservations.

In the earlier hearings in this court the applicant undertook to produce statements from the individual applicants setting out the losses which they had sustained as a result of their

dismissal. I accepted this as a common procedure which is adopted in these courts as a means of limiting the necessity for calling each individual applicant to testify in this regard. The acceptance of this procedure was always subject to the respondent's right to insist that witnesses be called for cross-examination if it required that and subject further to the right of the respondent to call evidence in rebuttal if it wished to do so. The statements referred to will be examined individually in greater detail at a later stage should I find that this is necessary.

The respondent has submitted a list on which a comparison is drawn between the names of the persons who declared that they had sustained losses as a result of the termination of the contracts and the names on Exhibit K. I am indebted to the respondent for this. The comparison shows that there is a large degree of consensus between Exhibit K and the affidavits. There are however five names for whom no corresponding match among the names on Exhibit K can be found. The respondent has investigated these cases. I accept the respondent's assurance that these persons are not entitled to participate as applicants in this action and I prefer the reliability of the respondent's records to the proven inaccuracy of the applicants documentation in this regard.

The latter set of affidavits emanate from only 58 of the

possible applicants mentioned in Exhibit K. The respondent is still prepared to accept Exhibit K as a list of the applicants. It is in my view to his prejudice to do so and to the advantage of the applicants. No more accurate proof of the identity of the applicants or of their intentions to participate has been forthcoming from the side of the applicants and the 1st Applicant is prepared to accept (broadly) that the respondent's list is accurate. I therefore also accept that list as being the proper list of applicants in this matter. For the purposes of this action therefore the applicants will be UWUSA and the 71 names listed by the applicant on the comparative schedule which now forms part of the record and is marked Exhibit AA. The dismissal of the claims of those applicants mentioned in Annexure A, which do not appear on Exhibit AA, will be incorporated in the final order made at the conclusion of this judgment.

Events Directly Related to the Strike

At the respondent's undertaking there are two main Unions namely the Food and Allied Workers Union (FAWU) and the 1st Applicant (UWUSA). UWUSA was originally the majority union on the respondent's premises. Their membership dwindled. At the same time the membership of FAWU increased. A stage was reached in 1991 (prior to the events which preceded this

dispute) where FAWU became the majority union on the respondent's premises.

During 1993, a certain Mr Albert Xakaza, a former employee of the respondent, was tried and convicted in disciplinary proceedings. The punishment was dismissal. He noted an appeal which was to have been heard on 18 May 1993, by a senior official of the respondent. The senior official was unable to attend to the matter and it was postponed. The holding of the appeal hearing was thereafter delayed for such a long period of time that the respondent came to the conclusion during August of 1993 that it would be procedurally unfair to continue with the matter and that Xakaza should be reinstated in its employ.

It is common cause that Xakaza was a member of FAWU and not of the 1st Applicant (UWUSA). Management at the respondent had conducted correspondence with FAWU in connection with this matter and notified FAWU that Xakaza could recommence his duties on 16 August 1993. This Xakaza did.

On 16 August 1995 applicants 2 to 72 arrived at work. It is common cause that they were all members of UWUSA. During the morning tea break according to the shop steward Sikhosana, the workers had a discussion regarding the reinstatement of Xakaza. This occurred at approximately 09h00. At the end of

the tea break Sikhosana and other shop stewards were delegated by the applicants to speak to management and to "find out an explanation for Xakaza's reappointment when he had stolen, because Jan Vilakazi had been dismissed for theft of maize meal." It is common cause that Jan Vilakazi was a member of UWUSA - 1st Applicant - and Xakaza a member of FAWU.

According to Sikhosana, an initial contact was made between Sikhosana and van Rensburg the Manager of the O.T.K. branch at Nigel. The upshot of this contact was that van Rensburg said he was too busy to deal with their matter. van Rensburg denies that he was ever contacted in this way. He heard of the work stoppage through other employees, contacted Duvenhage and continued with his other work.

According to Sikhosana when the workers did not get an explanation from management they decided not to return to work and "conducted a sit-in until Duvenhage arrived".

The organiser of UWUSA was contacted during the tea break at 09h00 and he informed the shop stewards that he would contact Duvenhage. It is common cause that Duvenhage is the Industrial Relations Manager for the respondent, that he is stationed at Bethal and not at Nigel where this incident occurred. It is also common cause that he handles industrial relations matters at the various O.T.K Mills. He heard of the problems at Nigel

at 09h15 and left immediately, arriving at Nigel at 11h00.

The content of various telephone conversations and who conducted those conversations is one of the disputed issues. It is common cause that at the very least Sikhosana spoke to the Union organiser, Nyandeni, at least twice and Duvenhage spoke to him at least twice.

A meeting was held at approximately 11h00 between the Shop Stewards and Duvenhage. Nyandeni, the Union Organiser, was not present at the meeting and there is disagreement as to what occurred at the meeting. A resolution of this difference is important. According to Duvenhage he explained to the shop stewards what had occurred in regard to Xakaza. This is confirmed by van Rensburg, who also attended the meeting. Sikhosana was adamant that no explanation was given by Duvenhage for the reinstatement of Xakaza. In cross-examination, however, the position becomes a little less certain. According to Sikhosana the following exchange took place:

> There was a meeting with Mr Duvenhage? - Yes
> The meeting was in the office of Mr van Rensburg?-Yes
> Mr Duvenhage explained the position regarding the re-instatement of Xakaza? - Yes

Further cross-examination of the witness, Sikhosana, followed this admission. The witness was clearly ill at ease during

further examination. When questioned more closely in regard to whether Duvenhage had said that Xakaza had been reinstated because of a problem with the enquiry held against Xakaza, Sikhosana stated that she was not told that.

Duvenhage, the Industrial Relations Manager for the group of mills, had travelled from Bethal for the meeting, the central point of discussion according to Duvenhage, was Xakaza's reinstatement. Both van Rensburg and Duvenhage stated that reasons for Xakaza's dismissal were given to the meeting and the meeting continued for a long time. Sikhosana admits that the meeting with Duvenhage was a lengthy one and that the reinstatement of Xakaza was the central point of the discussion. I dont accept Sikhosana's statement that Xakaza's dismissal was disposed of curtly and that the reinstatement was not discussed. That is not reconcilable with the length of the meeting. Her statement becomes particularly unacceptable when her replies and her discomfort in cross-examination are considered. I accept that Duvenhage explained the reason for Xakaza's reinstatement to Sikhosana and the other shop stewards and that there was discussion about this.

After meeting Duvenhage, Sikhosana and the other representatives of the strikers returned to the tea room and told the strikers what had occurred at the meeting. The

strikers refused to return to work. The submission on behalf of the applicants that the only reason for the strike was to seek an explanation for the dismissal of Xakaza, is without foundation. The strike still continued after reasons for Xakaza's dismissal had been communicated to the shop stewards by Duvenhage. Sikhosana says that she communicated the results of the meeting to the strikers. Continuance of the strike by the applicants was with knowledge of the reasons for Xakaza's reappointment. None of the strikers apart from Sikhosana have been called to testify to the contrary. The strike continuing because no explanation for Xakazas reinstatement was given is also inconsistent with UWUSAS letter to the respondent on the day of the strike setting out the reasons for the strike and the demands of the strikers.

Two further submissions are made on behalf of the applicants in regard to the continuance of the strike. The first submission is that Duvenhage should personally have told the strikers what had occurred at the meeting. According to Sikhosana, the shop stewards told the strikers only what Duvenhage had told them which was that the reinstatement of Xakaza had nothing to do with them and that they should return to work. It is argued that the strikers were unaware of the explanation given (if any was) and that they continued to strike for an explanation.

There does not appear to have been any attempt at any stage during the proceedings before me or during the incidents surrounding this strike, to portray that this was not a collective type of activity. The persons who interviewed Duvenhage were appointed by the strikers to do so. They conducted the interview with him and they contacted the 1st Applicant on behalf of the strikers. The shop stewards were not the representatives of the respondent but of the applicants. Information was conveyed to them during the course of discussions because they had approached the employer as the representatives of the strikers. The duty to convey the result of the interview to the employees rested upon the representatives. It was a collective complaint expressed through collective representatives. I can see no justification for the view that at the conclusion of the interview between Duvenhage and the shop stewards, he (Duvenhage) was under an obligation to conduct the same interview with the strikers.

The second submission made on behalf of the applicants in this connection was that the activity in which the "strikers" participated was not a strike in terms of the definition in the LRA. A strike in terms of the LRA, it is argued, must be in pursuance of a demand. I am not sure that I fully understand either the submission or its significance. Strike is described in the LRA as follows (only portions relevant are quoted):-

> "'strike' means any one or more of the following acts or omissions by any body or number of persons who are or have been employed either by the same employer or by different employers-
>
> (a) the refusal or failure by them to continue to work (whether the discontinuance is complete or partial) or to resume their work or to accept re-employment or to comply with the terms or conditions of employment applicable to them, or the retardation by them of the progress of work, or the obstruction by them of work; or
>
> (b) the breach or termination by them of their contracts of employment, if-
>
> (i) that refusal, failure, retardation, obstruction, breach or termination is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and..."

The definition needs little comment. The applicants were obviously striking. What I fail to appreciate is the significance of that which I am asked to find. I would have thought that for me to hold that this was not a strike would be detrimental to the cause which the applicants wish to establish. The only other imaginable alternative conclusion which I could draw is that the applicants were resiling from their contracts of employment.

According to Duvenhage, it was agreed during his discussion with Nyandeni, the Union organiser, that the employees would return to work at 14h00. Nyandeni denies this, he states that Duvenhage discussed the worker problem with him in the morning. He had already told the shop stewards over the telephone that the strike was illegal but he did not tell them

to go back to work because he had not discussed the matter with them and had no mandate to do that. Duvenhage had at that stage already told him (Nyandeni) that if the workers were not back at work by 14h00, they would be dismissed but he had made no agreement in this regard. There is no dispute regarding the allegation that the workers were expected to and were aware of the fact that they should return to work by 14h00.

The strikers demand is clearly reflected in Nyandeni's communication with Duvenhage on 16 August 1993:-

> "Albert Qhakaza who is a FAWU member was dismissed during the period April 1993 for stealing but today he is back to resume his duties and if that is the point Mr Jan Vilakazi must also be reinstated.
>
> If our demand is not met, Albert must leave the company premises not later than 10h00 the 16th August 1993."

A letter subsequent to the dismissal of the workers repeats the statement by Duvenhage that there was an agreement by the workers to return to work at 14h00. The 1st Applicant's letter in reply denies this. It can be concluded from this that at the very least there had been a demand by Duvenhage that the workers report for duty at 14h00, an attempt by Duvenhage to address the applicant's complaints and a warning to them from the union that their strike action was illegal.

After the shop stewards had returned to the striking group and

the striking group had refused to return to work, it is alleged that the workers insisted that Duvenhage meet with them and tell them himself what had been conveyed to the shop stewards. The applicants submit that Duvenhage's failure to do this was the cause of the continuance of the strike. I reject this. The truth of this allegation is doubtful, the strikers at that stage had received an explanation for the reappointment of Xakaza and given the circumstances, even if the allegation were true, I do not regard the employer as having been under any duty to account to the strikers for his actions in doing what he did. There may have been a reasonable expectation that the employer should meet with union representatives to explain the Xakaza situation but for the employees to create a largely unnecessary conflict situation and for them to then require the employer to extricate himself from that situation would appear to me to be stretching what they were entitled to expect beyond reasonable limits.

Duvenhage, according to his evidence, noticed that only some of the strikers had returned to work at 14h00. He then went down to the silo section where they were assembled and informed them that they must return to work before 16h00 or face dismissal. Nhlanhla admits that Duvenhage came to address the strikers at approximately 14h00. She says however that when Duvenhage came there he told them that they were fired. There was no further ultimatum to return to work. Nyandeni and

Duvenhage agree that Duvenhage phoned Nyandeni on the afternoon of the 16th. The content of the conversation is disputed. Soon after this Duvenhage wrote a letter to the Union and faxed it to them. There is no mention in the letter of a further ultimatum being issued to the strikers. According to the letter the strikers were dismissed for failure to adhere to the agreement that they would resume their normal duties by 14h00 on 16 August,1993. It seems more probable therefore that there was no final definite and unequivocal ultimatum to return to work given to the strikers after 14h00.

The Events Which Preceded the Decision to Strike

Prima facie, the strike was illegal and unjustified. There had been no interference with the rights of the strikers and no discussion with the employer before strike action was embarked upon.

Much of the hearing in this court was devoted to attempts to establish that the respondent, in his previous dealings with 1st Applicant had created a situation in which the only reasonable action which the employees could take was strike action. The evidence has covered, in considerable detail, the employer's actions in relation to previous strikes, previous

disciplinary procedures and the outcome of such procedures and complaints made by the 1st Applicant. The objective has been to demonstrate that FAWU was the "sweetheart" union and that the employer was trying all in its power to openly demonstrate that FAWU members would receive more favourable treatment than UWUSA members. None of these previous incidents of favouritism have in themselves formed the subject of any serious dispute before the conciliation board or this court. I have been asked to look at and compare the treatment of FAWU strikers and UWUSA strikers, dismissals of FAWU members and UWUSA members and complaints by FAWU graciously attended, with complaints by UWUSA brushed aside. I am asked at the conclusion of this examination to conclude that the unfairness which had become inherent in that relationship between UWUSA and respondent had caused such frustration that when Xakaza, a member of FAWU was reappointed, matters came to a head and without further ado the applicants went on strike in order to obtain an explanation. Their further contention is that the strike continued because no explanation for Xakaza's reinstatement was forthcoming. This latter contention I have already rejected.

It is to be expected that where two unions of relatively even strength are vying for support in one workplace they will use as a method of gaining superiority, the achievement of tangible results and benefits for their members. Successful

bargaining with the employer, demonstrates power and attracts members. Growth in one union leads to frustration in another. It is a situation which is fraught with potential for jealousy and strife. It is almost inevitable that some of the blame for failed performance in these circumstances, will be attributed to favouritism on the part of the employer. Critical self-examination is always a more painful exercise than allocating blame elsewhere.

Accusations of favouritism and unfair treatment were not the exclusive preserve of UWUSA. There is a documented complaint in this regard by FAWU and van Rensburg has informed the court that the past years at O.T.K. Mill in Nigel were like living under a microscope with the two unions looking through the eyepiece. Every move on the part of management led to verbal or written complaints by one or other of the unions. I believe that to be an accurate statement of the situation.

The accuracy of the situation as described by van Rensburg is further confirmed when one looks at the action which the employer took in attempting to initiate the appointment of an independent mediator (an IMSSA appointee) to mediate between the unions in order to create greater tolerance and understanding. Such action confirms the employer's concern and is not reconcilable with UWUSA's allegations of favouritism.

It is common cause that the employer issued an "ultimatum" to both of the unions on 13 May 1993. I accept Duvenhage's evidence that this "ultimatum" was to UWUSA and FAWU and that it was to the effect that the respondent was no longer prepared to tolerate industrial action against itself where such action arose out of tension between FAWU and UWUSA. It was stated in this ultimatum that if industrial action of this nature again arose, any employees who participated would have their services terminated. The content or the publication of this ultimatum is not disputed and UWUSA mentions it in correspondence with the respondent at the time of the strike. This is again confirmation of the existence of a situation as described by van Rensburg.

I have examined all of the evidence brought to support the allegation of bias on the part of the employer. I daresay that if a narrow, stilted approach to the interpretation of these events is taken and if the employer's reasons for acting as he did are ignored, it is possible to draw a type of paranoid conclusion of persecution. Such a conclusion is not justified on an overall consideration of all of the facts. The picture which emerges on an overall examination of the facts is that of an employer driven to distraction by the effects which internal union rivalry was having on his business. I reject the act of desperation theory advanced by the applicants as a reason for their illegal industrial action. This was no act of

desperation it was a deliberate act in the inter-union power play and it was made with consciousness of the previous "ultimatum" of 15 May, 1993.

There is a further very cogent reason for my rejection of the desperation theory. It cannot be seriously suggested that each of a long list of alleged biased dealings, which were ignored at the time that they occurred in the sense that no action was taken in respect of them to declare them unfair, should now cumulatively be dealt with on an *ex post facto* basis. Nor can it be seriously contemplated that I should as it were condone the lateness of the taking of further action in respect of those incidents and return a sort of general finding of unfairness in relation to the events which fall completely outside of the ambit of the present enquiry. A failure to follow the dispute procedures laid down in the LRA in regard to the individual historical events is an indication of the fact that the events were not considered to have been as serious at the time as the applicants would now have me believe. Those events have now been looked at with hindsight in order to attempt to justify an altogether unjustifiable strike.

The evidence of previous events which it is sought to rely upon as justification for the present strike must also lead me to a further conclusion. Those events, and the fact that they

did not form the subject of dispute proceedings at the time, coupled with the fact that they are now used as justification for the present illegal strike confirms a predilection on the part of the strikers to enter into precipitate industrial action without, over an extended period of time, utilising the machinery provided for in the LRA for the resolution of such disputes.

Conclusions

I conclude that the strike action was unnecessary. It was not preceded by any attempt to consult the employer or even to seek guidance from the 1st Applicant. There was no justification for the action, it has no claim to legitimacy and the employer cannot be held accountable in any way for its occurrence.

Fair action on the part of an employer who is faced with strike action is always dependant upon the events which precede the strike action. The following is quoted from ***Performing Arts Council of the Transvaal v Paper Printing and Allied Workers Union and Others*** (1994) 15 ILJ 65 (A) at 66 A:

> "Whether an illegal strike may fairly be met with an immediate dismissal or whether fairness calls for an ultimatum or other appropriate action short of dismissal is an issue which can only be determined on the facts of each case. An illegal

> strike constitutes serious and unacceptable misconduct by employees."

Illegal strikers are not entitled to "excessive protection against the legal and fair exercise of an employers common law rights", (*Perskorporasie van SA Bpk v Media Workers Association of South Africa* (1993) 14 ILJ 938 (LAC) and it is necessary to have regard to all of the facts which precede the strike in order to determine whether a party has acted fairly.

In deciding the appropriateness of the reaction of an employer towards striking employees, the legitimacy of the strike has always been an important consideration. The following by de Kock SM in *National Union of Metalworkers of SA v VRN Steel (Pty) Ltd* (1995) 16 ILJ 128 at 146 A-D, I consider to be an accurate summary of the stance of this court and the superior courts on this question:-

> "The court's approach is discussed in many decisions of the Industrial Court, the Labour Appeal Court and the Appellate Division. The approach is comprehensively discussed in *National Union of Metalworkers of SA and others v Elm Street Plastics t/a ADV Plastics* (1989) 10 ILJ 328 (IC). A distinction is drawn between a strike which is illegal and one which is not legitimate. As a general rule, where workers go on strike without attempting to settle a dispute through genuine collective bargaining, the court has not been willing to protect them against dismissal. That approach is based on the fact that it is not in the interest of collective bargaining nor of the public interest that those who flout the conciliatory provisions of the Act should be entitled to rely on the protection granted by the Act when their test of economic strength fails. The Act entrenches collective bargaining as the preferred method of resolving disputes. An illegal strike can be protected if it is shown that the strike, notwithstanding its illegality, still complies with

> the principles of collective bargaining and is therefore legitimate."

The flouting or the observance of the conciliatory procedures provided for in the Act, has in most cases been the prime factor which determines whether illegal strikers deserve to be protected from dismissal or not (See *inter alia* ***National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*** (1991) 12 ILJ 1221 (A) at 1237, ***Black Allied Workers Union and Others v Prestige Hotels CC t/a Blue Waters Hotel*** (LAC) at 972 et seq.

To summarise - In this matter one has a situation where an employer takes steps to try to resolve inter-union rivalry which is having a detrimental effect on his business. He (the employer), reaching a stage of despair, issues a warning that he will no longer tolerate work stoppages which result from inter-union rivalry. He warns further that he will dismiss any employees who participate in such strikes.

Without prior notice to the employer and without any attempt to discuss, negotiate or even enquire into the facts, the applicants embark upon a strike. The strikes objective is to secure the dismissal of a reappointed member of another union. This cannot be dubbed anything but a strike in the circumstances which the employer had specifically tried to prevent from recurring. The strike had no claim to legitimacy.

The employer would in my view have been justified in adopting the stance that the applicants had terminated their contracts of employment when the strike commenced. (See ***Seven Able CC t/a The Crest Hotel v Hotel and Restaurant Workers Union and others*** (1990) 11 ILJ 504 (LAC). The employers actions in giving the strikers an opportunity to return to work at 14h00 or alternatively (depending upon who is believed in this connection) negotiating an agreement that the employees would return to work at 14h00, went beyond what I would consider to be the fair conduct which the situation demanded of him.

Determination

There has been no unfair labour practice. The applicant's applications are dismissed. There is no order as to costs.

G. D. Maytham
ADDITIONAL MEMBER