IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C374/98

DATE: 23-9-1999

In the matter between:

HAZELEY PIGGERIES WORKERS Applicants

and

HAZELEY PIGGERIES Respondent

J U D G M E N T

BRASSEY, AJ:

1. The applicants in this matter were dismissed for participating in a strike commencing on 22 June 1998. The dismissal occurred two days into the strike, that is on 24 June, following on the refusal by the applicants to heed several ultimatums to return to work. The applicants now seek relief by way of reinstatement alternatively, compensation.

2. The issues that I have to decide are firstly, whether the strike was protected. If it was protected then the dismissal would, by operation of the law, have been incompetent and thus unfair. The second issue I have to decide, assuming that the strike was unprotected, is whether the dismissals were nevertheless unfair. The third issue I have to decide, which depends upon a positive finding on the second, is whether the applicants should be entitled to the remedy of reinstatement and, if not, what by way of compensation would be appropriate.

3. The facts in this matter were rehearsed before me at

considerable length. Having regard to the true nature of the issues with which I am concerned, can be briefly summarised.

4. The respondent purchased the business, which is a piggery, several years before the strike broke out. As part of the transaction the workers employed by the seller were retrenched, paid their severance pay, and then re-hired by the respondent. In the ensuing years discontent simmered over the conditions of employment at the respondent's farm. The focus of the discontent varied from time to time but it is fair to say, I think, that wages and the conditions of the hostel accommodation were two constant factors in the discontent.

5. Later in 1996 the workers, through their representatives, approached a certain Zamile August who ran an advice service in the area. In consequence of that, Zamile August sought a measure of recognition as the workers' representative, from the respondent. At the time the official channel of communication was a workers' committee and the respondent, anxious about the turn of events, placed the matter in the hands of the attorneys who act for its holding company. An acrimonious set of correspondence ensued between the attorneys and the advice service, the content of which it is unnecessary here to relay. Suffice it to say that the attorneys, if one examines the correspondence, took what can only be described as a legalistic approach to the overtures of the advice service questioning, inter alia, its status to act as a collective bargaining representative of workers.

6. The exchange of correspondence culminated in a reference of a dispute to the Commission for Conciliation Mediation and Arbitration. As the terms of that reference are of consequence to the status of

the strike it is necessary for me, albeit briefly, to summarise them here.

The referring party is described as Eric Salukzana and Others and their address is given as c/o WECWA, which is the Western Cape Workers Association, that is Mr Zamile August's advice body of PO Box 301, Athlone, 7760. The alternative contact details identify Mr Zamile August as the person with whom to liaise and describe him as a para-legal/organiser.

7. After a description of the respondent, the nature of the dispute is set out as being as follows:

"Refusal of respondent to bargain in good faith with applicants."

In paragraph 7 the results of the conciliation are set out in the form as follows:

"7. That the respondent undertakes to bargain and/or negotiate with workers over disputes that exist between them."

The document is then signed on 25 March 1997 by a number of people who would appear to comprise most, if not all, of the respondent's workforce of some 36 people.

8. At the CCMA hearing there was a discussion, not about the duty to negotiate as it happens, but about the problems that the workers were confronting within the workplace. Undertakings were given by the respondent, the exact nature of which was materially in dispute before me, on the improvement of the facilities on the farm and the question of negotiation over wages. Regrettably, this was not an end to the matter however, because in the period from the CCMA hearing in mid-April 1997 through to the end of that year, there was a refusal by the respondent to deal with Mr August until such time as

his union became registered.

9. Mr Nieuwoudt, the IR consultant retained by the company in place of its attorneys, explained why the company

took the attitude that it did. Some of what he had to say might have smacked of formalism, at least in the perception of some people, but beneath his evidence was a real anxiety that whoever should represent the workers would be in a position to bind them into any agreement that might be concluded.

10. In October wage increases were awarded to the workers. They were significantly higher than might otherwise have been awarded because the workers had sought, and were granted, the facility of membership of a provident fund that would be mutually contributory. What would have been an increase of some 8.75% became an increase of some 13.75%. The workers were dissatisfied with the level of the increase and remained dissatisfied with certain of the conditions on the farm. Meetings ensued in order to deal with complaints. Those meetings were attended by Mr Nieuwoudt who kept minutes of them and it is plain from the minutes, at least as I read them, and also from the evidence of Mr Nieuwoudt, that a genuine attempt was made to come to grips with the workers' complaints, consistent with the financial constraints applicable to the company.

11. In consequence of the deliberations the Pension Fund Scheme was rescinded but, it seems, the workers were allowed to keep the 5% component of the wage increase attributable to it. Despite these deliberations the workers remained dissatisfied and the matter was referred back to the CCMA in December. It was competent to make that reference because at the earlier hearing the CCMA Commissioner

had, as he put it, left his file open so that the parties could deliberate and seek to resolve their differences informally.

12. At the CCMA hearing the status of the union was once

again raised and for the first time it was able to produce a Certificate of Registration indicating that it had acquired that status in October of that year. In consequence of that, the respondent gave a commitment to deal with the trade union which, it was by now abundantly clear, was the representative of an overwhelming majority, if not all, of the respondent's workforce. At the hearing the question of wages was raised and the company took the attitude that it had previously taken, which was that wages had to be dealt with on the anniversary of employment, namely in October. That stance, which was by no means unreasonable, was seemingly accepted by Mr August.

13. In the ensuing six months the workers remained dissatisfied however. Complaints surfaced in the discussions between the company's management and the workers' committee and there was considerable uncertainty as to whether they should properly be resolved through Mr August or direct with the committee. During the period, as before, there were thinly-veiled threats of industrial action unless the complaints were properly attended to. Management, insofar as one can gather, remained patient in the face of those threats but nonetheless stood firmly on its position insofar as wages is concerned.

14. The frustrations, that are obvious from the notes and meetings of the time, came to a head in a letter dated 2 June 1998 written by the workers to management. I shall recite the letter, which is

important, without attempting to render accurately the spelling. It states:

"We ask strike on 22 June 1998. Sit down under this reason:

1. Money.

(a) First group we want to pay R500 start on fortnight.

(b) Second group we want to pay R550 on fortnight.

(c) Third group we want to pay R600 on fortnight.

2. Money of union must not get in – right to the office.

3. Hostel must not right after two years.

4. Money of UIF must not right.

5. Apartheid must not finished here.

14. The effect of this note which was briefly traversed in evidence is relatively clear. The workers are dissatisfied with the low level of their wages and seek an increase in the minimum wage, depending on the length of service of the three groups of workers referred to. The deduction of union dues is to take automatically and must not be collected on the farm and problems regarding UIF and attitudes of racism, which are termed "apartheid", must be dealt with. It is plain from that demand that the workers are concerned to obtain a substantive improvement in their conditions of employment and if there were any doubt about that matter, it would be put beyond uncertainty by the letter from the union of 8 June 1998 which reads as follows. Again I seek to render its meaning rather than give a literal rendering of it. It is addressed to the manager of Hazeley Pig Farms and the text reads as follows:

"We are writing to you on behalf and at the request of our members in your employment and we hereby demand that they be remunerated R350

per week and that the shop stewards or their

substitutes be given 18 days per annum leave for trade union activities, on full pay."

A request for a reply within seven days is then made.

15. On the same day, somewhat remarkably, the union writes a further letter to the respondent in which it states that:

"Members of WECWA hereby give notice to embark on industrial action in pursuance of demands for wages increase."

The response of management was somewhat predictable, it took the view that any such strike would be illegal, but by its letter of 10 June 1998 it made it clear firstly, that it was its intention that the parties should meet to clarify issues like conditions of employment, including the rights of the union. Secondly, that it had previously extended the invitations which had not been taken up, for reasons which were unclear.

16. To this letter Mr August replied on 12 June 1998, in language that is nothing if not intemperate. He stated:

"Your letter dated 10 June 1998 refers. We do not need clarities, we have tabled a demand in front of you and we expect a response; do not waste our time as you could transmit any information by fax to us, as you have with the letter we are responding to; and objectively it is management that has always endeavoured to thwart good labour relations between itself and the workers.

We have always said that you should produce to us a draft code for consideration and negotiations and up to now you have not done so but have instead forced upon us codes we do not

consent to and even your despicable conduct at recent hearings speaks for itself. Therefore again it is not us who are retarding any progress at the workplace, the blame should be put on you."

17. The inflammatory tone of this letter is in keeping with an earlier letter in which Mr August accused members and inspectors of the Department of Labour of being corrupt ,a statement that he was subsequently constrained to retract.

18. On 15 June 1998 the workers wrote a further note to the respondent stating:

"We are here to demand the following complaints before 22 June 1998. If no reply we are not going to work until we get a reply:

1. Money.
2. Hostel.
3. Union.
4. UIF.
5. Apartheid.
6. Elliot Setlahinga must come to work soon."

The first five items I take to be a reference back to the letter of 2 June, to which I have referred. The sixth item is a reference to a dismissed employee whom the workers were seeking to have reinstated. As at this stage therefore it is clear that the workers remain determined to have their substantive grievances resolved in their favour.

19. On 18 June 1998 the respondent wrote to Mr August in the following terms:

"Further to our fax of 10 June 1998 and your response dated 12 June 1998, the following:

1. It seems to management that WECWA is not prepared to settle any

differences which the

parties may have through dialogue and discussion.

2. Your insistence to negotiate wages and other conditions of employment for implementation with immediate effect is unacceptable as management made it clear in the meeting that we had on 3 March 1998 that negotiations of wages would take place as from October 1998 for implementation as from 1 November 1998.

3. Management once again would like the parties to come together to discuss proposals in order avert the proposed unprotected strike actions called for by your members.

4. In the event of the parties not being able to reach agreement over the perceived dispute, management agrees that the dispute be referred to the CCMA to prevent any unfair labour practice being committed by any of the parties.

5. Management would like to bring to your attention that the proposed industrial action called for by your members;

5.1 will be an unprotected strike

5.2 is illegal

5.3 is not conducive to good labour relations, and

5.4 is uncalled for in the light of management's continued willingness to settle the perceived differences around the negotiating table.

6. You are further notified that in the event of

your members going on an unprotected strike, management intends;

6.1 employing casual labour

6.2 to take the necessary action, which may include summary dismissal, against individual employees who take part in the strike and may be guilty of intimidation and any other form of misconduct during the duration of the strike.

7. You are also notified that the rule of no work no pay will be applied throughout the duration of the strike."

It us unclear to me whether Mr August relayed the content of that letter to the members of his union, but it is clear from the evidence which is corroborated by an endorsement on a copy of the letter, that the contents of the letter were read over to workers on the farm. From that moment onwards there could have been no doubt in the workers minds what attitude the respondent took to their impending industrial action.

20. The workers must have appreciated firstly, that management was open for discussions on matters which included the question of a proper recognition of the trade union. Secondly, that it considered the appropriate time for the negotiation of wages to be the anniversary of the hiring of the workers, that is October, but even in respect of that it was willing to discuss, as it put it, "proposals in order to avert the proposed unprotected strike action called for by the members". Thirdly, that the strike would not have the statutory protections offered by the Labour

Relations Act. Workers were pertinently warned that if they intimidated casual labour, management would take the requisite action.

21. On 22 June a strike did indeed break out and it was met early on

that morning by an ultimatum. The ultimatum states as follows:

"With reference to our correspondence of 18 June 1998 we would like to state the following:

(a) Management regards your actions as being an unprotected strike and therefore illegal.

(b) Management declares itself willing to discuss matters with the union and shop stewards in order that normality may be restored.

(c) All workers are to resume their normal duties by 9:30 on 22 June 1998.

(d) Failure to resume work by 9:30 on 22 June 1998 will lead to disciplinary action being taken in accordance with the Labour Relations Act No. 66 of 1995.

(e) If found guilty of misconduct, in accordance with the law, workers face instant dismissal."

The evidence before me was that this was read out and translated to all present among the strikers and that the shop stewards – that is David Safuba and two others – stated that they understood the contents thereof. Despite the ultimatum the strike continued and it was in consequence necessary for management to give a further ultimatum, which it did on the following day. It is unnecessary to read the ultimatum save for the following paragraph:

"Your demand to negotiate wages cannot be acceded

to for the reasons set out in our various correspondences to your union and unless you resume work by no later than 14:00 (2 o'clock) this afternoon 23 June 1998, your employment with the company will automatically be terminated. The reason being that the pigs are dying in the pig-sheds and you are intimidating the casuals

not to work."

22. As it happens, the threat implicit in that ultimatum was not carried out until the following day. It is clear from the evidence that had any workers come forward overnight and tendered their services they would not have been dismissed. On the following day the workers were formally advised of their dismissal and arrangements were made for the payment of their termination pay.

23. The circumstances surrounding what would otherwise appear to be a precipitate set of ultimatums were rehearsed in evidence and I shall return to them in a moment. They bear upon the question of whether, if the strike is unprocedural, it was permissible to dismiss the workers.

24. At this stage it is necessary, however, for me to consider whether the strike was indeed procedural or not, since it is clear from the evidence that it was for participation in the strike that the workers were dismissed. In order to determine whether the strike is procedural or not, it is necessary to consider what the nature of the demands were and whether they fall within the ambit of the reference of the dispute some time earlier to the CCMA.

25. On the first question there can be little doubt but that the dispute was over substantive questions. The letters from the workers themselves make that clear and so

does the letter from their trade union. So too does the evidence of both the witnesses who testified on the applicants' side. The reference of the dispute to the CCMA, on the other hand, was concerned with the matter of procedure. It was concerned with the so-called refusal by the respondent to negotiate with the workers.

That is a question of process, quite distinct from the substantive demands that were being pursued by means of a strike. The attempt to legitimate the strike by reference to that CCMA referral was, in my view, nothing but opportunistic. The effort was as unsuccessful, as most opportunistic ventures are when properly investigated. I should say, however, that even if I were to find that the issue being prosecuted by the strike was a matter of procedure, it would still not fall within the ambit of the reference.

26. The basis of the complaint in the reference was a failure to negotiate with the workers. The case made out by Mr Fisher, who appeared on behalf of the applicants, was concerned with the failure to negotiate with the trade union and for the purpose he dwelt at some length on the standpoint adopted by the respondent relating to the status of the union prior to the strike. That problem, I should say by-the-by, had been resolved at the CCMA meeting of December, but even if the issue remained alive as between the parties at the time when the strike broke out, and even if I were to find that the strike was concerned with matters of process, I should still not find that the demands underlying the strike were covered by the CCMA referral.

27. Negotiating with the workers, which is what the company had been doing and was content to continue to do, is a matter entirely distinct from negotiating with the trade

union as their collective bargaining representative. The distinction is not a technical one, nor does the making of it fall foul of the injunction that the Courts repeatedly issue, not to treat the contents of the CCMA referral too literally. At the time when Mr August completed the CCMA referral he must have been well aware

that the union itself could not apply on behalf of the workers, being unregistered. Conscious of the deficiencies in the union status, Mr August must have appreciated that it would be competent for him to frame the dispute as one concerned with the refusal to negotiate with the union, albeit unregistered. The fact that he declined to frame the dispute in those terms is not, in my view, suggestive of some inadvertence on his part.

28. I conclude, therefore, that the strike was unprocedural and therefore not such a strike as automatically serves to confer protection against dismissal under the Labour Relations Act.

29. I turn now to the question of whether, notwithstanding the unprocedural and thus unprotected quality of the strike, the dismissals were unfair. I have already described the ultimatum given by the company as somewhat precipitate. The precipitate giving of the ultimatums must be seen within its context however. The context is that unless the pigs are tended to and properly fed, they die, and the deaths are agonised.

30. A video film was placed in evidence before me and I was requested to look at it. It had shocking scenes of pigs fighting with each other and of piglets that were suffering and had died. Compassion alone would require of management that it took steps – and urgent steps at that – to make sure

that the pigs in the piggery should not be neglected. There are, of course, in addition financial considerations implicated in such neglect. It was, therefore, necessary for management to obtain alternative labour in order to feed the pigs the 40 tonnes of food

that they require for their subsistence. Attempts by management to employ casual labour were, however, frustrated by the striking workers. The evidence of Mr Jack, who testified on behalf of the management, and of Mr Nieuwoudt, who did likewise, made it clear that these acts of frustration amounted to intimidation. The video film graphically confirmed their evidence. What was clear is that the strikers, or at any rate a significant majority of them, formed themselves into a group and toyi-toyed through the premises. Some of the workers brandished sticks and one had an iron implement. A further worker on a later occasion was seen carrying a tyre, of whose symbolism nobody who has lived in South Africa, can be under the slightest doubt.

31. The workers formed in the group that I have described, made it their practice to surround the individual replacement workers (casual workers) and by means of threats and imprecations to force the individual to stop working. There were scenes on the video film in which workers were seen waving the casual workers away. Mr Jack testified that he himself was the victim of threats. Those threats were violent in nature.

32. On the video film I saw interviews conducted with the casual workers in which they said that they were too frightened to work in consequence of the threats against their lives that had been uttered by the strikers. These reports were confirmed by the evidence of both Mr Jack and

Mr Nieuwoudt. Whether these threats were actually uttered is a matter of hearsay. The reports are equally hearsay, save to the extent that they affect the mind of Mr Jack, as decision-maker within

the company. What was obvious to me was that the workers must have appreciated that the casuals were in communication with Mr Jack and with Mr Nieuwoudt and they could have been under no doubt of the tenor of those communications, given that the casuals were refusing to work.

In the circumstances they must have appreciated that if Mr Jack was not to fear further acts of intimidation it would be incumbent on them to reassure him. Yet no effort whatsoever was made by any of the workers to do that. Quite the contrary, the workers – as is evident both from the evidence and the video – treated approaches by the respondent with disdain. The attitude that they took was of passive, surly, recalcitrance. The continued to take that attitude notwithstanding the grant by this Court of an interdict to restrain them from further acts of intimidation. For their contempt of management they can expect little sympathy from this Court, but their contempt of an order of this Court is one that would deprive them of any sympathy whatever.

33. In the circumstances it seems to me that there was no alternative for management but to act as precipitantly as it did. In argument Ms Stelzner, who appeared on behalf of the respondent, pointed out that it was not for me to consider what better options might have been selected by management, but to ask myself on a conspectus of the events as a whole whether management had acted reasonably or not. The anxiety underlying that submission, which is

understandable, was nonetheless misplaced. For my part, I find it

difficult to know what more management could have done in the circumstances in order to avert the suffering of the pigs, and to prevent financial loss. It seems to me that management was entirely justified in approaching the matter as it did.

34. In coming to this conclusion, I consider of course the facts that have been placed before me. In argument one of the representatives of the workers drew my attention to the fact that some of these workers have a considerable service with the respondent and its predecessor. That is a factor that weighs strongly with me. A second factor that weighs with me is that it appears that the conditions on the farm, as perhaps is common with farms generally though on that I can make no pronouncement, are, to say the least, uncomfortable. The respondent itself made no effort to suggest that the wages paid to the workers were luxurious.

35. Finally, one must take into account the fact that these workers are illiterate or semi-literate and therefore can more easily be expected to fall prey to breaches of the law, through ignorance. But the workers could not have been under any illusion that it was necessary to refer the disputed substance to the CCMA before they embarked upon a strike. Indeed, one of the witnesses who testified on the applicants' side, made it clear that the reason the dispute was not referred was that he considered the previous CCMA meetings to have been futile. Nor can there be any suggestion on the workers' side that acts of intimidation are legitimate within a strike context.

36. The significance of such acts should properly be understood. The respondent did not dismiss the workers for

violence and therefore acts of violence and intimidation do not provide a basis for a consideration of whether the dismissal was fair or not. They do, however, provide a context. If collective bargaining is to be effective it is crucial that the operation of collective market forces should run its course. On the employer's side there is the collective comprised by capital. On the employee's side there is the collective implicit in the withdrawal of labour as a group. That tussle, as I say, operates within a market but that market must be regulated and the regulation entails the exercise of free will and the proper understanding of of market forces.

37. It is impermissible to distort it by the use of violence on either side. The experience in the United States in the 1930's demonstrated palpably the consequences of violence by employers within a strike context. The acts of violence on the employee's side, which are all too prevalent within the context of South African industrial action, are equally to be reprobated.

38. In the circumstances I can find nothing in the company's conduct in the events leading up to the strike and in its handling of the strike for which to criticise it. On the contrary, it appears to me to have acted with patience, tolerance and considerable restraint in the face of great provocation.

39. On that basis I cannot fault the company's act of dismissal and therefore conclude that the dismissal was fair. The application accordingly falls to be dismissed.

40. I turn now to the question of costs. Ms Stelzner is not seeking the costs of the litigation against the individual applicants, that is against the ex-workers of the

respondent. She does, however, seek the costs of the application against the trade union to the extent that they were incurred while the union was a party to these proceedings. The respondent is entitled, in my view, to those costs.

41. She also seeks the costs against the attorneys de bonis propriis in respect of two aspects. The first is the failure by the attorneys to paginate and index the papers properly by the first day of these proceedings. Apparently the respondent was ultimately forced to perform that task itself. The failure to paginate and index the papers considerably inconvenienced the Court, particularly as its file at the critical juncture of preparation was no longer in its possession. In the normal way the application would have been struck from the roll, but in this case this was inappropriate given that the workers remain in occupation of the premises, and thus the respondent is suffering prejudice for so long as there is a delay.

42. The proper way of dealing with this matter, in my view, is to make the attorneys who are responsible for the failure to perform their duties, pay the costs of the first day of the hearing de bonis propriis.

43. The second aspect is concerned with the want of preparation by the attorneys for the applicants in relation to the pre-trial conferences. The consequence was that no satisfaction could be obtained in a set of three such conferences. Eventually the respondent was forced to approach this Court on lengthy affidavit setting out the facts in order to have the matter enroled. Had costs been prayed for as part of that application I would have awarded those costs de bonis propriis against the applicants in

favour of the respondent. No costs were, however, prayed for so it appears to me wrong to take that approach. It would, however, be proper to require the applicants' attorneys to pay de bonis propriis the costs occasioned by the second and third pre-trial conference. Those costs include such costs as are attendant upon the arrangement of such conferences, including the correspondence that passed between the parties. The applicants' attorneys have not been heard in relation to that aspect of my order. They are entitled to be heard if they wish to be and therefore that aspect of my order I am going to make provisional and it will become final only if the applicants' attorneys give no notice within 10 days of the date of this judgment of their desire to be heard in respect of the matter of costs.

44. Accordingly I make the following order:

1. The application is dismissed.

2. The trade union that was the applicant to these proceedings until it withdrew shall pay the respondent's costs occasioned during the litigation for so long as it was a party to the litigation.

3. The applicants' attorneys shall pay de bonis propriis the following costs jointly and severally with the trade union;

(i) the costs of the first day;

(ii) the costs attendant upon and implicated in the second and third pre-trial conferences;

4. The order that is made against the applicants' attorneys is provisional and becomes final only if within 10 days of the

making of this order the attorneys fail to give formal notice of their desire to be heard in respect of the order.

5. For purposes of clarity I should make it clear that I see no reason why I should be exclusively the person who can hear any such application for variation of the costs order by the attorneys. It will be competent for one of my Brother or Sister Judges to hear that matter if the Judge President so directs.

BRASSEY, AJ