IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no. J 350/98

In the matter between:

J NKUTHA AND OTHERS APPLICANTS

and

FUEL GAS INSTALLATIONS (PTY) LTD RESPONDENT

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JUDGMENT

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BASSON, J

[1] After the consolidation of two matters the two distinct disputes to be decided *in casu* were whether the respondent victimised the applicants (whilst they were in its employ) on the basis of their union membership by infringing on their right to protection in terms of sections 5(2)(a)(iii), 5(2)(c)(i) and 5(3) of the Labour Relations Act, 66 of 1995 ("the Act") and whether the respondent unfairly dismissed the applicants for allegedly partaking in an unprotected strike on 23

June 1998.

[2] The allegation of victimisation or "union bashing" as it was labelled during the proceedings was based upon various alleged incidents. In this regard evidence was presented on the relationship between the union (the National Entitled Workers Union or NEWU) and the respondent, especially its director, Mr D Russell ("Russell").

[3] There was no union representation at the respondent when NEWU approached Russell on 22 April 1997 with a draft recognition agreement and stop orders for union dues to be deducted from the union members' pay by the respondent.

[4] For the period 22 April 1997 to 8 June 1997 the respondent failed to pay union subscriptions to NEWU and paid only after legal proceedings were instituted in the Labour Court. The application for a mandamus to pay the said subscriptions was refused on the basis that the respondent was at that stage willing to fulfill its statutory obligations and that an adequate alternative remedy of referring this dispute to arbitration at the Commission for Conciliation, Mediation and Arbitration ("the CCMA") was available.

[5] A list of worker demands was sent to the respondent by the union in a letter of 10 June 1997 also calling for a meeting to discuss these demands on 12 June 1997. However, no meeting took place. Russell alleged that this was due to the fact that the union official did not show up but the shop stewards alleged that the meeting was supposed to have been held with them only (as it was stated in the said letter - exhibit B19).

[6] On 7 July 1999 the workers handed an almost identical list of demands (now including also a wage demand) to the respondent and requested Russell to

reply by 10 July 1999. A meeting between Russell and Messrs J Nkutha and E Mdiniso ("Nkutha" and "Mdiniso", the two shop stewards) took place on 11 July 1997. The respondent alleged that the workers embarked on a strike during this meeting for about one hour. More about the alleged strike later.

[7] On 21 July 1997 the respondent and NEWU entered into negotiations culminating in an eventual agreement on these proposals or demands in October 1997 (exhibit B65).

[8] On 10 September 1997 the brother and co-director of Russell allegedly dismissed Nkutha for union activities. The respondent alleged that there was a second strike on this day. More about the strike later. Even if Nkutha was dismissed (which was denied by the respondent) he was immediately reinstated the next day.

[9] Another incident occurred during June 1997 when a union member, Mr J Zulu ("Zulu") and a non-union member (a certain "Moses") were involved in a fight. The respondent chose to charge only Zulu with assault alleging that he committed the more serious misconduct. After being dismissed for this misconduct, Zulu was re-employed on a fixed-term contract, renewed monthly. Somewhat disconcertingly, this contract appeared to infringe on Zulu's right to strike (exhibit B55 paragraph 9). Zulu was, however, not an applicant in this matter and this alleged act of discrimination against him can therefore merely serve to show the state of mind of the respondent.

[10] Zulu was also part of a discussion taped by the union in the period September/October 1997. This was a discussion between Zulu and Russell when he was requested to sign a renewal of the said contract with the respondent. A transcription of this conversation (or a part of it) was attached as annexure "A" to the pre-trial minutes. It was clear that Russell made some anti-union remarks

during this conversation. However, although this likewise was relevant to show the state of mind of the respondent, these words by themselves did not, in my judgment, constitute victimisation or union bashing in terms of the Act.

[11] Section 5(2)(a)(iii) of the Act which provides for protection of employees against victimisation on the grounds of union membership reads as follows:

"Without limiting the general protection conferred by subsection (1) (stating that no person may discriminate against an employee for exercising any right conferred by the Act), no person may do, or threaten to do, any of the following ...
(a) require an employee ...
(iii) to give up membership of a trade union ...".

[12] In the same vein, section 5(2)(c)(i) states that no person may do, or threaten to do, the following: "... prejudice an employee ... because of past, present or anticipated ... membership of a trade union ...".

[13] Section 5(3) grants similar protection in the following circumstances: "[n]o person may advantage, or promise to advantage, an employee ... in exchange for that person not exercising any right conferred by this Act ...".

[14] I do not believe that (apart from Zulu who was not an applicant before Court) the above evidence showed that the respondent either did or threatened to require any of the applicants to give up their membership of the union or to prejudice the applicants on the basis of their union membership or to advantage other non-union employees (or promised to do so) on the basis of their union membership.

[15] In the event, these actions by the respondent only have relevance to show an anti-union state of mind and nothing more.

[16] The same cannot be said for the following conduct of the respondent during September/October 1997.

[17] On 1 September 1997 Russell faxed a letter on the respondent's letterhead to the union (exhibit A50). This letter informed the union that its member, Mr SV Nkosi ("Nkosi"), resigns from the union" and "[I] will not be paying any more union fees as the union has not done anything for me as to date". Importantly, this letter was written in Russell's own handwriting, signed by Nkosi and witnessed by the foreman, Mr G O'Donoghue ("O'Donoghue"). Four days later on 5 September 1997, Russell gave Nkosi an increase in salary from R8,19 to R9,40 per hour (exhibit A268) and promoted him from a grade H to a grade F (exhibit A260).

[18] On 15 September 1997 Russell again faxed a letter in his own handwriting to the union (exhibit A46). This letter informed the union that its member, Mr PK Ndledla ("Ndledla"), resigns from the union "and have (sic) instructed Mr D Russell not to deduct union fees...". The letter was signed by Ndledla and witnessed by Russell and O'Donoghue. Four days later on 19 September 1997, Russell gave Ndledla an increase in salary from R8,19 to R9,40 per hour (exhibit A268) and promoted him from a grade H to a grade F (exhibit A260).

[19] On 14 October 1997 Russell for the third time faxed a letter in his own handwriting to the union (exhibit A42). This letter informed the union that its member, Mr HB Dludlu ("Dludlu") resigns from the union "and have (sic) instructed Mr Russell not to deduct any further union dues". The letter was signed by Dludlu and witnessed by O'Donoghue. Three days later on 17 October 1997, Russell gave Dludlu an increase from R8,91 to R9,40 per hour (exhibit A268) and promoted him from a grade G to a grade F (exhibit A260).

[20] The pattern in the promotion of the three union members who resigned was

abundantly clear. These three employees were thus promoted to the same grade and rate of pay. Moreover, they were the only employees to receive a promotion or an increase in salary for the whole period from August 1997 to January 1998 (exhibit A268). Perhaps significantly, increases (also to some union members, including the two shop stewards) were only again awarded in February 1998 after the dispute arising from the alleged discrimination was referred for conciliation to the CCMA on 4 February 1998.

[21] In the event, the above evidence showed a clear pattern of conduct on the part of the respondent of giving increases and promoting only the three former union members shortly after they had resigned from the union in September/October 1997.

[22] I am therefore satisfied that the applicants who alleged that the rights or protections afforded by sections 5(2)(a)(iii), 5(2)(c)(i) and 5(3) of the Act (quoted above at paragraphs [11], [12] and [13]) have been infringed have proven the facts of such conduct. In other words, the applicants have shown conduct on the basis of which it can be said that the respondent discriminated against the applicants on the basis of their union membership by either requiring a union member to give up his or her union membership and/or prejudicing a union member because of present membership and/or advantaging an ex-union member for not exercising his or her right to belong to a union in terms of section 4(1) of the Act.

[23] The burden of proof in proceedings such as these is prescribed by section 10 of the Act which reads as follows:

"In any proceedings -

(a) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and

(b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter".

[24] The *onus* thus shifts to the respondent to prove that the above conduct did not infringe upon the applicants' right to freedom of association contained in section 4(1) of the Act and the accompanying protection awarded to the applicants in terms the provisions of sections 5(2)(a)(iii); 5(2)(c)(i); and 5(3) of Chapter II of the Act (quoted above at paragraphs [11], [12] and [13]).

[25] The respondent's defence was that the said increases or promotions were given on the basis of the "outstanding performance" by the three employees concerned (see, *inter alia*, paragraph 5.2 of the pre-trial minutes).

[26]Russell testified to the effect that these were merely "merit increases". However, the documents did not appear to support the respondent's case that this was done on the basis of "outstanding performance" (exhibits B95 to B97). Especially the merit rating of Ndledla for 1997 merely noted that he had either "improved" or had been told to improve or was "trying very hard". This hardly constituted evidence of "outstanding performance" on the basis of which to promote an employee of only one year's standing.

[27] Russell further failed to properly explain why he had played such an active role in informing the union of the resignations. He stated that he was merely asked to assist the three employees in writing their resignation letters. However, the said three employees were more than capable of writing these facts down for themselves as their handwritten statements showed (see exhibits B69 to B71). Interestingly, Zulu who resigned in December/January 1997/1998 also completed such a handwritten statement (exhibit B79).

[28] Moreover, the respondent did not explain its failure to call any of the three employees, that is, Nkosi, Ndledla or Dludlu as witnesses to back up their

handwritten statements (above) that they resigned from the union voluntarily because the union failed to do anything for them.

[29] In the event, the respondent has failed to show that the said promotion and increases were not given to reward the three employees for resigning from the union. It follows that this conduct infringed upon the protection awarded especially by section 5(2)(c)(i) of the Act (quoted above at paragraph [12]) in that such conduct clearly prejudiced the union members because the workers who remained members of the union were not given such increases. In other words, the respondent discriminated against the applicants on the basis of their union membership thereby infringing upon their right to freedom of association protected in terms of the provisions of Chapter II of the Act (especially sections 4(1) and 5(1)).

[30] The parties agreed that, should I find that the respondent had discriminated against the applicants in this manner, it would be fair and equitable that the compensation to be awarded should be calculated in the manner set out in Annexure "B" to the pre-trial minutes.

[31] The principle underlying this calculation is that every applicant should receive an increase of 14,77%, that is, the maximum amount of increase that the respondent was prepared to give a worker in order to reward such worker who had resigned from the union, over a period of nine months as from September/October 1997 to 23 June 1998 (the date of dismissal) in the event of a finding that the applicants' dismissal was fair (which is my finding for the reasons discussed below).

[32] The parties further agreed that this principle was to be modified in regard to the four applicants who did, indeed, receive a belated increase as from 1 February 1998, that is, Messrs Nkutha, Mdiniso, P Masuku and P Nkambule. As

from this date, their respective losses were only R 1,24; 98c; 86c; and 70c per hour for the remaining period of five months.

[33] In the event, the other six applicants are to receive the following amounts as compensation according to the above calculations: Mr J Sikhosana - R 2 366; Mr M Mnguni - R 2 219; Mr E Ntombela - R 3 224; Mr C Ndledla - R 2 608; Mr J Nhleko - R 2 916; and Mr E Ntombela - R 2 624. The remaining four applicants are to receive the following amounts as compensation: Mr J Nkutha - R 2 390; Mr E Mdiniso - R 2 084; Mr P Masuku - R 1 818; and Mr P Nkambule - R 1 501.

[34] The respondent led evidence to show that the applicants had partaken in unlawful industrial action before they were dismissed for allegedly embarking on an unprotected strike on 23 June 1998.

[35] Both shop stewards (Nkutha and Mdiniso) who were the only witnesses on behalf of the applicants denied that there was a strike as a result of the alleged failure of the respondent to meet with the workers to discuss their demands on 11 July 1997 (see also the discussion above at paragraph [6] - this dispute was referred to conciliation on 8 July 1997).

[36] However, both witnesses who admitted being able to read and write and who stated that they had received extensive training from the union for their position as shop stewards signed a document on 11 July 1997, headed “meeting” and “resolution of strike” (exhibit B35).

[37] Further, the respondent sent a faxed letter to the union on 11 July 1997 asking it to assist in resolving the “strike” (exhibit B263). In the event, I am satisfied that the workers embarked upon a short work stoppage of about one hour, demanding that a meeting be set up to discuss their demands and that this action constituted a strike within the definition in section 213 of the Act. As there was no

compliance with the required procedures, this industrial action constituted an unprotected or unlawful strike.

[38] The applicants also denied that they embarked upon an illegal strike on 10 September 1997 over a dispute arising from Russell's brother allegedly dismissing Nkutha (see paragraph [8] above). However, the document headed "decision disciplinary enquiry", noting that Nkutha was given a final warning for participating in an illegal strike on 10 September 1997, was duly signed by Nkutha (exhibit B121).

[39] Mdiniso signed a similar document (exhibit B124) as did the other alleged strikers (exhibits B122 to B149). Nobody ever appealed against this decision although the shop stewards admitted that an appeal was possible. The shop stewards stated unconvincingly that they saw no reason to appeal as this would have wasted time. Nkutha even denied knowledge of this type of document or that he had ever attended such disciplinary hearing. However, it was common cause that such hearings did take place as Mdiniso also testified to.

[40] In the event, I am satisfied that the industrial action embarked upon by the applicants on 10 September 1997 and lasting for about one hour constituted a strike within the definition contained in section 213 of the Act. As there was no compliance with the necessary strike procedures, this action constituted an unprotected or unlawful strike for which the applicants received a final warning.

[41] Russell testified to the circumstances giving rise to the alleged unprotected strike on 22 June 1998.

[42] Russell stated that during April 1998 he was approached on behalf of the non-union members of staff with a request to close the factory on Monday 15 June 1998, thereby giving the staff a long weekend as Tuesday 16 June 1998 was a paid

public holiday. Russell agreed provided that workers would only be paid for Monday 15 June 1998 if they worked in time (a total of 8 hours) on two Saturday mornings.

[43] Russell testified that he then discussed this issue with the two shop stewards. They then allegedly consulted the union members and reported back, informing Russell that the union members agreed to his proposal and stated that the dates (the two Saturdays) on which they will work in time was to be discussed later.

[44] However, on 8 May 1998 the union members allegedly reneged on this agreement. Russell drew up a memorandum (exhibit B150) stating the following: "With regard to all of you agreeing that in exchange for having the day off on Monday, 15 June 1998, you would work on two Saturday mornings (09-05-1998 & 16-05-1998) from 8H00 to 12H00. Should any member of staff fail to come to work on those two Saturday mornings, he will not be paid for the 15th June 1998 as the factory will be closed. If any dates would be preferred as a majority, please advise me".

[45] I am not convinced that there was such an agreement between the union members of staff and the respondent The applicants' case was that no such agreement was reached and their witnesses testified to this effect. Russell could not really explain why he did not hold a ballot which appears to be prescribed by section 38 of the Bargaining Council Main Agreement when an employer wanted employees to work in time and which ballot required a 75% majority vote (exhibits A257 to A258).

[46] Moreover, Russell failed to properly explain why he had mentioned the dates of the two Saturdays in the said memorandum (quoted above at paragraph [44]) when, by his own admission, the dates themselves were never agreed with

the union members of staff. The memorandum also did not refer to any agreement reached in April 1998.

[47] In my view, the memorandum was merely an effort to get the union members of staff to agree to the terms already agreed upon between the non-union members of staff and the respondent. It appeared that non-union members of staff did indeed agree and worked in time on these two dates. In other words, the respondent has failed to convince me that such agreement was concluded with the union members of staff during April 1998.

[48] There was a dispute of fact whether Russell then handed the memorandum to the shop stewards. The shop stewards denied ever having received the memorandum of 8 May 1998. However, there is a note on the memorandum (exhibit B150) in Russell's handwriting that he "handed a copy" of the memorandum to them but there were no signatures next to the shop stewards' names admitting receipt. Russell testified that they had refused acceptance (see also the faxed letter to the union in this regard by Russell - exhibit B78). Russell stated that after the said refusal he also attached the said memorandum to the applicants' clock cards on Friday 8 May 1998 and a note to this effect appears on the memorandum (exhibit B149). It was never put to Russell that the applicants would deny this fact.

[49] In the light of the aforegoing, I am satisfied that the applicants did receive the memorandum on 8 May 1998. In fact, the applicants' version that they did not know that the factory would be closed on Monday 15 June 1998 as well as their version that they tendered their services by reporting for work on Monday 15 June 1998 stand to be rejected for the following reasons.

[50] It is highly improbable that the applicants' version of having reported for work on Monday 15 June 1998, finding nobody there and waiting in vain from

7H30 to 12H00, can be true, taking into account the fact that they did not inform the respondent on 17 June 1998 when they returned to work after the public holiday that they had done so.

[51] After all, the applicants alleged that they were under the impression that it would be a normal working day and that the factory would be open. In fact, it was common cause that the applicants failed to raise the issue of the factory's closure even on Friday 19 June 1998 when the applicants received their clock cards at 14H30. Their clock cards registered only 36 hours' of work yet the applicants took them without any comment or complaint. It is highly improbable that not a single question would have been raised had the applicants reported for work as usual on 15 June 1998 not knowing that the factory would be closed. This issue was only raised as a concern on Monday 22 June 1998.

[52] Further, the respondent denied that the applicants reported for work on Monday 15 June 1998 and led evidence to show that the applicants did not do so. Russell stated that he had sent the foreman, O'Donoghue, to see if the workers would report for work on 15 June 1998.

[53] O'Donoghue confirmed this when giving evidence and he stated that he did indeed go to the factory as from 7H20 to 8H10 but found none of the employees present. Although his evidence can be criticised especially on the basis that he could not really say when this instruction and the keys to the factory were given to him, his evidence that he was present at the factory on the said morning was corroborated by Mr T De Matos (a business associate of Russell) who stated that he had seen O'Donoghue there when he went in search of a trailer at around 8H00. De Matos also corroborated O'Donoghue's evidence that the electric gate was closed at the time.

[54] The two witnesses of the applicant contradicted themselves in regard to

this important dispute of fact. They both stated that they had arrived (separately) at the closed factory on 15 June 1998 at their usual starting time of around 7H00 to 7H30 and had waited until 12H00 and that O'Donoghue was never there. However, they contradicted themselves on the important issue of where they spent their time waiting for 4 hours. Although both indicated that the applicants stood at their normal place of waiting for the factory to open, Nkutha stated that they arrived at the gate but waited "next to the caravan".

[55] Mdiniso, on the other hand, stated that the applicants waited "at the gate" and was adamant that they did not wait next to the caravan when questioned about this discrepancy between his evidence and that of Nkutha. The gate and the caravan was 30 to 50 metres apart and the caravan stood adjacent to the factory's premises according to Nkutha's evidence. De Matos' evidence that the caravan stood 30 to 50 metres away also went largely unchallenged and Mdiniso appeared to support this.

[56] In the light of the aforegoing, there is, in my view, no room for the argument that Nkutha's evidence could be construed to mean that the applicants waited next to the gate, given the distance and position of the caravan the applicants supposedly stood "next to" on his version.

[57] In the event, in the light of the inherent improbabilities discussed above and the contradictory nature of the applicants' evidence, I am not satisfied that the applicants tendered their services by reporting for work on Monday 15 June 1998. In fact, I am satisfied on the evidence presented to Court by the respondent that the applicants did receive the memorandum on 8 May 1998, that the applicants were again alerted to the fact that the factory would be closed on Friday 12 June 1998 and that the applicants then failed to report for work on Monday 15 June 1998.

[58] Further, it was common cause that the applicants failed to react in any way both to the receipt of the memorandum as well as to the reminder. The only evidence in regard to their intention to come to work was that the applicants indicated on 8 May 1998 before the receipt of the memorandum that they would prefer to come to work on 15 June 1998 and not work in time on the Saturday mornings.

[59] However, the applicants never again communicated such intention to the respondent in spite of receiving the memorandum to the contrary and the reminder that the factory was to be closed. Instead, the applicants preferred to place before Court a false version that they were not aware of the factory's closure and that they had tendered their services as usual on the Monday.

[60] In the event, even though the evidence that there was agreement on the closure of the factory on Monday 15 June 1998 stands to be rejected (for the reasons discussed above), I am not convinced that the applicants intended to work on Monday 15 June 1998. The applicants never made such intention unambiguously clear to the respondent. In fact, by all appearances the applicants who knew about the closure of the factory on the Monday acquiesced in the decision to close the factory and took no steps to tender their services beforehand. Nor did they arrive for work on the Monday. It was even probable that the applicants intended to utilise the Monday when the factory was closed as a holiday, hoping that they would be paid. Such intention is, of course, the very opposite of an intention to tender their services and to work on the Monday.

[61] The minutes of the meetings held on 22 June and 23 June 1998 appear to fully support the above conclusion. Ms M Hauptfleisch ("Hauptfleisch"), the respondent's labour consultant who was present on both days, testified about the alleged strike and ultimatums given on those two days (more about this later). Hauptfleisch kept minutes of these meetings with both Nkutha and Mdiniso.

Although the two shop stewards denied when giving evidence that such meetings took place this important dispute was never put in cross examination to Hauptfleisch and it was, in fact, common cause that such meetings did take place (see the pre-trial minutes at paragraph 3.17). Many of the facts that she minuted were also not placed in dispute. I also found her to be a trustworthy witness as there were no contradictions in her evidence and much of her evidence was supported by the documentary evidence. In the event, I believe that her minutes or notes of these meetings can be regarded as trustworthy.

[62] I quote the following from Hauptfleisch's notes. Speaking about Monday 15 June 1998, Mdiniso was recorded as answering Hauptfleisch's cryptically recorded question as to whether "[y]ou knew factory closed Monday" as follows: "Yes because he wrote so" and Nkutha was recorded as answering this question as: "Yes". Hauptfleisch's question as to why the applicants came on Monday when they knew the factory will be closed was answered as follows by Nkutha: "Come to check". Revealingly, he does not answer "come to work" as Nkutha and Mdiniso wanted the Court to believe when giving evidence.

[63] Their version before Court was that the applicants did not even know that the factory would be closed on Monday 15 June 1998 and that they came to work believing it to be a normal working day. For the reasons already discussed above, this version stands to be rejected in favour of the respondent's version that the applicants knew about the closure of the factory and did not report for work on the Monday.

[64] The applicants contended that they did not go on a strike when they refused to work on 22 June 1998 and 23 June 1998 and demanded that the respondent first pay them their wages for Monday 15 June 1998.

[65] The applicants relied for this contention on the judgment in *Coin Security*

(Cape) v Vukani Guards & Allied Workers' Union 1989 (4) SA 234 (C). At 239I to J Friedman J (as he then was) stated the following:

"A contract of employment is a contract with reciprocal rights and obligations. The employee is under an obligation to work and the employer is under an obligation to pay him for his services. Just as the employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employer refuses to pay him wages which are due to him".

[66] The Court then applied the above principle to the facts of the matter as follows (at 240E to 241B):

"The respondents' refusal to work on the three days in question did not, under the circumstances, in my judgment, amount to a strike as defined in s 1 of the Labour Relations Act (Act 28 of 1956). To constitute a strike the refusal or failure to work must be in pursuance of an agreement or understanding between them and the purpose thereof must be to induce their employer:

'(aa) to agree to or to comply with any demands or proposals concerning terms and conditions of employment or other matters made by or on behalf of them ...; or

(bb) to refrain from giving effect to any intention to change terms or conditions of employment, or, if such a change has been made, to restore the terms and conditions to those which existed before the change was made; or

(cc) to employ or to suspend or terminate the employment of any person.'

A refusal by an employee to work in response to a refusal on the part of his employer to perform his, that is the employer's obligations in terms of the contract of employment, as is the position here on the respondents' version, does not fall within the ambit of the definition of a 'strike'. It is therefore unnecessary to decide

whether the action of the respondents in not working on the three days in question constituted a legal or an illegal strike.

Mr *Van Schalkwyk* contended that if the respondents were not paid what was due to them or did not receive the meals to which they were entitled, they had various alternatives available to them. They could, he said, resign and sue the applicant for damages or they could simply sue the applicant for damages or they could make use of the provisions of the Labour Relations Act (Act 28 of 1956) in order to settle the dispute, but they could not refuse to work.

I do not agree with this contention. Having regard to the reciprocal rights and obligations flowing from a contract of employment as set out above, refusal by the employer to perform his part of the contract, in my judgment, entitles the employee to refuse to carry out his side of the bargain as well. For these reasons, I find that the termination of the respondents' employment was unlawful".

[67] The new Labour Relations Act, Act 66 of 1995, which replaced the former Labour Relations Act, 28 of 1956, referred to in the above judgment, defines 'strike' somewhat differently in section 213:
"**strike** means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory".

[68] What does remain the same today are the contractual principles under common law identified in the above judgment. The employment contract is a contract with reciprocal rights and obligations.

[69] In the event, the refusal of employees to work in response to a failure on the part of the employer to perform its obligations, such as paying the employees for services rendered, is a **lawful** refusal in that it does not amount to a breach of contract under common law. In other words, the employees are **legally entitled** to refuse to carry out their side of the employment contract. In fact, it is the employer who is breaching the employment contract by unlawfully failing to perform its **reciprocal obligation(s).**

[70] Having regard to these legal principles, such lawful entitlement of employees to refuse to work must, in my judgment, be distinguished from a strike where the concerted refusal to work by employees amounts to an unlawful breach of contract under common law. In other words, such lawful entitlement of employees to (collectively) refuse to work does not constitute a strike as defined in terms of section 213 of the Act (quoted above at paragraph [67] - see also Cheadle H in *Current Labour Law* JUTA 1999 at pp 70 to 71).

[71] In fact, a strike which amounts to unlawful breach of contract (under common law) can be branded as misconduct for the purposes of the dismissal of the strikers concerned. This is explicitly provided for in terms of the present Labour Relations Act (item 6 of Schedule 8, also discussed below) with the ever important proviso, of course, that a strike that can be defined as a protected strike in terms of the provisions of Chapter IV of the Act is not a legitimate ground for dismissal. In fact, the fundamental right to strike is entrenched and protected in terms of these provisions of the Act.

[72] In view of the foregoing, care should, in my judgment, be taken to ascertain the circumstances or facts which present themselves in every case under investigation. The question must be answered: Is the collective refusal to work in response to the failure of the employer to perform its reciprocal obligations under

the employment contract or is the purpose of the collective refusal to work to place pressure on the employer to remedy a grievance or to resolve a dispute? Only in the last-mentioned instance would such concerted refusal constitute a strike in terms of section 213 of the Act.

[73] It may be difficult to answer the said question where the employer is in breach of contract because of a unilateral change to the terms and conditions of employment by the employer. The employees will namely then be able to make an election. On the one hand, the employees can elect to pursue their contractual remedies (referred to also in the above judgment) including the lawful entitlement to refuse to perform their contractual obligations until the employer remedies the breach of its reciprocal obligation. On the other hand, the employees will also be entitled to embark on protected strike action under these circumstances.

[74] Section 64(4) of the Act makes it clear that a dispute about a unilateral change to terms and conditions of employment can give rise to an employee's right to strike in terms of section 64(1)(a) of the Act. Section 64(4) and (5) even provides for a restoration of the unilateral change pending conciliation of the dispute, thereby putting pressure on the employer to bargain with the employees on this dispute.

[75] See in this regard also the judgment in *Monyela & others v Bruce Jacobs t/ a LV Construction* (1998) 19 *ILJ* 75 (LC). Zondo J (as he then was) stated the following at 82J to 83A:

"First of all it is clear that employees are given **the right to strike** over a dispute about a unilateral change of their terms and conditions of employment **despite it being a rights dispute**. This is to be gathered from a reading of s 64(1) read with s 64(1)(a)(i) and (ii) as well as 64(4) and (5). So pending the happening of any one of the events referred to in s 64(1)(a)(i) or (ii), the employees or the union is

entitled to prevent the employer from effecting a change to the terms and conditions of employment by requiring the employer in the referral not to effect such a change and, if such change has already been effected, by requiring the employer to restore the status quo. Once the event referred to in s 64(1)(a)(i) has occurred, or the period referred to in s 64(1)(a)(ii) has expired, and the employer is no longer obliged to comply with the union's s 64(4) requirement, the employees may go on strike and such strike will be a **protected strike**" (emphasis supplied).

[76] The judgment also underlined the principle referred to above that, in addition to this remedy of a protected strike, the employees can elect to rather or also exercise their contractual remedies (at 82E - G):

"If the employer changes the terms and conditions of employment of the workers without their consent, its conduct may constitute a repudiation of the workers' contracts of employment. In that event the workers will have an election whether to accept the repudiation and claim whatever damages they may suffer as a result of such repudiation or they may reject the repudiation and hold their employer to their contracts of employment".

[77] It remains to carefully apply the factual findings *in casu* (discussed above) to the legal principles identified here.

[78] The respondent wanted to effect a unilateral change to the terms and conditions of employment of the applicants when Russell made his intention clear that Monday 15 June 1998 would be regarded as an unpaid holiday and that the workers would only be paid for the day if they worked in time on two Saturday mornings. The respondent managed to secure agreement on this unilateral change to the terms and conditions of employment with the non-union members of staff who worked in time on 9 and 16 May 1998 and duly took the holiday on 15 June 1998.

[79] However, no agreement was reached with the union members (the applicants). In other words, the respondent acted in breach of the applicants' employment contracts when the factory was closed for an unpaid holiday on 15 June 1998. The applicants' reaction was to also stay away from work on 15 June 1998. In fact, for the reasons fully discussed above, the applicants never tendered their services for 15 June 1998.

[80] The applicants embarked upon a concerted refusal to work on 22 June 1998 and demanded that the respondent pay them their usual wages for 15 June 1998 (this was common cause).

[81] The applicants alleged that this concerted refusal to work was in response to the respondent's failure to comply with its reciprocal obligation in terms of their employment contracts to pay them for 15 June 1998. However, as the applicants never tendered their services for 15 June 1998, there was no reciprocal obligation on the employer to pay them for that day.

[82] In the event, when the applicants refused to work on 22 June 1998 the respondent was not in breach of its reciprocal obligations in terms of the employment contracts. The applicants should have been aware of this fact as it was they through their actions who elected not to tender their services for 15 June 1998 and who utilised this day as a holiday. Nevertheless, they collectively refused to go back to work unless they were paid for 15 June 1998.

[83] This conduct of the applicants amounted to a breach of their reciprocal duty to render their services on 22 June 1998 (the action continued on 23 June 1998). In fact, their concerted refusal to work on 22 and 23 June 1998 was not only unlawful (under common law) but (on the facts presented to Court) the demand to be paid was, if truth be told, a demand that the respondent change its

unilateral decision to regard 15 June 1998 as an unpaid holiday (unless time is worked in) and for the respondent to pay up.

[84] In the event, the concerted refusal to work was for the purpose of resolving the said dispute and this action falls squarely within the definition of a strike as defined in terms of section 213 of the Act (quoted above at paragraph [67]). Further, the strike was an unprotected strike because the applicants failed to adhere to the prescribed procedures in terms of the Act (especially section 64(1)(a) and (b)). This was, in fact, common cause.

[85] The only question which remains to be answered is whether the dismissal of the applicants for embarking upon the unprotected or unlawful strike action was fair.

[86] Hauptfleisch gave credible evidence supported by documentary proof that no less than four ultimatums were given, requesting the strikers to return to work (exhibits B151, B152, B155 and B159, respectively). The applicants admitted that the two shop stewards received these ultimatums.

[87] However, it was put to Hauptfleisch that the ultimatums were never translated to the strikers. She insisted that she saw Nkutha and Mdiniso discussing the ultimatums with the other applicants (the strikers). Nkutha likewise denied that the ultimatums were discussed with the strikers. However, Mdiniso contradicted him and stated that the ultimatums were indeed explained to the strikers by Nkutha as Hauptfleisch had testified.

[88] Further, Nkutha allegedly had problems with the legibility of some of the ultimatums. However, Mdiniso knew of no such problems. Further, when it was put to the two witnesses for the applicants that there was enough time to reflect, especially in regard to the fourth ultimatum, they both eventually admitted that the

time to reflect (from 12H50 on 22 June 1998 to 7H30 on 23 June 1998) was sufficient.

[89] In this regard Hauptfleisch also testified that the strikers were afforded a further opportunity to return to work at about 8H30 on 23 June 1998 and was only dismissed at 11H30 (see also exhibit B202).

[90] As far as intervention by the union was concerned, Nkutha stated that he could not remember that the union was ever in telephonic contact with the shop stewards on 22 June 1998. He could also not remember receiving any advice from the union.

[91] However, Mdiniso stated that he did indeed speak to the union on that day and that the union official (Ms H Mhlongo) did indeed advise the strikers to return to work (provided they were paid - see exhibit B201for Mhlongo's written recording of this fact). In this regard, Hauptfleisch pointed out that the respondent tried to fax two letters to the union requesting the union to intervene (exhibits B153 and B156). In a faxed letter the union answered the respondent that they were unable to attend a meeting scheduled for 12H30, *inter alia*, "due to prior obligations" (exhibit B158). The respondent then sent a faxed letter to the union informing it of the final and fourth ultimatum (exhibit B160 to B161). According to the pre-trial minutes, it is common cause that all the correspondence was received by the respective parties (paragraph 3.19).

[92] Meetings between the two shop stewards and Hauptfleisch (sometimes in the company of Russell) did take place on 22 June 1998. As is also pointed out above, Hauptfleisch minuted these meetings (see exhibit B230 to exhibit B239) and the shop stewards' allegation that no meetings took place stands to be rejected. In fact, according to the pre-trial minutes the fact that meetings took place on 22 June 1998 to resolve the dispute was common cause (paragraph 3.17 of the pre-trial minutes).

[93] A meeting between the respondent and the union took place at 12H35 on 23 June 1998 after the dismissal of the strikers. Hauptfleisch stated that even at this late stage the respondent made a further offer to the union official (Mr S Lunga) but that the offer to pay the applicants if they were prepared to work time in was again refused.

[94] Item 6(1) of schedule 8 to the Act states that participation in a strike that does not comply with the provisions of Chapter IV of the Act, that is, an unprotected or unlawful strike (such as the strike *in casu*) is misconduct. However, such misconduct does not always deserve or justify the dismissal of the strikers concerned. The substantive fairness of such dismissal is to be determined in the light of the facts of the case, including factors such as the seriousness of the contravention of the Act, attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct by the employer.

[95] The applicants *in casu* did not attempt to refer the dispute that gave rise to their unlawful strike action for conciliation (in terms of section 64(1)(a) of the Act) neither did they give a strike notice (in terms of section 64(1)(b) of the Act) and such failure was also not properly explained. In the event, the contravention of the Act was serious and no attempts were made to comply with its provisions. Further, even though the respondent was an employer that discriminated against union members (see the findings of the Court above) and its conduct in dismissing union members should therefore be carefully scrutinised, there is no indication that the unjustified discrimination (underpayment) provoked the unlawful strike.

[96] A different dispute gave rise to the strike which resulted not from an act of discrimination but from a unilateral change in the terms and conditions of employment of the applicants.

[97] As was also pointed out above, workers may legitimately embark upon strike action over such dispute and such strike will even be protected provided the prescribed procedures were followed. The problems *in casu* arose because these provisions of the Act were flaunted by the strikers themselves without any proper explanation. In the event, the applicants were the authors of their own misfortune and their unlawful strike action justified their dismissal, provided fair procedures were followed in dismissing them. In this regard it must also be remembered that the applicants had partaken in two unprotected strikes before and received a final warning for partaking in unlawful strike action during September 1997, less than a year before (see the discussion above at paragraphs [37] and [40]).

[98] Item 6(2) of schedule 8 contains guidelines for fair procedures when dismissing workers for partaking in an unlawful strike.

[99] I believe that these guidelines were adhered to by the respondent. It contacted the trade union at the early stages of the strike and a whole day went by before the applicants were dismissed. The respondent therefore cannot be blamed for the fact that the trade union communicated only telephonically with management and the shop stewards and never attended the meetings held with the shop stewards to resolve the dispute. The shop stewards never questioned the fact that the ultimatums issued were in clear and unambiguous language and they eventually also admitted that especially the final and fourth ultimatum gave enough time to reflect and respond to it.

[100] In the event, it follows that the dismissal of the applicants by the respondent for partaking in an unprotected or unlawful strike on 22 and 23 June 1998 was justified and fair.

[101] As far as the question of an order as to costs is concerned, both parties

were only partially successful and it will accordingly be fair to make no order as to costs.

[102] I make the following order:

1. The respondent discriminated against the applicants by infringing upon the protection provided by section 5(1) and section 5(2)(c)(i) of the Act in September/October 1997.

2. The respondent is to pay as compensation for the said discrimination to the applicants within 14 days of the date of this order the following amounts:

(a)	Mr J Nkutha	-	R 2 390.
(b)	Mr E Mdiniso	-	R 2 084.
(c)	Mr J Sikhosana	-	R 2 366.
(d)	Mr M Mnguni	-	R 2 219.
(e)	Mr P Masuku	-	R 1 818.
(f)	Mr E Ntombela	-	R 3 224.
(g)	Mr C Ndledla	-	R 2 608.
(h)	Mr P Nkambule	-	R 1 501.
(i)	Mr J Nhleko	-	R 2 916.
(j)	Mr E Ntombela	-	R 2 624.

3. The dismissal of the applicants by the respondent on 23 June 1998 was fair.

4. No order is made as to costs.

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BASSON, J

On behalf of the applicants:	Mr D Maluleke of National Entitled Workers Union
On behalf of the respondent:	Mr D Coetsee of Coetsee Van Rensburg
Dates of hearing:	1,2 3,4,8 and 10 November 1999
Date of judgment:	22 November 1999