IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Reportable

APPEAL CASE NO: CA 11/2007

In the matter between:

NATIONAL UNION OF MINEWORKERS
Obo 112 EMPLOYEES

Appellants

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER C H BOTHA N.O.

Second Respondent

SONOP DIAMOND MINING (PTY) LTD
(Formerly t/a SONOP DELWERY)

Third Respondent

Coram: Mlambo JP, Davis JA and Landman AJA

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JUDGMENT

DAVIS, JA

[1] This is an appeal against a judgment of Nel AJ dated 27 June 2007 in which the learned Acting Judge dismissed an application to review and set aside an arbitration award issued by second respondent on 5 May 2005.

The background facts

[2] Third respondent conducts mining operations which take place throughout each day of the year on a 24 hour basis. Two weeks before the public holidays on 9, 12 and 14 April 2004, the third respondent advised its employees that the plant would be closed on Good Friday 9 April 2004 and would only recommence at 18h00 on Wednesday 14 April 2004. In terms of the notices which were issued, employees were advised that, if they did not work on the nightshift of Thursday 08 April 2004 or commence to work on the nightshift of 14 April 2004, they would not be paid for the Easter weekend.

[3] A number of employees did not report for the nightshift of 8 April 2004. In addition, a number of employees did not work the nightshift of 14 April 2004.

[4] On 21 and 24 April 2004 the employees who did not report for duty on either of the two nightshifts were not paid at all for a specified number of days or had deductions made from their wages. On 24 April 2004, certain employees refused to return to their work stations, until such time as the monies, which had been deducted or had not been paid to them, had been so paid. At approximately 11h45, Mr Kobus Viljoen, a senior employee of the third respondent, requested the striking employees to appoint four representatives in order to discuss the problem of deducted wages whilst the other workers

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return to their posts to commence work. It appears that there was a refusal to appoint representatives, as all of the workers wished to engage with third respondent.

[5] At approximately 12h00 Mr Viljoen gave an ultimatum to the relevant workers informing them that, by so refusing to work, the employees were participating in an illegal strike and that should they, save for their representatives, fail to return to work by 13h00, they would be suspended and charged with participation in an illegal and unprotected strike.

[6] Contact was then made between the human resources manager of third respondent, Mr De Villiers, and a representative of appellant, Mr Lekwane but by 13h15 the relevant employees were still refusing to make available any representatives or to commence work. At this time Mr De Villiers spoke to the various employees who informed him that they wanted to be paid immediately. He replied that it was not possible to effect payment immediately, given that it was a Saturday afternoon and banking institutions were closed and, furthermore, that the employer did not have the requisite amount of cash. Upon refusing to commence their duties, he then verbally suspended the relevant employees although by then certain of the group had decided that they would not participate in the work stoppage any further. Later that day a similar situation occurred with the night shift where certain of these employees indicated that they wished to work but others refused. An ultimatum was also given to workers who were due to commence working at 20h00 but had refused to do so. Those employees who refused to work were then suspended.

[7] Mr De Villiers testified that on 26 April 2004 he had been contacted by Mr Viljoen who informed him of similar problems with the morning shift on that day. At this stage it appeared that the third respondent was of the view that it would correct the necessary payments although the actual payments would be included only at the next payment date. The work shift of 26 April 2004 appeared to have been divided. A number of employees decided to work but the majority decided to continue with the work stoppage. The employees, who

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decided to continue with work stoppage, were issued with suspension letters that they refused to accept.

[8] On the same day Mr De Villiers sent a letter to appellant to informing it that the employees had taken part in an unprotected strike; that the dispute would be discussed on 27 April 2004; and that disciplinary proceedings would commence at 11am on 29 April 2004. A notice of the disciplinary hearing was handed to Lekwane to represent the workers. On 28 April 2004, in terms of which, those employees who had participated in the work stoppage were charged with taking part in an illegal and unprotected strike, intimidation/incitement and disruptive behaviour. Subsequently the second and third charges were dropped.

[9] The disciplinary hearing was conducted where the employees were represented by union representatives. A recommendation was made that the affected employees who had been found guilty be dismissed. This recommendation was carried out on 10 May 2004.

The arbitration

[10] In arbitrating the dispute, second respondent concluded that, as the various employees had not followed the provisions of section 64 of the Labour Relations Act 66 of 1995 ('LRA') before they embarked on the strike, it followed that they had taken part in a procedural unprotected strike. Hence the question arose as to the applicable sanction for their unlawful conduct.

[11] Second respondent accepted that the employees had been correct that third respondent had wrongly deducted money that was due to these employees for the public holidays, Good Friday and Election Day of 2004. Accordingly, it was stated that the employees had every reason to be upset for the fact that the employer deducted the monies that they were entitled to for these days… the employees were entitled to refuse to work on public holidays. This, however, does not mean that the employees were entitled to go on a wild cat strike two weeks later when they established that they did not receive the payment they were entitled to for the public holidays However, second

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respondent found that the employees had acted in total disregard of the provisions of the LRA, in that they had not been willing to negotiate with third respondent when the latter requested that they appoint a representative. It is the second respondent's finding that all of the affected employees had been given sufficient time to reflect on an ultimatum and to respond thereto. Accordingly, second respondent concluded that the dismissal of the employees for participating in the strike action had been both substantively and procedurally fair.

<u>The strike</u>

[12] The first question to be answered is whether appellants had participated in a strike. In terms of section 213 of the LRA a 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 purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer or employee."

[13] Mr Cloete, who appeared on behalf of the appellants, submitted that, as the employees had ceased work not to address a general grievance about a wage dispute or other issues of mutual interest but lawfully to enquire about wages to which they were entitled, their action could not be classified as that of a strike but rather as another form of withholding of work.

[14] In my view, this submission would lead to the rather anomalous conclusion that where workers who had refused to work in circumstances where the dispute was not a matter of mutual interest but of right, then the concerted refusal to work in such circumstances would not be classified as an unprotected strike but would not be a strike at all. Manifestly, this conclusion cannot be accepted.

[15] A strike, as defined, has three key characteristics.

1. There must be a requisite act or omission;
2. It must be concerted; and

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3. It must be directed at the achievement of a specified purpose.

See Brassey, *Commentary on the Labour Relations Act* at A9 - 32 and the cases collected at footnote 1.

[16] In the present case, the affected employees refused to engage in their normal employment duty, which was to work on a particular shift. By refusing to observe the rules of the appellant and to carry out the instructions to continue to work in terms of the contract, they had refused to work. In this case, the action was concerted, in that a number of employees had participated in a decision to withhold their labour. As to the third requirement, there was a common purpose insofar as the employees were concerned, being to obtain redress for the third respondent's decision to withhold payment.

[17] Reference was made to the decision made by Basson J in *Nkutha and Others v Fuel Gas Installations (Pty) Ltd*,[1] where the learned judge said:

> "*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).*
>
> *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 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.*

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[1] [2000] 2 BLLR 178 (LC) at paras69 - 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."

[18] I find it difficult to accept the justification for this distinction between a collective refusal to work in response to a contractual breach by an employer and a collective refusal to work to place pressure to resolve a dispute. That is not in accordance with the section. Section 213 provides that "*[t]he 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… for the purpose of remedying a grievance*" constitutes a strike. Whether affected employees can decide to cancel the contract pursuant to a breach by the employer or sue for damages is beside the point. The key issue is to classify whether, on its own, the refusal to work for whatever reason in order to remedy a grievance falls within the scope of the Act's regulation of a strike. In my view, it manifestly does so and accordingly the *dictum* in *Nkutha* does not adequately reflect the position as encompassed in section 213.

[19] In summary, I am of the view that the refusal to work on both 24 and 26 April 2004 by the affected employees constituted a strike as defined and given that the procedures set out in section 64 of the Act were not followed, the strike stands to be classified as an unprotected strike.

<u>The fairness of the dismissals</u>

[20] Employees who participate in an unprotected strike can be dismissed in terms of section 68(5):

"(5) Participation in a strike that does not comply with the provisions of the Chapter, or conduct in contemplation or in furtherance of that

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strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account."

[21] However, the unprotected nature of this strike is not a license to dismiss without a careful consideration of the surrounding circumstances. In determining whether those workers who participated in an unprotected strike should be dismissed, a number of considerations must be part of the decision. Item 6(1) of the Code of Good Practice provides as follows:

> *"(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissals in these circumstances must be determined in the light of the facts of the case, including –*
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> *(a) the seriousness of the contravention of this Act;*
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> *(b) attempts made to comply with this Act; and*
>
> *(c) whether or not the strike was in response to unjustified conduct by the employer."*

[22] This provision of the Code affirms earlier law where the illegality of the strike did not automatically result in the dismissal of unprotected strikers. See, for example, *Betha v BTR Samcol* (A Division of BTR Dunlop (Ltd),[2] where the court held that the employer had conducted itself in bad faith, which was shown in its inflexibility to the reasonable approach by the union to the settlement of outstanding issues relating to a recognition agreement .In particular, the court found that the union was motivated by the desire to rid itself of the union. All of these factors were considered by the court to justify the strike sufficiently to entitle the dismissed employees to relief.

[23] The key question therefore is whether, in this case, dismissal was justified. The approach set out in *Sidumo and Another v Rustenburg Platinum Mines*

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[2] (1998) 19 ILJ 459 (SCA)

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Ltd and Others,[3] holds that to review an arbitration award, the reviewing court has to come to an conclusion that the award was one that a reasonable decision maker could not have reached in the circumstances. Accordingly, it is necessary to return to the reasoning of the second respondent.

[24] The second respondent noted that which was common cause that third respondent had wrongfully deducted the money that was due to the employees and therefore had acted illegally and in breach of contract. He, further, noted that they had every reason to be distressed with this illegal decision on the part of the employer. Furthermore, he held that no evidence had been presented to the effect that the monies which had been deducted had been the outcome of any disciplinary procedure, where the relevant employees had been given the opportunity to explain their conduct in question. He further noted that the strike can be described as fairly peaceful. He further accepted that the object of the strike was to force the employer to pay back the money that had been unilaterally deducted'. Furthermore, the absence of the employees had not had a significant impact, so that only 3 x 12 hour shifts had been affected. No evidence was led that this had a major financial impact on the employer's overall operation. Indeed, it appears that the estimated loss to the third respondent was between R120 000 to R180 000.

[25] In weighing up these factors in favour of the dismissed employees, second respondent emphasised that the employees had acted in clear breach of the provisions of the LRA in striking and that, while that they might have had a noble objective, they also had alternative remedies sourced in contract or dialogue with representatives of third respondent. In addition, he placed emphasis on the fact that the various shop stewards could not offer any acceptable explanation why they themselves did not make any attempt to contact the union officials when involved in a union dispute. Furthermore, the third respondent had acknowledged its mistake and had offered to make

[3] (2007) 12 BLLR 1097 (CC)

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redress at the next official payment. In addition, clear and fair ultimatums had been given by third respondent to the employees.

[26] Mr Aggenbach, who appeared on behalf of third respondent, submitted that second respondent had constructed a fair and careful award in which he had taken account of all considerations in coming to the conclusion that dismissal was a justified remedy in the circumstances of this unprotected strike. The applicable question, however, is whether second respondent reasonably weighed all of the factors in order to come to a reasoned decision. In my view, he failed to do so. The reaction of the affected employees was directly attributable to a unilateral action on the part of third respondent to withhold wages. The fact that third respondent might have offered to repay the amounts at some later date did not remove the legitimate anger and concern of employees who, given their circumstances, were hardly likely to have the necessary resources to sustain their basic standard of living when monies were unilaterally deducted in this fashion. The employees did not respond in a violent fashion. According to the findings of second respondent, their action did not last for very long; did not cause huge losses to the operation of third respondent; and, even second respondent, was constrained to admit that they might have had a noble objective. Once it is accepted that participation in an unprotected strike is not inevitably to be visited with dismissal, second respondent was bound to consider all the factors that were listed in the award both those in favour of the employers decision to dismiss and those in favour of the applicable employees.

[27] In my view, a reasonable decision maker, who arrived at a conclusion which properly took account of all of these factors, particularly those in favour of the affected employees and with knowledge of provisions of item 6(1) of the Code of Good Practice and the case law which underpins this provision to the effect that, even in the case of an unprotected strike, dismissal is not the automatic default position, would have arrived at a different result. A reasonable decision maker, given all of the circumstances of this case would have considered that an alternative to dismissal was manifestly indicated and for

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this reason would have decided that the employees had been unfairly dismissed.

[28] In the result therefore, the appeal succeeds with costs and the order of the court *a quo* of 27 June 2007 is set aside and replaced with the following order:

1. The arbitration award issued by second respondent on 5 May 2005 is reviewed and set aside.
2. The individual applicants are reinstated in the employ of third respondent as from the date of this judgment, 27 June 2007.
3. Third respondent is ordered to pay the applicants costs.

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DAVIS JA

I agree,

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MLAMBO JP

I agree

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LANDMAN AJA

Date of Hearing: 17 March 2011

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Date of Judgment:

Appearances for the Appellant: Neville Cloete

Instructing Attorneys: Neville Cloete Attorneys Inc.

Appearances for the Respondent: Morne Aggenbach

Instructing Attorneys: De Klerk & Van Gend Inc.

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