CG CASE NUMBER: 726/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL AUTOMOBILE AND ALLIED WORKERS' UNION (now known as NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA) Appellant

and

BORG-WARNER SA (PTY) LIMITED Respondent

CORAM: JOUBERT, NESTADT et VAN DEN HEEVER JJA

HEARD ON: 15 NOVEMBER 1993

DELIVERED ON: 30 MARCH 1994

J U D G M E N T

VAN DEN HEEVER JA

On 14 January 1986 an agreement was concluded between a registered trade union, the National Automobile and Allied Workers Union, now known as the National Union of Metalworkers of South Africa ("the Union"), and Borg-Warner SA (Pty) Ltd, now known as Gearmax Pty Ltd ("the Company"). This agreement is at the root of the present appeal. It reads:

> "RE-HIRING AGREEMENT BETWEEN BORG-WAGNER S.A. (PTY) LIMITED AND THE NATIONAL AUTOMOBILE AND ALLIED WORKER'S UNION
>
> 1.) Following negotiations with the National Automobile and Allied Worker's Union, Borg-Warner S.A. (Pty.) Limited agrees to re-hire 164 of the N.A.A.W.U members dismissed as a result of illegal strike action on 17 October 1985.
>
> 2.) The 164 members will commence work on Monday, 20 January 1986.
>
> 3.) The administrative arrangements for re-hiring are as follows:-

a) The first 82 members on the list of the 164 members to be re-hired must report to the Personnel Office between 8.00 a.m. and 3.30 p.m. on Tuesday, 14 January, 1986.

b) The remaining 82 members on the list

of the 164 members to be re-hired must report to the Personnel Office between 8.00 a.m. and 3.30 p.m. Thursday, 16 January 1986.

c) In the event that members do not report for re-hiring during the course of this week (week ending 17/1/86) it will be assumed that they do not want re-employment at Borg-Warner and another person from those mentioned in item 5 below will then be employed in their place. (Genuinely ill members will be excluded from the above proviso provided that a doctor's certificate be furnished in each case).

d) At the Personnel Office, the necessary administrative work such as signing of conditions for reemployment, taking of I.D. Cards etc. will be performed.

4.) Members will be re-hired in their old jobs as far as possible (all things being equal) but will start at the minimum rate for the applicable Borg-Warner grade.

5.) The balance of the 57 dismissed members together with employees previously retrenched during 1984/85 will be considered for re-employment as and when the need arises. Provided where skills are required which the aforesaid don't have, the company shall have the right to employ outside persons having the necessary skills.

6.) Re-instatement of service related benefits excepting pay be deferred for a period ending concurrently with the annual factory shutdown in December 1986 on condition that negotiated procedures are followed and that Borg-Warner S.A. (Pty.) Limited experiences no strike action, overtime bans, go-slow work periods or any other form of industrial action during this period.

7.) The employees to be re-hired will be required to sign a "conditions for re-employment" form.

The National Automobile and Allied Workers Union signs and agrees that they understand the contents of this agreement fully and are fully satisfied in all respects with each and every aspect mentioned in the agreement."

Among the employees referred to in clause 5 as having been retrenched, were workers who were members of other unions. In what follows I refer to this mixed group of previously retrenched and recently dismissed employees, as "the pool".

As time went by the Company re-employed many of those who had been earlier retrenched and a few of those who had been dismissed. It also employed persons

from outside the pool. There were queries and intermittent protests about this in letters to the Company from the Union and at meetings of the Shop Stewards' Committee. On 19 August 1988, the Union asked the Secretary of the National Industrial Council of the Iron, Steel, Engineering and Metallurgical Industry for the Eastern Province, of which both the Union and the Company were members, to convene a meeting to consider and attempt to settle "an Unfair Labour Practice dispute" between the parties. The dispute was described as "arising out of the Company's breach alternatively unfair implementation of the rehiring agreement", a copy of which was attached. Failing settlement, the Union intended referring the dispute to the Industrial Court for determination under section 46(9) of the Labour Relations Act No 28 of 1956 ("the Act"). Subsection (c) of that enjoins the Industrial Court to determine a dispute concerning an alleged unfair labour practice which the Industrial Council has not succeeded in

settling, "on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation".

It was common cause that the Act as it stood before certain amendments came into operation in September of 1988, was the touchstone against which the validity of the Union's charge against the Company, based on past events, should be tested. Sec 1 of the Act as it then read provided that, unless the context indicated otherwise,

> "'employee' means any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and ... any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer; and 'employed' and 'employment' have corresponding meanings."
>
> "'employer' means any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who ... permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business; and 'employ' and 'employment' have corresponding meanings."

"'unfair labour practice' means -

(a) any labour practice or any change in any labour practice other than a strike or a lockout which has or may have the effect that -

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work, security or physical, economic, moral or social welfare is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer of class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby;

(b) or any other labour practice or other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a)."

In referring the dispute to the Industrial Court, the Union (acting on behalf of its members) in its "Statement of Case" set out the contents of clause 5 of the re-hiring agreement, stated that the Company had

engaged persons in casual employment from outside the pool, and alleged that -

> "The respondent has accordingly breached, alternatively unfairly implemented, the re-hiring agreement ... which breach, alternatively which unfair implementation, constitutes an unfair labour practice in that:
> 1. the employees who are beneficiaries of the agreement have had their job security and employment opportunities unfairly affected;
> 2. labour unrest has been promoted thereby;
> 3. the relationship between employer and employee has been detrimentally affected."

It sought an order compelling specific performance of the undertaking in future, and for further relief including compensation for all and reemployment of some of the beneficiaries under the rehiring agreement.

The Company opposed the Union's demands. In its reply to the Union's statement of case, it admitted engaging persons from outside the pool in permanent positions and not only by way of casual employment. It however denied that in doing so it breached the

agreement since according to its plea it -

> "1. ... did consider the applicant employees and/or
> 2. the applicant employees have become employed, reached retirement age, or left the area and no longer qualify for reemployment."

It also denied each and every component part of the Union's allegation, quoted above, that its conduct constituted an unfair labour practice.

Before evidence was led, the Company challenged the jurisdiction of the Industrial Court on the grounds that the dispute, not being one between employees and employers, was not a labour dispute. It was based on a contract between the Company and the Union, relating to persons who had ceased to be employees.

The Industrial Court dismissed the attack on its jurisdiction, commenting that "the Act clearly envisages that relief can be granted ... to an employee who is no longer employed by his employer".

The Union then led the evidence of a number of men who had been dismissed in 1985, and of a shop steward still in the employ of the Company. After discussions between the parties' representatives, two documents were handed up to the court which disposed of ancillary issues which had clouded the main ones. Exhibit A is a list of the individuals agreed upon as being represented by the Union in the matter. The 104 names listed are those of members of the pool but do not constitute the entire pool (presumably because that contained members of other unions also). Against each name appears the age of the man, his period of service with the Company, whether he had been retrenched or dismissed, and his employment status at the time of the trial. Some were back with the Company, many were employed elsewhere, 35 were at that stage unemployed. In exhibit B the Company admitted that the facts set out in exhibit A were correct, and further that some of the individuals listed had applied for re-

employment with the Company, without success; all those mentioned in A who had been re-hired by the Company, had been approached by the Company; none of those not re-employed, had been so approached; when vacancies occurred in certain listed job categories, there had been a person or persons in the pool who qualified for consideration by the Company, having previously been employed by the Company in the same or a higher job category. Despite this, the Company had employed persons from outside the pool in those vacancies on certain occasions.

The Company tendered no evidence, confining its opposition to the order sought by the Union to argument: that clause 5 imposed on the Company only an obligation to "consider" re-employing members of the pool; and that neither the evidence led by the Union nor the admissions made by the Company brought the conduct of the latter within the definition of an unfair labour practice as alleged in the Union's statement of

Case.

The Industrial Court ruled against the Company. It did not deal with the position of any specific individual listed in exhibit A. There was no evidence to justify a finding that

> "... the persons mentioned in clause 5 would all have been accommodated had (the Company) looked to the 'pool' solely and not to outside workers. Further it appeared that more than one person in the 'pool' was eligible for a position which became vacant and ... (i)t is impossible for the Court to decide which one of the two or more persons from those mentioned in clause 5 would have been appointed to a particular position which became vacant".

Accordingly the claim for compensation was refused. The company was however directed to comply with the rehiring agreement. It was told how to go about this, namely

> "2. The (Company) is directed to advise the (Union) and the Industrial Council in writing of all vacancies arising from time to time which will enable the (Union) to communicate the existence of a vacancy to such employees as are qualified to fill such vacancies in order that such person or persons may apply for

> such position or positions. If no application is received by (the Company) from a qualified ex employee within seven days from the notification of a vacancy, the Respondent will be free to employ any other person or persons."

It was directed that there be no order as to costs.

The Company appealed to the Eastern Cape Local Division of the Labour Appeal Court against the judgment and order of the Industrial Court. The appeal was upheld with costs. The judgment of Erasmus J is reported in (1991) 12 ILJ 549. He upheld the Company's objection to the jurisdiction of the Industrial Court. The effect of his judgment is that under the Act, the relationship between employer and employee comes to an end when the contract between them is lawfully terminated. A dispute between the parties to the contract after its termination is a labour dispute only when the dismissal is the very subject of the dispute. The present dispute does not fall within that category. No employer-employee relationship existed between the

Company and the members of the pool when the agreement was concluded between the Company and the Union. The definitions of "employer" and "employee" do not extend to include a prospective employer nor an ex-employee. An act of employment or re-employment is therefore not a labour practice and falls outside the domain of the Industrial Court. And appellant could not take refuge in par (a) (iii) of the definition of an "unfair labour practice". There was no proof of actual "labour unrest" as envisaged in the definition.

The approach of the Labour Appeal Court (which granted leave to appeal) appears to be in accordance with the view of Tindall JA in DHANABAKIUM v SUBRAMANIAN & ANOTHER 1943 AD 160 at p 167 that "(i)t is a sound rule to construe a statute in conformity with the common law rather than against it". it did not however take sufficient cognisance of the rider immediately following on this statement: "except where and so far as the statute is plainly intended to alter the common law".

When it is clear that the very object of the Act is to alter or modify the common law, then full effect must be given to this object. (GLEN ANIL FINANCE (PTY) LTD v JOINT LIQUIDATORS, GLEN ANIL DEVELOPMENT CORPORATION LTD (in liquidation), 1981 (1) SA 171 (A) 183-4).

Under the common law, parties conclude a contract under which one of them is to provide services in return for payment. Their agreement determines when the relationship so constituted starts; what reciprocal rights and duties are acquired and incurred by each; and, if it is to be of indefinite duration, how it may be terminated. The unmistakeable intent of labour legislation generally, is to intrude, or permit the intrusion of third parties, on this relationship in innumerable ways. The intrusion as regards the content of the relationship is readily apparent in statutes such as the Basic Conditions of Employment Act No 3 of 1983 and the Wage Act No 5 of 1957. The Act we are concerned with - the primary purpose of which is to ensure

industrial peace by the promotion of collective bargaining - does that, and more. It goes beyond intruding, or permitting intrusion by others, as regards the terms which govern the relationship while it lasts. It envisages intrusion as regards the very duration of the relationship, regardless of common-law notions of consensus between the individual employer and employee on that score.

The Labour Appeal Court recognized that a termination of the relationship which would be unassailable under the common law, does not terminate the applicability of the definitions "employer" and "employee" to the parties to the relationship for purposes of the Act. That has been recognized by our courts for sixty years and more, in relation to predecessors of the Act. For example CITY COUNCIL OF CAPE TOWN v UNION GOVERNMENT 1931 CPD 366, dealt with the Industrial Conciliation Act no 11 of 1924 which defined employee as

> "... any person engaged by an employer to perform for hire or reward manual, clerical or supervision work in any undertaking, industry, trade or occupation to which this Act applies ..." (except for persons dealt with under other, named, statutes).

A literal interpretation consonant with the common law would exclude a worker properly dismissed from this definition. Qui haeret in littera haeret in cortice. Gardiner JP had no hesitation in stating, at p 380, that

> "... it does not follow that (a) man dismissed may not be an employee in terms of the Act. It seems to me that to hold that once a man is dismissed he ceases to be an employee would defeat the whole object of the Act, because anyone with knowledge of labour history knows that such disputes constantly arise and that serious strikes often take place owing to the fact that a person has been dismissed."

Mr Brassey, who appeared before us for the Union, traced the definition of "employee" through the Industrial Conciliation statutes from 1924 until now. The heart of the definition has for practical purposes remained the same though exclusions have varied and the

scope been broadened. History confirms that to read the definition literally and in the light of the common law would not accord with the intention of the legislature (Cf HLEKA v JOHANNESBURG CITY COUNCIL 1949 (1) SA 842 (A)) . To interpret "employee" as defined in Act 11 of 1924 to mean an employee by virtue of a common law contract, in 1930 already would have been incompatible with the use of the word in section 16 of the then Industrial Conciliation (Amendment) Act No 24 of 1930. That provided that a court could order an employer to reinstate an employee whose dismissal was lawful, but effected for reasons set out in subsection (1) and obviously regarded as unfair.

Mr Brassey then also traced the history of the definition of "strike". In s 24 of Act 11 of 1924 it read

> "'Strike' means a suspension or temporary cessation of work of any number of employees in order to compel their employer or to assist other employees in compelling the employer of such employees to agree to specific terms or conditions of employment."

In R v MACDONALD AND OTHERS 1935 TPD 153 the court overturned the conviction of workers who resigned en bloc and as a result were charged with contravening sec 12 of Act 11 of 1924. The court held that their lawful resignation resulted in their no longer falling within the definition of "employees" in the Act. The definition of strike was soon amended. That contained in the Industrial Conciliation Act No 36 of 1937, made it clear that the parties the legislature had in mind, were not "employer" and "employee" in a common-law contractual context. "Strike" was said to mean

> "any one or more of the following acts or omissions by any body or number of persons who are or have been employed, either by the same employer or by different employers -
>
> (a) the refusal or failure by them to continue to work ... or to resume work or to accept re-employment ... or;
>
> (b) the breach or termination by them of their contracts of employment if -
>
> (i) that refusal ... or termination is in consequence of a dispute regarding conditions of employment

> or other matters and is in pursuance of any combination, agreement or understanding, whether expressed or not, entered into between them; and (ii) the purpose of that refusal ... or termination is to induce or compel any person by whom they or any other persons are or have been employed to agree to or comply with any demands concerning conditions of employment or re-employment or other matters made by or on behalf of them or any of them or any other persons who are or have been employed." (emphasis added)

And sec 65 forbade employees to take part in a strike or the continuation of a strike for defined periods or unless preconditions had been satisfied, so clearly "employees" were to include persons who would have not qualified as such under the common law.

Mr Brassey in my view correctly submitted that in referring in other sections of the Act to employees

on strike, or forbidden to strike, the definition of "strike" cannot be ignored. The first part of the definition of "strike" in the Act is identical to that under its 1937 precursor; though the conditions under which the actions set out in (a) and (b) constitute a strike, have been rewritten. They still refer to persons who are not presently employees according to the common law.

Section 65 of the Act still prohibits incitement of any employee to take part in or continue a strike, again for defined periods or unless the conditions in the section have been fulfilled. Subsection (1) (c) refers to employees in essential services being on strike. "Employee" must clearly include persons referred to in the definition of "strike" who would certainly not qualify as such under the common law - amongst others ex-employees to be persuaded to once again provide their labour, as much as ex-employees who want their jobs back.

A further indication that the legislature intended to use "employee" in a wider meaning than it would have under the common law, is found in the provisions of sec 35 (5) (b) of the Act. Employee there at least includes an ex-employee seeking re-employment. This section provides that under certain circumstances a conciliation board may be established on the application of an individual employee to deal with "the refusal or failure of the employer to re-employ that individual". The establishment of a conciliation board is a necessary precursor to a dispute being referred to the Industrial Court. It would be an exercise in futility to establish a conciliation board that may not succeed in settling a particular dispute, if the matter were not then able to be referred to the Industrial Court for the dispute to be determined.

The Act therefore envisages that a conciliation board may be called upon to try to settle a dispute between a former employee claiming re-

employment. It follows as a necessary corollary that the Industrial Court would have jurisdiction in matters relating to a refusal to re-employ. Cf CONSOLIDATED FRAME COTTON CORPORATION LTD v PRESIDENT OF THE INDUSTRIAL COURT AND OTHERS 1985 (3) SA 150 (N) 158 A-B.

The relationship envisaged by the Act between "employer" and "employee" is therefore clearly not one that terminates as it would at common law. Cases accepting that the provisions of the Act do not relate solely to the enforcement of legal (common law) rights, are legion. Cf MARIEVALE CONSOLIDATED MINES LTD v PRESIDENT OF THE INDUSTRIAL COURT AND OTHERS 1986 (2) SA 485 (T), 498I-499H; and CONSOLIDATED FRAME COTTON CORPORATION LTD v PRESIDENT OF THE INDUSTRIAL COURT AND OTHERS 1986 (3) SA 786 (A) . The fact that the definition is framed in the present tense (by the use of the phrase "is employed") cannot alter the fact that other sections of the Act already referred to make it

clear that ex-employees are also included within its terms.

I did not understand Mr Brassey to argue that members of the pool would have a call on the Company to consider them for employment indefinitely in the future. Sec 3 (c) of the agreement makes clear that members of the most favoured class of employees, those to be taken on forthwith, lost their claim once and for all by deciding (or being deemed to have decided) that their relationship with the Company was at an end. There is no indication that pool members standing further back in the queue, were to be treated any differently. It is therefore sufficient that the legislature clearly had in mind that once a particular employment relationship is established, the parties to it remain "employee" and "employer" as defined, beyond the point of time at which the relationship would have terminated under the common law. Where it includes also former employees seeking re-employment or re-instatement, it has placed no

limitation suggesting when - or why - a former employee no longer falls within the definition. What is clear, is that when both parties so agree, or when equity permits, the relationship does come to an end.

The Company and the Union used the same language as the statute does, in the agreement they concluded. Clause 7 speaks of the employees, not the ex-employees or persons, to be rehired.

Once it is accepted that members of the pool may fall under the definition of "employee" in the Act, there can be no doubt that the Industrial Court had a labour dispute before it. That agreement was the result of collective bargaining between the Company and the Union, par excellence a labour practice - "action adopted in the labour field" (MARIEVALE CONSOLIDATED MINES v PRESIDENT OF THE INDUSTRIAL COURT AND OTHERS 1986 (2) SA 485 (T) at 498B-499H). It does not purport to be a contract concluded at common law between the Company and defined individuals but records the

understanding arrived at between employer and ex-employees (represented by the Union) as to how the interests of each side were to be served. And in it the Company undertakes an obligation to afford employment to unidentified members of a defined group of (ex) employees whose interests as regards job opportunities were being taken care of by the Union.

In short, the Industrial Court did have jurisdiction in the matter. The Labour Appeal Court was wrong in holding the contrary. That brings me to the issue whether it was established that an unfair labour practice had been committed. That depends on whether the re-hiring agreement had been breached, which in turn depends on the interpretation of that document.

Mr Fabricius who appeared before us for the Company, pursued the contention that the Company was obliged in terms of clause 5 to do no more than "consider" pool members for re-employment as and when the need arose, and that there was no evidence that that

had not been done.

That contention ignores the proviso contained in the clause. By necessary implication it limits the right an employer has at common law to select his employees at will. Admittedly the rule of construction of written instruments, expressio unius est exclusio alterius, should be applied with caution (SOUTH AFRICAN ESTATES AND FINANCE CORPORATION, LTD v COMMISSIONER FOR INLAND REVENUE 1927 AD 230, 236; SOUTH AFRICAN ROADS BOARD v JOHANNESBURG CITY COUNCIL 1991 (4) SA 1 (A) 16 G). However, were it not applied here, the proviso must be deleted entirely. Clause 5 is part of an overall agreement arrived at between the Company and the Union. Clause 3 (c) of this lends support to the view that the obligation undertaken by the Company went further than "I'll think about it". Clause 3 (c) read with (d) provides that if dismissed strikers who were to be taken on forthwith did not arrive for the paper-work to be done, "another person from those mentioned in item 5

below will then be employed in their place". Where the Company expressly in clause 5 reserves the right (which at common law would be completely unrestricted) to employ people outside the pool but undertakes to exercise that right only "where skills are required which the aforesaid don't have", the unavoidable inference is that where the required skills <u>are</u> so available, the Company's right to employ outside persons is excluded. What the Company then retains is only the right to choose which individual out of a group with the necessary qualifications - if there is more than one -it wishes to engage.

The Labour Appeal Court, having held that the Industrial Court had no jurisdiction, found it unnecessary to deal with the finding of the Industrial Court that the Company's breach of its undertaking to the Union constituted an unfair labour practice as defined in the Act.

There would in my view be no purpose in

remitting the matter to the Labour Appeal Court for it to do so. The admission by the Company in exhibit B that it had employed persons from outside the pool to fill vacancies when suitable applicants were available to take those posts, is an admission that it breached its undertaking. That breach of necessity "affected ... (the) employment opportunities" of employees on the list who had not succeeded in getting work elsewhere since the agreement was concluded. Breach of such an undertaking is prima facie unfair, as the Industrial Court assessed it to be. The Company offered no evidence to indicate otherwise. There was no evidence which would bring the Company's conduct under paragraphs 2 or 3 of the Union's statement of case. Those are limited to actual unrest, actual disaffection and did not rely on potential results under those headings. But the Company's admitted conduct falls squarely within sub-paragraph (i) of the definition of an "unfair labour practice."

Fabricius conceded that if his argument is not upheld, remittal to the Labour Appeal Court is unnecessary. There is no reason why the order for specific performance which is widely framed cannot be implemented. When the Company determines that it has vacancies, the Company and the Union between them should be able to discover which members of the pool have retained their relationship with the Company. Whether non-employment of any remaining pool member in future would constitute an unfair labour practice must depend, as it did here, on the facts of each case.

The appeal is allowed with costs. The order of the Labour Appeal Court is altered to read "appeal dismissed with costs".

L VAN DEN HEEVER JA

CONCUR:

JOUBERT JA)
NESTADT JA)