THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA
Case No. 409/96

In the matter between:

ABERTECH INDUSTRIES (PTY) LIMITED

(t/a National Spring) Appellant

and

NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA AND OTHERS Respondent

Coram: NIENABER, HOWIE, PLEWMAN, STREICHER JJA and
NGOEPE AJA Heard:
1 SEPTEMBER 1998 Delivered: 25
SEPTEMBER 1998

JUDGMENT

STREICHER JA/

STREICHER JA:

On Friday 22 June 1990 the appellant dismissed those of its workers who worked the permanent day shift and who had engaged in an illegal strike on that day. The Industrial Court found, on the application of the respondent union and certain of the dismissed workers, that such dismissal constituted an unfair labour practice and ordered the appellant to pay compensation to the workers so dismissed who were applicants in the matter before it. An appeal by the appellant to the Labour Appeal Court ("the LAC") was unsuccessful. The LAC refused the appellant leave to appeal but on petition to the Chief Justice such leave was granted. The appeal is only against the finding that the dismissals constituted an unfair labour practice.

In terms of s 17C(1)(a) of the Labour Relations Act 28 of 1956 ("the Act") this Court is bound by the findings of fact of the

LAC. In National Union of Metalworkers of SA v Vetsak Co-operative Ltd 1996 (4) SA 577 (A) at 583J-584A it was held that findings of fact comprise:

> "(1) actual findings of fact made by the LAC and (2) any factual findings of the Industrial Court which have either expressly or tacitly been approved by the LAC and consequently been incorporated in its judgment."

In addition this Court may also have regard to facts which appear from the record of the Industrial Court proceedings in so far as they are not inconsistent with facts found by the LAC (see Performing Arts Council of the Transvaal Paper Printing Wood & Workers Union 1994 (2)SA 204(A)at 214F).

Part of the factual background which the LAC found to have been proved, appears from the following extract from its judgment:

"The appellant carried on business as a manufacturer of automotive parts. Its factory operated on a continuous basis from 07h00 on Mondays to 14h30 on Fridays. It had a permanent day shift (referred to at times in the record as the 'straight shift') from 07h00 to 17h00 on Mondays to Thursdays and 07h00 to 14h30 on Fridays. In addition there was a morning shift from 07h00 to 19h00 on Mondays to Thursdays; and a night shift from 19h00 to 07h00 on Mondays to Thursdays. Workers on the morning and night shifts were rotated periodically.

During March 1990 a new shop stewards' committee was elected by the workforce. There was some evidence that a strained relationship existed between management and the newly elected committee, and in my view the events which followed bear this out.

On 15 June 1990 a disciplinary inquiry was convened to enquire into a charge of failing to carry out an instruction and/or insubordination which was brought against one of the shop stewards, Mr Tsiliso Mokoena. Mr Mokoena failed to attend the inquiry, which proceeded in his absence, and he was found guilty and a warning was issued to him . That afternoon he was summoned to attend a further disciplinary inquiry to be held on 18 June 1990 to answer another charge in similar terms. That inquiry was later postponed to 19 June 1990. Mr Mokoena again failed to attend the inquiry, and was again found guilty, but

this time he was dismissed.

On the morning of 20 June 1990 Mr Mokoena arrived at the appellant's premises at the start of the working day but was prevented from entering by the security personnel. This was observed by other workers who reported what they had seen, whereupon the workers all stopped work and gathered at the canteen and change room area.

At about 08h45 two shop stewards approached Mr Hook, who was the appellant's manufacturing manager, and told him that the workforce wanted to see him in connection with the exclusion of Mr Mokoena from the premises. Mr Hook's response was that Mr Mokoena had been dismissed in accordance with the appellant's procedures; that he had a right of appeal; and that he was not prepared to discuss the matter further. He warned them that the workers were acting illegally and that they would not be paid while they were not working.

A short while later the shop stewards returned to Mr Hook and told him that the workers were prepared to work but wanted Mr Mokoena to be taken back. Mr Hook repeated what he had said before. Further approaches were made to Mr Hook thereafter, each of which was met with the same response.

In the meantime the workers refused to return to work. At about 11 h00 they were addressed directly and told that management

expected them to return to their work stations; that every illegal striker would receive a formal written warning; and that they were not being paid while they were not working. The impasse nonetheless continued for the remainder of the day. That evening workers on the night shift reported for work but departed soon afterwards.

The following day workers on the day and morning shifts arrived at the premises and again gathered at the canteen and change room area. At 08hl5 Mr Hook repeated that they were not being paid; that they would receive written warnings; and that they were required to return to work. At llh30 he made what he termed a final request that they return to work after the lunch break, failing which the appellant would have to consider taking 'very serious action'.

By 14h00 the workers had not returned to work, and an ultimatum in the following terms was read to them:

> 'If the day-shift employees who normally work on a Friday are not at their work stations at 07h00 tomorrow morning, being the 22nd, they will be dismissed with immediate effect. ... For those day-shift employees who finish their shift at 19:00 today, if they are not at their work stations at 07h00 on Monday they will be dismissed with immediate effect. The same applies to the night-shift on Monday night. If they are not at their work stations at

19:00 on Monday night they will be dismissed with immediate effect....'

Only the day shift was due to work the following day, which was Friday 22 June 1990. Workers on that shift duly arrived for work at the appointed time. Although there was some dispute in this regard, in my view the evidence established that they reported to their workplaces and commenced work.

At about 07hl5 Mr Hook was approached by the shop stewards who handed to him a note from the workers which was to the effect that they would again stop work if the dismissed shop steward was not back within two hours.

Soon after they had left Mr Hook's office disciplinary steps were initiated against the shop stewards, at the instance of the production manager, for allegedly having left their workplace without permission. Clearly the charges were brought against the shop stewards without any prior inquiry having been made to establish whether they had any substance, as it is common cause that by or shortly after 09h00 their respective supervisors had confirmed to management that the shop stewards had indeed been given permission to leave their workplace, and the charges were dismissed.

Nevertheless the steps which had been taken against the shop stewards incensed the workers, who discussed the matter during

> their tea break which commenced at 09h00. They believed that their elected representatives were being harassed, and they decided to retaliate by not returning to work at the end of the tea break.
>
> Mr Hook told the workers that if they were not back at work by 10h30 they would be dismissed. At 10h30 they had not returned. At 10h45 he again addressed them and asked them to consider seriously the consequences of their action. The workers asked to be allowed more time to discuss the issue. At 11h30 Mr Hook asked them whether they had decided what they would do, and they again asked for more time. He said they had five minutes to make a decision."

It was only at about 10h45 on 22 July 1990 that the appellant told the workers why Mokoena had been dismissed. The workers were then given 15 minutes to return to work. According to a note kept by the appellant, Hook returned to address the workers at 11h32. It is clear from this note, if read with the evidence of Mr Lusithi, a shop steward, that Lusithi told Hook that the workers were not ready to respond to the ultimatum; that the appellant's reason for

dismissing Mokoena had only just been revealed to them; that the workers had heard a wrong version of what happened; and that time was required to explain the position to them. Lusithi also explained to Hook that the workers were uneducated. In court he added that the explanation to the workers had to be given in five different languages and that he also wanted time for Mr Nhlapo, another shop steward, who had been sent to the union's offices, to return. According to Lusithi the workers wanted the union organiser to come and help because it was clear that the employer and they "were not understanding each other".

After they had stopped working on 22 July 1990, the workers unsuccessfully tried telephonically to contact the union. According to Nhlapo he himself tried to do so but found that the telephone was out of order. He then went to the union's office where

he was advised by a union official, Mr Robertsons, that he should get the workers to go back to work so that he, Robertsons, could speak to management. Hook said in evidence that he did not know that Nhlapo had gone to consult the union.

Hook returned at 11h55. According to him he asked the workers what their decision was and when he received no indication that they had decided to return to work he dismissed them. Lusithi denied Hook's version and testified that when Hook returned he asked Hook for a further extension until after the lunch break which was due in five minutes' time, whereupon Hook simply walked away. The Industrial Court rejected the evidence that Lusithi requested an extension of the ultimatum until after the lunch break and accepted the version of Hook that the workers were dismissed at 11h55. The LAC did not make a finding in respect of this dispute of fact. I shall assume

in favour of the appellant that the Industrial Court's finding was

correct.

The evidence for the respondent was that during lunch-time the workers decided to go back to work. The appellant submitted that this evidence could not be accepted in the light of Hook's denial that that was the case. However, Hook himself testified that after lunch he received a telephone call from the security staff at the gate informing him that the workers wanted to return to work. According to him he saw the workers walking away from the gate when he went out to talk to them. Mr Eckermans, the security guard who, according to Lusithi, was asked by the workers to open the gate, was not called by the appellant to contradict the evidence in question. In the light of this evidence and the appellant's failure to call Eckermans it must be accepted that the workers, during the lunch-time, decided to return to

2 work.

The Industrial Court found that the union was in the process of being called upon to help; that Robertsons would have endeavoured to prevail upon the workers to return to work and that the appellant erred in not regarding it as essential that the union be contacted before dismissing the workers. For these reasons the Industrial Court found that the dismissal of the workers constituted an unfair labour practice.

the LAC agreed with this conclusion of the Industrial Court and stated that "little more than good sense dictates that the appellant ought to have attempted to avoid dismissal if it could reasonably have done so, and one course open to it was to have solicited the union's assistance in bringing the strike to an end".

The following very important factual findings were also

made by the LAC:

1 The permanent day shift workers complied with the ultimatum issued on 21 June 1990 and returned to work by 07h00 on 22 June 1990.

2 The workers stopped work at about 09h00 in reaction to the disciplinary steps which had been taken against the shop stewards that morning.

3 The appellant had no apparent grounds for taking those disciplinary steps.

4 The appellant's response to the stoppage was merely to issue more threats. It did nothing at all to find out why the latest stoppage had occurred, nor to attempt to resolve the problem if it was able to do so.

5 Even before this stoppage occurred, management had

done nothing to attempt to resolve the grievance which had previously arisen and which related to Mokoena. It had not even informed the workers why he had been dismissed. Its response to them throughout had been no more than to inform them that it had acted in accordance with procedures. It was not willing to discuss the matter.

In the light of these facts the LAC concluded:

> "In my view the appellant's conduct in taking those (disciplinary) steps … was provocative in the circumstances, and lends weight to the allegation that it was hostile towards the shop stewards. By doing so the appellant was bound to exacerbate the situation. Although the workers ought not to have stopped work, I do not find it at all surprising that they did so. They were quite entitled to request their elected representatives to act on their behalf and the appellant's reaction thereto would inevitably be seen as nothing short of harassment for having done so."

The LAC was furthermore of the view that the approach of the

appellant was shortsighted if industrial conflict was to be avoided and stated that experience had shown that few shop floor disputes were incapable of being resolved by proper communication. It stated:

> "In my view a fair employer would have made a concerted attempt to resolve the dispute before resorting to dismissal, if necessary by soliciting the assistance of the union. The appellant failed to do this and in my view the dismissal of the workers in these circumstances constituted an unfair labour practice."

In judging whether the dismissal of the workers constituted an unfair labour practice the court has to apply a moral or value judgment to established facts and circumstances and in so doing it must have due and proper regard to the objectives sought to be achieved by the Act. Fairness comprehends that regard must be had not only to the position and interests of the worker, but also to those of the employer, in order to make a balanced and equitable assessment (see Vetsak at 589C-D and 593B-G). An objective of the Act is to ensure

good labour relations. To this end the Act prescribes a procedure for the resolution of disputes by way of collective bargaining (see South Bazaars (1929) Ltd 1995 (3) SA 622 (A) at 628B).

The strike on 20 and 21 June 1990 was illegal and constituted serious and unacceptable misconduct on the part of the workers (see Performing Arts Council at 216E; and National Union of Mineworkers v Free State Consolidated Gold Mines (Operations) Ltd 1996 (1) SA 422 (A) at 448A-B). The workers should have followed the procedure prescribed by the Act in order to resolve the dispute. On behalf of the appellant the matter was argued on the basis that the work stoppage on 22 June 1990 was merely a continuation of that strike. If that was so the case for the workers would have been a very weak one. They had received an ultimatum to return to work and they had had

7 ample opportunity to consider their positions and to consult their trade union. For this reason the finding of the LAC that the workers had complied with the ultimatum to return to work at 07h00 on 22 June 1990 and that the disciplinary steps taken against the shop stewards that morning caused the work stoppage, is of considerable importance.

It was not contended and could not be contended that the LAC's decision in this regard was not binding on this Court. This Court is therefore precluded from finding that the strike on 22 June 1990 was a continuation of the strike on 20 and 21 June 1990.

The workers were once again not entitled to stop working on 22 June 1990 and their conduct was again illegal. However, the mere fact that the work stoppage was illegal did not entitle the appellant to dismiss them. Whether the appellant was entitled to do so has to be determined in the light of all the circumstances (see

Performing Arts Council at 216E and Vetsak at 592I). In this case there were some aggravating features. It was not the first time that the workers engaged in illegal strike action. They did so on 16 January 1990, during April for one or two days and on 20 and 21 July 1990. Furthermore, their conduct was at times provocative in that they sang while Hook was addressing them.

However, there were also mitigating features. The workers returned to work on Friday morning but were still not satisfied about the dismissal of Mokoena. The perception amongst them was that the shop stewards were being victimised and it is because of this perception that they embarked on strike action on Wednesday and Thursday. In these circumstances a reasonable employer would have realised that victimisation of shop stewards or conduct that could be interpreted as a victimisation of shop stewards on Friday could well

lead to another work stoppage. Nevertheless, on Friday morning the

shop stewards were, without any apparent basis therefor, charged with having left their work stations without permission to do so. Disciplinary enquiries were held in respect of some but the charges against all the shop stewards concerned were dismissed as they had the permission of their supervisors. No explanation for its conduct was tendered by the appellant and it is difficult to think of a possible innocent explanation. A simple enquiry from the shop stewards or their supervisors would have established whether or not they had the required permission. In the absence of any explanation from the appellant, the inference can be drawn that the appellant was in fact harassing the shop stewards. At best for the appellant it created the impression that it was harassing the shop stewards. Once again such harassment or perceived harassment did not entitle the workers to stop working. On the other hand, having

provoked the work stoppage by conduct that was likely to bring it

about, such stoppage could not in fairness be relied upon by the appellant as a ground for dismissing the workers until at least a reasonable chance had been given to them to come to terms with the conduct of appellant, to reflect on their position and to take a rational, informed decision in respect thereof. The ultimatum given by the appellant should have afforded them time to do so (see Performing Arts Council at 216C-D and 217B-D).

Again, what would have been a reasonable period has to be determined in the light of all the circumstances. As long beforehand as 20 July 1990 the workers had wanted to know from the appellant why Mokoena had been excluded from the premises. They were simply told that procedures had been followed, that he had been dismissed and that he could appeal. In the light of the fact that Mokoena was a shop

steward and that there was a perception amongst the workers that the shop stewards were being victimised, a reasonable employer would have realised that the reason for the dismissal had to be given to the workers as soon as possible. Similarly, a reasonable employer would have realised that the disciplinary steps taken against the shop stewards on the morning of the work stoppage called for an explanation. However, it was only at 10h45, on 22 July 1990, on the third day after the problem about Mokoena's dismissal had arisen, that the reason for his dismissal was explained to the workers. At no stage prior to the dismissal of the workers was an explanation given for the disciplinary enquiries against the shop stewards. During tea time at 09h00 the workers were informed that some of the shop stewards had been acquitted and that the charges against others had been withdrawn but that still did not explain why they had been charged in the first place.

In the circumstances the request by Lusithi for time to consider and

discuss the matter, after the explanation for Mokoena's dismissal had been given, was a reasonable one. Moreover, Hook's impression was that Lusithi was making progress in persuading the workers to return to work. It should therefore have been obvious to him, also at 1 lh55, that Lusithi and the workers needed more time. For this reason it matters not whether Lusithi's evidence that he again asked for more time until after the lunch break is accepted or not. His earlier request to be allowed an extension often minutes had been refused and only a five minute extension was granted. If he did not again ask for more time it is explicable only on the basis that he thought that such a request would be futile. On the other hand the appellant stood to lose nothing by allowing the workers a further extension until after the lunch break. However, at 1 lh55, five minutes before the lunch break, Hook decided

that the appellant had "no other option" but to dismiss them.

Quite apart from the aforegoing, affording workers an opportunity to take an informed decision involves allowing them sufficient time to consult their trade union, should they wish to do so. It is not necessary in this case to decide whether there was any duty on the appellant in the circumstances to take the initiative to contact the union as the workers through their representative, Nhlapo, had done so. As it happened they were dismissed before Nhlapo, who returned from the union's offices minutes before the lunch break, could convey the union's advice to them.

Even accepting that Hook did not know that Nhlapo had been to consult the union the workers were not allowed a reasonable time to come to terms with the conduct of the appellant and to take a

rational, informed decision in respect thereof. A reasonable time would at least have been until after lunch when the union's advice was belatedly conveyed to them. The appellant would not in any way have been prejudiced by an extension of the ultimatum until after lunch when they indicated that they wanted to return to work. In the circumstances, especially in the light of the fact that it was the appellant's conduct that provoked the work stoppage on the morning in question, and notwithstanding the fact that the workers were engaging in an illegal strike and notwithstanding the aggravating features referred to, I agree with the finding of the Industrial Court and the LAC that the appellant committed an unfair labour practice by dismissing the workers when it did so.

The appeal is therefore dismissed with costs.

P E STREICHER JUDGE
OF APPEAL

NIENABER JA) HOWIE
JA) Concur PLEWMAN
JA) NGOEPE AJA)