Case No 419/95 IN

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SOUTH AFRICAN SOCIETY OF BANK OFFICIALS APPELLANT

and

THE STANDARD BANK OF SOUTH AFRICA LTD RESPONDENT

CORAM: : MAHOMED CJ, VAN HEERDEN DCJ,

SMALBERGER, NIENABER et SCOTT JJA

HEARD: : 10 NOVEMBER 1997

DELIVERED: : 21 NOVEMBER 1997

JUDGEMENT

SCOTT JA/...

SCOTT JA:

The respondent (to which I shall refer as 'the bank') is one of the larger banks in South Africa and has branches throughout the country. The positions occupied by its junior, middle and senior managerial staff are graded from Ml to M7. The latter grade is immediately below the level of assistant general manager. The appellant ('the union') is a trade union which for many years has engaged in collective bargaining with the bank on behalf of the latter's employees below managerial level. The question which arises in this appeal is whether the bank is obliged to engage in collective bargaining with the union regarding the terms and conditions of employment of all managers occupying 'M' graded positions.

The question first became an issue between the parties some years ago. Eventually in 1991 a dispute was declared and a conciliation board established. The dispute could not be resolved and in due course it

was referred to the Industrial Court in terms of s 46(9) of the Labour Relations Act 28 of 1956 ('the Act'). The relief sought by the union, shortly stated, was (i) an order declaring the bank's refusal to negotiate with the union in respect of 'all the terms of employment' of the bank's 'M' graded employees to be an unfair labour practice; (ii) an order directing the bank to engage in such negotiations forthwith, and (iii) an order as to costs. The application was dismissed by the Industrial Court. (See SA Society of Bank Officials v Standard Bank of SA Ltd (1994) 15 ILJ 332 (IC).) The union appealed unsuccessfully to the Labour Appeal Court. (See SA Society of Bank Officials v Standard Bank of SA Ltd (1995) 16 ILJ 362 (LAC).) Leave to appeal was refused by the Court a quo and the present appeal is with leave granted pursuant to a petition to the Chief Justice.

By the time the matter came before this Court the Labour Relations Act No 66 of 1995 had come into operation repealing the Labour

Relations Act of 1956. Mr Sutherland, who appeared for the union, indicated that in view of the far-reaching changes to the law introduced by the new Act he no longer sought the relief claimed in prayer (ii) but merely the declaratory order referred to in prayer (i). Mr Loxton on behalf of the bank submitted on the other hand that the unfair labour practice jurisdiction of the Industrial Court had fallen away with the repeal of the old Act, that the relief claimed, including the declaratory order, had been rendered academic and that for this Court to grant such an order would be, if not incompetent, at least inappropriate. In view of the conclusion to which I have come on the merits of the matter it is unnecessary to consider the objection raised by Mr Loxton and I shall refrain from doing so, particularly as this would involve construing the new Act which makes provision inter alia for this Court no longer to exercise jurisdiction in labour appeals.

The bank raised two further and subsidiary issues in response

to the union's claim. The Industrial Court found in favour of the union on both. The first was whether the union's members were sufficiently representative of the employees falling within the bargaining unit sought to be established; the second was whether the union had a mandate from its 'M' graded members to bargain collectively on their behalf. With regard to the latter, it appears that managers have been members of the union for many years and have received certain benefits from their membership but at no stage have they been collectively represented by the union in negotiations relating to the terms of their employment. Neither issue was dealt with by the Court a quo which assumed in favour of the union in respect of both. I shall do the same.

Evidence was adduced on behalf of the bank to the effect that there had been major changes in commercial banking in recent times. According to Dr Verster, a general manager employed by the bank, a

proliferation of services on offer by banks generally had resulted in a greater emphasis being placed on marketing and selling with a corresponding increase in competitiveness. This in turn had resulted in what he described as an 'outwards' devolution of decision-making authority with branch managers in particular having far greater decision-making authority than before. Both at branch and 'cluster' level the performance of managers was judged to an increasing extent on their contribution to profit and entrepreneurial skills. Accordingly, managers were left largely to make decisions for themselves as how best to run their business units, including decisions relating to the hiring, transfer and dismissal of their staff. As far as their remuneration was concerned, Dr Verster testified that in terms of a 'business performance bonus scheme' which had been introduced some 4 years previously and which applied to all managers in the categories Ml to M7 a significant component was dependent on results achieved. All this,

he said, had resulted in greater individualism amongst managers and correspondingly less commonality.

The evidence of Dr Verster was largely confined to generalities. Apart from his evidence that managers in the 'M' grades include those in the branch network as well as those in central managerial positions it does not appear from the evidence precisely what functions are performed by managers in the grades concerned. Nor was any attempt made by either party to distinguish between the 7 grades other than to say that they covered the spectrum of junior, middle and senior management.

Shortly before the hearing in the Industrial Court the bank proposed in writing that certain steps be taken to determine the representativity of the union as well as the extent of its mandate in the various 'M' grades to be followed by negotiations 'to reach agreement on which of the grades ... [the union] might be recognised as collective

bargaining agent and the scope of such recognition'. This proposal was rejected by the union. The rejection of the proposal and the absence of evidence as to the precise nature of the functions of managers in the 'M' grades were consistent with the approach adopted by counsel for the union in this Court. He submitted that even if it were to be assumed that all those in the 'M' grades were managers in the true sense of the word with wide decision-making powers they were nonetheless entitled as a matter of law to be what he called 'the beneficiaries of collective bargaining' and as a discrete group constituted an appropriate bargaining unit. In support of this submission he relied, first, on the definition in the Act of 'employee' which he pointed out was wide enough to include even the managing director of a company and, second, on the recognition by the courts that collective bargaining was fundamental to the system of industrial relations envisaged by the Act (see, for instance, National Union of Mineworkers v East Rand

Gold and Uranium Co Ltd 1992 (l)SA 700 (A) at 733 H - J; Mutual &

Workers Union 1996(3) SA 395 (A) at 404 A). He submitted that in the absence of special circumstances, which was for the bank to establish, it followed that the managers in question were entitled to the benefit of collective bargaining.

It appears from the evidence that there are two banks in SA in which employees of managerial rank are included amongst those on whose behalf the union engages in collective bargaining. In both cases this is by virtue of agreement between the parties following negotiations. In the case of the one, a smaller bank, managers included in the bargaining unit are of a higher grade (approximately up to the equivalent of M7) than in the case of the other, a larger bank (approximately up to the equivalent of M4). In terms of the agreement with the smaller bank, however, certain aspects of

the conditions of employment relating to managers are specifically excluded from the scope of the collective bargaining agreed upon. The union is also active in several other banks with which it had in recent times concluded recognition agreements in terms of which no provision is made for collective bargaining on behalf of managers. In pursuing the relief it does (which includes an obligation to bargain in respect of 'all the terms of employment' of the managers in question), the union seeks, therefore, to break new ground and to adopt what counsel for the bank described in argument as an 'all-or-nothing' approach.

While the Act provides for structures which contemplate collective bargaining no express duty is imposed by the Act on employers to engage in collective bargaining. To this extent the Act differs materially from labour legislation in the USA and Canada in terms of which such a duty is expressly imposed. In both countries that duty is subject to

limitations. In the USA, for instance, the word 'employee' in the National Labor Relations Act is defined so as to exclude 'supervisors'. This exclusion has, in turn, been construed by the Supreme Court as applying also to managers. (See National Labour Relations Board v Bell Aerospace Co 416 US 267 (1974).) Similarly, in Canada persons who are employed to exercise managerial functions are not included within the notion of 'employee' as defined by collective bargaining legislation, thereby preventing them from bargaining collectively on their own behalf. (See H W Arthurs et al : Labour Law and Industrial Relation in Canada 2 ed (1984) paras 419 - 421 and 425.) According to the evidence adduced on behalf of both parties there is no statutory duty to bargain in the United Kingdom and the extent to which managers participate in collective bargaining on their own behalf is determined by agreement. The Act in this country does not, of course, exclude from the meaning of 'employee' a

manager or for that matter any other class of employee at common law. But, as observed above, there is no express duty imposed on employers to engage in collective bargaining. The extent to which they are obliged to do so was left by the legislature for the Industrial Court to decide in the exercise of its jurisdiction in relation to what constitutes an unfair labour practice.

Clearly there must be a limit to the employer's obligation to engage in collective bargaining. This much was common cause between the parties. If an employer were obliged to engage in collective bargaining with all its employees regardless of their level in the organisation's hierarchical structure or the nature of their employment the result in the case of companies could well be that the opposing forces in the collective bargaining process would be 'not management and labour but the operating group on the one hand and the stockholder and bondholder group on the

other' (per Justice Douglas in Packard Motor Car Co v N L R B 330 US 485 (1947) at 493 and cited with approval in the Bell Aerospace case supra). Had such a far-reaching result been intended by the legislature it would hardly have expressed itself in such an indefinite manner. The truth of the matter, as I have said, is that the legislature left it for the Industrial Court to draw the line.

The right of employees to bargain collectively has rightly been acknowledged as being fundamental to industrial relations. But this is not to say that the right is absolute. In Mutual & Federal Insurance Co Ltd v Banking, Insurance, Finance and Assurance Workers Union supra Vivier JA at 404 C - E stated the position to be as follows:

> 'The right to bargain collectively is, however, not absolute as the Court a quo seemed to suggest. In saying that it is axiomatic that once employees have decided to bargain collectively it would be unfair for an employer to refuse to do so, the Court a quo adopted too dogmatic an approach. In this Court counsel for the union did

> not contend for an absolute right to bargain collectively regardless of the circumstances. He conceded, correctly in my view, that in determining whether a refusal to bargain collectively amounted to an unfair labour practice, factors other than the interests of the union and its members, such as the interests of the employer and non-union employees and the need for efficient management also have to be taken into account.'

In each case, therefore, whether there is a duty on the employer or not depends upon whether on a conspectus of all the circumstances, including those mentioned by Vivier JA in the passage just quoted, the failure or refusal to engage in collective bargaining with the union representing a particular bargaining unit will amount to an unfair labour practice. Where that bargaining unit comprises employees at the lower end of the organisation's hierarchy a refusal on the part of the employer (represented by its management) would ordinarily constitute an unfair labour practice. Where, however, the bargaining unit comprises employees higher up the

hierarchy the position becomes less clear. There are various factors which can contribute to such a state of affairs. If the employee's position in the organisation's hierarchy is such that he (or she) is vested with discretionary powers requiring the use of his own entrepreneurial skills, where his remuneration is determined largely by the results he produces rather than dutiful obedience to instructions and where the circumstances of his employment are so individualised as to result in little or no commonality between himself and his fellow employees of similar or equal rank, collective bargaining in the form it takes on behalf of employees at a lower level becomes less appropriate or in some cases not appropriate at all. Other relevant considerations include the extent to which employees may be faced with a conflict between the interests of the union and those of the employer. That such situations may arise once employees of managerial rank engage in collective bargaining is not difficult to imagine, particularly

where, as in the present case, the union seeking to bargain on behalf of managers also happens to bargain on behalf of the lower level of the bank's employees. Again, it may be inappropriate that certain aspects of the employment relationship, eg merit increases, be included in the matters subject to collective bargaining.

All this does not mean that an employer may simply refuse to engage in collective bargaining with those of its employees who hold managerial positions. Depending upon the circumstances such a refusal may well amount to an unfair labour practice. But whether it does or not cannot be decided without a full understanding of the functions and responsibilities of the managers concerned as well as detailed information as to the type of considerations referred to above. In short, the Court is obliged to weigh up the conflicting interests of both sides in order to make what is ultimately a moral or value judgment; it cannot do so without the

necessary information.

As observed above, the approach adopted by the union was that evidence regarding such matters was unnecessary as all managers, being employees within the definition of 'employee' in the Act, are entitled as a matter of law to the benefits of collective bargaining and that such entitlement extends to collective bargaining in relation to all the terms of employment of the managers concerned. That approach, for the reasons I have given, is not correct. In the result there is no evidence before the court on which it can be determined whether the refusal to bargain collectively in relation to all or some of the employees concerned or in relation to all the terms of their employment, amounts to an unfair labour practice. The appeal must therefore fail.

There remains the question of costs. It appears from the evidence that this matter was in the nature of a test case. No order as to

costs was made by the Industrial Court or the Labour Appeal Court. Having regard to the considerations mentioned in National Union of Mineworkers v East Rand Gold and Uranium Co Ltd supra at 738F - 739J it seems to me to be appropriate that no order as to costs be made in respect of the appeal to this Court.

The appeal is accordingly dismissed and no order is made as to the costs of the appeal.

D G SCOTT

MAHOMED CJ VAN HEERDEN
DCJ - Concur SMALBERGER JA
NIENABER JA