IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: J890/97

In the matter between:

National Union of Mineworkers and Others Applicants

and

Goldfields Security Limited Respondent

JUDGMENT

Law and equity in dismissal

1 The Constitution of the Republic of South Africa of 1996 guarantees to everyone the right to fair labour practices. It also guarantees to workers the right to strike. Both these rights are regulated and given content in the Labour Relations Act 66 of 1995 ("the Act").

2 Section 68 of the Act limits the right to strike in certain situations. Even with these limitations employees enjoy a wide right to strike. Employees who comply with the elementary procedures in the Act are entitled to strike and to protection from the normal legal consequences of their withholding labour. These strikers do not commit a breach of contract and may not be dismissed, save for certain types of misconduct which might be committed during the strike. They also do not commit a delict and so avoid paying damages for any harm that they may cause. Most importantly, if the employer dismisses the strikers the dismissal is an automatically unfair dismissal and the strikers will be entitled to reinstatement or re-employment or compensation.

3 Where the strikers engage in an unprotected strike, i.e. do not comply with the requirements of the Act, they do not enjoy the protection of the law. By withholding their labour they breach their contracts of employment which entitles the employer to accept the breach and terminate the contract. See **R v Smit** 1955 (1) SA 239 (C). The right to fair labour practises is furthered by the Act which provides that no employee may be unfairly dismissed.

4 Workers who engage in an unprocedural or impermissible strike render themselves liable to dismissal on the basic ground that they have breached their contracts of employment and, although this is not an entirely separate ground, on account of committing misconduct. Section 68(5) of the Act states:

Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that 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.

5 Item 6 of the Code describes the normal course that an unprocedural strike usually follows and discusses, in general terms, what amounts to substantive fairness and more pertinently what constitutes a fair procedure. Item 6 of the Code reads:

(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 dismissal in these circumstances must be determined in the light of the facts of the case, including -

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should

state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

6 Du Toit *et al*, **The Labour Relations Act of 1995**, 2nd ed., commenting on article 6 of the Code of Good Practice, say at 419 that:

The Code singles outs the following criteria as being the most important

- 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.

This affirms the practice of the Industrial Court not to penalise 'illegality' occasioned by technical non-compliance nor justifiable, albeit precipitous, responses to unfair employer conduct.

7 Underlying Du Toit's approval is the premise that the strike is one which is permissible. If the strike is totally impermissible (and thus no procedure could be followed) then it does not follow that the pre-1996 law holds good for the new

dispensation.

8 Where there may be no strike it is nevertheless possible to refer a dispute for conciliation even though it may not be possible to take the further step and strike if the outcome of conciliation is unsatisfactory. There may be other steps available to deal with the issues eg if the subject of the dispute is justiciable by the Labour Court or adjudicable by a bargaining council or the CCMA, and it may be advisable to take these steps. But irrespective of whether it is desirable or not the right to strike may not be available. It seems that the Code does not, in dealing with substantive fairness, take sufficient cognisance of this situation. It is premised primarily on the situation where the strike is unprocedural for lack of compliance with formalities in contrast to a strike which is impermissible. But the Code nevertheless provides guidance eg. one must ask: was the strike in response to unjustified conduct by the employer?

Wildcat strike

9 Goldfields Security Ltd ("GFS") renders a security service *inter alia* to Harmony Mine situated at Virginia in the Free State gold field. Its staff consists of guard force members ("guards") and security officers. At the instigation of its client, Harmony Mine, GFS prepared a recommendation designed to beef up security at vulnerable points on the mine. Harmony Mine approved the

recommendation on 9 May 1997. Essentially the plan was to replace 68 guards who performed duties in the reduction plant area with a smaller number of newly acquired security officers. Security officers have a Matriculation Certificate and usually have or undergo training by GFS. They are better qualified, better trained and believed to be less pre-disposed to collusion with thieves than guards. The plan required the surplus or over-compliment guards to be transferred from Harmony Mine to GFS head office and then to other stations. The guards who were to be transferred would be selected on the usual basis of FIFO (first in first out).

10 GFS announced its intention to phase in the introduction of more security officers and transfer existing guards on 17 July 1997. I accept this as the correct date of a meeting held between the GFS station manager, Mr Nelson, and his regional manager, Mr Boje, and the branch committee of the National Union of Mineworkers ("NUM") for GFS staff at Harmony Mine. This committee, which was also referred to as a liaison committee or station committee, was a distinct committee to that which served mine workers on Harmony Mine. The station committee was unhappy with events. Management invited them to discuss their problems with them.

11 On 24 July a general meeting of guards was held. This meeting was addressed by Mr Nelson. I may mention that Mr Nelson impressed me as a reliable witness.

He was close to his men and his views on their perceptions and response to what was proposed is accepted. It is fair to say, based on Mr Nelson's testimony, that the workers perceived the plan to be one based on racial discrimination. Security officers were mostly composed of whites. Guards were almost exclusively composed of blacks. Their perceptions would have been strengthend by the recruitment of whites as security officers in July.

12 The transfer of the first seven guards was to take place on 7 August. Notices to this effect were issued to them on 31 July. Although it could not be said where the transferees would be relocated, this is not a case about retrenchment.

13 On 6 August the station committee handed Mr Nelson a memorandum objecting to the transfer, mentioned racial discrimination and requested feed back. The memo also stated that no one would go i.e. be transferred out of Harmony Mine.

14 Mr Nelson forwarded the memorandum to Mr Boje and Mr Fourie, the security manager at GFS's head office in Krugersdorp.

15 A further memorandum was presented to Mr Nelson at 15:20 on Friday 8 August. This memorandum needs to be quoted in full. It reads:

1. We demand that all employees you have stoped (sic) from doing their duties to return to their posts & shifts.

2. We demand that you should cancell (sic) all the charges you have laid against those employees.

3. We demand the re-deployment of the newly recruited security officers to other stations and consider the agreement that was archieved (sic) and signed between Gold Fields Security Management and the National Union of Mine Workers.

Failer (sic) to adress (sic) these demands in a transparent manner within six (6 hours) we embark on an industrial action.

16 GFS learnt that an unprotected strike was being planned for that evening. A notice was issued to the guards but the station committee was not convened.

17 The night shift did not fall in. Mr Tsitsi, the secretary of the station commitee, asked Mr Nelson to address them. Mr Nelson did so. He found the situation tense and the guards emotional. The guards expressed their grievances and concerns including the replacement of black guards by white security officers. The station commitee went to Mr Nelson's office. Mr Boje stated that Mr Tsitsi was under the influence of liquor and refused to speak to him. He also did not speak to the other committee members.

18 Mr Boje requested GFS headquarters for assistance. Mr Mashibini, the personnel officer responsible for industrial relations, was sent. He arrived at Harmony Mine at 01:00.

19 On the morning of Saturday 9 August, Mr Mashibini held a meeting with the station commitee. He told them that the strike was an illegal one, requested them to use the prescribed grievance procedure and urged them to return to work. He tried to contact Mr Mohlaba but was unable to do so. He was of the view that the matter could be discussed constructively with Mr Mohlaba on Monday.

20 During the course of Saturday the station commitee advised Mr Boje and Mr Nelson that the guards would return to work. The night shift reported as did the Sunday morning and afternoon shifts.

21 On Sunday, 10 August, GFS learnt that the night shift were not going to report for duty. Mr Boje summoned the committee and informed them of his information. He warned against further industrial action. Mr Mashibini sent a fax to the union regional office addressed to Mr Mohlaba. The fax outlined the course of events and invited the union's assistance and co-operation.

22 The night shift on Sunday and the morning and day shift on Monday 11 August failed to report at the appointed hour. Each shift was given a 30 minute

ultimatum. When they failed to report for duty after the expiry of the ultimatum they were dismissed.

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23 Mr Mohlaba came into possession of the fax at about 08:35 on Monday 11 August. He immediately went to work on the situation. He contacted Mr Mashibini and drove to Harmony Mine. There he and Mr Lekwene, another union official, spoke to some strikers, met management for a long discussion and embarked on the difficult task of convincing the employees to return to work. I accept his version buttressed by Mr Nelson's testimony that it was a tense and emotional situation.

24 Mr Mohlaba was especially engaged with the strikers who were to report for duty at 12:30 that day. The dismissal of the Sunday night shift, Monday morning and day shifts was a *fait accompli*. He was required to concentrate on the noon shift. But in order to convince them he had to deal with these other shifts and the reluctance of union members to split their ranks. He was busy near the parade ground talking to the strikers and fielding questions when Mr Boje sent Mr Nelson to the parade ground. Mr Nelson used a loudhailer to order the noon shift to fall in. When they did not do so he gave them a thirty minute ultimatum. This was confirmed by Mr Matsotso. Mr Mohlaba disputes the ultimatum but I think he is mistaken; possibly he was engrossed in his activities.

25 The ultimatum expired and, as the noon shift had not reported, they were dismissed. Some time later Mr Mohlaba convinced all the dismissed guards to tender their services which they did. The offer was not accepted.

26 NUM referred a dispute to the CCMA. It was not conciliated and a nine day trial in this court ensued.

27 The seven employees who failed to accept a transfer were not dismissed.

Evaluation

28 GFS were entitled to dismiss the guards who did not report for work in terms of the common law. The strike constituted a breach of their contracts of employment. The strikers were in breach of a statutory obligation barring them from striking about the issue in dispute. They had committed misconduct. They were most certainly aware of the Act and the existence of the CCMA. The chairperson of the station committee had previous experience of the benefits of using the Independent Mediation Service of South Africa ("IMSSA"). The agreement mentioned in the memo of 8 August refers to an agreement concluded between GFS and NUM at IMSSA. The agreement does not cover the present transfers.

29 There was no justification, in the sense of something approaching necessity, for the employees to take the steps which they did. The strikers could have used the existing grievance procedure. They did not, although initially they did express their concerns in writing on 6 August. They could have waited for the union organiser to arrive. They were capable of appreciating an ultimatum and the consequences of a failure to obey it. This is demonstrated by the fact that the strikers went back to work on Saturday but resumed the strike or, as the parties have it, continued the strike with effect from the night shift on Sunday. There was no urgency or necessity as the seven transferees, at the centre of the storm, were not going to be transferred involuntarily. Any disciplinary steps against them were scheduled for the following week.

30 GFS was not without fault. The failure to consult on the issue of the infusion of newly appointed security officers and the transfer of guards was an industrial relations situation calling for more sensitivity and consultation than that which ensued. The plan was capable of being perceived as racially tainted. This was not the intention as evidenced by the fact that black guards, including guards stationed at Harmony Mine, were being promoted to the positions of security officers. The all white security officer corps had changed and the white/black ratio had passed the fifty percent mark. Nevertheless labour relations is partly about perceptions. GFS ought to have consulted with the union at an early stage as a matter of good industrial relations practice. This was not an ordinary transfer. It was an unusually

large group of people who had roots in the community who were made redundant at Harmony Mine.

31 The scene was set. The strikers were at fault in terms of the law. The equities were on balance against them. GFS were, from a substantive position, entitled in law and fairness to dismiss the strikers if they so wished. However this could not be done without following a fair process or procedure.

32 The Code of Good Practice: Dismissals gives an indication of what is to be done in such a situation. This procedure is rather in the nature of a process and is more akin to the procedure required in a retrenchment situation than a disciplinary situation. The aim and object of a fair process in the case of both retrenchments and unprocedural and impermissible strikes is to comply with the constitutional commitment to fair labour practices including the preservation, within the limits of the law and equity, of job security. To that end a real and genuine effort must be made to avoid dismissals.

33 One of the ways to avoid the dismissal of strikers is to call in the assistance of the union. The code refers to a union official. A union official is a paid employee of the union. Clearly an office-bearer not involved in the strike could be contacted. A certain Daniel Kganya, an office-bearer of NUM, stationed at St. Helena Mine approached Mr Boje at 10:20 on 10 August. He said that he was on leave but had

been called in to assist. He asked that a meeting be held on 12 August as he would be consulting Mr Fourie. His intervention was rejected by GFS.

34 The Code's insistence on a union representative is a concrete illustration of the principle that outside intervention is most desirable. This is so because the protagonists in the heat of a strike are often unable to appreciate precisely the consequences of their action or what the right thing to do may be. A dose of reality may be required and as this, at least from the employer's perspective, is not being exhibited within the group, it must be injected from outside. Who better than a trusted union official or indeed office-bearer? Sometimes the group might not even have the presence of mind or think it necessary to invoke the assistance of a higher level of the union. Mr Matsotso was in contact with Mr Mohlaba, the regional organiser, but he did not think to discuss the crisis with him. The union's version that on Sunday they asked for Mr Mashibini's cell phone in order to contact Mr Mohlaba is devoid of truth.

35 GFS appreciated the need for outside intervention. This is itself an answer to the submission that to call in outside assistance is a form of paternalism which is undesirable. Its personnel officer responsible for industrial relations, Mr Mashibini, was of the view that he should contact Mr Mohlaba. Mr Mashibini made an effort to do so telephonically and sent a fax on Sunday urging him to intervene. It was known that in all probability it would only come to his attention

on the following day.

36 Mr Mohlaba reacted immediately on receiving the fax. He came to the mine and spoke to the committee and management. He was apprised of the situation. He was aware that the noon shift would be on strike or still on strike if he did not succeed in getting them back to work. I assume that Mr Mohlaba knew when the noon shift was to report for duty. He was running out of time. He could have approached management to ask for an extension of time. He did not do so. Mr Nelson used a loudhailer to call for the fall-in. Mr Mohlaba shouted at Mr Nelson that he was disturbing his meeting. GFS should have appreciated that Mr Mohlaba was engaged in a difficult process and could have sent word to him that time was up. GFS could have held back since Mr Mohlaba was meeting the strikers at its request. The reasonable and fair thing to do would have been to wait a reasonable time. GFS did not do so. It issued the ultimatum whilst Mr Mohlaba was struggling with the issue and dismissed the noon shift before he could complete his mission.

37 It was premataure to dismiss the noon shift before Mr Mohlaba had an adequate opportunity to discus the matter with them. By not allowing such opportunity, GFS prematurely pulled the plug on the only solution which could have obviated the need for dismissal, restored order and normality and preserved the jobs of the guards. The process was not allowed to run its course. The

dismissal of the noon shift was unfair.

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38 What of the previous shifts? Similar considerations apply to them. They were dismised before the union could respond to the invitation to intervene. There was no compelling urgency or necessity to do this. Contingency plans were in operation. The strike was peaceful.

39 In the circumstances I am of the view that the dismissal of the strikers was procedurally unfair, which carries with it the connotation that its substance may be questionable. Had the process succeeded, it may have avoided the possibility of dismissals. This is not to say that it would probably have done so. However, the opportunity of saving the day was lost, and it was lost primarily because GFS was too hasty.

The remedy

40 Where procedural unfairness has been proved, this court may order reinstatement or compensation or possibly both. I think reinstatement is the answer in this case. It is the primary remedy. Although GFS contributed to the cause of the strike it was the strikers who disobeyed the law and committed misconduct and it would, in my view, be unwarranted to reward them in any way for their flagrant breach of the Act. I do not believe that compensation is

warranted. In order to bring the message home that employees are obliged to play according to the rules of the game (see **Business South Africa v Congress of South African Trade Unions and Another** (1997) 18 ILJ 474 (LAC) at 477) I do not intend to make the order of reinstatement retrospective.

Who may benefit from the order?

41 Who are to be reinstated? There are 116 individual applicants who, *prima facie*, were guards dismissed by GFS on 10 or 11 August 1998. GFS has submitted that the only valid dispute referred to the CCMA was that done by NUM. Although NUM purported to refer the dispute on behalf of 115 employees it is submitted that it was constitutionally only empowered to refer the dispute on behalf of NUM members. It is contended therefore that only 54 members whose names appear on exhibit A, at pages to 211 to 213 of the Bundle, could possibly be entitled to relief.

42 I do not believe that this point may be validly taken. The applicants pleaded that "the Applicant referred the dispute to the CCMA for conciliation". This was admitted. This admission cannot simply be withdrawn. The production of the referral to the CCMA during argument does not suffice.

43 The next point taken relates to paragraph 1 of the statement of case. There it is

alleged that NUM acts on its own behalf and on behalf of the persons listed in annexure A "who were its members at the relevant time and/or who have authorised it to act on their behalf". Annexure A was produced during argument. I not understand Mr Barrie's argument to be that I should not have regard to it. His point is that even if non-members authorised the union to act on their behalf the NUM constitution does not empower the union to do so.

44 In **Amalgamated Engineering Union of SA v Minister of Labour** 1965 (4) SA 94 (W) Hiemstra J held that a trade union could apply for the establishment of a conciliation board for its members and such non-members as provided it with powers of attorney. Hiemstra J dealt with a point regarding the constitution of the union by saying, at 96:

The trade union is a corporate body and as such can act as agent for another, at any rate in matters within its ordinary sphere of activities. To say that the objects clause of its constitution makes no provision for such agency is to confuse objects with powers.

45 I am in respctful agreement. The point cannot be sustained.

Costs

46 This court has a discretion to order costs according to the dictates of law and fairness. The applicants have succeeded but I do not think that they should have their costs. It is important to stress the need to avoid unprocedural strikes and strikes which are impermissible. The denial of costs will serve to further strengthen this message.

47 In the premises:

1. Gold Fields Security Limited is ordered to reinstate the individual applicants whose names appear on annexure A to the statement of case save for those guards who were to be transferred and whose names appear on page 63 of exhibit "A". This order operates as from 18 December 1998. These individual applicants are entitled to present themselves for duty to Gold Fields Security's head office at Luipaardsvlei, Krugersdorp until 15 January 1999. They are entitled to be remunerated from the time they present themselves for duty.

2. There will be no order as to costs.

A A Landman

Judge of the Labour Court

SIGNED AND DATED AT JOHANNESBURG THIS 18th DAY OF DECEMBER 1998.

Date of hearing: 30 November and 1 - 4, 8 - 11 December 1998

Date of judgment: 18 December 1998

For the applicant: Mr P Maserumule of Tshabalala Maserumule Attorneys

For the Respondent: Adv F Barrie instructed by Brink Cohen and Le Roux Inc