IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J 352/98

In the matter between

Hotel, Liquor, Catering, Commercial and Allied

Workers Union **1st Applicant**

Mr Benjamin Mtsweni & Others **2nd to 35th Applicants**

AND

Glamorock North (PTY) Ltd and its trading

Divisions or Branches **Respondent**

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JUDGMENT

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MLAMBO J.

1. The individual applicants were all dismissed from employment after participating in a strike. The applicants allege that the strike was protected, a fact denied by the Respondent. The court therefore has to determine whether the strike was protected in terms of the provisions of the Labour relations act no. 66 of 1995 ("the Act").

1.

Background facts.

2. Starting in 1995 the Hotel, Liquor, Catering , Commercial and Allied Workers Union ("Hotelica") recruited the individual applicants to become its members. It appears that once a substantial number of employees had joined it, Hotelica then introduced itself to the Respondent and made overtures to start a collective bargaining relationship. It is not necessary to recount all the details of the initial contact between the parties suffice to state that the road was rather bumpy.

3. In February 1997 Hotelica, representing the individual applicants, and others, initiated negotiations on wage increases and other substantive terms and conditions of employment. These negotiations bore no fruit and on 11 March 1997 Hotelica referred the resultant dispute to the Commission for Conciliation Mediation and Arbitration ("the Commission") for purposes of conciliation. A conciliation meeting was held on 9 May 1997 but the dispute remained unresolved. A certificate in terms of section 135(5) of the Act, confirming that the dispute remained unresolved, was issued.

4. Hotelica then gave the Respondent 48 hours notice in terms of section 64(1)(b) that it intended to embark on a strike. The strike ensued at the end of the forty eight hours notice. An agreement was eventually reached on 12 August 1997 resulting in the strike being called off. The agreement made provision for a number of issues such

as an across the board increase of 9.4 percent to employees whose salaries were above R 300-00 per week and R 40-00 to those whose salaries were below R 300-00 per week.

5. During September 1997 a fresh round of negotiations on wages and other substantive issues was again initiated by Hotelica. This was in keeping with the agreement signed on 12 August 1997. A deadlock ensued and the dispute was again referred to the Commission for purposes of conciliation. The Commission scheduled a conciliation meeting for 14h00 on 17 November 1997. Both parties were represented at the meeting. At 14h00 no commissioner had arrived at the venue arranged by the Commission. Because of this the respondent's representative Mr Van Den Bos left the boardroom apparently to look for the commissioner. He did not return as he could not locate the commissioner. In fact he went back to his office while the Hotelica and some employee representatives remained.

6. According to the applicants, commissioner Chris Mbileni arrived at the boardroom after the Respondent's representative had left. Mbileni then, issued a certificate in terms of section 135(5) of the Act stating that the dispute remained unresolved. Hotelica again gave the respondent forty eight hours notice of a strike. After the expiry of the notice given the individual applicants and other employees of the Respondent went on strike.

7. When the strike started the Respondent informed Hotelica and the strikers that the strike was unprotected as no conciliation had taken place. The Respondent further advised the individual applicants that some of them were engaged in an unprotected strike as they were not its employees but were employees of other independent companies conducting business in association with the Respondent. When Hotelica failed to call off the strike the individual applicants were all dismissed for the reasons mentioned above. Those employees who according to the Respondent were employed by it were not dismissed.

8. The Respondent's stance is that only employees employed by it were engaged in a protected strike and that the individual applicants who were employed by other associated companies were engaged in an unprotected strike because no dispute between them and those associated companies had been referred for conciliation. The applicant for its part, denies that the strike was unprotected and that the individual applicants were not employees of the Respondent.

The Evidence

9. Mr Van Den Bos gave evidence on behalf of the Respondent. He testified that the Respondent was a marketer and distributer of various products manufactured and marketed by its associated companies. According to him the respondent has a warehouse and distribution depot at Glamocentre, Harriet Avenue, Driehoek, Germiston. He testified that the marketing and distribution of its products and the

products of the associated companies was conducted from Glamocentre.

10. He testified that the individual applicants in this matter were all employees of the associated companies. He confirmed the details of the associated companies as set out in the statement of defence as follows:

"3.1 The respondent is the marketer and distributor of various products manufactured and marketed by its associated companies, and has its warehouse and distribution depot at Glamocentre, Harriet Avenue, Driehoek, Germiston, Extension 4. Marketing and distribution of products of the Respondent and its associated companies takes place from the warehouse and distribution depot situated at this address. The associated companies of the Respondent and addresses are as follows:

3.1.1 Marblite (Pty) Ltd is a manufacturer of swimming pool construction materials which has a factory at 104 and 104B Porter Avenue, Vulcania, Brakpan. It also operates a warehouse on the premises of the Respondent.

3.1.2 Baten South Africa (Pty) Ltd is a manufacturer and marketer of sandblasting abrasives, which has its factory at 7 Main Reeve Road, Dunswart, Boksburg.

3.1.3 Glamotile (Pty) Ltd is a marketer and distributor of ceramic tiles, which operates its sales and marketing from the same address as the respondent, but also has a warehouse at 8 Siding Street, Vulcania, Brakpan.

3.1.4 Sparklon (Pty) Ltd which trades under the name National Garden Products, is a distributor of garden products which operates from the address of the Respondent."

11. He further testified that the associated companies were independent entities and were as such not subsidiaries or branches of each other. He testified that each company employed its own employees.

12. Mr Van Den Bos further testified that the dispute referred for conciliation in November 1997 related only to the Respondent hence those of its employees who

participated in the ensuing strike were not dismissed. He testified that the individual applicants were all employees of the associated companies and as there was no dispute referred to the Commission which involved those associated companies and the individual applicants their strike was unprotected hence their dismissal.

13. Mr Van Den Bos testified that the Respondent and the other companies were independent corporate entities which had independent bank accounts. He testified that because the associated companies were small they could not afford a full time general manager hence he was the general manager of the Respondent and all the associated companies. He communicated on a daily basis with the managers of the associated companies. These companies had their own employees, paid their employees salaries out of their own independent bank accounts and paid union subscription fees independently out of their own bank accounts. He also testified that the companies paid their employees different salary rates and that one company, Marblite (Pty) Ltd put its employees on short -time in the winter months something not done by the other companies.

23. Mr Van Den Bos also testified about the conciliation process in the Commission in the context of this dispute. He confirmed that he had received notice of the meeting at 14h00 on 17 November 1997. He arrived timeously for the meeting as did Hotelica and the employee representatives who were involved. He confirmed that at 14h00 no commissioner had arrived at the boardroom they were in and he decided to go out and look for the commissioner. He could not find the

commissioner nor could he reach the Commission telephonically. He then decided to return to his office.

Failure to conciliate

24. Conciliation is the primary process through which disputes are resolved within the scheme of the Act. So much so that the Act makes provision that this court may refuse to determine any dispute if the court is not satisfied that an attempt was made to conciliate the dispute. **(section 157(4) (a))**. All disputes have to be referred for conciliation first before they can be arbitrated or adjudicated. That conciliation is paramount is demonstrated by the absence in this act of a provision similar to the one in the 1956 LRA which enabled parties to bypass conciliation by simply agreeing that they were satisfied that conciliation would not resolve the dispute.

25. Section 157(4)(b) however provides that a certificate issued in terms of section 135(5) is sufficient proof that an attempt was made to conciliate the dispute concerned. Whilst this may be so this court cannot exclude the possibility that it may in appropriate cases refuse to determine a dispute even if a certificate was issued. One of such situations is if it is shown that the certificate was obtained improperly.

26. For purposes of the case presently before this court, I am prepared to accept that the mere fact of a referral for conciliation and actual attendance of a conciliation meeting would qualify as an attempt to conciliate the dispute. In this case the sole issues relied upon by the Respondent regarding the issuing of the certificate is that conciliation did not take place as it (Respondent) was not present during the conciliation meeting. There is no argument that the Applicants did not want to conciliate the dispute or that they were obstructive in any way. In fact the applicant's demeanor is quite to the contrary. They received notice of the conciliation meeting and actually attended the meeting timeously.

27. In the court's view it cannot be said that the drafters of the Act intended to disqualify a commissioner from issuing a certificate where the Respondent party is absent. This would allow unscrupulous parties to frustrate the process by simply staying away from the process. However it is only proper for the Commission to be open to representations from Respondents who don't attend because they did not receive any notification of the conciliation meeting. Where the Applicant stays away from the conciliation meeting a different approach seems justifiable. It is the applicant who drives the process and if the applicant stays away there is no conceivable reason to issue the certificate. In that situation it is only proper to regard the referral as having lapsed unless just cause is shown which would justify a rescheduling of the conciliation meeting.

28.

29. In this case the Respondent received notification of the conciliation meeting and actually sent Mr Van Den Bos to represent it. Mr Van Den Bos left the venue as there was no commissioner present. However the commissioner arrived afterwards and the section 135(5) certificate was issued. Perhaps in a situation such as this commissioners should not be overhasty to issue a certificate because the Respondent's representative left as a result of the late arrival of the commissioner. The prudent thing to do would be to reschedule another meeting if the 30 day period has not run out. If the applicant is prepared to extend the 30 day period for purposes of another conciliation meeting there is no reason why this should not be done. In the present case the 17 November 1997 was the 30th day and one can only conclude that the applicants were not prepared to extend the 30 day period. The court can therefore not uphold the Respondent's argument that the certificate is not valid as no conciliation took place. The court is therefore satisfied that the certificate issued by commissioner Mbileni is proper and valid.

<u>The true employer</u>

30. In essence the applicants' case is that the individual applicants were all employed by the respondent but working at its varius sections or departments in the form of Marblite (Pty) Ltd, Baten SA (Pty) Ltd, Glamotile (Pty) Ltd and Sparklon (Pty) Ltd. The court must take cognisance of the uncontested evidence tendered by the Respondent that the other companies were all corporate entities in their own right.

It is also undisputed that the other companies maintained their own banking accounts. However it is also true that all the companies including the Respondent were centrally managed from Glamocentre by one general manager, Mr Van Den Bos. It is also correct that for about two years or so in the early 1990's the payslips issued to all employees, i.e of the Respondent and the associated companies, reflected the Respondent as the employer of all of them. This was changed, apparently, after it was discovered. The explanation tendered by Mr Van Den Bos is that this was an error hence it was rectified.

31. The shareholding in the Respondent and the associated companies is also relevant. The majority shareholding in all the companies is held by the Melamed family i.e. the father Peter Michael Melamed, the son Peter Martin Melamed and the daughter Karen Anne Melamed. The exception, if one can call it that, is that Mr Van Den Bos is a minority shareholder in Baten SA (Pty) Ltd and N. Sifris is a nominee shareholder in Glamorock North (Pty) Ltd, the Respondent. The total shareholding is as follows:

Marblite (Pty) Ltd -P.M Melamed 40%.

P.M Melamed Trust 30%

K.A Melamed Trust 30%

Baten (Pty) Ltd-P.M Melamed Trust 40%

K. A Melamed Trust 40%

J Van Den Bos 20%

Sparklon (Pty) Ltd-P. M Melamed100%

Glamotile (Pty) Ltd-P. A Melamed Trust50%
K. A Melamed trust 50%

Glamotile North (Pty) Ltd - P. M Melamed Trust49%

K. A Melamed Trust 50%

N. Sifris 1%

22. The court was also referred to a number of business cards used by the Respondent and its associated companies. One of the cards belongs to the Respondent, Glamorock North (Pty) Ltd. However on the same card is a section titled "Trading divisions" where eight names appear. Four of these names are: Glamotile, Marblite; Glamorock and Baten. Another card reflects the companies: Marblite (Pty) Ltd Glamorock North (Pty) Ltd and Glamotile (Pty) Ltd. Mr Van den Bos explained that the cards reflected this situation because the products of all the companies were marketed together.

32. Parties to an employment relationship are the employee on the one side and the employer on the other. In the normal cause an employee has one employer who is either a natural person or a juristic person such as a company. It is possible for an employment relationship to exist between an employee and two or more entities as employer. This would be the situation in a joint venture by a number of companies

involved in the same project. In such a case the different companies form a joint venture and it is that joint venture that employs employees. In such a case the individual companies are not employers individually but are constituted into a single employer for purposes of the joint venture. However if the individual companies second their own employees to the joint venture they remain liable as individual employers.

33. In the case at hand the Respondent and the associated companies operate as a single unit. They are managed as a single unit by a single general manager. They are managed through one administration centre, Glamocentre. The telephone number, telefax number, street address is the same. The marketing and distribution of the products of the associated companies is done by the Respondent. The associated companies have no independent administration offices nor administration functions.

34. The only reason that could prompt the individual applicants to regard the associated companies as departments of the respondent is because those companies were in fact managed as departments of the respondent. None of the associated companies have mangers at their production centers such as Boksburg and Brakpan. There are only supervisors on site who all report to Mr Van Den Bos the general manager. The fact that all the associated companies have separate corporate status does not alter the picture. The controlling mind of the Respondent

and the associated companies is one. The letterhead of the respondent has the following marketing inscription **"Producers of natural stone aggregates chips and pebbles, Glamotile ceramic mosaics, poolcote fibreglass and esposey pool coatings, mablite pool construction materials, Benmag pool equipment, Baten abrasive gist, Rockit-natural stone wall coatings."** The products referred to in this inscription are produced by the associated companies.

35. Mr Van den Bos confirmed that the associated companies were named after the products they handled, eg Baten SA (Pty) Ltd handled Baten abrasive grit, Glamotile (PTY) Ltd handled Glamotile ceramic mosaics and Marblite (Pty) Ltd handled Marblite pool construction materials. The fact that the Respondent's letterhead carries the marketing inscription set out above which in effect promotes the products of the associated companies can only mean that all the companies inclusive of the Respondent formed one economic entity.

36. The negotiations which led to the strike were handled by Van Den Bos and on behalf of the employees by Hotelica and the employee representatives from the associated companies. It is therefore clear that in their minds Hotelica and its members were negotiating with Van Den Bos representing a single employer unit being the Respondent and the associated companies. It is therefore not open to Mr Van Den Bos to argue that he represented only the Respondent at these negotiations. The fact of the matter is that he never objected to the presence of the

employee representatives from the associated companies during negotiations.

37. In fact the agreement signed on 12 August 1997 referred to the Respondent as the company but it was implemented in respect of all the companies and their employees. When the negotiations in September and October 1997 ended in deadlock Hotelica referred a dispute to the Commission. The referral of this dispute specified the respondent Glamorock North (Pty) Ltd (the present Respondent). In clause 4 the following was stated by Hotelica: **"The dispute is very urgent in that it involves a large number of employees from various branches of Glamocentre, Baten (Pty) Ltd, Marblite (Pty) Ltd, Glamorock North (Pty) Ltd, Kooloo and Messina..."** This demonstrates in no uncertain terms that the applicants considered themselves to be in dispute with the Respondent and the associated companies as a single employer.

38. Mr Van Den Bos conceded that it was possible that employees had worked for one or more of the companies for one or more of the companies and that transfers from one company to the other may have occurred. He confirmed that an employee would be notified that he would be working for another company but his employee number would not change. Whenever an employee was transferred from one company to another one he was never paid his accrued leave pay nor was he given his blue card, he just carried on with the new company. It is also common cause that from time to time a supervisor employed by one associate company can

supervise employees of another associated company. It is also common cause that employees of one associated company could perform their duties jointly with employees of another associated company. Employees of all the companies wore overalls similar in colour and design. Some of the companies operated from the same premises and used the same change rooms. Mr Van Den Bos conceded that employees who received their salaries per bank transfer were paid out of the Respondent's bank account even though they may have been employed by the other associated companies. He stated, though that the other companies would then reimburse the Respondent every month.

39. It is clear therefore that the respondent and the associates companies were associated together in a single business enterprise and were constituted into a single economic entity. All the companies were the same in mind and management.

40. The approach where the identity of the employer is in dispute is to be found in **Buffalo Signs Co. Ltd & Others v De Casto, AJMS & Another** unreported Labour Appeal **case no. NH 11/2/22291 (appeal case no. JA 36/98).** Conradie JA suggested in that case that the approach is to look at substance rather than form. In this case the court notes that formally the evidence suggests that the respondent was not the employer of the individual applicants. Substance however suggests otherwise. The Respondent is the same company through which all business and

administration transactions were done. It is therefore justified to find that the Respondent was the directing and controlling mind of all the associated companies. In the court's view the Respondent employed the individual applicants through the associate companies. The associated companies are effectively used as trading entities and directly managed and controlled by the Respondent. The Respondent is, therefore, in the court's view the true employer of the individual applicants.

41. The dismissal letter handed to the individual applicants is not done on any letterhead. This on its own is strange and tempts one to speculate. The letter is signed by Mr Van Den Bos. If the Respondent's argument had merit then at least each associated company would have issued a dismissal letter in its letterhead dismissing its own employees for embarking on an unprotected strike. In fact throughout the negotiations and the referral to the Commission there was never any suggestion that the dispute was between the Respondent and its own employees. In fact on 26 November 1997 during the strike the Respondent sought and obtained a court interdict against all the employees involved in the strike. It is notable that the interdict was not sought by the associated companies despite the fact that their employees were involved. This is a further demonstration of the Respondent's total control and management of all the associated companies.

42.

43. The court can therefore not uphold the Respondent's argument that

no dispute between the individual applicants and the other companies was referred to the Commission for conciliation. The dispute referred for conciliation had as much to do with the Respondent as with the other companies as one employer. The individual applicants were therefore not engaged in an unprotected strike. In the court's view therefore the individual applicants were engaged in a strike that was protected in terms of the Act. They had complied with all the requirements of the act to earn immunity from dismissal if they embarked on a strike. There was therefore no justification for the decision to dismiss the individual applicants on the basis that they were engaged in an unprotected strike. Even if one were to consider the separate identities of the Respondent and the associated companies it remains so that all the companies were represented during the negotiations and were referred to in the referral to the Commission. Having considered all the above it is the court's view that the Respondent with the associated companies were constituted into a single employer unit of all employees employed.

44. In considering what relief should be granted the court is guided by the provisions of section 193. The individual applicants have asked to be reinstated. No evidence was tendered suggesting that

reinstatement was not practicable or desired. The court is therefore satisfied that they should be reinstated. With regard to the fixed term contracts apparently signed by the individual applicants the court is of the view that they have no effect on this judgment. They have been overtaken by events. In any way there is no reason why the individual applicants should not receive the same treatment as the employees who were not dismissed and are still in employment.

45. The order of the court is therefore:

1. The dismissal of the individual applicants was unfair substantively and procedurally.

2. The individual applicants are reinstated in the employ of the Respondent and the associated companies on terms and conditions that would apply to them had they not been dismissed.

3. The respondent is ordered to pay each individual applicant compensation of twelve months based on the rate of pay that would apply to them had they not been dismissed.

4. There is no order as to costs.

MLAMBO J.

Date of judgment: 3 June 1999.

For the applicants: Mr Zulu of Hotel, Liquor, Catering, Commercial and Allied workers Union.

For the respondent: Mr Le Roux instructed by Corrie Nel Attorneys.