OF INTEREST

IN THE LABOUR COURT OF SOUTH AFRICA

(SITTING IN CAPETOWN)

CASE NO.:

C378/2001

HEARD : 26-28 AUGUST 2002

DELIVERED: 30 AUGUST 2002

In the matter between:

CEPPWAWU on behalf of

D Konstabel & 71 Others APPLICANT

and

SAFCOL RESPONDENT

J U D G M E N T

PILLAY D, J:

1. The first applicant was a sole bargaining agent of the 2nd to 73rd applicants, ("the employees"). The employees were dismissed for misconduct. At the insistence of the respondent the dispute was referred to the Labour Court instead of Arbitration.
2. The annual shut down of the respondent was from 15 December to 15 January the following year. The last working day was always a Friday. The employees usually stopped work at 9:00 on that day, collected their payslips and left. It was also customary for the respondent to hold a year-end function for the staff.
3. Towards the end of every year the arrangements for the function were discussed between the respondent and the shop stewards. The date, time and programme for the function were agreed. Usually it involved a braai.
4. Arrangements for the function in 2000 was tabled for discussion at a meeting held on 30 October 2000. Three proposals were made, two of which involved having a braai, while the third proposal was to give the employees cash in lieu of a braai.
5. According to the minutes of that meeting the function was to be held on 8 December 2000 at 15:00. The minutes were circulated about 3 November 2000 to the shop stewards. The first applicant alleged that after consulting the employees, the shop stewards Messrs Tu and Daphula informed Mr Niemand, the manager of the respondent, on 26 November 2000 that they

wanted to be paid cash at 12:30 on 8 December 2000 and not at 15:00.

6. The respondent undertook to pay the cash of R40,00 instead of holding a braai, but according to the applicants it insisted on making the payment at 15:00 and not at 12:30. Further discussions were held on 1 December 2000 and informally on other occasions, the aaplicants alleged.
7. As far as the respondent was concerned the time of payment was not in issue as it believed it had been agreed that the payment would be made at 15:00. The respondent denied that there were discussions about the time of payment being 12:30 at any stage before 7 December 2000. When shop steward Mr Daphula communicated the desired time of payment as 12:30 to the respondent, the latter reiterated its stance to Mr Daphula.
8. The respondent immediately attempted to reconvene an urgent meeting with the applicant's organiser, Mr Johnson Williams. This meeting took place at about 08:00 on 8 December 2000. The respondent reiterated its position that payment will take place at 15:00. It alleged that this was accepted by the shop stewards and Mr Williams. Such acceptance was denied by Mr Williams and the shop stewards.
9. A memorandum was handed out to the employees informing them that they would be paid R40, 00 at 15:00. The shop stewards also informed them about the respondent's stance on the matter. The employees insisted on being paid at 12:30. Mr Niemand asked Mr Williams to return to the plant to resolve the matter.

10. At 12:30 the start of the normal half hour lunch break the employees assembled at the administration offices and demanded payment. Mr Williams reiterated the respondent's position and read out an ultimatum that the employees return to work or face disciplinary action. The employees refused to return to work. The ultimatum was also translated by the shop stewards.
11. A collective disciplinary hearing was held on 14 December 2000. Those employees who were already on a final written warning were dismissed, those who had no final written warnings were issued with such warnings and not dismissed.
12. I turn to consider the material issues in dispute:

Was there an agreement on 30 October 2000 that the employees would be paid at 15:00 as alleged by the respondent?

13. The time of payment as well as the other terms of the respondent's proposal were to be taken back to the employees for a mandate. It was conceded for the respondent that in the past a part of the working hours was taken up by the function.
14. The respondent's proposal meant that this benefit was no longer available if the time for payment was accepted as 15:00. It is unlikely that the shop stewards would have agreed to abandon a benefit without a mandate from

the employees. In my view no agreement about the time of payment was concluded on 30 October 2000. The entire proposal, including the timing of the payment, if the payment option was exercised, was to be referred to the employees for a mandate.

When was the respondent alerted to the employees' stance that they wanted to be paid at 12:30?

15. Although Mr Niemand was cross-examined about meetings with the applicant's representatives on 26 November. That there were other meetings with them thereafter about the payment and its timing was not put to him.
16. When and how often the respondent was engaged about the issue was important. If the first applicant had engaged the respondent as soon as possible after it had obtained a mandate from the employees and frequently thereafter as alleged, then the probabilities are that the applicants viewed the matter seriously and pursued it vigorously with the respondent.
17. An adverse inference must be drawn from the applicants' failure to cross-examine Mr Niemand about the further meetings. Even if the first applicant communicated the employees' position before 7 December 2000 to the respondent, it could not have done so in the manner that signaled

the seriousness and importance of the matter as far as the employees were concerned. Having regard to Mr Niemand's prompt attempt to secure the intervention of Mr Williams when he did learn about the applicants' demand, I am satisfied that he would have acted similarly if he had been alerted sooner.

Did the applicants embark on an illegal work stoppage for about two hours on 8 December 2000?

18. The applicant alleged that it was a term or condition of their employment that they would have a year-end function on the Friday before the shut down at 12:30.
19. Mr Whyte submitted for the applicants that the function was a historical practice which became an entitlement either because it was a tacit term of the contract of employment or because it was covered by a collective agreement regulating terms and conditions of service.
20. With regard to the alternative argument that it was a term in a collective agreement Mr Whyte relied on the written agreement that was concluded at the end of their relationship building intervention on 20 October 2000, (the" RBI agreement"). In terms of that agreement the respondent, it was submitted, had to negotiate with the first applicant about any departure from historical practices.

21. The respondent had unilaterally withdrawn the entitlement and breached the collective agreement which regulated matters of mutual interest so it was submitted. In either event it was a right that the employees had acquired to have two hours off on the day of the function. As they were merely exercising such a right, their refusal to return to work could not be construed as a work stoppage, so it was submitted for the applicants.
22. The respondent denied that the year-end function was a term or condition of employment, or a practice. It was not a right, but a discretionary benefit to acknowledge the employees' service, it was submitted. Every year the arrangements for the function were discussed. In 1997 the function was held on a Saturday at 11:00 and in 1998 on Monday 14 at 13:00.
23. In 1999 it was held two weeks before the shut down, on 3 December 1998 at 12:30. The function was dispensed with in favour of cash. There was not only no right, but no need for time off to hold a function.
24. As all the arrangements were discussed every year there was no historical practice. In so far as I might find that there was a custom or practice then it was submitted that the respondent had no greater obligation than to consult with the workforce before implementing or changing it. That was done in this case. So it was submitted for the respondent.
25. For the determination of a tacit term in a contract in a contract Mr Whyte relied on Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506(a) at 531 where the tacit term was defined

as:

"An unexpressed revision of the contract which derives from the common intention of the parties as invoked by the Court from the express terms of the contract and the surrounding circumstances."

26. A Court, he said, should seek to give workability and efficacy to the contract based on the practice between the contracting parties. An employment contract, it was submitted, is not static, but changes over time. This theoretical proposition does not fit the facts of this case.

27. Mr Oosthuizen for the respondent referred me to the Law of Con-tract in South Africa by RH Christie, Fourth Edition, Butterworth. At page 193 the learned author quotes thus from the judgment of Scrutton LJN Reigate v Union Manufacturing Companies Ramsbottom 1981 (KB) 592,609:

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is if it is such a term that it can confidently be said that if at the time the contract was then negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: 'Of course so and so will happen and we did not trouble to say that, it is too clear.'"

28. Nothing from all the facts can necessarily or reasonably imply that the parties had the common intention of conferring such a benefit as a contractual right, a breach of which entitled the employees to redress. The year-end function was not a term and condition of employment. It was a discretionary benefit offered to employees whose attendance was voluntary. This was conceded by shop steward Mchitwa who testified at the disciplinary inquiry.

29. The function was not a right. Consequently the two hours time off work was also not a right. Because of the regularity of its occurrence it acquired the status of a practice. However, it always remained within the respondent's discretion to offer or withdraw it in order to meet the objectives for which it was intended. As an acknowledgement by the respondent of the employees' services for the year, it had to be voluntary and discretionary. If it was elevated to a right of the employees then the respondent's performance was an obligation and not a gesture of goodwill. That was never the mutual intention of the parties and it cannot be implied as a term or condition of a contract of employment.

30. However, the regularity of its occurrence resulted in the function acquiring the status of a customary practice without losing its purpose as a voluntary gesture of appreciation. The practice could therefore not be elevated to a right. If the respondent wished to vary the practice it had to consult with the applicants. This he did on 30 October 2000. As the applicants failed to engage the respondent expeditiously, the latter cannot be accused of acting unilaterally.

31. With regard to the alternative argument that the function was provided for in a collective agreement, the RBI agreement records the position relating to the historical practices thus at (A)18:

"3.1 All agreements between the parties will be reassessed through a process of negotiation. They will either be confirmed, modified or

terminated.

3.2 In preparation for the above the union will provide details of all unwritten agreements (or historical practices).

3.3 The parties will agree on a dispute procedure to be followed in the event of non-consensus.

3.4 The parties commit themselves to the application of the recognition agreement and all other agreements."

32. In addition the first applicant was to provide a provisional and final list of unwritten agreements by 20 and 24 October 2000 respectively. These were the express terms of the agreement. On the authorities cited above it cannot be implied from these terms that the employees had acquired a substantive right to the function as a historical practice. The applicants have to first prove the existence of the practice before they can assert any rights thereto.

33. It is common cause that the first applicant did not supply the list as agreed. It was also common cause that the parties had not engaged each other about what the historical practices were prior to 8 December 2000.The procedures agreed in the RBI agreement therefore did not take place.

34. The respondent cannot be blamed for that as the initiative lay with the first applicant. The applicants failed to either prove in these proceedings or by invoking the procedures in the RBI agreement that the historical practice

amounted to a substantive right arising from the RBI agreement or any other collective agreement. Consequently, the question whether the respondents breached the collective agreements does not arise.

The penalty.

35. Those employees who had been issued with previous final written warnings for participating in work stoppages were dismissed while those who had not been previously disciplined received final written warnings. No distinction was drawn between those with several written warnings and those with only a single written warning. This approach, Mr Whyte submitted, was arbitrary and unfair as such a policy had not been applied in the past. He further submitted that if I were to find that the applicant had participated in an illegal work stoppage then I should also find that it was triggered by the unjustified conduct on the part of the respondent. The conduct referred to was:

a. The respondent's withdrawal of an existing benefit;
b. The respondent undertaking in the RBI agreement to negotiate with the first applicant before departing from the unwritten agreement;
c. The respondent taking drastic action because of the concerns of senior management that it was unprofitable.
d. The respondents' breach of the RBI agreement which enraged the

employees.

36. I have already found that the respondent's conduct did not depart from the RBI agreement. I have also found that the existing benefit was discretionary and as such, the respondent could withdraw it after consultation. If the drastic action referred to was a withdrawal of the two hours time off that was normally taken up by the function, then the respondent's actions and reasons therefor were entirely justified as it was common cause that productivity was low. Furthermore, Mr Niemand testified that if the logs were not worked on before the employees went off duty there would be wastage.

37. It is to the conduct of the applicants that I must turn to determine whether they acted reasonably in all the circumstances. The applicants could not reasonably have believed that they were exercising a right not to work and accordingly were not participating in an illegal stoppage. I say so because firstly, there was apparently a difference of opinion amongst the shop stewards about whether the function was a right or a gesture of gratitude. Here I refer to the evidence of Mr Mchitwa. This should at least have caused the applicants to doubt or reconsider their assertions and adopt a more cautious method of enforcing what they believed were their rights.

38. Secondly, the point was not raised *in limine* at the disciplinary inquiry or in these proceedings that the employees should not have been disciplined

and dismissed in the first place because they were exercising their right. They would have sought a determination as to whether they were participating in an illegal work stoppage at the outset if they genuinely believed that they were exercising the right to their time off.

39. Thirdly, even if the applicants were *bona fide* in the belief that they were exercising a right not to work, they were warned at least twice orally and in writing. Such warnings ought to have cured any doubt or belief that the applicants might have had about the correctness of their assumptions. (Coin Security Group (Pty) Ltd v Adams & Others 2000(4) BLLR 371 LAC.)

40. Fourthly, the applicants participated in the stoppage because they believed that they had a right to the time off. It was submitted that it was not because they wanted to organise a function themselves. That reason was never communicated to the respondent at the time. It emerges in these proceedings as an afterthought.

41. Fifthly, the shop stewards and organiser of the first applicant chose not to advise the employees on what course of action they should take. I note on the other hand that they did not exhort the applicants to persist in their conduct.

42. Sixthly, the applicants had not even contemplated using a less drastic dispute resolution procedure.

43. Seventhly, the first applicant did not provide the list of historical practices as agreed. It therefore failed to initiate an engagement with the respondent

as agreed in the RBI agreement. The applicants also did not alert the respondent timeously to their position that they believed they were entitled to the two hours off.

44. It was submitted that as the respondent had decided to change its strategy towards its workforce, it should have exercised discipline more sensitively by not dismissing the employees. In the past the respondent had issued two written warnings without dismissing after the first warning. The employees should have been given an opportunity to adjust to the changes. Furthermore, in the RBI agreement first applicant and the respondent committed themselves to jointly communicating the disciplinary code and procedure to the employees. This had also not been done.

45. The applicants conceded that discipline was not suspended by the RBI agreement. The relationship building initiative recommended that management should also act firmly in relation to managing its labour. This was acknowledged on behalf of the applicants. The respondent had endured three work stoppages that year. For the first two it issued letters of warning. After the third stoppage the respondent and first applicant agreed to subject themselves to the relationship building initiative without taking disciplinary action.

46. Before disciplinary action was taken in December the employees were warned of the consequences of their actions. They could not have entertained any reasonable doubt that the respondent will not act firmly

against them. There was no evidence that they were confused as was suggested during the cross-examination of the respondent's witnesses. They ought to have realised that they risked their jobs when they tested the tolerance of the respondent.

47. I find that the conduct of the applicants was in all the circumstances intransigent and unreasonable. The argument that clause 9.1 of the collective agreement which precluded dismissal within 48 hours after the commencement of industrial action indemnified the employees against dismissal in this case, was withdrawn.

The previous warnings.

48. Some employees had been issued with warnings following the industrial action in May and July. The first applicant admitted that there were work stoppages on those two occasions but denied that employees were disciplined before. No hearings were held and no warnings were issued.

49. Mr Niemand testified that the warnings were handed to the employees and some of them threw them away. None of the employees to whom the respondent alleged it had given warnings was called to refute Mr Niemand's evidence. The evidence of their organiser and the shop stewards that they would have been aware if the warnings had been issued, is not an adequate rebuttal of Mr Niemand's testimony. An adverse

inference must follow the failure to call an employee as a witness in rebuttal.

50. It was admitted that the letters of warning relating to the July stoppage was created on 28 July 2000, that is the day of the stoppage. On the probabilities it is hardly likely that the respondent would generate letters of warning and simply file them without alerting the employees concerned that he or she was warned.

51. The applicants were therefore aware of the letters of warning. Consequently, their failure to challenge the warnings as soon as they became aware of them must be seen as an acceptance of the warning.

Bias.

52. The witnesses for the applicants testified that on 12 December 2000 they per chance discovered that the respondent's management was having a strategic planning meeting at the King George Hotel where they were also meeting.

53. Mr Krige, the respondent's human resources manager was beckoned out of the meeting and asked whether the first applicant's representatives could meet with Mr Niemand. As first applicant's general secretary from Johannesburg was available, it had hoped that the disciplinary action

against the employees could be discussed.

54. Mr Krige, it was alleged by the applicants, reported back that a meeting was not possible and that the issue of the work stoppage was the very subject of discussions that day. Mr Krige denied saying this. He and other witnesses for the respondent testified that there was no discussion about the disciplinary action that was to be taken against the employees two days later.

55. The only direct evidence I have of what transpired at the meeting at the King George Hotel is that of the respondent's witnesses. They acknowledged that the work stoppage was discussed in a strategic context. The minutes reflect that they decided to follow a "conservative approach" as a first option and then a "drastic approach" if that failed. By this it was meant that if firm management of the labour force did not work then the mill would be closed down.

56. I doubt that Mr Krige as an experienced human resources manager would have been so naive as to inform the applicant's representatives that the disciplinary action was to be discussed. If he had done so then the applicants would have protested immediately that the outcome of the disciplinary action was being pre-judged. This they did not do at the disciplinary hearing. The complaints that Mr Taylor who chaired the inquiry was biased because he attended and was influenced by the strategic planning meeting, was raised for the first time in these

proceedings.

57. As a manager Mr Taylor could not be expected to be neutral in the sense of being devoid of all opinion about managing labour in the interests of the respondent. Whether he attended the meeting or not he must have had some preconceived ideas about the respondent's approach to discipline.

58. I would be surprised if he was not mindful of the respondent's strategy for managing its labour force. The test is, however whether the applicants reasonably feared that he would not exercise sufficient self-discipline to determine their case impartially. As the applicants representative, Mr Williams, an experienced organiser, did not at the time express any reservations about Mr Taylor chairing the hearing, I infer that the applicants had no fears about his competence as an impartial adjudicator.

59. It may have been inferred that Mr Taylor's decision manifested bias after it was disclosed to the applicants because of his slavish acceptance of aggravating circumstances presented by the respondent and his rejection of the mitigatory circumstances. That goes to the penalty to be imposed on the employees. I note that the finding of guilty is not seriously challenged in these proceedings as a manifestation of his bias. If it was, then the finding that the employees were guilty of misconduct would have to be examined to determined whether it was tainted by bias.

60. As far as the penalty is concerned, Mr Taylor adopted a formula that is objectively justifiable in labour law jurisprudence relating to collective

discipline. Modise & Others v Steve Spar Blackmead 2000 BLLR 496 LAC at 522(g).

61. In the circumstances I find that the complaint of bias is also an after-thought.

62. With regard to costs I take into account the applicant's conduct and the submissions they have made in pursuit of retaining their jobs. It is disturbing that Mr Williams misled the disciplinary inquiry by submitting that the first applicant became aware of the dispute on 8 December, the very day of the stoppage. As a result thereof he claims that he did not know and did not have time to follow the dispute procedure.

63. The submission is untrue because the evidence for the applicants in these proceedings was that they were aware of a dispute by at least 26 November 2000. It is also their evidence in these proceedings that they had not considered the grievance procedure at all. Such conduct is dishonourable and must be censured with some cost.

64. On the other hand there is the ongoing relationship between the respondent and the first applicant. The latter was duty-bound to protect and defend the rights of such a large number of its members.

65. In the circumstances I grant an order in the following terms:

a. The dismissal of the employees was procedurally and substantively fair;

b. The claim of the applicants is dismissed;

c. The first applicant is to pay 20% of the respondent's costs.

HE APPLICANT : J. WHYTE

UCTED BY : CHEADLE THOMPSON AND HAYSE

HE RESPONDENT : A. OOSTHUIZEN

UCTED BY : BARNARD WHITEHEARD INC.

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JUDGE D. PILLAY