IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

Case no: JS 794/03

In the matter between:

NATIONAL UNION OF METAL
WORKERS OF SOUTH AFRICA **First Applicant**

MOSES FOHLISA & 41 OTHERS **Second and further**
Applicants

And

HENDOR MINING SUPPLIES
A DIVISION OF MARSCHALK
BELEGGINGS (PTY) LTD **Respondent**

JUDGMENT

CELE AJ

Introduction

[1] The case of the applicants is about an unfair dismissal of the 2nd to the 41st applicants, hereafter referred to as the applicants, by the respondent, their erstwhile employer. They were assisted by the first applicant ("the union"). The respondent opposed the claim.

[2] The applicants have previously approached this court by way of an urgent application, seeking to have the action of the respondent, in intending to dismiss the 2nd to the 41st applicants declared unlawful in terms of the Labour Relations Act 66 of 1995 ("the Act") and also to therefore interdict it from dismissing them. On 13 August 2003 Jammy AJ dismissed the application with costs. That judgment was reported as *NUMSA & Others* v *Hendor Mining Supplies* (2003) 10 BLLR 1057 (LC).

[3] The chronology of events leading up to the judgment of 13 August 2003, is relevant in the present matter but it is unnecessary to give a detailed account thereof as it is likely to be a duplication of what Jammy AJ has aptly covered in his judgment. I will therefore endeavour to be brief.

Background facts

[4] The applicants worked under the supervision of the respondent's production controller, one Mr Corrie De Bruyn. Tensions between the applicants and Mr De Bruyn developed, reaching such a high degree that the union issued a letter dated 26 September 2002, to the respondent, setting out a series of allegations of the applicants against Mr De Bruyn and stating that a request had been made to but snubbed by the Managing Director, Mr Daniell, to have Mr De Bruyn dismissed or transferred from the respondent's premises.

[5] On 3 August 2002 the Congress of South African Trade Unions ("COSATU") organised a national stay away. The applicants heeded the call but when they returned to work, Mr De Bruyn allegedly issued insulting utterances of a racist nature to certain of the applicants by referring to them variously as "kaffirs", "baboons" and "bobbejaans". He was further said to have made demeaning utterances towards COSATU and its officials. The incident led to the applicants embarking on a spontaneous work stoppage during which they demanded the removal of Mr De Bruyn from their workplace. Mr Daniell intervened by suspending Mr De Bruyn, pending a disciplinary enquiry. When the enquiry was held, 6 of the applicants testified and Mr De Bruyn was found to have committed a different misconduct to the one he was charged with and he was given a final written warning and he was directed to attend a course on staff management and human relations. He returned to his supervisory role which then resulted in another work stoppage by the applicants. They were disgruntled by the sanction imposed as it fell short of a dismissal or transfer. The respondent dismissed the applicants for taking part in an unlawful work stoppage. The union intervened for its members and an agreement was reached on 17 October 2002. All the applicants were reinstated subject to each signing a written undertaking in the following terms:

> "I accept reinstatement in my old position in the company.
>
> I accept a final written warning for twelve months for participating in an unprotected work stoppage.
>
> I further accept to report to Mr Corrie De Bruyn."

[6] The agreement reached between the union and the respondent was thereafter summarised in a document which was written by Mr Jacob Xilongo, the union's organiser and was sent to the respondent as a confirmation of the agreement reached. The written undertaking which was to be signed by the applicants was a separate document with terms of reinstatement. It was drafted by the respondent and was shown to the union during the discussions preceding the agreement. The applicants were reinstated and work resumed as usual.

[7] On 29 October 2002 the union had a meeting with Mr Daniell and indicated to him that the applicants were finding it intolerable to work under Mr De Bruyn. The union demanded the dismissal or removed of Mr De Bruyn. The union requested to be furnish with a copy of the tape transcript of the disciplinary hearing. On 26 November 2002 Mr Daniell issued a letter to the union in which he stated that there was no evidence that Mr De Bruyn had insulted the applicants but did not supply the requested transcript. The respondent shut down its business for the annual leave and re opened on the following year.

[8] On 27 February 2003 the union referred a dispute of mutual interest to the Metal and Engineering Industries Bargaining Council Centre for Dispute Resolution ("the Bargaining Council"). Conciliation was held on 22 April 2003. The meeting was adjourned to allow the respondent to provide excerpts to substantiate its claim that the insulting and demeaning utterances had not been testified to by any of the applicants during the disciplinary hearing. A meeting was held between the union and the respondent and the tape recording was played back. The

respondent switched the tape recorder off before all recording could be heard, resulting in a further dispute between the parties. The dispute remained unresolved and a certificate of outcome was issued on 6 May 2003. Further attempts made to resolve the issue failed and the union issued a notice of a strike on 20 June 2003. On 24 June 2003 the respondent issued a letter to its entire staff, indicating that the applicants were on a final written warning and that if they embarked on the strike, they ran a risk of being dismissed. As it was indicated in the notice, the strike commenced on 25 June 2003. The respondent took the position that the disciplinary enquiry held against Mr De Bruyn and the agreement of 17 October 2002 to reinstate the applicants, resolved the dispute involving Mr De Bruyn as applicants accepted that they would report to him. The strike was therefore unlawful, according to the respondent.

[9] On 1 July 2003 the respondent wrote to the union and to the applicants, threatening to dismiss the applicants unless they returned to work before the commencement of the shift on Friday 4 July 2003.The applicants and the union were invited to make representations prior to 4 July 2003 as to why the applicants were not to be dismissed. No such representations were made. The union brought the urgent application to this court. Through the agreement of the parties, an interim order was granted, preventing the respondent from dismissing the applicants pending the hearing of the matter by this court. On the next court date, the application was dismissed. On 13 August 2003 the respondent invited the union to make representations as to why the applicants were not to be dismissed. Notwithstanding the representations made by the union, the respondent proceeded to dismiss all the 40 applicants, with 2 others on 18 August

2003. A dismissal dispute which arose was referred to the Bargaining Council on 19 August 2003 for conciliation and when it could not be resolved, it was referred to this court.

The issues

[10] The parties agreed, in their pre-trial minute, that this court had to decide whether:

- An agreement was reached on 17 October 2002 between the first applicant and its members and the respondent and if so, the nature thereof,
- The strike by the individual applicants was protected and / or lawful in terms of the Act,
- The dismissal of the applicants was nevertheless fair, in the event the court finds that the strike was unprotected and / or unlawful.

Evidence

[11] Most of the evidence led by the parties was not in dispute. The respondent was among a group of four companies falling under one holding company. Mr. Daniel was a Director of all four companies. There was therefore a possibility of the transfer of the services of Mr. De Bruyn to one of the other companies.

Mr. De Bruyn's enquiry

[12] One Mr. Leon Steenkamp was the chairperson of the hearing and Mr. P.C. Jacobs assumed the role of a prosecutor or initiator. Six witnesses were called to testify against Mr. De Bruyn. They were Mr. Moses Fihlisa, Mr. Daniel Mlombo, Mr. Solomon Khumalo, Mr. Lungephi Mbushe, Mr. Obed Sithole and one Jim, whose surname is either Natlawonde or Mhaule. As the issue of his correct surname was never canvassed, I will only refer to him as Jim, (without intending to be derogatory towards him)

[13] The first three witnesses were in attendance from the commencement of the proceedings. Mr. Fihlisa stayed on through out the proceedings. When Mr. Fihlisa was "testifying" Mr. Mlombo and Mr. Khumalo left the room only to return when their turn to "testify" came and they thereafter stayed in the room until the end of the hearing.

[14] Jim was the only witness who directly incriminated Mr. De Bruyn for having referred to him as a "kaffir". This highly insulting utterance was said to have been made when Jim had refused to comply with a work instruction given to him by Mr. De Bruyn. The instruction was given in the morning, when the shift commenced but the utterance was allegedly made after tea break when Mr. De Bruyn came to Jim.

[15] In his plea and through questions that he put to the witnesses, Mr. De Bruyn conceded that he could have used "a strong language" to the workers. By "a strong language", was understood to be inclusive of an expression "fock-off". The other witnesses testified about reports which were made to them and about Mr. De Bruyn having used a finger

language in an insulting manner. Mr. De Bruyn conceded to a use of the finger language but said that it was intended to be a joke as the same had been done to him. Reference was made to Mr. Andries Mathebula and a Mr. Chauke as witnesses who could testify on the abusive language used by Mr. De Bruyn but the two were not called as witnesses.

[16] At the end of the hearing, Mr. Steenkamp indicated that evidence led at the hearing did not disclose a very serious transgression by Mr. De Bruyn and that a sanction of dismissal was out of question. He left the hearing without pronouncing a formal finding which he indicated would follow after he would have deliberated with Mr. Daniell, Mr. De Bruyn was later found guilty of a lesser transgression. The reason behind the decision was premised on the finding that Jim was not a credible witness over the issue where he was the only witness. The sanction imposed on him was of a final written warning coupled with a requirement that he attends a course on staff management and human relations.

[17] It seems that the only sanction which came to the knowledge of the applicants was one of a final written warning.

The agreement of 17 October 2002

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[18] The version of the respondent was that the agreement terminated all "issues" it had with the applicants in respect of Mr. De Bruyn. The respondent believed therefore that there was nothing else it could engage the applicants and their union on, in regard to Mr. De Bruyn as the applicants agreed to report to him. The respondent refused to enter into

any correspondence with the union over Mr. de Bruyn until the union referred the dispute which had arisen to the Bargaining Council on 26 February 2003. Except through the letter of 24 June 2003 and 1 July 2003, the respondent chose not to challenge any of the processes initiated by the union until the matter was brought to this court by way of an interdict.

[19] The version of the applicants was that the agreement reached was intended to help the applicants resume their work. While they agreed to report to Mr. De Bruyn, they did not understand that to mean they could no longer raise the issue of his abusive utterances towards workers. The applicants believed they were entitled to refer the dispute to the Bargaining Council, to engage in a strike and to seek an interdict from this court.

Dismissal of the applicants

[20] That the respondent dismissed all the applicants remained beyond dispute. As a consequence, the respondent had to show that there existed a fair reason for it. The procedural fairness of the dismissal was never challenged by the applicants.

[21] The letter of 24 June 2003 was an advice to the union that the strike would be unprotected. The respondent also issued a notice to all the staff advising them that their strike would be illegal and that they could be dismissed. On 1 July 2003 the respondent issued a letter to the union in which it disclosed its intention to dismiss the striking workers if they did

not return to work at the beginning of their shift on 4 July 2003. The applicants were also advised to make any representations they might wish to, in regard to their prospective dismissal, to Mr. Daniel.

[22] On 13 August 2003 Jammy AJ handed down a judgment whose order went against the applicants. Once the applicants came to know of the court order, they tendered their services. They also withdrew their demand in regard to M. De Bruyn. The respondent reciprocated by declining the tender and by suspending the applicants on full pay. It required of the applicants to furnish representations as to why each was not to be dismissed. On 18 August 2003 a disciplinary hearing was held. Various submissions were made on behalf of the applicants by Mr. Xilongo. They were however dismissed on the same day and their subsequent internal appeal was in vein. The respondent took the position that the applicants had shown no remorse for the production loss incurred during the strike.

Submissions by parties

[23] The submission by Ms Ruth Edmonds, who appeared for all applicants, was that a collective agreement did not envisage a three- part agreement in which the individual applicants were also made party on an individual basis to such collective agreement. Accordingly, the submission went, the agreement arrived at between the employees and the respondent on 17 October 2002, was not a collective agreement.

[24] She said that a collective agreement, like any other contract, needed to be interpreted on the basis of the clear meaning of the words. Her argument was further that the wording of the final sentence in the agreement arrived at on 17 October 2002., did not expressly or impliedly state that the entire issue in regard to Mr. De Bruyn's conduct and the respondent's response thereto, had been resolved.

[25] The applicants and the union, she argued, at all times conducted themselves with caution, took legal advice and honestly believed that they were embarking upon a protected strike which would not leave them vulnerable to dismissal. She said that the respondent, in a particularly legalistic and technical response, to a continuing dispute, refused to meet with the applicants in an attempt to resolve the dispute.

[26] Mr. Redding for the respondent submitted that the strike upon which the applicants embarked was illegal. The reasons thereof being that:

- The matter or issue which gave rise to the strike had been abandoned.
- The demand in the strike notice that Mr. De Bruyn be dismissed or removed was unlawful.
- There was insufficient evidence to warrant his dismissal or removal.

[27] He said that a collective agreement regulated the issue in dispute. As such, the re-employment of the applicants was subject to the conditions recorded in their individual letters. One such condition was that the issue of Mr. De Bruyn had been "put to bed" which was reinforced by the

written warning which the applicants accepted. He said that there was nothing in the definition of "collective agreement" in the Act which required its terms to be recorded in a single memorial.

Analysis

[28] Once the employees had lodged a grievance against Mr. De Bruyn, they were entitled to the matter being investigated upon. The outcome of the investigations would then inform the respondent of the appropriate measures to take. In this case, Mr. Daniell basically suspended Mr. De Bruyn and arranged for a disciplinary hearing. The consequences of a failure to conduct an appropriate preliminary investigation are that on the date of the disciplinary hearing:

- Mr. P.C.Jacobs did not know the role he was to play. His very first statement was that he was chairing the hearing, -page 2 of exhibit B. By then, Mr. Steenkamp had already indicated that Mr. Jacobs was to be a prosecutor for the respondent. Mr. Jacobs was therefore not prepared for the task he was to perform.
- When Mr. Steenkamp listed people in attendance, he referred to Mr. De Bruyn as the complainant, -page 3 of Exhibit B. This could well have been a subconscious reluctance on Mr. Steenkamp to look at Mr. De Bruyn as the accused.
- When Mr. De Bruyn pleaded guilty but under circumstances, Mr. Steenkamp failed to elicit clarification of such a plea but quickly said, they would get to that later, whatever that meant. He then called on Mr. Fihlisa to continue with his evidence. At

that stage it remained unclear what Mr. De Bruyn was pleading guilty to, if not to the charge as it had been read. Mr. Steenkamp was very much confused about his role in the hearing.

- After Mr. David Mlambo had testified Mr. Jacobs did not even know who the next witness was to be, page 10 of Exhibit B. At that stage the two witnesses who had testified had not given any evidence of the very serious allegations Mr. De Bruyn was facing. Clearly, Mr. Jacobs had not spoken to any of the witnesses in preparation for the hearing.
- Page 12 of the transcript has Mr. Steenkamp confessing that he came into the enquiry with no clarification of what procedure to follow. He and Mr. Jacobs did not know that the respondent would be charging Mr. De Bruyn, and that Mr. Jacobs would be calling witnesses to substantiate the case of the respondent against Mr. De Bruyn.
- After Mr. De Bruyn had testified Mr. Jacobs was supposed to cross-examine him. He did not. Cross- examination was left to be done by an employee, Mr. Fihlisa.
- Page 22 of the transcript has Mr. Jacobs explaining what Mr. De Bruyn meant about a hand gesture which he said was used to express a joke, instead of cross-examining him.

[29] The assessment of evidential material in Mr. De Bruyn's disciplinary hearing left much to be desired. When testifying on the events of 3 October 2002, Mr. Lungephi Mbushe said that Mr. De Bruyn had spoken to him "after teatime." No issue was taken on this time estimation.

Similarly, Mr. Obed Sithole said that Mr. De Bruyn had spoken to him before teatime", which was changed to: "not sure about time but it was after teatime." Again the issue around time and its significance were not raised with Mr. Sithole. Jim said that Mr. De Bruyn spoke to him "after teatime", when the insulting words were uttered. If Mr. De Bruyn spoke to some employees after "teatime", there appears to be no reason why he could not have similarly spoken to Jim. While the instruction to Jim may have been given at the beginning of the shift, Mr. De Bruyn later went to Mr. Fihlisa to complain about Jim's reaction, or lack thereof. Mr. De Bruyn appeared to have been concerned about Jim's attitude. Nothing at least, in logic, could stop him from later approaching Jim. Jim's evidence on time appears, to find corroboration, at least, in the evidence of Mr. Lungephi Mbushe. The subsequent finding that Jim's evidence was uncorroborated and was a lie appears to have had no basis at all.

[30] The disciplinary hearing against Mr. De Bruyn was in my view, a sham. It had the consequence that:

- It left the employees unsatisfied, bitter and still disgruntled. Those who wanted to testify against him on the alleged insulting and degrading utterances were not identified before the hearing.
- It incapacitated the respondent from being able to take any further disciplinary action against Mr. De Bruyn.

[31] By their very nature, the alleged racist and degrading utterances were of such serious a magnitude that, if successfully proved, would justify a dismissal.

[32] I hold the view that the disciplinary hearing against Mr. De Bruyn brought with it unfair consequences to the employees and hence, to the applicants. Up until 17 October 2002, the demand by the employees to have Mr. De Bruyn dismissed or removed was therefore legitimate.

[33] The letter dated 17 October 2002 from the union expressly purports to confirm the positions of all employees who participated in an industrial action and the management's agreement to reinstate them subject to the conditions recorded in their individual letters. Seen in this light, the letter is therefore not itself a written agreement but a confirmation of an orally made agreement. There is no evidence, throughout the hearing of this matter, that the parties intended to have an agreement they reached on 17 October 2002, reduced into writing. If Mr. Xilongo had not written the letter of 17 October 2002, that would not detract from the fact that an agreement to reinstate the workers had been reached by the union and the respondent. In my view therefore, the agreement reached by the parties on 17 October 2002 was only verbal. The confirmation of it in writing is not a collective agreement as envisaged by the Act. The letter unequivocally declares itself to be a confirmation of the terms of an agreement which had already been reached by the parties. Section 213 of the Act is very clear. It states, *inter alia* that a collective agreement means a written agreement concerning terms and conditions of employment.

[34] Further, while section 213 does not require that a collective agreement, be signed by the parties thereto, it was held in *Communication Workers*

Union v *Telkom SA Ltd* (1998) 19 ILJ 389 (LC) that such agreement had to be signed by the parties. While I have some reservations about this added requirement, I am not called upon to decide it, having found that the document in question is not a collective agreement. I have taken note of a further decision finding support for the view, that a collective agreement must be signed by the parties thereto (See in this regard a decision in *Ceramic Industries Ltd t/a Betta Sanitaryware* v *NCBAWU* (1998) BLLR1120 (LC)

[35] The next issue for decision is whether or not the applicants abandoned the matter at issue when they entered into the verbal agreement of 17 October 2002. In the case of *Public Servants Association of SA* v *Minister of Justice & Constitutional Development & Others* (2001) 22 ILJ 2303 (LC), Landman J relied on a decision of Innes JA in *Vermeulen's Executrix* v *Moolman* 1911 AD 384 to hold that :

> "And the well-known principle applies that an intention to waive rights of any kind is never presumed. There must therefore be clear evidence not only of the owner's knowledge but of his inaction for a sufficient time, and under effective circumstances."

See also the decision in Mutual Life Insurance Co. of New York v Ingle 1910 TS 540 at 550, which was similarly relied upon by Landman J.

[36] When the intention to renounce is expressly communicated to the person affected, he or she is entitled to act upon it and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right or clearly showing an

intention to surrender it, then also the intention may be acted upon, and the right perishes, -the *Ingle* decision.

[37] In the matter at hand, the parties failed to expressly communicate to each other whether the issue concerning Mr. De Bruyn's dismissal or removal was resolved or not when they reached an agreement of 17 October 2002. The agreement was preceded by a dismissal of the applicants because they had embarked in a strike in which they demanded the dismissal or removal of Mr. De Bruyn. Clearly therefore, the demand to dismiss or remove could not co-exist with the acceptance to report to Mr. De Bruyn. One had to give way to the other. When the applicants accepted as a condition of reinstatement that they would report to Mr. De Bruyn, they were, by implication, abandoning their demand to have him dismissed or removed. Their conduct and a written undertaking were inconsistent with the enforcement of their demand. That gave the respondent a right to act on the impression they created by reinstating them on the assumption that the demand had been abandoned.

[38] Each step of the events which ensued *ex post facto* the completion of the agreement, was a revelation that the agreement notwithstanding, the parties were not *ad idem*. The applicants believed that they could still demand the dismissal or removal of Mr. De Bruyn and took steps in furtherance of that belief. The respondent believed that the agreement "put the dispute to bed" and acted accordingly. In my view, the belief of the applicants was unreasonable even though on probabilities, it was genuinely held. The strike which they embarked upon was therefore unlawful in terms of the Act, as the dispute no longer existed

[39] The final enquiry is whether the respondent was forced to dismiss the applicants in order to keep its business going. (See in this respect a decision in *National Union of Mineworkers v Black Mountain Mineral Development Co. (Pty) Ltd* (1994) 15 ILJ 1005 LAC.) The respondent was indeed entitled to take into account the fact that the strike had taken about seven weeks. It took the union a period of about 10 months to pursue the issue of Mr. De Bruyn after 17 October 2002. This was from 29 October 2002, when it approached Mr. Daniell to 13 August 2003, when Jammy AJ handed down his judgment. The strike only commenced from 25 June 2003. It was a fairly long period of time during which the union and the applicants attempted to articulate their concerns, their misdirection in that regard notwithstanding. The respondent was accorded an opportunity of exercising a degree of flexibility in co-operating with the union in finding a peaceful manner to resolve the impasse. It chose a somewhat legalistic and technical response. There was no evidence of the strikers having committed any acts of misconduct during the strike. There was uncontested evidence that the applicants tendered their services as soon as they came to the realisation that their interdict application was dismissed. A consideration of all these factors, together with the unfairness of the enquiry against Mr. De Bruyn, informs me that the dismissal of the applicants was premised on an unsound rational and was consequently unfair.

[40] Accordingly the following order will issue:

(a) The respondent is ordered to reinstate the applicants in the same or not less favourable positions as they had at the time of their dismissal.

(b) The reinstatement is to be with effect from 1 January 2007. Each applicant is to report on duty on 23 April 2007at 08h00.

(c) No costs order is made.

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Cele AJ

Date of Hearing : 19 April 2006

Date of Judgment: 16 April 2007

For the Applicant: Ruth Edmonds of Ruth Edmonds Attorneys

For the Respondent: Adv. Redding S.C.
Instructed by Brian Bleazard Attorneys