IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: JS 245\06

In the matter between:

NATIONAL UNION OF MINEWORKERS First Applicant

SEGWABE & 42 OTHERS Second Applicant

and

CHROBER SLATE (PTY) LTD Respondent

JUDGMENT

MOSHOANA AJ

Introduction

[1] The respondent is a slate mine operated by one Christoffel Johannes Oberholzer in the area of Groot Marico around Zeerust. The respondent operates on two sections namely the quarry and the factory. At the quarry, the stockmen excavate

raw materials (slate). At the factory, factory workers cut the slates and polish them. If no slates are produced at the quarry, the production at the factory gets affected by such.

[2] The matter before Court relates to dismissal of about 42 employees on the basis of their participation in an unprotected strike action. About 20 of those dismissed were stockmen (schedule A), 18 of those were dayshift factory workers (schedule B) and 4 of those were nightshift factory workers (schedule C).

[4] The first applicant being the National Union of Mineworkers and the individuals challenged the fairness of the dismissal.

Facts

[5] It is common cause that on 07 November 2005, the stockmen refused to release the slates they excavated to the factory. In view of that, Oberholzer, attempted to find out what the problem was. He was informed by the stockmen that they need a front-end loader to be engaged to clean the place to enable them to work. Oberholzer informed them that the loader would be arranged before end of the week. The stockmen did not want to believe that and insisted that until

the loader is brought they will not release the slate. The evidence of the respondent's witness pointed that the stockmen continued to excavate until 22 November 2005, whereas the applicant's evidence suggest that no work was done by the stockmen after 07 November 2005. I shall return to this fact later.

[6] The refusal to release the slates endured until 14 November 2005 when the stockmen together with the factory workers were dismissed.

[7] On 08 November 2005, A. P De Jongh on behalf of the respondent communicated with the first applicant to intervene on the issue of refusal to release slates. There was communication between Ntlakane of the first applicant and De Jongh whereby an agreement was reached to meet on 17 November 2005. De Jongh wrote to Ntlakane and informed him that the intervention is urgently required, it cannot wait for the 17th of November 2005 as the respondent was losing business as a result of the actions of the stockmen. There was no reaction to this request. On 11 November 2005, Hatting issued a notice to the first applicant indicating that its members are engaged in a concerted retardation and obstruction of work. In the notice he indicated that should the action continue on Monday, 14 November 2005, an ultimatum shall be issued and its ignorance would lead to summary dismissal.

[8] On 14 November 2005, the action continued. Ntlakane arrived at the premises of the respondent. An ultimatum was issued to the employees. The first ultimatum was issued at about 09h00. the second one was issued at or about 10h05. At or about 12h00 all the employees were notified of their dismissal.

[9] In so far as the factory workers are concerned, it was the evidence of Oberholzer that at or about 11h00, they had finished work as there was no more work to be done owing to the actions of the stockmen (refusing to release slates). He further testified that he gave instructions to the 10 men at the factory to collect other slates at the nearby quarry to which they refused. He then formed a view that they are also participating in a strike action of the stockmen. He conceded that the factory workers had no demand. He further conceded that there was no reason for the dismissal of the nightshift workers in that they were dismissed long before their shifts could commence.

[10] However, Hatting testified that the factory workers had not finished their work, they stopped working after Ntlakane told them to stop. He then formed a view that they joined the strike in support of the demand of the stockmen. On the issue of the nightshift workers he testified that their failure to report for duty at 18h00 (at which time they were already dismissed) led to the conclusion that they joined the strike of stockmen and

factory workers (whom have already been dismissed at that time).

[11] Ntlakane denied ever informing the factory workers to stop working. He testified that on 08 and 09 November 2005, he spoke to one Tebogo regarding the refusal to release slates. He warned him of their actions but they refused to heed his advise. He could not confirm whether the stockmen stopped working due to the alleged unsafe work conditions. He only responded to the letter of Hatting dated 11 November 2005 on 14 November 2005, when he returned to the office from the respondent. He confirmed refusal to sign and accept the ultimatum. He testified that he was not there for ultimatums. He was there for the safety issue of the members.

[12] Two of the stockmen testified, both gave different account of the stoppage. One testified that it was from the beginning of November whereas the other testified that it was shortly after 11h00 on 07 November 2005. One of them took photographs of the quarry in November 2006 and attempted to show that the quarry was unsafe. They all testified that they never left the quarry throughout. One testified that they sat on their slates, whilst the other testified that they were about 11 metres away from the workstation.

[13] On the first day of the trial the Court was asked by the parties to conduct an inspection *in loco*. In the Court's view that was

totally unnecessary, in view of the fact that the quarry had changed in the past two years and the alleged unsafe places could not be identified anymore. It was truly a worthless exercise. Nothing was achieved by this exercise.

[14] The photographs entered into evidence were of no assistance at all. They were taken a year after the dismissal. The quarry had changed in form as it incorporated the neighbouring quarry.

[15] Tsetse testified that the factory workers never supported the demands of the stockmen. They were surprised when they got informed that they were dismissed. She refuted allegations that Ntlakane instructed them to stop working.

Argument

[16] Adv Bekker for the respondent correctly conceded that the dismissal of the factory workers was unfair. He urged the Court to grant them less backpay due to the conduct of the first applicant in not assisting to deal with the problem. On the issue of the stockmen, he argued that their dismissal is both substantively and procedurally fair. He contended that, their action to refuse to release slate in itself amounts to a strike action as defined in section 213 of the Labour Relations Act, 66 of 1995. He further contended that by the stockmen's own admission they stopped working from 07 November 2005, and

that amount to a strike as defined.

[17] He further contended that enough opportunity was given to the first applicant and the stockmen to reflect on their actions and to return to work. They failed to heed the ultimatum. Accordingly the dismissal is fair.

[18] Adv Malan for the applicants argued that the backpay for factory workers should not affected by the conduct of the first applicant. He in turn argued that the stockmen did not engage in a strike. They had a common law right to withdraw labour as they were working in unsafe environment.

[19] In his argument refusal to work under those circumstances does not amount to strike. He abandoned his submission that relied on the provisions of section 23 of the Mine Health and Safety Act, 29 of 1996, in view of the definition of working place by the Act.

[20] He concluded that the dismissal of the stockmen is also substantively unfair as there was no fair reason for their dismissal. He further submitted that the fact that the respondent did not investigate the safety issues renders the dismissal procedurally unfair.

Analysis of facts

[21] Central to this matter lies two factual questions namely:

1. Did the stockmen work on 07 November to 22 November 2005?

2. Was the workplace safe?

[21] Turning to the first question, the evidence of the respondent's witnesses is that the stockmen proceeded to produce slate throughout but held on it until their demand is met.

[22] The stockmen as pointed out earlier gave conflicting versions.

Joseph Ratshwene testified that since the 01st November 2005 they stopped excavating slate until their demand of the loader is met. Tebogo Segwabe on the other hand testified that from about 11h00 on 07 November 2005, they stopped working.

[23] This evidence does not in the Court's view assist the stockmen's case. Even if I were to find which I am not, that they indeed stopped working that stoppage amounts to strike and it ought to have been proceeded by certain procedural steps before being embarked upon. The evidence of Reyneke that on 22 November 2005, they had to count number of slates to determine what is due to the stockmen was not sufficiently challenged.

[24] That evidence simply points to the fact that slate was

excavated ever since 01 November 2005.

[24] Further the evidence that the tractor would remove slates almost daily and the stockmen be paid for the month's work was equally not sufficiently challenged. That also leaves the Court with an indelible impression that slate was indeed excavated. It does appear and in fact the Court finds it as a fact that, the evidence to suggest that no work was done from November 2005 until dismissal was aimed at attempting to bring their conduct within the ambit of section 23 of the Mine Health and Safety Act which I shall deal with later.

[25] The applicants statement of case leaves much to be desired. It does not attempt to spell out the fact that the stockmen stopped working. All that was alleged was that on 14 November 2005 some of the applicants were participating in an unprotected strike action by way of a work stoppage. The only time this fact was alluded to was in a pre-trial conference held on 02 November 2006. (paragraph 4.2 under facts in dispute)

[26] In the Court's view, the stockmen did in fact work for the period 07 November 2005 to 22 November 2005. The fact that they refused to release the product of their labour is common cause.

[27] Turning to the second question, the evidence of the

respondent's witnesses was such that in their view (which view does not matter) the quarry was safe.

[28] On the other hand, the stockmen's evidence was that the quarry was unsafe at the time (this being their view).

[29] The photographs taken a year later does not advance the applicants case on this point neither do the inspection *in loco*.

[30] The question whether the quarry was safe requires evidence of a technical nature, expert testimony as it were. There is no evidence to show how the working place was in November 2005.

[31] The onus is on the applicants to prove this fact. They allege that the quarry was unsafe hence they withdrew their labour. He who alleges must prove. It cannot be so as Malan argued that the onus is on the respondent on this aspect. I agree with Bekker that the onus rests on the applicant.

[32] The following facts militate strongly against the fact that the working place was unsafe:

1. The applicants (stockmen) remained and continued to work (as it is found) in the unsafe working environment. Joseph testified that they were prepared to sacrifice their safety by guarding the slates they had excavated. Surely

if the place was that unsafe one would expect them not to remain in the quarry for a period of about 14 days.

2. The issue of unsafe working conditions was raised for the first time in the pre-trial conference (paragraph 4.9). In the letter of 14 November 2005, Ntlakane only refers to working safely. This does not suggest that the place is hazardous and risky as succinctly put in paragraph 4.9 of the minutes. Surprisingly the statement of case is completely mum about this rather important fact of the stockmen's case. This can only lead to one conclusion. The safety issue was truly an afterthought. I agree with Bekker in his submission that it is indeed an afterthought.

[33] Accordingly no evidence has been presented to substantiate the fact that the quarry was unsafe. The Court is not in a position to find that the quarry was indeed unsafe.

[34] On the contrary, there are sufficient factors referred to earlier which suggest that the quarry was indeed safe. If it was not, then the stockmen could have evacuated the quarry from day one of unsafe conditions.

The Law

[35] This matter raises various legal questions. But the central ones

relate to:

1. The applicability of section 23 of the Mines Health and Safety Act, 29 of 1996.
2. Was there a strike?
3. Was the dismissal of stockmen substantively and procedurally fair?
4. Should the Court limit backpay for factory workers?

The applicability of Section 23 of the Mines Health and Safety Act

[36] Other than the applicability of the section, arises the question whether if applicable does it render the strike protected?

[37] Section 23(1) gives an employee a right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee.

[38] Proper reading of the section reveals that once a working place, which is defined as any place at a mine where employees travel or work appear to that employee to pose a serious danger to the health defined as occupational health at mines, which occupational health is defined as including

occupational hygiene and occupational medicine, or safety of that employee, the employee should leave.

[39] Safety is defined as safety in the mines.

[40] Mine is defined to mean any other place where a mineral deposit is being exploited, including mine area and all buildings, structures, machines, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploiting or processing of a mineral or for health and safety purposes…

[41] In the circumstances for the provisions of section 23 to obtain there must be evidence to suggest that the mine posed serious danger to health and safety. There must also be evidence to show that the employee left the mine due to the danger. In the matter before me, the applicants (stockmen) remained in the quarry (mine). This fact immediately raises serious doubts about the serious danger aspect.

[42] Accordingly in the Court's view section 23 does not apply. In instances where section 23 apply, there could be no mention of a strike in that what will make the employee to leave the working place would not be to force acceptance of a demand but for his or her own safety. Since there will be no demand, there will not be a strike as defined.

[43] In **NUM and others v Driefontein Consolidated Ltd (1984) 5 ILJ 101 (IC)**, the Industrial Court, then dealt with a matter involving the regulation under the Mines and Works Act, 1956 which provided thus:

"*If any … person working under the supervision of a ganger or miner complains that the part of the working place where he is required to work is dangerous, the ganger or miner shall withdraw all workmen therefrom until he has personally with such assistance as he may require made it safe".*

[44] The court found that:

"*All that the non-scheduled miner is required to do is to complain that the part of the working place where he is working is dangerous and then the ganger is required to withdraw all the workmen from that place……".*

[45] A A Landman in his article, "A miner's right to leave dangerous working place" 1996 Vol 6 No 1 CLL said:

"*It would not be appropriate to order or permit the employees to remain in a working place which is subjectively perceived to be unsafe".*

[46] See also **The right to stop work in dangerous circumstances, 1997 ILJ Vol 18 page 1198, E Van Kerken**.

Was there a strike?

[47] Malan argued that there was no strike as the situation contemplated in section 23 of the Mines Health and Safety Act presented itself. I do not agree with him. The situation in section 23 did not arise.

[48] Besides paragraph 2.3 of the statement of case stated that on 14 November 2005 some of the applicants were participating in an unprotected strike action by way of a work stoppage.

[49] In paragraph 3.1.1 of the selfsame statement of case it was alleged that the respondent failed to give sufficient ultimatum or at all to striking employees prior to effecting their dismissal.

[50] In paragraph 4.2 of the pre-trial minutes it was recorded that the applicant shall contend that the duration of the strike embarked upon by stockmen was for one day only. In paragraph 4.4 of the minutes it was recorded that the applicants contented that the subject matter of the strike was a demand made by the 2nd to 22nd individual applicants to the effect that the respondent should engage a front-end loader to clear and remove excess soil from the quarry.

[51] In paragraph 4.9 of the selfsame minutes it is recorded that whilst admitting that it had not complied with the provisions of section 64(1) (a) and (b) of the Labour Relations Act, the

applicants contended that the individual applicants were indeed justified in not complying.

[52] Surely if the applicants were not on strike references referred to above would not have been there. I find an argument that there was no strike rather opportunistic and lame.

[53] Strike is defined as the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory.

[54] Cleary the actions of the stockmen fall within the definition of a strike. Even if the Court accepted their version that they stopped work on the 07 November 2005, that would still bring them within the ambit of the definition. What is clear from the evidence is that they refused to release slates until their demand for a front-end loader is met. That in itself amounts to obstruction and or retardation of work.

[55] Factory workers could not work due to the actions of the stockmen.

[56] Accordingly the finding is that the actions of the stockmen amount to strike as defined.

[57] Ntlakane warned the individual applicants (stockmen) of their actions and the consequences thereof but his warning was ignored.

Was the dismissal of stockmen substantively and procedurally unfair?

[58] In this judgment the dismissal of the factory workers shall not be considered in any detail as Bekker has conceded that their dismissal was unfair, both substantively and procedurally.

[59] Suffice to mention that the respondent seem to have been misled by its advisors about the dismissal of the factory workers. Perhaps out of frustration he accepted the advise to dismiss them.

[60] Commencing with the substantive fairness of the dismissal of the stockmen, it is common cause that the strike action that the stockmen participated in did not comply with the provisions of the Act.

[61] In terms of item 6(1) of schedule 8, participation in a strike action that does not comply with the provisions of chapter IV is a misconduct.

[62] In terms of section 188 (1) (a) (ii), a dismissal is fair if the reason relates to employee's conduct.

[63] Item 6(1) provides that substantive fairness must be determined in the light of:

a) Seriousness of the contravention of the Act,

b) Attempts made to comply with the Act,

c) Whether strike was in response to unjustified conduct by the employer.

[64] In as for as the seriousness of the contravention is concerned, it is the Court's view that the action by stockmen was spontaneous and seriously contravened the Act. They ignored an advise from their union official. This makes their contravention more serious. They continued with their action for a period of seven days before dismissal. No attempts were made to comply. This was despite advise from the union and ultimatum by the respondent.

[65] The conduct of the employer in saying to them the front-end loader shall be brought within a week cannot be seen to be unjustified in any manner whatsoever. Obeholzer testified that if the mine was unsafe as they alleged he would have taken

urgent and swift measures. He did not have the front-end loader on site. It was costly for the respondent to bring one. There were no compelling reasons for the front-end loader to be brought urgently.

[66] The fact that the stockmen participated in the unprotected strike is common cause.

[67] Accordingly the dismissal of the stockmen is substantively fair.

[68] As for the procedure, item 6(2) provides that prior to dismissal the employer should, at the earliest opportunity contact trade union official to discuss the cause 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. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.

[69] The evidence before me suggests that as early as the second day of the strike a letter was addressed to the union. It is clear that Ntlakane adopted a recalcitrant and uncooperative attitude. This was so despite what he himself advised the stockmen about. His attitude that he was not there to receive ultimatums is reflective of the recalcitrancy.

[70] The fact that two ultimatums were issued is common cause.

[71] In their statement of case the applicants suggested that they were not given sufficient ultimatum. What is meant by that is not clear.

[72] However in argument Adv Malan suggested that the fact that the respondent did not investigate the safety issue rendered the dismissal procedurally unfair. This cannot be.

[73] Accordingly in the Court's view no evidence was presented to suggest that no sufficient time was allowed to reflect.

[74] On the contrary, Ntlakane adopted the attitude of not even reading the ultimatum.

[75] Accordingly the dismissal is bound to be procedurally fair. (**Modise and others v Steve's Spar Blackheath (2000) 5 BLLR 496 (LAC)**.)

The issue of the relief and the question of limitation of backpay

[76] The stockmen are not entitled to any relief. As conceded by Adv Bekker, the dismissal of the factory workers is both substantively and procedurally unfair. What remains for them

is the issue of the relief. Section 193(1) provides that if the Labour Court finds that a dismissal is unfair the Court may;

a) Order the employer to reinstate the employee from any date not earlier than the date of dismissal.

b) ……

c) ……

[77] Subsection (2) provides that the Labour Court must require the employer to reinstate or re-employ the employee unless:

a) The employee does not wish to be reinstated or re-employed.

b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

c) It is not reasonably practicable for the employer to reinstate or re-employ the employee.

d) The dismissal is unfair only because the employer did not follow fair procedure.

[78] Reinstatement is the primary remedy for unfair dismissal.

[79] In the Court's view, it has a discretion in so far as the date of reinstatement.

[80] The only barrier in the section is a date earlier from the dismissal date. In considering which date to reinstate the factory workers, I have taken into account the conduct of the union official. Ntlakane had in the Court's view, a duty to assist the respondent to normalise the situation. This is so, particularly because he shared the same view with the respondent that the actions were unjustified hence his advise. However it is clear that he encouraged the action hence his refusal to even read the ultimatum. Had he acted, the strike could not have continued, and the factory employees and even the stockmen may have not been dismissed.

[81] I also took into account the uncontested evidence of instructions to the ten factory workers. All the above considerations do not apply with equal vigour in relation to the four nightshift workers.

[82] Accordingly the Court has a discretion to limit the backpay by moving the reinstatement date forward, from the date of dismissal to some other date after dismissal.

The issue of costs.

[83] In applying the principle that costs should follow the results, the Court find itself in a situation where both parties were partially successful. The concession that the dismissal of the factory workers is unfair was made in argument on the last day of trial. In that regard the applicants were successful in so far as factory workers are concerned.

[84] In so far as stockmen are concerned the respondent was successful.

Order:

[85] In the result I make the following order:

1. The dismissal of the factory workers (schedule B and C) is both substantively and procedurally unfair.

2. The dismissal of the stockmen (schedule A) is both substantively and procedurally fair.

3. The respondent is ordered to reinstate the factory workers (schedule B) without loss of benefits with effect from 03 March 2007.

4. The respondent is ordered to reinstate the factory workers (schedule C) without loss of benefits with

effect from 03 September 2006.

5. No order as to cost.

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G N MOSHOANA
Acting Judge of the Labour Court

Date of Hearing : 27, 28, 29, 30, and 31 August 2007

Date of Judgement :17 September 2007

Appearances

For the Applicant: Advocate L Malan
Instructed by K D Maimane INC.

For the Respondent: Advocate W Bekker
Instructed by Hantie Groenewald & Botha Attorneys