IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN **CASE NO. C459/04**

IN THE MATTER BETWEEN:-

NEHAWU **1st APPLICANT**

J CORNELIUS & 17 OTHERS **2nd TO FURTHER APPLICANTS**

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1st RESPONDENT

BILL MARITZ N.O.

2nd RESPONDENT

HIGH RUSTENBURG HYDRO

3rd RESPONDENT

JUDGMENT

GUSH, A J

1. This is an Application to review the Award of the 2nd

Respondent who found that the 2nd and further Applicants had been fairly dismissed.

2. The 2nd and further Applicants were all members of the 1st Applicant and were employees of the 3rd Respondent at the time of the incident which lead to their dismissal. At the time of their dismissal the 1st Applicant and 3rd Respondent were engaged in wage negotiations.

3. The 2nd and further Applicants in support of their wage demands and certain grievances gathered outside the gates of the 3rd Respondent's premises on the 7th of August 2003 in what was variously described by the witnesses as a *"strike",* a *"picket",* and a *"public protest"*

4. The 3rd Respondent, having videoed the protest identified the 2nd and further Applicants as employees who had participated in the gathering and instituted a disciplinary enquiry into their conduct At the disciplinary enquiry the Chairperson of the disciplinary enquiry came to the conclusion that the 2nd and further Applicants were guilty of:-

> "1. *Participate[ng] in an action which put the employer in the position where its business was negatively affected in a serious manner, without prior consultation and thus damaging the employer employee relationship; and/or*
>
> *2.* [that their] *actions* [were] *contrary to a collective agreement made between the parties stipulating a procedure of arbitration to be followed in respect of disputes of mutual interest and/or wage demands and collective grievances,*

(Paragraph 4 of the Recognition Agreement dated 23 July 1997)"

5. The Chairman of the Disciplinary Enquiry then dismissed the 2nd and further Applicants.

6. It is relevant to note from the Record of the Disciplinary Enquiry that there was little evidence lead describing the behaviour of the 2nd and further Applicants during the protest save that the 2nd and Further Applicants had gathered and held posters. In summarising the evidence the Chairperson of the Disciplinary Enquiry recorded:-

"Mr Van der Zand further testified that on the 3rd of August 2003 in the afternoon the accused held a protest action and during this protest action a notice was handed to the accused with the heading "UNPROTECTED STRIKE/PICKETING" and in which they were warned that disciplinary action would be taken against them and that they must immediately cease with their action it was further testified that the protest action of the accused, which was clearly well planned, caused great damage to the Hydro's image, although there is no documentary proof, but in the long term".

The basis of the complaint was confined to the fact that they had gathered to protest on the evening/afternoon of a function organised by the 3rd Respondent to promote the 3rd Respondent's business.

7. The Chairperson the Disciplinary Enquiry records the argument of the 3rd Respondent as follows:-

"1,1 that the action was pre-planned and that it was regarded by the 3rd Respondent as a strike;

1.2 that the 3rd Respondent regarded the actions of the 2nd and further Applicants as an attempt to circumvent the dispute resolution processes in the Labour Relations Act; and

1.3 that the actions of the 2nd and further Applicants were in contravention of the collective agreement and that their actions had caused the 3rd Respondent great loss".

8. The Chairperson of the Disciplinary enquiry in finding the Applicants guilty described their conduct as follows-

"Such action as that taken by the accused, can only do harm to any business's image It was vile and vulgar on the part of the employees' action to hold such action on the day of a business promotional function"

9. As far as the agreement was concerned the Chairperson of the Enquiry found that a collective agreement was in place and enforceable, that it provided for a procedure and that that section of the agreement the 2nd and further Applicants were accused of contravening was to protect *"the Hydro against negative publicity"*

The enquiry found that the 2nd and further Applicants had acted "in *contradiction to the terms of the agreement",* (sic)

10. During the arbitration conducted by the 2nd Respondent it again appears from the record that little if any evidence regarding the conduct of the Applicants who were participating in the action was lead. There is only an oblique reference made to vehicles having turned back and people being concerned for their safety. There is no direct evidence to suggest that the 2nd and further Applicants conduct during their participation in the protest was unacceptable. The 3rd Respondent's concern appeared to be confined to the mere fact that they had embarked on the protest specifically in the light of the marketing function that evening and the fact that the 3rd Respondent had recently been rescued from insolvency,

11. It is important to firstly consider the nature of the agreement which the 2nd and further Applicants are accused of breaching and who were parties to the agreement

12. The agreement is a recognition agreement. The purpose of the recognition agreement is to record the recognition of the 1st Applicant by the 3rd Respondent as the bargaining representative of its members employed by the 3rd Respondent Besides the fact that the 2nd and further Applicants were not a party to the agreement, what appears to have been overlooked by both the Chairperson of the disciplinary enquiry as well as the 2nd Respondent is the fact that the clause in question that the 2nd and further Applicants were accused of breaching is in fact a clause which specifically applies to the 1st Applicant only The clause records the first Applicant's undertaking to utilise its best endeavours and

utmost good faith to at all times to ensure that its members *"refrain from engaging in illegal strikes, work stoppages, go slows, protests or any other conduct intended to pressurise the employer in any manner including but not limited to conduct which has the intention or result that privacy, quiet enjoyment of the facilities of medical processes at the employer's business are disturbed in anyway other than by means of a protected strike in compliance with their labour practice"*

13. This agreement or undertaking on the part of the 1st Respondent is not capable of being breached by the 2nd and further Applicants.

14. The first allegation of misconduct contained in the charge sheet at the enquiry was in fact the charge that the 2nd and further Applicants had:-

> *"Participated in an action which put the employer in the position where its business was negatively affected in a serious manner, without prior consultation and thus damaging the employer/employee relationship".*

This is the essence of the conduct complained of

15. The collective agreement as set out in the second count of misconduct is not more than an attempt to place the conduct complained of in context and attach to it a rule of conduct against which the 2nd and further Applicants action should be judged

16. The Applicants in their heads of argument raised seven grounds of review. However the argument related to representation was withdrawn and the Applicants persisted with the remaining six namely:-

16.1. Suspension of charging of the shop stewards:

As far this ground of review is concerned I do not believe that it has any merit.

16. 2. Freedom of Association;

As far as freedom of association is concerned the relevant issue is whether the conduct of the employees constituted misconduct in relation to their employment and not only whether their action constituted an exercise of their freedom of association. It must be emphasised that apart from oblique references to an effect on the function the 3rd Respondent, at neither the disciplinary enquiry nor the arbitration did the 3rd Respondent lead any evidence to substantiate the alleged *"seriously negative"* effect on the 3rd Respondent's business. The action by the 2nd and further Applicants took place outside the 3rd Respondent's gates outside visiting hours and after obtaining permission from the Municipality to hold a gathering. It is relevant to note that the conduct complained of by the 3rd Respondent in the allegations is alleged to have *"damaged"* the employment relationship and not that their conduct destroyed the employment relationship.

16.3. Arbitrator's oversight of the lawfulness of the protest

action;

Whilst the fact that the employees had sought permission to conduct protest action does not a direct bearing on their employment relationship, it's worth repeating however that the action took place outside the premises of the 3rd Respondent and was held ostensibly in accordance with the authority granted by the local municipality. This ground of review does not take the matter any further,

16.4. Inconsistency;

The failure of the 3rd Respondent to take action against one employee at the time who participated in the action does not assist the Applicants. The omission of the one employee is explained.

16.5. Video footage;

It is evident from both the Record of the Disciplinary Enquiry and the Arbitration that the video footage was not part of the evidence presented to the Disciplinary Enquiry nor the arbitration. The 3rd Respondent seems to have placed little weight on the individual actions of the 2nd and further Applicants during the protest action save that they had gathered together with placards recording their grievances regarding circumstances surrounding the wage negotiations, If the actions of the Applicants during the protest action were relevant and displayed unacceptable conduct other than

mere participation in the protest this evidence would have been presented. That it was not however does not constitute a valid ground of review

16.6. Sanction;

The 2nd Respondent in his award states:-

"I would confess that had I been at liberty to fashion a sanction I might have been persuaded because of the numbers involved and my belief that the employees were lead astray by the Union to think in terms of final warnings".

There is sufficient authority to support the view that if the arbitrator is of the view that a sanction is unfair that the arbitrator must in those circumstances substitute the sanction with an appropriate sanction. That the 2nd Respondent did not interfere is startling particularly in the light of the specific averment in the charge sheet that the action of the Applicants had merely damaged the relationship. The substitution of the dismissal with a final written warning presupposes that the 2nd and further Applicants were in fact guilty of misconduct. I am not necessarily persuaded that in fact the 2nd and further Applicants were in fact guilty of misconduct in relation to their employment by the 3rd Respondent.

17. Leaving aside however the question of whether the 2nd and further Applicants are guilty of misconduct, in the absence of any evidence to substantiate a finding that the actions of the 2nd and further Applicants did in fact affect the 3rd Respondent

in a manner serious enough to sever the employment relationship, the 2nd Respondent should have intervened as far as the sanction was concerned and substituted it for the final written warning he had in mind

18. The 2nd Respondent records the facts that he relied on in coming to his decision and includes amongst these facts the following:-

18.1. That the picketing action undoubtedly harmed the planned promotion of the management and that the action also disturbed visitors at the establishment but fails to record what facts he relied on to justify this view and did not attempt in any way to determine that their conduct amounted to misconduct between employer and employee other than relying on the collective agreement; and

18.2. That the Union was obliged to undertake to ensure that the members refrained from engaging in the protest action, The 2nd Respondent having recorded this fact fails to make the distinction between the 1st Applicant's contractual obligation and the fact that the 2nd and further Applicants were accused of breaking a clause in the agreement which referred only to the 1st Applicant

19. The Record of both the Disciplinary Enquiry and the arbitration in fact reveal that no direct evidence was lead regarding the effect that the protest action had on the function nor was there any direct evidence lead regarding the affect that the action had

on visitors or guests at the establishment. There is nothing to suggest that it was established that the 3rd Respondent's *"business was negatively affected in a serious manner",*

20. It would appear from the manner in which the Applicants approached the Disciplinary Enquiry and the Arbitration that the Applicants were of the view that they were entitled to take part in the protest action and that it would not have been unreasonable for the 2nd Respondent to have concluded that the 2nd and further Applicants had a right to take part in protest action and that their actions did not per se constitute misconduct particularly in the absence of any evidence of misconduct during the protest.

21. However whether the 2nd and further Applicants were in fact guilty of misconduct does not alter the fact that the 2nd Respondent was of the view, having recorded that the nature of the action was collective and that it was to an extent driven by the 1st Applicant that a final written warning was appropriate. I am of the view that the Respondent's failure to substitute the sanction with a final warning is reviewable

22. The Applicant's review application was filed late as was the application for condonation, The condonation application was not opposed by the Respondents and accordingly for the reasons set out therein and the heads of argument I grant condonation.

23. There have however been a number of unfortunate delays in this matter Not only was the application for review filed late, the record which had been completed by Sneller Transcriptions on the 16th of March 2005 appears only to have been filed on the 3rd of August 2005.

24. In addition when the matter was enrolled to be heard on the 23rd of November 2006 it was removed from the roll with an order that the Applicants pay the wasted costs,

25. There is authority for the view that where there has been a substantial delay in prosecuting the dispute the probability of resuming an employment relationship becomes increasingly *"not reasonably practicable".* I am of the view that this applies to this matter, See *Republican Press Pty Ltd vs CCPPWAWU and others (2007) ILJ 2503 (SCA)*

26. I accordingly make the following order-

26.1. the review application is upheld.

26.2. The award of the 2nd Respondent is substituted for an award that the dismissal of the 2nd and
further Applicants was unfair,

26.3. The 3rd Respondent is ordered to pay compensation to the 2nd and further Applicants in

the amount equivalent to 12 months remuneration each at the rate of remuneration applicable at the time of the dismissal.

26.4.

Costs

GUSH AJ:

ACTING JUDGE OF THE LABOUR

COURT FOR THE APPLICANT:

ADV. C. TSEGARIE

Instructed by: THAANYANE ATTORNEYS

FOR THE RESPONDENT: ADV J C TREDOUX

Instructed by: CARELSE ATTORNEYS

DATE OF HEARING:
28 AUGUST 2007

DATE OF JUDGMENT:

15 JANUARY 2008