37/96

Case No 451/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MUTUAL AND FEDERAL INSURANCE COMPANY LIMITED — APPELLANT

and

BANKING, INSURANCE, FINANCE AND ASSURANCE WORKERS UNION — RESPONDENT

CORAM: CORBETT CJ et NESTADT, VIVIER, F H GROSSKOPF et NIENABER JJA.

HEARD: 8 March 1996.

DELIVERED: 28 March 1996.

JUDGMENT

VIVIER JA/

VIVIER JA:

The appellant ("the company") is an insurance company which has its head office in Johannesburg and branch offices in various parts of the country. The respondent is the Banking, Insurance, Finance and Assurance Workers Union, an unregistered trade union ("the union"). Prior to 1991 a dispute arose between the parties over the union's demand to engage in collective bargaining with the company with regard to wages and conditions of employment of those members of the union who were employed by the company at its Johannesburg office. This matter relates only to the company's employees at its Johannesburg office and references to the company's employees should be construed accordingly. After a conciliation board had been unable to resolve the dispute it was referred by the union to the Industrial Court for determination in terms of sec 46(9) of the Labour

Relations Act 28 of 1956 ("the Act"). Before the Industrial Court the union sought an order declaring, *inter alia*, that the company's refusal to negotiate wages and conditions of employment in respect of the union's members for the period commencing 1 January 1991 constituted an unfair labour practice. Other relief sought was not subsequently proceeded with and I need not refer to it. The Industrial Court held that no unfair labour practice had been committed and dismissed the application. Its judgment is reported at (1993) 14 ILJ 1298 (IC). In terms of sec 17 (21A) (a) of the Act the union appealed to the Labour Appeal Court. The appeal succeeded; the Industrial Court's determination was set aside and a determination substituted therefor that the company's conduct in refusing to negotiate wages and conditions of employment in respect of the union's members for the period commencing 1 January 1991 constituted an unfair labour practice.

In terms of sec 17 C (1) (a) of the Act the union now appeals to this Court, the requisite leave having been granted by the Court *a quo*.

The essential facts which are either common cause or not in issue may be summarised as follows. The union was formed in 1983 for workers in the banking and finance industry. On 21 March 1986 it wrote to the company requesting a meeting to introduce itself and to discuss, among other things, the conclusion of a recognition agreement. Protracted negotiations followed during which the company initially adopted the majoritarian approach, namely that it was only prepared to enter into a recognition agreement with a trade union which had a membership in excess of fifty percent of a defined bargaining unit. Such bargaining units, the company maintained, had to be determined by criteria relating to the complexity of jobs, conditions of employment and pay. In

a letter to the union dated 15 July 1987 the company proposed dividing its non-managerial staff into three bargaining units: the non-clerical employees, the clerical employees and the first-line supervisory employees. The letter pointed out that the union did not represent a majority in any of these categories.

The majoritarian approach was subsequently abandoned by the company in favour of the pluralist approach in terms of which the company undertook to recognise the union as the collective bargaining representative within a particular bargaining unit if the union could show that it was sufficiently representative of the employees within that bargaining unit. In a letter dated 15 November 1990 addressed by the company's attorneys to the union's attorneys the company offered to bargain collectively with the union in respect of its members in the non-clerical group, subject to verification that it had sufficient representivity in that

category. The company, however, refused to bargain with the union in respect of its members in the other two categories on the ground that it was not sufficiently representative of employees in these categories.

The union refused the offer, stating that it did not accept the distinction between clerical and non-clerical employees and demanding to bargain on behalf of all its members. The union adopted the attitude that the sole purpose of demarcating bargaining units was to determine representivity. It maintained that if it was sufficiently represented within any particular bargaining unit it was entitled to bargain on behalf of all its members including those falling outside that bargaining unit. The union suggested that the company's employees be divided into two election units viz managerial and non-managerial employees and that its representivity be tested within the latter category. It accepted that the test

was one of sufficient representivity and claimed that it was sufficiently represented within the non-managerial group. On 4 March 1991 the union declared a deadlock and applied for a conciliation board. The company had in the meantime implemented new wages and conditions of employment for the period commencing 1 January 1991 without negotiating them with the union.

The application to the Industrial Court was launched during July 1991. As at January 1991 all the union's members were employed in the company's non-managerial section, either as non-clerical, clerical or first-line supervisory staff. There were no union members amongst the managerial staff. The constitution of the union precluded white employees from membership. The union had its biggest representation amongst the non-clerical workers, where 34 out of a total of 85 employees or 40%

were union members. Of the clerical staff 34 out of a total of 367 employees or 9% were union members and in the first-line supervisory category 5 out of 80 employees or 6% were union members. Overall 73 out of 532 non-managerial employees or 13,72% were members of the union. By the time the dispute came before the Industrial Court in October 1992 the union's membership amongst all non-managerial employees had risen to 15%. Forty-four percent of all non-clerical workers, 10% of all clerical workers and 3% of all first-line supervisory employees were then members of the union.

Before the Industrial Court Mr R H van Rooyen and Mr G J R Brown testified in support of the company's proposed bargaining units. Their evidence was largely uncontested. Mr Van Rooyen, who is an industrial psychologist and the company's human resources manager, said that employees' wages and other

terms of employment are based on a grading system, which is in turn based on a carefully devised system of job evaluation and performance appraisal. The TASK (tuned assessment for skills and knowledge) job evaluation system used by the company is an adaptation of the widely used Patterson evaluation system and uses a variety of factors in determining the intrinsic and relative value of jobs in relation to one another for the purpose of establishing a hierarchy within the company and attaching status to it, determining remuneration practices within the company and comparing it with salaries elsewhere. The performance appraisal system is used to measure the performance of an individual employee twice yearly against a number of specific job standards. Mr Van Rooyen said that there were significant differences between the work performed by clerical and non-clerical employees, with concomitant differences in the level of education and training

required of, and the remuneration and benefits accorded to, employees in each category. These differences provide a rational basis for dividing employees into clerical and non-clerical categories for purposes of collective bargaining. He said that if the company were forced to negotiate wages and conditions of employment with the union on the basis demanded by it, it may result in different conditions of employment applying to employees performing similar work. It would invalidate the evaluation and appraisal systems used by the company as it would now have to apply different philosophies and approaches towards job evaluation. It would cause administrative difficulties if an employee's conditions of employment depended on his membership of the union. The employees who are not members of the union and who are by far in the majority, may regard the fact that they are excluded from the bargaining process as an unfair labour practice.

The evidence of Mr Brown, an industrial relations consultant, was that in the determination of appropriate bargaining units the principle that the employees on whose behalf bargaining was to take place should share the greatest commonality of interest consistent with the operational structures of the employer, should be taken into account. The appropriate bargaining units should be pragmatically determined having regard to factors such as the nature of work being performed; the work location and environment of the employees; the education and skill levels of the employees; the hours of work and working conditions of the employees; the extent to which the employees concerned share similar levels of responsibility; the remuneration system applicable to the employees; the issues over which bargaining will take place; the organisational structure of the employer; the wishes of the employees; the numbers of employees to be bargained for and the

nature of the employer's business. Mr Brown said that many of these factors were taken into account by the company in classifying its employees into various grades of employment. There was a clear delineation between the company's grades A and B, which were primarily non-clerical employees, and grades C, D, E and F, which were primarily clerical employees. Other differences between these two classes of employees included the benefits available to them and their promotional prospects, training and development. According to Mr Brown the clerical and non-clerical employees are two completely different classes of employees whose only commonality of interest would be their membership of the union. He expressed the view that it would be grossly unfair for the company to be compelled to bargain with the union for those of its members in clerical positions. This would have the practical effect of a very small number of

employees in the clerical group being negotiated for by the union when the vast majority of employees in that group would have their remuneration and conditions of employment determined by factors which bear relation not to their membership of any organisation but rather to operational requirements, labour market realities and their job performance as individuals.

An official of the union, Mr J D Nhlapo, who is employed by the company as an underwriting clerk, testified for the union at the hearing before the Industrial Court. His evidence was that, unlike the situation which prevailed in other sectors such as the mining industry, black workers were substantially in the minority in the banking and financial sectors of the economy. For this reason the union was formed to promote specifically the interests of black workers. These interests were substantially separate and different from those of white workers.

He mentioned as examples holidays such as 27 March and 16 June each year which were of particular significance to black workers as well as the question of the recognition of traditional healers which did not interest white workers. He said that there was a real perception amongst the union's members that a disparity existed between the conditions of service and prospects of promotion of union members and those of white employees. Union members perceived the company's job evaluation system as subjective. He reiterated the union's demand to negotiate on behalf of its members only.

The Industrial Court's approach was to consider whether the company had acted unfairly in refusing to accept the union's proposed bargaining units. In doing so, it examined the union's own proposals as well as the fairness and rationality of those of the company, and came to the conclusion that the company's division

of its labour force into the said three categories for the purpose of determining bargaining units was based on objective and universally accepted factors so that it could not be said that it had acted unfairly in refusing to bargain with the union on the basis proposed by the union. The Industrial Court held that the union had in any event insufficient representivity in its own proposed bargaining units as well as in the clerical and first-line supervisory categories of the company.

The Court *a quo's* approach was the following. It said that the right of employees to join together for the purpose of collective bargaining has been recognised as fundamental to our system of labour relations and referred in this regard to a number of decisions by the Industrial Court and to the decision of this Court in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A). The Court *a quo* further said that

in the circumstances it seemed to be axiomatic that once employees have chosen to advance their interests by bargaining collectively, it would be unfair for an employer to refuse to do so. It said that the company's refusal to bargain collectively with the union was based on two preconditions which it wished to impose. Firstly the company insisted that the union should bargain on behalf of all employees within a particular category before it could bargain at all, and secondly it insisted that the union may bargain for that category of employees only if it was sufficiently representative of the employees in that category. The issue, the Court *a quo* said, was not whether the company's demarcation of its bargaining units was fair, but whether the demarcation ought to have been made at all. The true enquiry was therefore whether the company was justified in refusing to bargain at all unless the union accepted the duty to bargain for employees who were not its members. It was

only when the union was obliged to accept that duty that questions relating to representivity may arise. The Court *a quo* held that none of the company's reasons for requiring the union to bargain on behalf of all the employees in the bargaining units which the company had demarcated (or indeed for any other unit which included employees who chose not to belong to a union), as a precondition for collective bargaining, were compelling, and that the company had, in so doing, effectively denied the employees concerned the right to advance their interests by collective bargaining. On this basis the Court *a quo* held that the company's refusal to engage in collective bargaining with the union on the terms upon which the union sought to negotiate constituted an unfair labour practice. The Court *a quo*'s judgment is reported at (1994) 15 ILJ 1031 (LAC).

One of the grounds upon which leave was sought to appeal against the judgment of the Court *a quo* was that the evidence did

not support its finding that the company had insisted that the union should bargain on behalf of all employees within a particular category. In its judgment on the application for leave to appeal the Court *a quo* referred in this regard to the evidence which had been given on behalf of the company to the effect that a disparity in the terms of employment between union members and non-members would result if the company bargained with the union on the basis proposed by the latter. It was implicit in this evidence, the Court *a quo* said, that the company would bargain with the union only if the union was able to negotiate conditions of employment which would apply to all employees in the particular category, whether they were union members or not. In my view the evidence does not justify this finding. The company never said that it would refuse to bargain with the union unless it was prepared to bargain also for non-union employees. And although

the company seems to have been anxious to avoid a disparity in the terms of employment governing members and non-members of the union, it does not follow that the company thereby required the union to represent all the employees in a particular category.

The fundamental right of employees to bargain collectively with their employers with regard to wages, conditions of employment and other matters of mutual interest is now well established in our law. It has been said that collective bargaining "lies at the heart of the industrial relations system" (*National Union of Mineworkers v Henry A Gould (Pty) Ltd and Another* (1988) 9 ILJ 1149 (IC) at 1154 E-F); and collective bargaining has been described as "the cornerstone in any labour relations system" (*National Union of Mineworkers & Others v Buffelsfontein Gold Mining Co* (1991) 12 ILJ 346 (IC) at 351 H). In *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*,

supra, Goldstone JA said at 733 H-J that the fundamental philosophy of the Act is that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.

The right to bargain collectively is, however, not absolute as the Court *a quo* seemed to suggest. In saying that it is axiomatic that once employees have decided to bargain collectively it would be unfair for an employer to refuse to do so, the Court *a quo* adopted too dogmatic an approach. In this Court counsel for the union did not contend for an absolute right to bargain collectively regardless of the circumstances. He conceded, correctly in my view, that in determining whether a refusal to bargain collectively amounted to an unfair labour practice, factors other than the interests of the union and its members, such as the interests of the employer and non-union employees and the need for

efficient management also have to be taken into account. On the question of representivity, however, counsel for the union submitted that if there is only one union on the scene it is not required of that union to show sufficient representivity in any proposed bargaining unit.

It is convenient to deal first with the issue of representivity. It is clear from the correspondence and from the judgment of the Industrial Court that at least up to the hearing before the Industrial Court the union accepted the principle that it had to show sufficient representivity in any proposed bargaining unit before it could bargain collectively with the company. So, for instance, in a letter dated 17 July 1990 the union's attorneys wrote to the company's attorney *inter alia* as follows :

> "What our client has been attempting to obtain by agreement with your client is the determination of an appropriate bargaining unit ..... Client's contention is that if it is sufficiently representative in that election unit then it should

> have the right to bargain on behalf of its members only ..... Our client contends that it does not need to represent a majority of employees in the election unit but a substantial enough number to warrant being dealt with."
>
> (For present purposes no distinction need be drawn between *bargaining units* and *election units*).

The letter went on to say that the union's proposed bargaining units were the managerial and non-managerial sections and that it had sufficient representivity in the latter section to warrant bargaining collectively with the company. This was also the union's approach at the hearing before the Industrial Court.

Prior to the decisions of the Industrial Court in *Natal Baking and Allied Workers Union v B B Cereals (Pty) Ltd and Another* (1989) 10 ILJ 870 (IC) and *Radio Television Electronic and Allied Workers Union v Tedelex (Pty) Ltd and Another* (1990) 11 ILJ 1272 (IC) it was generally accepted by the Industrial Court that the pluralist approach should be applied in

collective bargaining between an employer and a trade union, i e the employer should negotiate with every trade union which could claim substantial support or which was sufficiently representative of the employees. (LAWSA Vol 13 para 334 and the cases there referred to, in particular *Stocks and Stocks Natal (Pty) Ltd v Black Allied Workers Union and Others* (1990) 11 ILJ 369 (IC) at 376 I - 377 B. See also Brenda Grant, **In Defence of Majoritarianism**, (1993) 14 ILJ 305.) In an article in (1989) 10 ILJ 808 at 809 Prof Thompson points out that the premium placed on the union's representative character is well founded, and that the almost universal experience of the industrial nations with market economies has been that labour peace is a function of stable collective bargaining between strong unions and employer organisations.

In the *B B Cereals* and the *Tedelex* cases the Industrial Court adopted a completely new approach to the requirement of

sufficient representivity. It was there held that each employee has a fundamental individual right to bargain with his employer and that this forms the basis for the union's right to bargain, however insignificant its representivity may be. The collective nature of the bargaining process was thus largely ignored, as the union's right to bargain was held to flow from an individual right to bargain which, the Industrial Court seemed to say, could be delegated to the union.

In the *Tedelex* case, which was decided by three permanent members of the Industrial Court, Tedelex had entered into a recognition agreement with NUMSA, the majority union, in terms of which NUMSA was recognised as the collective bargaining agent of employees within a particular bargaining unit. The applicant, a minority union with a representivity of about 15% of the employees in the bargaining unit concerned,

demanded bargaining rights and applied for an order in terms of sec 17 (11) (a) of the Act aimed at compelling Tedelex to bargain with it, which order was granted. Basic to its judgment is the Court's finding (at 1275 E) that every employee has a right to negotiate conditions of employment with his employer.

No such right to negotiate, however, exists at common law. In *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 892 it was held that agreements to negotiate or to agree are unenforceable. Such an agreement is too vague to enforce as it depends on the absolute discretion of the parties. Nor does our law recognise an obligation to negotiate. (See *Putco Ltd v TV and Radio Guarantee Company (Pty) Ltd* 1985 (4) SA 809 (A) at 813 F-G). For the notion of an individual right to negotiate, which formed the basis of the decisions in the *B B Cereal* and *Tedelex* cases, one has to look elsewhere than to our common law.

The Industrial Court, in the two decisions under consideration, also found support for the notion of the employee's individual right to negotiate in para (j) of the unfair labour practice definition in sec 1 of the Act (as it read at the relevant time), which protected the right to associate (see the *B B Cereal* case at 874 B-D and the *Tedelex* case at 1276 C-E). At the relevant time, prior to its amendment by Act 9 of 1991, the relevant portions of sec 1 of the Act provided as follows:

> " 'Unfair labour practice' means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following :
>
> (j) subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate, by any ..... employer ....."

As Cheadle, **One Man One Bargaining Unit,** Employment

Law, November 1990, 35 at 37 points out, inferring the right to bargain from the right to associate presumably finds its justification in the notion that collective bargaining is the central purpose of association in labour relations. As he correctly points out, however, the right to bargain enures to employees only when they associate; it can only be a collective right and cannot be the individual right the Industrial Court believes it is.

The decisions in the *B B Cereal* and *Tedelex* cases cannot therefore, in my view, be regarded as good authority for departing from the generally accepted approach which requires a trade union to show sufficient representivity before it can bargain collectively, whether or not there is another union in existence or on the horizon. Before leaving these two cases I should point out that in both, the level of representivity enjoyed by the applicant union was taken into account in granting relief, despite the

Industrial Court's rejection of the requirement of representivity. See the *B B Cereal* case at 874 G-H and the *Tedelex* case at 1278 A-B and F-H.

To return to the present case, the issue is whether the company has acted unfairly in formulating a bargaining structure of three bargaining units within the non-managerial segment of its labour force, as opposed to the union's single non-managerial bargaining unit, and requiring the union to be sufficiently representative in each before it will bargain with the union. The Act does not say how bargaining units are to be determined. The Legislature has left the formulation of substantive and procedural rules governing collective bargaining outside industrial councils and conciliation boards to be formulated by the parties, or in default of agreement, to the Industrial Court in terms of its unfair labour practice jurisdiction (*National Union of Mineworkers v Henry A*

Gould (Pty) Ltd and Another, supra, at 1155 E-G). That Court has been reluctant to exercise its unfair labour practice jurisdiction to determine appropriate bargaining units for the parties on the ground that this would amount to an undue interference with the collective bargaining process (*Amalgamated Engineering Union of South Africa and Others v Mondi Paper Co Ltd* (1989) 10 ILJ 521 (IC) at 525 G-H and *S A Union of Journalists v Times Media Ltd and Others* (1993) 14 ILJ 387 (IC) at 392 G - 393 B). In *S A Commercial Catering and Allied Workers Union v Shoecorp Shoe Stores (Pty) Ltd and Another* (1994) 15 ILJ 1072 (IC) at 1076 F the Industrial Court went so far as to sound a warning that to compel bargaining which would not advance industrial peace and may create industrial unrest would negate the very purpose of the Act.

In the present case the company has led evidence to the effect

that its proposed bargaining structure was rational and fair, that it was formulated for sound commercial and administrative reasons and that it was designed to promote industrial peace. That evidence was largely uncontested and was accepted by the Industrial Court.

Kate O'Regan, **Arbitration and Collective Bargaining,** Employment Law, January 1992 at 59, points out that in determining what the appropriate bargaining unit is, there is much to be said for both smaller and larger bargaining units. For the purposes of recognition a smaller bargaining unit is to be preferred since the smaller the bargaining unit, the easier it is for the union to prove representation and the sooner collective bargaining can begin. It seems to me that in the present case smaller bargaining units would be appropriate since the union lacks representivity, both overall and in two of the three categories proposed by the company, so that recognition must be a problem for it. The

evidence has established that other advantages are to be gained from the company's proposed three smaller bargaining units, such as that it will facilitate the conclusion of effective collective bargaining agreements and extending such agreements to non-union members. It will further prevent a union representing exclusively sectional interests from bargaining for other interests.

With regard to the question of representivity the company's insistence that the union should be sufficiently representative of employees in each of the three bargaining units proposed by the company was in line with the generally accepted approach which I have outlined above. The union's representivity in the two categories in which the company has refused to bargain with it is minimal: 9% of the clerical workers and 6% of the first-line supervisory workers.

In all the circumstances I have come to the conclusion that it

cannot be said that the company acted unfairly. The Court *a quo* consequently erred in finding that the company's refusal to bargain with the union constituted an unfair labour practice.

No order for costs was made in either the Industrial Court or in the Court *a quo*. Allowing for the requirements of the law and fairness (sec 17C (2) of the Act) and having regard to the considerations mentioned in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd, supra*, at 738 F - 739 J I am of the view that no award of costs should be made in respect of the appeal either.

The following order is made :

1. The appeal is upheld.
2. The order of the Court *a quo* is set aside and the following order is substituted for it:
   "The appeal is dismissed."

CORBETT CJ)
NESTADT JA)
F H GROSSKOPF JA)
NIENABER JA) Concur.

W VIVIER JA