

SOUTH AFRICA / JUDGMENT

National Union of Leather And Allied Workers Union and Others v Bader Bop (Pty) Ltd and Others (JS 1021/01) [2004] ZALC 51; [2004] 8 BLLR 799 (LC); (2004) 25 ILJ 1469 (LC) (30 June 2004) [2004] ZALC 51

COURT
Labour Court

BEFORE
A A Landman

CASE / FILE NUMBER
JS 1021/01

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IN THE LABOUR COURT OF SOUTH
AFRICA
HELD AT BRAAMFONTEIN CASE
NO JS1021/01

In the matter between:

National Union of Leather and
Allied
Workers' Union First
applicant
Jacob Ramatlo and 427 others
Second and
further applicants
and
Bader Bop (Pty) Ltd First
respondent
Bader Blueings (Pty) Ltd Second
respondent
Bader Trimmings (Pty)
Ltd Third respondent

JUDGMENT

LANDMAN J:

The first applicant is the National Union of Leather and Allied Workers ("NULAW"), a registered trade union. It is the collective bargaining representative of the second and further applicants. The individual applicants are listed in annexure "E" to the pre-trial minute. They were all members of the union at the time of their dismissal.

The Respondents are Bader Bop (Pty) Ltd, Bader Blueings (Pty) Ltd, and Bader Trimmings (Pty) Ltd. The three companies conduct their business on the same premises, stand 232, 3rd Street, Garankuwa Industrial Site, North West Province. The individual applicants were employed by the companies. I shall refer to the companies as "Bader".

Bader manufactures goods for the motor vehicle industry. On 30 January Baderbop dismissed 428 employees who were on an unprotected strike. They and their union have referred a dispute to this court concerning the dismissal of the individual employees. Bader in turns seeks payment of compensation for the damages allegedly caused by the strike.

The parties agreed that the issues would be separated. At this stage I am only required to determine whether the dismissals were substantively and procedurally unfair. I am not required to determine what relief should be awarded if the dismissals were unfair.

Applicants' amended statement

The trial concerning the fairness of the dismissal of the individual applicants was completed on 30 March 2004. The applicants amended their statement of claim. I reproduce paragraph 4 of the amended statement of claim.

"4.1. On the Wednesday the 24th January 2001 the Applicants and other non-Nulaw employees commenced unprocedural strike action at the Respondents' premises in Garankuwa, over the Respondents' failure to pay additional pay for overtime.

4.2 The First Applicant was advised of the strike and was requested to intervene, which it did.

4.3. The 1st Respondent issued an ultimatum on the 24th of January 2001 requiring Nulaw members to immediately cease participation in the strike and to resume their duties.

4.4. The Applicants failed to comply with this ultimatum and, on Thursday the 25th of January 2001, the Respondents commenced employing casual workers to replace the Applicants.

4.5. In the period between the 24th and 29th of January 2001, several meetings were held at the respondent's premises in Garankuwa between the First Applicant, the Respondents and the First Applicant's membership in an attempt to persuade the membership to return to work.

On Monday the 29th of January 2001 at approximately 14h00, subsequent to a meeting between the Respondents, the First Applicant and another union, the 1st Respondent issued a "termination ultimatum" to the striking employees requiring that the strike cease and that the employees report for duty and commence working on Tuesday the 30th January 2001 at the start of each of the employees shift/working day.

4.7. On the afternoon on Monday the 29th of January 2001, subsequent to the issuing of this ultimatum, the First Applicant held a general meeting with its members present at the Respondents' premises at the time and the individual Applicants present at the time were persuaded to comply with the ultimatum and to return to work.

4.8. After having issued the ultimatum, and without any notice of whatsoever nature, the 1st Respondent approached the High Court of South Africa Transvaal Provincial Division and, on oral evidence, obtained an interdict

against the employees of the 1st, 2nd, and 3rd Respondents.

The 1st Respondent did not advise the court that the Labour Court has exclusive jurisdiction in matters of this nature.

4.10. The High Court ordered that a transcript of the oral evidence be served together with its order. The Respondents failed to do this.

4.11. The High Court indicated that those employees reporting for work should be allowed to do so.

4.12. On the 29th January 2001 at 22h00, those individual applicants who attended at the Respondents' premises were met by the Sheriff of the High Court and members of the South African Police Services. The Sheriff read out the court order which excluded the individual Applicant's from the 1st Respondents premises and forbade them from being within 400 metres of the 1st Respondent's premises without the permission of the 1st Respondent.

4.13. This order was interpreted into English and Setswana.

4.14. This order was read out to each subsequent shift reporting for work on the 30th January 2001 and the individual Applicants reporting for work on these shifts were also denied access to the 1st Respondent's premises.

As a consequence of the Respondent's action, the Applicants were prevented from complying with the ultimatum and returning to work.

4.16. At a meeting on the 30th January 2001, requested by the First Applicant, the Respondents advised the First Applicant's General Secretary, Martin Paulsen, that the individual Applicants had been dismissed.

The dismissals took place prior to the expiry of the ultimatum.

4.18. The Respondents failed to advise the individual applicants of their dismissals.

No hearing of any nature took place prior to the dismissals.

The 1st Applicant has repeatedly asked that it be provided with the notices of dismissal of the individual Applicants but these have not been forthcoming.

4.21. The 1st Applicant has repeatedly invited the Respondents to advise on what basis those of its members who remain in the Respondents' employ have retained their employment. The Respondents have failed and/or refused to reply to this.

The conciliation meeting was held at the Bargaining Council for the Leather Industry on the 8th of February 2001.

The Respondent, despite being given adequate notice, failed to attend at the dispute meeting and failed to make any attempt to resolve the dispute.”

Legal Issues

The legal issues which arise for decision, as stated in paragraph 5 of the amended statement, of case are the following:

“5.1. The individual Applicants were unfairly dismissed by the Respondent both procedurally and substantively for, inter alia, the following

reasons:

The Respondents by their own conduct prohibited the individual from complying with the ultimatum;

5.1.2. The Respondents failed to advise the 1st Applicant of their intention to dismiss the individual Applicants and failed to attempt to resolve the issue with the 1st Applicant;

The Respondents failed to advise the individual Applicants of their dismissals;

The Respondents failed to attempt to hold a pre-dismissal hearing of the any nature prior to the dismissals.”

Common Cause Facts

The amended statement of case must be read with the common cause facts set out in the pre-trial conference minute. It is common cause that:

“2.4. On Wednesday, 24 January 2001, the individual Applicants and other non-NULAW employees commenced unprocedural strike action at the Respondents' premises in Garankuwa.

2.5. The First Applicant was advised of the strike and was requested to intervene, which it did.

2.6. The First Respondent issued an ultimatum on 24 January 2001 requiring NULAW members to immediately cease participation in the strike and to resume their duties. The strikers failed to comply with this ultimatum.

2.7. In the period between 24 and 30 January 2001, several meetings were held at the Respondents' premises in Garankuwa between the First Applicant and some of its shop stewards on the one hand and the Respondents on the other in an attempt to persuade the strikers to return to work.

2.8. In this period, NULAW representatives and representatives of another union, namely SACTWU combined for the purposes of dealing with the issues underlying the strike and the resolution thereof.

During these meetings, the Respondents' representative attempted to establish what the issues underlying the strike were. The

Respondents pleaded with the representatives of the strikers that strikers should return to work and pursue their grievance through the agreed procedures.

2.10. The union representatives, pursuant to these meetings, advised their members that the strike was unprotected and in breach of the collective agreement. The First Applicant's union officials wanted the strikers to resume work, and the strikers were advised by their representative to resume work.

During a meeting held on 29 January 2001, Mr Ramatio a shop steward of the First Applicant uttered the words:

"Mark, I think what Mr Naude explained it is still the position even now, that feeling from the participating members is still there and then I emphasised to Mr Naude, I reiterated that according to how they view the intention of the company, the company is actually moving away from the problem and creating another problem because they are adamant that should any one of those people standing out there enter this premises or work here, then police or no police or rather some people will die because that is the benefit of the struggle in most cases. They will wait here and do anything and they will go to an extent of damaging the machines,

and those who are being taken out there to come in there, they will be forced to sleep here and more so some of them know where this people live out there in their communities they will go to an extent of visiting their respective residence and deal with them accordingly so that is the feeling of this angry employees".

During the meetings held, the representatives of the strikers were given a number of opportunities to make representations as to why they should not be dismissed if they did not return to work.

2.13. By 29 January 2001 one of the reasons for the individual Applicants refusal to resume work was the Respondents' decision to place them on final warnings for unlawful strike action and to recover damages from them.

2.14. During the strike, the strikers occupied and protested in the area of the main gate to the factory premises as well as the entrances to the factory and administrative building. The strikers blew hooters and whistles in the vicinity of the administration building and one of them brandished a wooden replica of an AK-47.

2.15. Some of the strikers slept on the premises of the Respondents on the nights of 24 and 25 January 2001.

2.16. On the afternoon of the 29 January 2001 a meeting was held between the Respondents and the Applicants' representatives at which an ultimatum was discussed. On the same afternoon, the Respondents issued a further ultimatum to those striking employees present at the time requiring that the strike cease and that the employees report for duty and commence work on Tuesday, 30 January 2001 at the start of each of the employee's respective shifts.

2.17. On the afternoon of Monday, 29 January 2001, the First Applicant held a general meeting with some of its members regarding the ultimatum.

2.18. On Monday, 29 January 2001, the First Respondent, approached the High Court of South Africa, Transvaal Provincial Division, by way of an ex parte application based on oral evidence, for an interim interdict against the strikers.

2.19. At the start of every shift from 22h00 on 29 January 2001 to 22h00 on 30 January 2001, the Sheriff of the High Court as well as members of the South African Police Services were present at the Respondent's premises.

2.20. On the morning of the 30 January 2001, Mr Naude called Messrs Bokaba and Marapyane to attend a meeting with the Sheriff at approximately 06h20- The Sheriff explained the interdict.

Later that same morning but before 09h00 there was a further meeting between the shop stewards, the Sheriff, Mr Naude and Mr Oosthuizen.

2.22. At about 11 h30 on 30 January 2001, a further meeting was held at the request of the First Applicant's general secretary, Mr Paulsen."

The Law

Section 68 (5) of the Labour Relations Act 66 of 1995 provides:

"Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account."

Item 6 of the Code provides:

"(1) Participation in a strike that does not comply with the provisions of Chapter iv is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including

- (a) the seriousness of the contravention of this Act;
 - (b) attempts made to comply with this Act; and
 - (c) whether or not the strike was in response to unjustified conduct by the employer.
- (2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course 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 with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

The onus rests upon the employer to prove that the dismissals are substantively and procedurally fair.

The dispute, strike hearing and ultimatum

The immediate trouble started on the evening of 22 January 2001 when Bader required the 26 workers in its trimming division to work a double shift to meet an urgent order from a client. It is doubtful whether Bader was lawfully entitled to make this request but the trimmers agreed to work this overtime provided they were each paid R300 tax free. The company acceded to their demand.

The news of this piece of successful collective bargaining spread rapidly. At 08:00 the next morning, Mr J Ramatlo, NULAW's chief shop steward, informed Mr E Naude, Bader's Human Resources manager, that his members, who had worked overtime in the past, demanded that they too be paid R300 for that overtime. A strike commenced at 10:30.

A series of meetings took place between management and the shop stewards. During these meetings the shop stewards articulated their demands and conveyed their members' anger at management's discriminatory decision. Management in turn explained the circumstances that led to the technical manager/director agreeing to the trimmers' demand. Management endeavoured to persuade the shop stewards to urge the strikers to resume their duties. Management issued two warnings to the strikers.

The workers were on a full time strike. They behaved badly and created a hostile atmosphere. Casual employees were threatened with the loss of their lives.

Management prevailed upon NULAW's leadership to intervene. The union leadership was afforded an opportunity to persuade the workers to return to work. When this did not eventuate, the shop stewards were required to provide reasons why an ultimatum to return to work or be dismissed should not be issued.

The various meeting between management and the shop stewards, including those where the union leadership was present, constituted the audi alteram partem which the company was obliged to afford the strikers. Indeed this was recorded as common cause in the pre-trial conference minutes as follows:

"During the meetings held, the representatives of the strikers were given a number of opportunities to make representations as to why they should not be dismissed if they did not return to work."

The witnesses for Bader testified that the representatives did not avail themselves of these opportunities. I find this to be the case.

On Monday 29 January, at about 14:00, management issued a written ultimatum to the strikers. The ultimatum was given to the shops stewards and copies were handed to the workers present at the factory. The ultimatum gave the workers sufficient time to reflect on the fact that their strike was an unprotected one and that only an unconditional return to work would prevent their dismissal. The ultimatum was to be complied with the next day at the commencement of the respective shifts. The strikers had time to discuss it with fellow strikers and as a collective. Those strikers who had not received a copy of the ultimatum would be informed of its contents when they presented themselves at their appointed shifts the next day. I may add that on the union's version the ultimatum had served its purpose for the strikers resolved to return to work.

There was never any doubt that the strike was a wildcat strike. It had not been sanctioned by the union. I am unable to determine whether the strike enjoyed the support of the shop stewards. Nevertheless the shop stewards acted as the representatives of the strikers. Not the slightest attempt had been made to engage the procedure laid down by the LRA. I assume in favour of the applicants that there was no prohibition on industrial action, but there was no attempt to conciliate the dispute. There was no notice of intention to proceed with the strike. There was no immediate and urgent need to embark on the strike. Although the strike may have been inspired partly by the unsatisfactory manner in which Bader dealt with the longstanding SEBO pension fund issue; the R300 demand and the prospect of discipline and compensation were the outstanding issues.

Bader suffered a major shortage of labour. This negatively affected productivity. The amount of the loss has yet to be proved. But it is beyond dispute that Bader suffered a loss of production. The strike began on 24 January. Efforts had been made to resolve the dispute. It has been submitted that Bader may have done more to resolve the dispute eg by offering an apology for succumbing to the demands of the trimmers and paying them R300 for their overtime. There is some merit in this. But the settlement of the dispute was primarily a matter for discussion at informal processes designed to conciliate disputes and the formal conciliation

processes of the LRA.

In my view the dismissals following upon a failure to comply with a proper ultimatum would be substantively fair.

The stage was set. The strikers had to report for their respective shifts at the appointed hours on 30 January i.e. 06:00, 07:30, 14:00, 18:00 and 22:00. If they did not, they would be regarded as having been dismissed. The overwhelming majority of strikers did not report for duty. They were dismissed.

Reaction to the ultimatum

To appreciate the events of 30 January it is necessary to take a pace back and consider the acquisition of a High Court interdict, the alleged reading of the ultimatum to the 22:00 shift followed by the reading of the interdict by the Sheriff on 29 January 2001.

The behaviour of the strikers had persuaded management that an interdict was required to secure the safety of other employees and casual employees. Bader felt the need to invoke the assistance of a court of law. Bader sought, on an urgent basis, and obtained an interdict from the Transvaal Provincial Division (TPD). The union was given notice of the application when a 63 second cellphone call was made to Mr Paulsen, a union official. The shop stewards, who were meeting with the management at this time, were deliberately kept in the dark about this application.

The interdict itself has no legal validity. The TPD had no territorial jurisdiction over the parties. But the fact that it was issued and served upon most of the strikers must be taken into account. At the same time sufficient cognizance must be paid to the fact that the unlawful conduct of the strikers played a role in the decision to seek an interdict.

The ultimatum was handed out at about 14:30 on 29 January 2001 to the 200-300 employees who were on strike and at or near the factory. These employees have not been identified. But Ms Joan Mboweni who testified said that she received a copy. So did Mr Monyane.

The strikers read the copies of the ultimatum handed to them and then tore them up and continued dancing and blowing their vuvuzelas.

It is common cause that a shop steward or shop stewards held a meeting with those present at the factory about the ultimatum. An intention to comply with the ultimatum would be manifested by a return to work. Mrs Mboweni said that that Mr Ramotlo told them to report on the morrow in compliance with the ultimatum.

Tuesday 30 January

The applicants' version of what happened on Tuesday differs from that of the Bader. I shall set out Bader's version and then that of the applicants.

Bader's version

Bader's version as regards the first two shifts is conveniently summed up by Mr Oosthuizen at a meeting held at about 09:00 on Tuesday. The minute records the discussion. The following were present: M Oosthuizen MO; E Naude EN; J Ramatio JR; G Montsho GM; P Sedile PS; O Marapyane OM; T Bokaba TB; and T Khumalo TK.

"M.O. Good morning lady and gentlemen

"M.O. Good morning lady and gentlemen I have asked for this meeting just to go through the events of this morning and just to put them into their proper context. As you are aware and here I am talking -in respect of the shop stewards and we have explained it to the Sheriff, Mr Paul Sedile that an ultimatum was issued yesterday calling upon the employees to return to work on their respective shifts and tendered their services. Last night the ten o'clock shift was addressed by myself and Mr Paul Sedile the Sheriff explaining the ultimatum and Mr Sedile explained the court order that he served on them, explaining to them the content and the impact thereof. This morning at six o'clock the first shift was supposed to report for duty, I just want to confirm that nobody tendered their services, I also want to confirm that Mr Eddie Naude was at the gate and he had explained the ultimatum to the employees and that those employees that want to come and work must go through, collect their clock cards and go to work. Nobody took up the offer or responded to the ultimatum, whereafter Mr Paul Sedile read out the Order, the Order is in Afrikaans, it was explained in English, sorry Mr Sedile, In Tswana?"

P.S. Tswana.

M.O. So it was explained to the people and basically the order in a nut shell instructed that:

1. Nobody is allowed on the premises without the company's permission, secondly nobody is allowed within 400m of the Company's premises without permission, thirdly that you are not allowed to intimidate any person entering the premises for purposes of working and fourthly there is to be no damage to Company property. Now we have waited for the 7:30 day workers to arrive, same procedure was followed as you shop stewards are aware, because you were party to it. Mr Naude again explained the issue of the ultimatum, invited those people who wanted to work to come to the gate, collect their clock card and go to work and explained that those who don't tender their services in terms of the ultimatum are dismissed, whereupon Mr Paul Sedile then served the order on the people present. Now, I have just to put on record, I have faxed a copy of the order to Mr Martin Paulse and per Jacob's request, I have got confirmation of the transmission if anybody is interested in receiving it, but I will keep it so that if ever that becomes questioned at least we have got proof of transmission. Now gentlemen we have covered the 6:00 shift and 7:30 shift. The only other people who are at this stage capable

of tendering their services are the people that come on 14:00 to 22:00 and we will follow the same procedure as we have with the 6:00 shift and the 7:30 people and then the same procedure will be repeated this evening in respect of the people attending duty at 22:00. Keep in mind the ultimatum expires on the occasion of your shift or on the occasion that you are to report to work. If you do not report to work you are dismissed as discussed yesterday. I believe that the ultimatum as per Jacob's advices was explained to the employees and copies were handed out to

me ??? employees. Well we know most of them tore up the copies of the ultimatum. Just to now discuss the issue of the Court Order, the people have to now disperse. The court order is very clear no one who does no person or no employee or any of the strikers who does not have permission to be on me premises has to get off the premises, not come onto the premises and furthermore no one without permission is allowed within 400m of the Bader Bop premises and that order now has to be observed and respected. I have asked the officer in charge of the just to attend so that we can sort this matter out in an orderly fashion, obviously we would like the employees co-operation, failing which gentleman the authorities are empowered to act in terms of the court order so that its terms are respected. I don't know if there are any queries, anything that anybody wants to raise at this stage?

J.R. Mark, okay thank you. I have been listening to what the Company has been saying, I want to believe that earlier on I explained to you that the Union is requesting a copy of the court order obviously the Company just confirmed that through the as well they need proof of the transmission of such a document and further to that attempt we have from our side you know spoken to the employees while the sheriff of the court was explaining the contents of this document to them. Now, the question of co-operation from the employees or from the workers side we did it from our side, we emphasise that we are still busy conciliating as to how can you, you know bring this situation back to normal order now what we are requesting from them is their co-operation and that as the court order indicates that we should not intimidate victimises anyone who might be coming into the premises with the intention of carrying out services and then further to that that they are still awaiting, we are still awaiting the Union's advise, you know their opinion in this regard and then hence into the company's attack. The response from the Union was that we should hangout in the meantime while they are going though the document and then. when they are finished they will respond and give us advise to that effect and then we will take it from there.

M.O. Okay, could you find Mr Martin Paulse now please because I don't want something to happen while the people are out there. I would him, if you can speak to him now, so that we can start enforcement of the court order please. So Jacob if you can phone him quickly you know so that he can advise and then, you know you can with the Sheriff, I would imagine the Sheriff and possibly the inspector explain to the people that they must now disperse peacefully. We have got your cell number, you have got the Company numbers, as and when the Union organiser arrive, obviously we will have a meeting and you would then obviously advise us accordingly so that the necessary arrangements can be made. Okay, well one of the Union's organisers, Thokezani has arrived.

E.N. Mark, can you maybe check with the people also the departmental heads obviously are required at the factory they are still sitting at the gate. It is just those people coming to work, are there any further who want to come in or can we get the departmental heads dispersed.

O.M. Yah I should believe that there is confusion, there are a lot of confusion, because there are parents that put forward have you consulted with the Company to get their permission as to what happened in the morning.

M.O. Well, at 6:00 in the morning nobody arrived, nobody tendered their services in terms of the ultimatum.

O.M. Okay, let me tell you what happened, because you were not here you

have just arrived. Okay what happened we have been here since 5h30,

the people came and then they were prevented from entering and only people and the only people who allow to enter this company was the people

from the trimmings department only. Then at a later stage Mr Naude actually caught me and Mr Bokaba and explained the situation to us that actually what the Company is trying to do is that they have put the departmental heads there at the gate so that employees who still wish to come in, they can come in, take you card and proceed with going to work. Subsequent to that Mr Paul Sedile was called and then actually to explain the court order.

M.O. That is right.

O.M. That is where the confusion actually came, because they were led to believe that me ultimatum that was issued yesterday, the employees have objected to the ultimatum and they had to respond. Then their response that. was expected of them by the company was to come in and work, but prior to that they were prevented from entering the premises. That in itself caused confusion, because people don't know whether they have been dismissed automatically or not.

M.O. The ultimatum expired at 6:00 this morning and at 7:30 the people were asked those that wanted to work could come in to work, the gates were not locked in respect of the people that wanted to come in. Mr Naude explained to them that there was an arrangement that people that want to come in and work as you have confirmed, come in, get their clock cards from their respective departmental head manager and they go and work. So nobody was prevented

O.M. Mark you were not here, Mr Naude never said that to employees out here they had to deliver such information to the employees after this now....”

E.N. Shop stewards was called between 6:10 and 6:15 okay for discussions. Before that the people were not prevented to come onto the premises, trimmings people were coming through, other employees did not want to enter the premises. We had a specific case where Mr Botha, one person came because it was before Mr Botha was here, then when Mr Botha arrived went to call him to say, look you can come through, then he did not want to come through. So I do not agree with your pretension that the people were prevented on coming onto the premises, they did not come onto the premises, then after 6:00 when they did not come onto the premises I called the shop stewards, I explained the situation to them, Mr Sedile explained the court order to you, we then went, I then addressed the people again in your presence to inform them that those people

who want to come onto the premises to work must do so, if they don't (Naude answers cell phone) it was explained to them that those people who want to come onto the premises to come and tender their services and work are welcome to come on if they do not enter the premises a court order has been obtained and then that would apply and Mr Sedile then explained the court order to them. That was in the presence of Mr Fourie also.”

The procedure was repeated for the 14:00 and 22:00 shifts. 220 employees were scheduled to report for duty on the 14:00 shift. Between 40 and 50 employees arrived at the factory gate before the start of the shift. Mr Naude read the ultimatum to them and invited them to enter the premises. None of them responded. The sheriff then read the interdict. They dispersed. It is common cause that no one reported for the 18:00 shift.

On 30 January, 30 employees scheduled to work the 22:00 shift arrived at the premises. They were spoken to by Mr Ramtlo and did not report for work. Four employees who were NULAW members and who had been on strike presented themselves for work. 90 employees did not report for work.

Mr “X” an unidentified striker told Mr Oosthuizen, in a question and answer session which has been recorded, that the strikers were angry and armed themselves with planks with the intention of assaulting casuals. He did not read the ultimatum on Monday 29 January. He heard about its contents. He understood he was to report for duty the next day. Mr Diayle told the strikers to go back to work and he would “bring the certificate for a legal strike”. The shop stewards were opposed to this

and the meeting decided not to return to work.

On Tuesday “Mr X” saw Mr Naude talking to the people. He says the sheriff read the ultimatum. He also said the sheriff read the court order. The sheriff spoke second. He saw managers seated at tables. He was part of the strikers. He went with them to Gomma Gomma. The worker decided not to go back to work. He decided to go to work. He was on the 14:00 shift. He walked in through a back entrance, went to Mr Marais and clocked in. Management regarded the strikers who did not report for work on 30 January as having been dismissed.

Applicants’ version

The evidence led by the applicants was to the effect that they had resolved to return to work in accordance with the ultimatum handed out on 29 January. The ultimatum was not read out before each shift. They were prevented from entering the premises and tendering their services by the court interdict read by the sheriff, backed up by police.

Mooke

Mr Mooke was a tanner. He knew the strike was unprotected. He says he was aware of this throughout the strike. He was given a copy of the ultimatum on 29 January. A shop steward, Mr Bokala, and 100-200 workers were present at the time. Later said about 300-400 workers were present. He understood the ultimatum. The shop steward told them to report to work tomorrow ie 30 January. They agreed to do so.

On 30 January he and others returned to the premises to report for work. He was to work the 06:00 shift. He entered the premises at 05:40. But Mr Naude told him to wait outside. The trimmers were allowed in. Mr Naude repeated this over and over as crowd grew. Mr Naude told them of the court order. Mr Naude did not read ultimatum. The sheriff read it at 06:15. The workers were told to stay 400 m away. He was confused by this. A small group of workers remained outside the gate. The rest moved away to Gomma Gomma.

He only saw Mr Naude at the gate. He later admitted that others managers were seated at the tables. He saw that the 07:30 shift was not allowed in. But under cross-examination said he was not there when sheriff read the interdict to the 07:30 shift. He stayed around until 15:00-16:00 then he went home.

Jane Mboweni

Ms Jane Mboweni was an assistant sprayer. She was present at the factory premises on 29 January until 14:00. She was not given a copy of the ultimatum. About 250-300 of her fellow strikers were present waiting to hear about the future of the strike. She conceded that a shop steward Bokaba was present.

On 30 January she went to Bader's premises. Her shift was at 06:00. She said she did not intend working. She arrived at 05:50 in the company of two trimmers She found the gate closed and workers were waiting outside. The Police were there. The trimmers entered the premises. She did not. The security staff and the supervisors were pointing out those who could enter. After 06:00 the sheriff came out. He read the ultimatum to them. He said they had been dismissed. She said that she meant the sheriff had read the interdict.

She stood around for about 30 minutes. She understood she had been dismissed. She approached her manager Mr Warren Phipps at the gate. He said he could do anything as an interdict had been issued. She said she did not see Mr Naude. But later she said that she saw Mr Naude after the sheriff had read the interdict. She went away with the workers to wait. She was not told that she had been dismissed.

She was waiting at Gomma Gomma at 07:30 but could not see what was happening at the gate. While she was there she heard singing. She does not know anything about a meeting allegedly held there. She heard of the ultimatum on the afternoon of 30 January.

Monyane

Mr A B Monyane worked in the milling section. He received a copy of the ultimatum at 15:00 on 29 January. It was given to him by a security guard. A meeting was held. Mr Bokaba, a shop steward was present and addressed the gathering. The other shops stewards came while he was addressing the strikers. At the meeting they were told that the strike had been cancelled and that they would go back to work on the morrow. He arrived at about 07:30 as was his habit. He saw 12 policemen and police vehicles and company security officers at the gate. The gate was closed or locked. He did not see any member of management. The police told him not to approach the gate but to stand on the other side of the road.

The sheriff spoke to them at 07:40. He addressed those present and told them that they had been dismissed from work. He did not see Mr Naude. He went to wait at Gomma Gomma. A union official came to speak to them but he does not remember what was said.

Moche

Ms Rosemary Moche came to work on 29 January for the 22:00 to 06:00 shift. About 10 workers were present. The chief shop steward, Mr Ramatlo, read the ultimatum to those present. She understood that the workers were going to return to work. The sheriff then read the interdict. No police were present. Mr Oosthuizen was not there.

On 30 January she arrived at 13:00 although her shift would begin at 22:00. She waited at Gomma Gomma with her co-workers. They told her that they were not to go to work because of the court interdict. She said "We were dismissed as we could not go into the premises". This is the reason that she did not report for work at 22:00. She did not know anything about a meeting held at Gomma Gomma.

Mori

Mr Obed Mori testified. He was a drum operator. On 29 January there was no consensus about the strike. A security guard, whose name he does not know, prevented him from entering the premises. The guard read the ultimatum to him. He understood it and had time to reflect upon it. The guard said that the shifts would commence the next day. The police were inside the yard.

On 30 January he came to work. At Gomma Gomma a co-worker told him that they were not going to proceed to work. His co-worker told him that the interdict required them to keep 400 m away from the premises. At 14:00 he nevertheless went to the gate. The sheriff read the interdict to those present. He said they were dismissed. He did not see Mr Naude. He left Gomma Gomma between 15:00 and 16:00.

When were the individual applicants dismissed?

It is part of the applicants' pleaded case that the individual applicants were dismissed before the expiry of the ultimatum ie the commencement of the five shifts on 30 January. The applicants allege that at a meeting on 30 January Bader management advised the Martin Paulsen, the general secretary, that the individual applicants had been dismissed. Mr Paulsen did not give evidence. Mr Oosthuizen testified that a meeting was held that day at 11:30 with Mr Paulsen. But

it was an off the record discussion. He declined to say what had been discussed. It has not been shown that the individual applicants were dismissed before the ultimatum had expired. The dismissals were not effected in writing.

Were the strikers prevented from working and was the ultimatum read?

These issues must be dealt with together as they are inextricably linked to each other. The applicants' case is that on the 30 January the individual applicants were prevented from tendering their services because the sheriff ordered the strikers to keep 400 metres away from the premises. Bader's case is that the interdict was read after Mr Naude read the ultimatum and invited those present for the 6:00, 7:30, 14:00 and 22:00 shifts to enter the premises and resume their work. I am satisfied that the evidence of Mr Oosthuizen and Mr Naude, which was subjected to withering cross-examination should be accepted as being credible and reliable. As far as the reading of the ultimatum is concerned their evidence is strengthened by the video tape of part of the events which took place outside the gate.

Ms Mboweni's evidence and that of Mr Mooke was unsatisfactory. Mr Monyane's evidence was evasive. Ms Moche's evidence is contrary to the probabilities, so is Mr Mori's evidence. I find that an ultimatum and an invitation to enter the premises was extended to those strikers who attended at the commencement of the 6:00, 7:30, 14:00 and 22:00 shifts. The refusal by the strikers to heed the ultimatum or to accept the invitation led to their dismissal.

Element of confusion?

The passive presence of the SA Police Service, the reading of the ultimatum by Mr Naude followed by the reading of the interdict by the sheriff may have injected an element into the proceedings on 30 January which two of the applicants' witnesses contend led to confusion and which caused the strikers not to comply with the ultimatum. I have given much thought to this. But this confusion ought not to have been a factor as the shop stewards knew of the interdict on 29 January. On the applicants' version had become academic as they had resolved to return to work. Any confusion which might have been present would have abated when the ultimatum was read at the commencement of the shifts. But even if the reading of the interdict, which followed, could have caused some confusion in the minds of the striker, I am unable to deal with it simply because the union witnesses say that no ultimatum was read at the shifts.

Prevention

The applicants' case is simply that the interdict was read. It or rather its terms forbade them from entering Bader's premises and Bader dismissed the individual applicants. I have found that although the interdict was of no legal effect it must be treated as being of full legal effect where its true nature would prejudice the applicants. But I have found that the interdict was not read in isolation. It followed the reading of the ultimatum and an invitation to enter the premises and clock in. It was only when this invitation was refused that the interdict was read.

On the case, as presented by the applicants, it is not open to me to consider whether the ultimatum did not reach all the strikers. In any event the evidence does not show that any applicants were dismissed without, at least, receiving oral the ultimatum. The only witness who says she did not hear an ultimatum was, in my opinion, untruthful. For the same reason I am unable to consider whether the time for reflection for a striker hearing the ultimatum for the first time was sufficient.

Conclusion

I am constrained by the narrow compass of the defined issues. On this basis I find that the dismissal of the individual applicants was procedurally and substantively fair. The parties are agreed that costs should follow the result.

In the premises the application is dismissed with costs, the costs are to include the costs of two counsel.

SIGNED AND DATED AT BRAAMFONTEIN THIS 30th DAY OF JUNE 2004.

A A Landman

Judge of the Labour Court

Date of hearing: 25, 26, 27, 28 February, 27, 28, 29 October 2003, 24, 25, 26,
29, 30 March 2004

Date of judgement: 30 June 2004

For the applicants: Ruth Edmonds Attorneys

For the respondent: Adv J Grogan and with him Adv Barnard instructed by RC Futter Attorneys

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