IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No:J1543/98

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	**First Applicant**
R PEENS	**Second Applicant**
S SCHOOMBEE	**Third Applicant**

and

RUSTENBURG TRANSITIONAL COUNCIL	**Respondent**

JUDGMENT

BRASSEY AJ:

1. On 27 January 1998 the respondent, a local council operating under the Local Government Transitional Act of 1993, adopted a resolution in terms of which, *inter alia*, it determined that 'employees on job level 1-3 not be allowed to serve in executive positions of Trade Unions or be involved in trade union activities.' Following an objection by the first applicant, which I shall refer to as 'the union', the final phrase ('or be involved in trade union activities') was deleted from the resolution, but the balance was left unchanged. Still dissatisfied, the union launched proceedings which culminated in the present

claim for an order to set the resolution aside as a contravention of the Labour Relations Act 66 of 1995 and the Bill of Rights in the Constitution.

2. Under the council’s job grading system the job levels referred to in this resolution comprise the senior executive and managerial officials of the council. The incumbents perform the functions traditionally assigned to the top management of an organization. They give advice and make recommendations to the councillors, who are ultimately responsible for formulating policy, and ensure that the council's resolutions are carried out properly. For the purpose, they must direct, motivate and where necessary, discipline the members of staff under their control in the departments into which the administration of the council is divided. To do the work properly, they must enjoy the trust and confidence of the council and, perhaps more than any other category of employee, must place the interests of the council above their own and above those of third parties. The council contends that these senior officials cannot simultaneously discharge their obligations as employees and sit on the branch executive of the union. In its reply to the statement of case it gives three reasons for taking this stance:

2.1. The officials have access to confidential information 'such as levels of maximum increases to which the respondent might agree in wage negotiations, which they would be duty bound to disclose to the first applicant if they served on its executive’.

2.2. They are required to initiate or conduct disciplinary hearings against employees and, should the accused be a member of the union, the membership of the executive of the first applicant would ‘at the very least, be seen to compromise the fulfilling of the disciplinary duties’.

2.3. They might, by reason of their membership of the union executive, find

themselves in the position in which they were 'unable or unwilling to fulfil essential tasks required of them.'

3. In the reply, the council raises no contention that an official within the management cadre commits a breach of his duty of fidelity by the very act of accepting a position on the union executive. Mr Beaton suggested that I should consider this objection as implicit in the plea. I doubt whether I can do this. The issue should have been properly raised so as to enable the applicants to decide whether to lead evidence on it and to prepare argument concerning it. I shall, however, accept for the purposes of this judgment that I can consider the issue, and will use it as my point of departure.

4. When employees join a union they commit themselves to a body whose primary object is to maximize the benefit its members derive from their relationship with their employers. This is as true of the first applicant as of any other union: its constitution opens by recording that its objects are to 'protect the rights and promote the interests of members' (para 4.1) and 'negotiate the most favourable conditions of service, remuneration and benefits for members [and] continually strive for the enhancement in conditions of service' (para 4.3. In the pursuit of their object, unions extract what they can from the employer by peaceful negotiations if this suffices, by industrial action if it does not. The point is not that unions do not co-operate with employers – they do and do so increasingly as commerce and industry becomes more complex. The point is that unions are competitors for a share in the revenue of the enterprise and are so by design, being established for that very purpose.

5. So much should be trite. In the nineteenth century it most certainly was. No one denied the adversarial nature of the relationship between unions and employers and each dealt with the other accordingly. The question became confused, however, when the role of unions became secure and their legitimacy was accepted, for efforts were then made to recast them as partners in a corporatist enterprise. It took a Kahn-Freund to debunk these unitarist theories and remind us that the conflict between capital and labour is eternal. 'Any approach to the relations between management and labour is fruitless unless the divergency of their interests is plainly recognised and articulated. … It was [Mr Justice Higgins, "the principal Founding Father of the Australian system of arbitration and conciliation"] who said that "the war between the profit-maker and the wage-earner is always with us"'. (The passage is taken from the last edition of which he was sole author: see *Labour and the Law* (1977) 16-17).

6. In some cases, no doubt, the conflict is veiled. Years of co-operation, which can be of considerable mutual benefit, can encourage a belief that the union is the employer's friend. One of the first applicant's constituent unions was, it seems, seen in precisely this light in the period preceding the amalgamation of 1995, presumably because wage negotiations were normally smooth and because the union, by efficiently administering its employee benefit schemes, was providing the employer as well as its members with a useful service. In such a climate it is easy to see why the employer might look with indulgence upon a situation in which its top management occupied the senior positions in the union. Such relationships are seldom enduring, however, as municipalities have discovered in the period since 1995. Obliged to live together though they are, unions and employers are natural

adversaries, and the first applicant and the respondent are no exception.

7. By joining a union, an employee commits himself to a body that stands in opposition to his employer. In a real sense he 'goes over' to the opposition. This can be a breach of the duty of fidelity owed by an employee to an employer for ‘the servant is bound to give of personal service to his master and, as a consequence, to refrain from any course of conduct the natural tendency of which used to injure his master's trade or business.’ *R v Eayrs* (1894) 12 SC 330 at 332. The judgment in *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler* 1971 (3) SA 866 (W) at 867H-I is in the same vein: ‘There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master’s interests.’ As these and other cases reveal, the employee can commit a breach of the duty by moonlighting for a competitor, and does so when he discloses confidential information, touts for business on another’s behalf or encourages fellow employees to leave the employer and take up work elsewhere. There is, as far as I know, no case in our law in which it has been held to be lawful to dismiss an employee for joining a union but I have little doubt that such a dismissal might be legitimate at common law. Aligning oneself with a body specifically established as a counterweight to the employer is arguably a greater infringement of the duty of fidelity than taking up a part-time position with a competitor; it certainly seems to be no less.

8. The cases seem to make it clear that working for a competitor will only sometimes be a breach of the duty. The determining factor is, generally, the status of the employee: the more senior he is, the greater the degree of loyalty expected of him.

I made this point after examining the authorities in my book (see M S M Brassey *Employment Law* D2.26 – D2.28) and see little reason to reconsider the question here. The same principle, I believe, applies when employees join a trade union. The senior employee is expected to stand by the employer in her battles with the union and frequently asked to help keep production going when a strike occurs. By joining the union he visibly betrays these expectations and deprives the employer of his support. The betrayal is all the more acute when, as in this case, the member of management takes up a leadership role in the union. As an ordinary member he can say that his submission to the union's decisions is merely nominal, but the argument is no longer open to him once he accepts a leadership position in the union, as the second and third applicants have done. His status in the union places him in the vanguard of the struggle – his colours are firmly pinned to the union mast.

9. At common law, in short, an employee can commit a breach of his duty of fidelity by joining a union. Whether the act of enrolment always constitutes a breach is unclear, but it seems safe to say that a member of management commits the breach when he enrols and certainly when he takes up a leadership position in the worker organization. At common law, therefore, it would be permissible to take action against employees in the position of the second and third applicants who are, as I have said, members of the respondent's managerial cadre. At common law it would, moreover, be neither unreasonable nor unlawful to make the rule that the respondent made in the present case and thus force members of management to choose between the union and their managerial status.

10. To what extent has this position been changed by legislation? The answer to this question has the Bill of Rights as a natural starting point. Section 23, which deals with labour relations, states *inter alia* that -

‘(1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right -

(a) to form and join an employers’ organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

Every trade union and every employers’ organisation has the right-

to determine its own administration, programmes and activities;

to organise; and

(c) to form and join a federation.’

11. These rights, which can be limited under s 36, are in some respects broader than those conferred by the Labour Relations Act 66 of 1995, to which I will be turning in a moment. Whether, in laying down narrower rights, the legislature impliedly intended to limit the rights was a matter much debated before me, but it is unnecessary for me to decide the issue since I am satisfied that the provisions of the Act are themselves broad enough to dispose of this matter. It is unnecessary, therefore, to invoke the specific provisions of the labour clause in the Bill of Rights. All we need do is remind ourselves that the Bill of Rights provides the context within which the Act must be considered and interpreted. So much is clear from s 39(2) of the Constitution, which requires courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights; and the Act itself puts paid to such doubts as might survive a reading of this section by stating, in s 3(*b*), that the Act must be interpreted 'in compliance with the Constitution'.

12. The provisions in the Act that govern an employee's right to join a trade union and participate in its affairs are in unequivocal and unconditional terms. Section 4, which deals with freedom of association, gives every employee the right to join a trade union (s 4(1)(*b*)) and every union member the right to participate in its lawful activities (s 4(2)(*a*)) and to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office (4(2)(*c*)). Section 5 sets out the effect of these rights by explaining the precise scope of the protection. It prohibits discrimination against an employee 'for exercising any right conferred by this Act' (s 5(1)(*a*) and see too s 5(2)(*b*)); prohibits an employer from requiring an employee not to be or become a member of a trade union (s 5(2)(*a*)(i) and (ii)); precludes an employer from acting to the detriment of an employee

'because of past, present or anticipated … membership of a trade union' or participation in its activities (s 52(*c*)(i) and (iii)); and prohibits the giving of a benefit in exchange for an employee's agreement to refrain from exercising his rights under the Act (s 5((3)).

13. Mr Beaton, arguing on behalf of the respondent, suggested that a construction be placed on these sections that would limit their scope to employees below managerial level. He referred to s 78(*a*) which confines the category of employees to which the chapter on workplace forums applies to those below senior managerial level. The section bears out the point he made, which is that the legislature is willing to draw a distinction between employees on the basis of status, but is otherwise against him. The proper conclusion to derive from it is that the legislature was aware that distinctions might be made and was willing to make them where appropriate. Within the present context express provision for such a distinction would surely have been made had the intention been to exclude managerial employees from the ambit of the organizational rights for which the Act provides. The argument for treating senior staff differently from their subordinates is hardly one the legislature could have overlooked through inadvertence.

14. Mr Beaton other textual argument was based on the premise that the applicants could derive their protection only from s 4(2)(*a*), which subjects the right to participate in trade union activities to the qualification of lawfulness ('participate in [the union's] lawful activities'). 'Lawful', he said, means more than just legal in the sense of non-criminal – it means legitimate in the sense of non-wrongful. It follows, he argued, that activities that constitute a breach of contract or a delict fall

beyond the purview of the Act. Both legs of the argument are in my view untenable. As to the first: s 4(2)(*c*), which enshrines the right of employees to hold office in a union, pertinently outlaws rules, such as the present one, that prohibit top management from participating in the governance of a union and it is not qualified by reference to lawfulness. As to the second: lawfulness cannot sensibly be taken to encompass conduct wrongful under civil law within a set of protections from which it is impermissible to contract out (see s 5(4)). A collective bargaining statute such as this seeks to escape, not submit to, the grasp of contract: see, for instance, s 67(2), which prevents protected strikes from being treated as breaches of contract or delicts. An overriding answer to the argument, however, is that it is unavailing even if both legs are sound. The reason is simply this: the qualification of 'lawfulness' governs the activities of the union, not those of its members. A union's activities do not, in the absence of a finding of conspiracy, common purpose or the like, become unlawful simply because its office-bearers, by participating in the activities, commit a civil wrong for which their employers, who are strangers to the relationship between the union and its members, can hold them liable.

15. Mr Beaton's principal argument, as I understood it, was one based on considerations of policy. He submitted that the legislature could never have intended to bring senior managers within the ambit of the protections given by ss 4 and 5. I cannot agree. Bound by a Constitution that confers organizational rights on workers without limitation, the legislature might well have decided that no such limitations should be embodied in the protections conferred by the Act. There is nothing untoward, still less absurd, in giving senior management the right to participate in trade union activities: white collar unions have long been recognized

as legitimate and there is no reason to believe the legislature intended to curb their scope or activities. The implication of limitations and conditions into statutory provisions is not lightly to be undertaken and, even if one were persuaded that they might be legitimate here, it would be all but impossible to decide where the legislature implicitly intended the line to be drawn. I consider that the sections must be read as they stand.

16. The argument based on absurdity assumes that the work of the enterprise would become impossible if senior employees enjoyed the protection of the organizational rights conferred by the statute. Evidence was placed before me to show the effect of second applicant's union activities on the municipal work he is meant to be doing. He has, it is common cause, been unable to furnish legal opinions because his loyalty to the union creates a fear in his breast that he will be make himself guilty of conflict of interest. The tug of separate loyalties has led to a request, to which the respondent has agreed, relieving members of the executive of the duty to discipline union members. There has been at least one accusation, whose foundation is debatable, that the second applicant undermined his mandate when representing the respondent in negotiations with the union over essential service matters. Finally there is the general fear that the confidentiality of information to which, as a matter of course, senior management becomes privy, might deliberately or inadvertently be compromised.

17. The force of these charges is undeniable and Mr van Staden, who appeared for the applicants, made no attempt to controvert them. Accepting that the duty of fidelity applied to them, he argued that they should each be dealt with on their

individual merits. Given the express language of the Act, he said, it was impermissible to deal with them by means of a rule prohibiting senior management from taking up executive positions in the union. I agree. The protections conferred by the organizational rights clauses give employees, whatever their status, the absolute right to join trade unions and take part in their activities. By so doing, they legitimize acts that might otherwise constitute a breach of the employee's duty of fidelity, prohibit victimization and outlaw rules of the sort that the respondent laid down in the present case. Beyond that, they do nothing to exempt employees from their duties under the contract. The employee must still do the work for which he is engaged and observe the secondary duties by which he is bound under the contract. If he does not, he can be disciplined for misconduct or laid off for incapacity.

18. The point is important enough to illustrate by way of some examples. An employee has no right (sections 14 and 15 aside) to take time off from work in order to perform his trade union activities – if he had such a general right, there would have been no need to enact the two sections I have just referred to. If the employee takes time off without his employer's permission, he will, in the absence of very special circumstances, be guilty of misconduct for which he can be disciplined. In the same vein, an employee who is hired to conduct disciplinary hearings can be dealt with according to the principles governing incapacity if, by reason of his election to a position in the leadership of the union, he can no longer perform his work. In neither case, of course, is dismissal the sole option; other ways can frequently be found that make it possible to eliminate the conflict between the two roles. The point I seek to make is simply this: the employee cannot be punished

for taking up a leadership position in the union, but his status in the union gives him no right to do less than his job requires unless some specific provision, such as ss 14 and 15, gives it to him.

19. The senior employee who becomes a union leader must, in consequence, tread carefully, especially in his handling of confidential information. It is not enough simply to keep the information secret; he must recuse himself from every discussion within the union to which such information might be relevant either directly or indirectly lest he convey, merely by his conduct or simply by silence, facts which the employer would prefer the union not to know. He can, I believe, participate in discussions on strategy to which information given to him in confidence is irrelevant, since this is implicit in his right to participate in trade union activities, but he must guard himself even from exercising a judgment on the basis of such information. The delicacy of discretion that this entails makes his position an unenviable one, but the Act gives him the right to enter this minefield if he wishes.

20. Mr Beaton argued that such a regime is very difficult to police. How, he asks, is the employer to know whether the senior manager is breaching confidences or not? In itself, this is no objection to the conclusion I have arrived at, for the problem is common to every form of misconduct whose commission is surreptitious. The common law meets this problem by prohibiting people in positions of trust from taking up positions that might potentially compromise their duties. The Act, in an effort to promote trade unionism and collective bargaining, makes the act of breach of faith the focus of its attention and permits an employee to have divided loyalties.

In this it is far from singular: a counsel, for instance, owes potentially conflicting duties of fidelity to both her client and the court, but need only be concerned about the division of loyalty when the potentiality becomes a reality.

21. In the circumstances the applicants must be granted the relief they claim. The prayer is drawn too broadly and I shall tailor my order to meet the circumstances of the case. The applicants pressed for costs in argument and I see no reason why they should not be granted.

22. I make the following order:

The respondent's resolution of 27 January 1998 prohibiting employees on job level1-3 from serving in executive positions on trade unions is declared to be unlawful and set aside to the extent of such prohibition;

The respondent must pay the applicants' costs.

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Brassey AJ

ON BEHALF OF APPLICANT : **Mr M van Staden**
INSTRUCTED BY : **Savage, Jooste & Adams Inc.**
ON BEHALF OF RESPONDENT : **ADV R G Beaton**

INSTRUCTED BY	:	**Van Zyl, Le Roux & Hurter Attorneys**
DATE OF HEARING	:	**12,13 SEPTEMBER 1999**
DATE OF JUDGMENT	:	**17 SEPTEMBER 1999**