IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

In the matter between:- **CASE NO. J5099/99**

RUSTENBURG PLATINUM MINES LIMITED **Applicant**

and

THE MOUTHPEACE WORKERS UNION **Respondent**

J U D G M E N T

CORAM FARBER, A.J.:

Reliant on the provisions of Section 68(1)(b) of the Labour Relations Act, No. 66 of 1995, the Applicant, on the 14th December 1999, instituted proceedings for the payment of compensation in the sum of R15 370 000,00. The matter was opposed. It was ultimately referred to the hearing of oral evidence, which took place before me on the 8th and 9th May 2001.

At the outset, I ought to make reference to three matters which had an impact on the proceedings. Firstly, the Applicant, in the formulation of its claim, relied upon two strikes said to have taken place on the 21st April and the 26th

October 1999 respectively. At the close of the Applicant's case, Mr. Cassim on its behalf abandoned reliance on the strike of the 26th October 1999. In the result, the events surrounding it need not be considered in this judgment. Secondly, the Respondent, as one of its defences to the claim flowing from the strike alleged to have occurred on the 21st April 1999, contended that the matter had been settled and that in consequence the Applicant was precluded from seeking compensation for the loss said to have been sustained in respect thereof. During the course of the trial, the Respondent abandoned reliance thereon. Similarly, it need no longer be referred to. Finally, Mr. Cassim limited the Applicant's claim to the sum of R100 000,00.

The facts germane to the determination of the dispute are largely common cause and may be detailed thus:-

The Applicant carries on business in the mining of platinum in the North West Province. It does so from several mines, each of which is geographically dislocated from the other. Moreover, each is under separate management, at least insofar as its day-to-day activities are concerned. Two of them are known as Union and Rustenburg, and the distance from the one to the other is of the order of twenty-six kilometres. The Applicant is the largest producer of platinum in the world and operates on a three shift system, comprising of a **"day shift"**, from 05h30 to 13h30, an **"afternoon shift"**, from 13h30 to 21h30 and a **"night shift"**, from 21h30 to 05h30.

The Respondent is a duly registered trade union.

On the 24th February 1998 the Applicant and the Respondent concluded a written recognition and procedural agreement. I do not intend analysing the agreement in any detail. What is plain is that it manifestly, in the clearest of language, regulates the manner in which grievances and disputes are to be dealt with. Responsibility, orderliness and lawfulness in terms of clearly defined procedures are at the forefront of it all.

I pause to observe that the Respondent is one of several trade unions recognised by the Applicant. At the time of the occurrence of the events seminal to the dispute, some 13,000 of the Applicant's workforce of 30,000 were members of the Respondent. Plainly, and in terms of representation in the workplace, the Respondent was then by far the largest and strongest of the trade unions which had been accorded recognition by the Applicant. In parenthesis, it may also have been the most troublesome.

Following upon certain industrial action which took place in January 1999 and an apprehension that such conduct would be persisted in, the Applicant, on the 4th February 1999, sought and obtained temporary interdictory relief against a very great number of the Respondent's members. The relief was extensive in nature and, *inter alia*, interdicted the Respondent and its members from promoting, inciting, instigating and/or participating in unprotected strike action. The order was made final on the 4th March 1999.

On the 19th April 1999 members of the Applicant's management received a

report to the effect that the workforce intended embarking on a strike on the morning of the following day. As a result thereof, Mr. M. Badenhorst, a senior coordinator in the Industrial Relations Department of the Applicant, telephoned Mr. P. Joubert, the Respondent's principal executive officer. Mr. Badenhorst advised Mr. Joubert of the reports which had been received and sought clarity on the veracity thereof. According to Mr. Badenhorst, Mr. Joubert was evasive and would not commit himself, either one way or the other. He did, however, articulate a number of demands which the workforce wished the Applicant to address.

Attempts were thereafter made by the Applicant to convene a meeting urgently with representatives of the Respondent. Little, so it seems, came of this. Moreover, a meeting which had by prior arrangement been scheduled to take place between Mr. David Mwalanda, the Respondent's general secretary, and Mr. M. Appelgryn, the Applicant's human resources manager for Rustenburg, was cancelled by Mr. Joubert. This occurred despite the availability of Mr. Mwalanda to attend it. At the time of cancellation, Mr. Appelgryn was en route to attend the meeting. He was accompanied by Mr. A. Geldenhuys, a human resources consultant who then held a general engagement with the Applicant. Both intended raising the Applicant's fears in relation to the possibility of a strike with Mr. Mwalanda.

During the course of the 20th April 1999 a number of **"mass"** meetings involving the workforce took place.

The reports which the Applicant had received were not misplaced, for on the 20th April 1999, at 20h30, the Applicant's workforce at Union and Rustenburg embarked on a strike. It involved both members of the Respondent and of the other trade unions which had been accredited by the Applicant. The **"night shift"** of that day did not report for work. Nor did the **"day shift"** of the following day.

On the morning of the 21st April 1999 Mr. Mwalanda received a report to the effect that the Applicant's workforce was on strike. He immediately proceeded to one of the Applicant's mines where he addressed a segment of the workforce. He listened to its demands and then prevailed upon them to return to work. They undertook to do so immediately. This, however, did not occur until a very much later stage.

During the course of that morning, Mr. Joubert arranged for representatives of the Respondent to meet the Applicant later that day so that the demands of the workforce might be addressed. Mr. Joubert at the time expressed the view that if the demands were resolved, he was confident that the workforce would return to work that evening.

As had been the case on the previous day, a number of **"mass"** meetings involving the workforce took place during the course of the morning and afternoon of the 21st April 1999. The Applicant videoed and voice recorded one of these meetings. During the course of that particular meeting, Reverend Lee Tsheme and Mr. D. Coetzee, two members of the Respondent's National

Executive Committee, urged workers not to return to work until their demands had been satisfied.

The Applicant again sought recourse to the Courts. An interdict was obtained as a matter of urgency on the 21st April 1999, and copies of the relevant order were distributed to the workforce by the Sheriff.

Shortly thereafter, one of the other trade unions which had been accorded recognition in the workplace, the National Union of Mineworkers **["NUM"]**, addressed two letters to the Applicant disassociating itself from the strike which was then still in progress.

On the 21st April 1999, at approximately 13h00, the Applicant met with members of NUM's local branch. They expressed concern in regard to the strike and distanced themselves from it, indicating that it did not enjoy their support. They indicated that members of NUM had through intimidation been precluded from tendering their services to the Applicant.

On the same day, at 15h30, a meeting took place between the Applicant and the Respondent. This occurred pursuant to the arrangement which Mr. Joubert had concluded earlier that day. The meeting was of undoubted importance and the Respondent was represented thereat by Mr. P. McLeod, a member of its National Executive Committee, Mr. B. Sekoto, the head of its legal department, Mr. G. Sinaphula, one of its regional chairpersons, and some twelve workers' representatives. Mr. P.W. Coetzer, the Applicant's business manager, addressed the meeting and alluded to the circumstances which had

given rise to the convening thereof. Mr. McLeod then proceeded to read from a memorandum which had been compiled by the workforce or on its behalf. This memorandum detailed the demands of the workforce. The meeting was then adjourned for a short while, apparently to permit management to discuss the demands which had been raised.

On the resumption thereof, Mr. Coetzer addressed the meeting in the following terms:-

"We are disappointed with the way your Union have expressed your concerns. I am convinced that if we had the same discussions previously we could have prevented the situation. On the one hand you care for your members, but your actions deprived them of one day's pay. We as management also care for our employees and we believe the situation could be prevented. It is my perception that the stay-away was instigated by M.P.W.U. Head Office yesterday when mass meetings took place. Living out employees arrived on the mine this morning without knowing of any protest action. However, it is done." [my emphasis]

These statements were not challenged by the Respondent's representatives.

Mr. Coetzer then proceeded to address the demands which had been raised earlier. During the course thereof, and thereafter, he alluded to the possibility of the Applicant instituting disciplinary proceedings against those members of the workforce who had participated in the strike. The meeting was again adjourned. During the course of that adjournment, representatives of the Respondent addressed the workforce and instructed it to return to work, a call which was apparently heeded shortly thereafter.

On the resumption of the meeting, the question of possible disciplinary action

was again raised. The Respondent expressed its disquiet in regard to that possibility. Mr. Sekoto pressed the issue on its behalf. He stated that he wanted **".... clarity on the disciplinary action"**. He continued in the following terms:-

"We don't know how you are going to address the masses. Be open and tell us your actions as we are in a corner now."

Mr. Coetzer's response was immediate and forthright. He stated that -

"You people placed yourself in the corner. You took the decisions. I will take the action."

The reference therein to **"you"** was a plain reference to the Respondent. Its representatives did not then seek to controvert what had been said by Mr. Coetzer.

The strike at both Union and Rustenburg terminated at approximately 19h00 when the workforce on **"night shift"** reported for duty.

By reason of the strike, the Applicant lost production, and thus profits. Its loss, in respect of both Union and Rustenburg, was quantified in an amount of not less than R15 000 000. It may well have been considerably more.

On the 9th July 1999 the Respondent advised the Applicant that Rev. Tsheme and Mr. Coetzee had been dismissed and were no longer authorised to represent it.

Before leaving the seminal facts, two observations are pertinent. Firstly, the

meeting of the 21st April 1999 between the Applicant and the Respondent was mechanically recorded. A minute reflecting what had transpired thereat was then compiled. Witnesses from both sides confirmed that the minute accurately reflected what had in fact transpired, save that it was wrong to the extent that it suggested that in detailing the demands of the workforce, Mr. McLeod spoke in his own words. He was in fact reading from a memorandum which had been compiled by the workforce or on its behalf. Secondly, the authenticity of the video footage to which I have referred is not in issue. What was in issue was whether the events depicted thereon occurred on the 21st April 1999. Counsel, on behalf of the Respondent, suggested in his cross-examination of at least two witnesses called on behalf of the Applicant, that the footage might not relate to an occurrence on the 21st April 1999, but to an occurrence on some other occasion. As to when that might have been was not alluded to. The witness, who was present at the time, was for good reason emphatic that the footage related to a meeting held on the 21st April 1999, and in the absence of evidence to the contrary, I have no hesitation in accepting what he said.

The relevant provisions of Section 68 read as follows:-

"**68. Strike or lock-out not in compliance with this Act.-** (1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) to grant an interdict or to restrain -

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

(ii) any person from participating in a lock-out or any conduct in contemplation or in

furtherance of a lock-out;

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, having regard to-

(i) whether-

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out was premeditated;

(cc) the strike or lock-out was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out; and

(iv) the financial position of the employer, trade union or employees respectively.

(2) .....

(3) .....

(4) .....

(5) ....."

It is manifest that in relation to a strike, three requirements must be satisfied before the questions, whether compensation as contemplated in sub-section 1(b) is to be awarded, and if so, in what amount, arise for determination. In the first instance, it must be established that the strike does not comply with the provisions of Chapter IV of the Act. Secondly, the party invoking the remedy must establish that it has sustained loss in consequence of the strike. Thirdly, it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or in furtherance thereof. This much is evident from the provisions of sub-section 1(a) which, in its delineation of the nature of the acts which might legitimately form the subject matter of an interdict or restraint, identifies who might be held accountable therefor. The Legislature plainly intended to embrace the same class in relation to the Court's competence to award compensation.

It is common cause that the strike on the 21st April 1999 did not comply with the provisions of Chapter IV and that the Applicant sustained loss in consequence of it in an amount of at least R15 000 000,00.

The third requirement is in issue and the question whether it had been established forms the real essence of the dispute before me. On this score, the stance of the Respondent was encapsulated in paragraph 76.2 of the answering affidavit deposed to by Mr. Mwalanda in the proceedings. He, in relation to the strike which commenced on the 20th April 1999, said the following:-

"76.2 The strike action was not at the insistence or instigation of the Respondent, and the Respondent at all times, acting as responsible trade union, persuaded employees to return to work."

He went on to record the following in paragraph 81.1:-

"81.1 The Respondent was not a party to the events of 20 and 21 April 1999, prior to being asked by Applicant to assist in resolving the matter. The matter was resolved after the intervention of the Respondent."

It is manifest from what occurred at the meeting of the 21st April 1999 between the Applicant and the Respondent that Mr. Coetzer on behalf of the Applicant, in clear and unequivocal terms, made it plain that he considered that the strike had been instigated by the Respondent. He did so on two occasions. The representatives of the Respondent did not demur or protest on either occasion and did nothing to controvert what Mr. Coetzer had said.

During the course of his evidence, Mr. Sekoto advanced the reason for the Respondent's omission in that regard. He said that it would have been impolitic and imprudent for it to side with management against the striking workforce. I have difficulty in grasping this explanation. The correction of a palpably wrong statement would in my view not have constituted an alignment of the Respondent with management to the detriment of the workforce. Indeed, such pronouncement would not only have served to exculpate the Respondent from all blame in relation to the strike and its consequences, but may have tended to place the workforce in a more favourable light. Recourse by a workforce to strike action, without any intervention or involvement on the part of their union, may be indicative of a very high level of frustration on its part. The explanation sought to be advanced is in my judgment lacking in candour. It represents little more than an *ex post facto* attempt to seek to undo the consequences of the Respondent's failure to make its position known at the first available opportunity. I cannot accept the explanation as truthful. In my view, the circumstances of the situation were such that had the Respondent not instigated the strike, it would have so proclaimed in the clearest of terms. Its failure to have done so must in my judgment constitute an admission on its part that it in fact instigated the strike. [As to the circumstances under which a failure to speak may found an admission, see generally *Benoni Produce and Coal Co Ltd v Gundelfinger* 1918 TPD 453; *Benefit Cycle Works v Atmore* 1927 TPD 524; *East Asiatic Co (S A) Ltd v Midlands Manufacturing Co (Pty) Ltd* 1954(2) SA 387 (C).]

This conclusion is in my judgment supported by the general probabilities of the case. Firstly, and on uncontroverted evidence which I have no hesitation in accepting, Mr. Joubert, the Respondent's principal executive officer, was evasive when Mr. Badenhorst, on the 19th April 1999, sought clarity on the report which had been received, to the effect that the workforce intended striking on the morning of the following day. Mr. Joubert's evasiveness and his reluctance to commit himself, either one way or the other, tends, I think, to suggest that he already knew of the possibility of a strike. Despite this, he failed to distance himself from it, but chose to detail the demands of the workforce. Secondly, during the course of the strike itself, two members of the Respondent's national executive committee urged the segment of the workforce which they addressed not to return to work until its demands had been satisfied. This is hardly consonant with the state of affairs referred to by Mr. Mwalanda. Thirdly, it is clear that the strike was orchestrated. I say this because Union and Rustenburg are separated by some 26 kilometres and the strike commenced at each of them at the same time. There is no suggestion on the evidence how this might have come about other than through the involvement of the Respondent.

I am mindful of Mr. Mwalanda's testimony to the effect that on learning of the strike he sought to intervene in the matter, and that insofar as the strikers which he addressed are concerned, he urged them to return to work. He may not have supported the strike initiative, but he seems to have been alone in this attitude. What is, however, plain is that despite the workers' undertaking to Mr. Mwalanda that they would return to work immediately, this did not

occur. It seems that there was a larger force in play. It is also instructive that the grievances which were furnished to Mr. Mwalanda differed quite radically from those which Mr. McLeod, on behalf of the Respondent, submitted to management later that day. I am not satisfied that the impact and cogency of Mr. Mwalanda's evidence is such as to disturb the reliability of the admission made at the meeting to which I have referred.

I consequently find that the Respondent in fact instigated the strike of the 21st April 1999 and thereafter committed acts in furtherance thereof. This falls squarely within the provisions of Section 68(1)(b).

I now turn to the question whether compensation ought to be awarded, and if so, in what amount. This must be adjudged in terms of the considerations detailed in sub-paragraphs (i)(aa), (bb), (cc), (dd), (ii), (iii) and (iv) of Section 68(1)(b).

Before turning to a consideration of these factors, some general comments are perhaps apposite. The Legislature has conferred a very wide discretion on the Court. It is circumscribed only to the extent that the result achieved must be **"just and equitable"**. This means no more than that it must be fair. The sub-section, and thus the discretion which is to be exercised thereunder, is designed to compensate an aggrieved party for the loss actually suffered. Such compensation is in the nature of recompense [*Foodpiper CC t/a Kentucky Fried Chicken v Shezi* (1993) 14 ILJ 126 (LAC)]. It is not penal in character. However, the various factors which must be considered in the exercise of discretion make it plain that if compensation is awarded it need not necessarily

equate to a full indemnity for the loss suffered. So much so is evident from the structure of the sub-section and the factors therein referred to. They postulate that the result in any particular case will turn on its own facts. On this score, it is plain that much of the enquiry is subjective in nature, involving an assessment of the gravity (or the lack thereof) of the conduct complained of, and the blameworthiness of the person sought to be held accountable therefor.

I now turn to a consideration of the factors relevant to the exercise of the discretion.

1. COMPLIANCE WITH THE PROVISIONS OF CHAPTER IV OF THE ACT

No attempt whatsoever was made by the Respondent to comply with the relevant sections of Chapter IV of the Act. Its breach was in the circumstances gross.

2. PREMEDITATION

I have little doubt that the strike in question was premeditated, although it is difficult to determine the extent thereof. Plainly, on the 19th April 1999, a strike was potentially in the offing, so much so that the Applicant sought to intervene with the Respondent and secure information in regard thereto. It admits of little doubt that the strike was orchestrated, and it can hardly be co-incidental that the workforce, at two separate mines some 26 kilometres apart, commenced striking simultaneously. The circumstances are such that it cannot be said that the strike was spontaneous in consequence of a decision

taken on the spur of the moment.

3. UNJUSTIFIED CONDUCT BY ANOTHER PARTY

The demands of the workforce, as articulated by Mr. McLeod at the meeting of the 21st April 1999, were encapsulated in the minutes of that meeting thus:-

"We are all aware of the protest action, which is all about grievances never attended to or prolonged purposely. We want the relevant people to take note thereof and to attend to each problem, which is as follows:

1. Provident Fund Task Team

The Provident Fund Task Team was originated by MPWU and should only be composed by members of MPWU and not NUM as required by Management of Amplats.

2. Financial Institutions

We are all aware of certain financial institutions which offer micro loans to employees. Boland Bank was introduced by NUM, MPWU reacted and introduced Capital Alliance. Benefits of our members and your employees are important to us. We now obtained a better offer from Unibank and we consulted Amplats Head Office to introduce Unibank. Mr Beamish held a meeting with EXCO and he advise(sic) me that there is no problem. He proceeded on leave. Mr King then phoned me and said everything has been arranged. He requested a copy of the stop order facility for deduction purposes. I faxed it to him. Thereafter Mr Roland van Kerckhoven informed me that the matter was now under his jurisdiction.

I spent 2-3 days in Johannesburg trying to finalise the matter with Amplats Head Office. We eventually got the feeling that Amplats Head Office just wanted to postpone the matter. We received a letter from Mr R Van Kerckhoven who want us to enter into an informal contract. From my previous experience with Capital Alliance I know what this informal contract was. Capital Alliance was too slow to assist our members. After investigations we found that Capital Alliance and NUM entered into an agreement. We assume that Capital Alliance purposely delayed the process to assist our members. Therefore I request you to assist us to get the Unibank agreement. We have already ± 1 500 loan applications in the pipeline.

In the past NUM never had any opposition and Teba Bank was therefore introduced. MPWU is now the majority Union on the Mine and we request negotiations to open our own Banking institution to replace Teba.

3. Negotiations with Amplats Head Office

It is our Union's view that negotiations at our and your Head Offices only waste time.

Amplats Head Office is just `a picture on the wall' as they don't know what is going on. R.P.M. Bleskop Mine is responsible to make decisions and they can summon Amplats Head Office if required. Employees feel it takes a long time to resolve problems. It is important for MPWU that members must come first.

4. Forceful Retrenchment exercises

Numerous pension and redundancy exercises taking place on the Mine must stop with immediate effect until our Head Office receive a clarification from Mr Eric Ngubane.

5. Wage increase

We demand a 4% increment from January 1999 in addition to our increase in 1998, without the two year agreement. We enter into this protest action to indicate to you that we must start negotiations with our Head Office.

We demand immediate response on our demands as we believe that our reasons are enough for the protest action taken."

Despite the allegation therein to the contrary, no evidence was placed before me which even remotely suggests that the Applicant had been intransigent in regard to the issues in question. Nor was there any suggestion that it was unwilling to engage in dialogue in an endeavour to resolve them. In short, no cognisable evidence to the effect that the strike was in response to unjustified conduct on the part of the Applicant was adduced.

4. INTERDICT PROCEEDINGS

As I have indicated, an interdict against the members of the Respondent was in place at the time of the commencement of the strike on the 21st April 1999. Despite this, the strike was initiated. A further interdict was obtained during the course thereof. It did not serve to dampen the enthusiasm of the Respondent and its members in regard to the continuation of the strike.

5. THE INTERESTS OF ORDERLY COLLECTIVE BARGAINING

In my view, the strike in question was a serious one. So much so appears from my analysis of the factors already addressed. The Respondent was the instigator thereof and, to be sure, its conduct was highly irresponsible and totally erosive of orderly collective bargaining. It seems to me that the Respondent requires reminder that the interests of security in the workplace are best promoted by stable and ordered action in terms of procedures sanctioned by law. Recourse to other stratagems can only serve to bedevil sound labour relations to the prejudice, not only of the parties involved, but to the economy as a whole. A loss of R15 000 000,00 is no trifling matter.

6. THE DURATION OF THE STRIKE

The strike was short lived. To the Respondent's credit it, through its influence, eventually brought it to an end.

7. THE FINANCIAL POSITION OF THE APPLICANT AND RESPONDENT

I have already referred to the activities of the Applicant. I have no reason to suppose that its financial position is other than extremely strong. In contrast, the Respondent is barely solvent. I have no doubt that an award for compensation will bear very heavily on it. However, and as will presently emerge, an order for compensation is open to amelioration through recourse to a periodic payment structure.

Weighing up all these factors, and affording to them such weight as I must, it seems to me that a proper case for the award of compensation has been established by the Applicant.

As to the amount, the Applicant has limited its claim to the sum of R100 000,00. This falls well within the upper limit of what I would have considered fair in all the circumstances. I accordingly intend directing the payment of compensation in that amount. Counsel referred me to Section 158(1)(j) of the Act and were agreed that it permitted me to direct that the compensation awarded be discharged in monthly instalments. I propose giving effect thereto.

Costs will follow the event.

The following orders are made:-

1. The Respondent shall pay the Applicant the sum of R100 000,00 in monthly instalments of R5 000,00.

2. Payment of the instalments referred to in paragraph 1 shall commence on the 7th September 2001 and shall thereafter be paid consecutively on the 7th day of each succeeding month.

3. The Respondent shall pay the Applicant's costs of suit.

G. FARBER
ACTING JUDGE
OF THE LABOUR COURT

DATE OF HEARING:
8TH & 9TH MAY 2001

DATE OF JUDGMENT:
14TH AUGUST 2001

I. NONKONYANA
el for Respondent

ted by:
MBELE MGXAJI