THE STATE VERSUS
SHADRACH SELLO
AND OTHERS.

CASE NO:- M.1666/78

DATE:- 18.8.78.

PLACE:- SUPREME COURT OF
SOUTH AFRICA
(TRANSVAAL PROVINCIAL
DIVISION).

M.1666/78. 1. R7.50.

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IN THE SUPREME COURT OF SOUTH AFRICA.

(TRANSVAAL PROVINCIAL DIVISION)

Dated: 15.5.78.

In the matter between -

P.B. BOSMAN TRANSPORT WORKS COMMITTEE First Applicant

TRANSPORT & ALLIED WORKERS' UNION Second Applicant

SHADRACK SELLO Third Applicant

AND OTHERS

and

P.T. BOSMAN TRANSPORT (PROPRIETARY) LIMITED Respondent

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JUDGMENT

[illegible]OFF, J

This is the return day of a rule nisi calling on the respondent to show cause why it should not be interdicted from dismissing its employees, or any one of them, from its employ, or altering their terms or conditions of employment to their disadvantage, or to the disadvantage of any one of them without just and lawful cause; and why it should

not pay costs. It is also the hearing of a further prayer for an interdict restraining respondent from breaching certain provisions of the Agreement for the Motor Transport Undertaking (goods) made in terms of the Industrial Conciliation Act No. 28 of 1956. The first applicant is described as P.E. Bosman Transport Works Committee, established in accordance with the Bantu Labour Relations Regulation Act, No 48 of 1953. The second applicant is Transport & Allied Workers' Union. The third applicant, Shadrack Sello, an employee of the respondent, is the deponent to 10 the founding affidavit. And the remaining applicants, seven in number, are other employees or erst-while employees of the respondent. The respondent is a company carrying on business as a carrier.

The dispute engendered by the application centres around the abovementioned Agreement for the Motor Transport Undertaking (Goods), which was made in terms of the Industrial Conciliation Act, No 28 of 1956, and promulgated in the Government Gazette of the 21st April 1978. On behalf of applicants it is alleged to be binding on respondent and 20 its employees, and inter alia obliges respondent to pay certain prescribed minimum wages; to pay them for overtime work; to furnish them with log books; and it fixes their ordinary hours of work. It is alleged that respondent failed to observe the provisions of the agreement; that this led to complaints and friction; first applicant was called into being in terms of the Bantu Labour Relations Act, No 48 of 1953 in an effort to resolve the dispute by dialogue and negotiation, but that this did not

have the desired result; that second applicant, the Union, endeavoured to intercede on behalf of the employees, but that this only resulted in one employee being dismissed and some of the other employees fear like treatment. The relief sought is designed to prevent further dismissals without lawful cause, and to exact compliance with the relevant terms of the Industrial Conciliation Agreement.

At the commencement of the hearing counsel for the respondent raised four points in limine. I shall deal with each in turn.

The first is that first applicant has not locus standi to take part in the proceedings. The argument raised necessitates a reference to Act No. 48 of 1953.

Section 7(A) of that Act provides that employers of Bantu engaged in certain establishments may be called upon to or may on their own initiative arrange for the election of works committees. A Works committee shall comprise not less than three and not more than twenty of the Bantu employed in the establishment. Once it is elected a chairman and secretary is to be elected from amongst its members, and it may adopt rules with reference to the calling and conduct of meetings; the admittance to its meetings of employees at the establishment or the employer; and "such other matters as may be necessary or expedient for the proper functioning of the committee"(Section 7(A)(9) of the Act).

Section 7(A)(10) states :

"The functions of a works committee shall be to communicate the wishes, aspirations and require-

ments of the employees in the establishment or section of an establishment in respect of which it has been elected, to their employer and to represent the said employees in any negotiations with their employer concerning their conditions of employment or any other matter affecting their interests."

Section 7(A)(11) charges the elected chairman of the committee with the function of acting as intermediary between the committee and the employer concerned.

The foregoing consititutes the sumtotal of the statutory provisions which are or may be relevant for present purposes. Now it will be seen from these provisions that a works committee such as first applicant is a statutory body with the limited functions of establishing and maintaining dialogue with an employer of Bantu in an establishment, and negotiating with him on behalf of his Bantu employees. It is nowhere provided that it may take up the cudgels on behalf of the employees further than with the employer himself. It is certainly not provided that it may assume the garb of litigant, nor is there any room for 30 an implication to that effect. Indeed, Mr. Leveson, who appeared for applicants, conceded, rightly so in my opinion, that the statute itself does not vest a committee such as first applicant with the power of going to court. He contended, however, that first applicant acquired that power by virtue of the terms of the constitution which it adopted for itself. It escapes me how first applicant, being a purely statutory body, can effectively create powers for

itself which it would otherwise not have had, by the adoption of a constitution providing for such powers. If it did so it would be acting ultra vires. In any event, I have studied the constituion and it does not, in my view, purport to give first applicant the powers under discussion. In my judgment first applicant has no locus standi in judic[illegible] and the point taken as far as it is concerned succeeds.

The second point relates to second applicant's participation in the litigation; it is said that it has no direct legal interest in the litigation, and was improperly joined as co-applicant.

Second applicant is a trade union, not registered as such in terms of the Industrial Conciliation Act, No 28 of 1956. It accordingly has no statutory rights or duties, and is in reality an ordinary voluntary association. Its aims and objedts are set forth in its constituion, a copy of which is annexed to the founding affidavit. The relevant ones thereof are expressed to be :

"(a) To endeavour to obtain and maintain satisfactory rates of wages, hours of work, conditions of works and generally to protect and promote the interests of members.

(b) To faster sound industrial relations in the industry and to settle labour disputes and disputes between members.

(c) ....

(d) To pursuade all workers eligible to join to

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(e) To represent the interests of members and to affiliate to any organisation or body having similar objectives.

(f) ....

(g) Generally to perform any function usually carried out by a Union."

It appears from the papers that second applicant had taken steps to protect the interests of certain employees of respondent in the disputes previously referred to, and some of these employees are or were members of second applicant. It is in fact applicant's case that some employees of respondent were dismissed *inter alia* if not solely because of their membership with second applicant. This is said to affect second applicant in the following manner :

"(Paragraphs 16(b) and (c)) :

(b) The trade union is a voluntary association which derives its strength from the number of its employees. It exists for the protection and promotion of the interests of its members and to this end, acts as a liaison between them and their management. In addition, it provides certain ancillary services such as educational facilities, legal advice, and benefit schemes. To finance these benefits, the union levies dues from its members.

(c) By reason of the aforegoing, a union's power and financial strength is primarily determined by the number of members who belong to it. If a union

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member is unlawfully dismissed, the union suffers actual or potential prejudice for two reasons : Firstly, if a union member is dismissed as a result of his membership alone, other members stop supporting the union for fear of similar dismissal and potential members are discouraged from joining for the same reason; and secondly, unemployed members are unable to pay their dues. The effect of the aforegoing is that the union is rendered less effective, and suffers financial loss. For these reasons, the union has a substantial and direct interest in this application."

It is well settled that in order to justify its participation in a suit such as the present, a party such as second applicant has to show that it has a direct and substantial interest in the subject-matter and outcome of the application. In regard to the concept of such a "direct and substantial interest", CORBETT J. in United Watch & Diamond Co. v. Disa Hotels, 1972(4) S.A. 409(C) quoted with approval the view expressed in Henri Viljoen (Pty) Ltd. v. Awerbuch Brothers, 1953(2) S.A. 151 (O), that it connoted -

" ..... an interest in the right which is the subject-matter of the litigation and ...... not thereby a financial interest which is only an indirect interest in such litigation."

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and then went on to say (at p. 415 (H)) :

"This view of what constitutes a direct and substantial interest was been referred to and adopted in a number of subsequent decisions, including two in this Division ..... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court (See Henri Viljoen's case (supra) at p. 167)."

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This requirement of a legal interest as opposed to a financial or commercial interest also received judicial endorsement in Anderson v. Gordik Organisation 1962(2) S.A. 68 (D & CLD) at p. 72 (D-E).

It seems to me that the abovequoted averments in applicant's affidavit establish no more than a financial or commercial interest which second applicant might have in the outcome of the application. Second applicant has at best an indirect interest in what happens to respondent's employees, and no legal interest.

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On behalf of second applicant Mr. Leveson put the case for second applicant on an alternative basis, namely that a body such as second applicant with the function of a watchday may for that reason approach a court for the protection of those in whose interests it was created. He sought to draw an analogy with the position of a local authority and referred to two decisions concerning the locus standi of such a body. I am not sure whether the

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position of a municipal authority is, for present purposes, comparable to that of a trade union, but I in any event think that in both of those cases locus standi was found to exist because the municipal councils concerned had each a legal interest. The first of these cases was that of Madrassa Anjuman Islamia v. Johannesburg Municipality, 1917 A.D. 718. That was a case where a municipal council was held to have locus standi to claim an interdict prohibiting a person from occupying stands in a township within its municipality in contravention of certain statutory provisions. As appears from pp. 725/6 of the report, however, the council was itself the owner of land within that township and had moreover a reverionary interest in certain stands; it accordingly had a direct legal interest in the subject matter of the suit. The second was is that of Dadoo Ltd. and Others v. Krugersdorp Municipal Council, 1920 A.D. 530. In his dissenting judgment DE VILLIERS J.A. at p. 574 held that the municipal council had locus standi to seek an interdict restraining Asiatics from illegally occupying land within the municipality. His reasoning was that the statutes rendering the occupation illegal were enacted in the public interest " ..... but also in the interests of other owners of land, who on sanitary and economic grounds might object to the presence of Asiatics on the stands. A fortiori would this give the municipality, the health authority, as well as a large owner of stands, a locus standi." Neither of these decisions seems to me to support the proposition contended for.

Mr. Leveson also sought to draw an analogy between the position of the second applicant and a body such as the

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Transvaal Indian Congress, whose locus standi was discussed in Transvaal Indian Congress v. L.T.A.B. and another, 1955(1) S.A. 85 (T). That was a case in which the congress sought a judicial review of the decision of the Land Tenure Advisory Board, consequent on the refusal of the latter to hear the congress at an enquiry conducted in terms of a statute which obliges it to hear "any interested party."

It was decided that the congress as a body representing the Indian Committee should have been accorded a hearing. In my opinion that case is distinguishable; the applicable statute did not require the congress to have a direct and substantial legal interest in the subject-matter of the Board's deliberations. The case is no authority for the proposition that had the congress taken legal action to interdict an alleged wrong committed in respect of one of its member, it would have had locus standi.

In my judgment second applicant has no locus standi in these proceedings, and the objection raised in regard to it likewise succeeds.

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The next point concerns the locus standi of fourth and eighth applicants. They are erstwhile employees of respondent who were dismissed by it, allegedly unlawfully. In the founding affidavit it is not said what these applicants did consequent to their dismissal: whether they accepted it as a repudiation of their agreements of employment or whether they took up employment elsewhere; nor does one know whether criminal proceedings under section 24 of Act 43 of 1953 are to be instituted. Mr. Levenon argued that

the joinder of these applicants is justified on either or both of two bases: Firstly, they have a statutory right or expectation of re-instatement giving them a "contingent interest" (counsel's phrase) in seeking the interdicts set out in the papers; and secondly their purported dismissal was null and void. Those submissions are based on the provisions of Section 24 of Act No. 48 of 1953, which couples a criminal sanction with a prohibition against victimisation by reason of the employee exercising his rights in terms of the Act. The section furthermore provides, in sub-section (2) ;

> "The court which convicts any person of an offence under sub-section (1), may in addition to any sentence which it may impose in respect of that offence, order him to reinstate, for such period and subject to such conditions as it may determine, the employee whose dismissal, or the reduction of the rate of whose remuneration, or the alteration of whose position, was the subject of the charge of which he was convicted, or may order him to pay that employee compensation, not exceeding two hundred pounds, for loss suffered by that employee, or may order both such reinstatement and the payment of such compensation, and any such order for reinstatement or compensation shall have the effect of civil judgment in favour of that employee."

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It will be convenient firstly to discuss the second of the abovementioned bases of justification for the

joinder of a fourth and eigth application. Counsel relied in this regard on the judgment of the full bench in the case of Rooiberg Minerals Development Co. Ltd. v. Du Toit, 1953(2) S.A. 505 (T), given in relation to legislation which is in all material respects the same as that now under discussion. It was held (at p. 509 (F-H) that the dismissal of an employee in circumstances constituting a contravention of the statute was a nullity. That decision binds me, but it does not follow from it that the further consequence is that the employee in question is entitled to re-instatement. (cf. Kubheka and another v. Imextra (Pty) Ltd., 1975(4) S.A. 484 (W) at p. 490 (D-H). The employee may, if there is a prosecution and conviction under section 24(1) of Act No. 48 of 1953, at best lay a charge and entertain the hope that if the employer is convicted, the court convicting him will in the exercise of his discretion direct a re-instatement. Neither under the common law (cf. Schierhout v. Minister of Justice, 1926 A.D. 99 at p. 107; Kubheka's case (supra) at p. 486 (D-C) nor under the statute may such an employee ex debito justitiae claim re-instatement. He has no more than a spes, and that is to my mind insufficient to give an employee such as the fourth or eigth applicant a sufficient interest to justify his joinder. He has, as I held in relation to the position of second applicant, to allege and prove a legal interest inhering in himself, and I think that that has to be the position when the litigation is initiated.

This view of the matter seems to me at the same time to dispose the first abovementioned basis relied on for the joinder of fourth and eighth applicants. They do not have a "contingent right" at all, merely a hope.

For these reasons I conclude that the point taken in regard to them also succeeds.

That brings me to the last point in limine. It is one of non-joinder; it is contended that the Industrial Council for the Motor Transport Undertaking (Goods); the Regional Bantu Labour Committee (Vereeniging); the Central Bantu Labour Board and the Minister of Labour should have been joined in this application. 10

The first of the abovementioned bodies is in terms of the abovenamed Industrial Conciliation Agreement of the 21st April 1978 said to be "the body responsible for the administration of this agreement and may issue interpretations and rulings not inconsistent with the provisions thereof or of the Act, for the guidance of employers and employees."

The second body, the Regional Bantu Labour Committee (Vereeniging) was established in terms of Section 4 of Act No. 48 of 1953. In terms of section 6 it is charged with the duty of endeavouring to further the interest of Bantu in the area in respect of it is appointed, 20

" ..... and for that purpose shall -

(a) maintain contact with employees with a view to keeping itself informed as to the conditions of employment of employees in its area generally and

in particular tr[illegible]s;

(b) from time to time submit reports to the inspector defined by regulation in regard to any labour disputes which may exist or are in the opinion of the committee likely to arise;

(c) in accordance with the provisions of sub-section (2) of section ten, assist in the settlement of labour disputes; and

(d) from time to time submit to the board reports in regard to such matters as may be referred to it by the board."

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The third body, the Central Bantu Labour Board is appointed under section 3 of Act No. 48 of 1953 "to perform the duties and functions assigned to it under this Act, and to advise the Minister on any matter which the Minister may refer to it or on which, in the opinion of the board, advice should be submitted to the Minister in the interests of Bantu employed in any trade." References in the Act to some of the functions of the board occur in e.g. section 9, which gives it a voice in the negotiations leading to the making of an Industrial Conciliation Agreement, and section 10, where it participates in the establishment of a Wage Determination.

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The Minister of Labour is mainly given the power of appointment of some of the bodies, boards and officials referred to in the Act.

The locus classicus on the question of non-joinder, Amalgamated Engineering Union v. Minister of Labour, 1949(3) S.A. 637 (A.D.) states that parties having a direct and substantial interest in a law suit should be joined in it. I do not think that any of the above bodies or the Minister of Labour has such an interest. They have no rights which will be affected one way or another, should the main application be uphold or dismissed. It was argued by Mr. Müller on behalf of respondent that some of these bodies, in particular the Labour Committee, could if called upon have resolved the dispute with respondent, I fail to see how that gives it the sort of interest necessary for joinder. This point seems to me to have no merit and it is dismissed.

Summarising, the objection to the locus standi and joinder of first, second, fourth and eighth applicacants is upheld with costs against those parties. The objection of non-joinder is dismissed with costs in favour of the remaining applicants. Both orders for costs include the costs of two counsel. The rule nisi is extended and the matter is postponed to the 29th August 1978.

(Sgd.) C.F. Eloff.
JUDGE OF THE SUPREME COURT.

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