

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS599/17

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA)**

First Applicant

S MNISI AND 16 OTHERS

Second to Further Applicants

and

**MANDLAKAZI ELECTRICAL
TECHNOLOGIES HOLDINGS**

Respondent

Heard: 9 to 13 September 2019

Delivered: 11 October 2019

Summary: Dismissal for participating in an unprotected strike – selective discipline and re-employment – appropriateness of the sanction.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] This matter relates to a dispute that arose on 29 March 2017 when the second to further applicants (applicant employees) were dismissed by the respondent, Mandlakazi Electrical Technologies (MET) for participating in an unprotected strike. The applicant employees are members of the National Union of Metalworkers of South Africa (NUMSA).

- [2] The fairness of the dismissal is placed in issue. The applicants are challenging the procedure that led to the dismissal of the applicant employees as well as the rationale for the dismissal.

Pertinent facts

- [3] The respondent is an electrical infrastructure service provider and operates within the purview of the Metal and Engineering Industries Bargaining Council (MEIBC). The applicant employees were employed in various capacities within MET, including electrical assistants, general workers, linesman and administrative personnel. Some of them were field workers, deployed at clients' sites while others worked mainly at MET's workshop.
- [4] It is common cause that MET had been under financial strain from 2015 to the time of the strike. As a result, it had to implement measures to alleviate its precarious financial position by introducing, *inter alia*, a three days per week short time and applying for exemption from the MEIBC's Main Collective Agreement (Main Agreement) and relevant subsidiary collective agreements on certain extended benefits to employees, particularly the Leave Enhancement Pay (LEP).
- [5] On 1 August 2016 to 15 August 2016 and 31 August 2016 to 2 September 2016, NUMSA members, including the applicant employees, embarked on an unprotected strike (first strike) on a demand that they be paid the annual wage increase with effect from 1 July 2016 in terms of the Main Agreement. There were several meetings between NUMSA and MET aimed at resolving the impasse. It was in those meetings that NUMSA was made aware of MET's financial predicament and its intention to seek exemption in respect of annual increases and LEP.
- [6] Subsequent to the marathon consultations, the parties reached an agreement ending the first strike on the following terms:

6.1 MET would implement the annual wage increase as per the Main Agreement effective from 1 July 2016;

6.2 The employees would be paid the back pay for the months of July and August 2016 by 2 September 2016;

6.3 The three day per week short time would continue;

6.4 MET would not pay the employees for the days in which they participated in an unprotected strike; and

6.5 The parties undertook to ensure that there is a proper and timeous engagement, communication and consultation in order to prevent any future unprotected strike.

[7] During the meeting of 4 October 2016, the issue of LEP was specifically discussed. Once more, MET informed NUMSA that it was intending on applying for exemption to pay LEP from MEIBC due to its financial challenges. NUMSA acknowledged MET's right to seek exemption but was not prepared to support its application. On 28 October 2016, MET accordingly applied for the exemption.

[8] The application for LEP exemption had not been finalised by the MEIBC when it was due for payment in December 2016. Ms Lindiwe Sibande (Ms Sibande), the Administration Director, informed NUMSA members, through their shop stewards, Mr Katlego Tsotetsi (Mr Tsotetsi) and Ms Sibongile Mnisi (Ms Mnisi), that the LEP would not be paid pending the outcome of the exemption application. The employees received their payslips before the annual shut down on 15 December 2016 confirming that LEP had not been paid.

[9] Upon return from the December shutdown on 16 January 2017, Ms Sibande was approached by Mr Tsotetsi to enquire about the LEP and informed her that the employees would embark on a strike if their LEP was not paid into their bank accounts by the end of the day. Ms Sibande explained to him that the MET was still awaiting the outcome from the MEIBC and that employees could not embark on an unprotected strike. Mr Tsotetsi also approached Mr

Paul De Castro (Mr De Castro), the Operations Director, and informed him about the impending strike over the LEP.

- [10] Ms Sibande contacted the MEIBC, in the presence of Mr Tsotetsi, in order to establish the progress on the LEP exemption application. Unfortunately, she could not be helped as the MEIBC official dealing with the matter was not at work and was due to return on 19 January 2017.
- [11] Ms Sibande sent an email to Mr Mabango Siyenga (Mr Siyenga), NUMSA official, seeking his assistance regarding the impending strike. The next day, 17 January 2017, NUMSA responded to her email, stating that Mr Siyenga was on leave until 19 January 2017. No one was assigned to assist in his stead.
- [12] On 17 January 2017, at about 07h00 employees refused to work and demanded the payment of their LEP. At about 07h30 MET issued the first ultimatum to the striking employees directing them to return to work by 08h00 and advising them that the strike was unprotected.
- [13] The striking employees failed to return to work. That led to the issuing of the second ultimatum at about 08h10, directing the striking employees to return to work by 08h45 and warned that if they failed to adhere to the ultimatum, MET would proceed with disciplinary action.
- [14] The MET's senior management (Mr De Castro, Ms Sibande and Mr Gary Coetzee (Mr Coetzee), the Managing Director, met with the shop stewards, Mr Tsotetsi and Ms Mnisi, in an attempt to resolve the dispute. MET requested the time up until 20 January 2017 in order to find means of resolving the impasse, including seeking an overdraft facility from the bank. The shop stewards communicated MET's request to the striking members but was rejected *pronto*. The striking employees were adamant that they would only return to work once they had received an SMS confirming that their LEP had been paid.

- [15] The striking employees were instructed to leave MET's premises and were advised to return back to work the next day, 18 January 2017, whilst allowing the respondent time to resolve the issue. No one heeded the call. On 19 January 2017, the striking employees were served with SMS messages notifying them to attend the disciplinary enquiry on 23 January 2017.
- [16] In response, Mr Siyenga sent an email to Ms Sibande, requesting a meeting on 23 January 2017 in order to discuss the strike. On 23 January 2017, the striking employees arrived at the premises of MET but did not commence with their duties. The position and mandate that was articulated by NUMSA during the meeting of 23 January 2017 was that the striking employees would only return to work if their LEP was paid that very same day; and that NUMSA officials would plead with employees to await the outcome of LEP exemption application from MEIBC only if MET management would not take disciplinary action against the striking employees. MET rejected NUMSA's proposals and demanded that striking employees return to work the next day and that it would proceed with the disciplinary enquiries.
- [17] The disciplinary enquiry for all the striking employees, save for the shop stewards, was held on 25 and 26 January 2017. While the shop stewards' disciplinary enquiry was held on 24 and 28 February 2017.
- [18] On 7 March 2017, MEIBC accordingly approved MET's application for exemption to pay LEP for the year 2016.
- [19] The striking employees were dismissed on 29 March 2017, having been found guilty of participating in an unprotected strike on 17 to 23 January 2017. Subsequently, ten of the striking employees were re-employed subsequent to the successful appeals.

Issues to be decided

- [20] The issues that this Court is called to determine are as follows:

20.1 Whether NUMSA had been given reasonable time to intervene;

20.2 Whether the applicant employees had been given sufficient time to comply with the ultimatums;

20.3 Whether MET applied discipline consistently; and

20.4 Whether the dismissal was an appropriate sanction.

Law and application

[21] In terms of section 68(5) of the Labour Relations Act¹ (LRA) the employer has a right to dismiss employees who participate in a strike that does not comply with the provisions of the LRA.² In *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*,³ the Labour Appeal Court (LAC) confirmed the principle that illegality of the strike is not 'a magic wand which when raised renders the dismissal of strikers fair'. Hence it was stated that the determination of substantive fairness of a dismissal pursuant to strike must be undertaken in two stages; firstly, in terms of item 6⁴ of the Code of Good Practice: Dismissal, Schedule 8 of the LRA (Code)

¹ Act 66 of 1995 as amended.

² See: *Vodacom (Pty) Ltd v CWU* [2010] 8 BLLR 836 (LAC) at pars 10 and 11, where it was held that despite the procedural compliance with section 64, a strike will be unprotected if it is prohibited in terms of section 65 of LRA.

³ [2014] 1 BLLR 31 (LAC) at para 29. See also *National Union of Mineworkers of SA v Tek Corporation Ltd and Others* (1991) 12 ILJ 577 (LAC).

⁴ Items 6 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.

where a strike related enquiry takes place and secondly, in terms of item 7⁵ of the Code where the enquiry into the misconduct *per se* takes place.

- [22] In the present case, the applicants took issue with the fact that NUMSA was not notified of the course MET was going to take prior to the issuing of the ultimatums, so as to allow it to intervene. In this regard, Ms Sibande testified that on 16 January 2017, she sent an email to Mr Siyenga, seeking his assistance regarding the impending strike the next day as advised by Mr Tsotetsi. She only realised the next day, at about 8h30 when she received an email from NUMSA stating that Mr Siyenga was on leave up until 19 January 2017. She responded to that email and requested NUMSA to send someone else to assist with the strike that was already underway but to no avail. This evidence was not disputed.
- [23] Mr Siyenga, on the contrary, testified that he only became aware of the strike upon his return from annual leave on 19 January 2017. However, there was no evidence led as to why NUMSA did not intervene despite having been informed of the strike on 16 January 2019. Also, Mr Tsotetsi was made aware as early on 16 January 2017 that any strike action by NUMSA members would be unprotected and would result in disciplinary action been taken against them. His evidence was that he was just carrying the employees' mandate and did not deem it necessary to advise them on the consequences of their actions.

⁵ Item 7 provides:

Any person who is determining whether dismissal for misconduct is unfair should consider -

- (a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) If a rule or standard was contravened, whether or not -
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer; and
 - (iii) dismissal was an appropriate sanction for the contravention of the rule or standard.'

- [24] Even though NUMSA was not specifically notified of the impending ultimatums, it was made aware that its members were planning on embarking on an unprotected strike a day before the strike. Even on the day of the strike, NUMSA was also made aware of the strike and its intervention was once more sought. It is granted that Mr Siyenga was not on duty. However, the email address that was used to communicate to NUMSA was for its branch office, hence there was a reply to Ms Siyenga's email. Since NUMSA was aware that its members were on strike, it was incumbent upon it to either inform Mr Siyenga of the strike or send someone else in his stead.
- [25] The unprotected strike lasted for about five days (17 to 23 January 2017). Upon his return from leave on 19 January 2017 and having been apprised of the strike and the notices for the impending disciplinary enquiries, Mr Siyenga only sought a meeting for 23 January 2017 without even committing to persuading the striking employees to return to work. Even on 23 January 2017, NUMSA persisted with the demand for the immediate payment of the LEP as a condition to end the strike. However, the striking employees only returned to work the next day, 24 January 2017 when it was clear that MET was not budging on its decision to proceed with the disciplinary enquiries against the striking employees.
- [26] In my view, the fact that NUMSA was not notified of the ultimatums is inconsequential as it was ultimately afforded an opportunity to intervene and persuade its members to return back to work.
- [27] The applicants impugn that the striking employees had not been given sufficient time to reflect on the ultimatums is without merit. The first ultimatum gave them 30 minutes to return to work whilst the second one gave them about 45 minutes. Also, it is common cause that senior management held a meeting with the shop stewards to request them to persuade the striking employees to return to work and give MET an opportunity up until 20 January 2017 to address their demand. Still, the

striking employees were intractable even though the contents of the ultimatums had been explained to them even in isiSwati. The ultimatums clearly spelt out the consequences that would follow should they refuse to heed the call to return to work. Mr Tsotetsi conceded that they, the shop stewards, did not persuade the striking employees to return to work as they were in solidarity with their plight.

- [28] In a last bid to get the striking employees back to work, Mr De Castro testified that the striking employees were also given an opportunity to reflect on their actions and return back to work the next day. This evidence was corroborated by Mr Coetzee and was never challenged. It is instructive that even after five days of participating in an unprotected strike and having consulted with Mr Siyenga, the striking employees were still intractable.
- [29] In my view, the applicants were given more than sufficient time to reflect on the ultimatums and return to work.
- [30] On the issue of inconsistency, the applicants accused MET of unfair application of discipline in relation to two employees, Mr Samuel Mukamu (Mr Mukamu) and Mr Vusi Mnisi (Mr Mnisi) who were not dismissed even though they participated in the strike. Ms Sibande testified that Mr Mukamu was an unemployed learner who did not receive a salary, but he received a stipend. Even though he had been charged, it was later realised that he could not be disciplined as he was not employed by MET. She was adamant during cross examination that Ms Mnisi, the shop steward, could not be compared with Mr Mukamu as she was not a learner or student but a permanent employee of the MET. She, nonetheless, conceded that Ms Mnisi's certificate of service erroneously stated that she was an apprentice; an error she attributed to the pressure she had been put under by the shop stewards when the certificates of service were prepared. This evidence was not seriously challenged. In fact, Mr Tsotetsi conceded that Ms Mnisi had been in the employ of EMT for more than four years and had signed a permanent contract of employment.

[31] When it comes to Mr Mnisi, the driver, Ms Sibande testified that even though he initially participated in the strike, he was a driver and part of the administration. He returned to work when all the administration staff were sent notices that they could not participate in the strike. He was subsequently given permission to leave the workplace after he received a call that his sister was gravely ill. His sister died on 19 January 2017. Nothing much turns on the date of her death as the family responsibility leave was granted on 17 January 2017 due to her illness but was extended because she did not make it.

[32] Ms Sibande, also clearly explained that, even though Mr Mandla Nhlapho (Mr Nhlapho) was also a part of the administration, he did not return to work after receiving the SMS from her hence he was also dismissed. The applicants were not in a position to dispute Ms Sibande's evidence in this regard.

[33] Tritely, parity of treatment in the circumstance of an unprotected strike entails that disciplinary rules should be applied consistently and like cases should be treated alike.⁶ Item 3(6) of the Code provides that:

'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[34] However, the LAC cautioned in *SACAWU and Others v Irvin & Johnson Ltd*,⁷ that consistency is an element of disciplinary fairness and is not a rule unto itself. It was stated that:

'Consistency is simply an element of disciplinary fairness... Discipline must not be capricious. It is really the perception of bias inherent in selective

⁶ *Member of the Executive Council: Department of Health, Eastern Cape Province v Public Health and Social Development Sectoral Bargaining Council and Others* [2016] 6 BLLR 621 (LC); *ABSA Bank Ltd v Naidu* [2015] 1 BLLR 1 (LAC); *National Union Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC); *Cape Town City Council v Mashito and others* (2000) 21 ILJ 1957 (LAC); *SACCAWU v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC), ⁶ [1999] 8 BLLR741 (LAC).

⁷ *Supra* n 4 at para 29.

discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, ... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders.' (Emphasis added)

- [35] In the present case, it is clear that the decision not to dismiss Messrs Mukamu and Mnisi was not capricious or induced by improper motives but justifiable given their peculiar personal circumstances.
- [36] The last issue to be addressed is the appropriateness of the sanction. The basis of the applicants' impugn in this regard is that the dismissal was too harsh. Notwithstanding, the applicant employees had participated in the first strike four months prior and got away with impunity as there was no disciplinary action taken against the striking employees as per the agreement between the parties. Also, in terms of the same agreement, NUMSA committed to ensuring that its members would embark on consultation processes instead of unprotected strike.
- [37] Even though the agreement was not signed by NUMSA, Mr Siyenga conceded during cross examination that the applicant employees were bound by its contents, in particular, the undertaking not to participate in an unprotected strike in future. Mr Tsotetsi also conceded that he was aware of the undertaking not to embark on the unprotected strike as per the agreement. However, he seemed to take issue with the fact that it

was not signed hence not binding. There is no merit in this assertion and it must be rejected in the light of Mr Siyenga's concession that it was indeed binding on the applicant employees.

- [38] Despite, the applicant employees renounced on their undertaking without any provocation. The issue of LEP had been discussed in October 2016. NUMSA was also aware of the application for exemption and the fact that no LEP would be paid in December 2016 pending the decision of MEIBC. Mr Tsotetsi was once again informed on 16 January 2017 that the LEP issue was pending the outcome of MEIBC. It was not disputed that MET was under financial constraints hence it applied for exemption; which was ultimately granted.
- [39] In *CBI Electric African Cables*, the LAC confirmed as substantively fair, the dismissal of employees who had engaged in a two-hour strike, while on a final written warning, in response to the employer short paying them their wages, because the employee's decision to strike was found to be deliberate, calculated and undermined the process of collective bargaining as a tool to resolve industrial disputes.
- [40] Similarly, in the present case, the strike was not an inadvertent act which was triggered by MET's irrational conduct. Conversely, it was concertedly premeditated which put further strain to MET's dire financial position. All the efforts to get the applicant employees back to work, including explaining the second ultimatum in the language understood by all of them, isiSwati, did not bear any fruits.
- [41] The applicant employees were intransigent and unreasonable in their conduct. They persisted with the unprotected strike despite being aware of the unlawfulness of their conduct and consequences that would follow. Clearly, the unprotected strike undermined the process of collective bargaining as a tool to resolve industrial disputes, a process they had agreed to adhere to after the first strike.

[42] In the circumstances, I am satisfied that the sanction of dismissal was appropriate.

[43] The applicants seem to also have qualms with the fact that some of the striking employees were subsequently re-employed. In this regard Mr Coetzee, who dealt with appeals, testified that those who submitted individual appeals wherein they showed remorse were re-employed. The applicant employees filed individual appeals on the similar technical grounds of appeal and without showing any remorse hence their appeals were unsuccessful.

[44] In particular, Mr Coetzee referred to the appeal of Mr Calvin Ngwenya (Mr Ngwenya) by way of example. His appeal was successful because he provided the factual information in support to his appeal and was remorseful hence he was re-employed. Also Mr Skuta Mkhabela (Mr Makhubela), Mr Mda Mathanzima (Mr Mathanzima) and Mr Sthembile Maunye (Mr Maunye) were some of the employees who were re-employed because they were apologetic, remorseful and pleaded for their jobs. According to Mr Coetzee, the case of ten employees was distinguishable as they were sincere and honest in their approach. As a result, he felt that he could build a future with them.

[45] Mr Dawie Wicht (Mr Wicht), an official from the employer organisation, testified that on 26 May 2017 there was a meeting held between the respondent and the applicant after conciliation on 17 May 2017 and NUMSA was informed that the applicant employees could still appeal.

[46] A letter dated 31 May 2017 was sent to NUMSA containing the appeal criteria to be used for appeals, which in essence demanded the appellants to show remorse like all other re-employed employees. Mr Wicht also sent a follow-up letter to NUMSA wherein he emphasised the appeal criteria and edged NUMSA to forward the offer to all the applicant employees. However, NUMSA rejected the offer *pronto*.

- [47] It is not clear whether the offer to appeal was ever forwarded to the applicant employees. However, Mr Siyenga was adamant that it was never forwarded to them as the union had the mandate to act in the interest of its members. On the other hand, Mr Tsotetsi conceded that he did receive the offer but rejected it.
- [48] Notwithstanding, it was ill-conceived of NUMSA to reject the offer to appeal the dismissal of the applicant employees and have them re-employed like the 10 employees who had shown remorse. In fact, NUMSA ought to have advised its members to take responsibility for their misconduct and plead for a lenient sanction as soon as it was afforded an opportunity to intervene. To simply reject the indulgent offer by MET, when it had no obligation to do so, was a serious disservice to the applicant employees. In my view, it is NUMSA that must be held accountable for the turn of events.
- [49] Therefore, the applicant's claim that MET selectively re-employed some of the striking employees and excluded the applicant employees is untenable.

Conclusion

- [50] In all the circumstances, MET successfully showed that the dismissal of the applicant employees was both procedurally and substantively fair.

Costs

- [51] Owing to the persisting relationship between the parties, I am not inclined to make an order as to costs.

- [52] In the circumstances, I make the following order:

Order

1. The dismissal of the applicant employees is procedurally and substantively fair.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr N Masutha, NUMSA Regional Legal Officer

For the Respondent:

Ms C Lancaster of Lacaster Kungoane Attorneys