



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D826/2009

In the matter between:

SACCAWU

First Applicant

NOMFUNDO NXUMALO AND OTHERS

Second and Further Applicant

and

CHECK ONE (PTY) LTD

RESPONDENT

Date of hearing: 12 September 2011

Date of Judgment: 24 January 2012

JUDGMENT

CELE J

Introduction

[1] It is pursuant to their dismissal on 1 June 2009, that the applicants have instituted a claim against the respondent of unfair dismissal while they took part in an

unprotected strike. They seek an order of reinstatement alternatively, compensation. The respondent relied upon the evidence of four witnesses to oppose this claim.

Background facts

[2] The respondent operates a chain of supermarkets nationally. The second to the tenth applicant (“the applicants”) were employed at the respondent’s branch in Margate, KwaZulu Natal. Most of them were in charge of cash registers at the shop of the respondent.

[3] In August 2008, the first applicant (the union) referred a dispute regarding a refusal to bargain to the Commission for Conciliation, Mediation and Arbitration, (the CCMA), which it said arose on 16 July 2008. The union had made various attempts to engage the respondent to discuss wages and the conditions of employment of the employees of the respondent. At the conciliation hearing, the parties agreed to meet on 16 September 2008 at the Margate store in order to discuss the union’s concerns. Mr Ivan Bonga Phuthini, the union’s organiser, conceded that he failed to attend the meeting scheduled for 16 September 2008 as he was attending to a strike at Woolworths stores. Mr Phuthini further conceded that he did not make any contact with the respondent for over four months thereafter until he issued a letter on 20 January 2009, requesting a meeting on certain proposed dates. The respondent replied on 10 February 2009 and proposed a meeting for 4 March 2009 but Mr Phuthini was not available for 4 March 2009. Mr Phuthini was approached by the third and fourth respondents sometime after 25 February 2009 to enquire about the progress in the matter. He informed them that he was still waiting for the respondent to respond to his letters of 11 and 25 February 2009 in which he proposed certain dates on which they could meet. Mr Xulu denied receiving those letters. Mr Phuthini did not contact the respondent thereafter until the day of the strike on 30 March 2009. In 2009 there is no organisational rights dispute which the union referred to the CCMA in respect of the Margate store nor was there any dispute in respect of a refusal to bargain referred to the CCMA preceding the strike.

[4] On 30 March 2009 and at approximately 08h00, a group of 38 employees, including the applicants, embarked on an unprotected strike. The employees demanded that a meeting be held between Mr Xulu, the respondent’s Industrial

Relations Manager who was based at the respondent's head office in Durban and their union organiser, Mr Phuthini. At approximately 08h05, the manager of the store, Mr Govender, informed the employees that Mr Xulu was on his way to Margate to meet with them.

[5] Several verbal and written ultimatums, calling upon the employees to return to work or face disciplinary action and possible dismissal were issued by the respondent but were ignored by the employees. Mr Govender communicated such ultimatums to the employees. The strike took place during a busy trading period for the respondent and also on the day that pensioners came to collect their pension pay at the store.

[6] When the applicants failed to comply with a verbal ultimatum and the first written ultimatum to return to work, the respondent arranged to transport employees from its branches in Harding and Umzinto to enable it to open the store in Margate as all the cashiers were on strike. Mr Billy Jooma drove into the yard at the receiving entrance of the Margate store with four employees who were in uniform from the Harding store. The striking employees were carrying various weapons ranging from sticks, pipes, planks and bottles which they waved around. Mr Jooma alighted from the vehicle whilst the other employees he brought along remained in the vehicle. After a brief moment Mr Jooma took his employees away to wait at the beach for further instruction. Mr Bilal arrived at the Margate shop shortly thereafter in another vehicle filled with employees from the Umzinto store. Mr Bilal also left the store with his staff and went to the beach area to wait with Mr Jooma for further instructions. On two occasions the respondent elicited the help of the South African Police Services (SAPS) members who came to the Margate shop to maintain peace. Mr Xulu finally arrived at the Margate store and as he did so, the striking employees sang and "toy toyed" even louder. Mr Xulu was accompanied into the store by Mr Steven Bobby, a security official in the employ of the respondent.

[7] The respondent sent a letter to the union's regional office to report that its employees had embarked on an unprotected strike at its Margate store. That information was sent to Mr Phuthini by the regional office with an instruction to attend to the situation. Mr Phuthini left Durban for Margate but *en route* he went to Pick 'n Pay Shelly Beach to collect the union's local chairperson. Mr Owen Phewa. They

arrived at the Margate store at about 13h00 but were allowed into the meeting room at about 13h30. They were with officers of the SAPS and Mr Conrad Mkhize, the fourth applicant. There is a dispute about whether Mr Clement Cele, the third respondent attended the meeting. Mr Xulu refused to enter the discussions while the employees continued with the strike. The union officials left the meeting and went to the strikers to persuade them to return to work, undertaking to deal with the issues at hand. The employees finally returned to work at 14h00. The meeting resumed between the union officials and management of the respondent.

[8] On 1 April 2009, the respondent gave notice of its intention to charge all the employees with participation in an unprotected strike. The applicants faced a further charge of gross misconduct relating to intimidating and threatening other employees and preventing them from working. On 8 April 2009, the charge sheets were handed to the employees and the disciplinary enquiries were scheduled for 16 April 2009. The enquiries were postponed on several occasions at the instance of the applicants. The enquiry in respect of the 29 employees who faced one charge of gross misconduct relating to their participation in an unprotected strike took place on 24 April 2009. The employees were found guilty and were issued with final written warnings.

[9] On 19 May 2009, the applicants who faced two charges of gross misconduct were suspended pending the outcome of the disciplinary hearing. The hearing took place on 25 May 2009 and on 1 June 2009 and the applicants were found guilty of both charges of gross misconduct and were dismissed. On 3 June 2009, the 29 employees who were on final written warnings embarked on another unprotected strike in protest against the dismissal of the applicants. The strike was peaceful and was resolved in a short space of time.

[10] On 4 June 2009, the first applicant made representations to the respondent not to dismiss the employees who were on a final written warning. The union then referred an unfair dismissal dispute for conciliation which failed to resolve it. The dispute was then referred to this court in terms of section 191(5)(b)(iii) of the Act.¹

The issue

¹ The Labour Relations Act 66 of 1995.

[11] The trust of the applicants' case was that:

11.1 The respondent has failed to apply its discipline consistently as only certain individuals were charged.

11.2 The work stoppage on 30 March 2009 was in response to unjustified conduct on the part of the respondent.

11.3 The applicants were not intimidating and threatening any employees as they were not carrying sticks or bottles.

[12] The position taken by the respondent was that an employer acts within its rights if it singles out employees guilty of misconduct and disciplines them. It remained common cause that the respondent dismissed all the applicant employees. At issue is the substantial fairness of the dismissal which the respondent had to prove.

An alleged failure to apply discipline consistently.

[13] According to the respondent, there is no merit in the allegation that only the applicants were disciplined and that the rest of the employees were not charged nor given any kind of warning as has been pleaded. The other 29 employees were found guilty of participating in an unprotected strike, causing the respondent to suffer a financial loss and were given a final written warning. It was because of the additional charge that the applicants were dealt with differently. To the extent that the applicants have sought to extend their evidence to the strike action on 3 June 2009, Mr Xulu and Mr Govender gave undisputed evidence that the work stoppage was peaceful and endured for a very short period of time. The union made representations to the respondent not to dismiss the employees.

[14] The applicants' case in this respect is that of refuting that any of them were properly identified as having committed the second acts of misconduct and therefore that they were entitled to be treated as the other 29 employees.

Work stoppage was in response to unjustified conduct of the respondent.

[15] The respondent's version was that the applicants were dismissed for misconduct relating to violent, threatening and intimidating behaviour and not for their participation in an unprotected strike. Mr Xulu testified that the union issued a demand to the respondent to negotiate wages before it had demonstrated the requisite representivity and acquired organisational rights at the Margate store. The union had never issued a demand or referred a dispute about organisational rights in respect of the Margate Store and the respondent was of the view that this was a necessary precursor to negotiating issues such as wages. All the correspondence as well as the dispute referred to the CCMA in August 2008 related to a refusal to bargain and not to organisational rights. The respondent contended that it also could not be said that the employees took a conscious collective decision to go on strike as a result of the respondent's alleged unjustified conduct in that: 15.1 The Applicants testified that they were happy with the Respondent as their employer;

15.2 The union was unaware of the strike until notified by the respondent;

15.3 Mr Mkhize who was a shop steward did not know that the employees were going to strike;

15.4 Mr Patrick Cwele, the 9th applicant, did not even know why he was on strike.

[16] Mr Phuthini testified that the respondent initially avoided the union and failed to respond to a number of its correspondence. He conceded though that he failed to attend the meeting of 16 February 2008 due to other commitments and he did not make any further contacts with the respondent for over four months thereafter, until he issued a letter of 20 January 2009, requesting a meeting to be held on certain dates he proposed. In its response the respondent suggested the date of 4 March 2009, which was not suitable to Mr Phuthini.

The intimidation and threatening of other employees and weapons carried.

[17] This forms the subject matter of the second charge. The probe turns on whether the employees armed with various weapons and other objects were reliably identified to have been the applicant employees. This charge arose from three incidents where it was alleged that the applicants threatened and intimidated other employees and prevented them from doing their work. The evidence of Mr Govender is accordingly important in this respect. He worked with all the applicants for about 6

months and knew them well. Mr Jooma, Mr Bilal and Mr Xulu admittedly did not know the applicants well enough to be able to put a name to their faces. For whatever reason, Mr Govender did not testify during the internal disciplinary hearing of the applicants.

[18] Mr Govender testified that when the applicants failed to comply with a verbal ultimatum and the first written ultimatum to return to work, the respondent arranged to transport employees from its branches in Harding and Umzinto to enable them to open the store in Margate as all the cashiers were on strike. When Mr Jooma drove into the yard at the receiving entrance of the store with the employees from the Harding store, Mr Govender witnessed the applicants storm and surround the vehicle. The applicants were carrying various weapons ranging from sticks, pipes, planks and bottles which they waved around and used to intimidate the occupants of the vehicle who were in uniform. Mr Cele and Ms Nqoko threatened to cut the throats of those employees who had just been brought in to help run the shop. He said that the other seven applicants told the employees not to alight from the vehicle; calling them “rats” and that they had to go back. The nine were separate from the other staff, who continued with singing and toy-toying. Mr Jooma alighted from the vehicle whilst the other employees were too afraid to leave the vehicle. He tried to speak to the striking staff and was moving forward and the staff moved backwards.

[19] After a brief discussion, Mr Govender instructed Mr Jooma to take the employees away and to wait at the beach for further instructions. When Mr Bilal arrived shortly thereafter in another vehicle filled with employees from the Umzinto store, the applicants also threatened these employees and prevented them from entering the store. Mr Bilal was also instructed to leave the store and wait with Mr Jooma for further instructions. Upon Mr Xulu’s arrival at the store, his vehicle was also surrounded by the applicants who were calling his name, threatening to assault and kill him, and waving the sticks and bottles in the air. Mr Xulu had to be accompanied into the store by security official. Mr Govender consistently and repeatedly identified the applicants and the weapons that they were carrying as follows:

- Conrad Mkhize – broomstick
- Precious Nqoko – broomstick

- Eric Ncani – broomstick
- Jarvis Langa – broomstick
- Princess Zakuza – plank
- Nana Thitsini – plank
- Clement Cele - green Autumn Harvest glass bottle
- Patrick Cwele - white pipe
- Nomfundo Nxumalo - 300ml king size Coke glass bottle.

[20] In respect of Mr Cele, Mr Govender testified that he saw him swinging the green Autumn Harvest bottle at him when he delivered the ultimatum to Mr Mkhize. Mr Govender called the police for assistance on two occasions, once after Mr Jooma's incident and when Mr Xulu arrived. Mr Govender further said that the applicants surrounded him when he delivered the ultimatum and that he felt threatened and scared because the atmosphere was hostile. He said that he was present during the meeting between the officials of the union Mr Mkhize, Mr Cele, the police and Mr Xulu. The meeting became heated and Mr Mkhize pointed his finger at Mr Xulu and threatened to assault him, speaking in English as he did so.

[21] Mr Govender testified that whilst the employees were striking, the store was not trading and that he was watching them from the receiving door at the back of the store. He walked outside into the yard from time to time. Mr Mditshwa, the bakery supervisor for the respondent, who had been with the Margate shop for three years, testified that he was sitting with Mr Govender at the receiving entrance and that they could see everything that was happening outside. He said that Mr Govender walked around, peeped through the door and at times walked outside and would come back and that he continued to do so until eventually the people from the head office came. Mr Mditshwa said that Mr Govender did not at any stage go to sit in his office.

[22] Mr Govender said that he identified Mr Mkhize and Mr Cele to Mr Jooma and that he identified the applicants to Mr Bobby, the security officer prior to the internal disciplinary enquiries for all 38 employees. Mr Govender testified that he was possibly not called to give evidence because he worked at the store with the employees and there might have been fear of intimidation. It was only Mr Bobby and Mr Xulu who gave evidence at the disciplinary hearings. Mr Jooma was supposed to give evidence but was not available on the day to give evidence personally.

[23] Mr Xulu testified that, when he arrived at respondent's shop, in addition to employees singing and shouting, a whole group of employees ran towards him, shouting and calling his name. He stated that the group was very aggressive and violent when it was coming to him. In respect of the incident in the meeting room, he said that Mr Mkhize walked up to him, poked him with a finger and in Zulu, threatened to assault him in the presence of the police.

[24] Mr Bobby did not testify during the trial but he testified at the second disciplinary hearing. He said that he arrived at the Margate shop between 11h00 and 12h00 on 30 March 2009 and entered through the receiving area. When he alighted from the motor vehicle he was travelling in, he saw most of the applicant employees on strike. He saw Mr Jooma there but did not see his car. He said that the staff collectively shouted, screamed and waved objects in the air, which he considered to have been "toy toying". In respect of what transpired when Mr Xulu emerged from the vehicle he stated only that the noise became louder and he felt threatened on Mr Xulu's behalf.

[25] The applicant employees who testified agreed that Mr Govender had worked with them on a daily basis for at least six months prior to the strike action. He knew them well and he could easily identify them. They conceded that he knew each of them very well and by their names, and that out of the respondent's witnesses who testified, he knew them the best. The applicants said that they had a good relationship with Mr Govender and that he would have no reason to falsely implicate them.

[26] On their version, they conceded that Mr Govender could have observed them when he came out to tell them that Mr Xulu would be coming to the shop, when he came to them to deliver the verbal and written ultimatums and when he came out with Mr Bilal who was then leaving the shop. They said that Mr Govender was nowhere on the scene when Mr Jooma arrived at the shop.

[27] Mr Mkhize said that the employees sang vigorously when the vehicles with the employees from the other shops arrived. He conceded that none of those employees alighted from the vehicles from Harding and Umzinto. Mr Cele admitted that he was carrying a bottle but said that it was plastic made. He said that only two

males carried planks. Ms Eustacia Nxumalo, the second applicant said that she carried a 300ml king size Coke bottle but that it was a plastic. She used it to carry drinking water as it was a hot day. Ms Princess Zakuza, the sixth applicant testified that there were many people carrying sticks, too many to identify. She also testified that there were many people who carried planks. Mr Sibusiso Eric Ncani the eighth applicant confirmed that he was at the front of the crowd and could easily be identifiable. Mr Patrick Cwele, the ninth applicant admitted that he was carrying a white pipe which he used for sound production as a "vuvuzela". He was standing in the middle of the crowd. Ms Precious Nqoko denied that she carried any broomstick while taking part in the strike. She said that only two men carried planks and none carried the alleged broomsticks. Ms Nana Thusini, the tenth applicant and a Till Supervisor said that she only carried a piece of card box to block the sun and to fan herself therewith. She denied carrying a plank as alleged by Mr Govender. All applicants said that they had not been successful in getting employment elsewhere since their dismissal by the respondent.

Evaluation

[28] In relation to selective discipline, the respondent submitted that there was no merit in the allegation that only the applicants were disciplined and that the rest of the employees were not charged nor given any kind of warning as has been pleaded. 29 employees were charged with one count of gross misconduct for participating in an unprotected strike and causing the respondent to suffer a financial loss. The 9 applicants were charged with two counts of gross misconduct for participating in an unprotected strike and for threatening and intimidating other employees and preventing them from working. Pursuant to disciplinary hearings the 29 employees were issued with final written warnings and the applicants were dismissed on the basis of the second charge. The applicants have not shown that selective discipline was at play in this matter. To the extent that the applicants have sought to extend their evidence to the strike action on 3 June 2009, Mr Xulu and Mr Govender gave undisputed evidence that the work stoppage was peaceful, endured for a very short period of time and the union made representations to the respondent not to dismiss the employees.

[29] In respect of the unjustified conduct on the part of the respondent, the probable version is that of the respondent, namely that when strikers were dismissed for misconduct, they were dismissed for a second disciplinary misconduct and not for the act of striking *per se*. Procedures applicable to dismissals for misconduct ought to be followed. I find in the circumstances that, the applicants were dismissed for misconduct relating to violent, threatening and intimidating behaviour, as submitted by the respondent and not for their participation in an unprotected strike and accordingly the provisions of item 6(1) of the Code of Good Practice for dismissals were not applicable. This issue was correctly not vigorously pursued by Mr Schumann for the applicants.

[30] On the final issue of intimidation, threatening and carrying weapons the respondent submitted that the applicants' denial, as pleaded was, on the face of it, false as Mr Cele and Ms Nxumalo conceded that they were carrying bottles which, court was asked to find, were glass and not plastic made. To the extent that the applicants claimed that it was a case of mistaken identity, the submission was that none of them could explain why Mr Govender would identify women as carrying sticks and planks when they claimed that only two men carried planks. The further submission was that Mr Govender's version was corroborated by the applicants' versions in several respects and had to prevail, *inter alia*, in that:

30.1 Mr Mkhize confirmed that the police were called on two occasions and that they were present during the meeting held with Mr Xulu and the union officials;

30.2 Mr Mkhize also confirmed that the employees intensified the singing ("singing vigorously") when the vehicles with the employees arrived;

30.3 Mr Mkhize conceded that none of the employees alighted from the vehicles from Harding and Umzinto but was unable to explain why that was so.

30.4 Mr Cele admitted that he was carrying a bottle but claims that it was plastic. This distinction was not mentioned when he gave evidence at the disciplinary enquiry.

[31] It was submitted that in the absence of any reason why Mr Govender would implicate the applicants as opposed to any of the other employees, his version was to be accepted. Court was asked not to regard as sinister the fact that Mr Govender did not testify at the disciplinary hearing. It was submitted that the respondent's

internal processes and the legal abilities of its representative at the disciplinary enquiry was not be judged according to the standard that one would apply to a judicial process where the rules of evidence were fully understood.

[32] The defence of the applicants was simply that they were not correctly identified by Mr Govender whose evidence was nothing short of a fabrication.

[33] In respect of the issue in point, the two versions of the parties are contradictory and cannot co-exist. The respondent bore the onus to prove that it had a fair reason to dismiss the applicant employees on the basis of the additional charge. In this trial, the applicants have successfully shown that the evidence on the basis of which they were dismissed, pursuant to the disciplinary hearing, was very unconvincing as Mr Govender did not testify and he was the only person who could have identified them for violent behaviour. The respondent has had the benefit of a trial *de novo*, during which Mr Govender testified as the respondent was entitled to call him.

[34] Contrary to the submissions by counsel for the applicants, I find that Mr Govender was a credible witness. While court has to exercise caution in accepting single evidence, such evidence may be accepted if the testimony of the witness was satisfactory, even in the absence of its corroboration. Mr Govender had a number of occasions, some of which were conceded to by the applicants, during which he could observe the behaviour of the striking employees. He knew them well. There are moments when he came very close to their proximity, at which instances his observation could be reliable. He was never shown to have had any motive to want to falsely implicate the applicants. Some aspects of his evidence were corroborated by the applicants which lends credence to his version. His evidence was never shown to have any material internal and external contradictions with what was pleaded or put on behalf of the respondent, see *Stellenbosch Famers' Winery Group Ltd and Another v Martell Et Cie and Others*.² When all evidential material is considered, the version of the respondent comes across as favoured by the balance of probabilities.

² 2003 (1) SA 11 (SCA) at 14 - 15.

[35] According to Mr Govender the applicants were carrying various weapons ranging from sticks, pipes, planks and bottles which they waved around and used to intimidate the occupants of the vehicle who were in uniform. In respect of Mr Cele, Mr Govender testified that he saw him swinging the green Autumn Harvest bottle at him when he delivered the ultimatum to Mr Mkhize. Whether the container was of plastic or glass make therefore becomes irrelevant as it was used as a weapon to instil fear. Mr Govender further said that the applicants surrounded him when he delivered the ultimatum and that he felt threatened and scared because the atmosphere was hostile. He said that Mr Cele and Ms Nqoko threatened to cut the throats of those employees who had just been brought in to help and that the other seven applicants told the employees not to alight from the vehicle, calling them “rats” and that they had to go back. The nine were separate from the other staff, who continued with singing and toy-toying. From this evidence it is clear that the conduct of each of the nine applicants could be distinguished from the conduct of the rest of the other staff. It is Mr Govender’s evidence which explains the rationale behind the departure of Messrs Jooma and Bilal and their staff from the Margate shop. The suggestion by the applicants that Mr Govender was not at the scene when Mr Jooma arrived at the Margate shop is therefore not favoured by the probabilities of this matter.

[36] Contrary to the detailed evidence of the respondent the applicants’ version amounted to a bare denial of committing the alleged misconduct. It remained undisputed that there was a group of employees who charged towards the motor vehicles that brought in the relief staff in a threatening manner. The main issue turned on who those nine employees were. In my view the evidence of the respondent has been satisfactory and reliable in identifying the applicants as being the nine that committed the second misconduct. Correctly so, this enquiry did not turn on the appropriateness of dismissal as a sanction.

[37] Accordingly the following order will issue, taking into account the law and fairness of the issue on costs:-

1. The application is dismissed on the basis that the dismissal of the nine applicants by the respondent was substantively fair.
2. No costs order is made.

Cele J.

LABOUR COURT

APPEARANCES

1. For the applicants: Mr P Schumann instructed by Brett Purdon Attorneys.
2. For the respondent: Ms L R Naidoo instructed by Lockhat & Associates.

LABOUR COURT