CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 3/03

XINWA and 1335 OTHERS Applicants

versus

VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD Respondent

Decided on : 4 April 2003

JUDGMENT

THE COURT:

[1] The applicants are some 1336 individuals who are the former employees of Volkswagen (Pty) Ltd (Volkswagen), the respondent. They were dismissed by Volkswagen on 3 February 2000 following their participation in a strike action. At all material times, the applicants were members of the National Union of Mineworkers of South Africa (NUMSA), a trade union which was the sole bargaining agent for hourly paid workers at the Volkswagen workplace. The applicants are seeking an order for (a) compensation and (b) re-employment in terms of the provisions of the Labour

Relations Act of 1995[1] (LRA) and, as the supporting affidavit indicates, an order declaring that their dismissal was procedurally unfair.

[2] The factual background to this application has been fully set out in the judgments of the Labour Appeal Court (LAC)[2] and the Labour Court[3] as well as in the award issued by the Commissioner.[4] It need not be repeated here. Only those facts that matter for the purposes of judgment will be repeated. It is apparent from the two judgments and the Commission for Conciliation, Mediation and Arbitration (CCMA) award that the facts that give rise to the present application were common cause. In their application to this Court, the applicants do not suggest otherwise.

[3] The present application has its genesis in an internal NUMSA dispute concerning shop stewards at the workplace of Volkswagen. That dispute led to the suspension of some 13 shop stewards by NUMSA. On 20 January 2000, workers who were the supporters of the suspended shop stewards, including the applicants, embarked upon a strike action. The intention of the workers was to persist in that strike until NUMSA lifted the suspension of the shop stewards. Attempts to resolve the dispute with the union and the representatives of the applicants proved fruitless. Both management and NUMSA took the position that the strike was illegal and

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[1] Act 66 of 1995.

[2] *Mzeku & Others v Volkswagen SA (Pty) Ltd and Others* [2001] 8 BLLR 857 (LAC); 2001 (22) ILJ 1575 (LAC).

[3] *Volkswagen SA (Pty) Ltd v Brand NO and Others* [2001] 5 BLLR 558 (LAC); 2001 (22) ILJ 993 (LC).

[4] *Mzeku and Others v Volkswagen SA* 2001 (22) ILJ 771 (CCMA).

unprotected. The intervention by the Congress of South African Trade Unions, a federation to which NUMSA is affiliated, calling upon the workers to return to work evoked little or no response. The workers stood fast on their demand that the suspension of the shop stewards had to be lifted before they would return to work.

[4] Various meetings were held between Volkswagen and NUMSA, and between Volkswagen and the representatives of the striking workers. At these meetings management warned that workers who continued to participate in the strike would face disciplinary action, which included dismissal. On 21 January 2000, Volkswagen closed down the plant and issued notices to all workers leaving the plant, warning the workers once again that their strike was illegal and that continued participation in it would attract serious consequences, which might include dismissal. The notice called upon the workers to resume work on 24 January 2000. As the workers entered the plant on 24 January 2000, they were issued with notices requiring them to return to their workstations or face possible dismissal. They did not resume their duties. When the workers did not heed that warning, management decided to close down the plant in its entirety until further notice.

[5] On 28 January 2000, NUMSA and the management of Volkswagen concluded an agreement to end the strike. They agreed that Volkswagen would reopen the plant on 31 January and that if the workers persisted in the strike, management would take disciplinary action, which would include dismissal. In addition, Volkswagen informed NUMSA that if the workers did not comply with the agreement it would

issue an ultimatum. This agreement was widely publicised in notices, electronic media, radio and print media. On 31 January 2000 a substantial number of workers were still absent from work. A notice was distributed in various languages through the media and some 50,000 copies of the notice were distributed in the area. The notice called upon the workers to return to work by 3 February or face dismissal. On 3 February, a substantial number of workers returned to work but the applicants did not. They were accordingly dismissed. A dispute arose between the applicants and Volkswagen as to whether the dismissal was fair.

[6] Attempts by the CCMA to resolve the dispute were unsuccessful. Following an agreement between the applicants and Volkswagen, the dispute was referred for arbitration. The senior commissioner who arbitrated the dispute found that the dismissal of the applicants was substantively fair but procedurally unfair. He found that Volkswagen had failed to comply with the *audi alteram partem* principle (the *audi* principle) in that prior to the decision to dismiss the applicants, there had been no invitation by Volkswagen "to NUMSA or for that matter, the striking workers or their representatives to explain why their conduct should be tolerated, why an ultimatum should not be issued and why they should not be dismissed."[5]

[7] Thereupon, the Commissioner ordered the reinstatement of the applicants but declined to do so retrospectively. In granting that relief the Commissioner took the

[5] *Mzeku and Others v Volkswagen SA* above n 4 at 794B.

view that section 193(1)[6] of the LRA, does not preclude an order for reinstatement or reemployment where the dismissal is only procedurally unfair. The award was promptly taken on review to the Labour Court by Volkswagen. The applicants launched a counter-application for review challenging the Commissioner's finding that their dismissal was substantively fair.

[8] The Labour Court upheld the finding that the dismissal was substantively fair but procedurally unfair. The scope of review by the Labour Court is regulated by sections 145(1) and (2)[7] of the LRA. In reviewing the Commissioner's award, the

[6] Section 193 provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
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> (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee.
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> (2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless—
>
> (a) the employee does not wish to be re-instated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.
>
> (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.
>
> (4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."

[7] Section 145(1) and (2) provides:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
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> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
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> (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

Labour Court held that although it could not fault the procedure followed by Volkswagen in dismissing the applicants, it could not hold that the Commissioner's decision in this respect constituted a reviewable misdirection within the terms of section 145. However, it held that the Commissioner had misdirected himself in ordering the reinstatement of the workers as relief for the procedural unfairness. It held that section 193 of the LRA does not permit the reinstatement of workers whose dismissal is procedurally, as opposed to substantively, unfair.

[9] On appeal, the LAC upheld the finding that the dismissal was substantively fair but set aside the finding that the dismissal was procedurally unfair and replaced it with a finding that the dismissal was procedurally fair. It found that both NUMSA and the applicants were given ample opportunity to make representations prior to the decision to dismiss the applicants. It added that because the dismissal had been in accordance with the agreement to end the strike that was the end of the applicants' case. It concluded that the Commissioner had misconceived the nature of the enquiry in relation to the *audi* principle. But it went further and considered the question whether reinstatement is a competent remedy for a dismissal which is procedurally unfair. It

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(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).
(2) A defect referred to in subsection (1), means—
(a) that the commissioner—
(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or
(b) that an award has been improperly obtained."

held that it was not and concluded that in ordering reinstatement, the Commissioner had exceeded his powers.

[10] These motion proceedings are a sequel.

[11] We considered it appropriate to deal with the matter at once in terms of rule 18(10)(b)[8] without waiting for the opposition intimated by Volkswagen. We did so because in the first place, the facts were not in dispute. In the second place, the applicants said that they had to sell their belongings to raise the fees for the appeal. They were left without funds. They are indeed indigent. It is therefore clear that they would not have been in a position to pay Volkswagen's costs. In these circumstances, we considered it undesirable to require Volkswagen to incur any further costs in this matter. Furthermore, once we were satisfied that the application was bound to fail, we considered it necessary to announce our decision at once and bring this matter to finality "so that the parties can organise their affairs accordingly."[9]

[12] The present application is not, on its face, an application for leave to appeal. It is an application for an order declaring that the dismissal of the applicants was procedurally unfair and for an order of reinstatement and compensation.

[8] Rule 18(10)(b) provides that:

> "Applications for leave to appeal may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself."

[9] *NEHAWU v University of Cape Town and Others* 2003 (2) BCLR 154 (CC) at para 31.

[13] Pleadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance.[10] While the applicants' notice of motion does not seek leave to appeal, what the applicants are seeking is quite clear. They are seeking to appeal against the finding by the LAC that their dismissal was procedurally fair and the consequential refusal to reinstate them and to award them compensation. Their application must therefore be construed as an application for leave to appeal directly to this Court from the decision of the LAC.[11] In addition, the applicants are seeking condonation for the late filing of their application for leave to appeal.

[10] In *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 757B-C, Steyn AJ, on the question of pleadings by lay persons, said that:

> "Where the pleadings to which exception is taken are drawn by a lay litigant in person a Court will make allowance for the fact that such a person cannot be expected to display the same ability of draughtsmanship and precision of language as is expected by a legally trained and experienced pleader. On the other hand the Court will not ignore the interests of the excipient and will not allow mere inexperience in matters of pleading to excuse serious non-compliance with the requirements of the Rules of Court which are, after all, based on notions of justice and fair play to both sides in litigation."

Similarly, pleadings prepared by laypersons in the United States of America are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v Kerner et al* 404 US 519 (1971) at 520. In *Picking et al v Pennsylvania R.. Co. et al* 151 F 2nd 240 at 244, the court held that "where a plaintiff pleads pro se in a suit for the protection of civil rights the court should endeavor to construe the plaintiff's pleading without regard for technicalities."

[11] In *S v Twala (SA Human Rights Commission Intervening)* 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC) at paras 4–5, this Court construed a handwritten letter as an application for leave to appeal even though the letter was "not on its face an application for leave to appeal but [was] described as an application in terms of section 35(3)(o)."

[14] The only procedural problem that remains in applicants' way is their failure to obtain a certificate under rule 18. No explanation has been advanced as to why this was not done. In the view we take of the matter, it is not necessary to deal with the application for condonation and the failure to obtain the rule 18 certificate.

[15] The facts show that management held meetings with the delegation of the striking workers and NUMSA, separately, to try to end the strike. At these meetings, management warned that the strike was illegal and that those participating in it faced possible dismissal. Management resorted to the closure of its plant in an attempt to get the workers to return to work. It required workers returning to the plant to resume their duties or face dismissal. This too did not work. The agreement between NUMSA and management to end the strike did not succeed in getting the applicants back to work. Nor did the warning that those workers who did not return to work on 31 January would face disciplinary action which would include dismissal. An ultimatum calling upon the workers to return to work on 3 February 2000 and warning that failure to return to work would result in dismissal did not succeed in getting the applicants to return to work either.

[16] In the light of these facts, the applicants have no prospect of persuading this Court that their dismissal was procedurally unfair. Having concluded that the dismissal was procedurally fair, and in the absence of a challenge to the substantive fairness of the dismissal, it is not necessary to consider the question of the relief. We express no opinion on whether section 193(1) precludes the Labour Court or an

arbitrator from ordering reinstatement where the dismissal is unfair only because the employer did not follow a fair procedure.

[17] For these reasons, the applicants have no prospects of success on the merits. In the circumstances, it is not in the interests of justice to grant the application for the condonation of the late filing of the application for leave to appeal.

[18] In the event, the application for leave to appeal is dismissed.

Chaskalson CJ Langa DCJ Ackermann J Goldstone J

Madala J Mokgoro J Moseneke J Ngcobo J

O'Regan J Yacoob J

Applicants in person.

For the Respondent: Bowman and Gilfillan Inc., Johannesburg