REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D770/10

In the matter between:

ALSON BONGINKOSI ZONDI	**First Applicant**
MDUDUZI NGUBO	**Second Applicant**
PHINDILE HLONGWA	**Third Applicant**
THULANI ZUMA	**Fourth Applicant**
MFANELO PHILLIP	**Fifth Applicant**
LESLIE SBONISO NDAWO	**Sixth Applicant**
ZWELIBANZI MNCWABE	**Seventh Applicant**
NONDUMISO NGCOBO	**Eighth Applicant**
SANDILE NDLOVU	**Ninth Applicant**
MOSES ZIQUBU	**Tenth Applicant**

and

SOMTA TOOLS (PTY) LTD	**Respondent**

Heard: **23 April 2014**

Delivered: 9 July 2014

Summary: This is acclaim of unfair dismissal following a participation in an unprotected strike - in a workplace managers are not experienced judicial officers. It must therefore follow that workplace efficiencies should not be unduly impeded by onerous procedural requirements - by disciplining the applicants the respondent reneged on its word as stated in the ultimatum and in the agreement reached by the parties – dismissal unfair.

JUDGMENT

CELE J

Introduction

[1] The applicants seek an order declaring their dismissals to be substantively and procedurally unfair and a relief that they be reinstated to their positions as employees of the respondent with retrospective effect. The respondent opposed the application but it conceded that it dismissed the applicants. The respondent accordingly bears the onus to prove that the dismissals were based on a fair reason and were carried out in accordance with a fair procedure.

Factual Background

[2] During May 2009, there was an unprotected work stoppage at respondent's workplace in which employees demanded the resignation of the Managing Director. Pursuant to a meeting held with the representative trade union, NUMSA, it was resolved not to take any disciplinary action against the employees but they were warned that such conduct was unacceptable. On 13 July 2009 and just after the workplace challenge meeting which was held daily for about ten minutes from 07h00, the employees, including the applicants, embarked on another unprotected work stoppage. According to the respondent, the work stoppage took place again after the tea and the lunch breaks. On this occasion, they were demanding that their wages be increased because the respondent had not been granted the exemption that it had

sought. They were unhappy and worried in that their increased wages had not been paid as they expected it at the beginning of July 2009. The work stoppage was in response to the employer's breach of paying the increased wages which was due by the beginning of July 2009.

[3] On 15 July 2009, the employees, including the applicants were issued with final written warnings for participating in an illegal work stoppage just after the workplace challenge meeting and the union conceded that the employees were notified of their right to appeal against the final written warnings. Some nine employees appealed and had their warnings overturned on appeal, another nine employees who also appealed had their appeals dismissed and their final written warnings remained intact. The applicants did not appeal. The number of people who had final written warnings not overturned is 20 employees. This includes the 11 employees who did not appeal at all and the 9employees whose appeals were dismissed.

[4] There was a mass hearing scheduled for hearing on 4 August 2009 for a work stoppage that took place on 13 July 2009 either after the tea or the lunch break. Only three employees attended that hearing and for others who were not in attendance, the hearing was held in their absence. The chairperson decided to impose no sanction upon considering various factors, including a final written warning issued for the earlier transgression.

[5] On 31 August 2009, the employees, including the applicants, embarked on a further unprotected work stoppage, ostensibly in sympathy with a group of workers, in the packaging department who did not tender their services as required and were suspended by the respondent. The respondent issued a written ultimatum requesting the employees to return to work by 9h00, failing which disciplinary action would be taken against them. The time was extended to 10h00 to allow the trade union official an opportunity to persuade the employees to return to work. The applicants did not comply with this ultimatum. At approximately 11h28, the respondent received written notification from NUMSA union confirming that:

(a) the ultimatum had been extended from 9h00 to 10h00;

(b) its members "are currently on illegal industrial action";

(c) it was not requesting a further extension of the ultimatum;

(d) it did not condone the action on the part of its members.

[6] The respondent issued a further ultimatum in which it:

(a) stated that the employees had failed to adhere to the request to return to work at 9h00;

(b) requested the employees once again to resume work;

Alternatively:

(c) stated that if they were not going to resume work they were required to go home and consider the consequences of their conduct;

(d) confirmed that their continuing participation in the illegal work stoppage/strike "may result in termination of your employment";

(e) requested the employees to return to work on 1 September 2009 at 7h00;

(f) confirmed an agreement that in such event, they would be required to work on 4 September 2009 to make up for lost time.

[7] Some of the employees complied with the ultimatum to return to work whilst others including the applicants left the respondent's premises and returned to work on the following day. On 1 September 2009, the respondent convened a special meeting with the union representatives and officials where:

(a) the union admitted that its members had embarked on an illegal industrial action employees;

(b) various proposals were made regarding disciplinary action in respect of the employees who participated in the illegal work stoppage;

(c) it was agreed that:

(i) disciplinary enquiries would be dispensed with;

(ii) written warnings would be issued to those employees who returned to work after the expiry of the ultimatum and final written warnings in respect of those who did not return to work on 31 August 2009.

(d) there was no agreement regarding those employees in the latter category who were already on final written warning. The minutes of the meeting ended with the following entry:

'Management was encouraged to think about the union's recommendation. Likewise the union was encouraged to consider management's dilemma – if employees already on a final written warning give no heed to the ultimatum on Monday, what difference will a 'comprehensive final written warning' make to their attitude.'

[8] The respondent resolved to convene disciplinary enquiries in respect of those employees who were already on final written warnings. The applicants were charged with participating in an illegal industrial action and were issued with notifications to attend a disciplinary enquiry on 8 September 2009. Mr David Risk chaired the disciplinary enquiry and the applicants or some of them elected a shop steward, Mr Protus Sokhela to represent them. Upon considering the representations of both parties regarding the events on 31 August 2009, the final written warnings in respect of the misconduct on 13 and 14 July 2009, mitigating factors as well as the breakdown in the trust relationship, the applicants were found guilty of misconduct and dismissed.

[9] The applicants appealed against their dismissal but the appeal was dismissed on 21 September 2009. During October 2009, the applicants referred a dispute regarding their dismissals to the MEIBC. On 21 July 2010, the MEIBC issued a ruling to the effect that the applicants had engaged in an illegal strike for which they were dismissed and therefore that the council did not have jurisdiction to arbitrate the matter. On 30 October 2010, the applicants

delivered their statement of case in terms of section 191 (5) (b) (iii) of the Labour Relations Act[1] (the Act).

[10] The issue raised by the applicants related to the validity of the final written warnings. The question was whether the respondent issued the final written warnings in a fair manner in respect of the work stoppage of 13 of July 2009. The applicants' challenge on this issue was premised on the contention that the final written warnings were null and void because the applicants were not afforded an opportunity to defend themselves prior to such decision being taken. Secondly, the work stoppage was in response to employer's breach of an agreement to pay them increased wages. In the event that the Court found that the final warnings were null and void, their dismissal was similarly substantively unfair, so the applicants contended. They sought re-instatement.

[11] The respondent called three witnesses in support of its case, namely, Messrs Simon Gushu, Sharl van Rensburg and David Risk. Despite being present in court for the duration of the trial, putting various versions to the respondent's witnesses as well as indicating that they would be calling witnesses to give such evidence, the applicants did not lead any evidence in rebuttal of the respondent's evidence.

Evidence

[12] Mr Gushu testified and said that according to the company disciplinary code, any person in authority over an employee was entitled, in the event of a minor misconduct on the part of the employee, to reprimand, to give informal advice to or counsel, to warn such employee and to issue an incident report. An employee might, however, be summarily dismissed in the case of a serious misconduct or for repeated offences following an enquiry conducted in accordance with the Code of Good Practice Schedule of the Act. The disciplinary enquiry was to be conducted where the outcome of a case was potentially a dismissal. In respect of the work stoppage of 13 July 2009, there was no possibility of a dismissal sanction and therefore there was no need for a disciplinary hearing to be convened.

[1] Act Number 66 of 1995.

[13] He said that the events which led to the unprotected strike taking place on 31 August 2009 were those of Friday 28 August 2009. The packing Department had earlier been asked to work the 40 hours week instead of the short time 32 hours as there were many tools to pack up. So on that Friday, the employees did not peach up at work. The respondent took their default as a serious act of misconduct and it decided to serve them with notices to attend a disciplinary hearing. The plan was to hand out the notices to the packing employees at the gate on Monday morning and therefore not to allow them in. The rest of the other employees were allowed in but upon seeing what was going on the other employees, particularly, the drill factory employees went about urging other employees not to report for duty but to go to the lawn so as to act in sympathy with the packing employees.

[14] The respondent issued an ultimatum to the striking employees, instructing them to resume work by 09h00 failing which disciplinary action would be taken against them. The union was duly notified of the events and it wrote a letter in which it asked for the extension of time to 10h00 so that it could persuade the employees to resume work. Some employees resumed work while others did not. The respondent extended the time to 10h00. A second ultimatum was issued with the last three paragraphs reading:

> 'Your conduct is damaging to the company and is causing harm and cannot be condoned. You are encouraged to go back to work failing which go back home and consider the consequences of your conduct carefully. If necessary hold discussions with your family or advisers.
>
> Your continuing participating in the illegal work stoppage/strike may result in termination of your employment. You are in the circumstances required to return to work at the commencement of your shift, i.e. Tuesday the 1st of September at 0700.
>
> In the discussion with your representatives we agreed that if Employees return to normal production in their next shift, than (sic) Friday the 4th of September will be worked to substitute this lost day.'

[15] Mr Gushu said that all employees resumed work on 1 September 2009 and in so doing, heeded the call of the company as stated in the second ultimatum which was the last instruction from the company. At about 12h30 of that day, a special meeting was held between management, shop stewards belonging to unions UASA and NUMSA and NUMSA's organiser. An agreement was reached on a number of issues, as already indicated in this judgment. In respect of the employees who were already on a final written warning, the parties agreed to disagree on how to deal with them. Management refused to issue such employees with a comprehensive final written warning as suggested by the unions. That refusal led to the applicants being charged, found guilty and dismissed. Mr Gushu was aware that the applicants were seeking to be re-instated. He said that the respondent could not afford to re-instate the applicants as the company was engaged in negotiations for further retrenchments.

[16] Mr Sharl van Rensburg, the Financial Director of the respondent testified also. While he had been with the respondent for about three years and nine months, he was able to produce financial records of the respondent for the period 31 December 2008 to 31 October 2012. The financial records were audited for the period 2008 to 2011 as the auditing period for 2012 had not yet ended. The first document represented a yearly breakdown of the financial results of the respondent company, including accumulated possession after four years commencing from December 2008 to the end of 2011. He said that while in 2008 the company had a net profit, after tax, of R2 185 739, in 2009, the company suffered a loss of R35 183 939. The total comprehensive income / loss were given as:

2008	**2009**	**2010**	**2011**
R2 185 739	R-35 183 510	R-1 389 939	R12 385 907.

[17] He described the taxation column, particularly for 2011 as not representing the taxation charge or expense but that it referred to a taxation income which was an unusual phenomenon in financial statement which took away what was essentially a profit before taxation and was actually a deferred tax. Due to

the abnormal and extremely huge loss of R35 million incurred in 2009, the company had not yet become sufficiently profitable at the end of 2011 to reverse the significant deficit of R22 million. He then gave a month to month account of how he arrived at the profit of R1 328 733 made by the company in 2012. Due to the yearly shut down in December of each year, the company traditionally experienced a low circle in profit making. He testified on the graph that he had drawn to represent the order intake numbers. The company took orders from its clients in advance for the factory production. Lead time of about eight to twelve weeks is given to customers between the taking of orders and their deliveries. The graph showed a decline in the average order book value from December 2008 to October 2012. The graph begins with the order book value of R43, 75 million and ends with R14, 53 million.

[18] The year 2009 had a worst worldwide scale economic recession known to the current generation. The respondent company was not spared. Thus, from a level of R40m book value in 2008, the company ended in 2009 with the book value of R14m. Since the 2009 economic recession, the company had not yet come up to anywhere near the R40m mark of 2008. The later part of 2012 showed a similar decline as in December 2008.

[19] He said that the work stoppage of August 2009 for which the applicants were dismissed had a significant effect on the financial position of the company. The company gauged the daily factory performance and what that allowed the company to do by looking on daily basis as to what consumable costs, labour costs and other fixed costs such as depreciation and rentals were. As people produced products in the factory, the operations were captured so that the company could assess which of those overheads had been recovered through productivity. The minute there was a work stoppage, the company could only determine the expense side and not the recoveries that would normally come through. A total work stoppage resulted in a daily loss of about R250 000.

[20] He testified about a newspaper article that reported on an expansion embarked on by the respondent. The article had Mr Allan Connolly, the Managing Director of the company who was depicted in the article standing in front of two carbide machines acquired by the company for its carbide plant.

Steadier and harder material was to be used in the carbide plant with a higher performance as opposed to the material that had been used in the existing high speed tooling factory. The entire expansion was funded through a R10 million loan taken from the Industrial Development Corporation, the IDC which loan had to be refunded in 60 months. The article referred to a new production capability of the company that had been ramped up five times compared to that of the previous year. He said, however, that the carbide factory required much less employees as the machine was capable of an entire operation from the beginning to the end of the tool production. That was contrary to the high speed steel factory where a tool had to go through numerous workstations and operations that required more people to do the job. The carbide factory was thus machine driven while the high speed steel factory was labour intensive. The carbide factory was to operate with about four people and was thus a small factory with a less demand of production.

[21] On the issue of the possible re-instatement of the applicants, Mr van Rensburg said that the high speed steel factory, where the applicants were employed was experiencing a short time. Attempts were made to have the sales personnel aggressively going out to look for more business, failing which the manufacturing plan had to change with the result that there would be less work force. He said that the company had in fact started negotiating with the unions on the work force reduction.

[22] Mr David Risk, the Export Sales Director of the company testified and said that he chaired the internal disciplinary hearing of the applicants. He recognised the minutes of the hearing and said they were a correct record of the hearing. He said that Mr Protus Sokhela, a shop steward, represented all the applicants but he conceded that he did not enquire into representation but simply assumed that all applicants were represented by Mr Sokhela as no one told him the contrary. According to him, there was no suggestion by the applicants that they did not take part in the unprotected strike on 31 August 2009. In coming to the findings that he reached, he said that he considered various factors including that:

- All applicants had a final written warning in their files for a similar misconduct of illegal work stoppage;
- An ultimatum was given to the employees but they did not heed to it;
- The union organiser had requested the extension of the ultimatum from 09h00 to 10h00 which the company allowed;
- The union organiser addressed the employees and instructed them to return to work, yet the eleven employees did not listen to the instruction, so there was nothing that would result in them going back to work;
- The relationship was based on precarious position as the company had lost many of its export orders because of economic crisis in 2009;
- The company was in a desperate position for the employees to return to work so as to retain existing orders that were still remaining in the company;
- The failure of the company to deliver its product to its customers in time due to numerous work stoppages had a negative effect possibly resulting in the company losing face with its customers and having to source their product elsewhere.

[23] On the allegation that the applicants were not aware that disciplinary action would be taken against them if they returned to work on 1 September 2009 at 07h00, he said that in the initial ultimatum of 09h00, it had specifically been stated that their action was causing harm to the company and that they were urged to return to work as disciplinary action would follow if they did not return to work. The warnings had been issued after a couple of instances of the illegal work stoppages and it was a gradual build up in majors taken to warn the employees to return to work to deliver orders to get the company out of a difficult situation that it had found itself in. He did not agree that the outcome of the hearing was harsh.

[24] He conceded that no minutes were produced of a disciplinary hearing as a result of which the final written warnings of the applicants were issued. The minutes produced to him were those of the other four employees in a hearing presided over by Mr Evans Franzen. Mr Franzen noted that a final written warning had been issued against the four employees and he decided not to impose any further sanction against them.

Evaluation

[25] As already alluded to the main issue was whether the respondent issued the final written warnings in a fair manner in respect of the work stoppage of 13 of July 2009. The applicants' challenge on this issue was premised on the contention that the final written warnings were null and void because the applicants were not afforded an opportunity to defend themselves prior to such decision being taken. Secondly, the work stoppage was in response to employer's breach of an agreement to pay them increased wages. A further issue that arose during the trial was that the applicants ought not to have been subjected to any disciplinary measured as they complied with the terms of the second ultimatum.

[26] In the absence of the evidence of the applicants to contradict that of the respondent, it remains undisputed that the applicants participated in a work stoppage in the morning of 31 August 2009. Such work stoppage constituted an unprotected strike that did not comply with the provisions of chapter IV of the Act as has already been determined by the MEIBC in the jurisdiction ruling dated 21 July 2009 issued by Commissioner Lisa Williams-De Beer. In the absence of a review application to have such ruling set aside, the ruling stands. A further concession was made by NUMSA when it confirmed on several occasions that the applicants had engaged in illegal industrial action.

[27] The conduct which appears to have prompted the applicants to withhold their services was only directed at employees in the packaging department who did not tender their services as required on a Friday. The respondent's refusal to allow the packaging employees entry to the workplace was a temporary measure to ensure that each of them were handed a notice regarding their

misconduct prior to entering the premises. The packaging employees were not deprived of their salary during this time nor were they subjected to any arbitrary or unfair disciplinary action. The applicants were not supposed to be involved with or affected by the respondent's conduct. They persisted with their unlawful conduct even after the issue regarding the packaging employees had been explained to them by the respondent and their trade union official.

[28] As correctly submitted by the respondent, the applicants made no attempts to comply with the provisions of chapter IV of the Act. The seriousness of the contravention was underscored by:

28.1 the fact that it was the third incident of illegal industrial action in a period of four months;

28.2 the refusal and/or failure to comply with the Respondent's ultimatums to return to work on the day;

28.3 the refusal and/or failure to heed NUMSA's request that they return to work on the day;

28.4 NUMSA's condemnation of the Applicant's conduct; and

28.5 the Respondent's precarious financial situation.

Failure to hold a disciplinary enquiry before the issuing of a final written warning

[29] It was submitted by Mr Ngubane, for the applicants, that the respondent's failure to hold a disciplinary enquiry before the issuing of a verdict of guilt and the sanction of a final written warning against the applicants, based on the internal policy which did not provide for a fair disciplinary enquiry before final written warnings are issued, rendered the final warnings unfair and invalid. It infringed on the applicants Constitutional rights to fair labour practice, and their right to *audi alteram partem rule*.

[30] Where the employer's code does not provide for the Code of Good Practice, the court should consider taking the Code of Good Practice in Schedule 8 of

the Act into account in deciding whether or not the employers conduct was fair as the employees were entitled to the right to be heard. Mr Ngubane placed reliance on a number of cases to support his submission. One was the case of *FWCA and Others v Casbah Burger Box CC*[2]. I was however not able to find support for his submission in that case. In *Modise and Others v Steve's Spar Black Heath,*[3] the Court held that the *audi alteram partem rule* had been imported from administrative law and was generally held to apply to all forms of dismissals. The Court noted that the Audi rules emanated from the principle that people should be given a hearing before adverse decision are taken against them. It held that a decision to dismiss an employee has adverse consequences for whatever reason it was taken. It was further held that there was no reason therefore, why it should not also apply in the case of dismissal for participation in strikes, irrespective of whether the strike were given a proper ultimatum.

[31] The *audi alteram partem* rule relied upon by the applicant was mainly applicable in dismissal cases. No case was relied upon where the danger of a dismissal was not hovering during the internal hearing. Item 4 (4) of Schedule 8 of the Code of Good Practice Dismissal provides that in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures. In a workplace, managers are not experienced judicial officers. It must therefore follow that workplace efficiencies should not be unduly impeded by onerous procedural requirements.[4] The respondent's failure to hold a disciplinary enquiry by following its disciplinary policy, before the issuing of a verdict of guilt and the sanction of a final written warning against the applicants, has accordingly not been shown to have rendered the final warnings unfair and invalid.[5]

<u>The ultimatum</u>

[2] (1996) 17 *ILJ* 947 (IC).
[3] (2000) 21 *ILJ* 519 (LAC) at para 16.
[4] See *Tshongweni v Ekurhuleni Metropolitan Municipality* [2010] 10 BLLR 1105 (LC).
[5] See *National Union of Metalworkers of SA and Others v Malcomess Toyota A Division of Malbak Consumer Products (Pty) Ltd* (1999) 20 ILJ 1867 (LC).

[32] I consider the second ultimatum issued by the respondent to the applicants to be an essential determining factor in the assessment of the fairness of the dismissal of the applicants. In the New Shorter Oxford Dictionary on Historical Principles, edited by Lesley Brown, the 1993 edition, ultimatum is defined, *inter alia*, to mean:

> 'Final terms presented by one party in a dispute, etc to another the rejection of which could cause a breakdown in relations.'

The final terms presented by the respondent to the applicants were couched in the following terms:

> 'Your conduct is damaging to the company and is causing harm and cannot be condoned. You are encouraged to go back to work failing which go back home and consider the consequences of your conduct carefully. If necessary hold discussions with your family or advisers.
>
> Your continuing participating in the illegal work stoppage/strike may result in termination of your employment. **You are in the circumstances required to return to work at the commencement of your shift, i.e. Tuesday the 1st of September at 0700.** (My emphasis)
>
> In the discussion with your representatives we agreed that if Employees return to normal production in their next shift, than (sic) Friday the 4th of September will be worked to substitute this lost day.'

[34] It remained common cause that the applicants did precisely as advised. They went home and on 1 September 2009 at 07h00 they resumed work thus ending the unprotected strike. Clearly, they finally heeded the advice of the respondent. The parties had already agreed that if employees return to normal production in their next shift, that Friday 4 September 2009, would be worked to substitute the lost day. The respondent's evidence which contradicted the clear terms of the ultimatum and the agreement reached by the parties made no sense at all. By disciplining the applicants, the respondent reneged on its word as stated in the ultimatum and in the agreement reached by the parties. Disciplinary actions would certainly have been justified had the applicants failed to tender their services on 1 September 2009.

[35] Mr Risk ought to have taken a cue from Mr Franzen who noted that a final written warning had been issued against the other four employees and he decided not to impose any further sanction against them. In that event, the respondent would have been consistent in applying its disciplinary measures. I accordingly hold that the dismissal of the applicants by the respondent was substantively unfair. It is now close to five years since the applicants were dismissed. They did contribute in the delay of this matter when they referred the dismissal dispute to arbitration. I have reflected on those prevailing considerations which led to Mr Risk deciding on a dismissal, with particular reference to the precarious position of the respondent. In my view, the applicants do not deserve to be treated much differently from the other employees they were in the same position with in 2009. I have also reflected on how the position of the respondent can be mitigated against the harshness there can be in the retrospective effect of a fair order.

[36] I accordingly issue an order with the following terms:

1. The dismissal of each of the applicants was substantively unfair.

2. The respondent is ordered to re-instate each applicant into the position each held on the date of dismissal, or a position similar thereto, with retrospective effect from the date of dismissal, with no loss of earnings and, or benefits. The applicants are to report on duty on 16 July 2014.

3. The respondent is to pay the outstanding salary emoluments to the applicants in equal or almost equal installments of twenty four (24) months.

4. No costs order is made.

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Cele, J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicants:	Mr A T Ngubane
Instructed by:	S G Nzimande Attorneys
For the Respondent:	Ms L Naidoo
Instructed by:	Navie Green – Thompson and Associates

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For the Respondent: Ms L Naidoo

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