



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: DA8/17

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (NUMSA)

First Appellant

PHAKAMILE KHANYILE & 16 OTHERS

Second and Further Appellants

and

TRANSNET NATIONAL PORTS AUTHORITY

Respondent

Heard: May 2018

Delivered: 29 November 2018

Summary: Dismissal of 17 employees for participation in an unprotected strike – The Labour Court finding- that the dismissal was substantively and procedurally fair.

On Appeal to the Labour Appeal Court- finding that there were overriding considerations inimical to the question of identification of the employees as the perpetrators. Having had regard to those considerations- finding that the employer failed to demonstrate that the individual appellants refused to work or obstructed

work for approximately 10 hours on 24 April 2015 – further finding that the Labour Court erred in concluding that the dismissal was substantively fair.

Held that the purpose of a disciplinary inquiry is to determine guilt and the appropriate sanction to be meted out to an employee – that nothing bars an employer, in the case of alleged collective misconduct, to deal with the employees involved as part of a collective as opposed to individuals – further held that there is no reason why the employer cannot comply with the *audi* rule by calling for collective representations why the strikers should not be dismissed - finding that the Court *a quo* cannot be faulted in concluding that the procedure followed by the employer, leading up to the dismissal of the 17 employees, was fair.

The order of Labour Court set aside- appeal upheld in part - dismissal of the 17 employees found to be substantively unfair- The Court ordering their retrospective reinstatement.

Coram: Phatshoane ADJP, Waglay JP and Hlophe AJA

JUDGMENT

PHATSHOANE ADJP

- [1] Mr Phakamile Khanyile and 16 other individual appellants, the second and further appellants, all members of the National Union of Metal Workers of South Africa (“NUMSA”), the first appellant, were dismissed on 22 May 2015 from the services of Transnet National Ports Authority, a division of Transnet SCO Limited (“TNPA”), the respondent, for participating in an unprotected strike. The Labour Court (*per* Cele J) found their dismissal to have been substantively and procedurally fair. This appeal, which is with leave of this Court, lies against this finding.
- [2] The Marine Services Department of TNPA manages and administers the South African ports. Its Durban Harbour, with approximately 59 berths (parking bays), 40 of which are for commercial vessels, has between 15 and 45 ship movements in a 24hour period. A ship entering or leaving the harbour is serviced by a tug (with its

crew) and the berthing staff. The individual appellants entered into employment with the Marine Services Department of the TNPA as marine shore hands (land-based/quayside). They performed their duties at the berths where they would await the arrival of a vessel, brought in by the water-based crews accompanied by the tugs, and would secure it once it is alongside the quay or when moored into the harbour by tying it with robes to the bollards to stabilise it. When a vessel departs from the harbour they would untie the robes and a tug, on the waterside, would help it move off the berth.

- [3] On 24 April 2015, at approximately 06h45, Mr Moshe Motlohi, the port manager, received calls to the effect that the employees of TNPA were not servicing the vessels and had congregated at the mess hall.¹ On his arrival at the workplace at 7h15 he found Ms Xoliswa Bhekiswa, the acting marine operation manager, and Mr Mark Olmesdahl, the employee relations manager, persuading the employees to resume their duties. The mess hall was full of employees, marine shore-hands, land-based and waterside employees. He enquired from them what their protestation was about. The group expressed their discontentment in that the telefax that they directed to TNPA, setting out their concerns, had not been addressed. He further questioned why they had not forwarded their grievance to their union to which they responded that they were not unionised. He suggested, which proposal was rebuffed, that they choose four representatives he could engage with whilst others resumed their duties. He intimated that in the course of this exchange he repeatedly gave the employees a verbal ultimatum to this effect: *"You are embarking on an unlawful industrial action and failure to comply with the reasonable instruction to go back to work is going to be seen (sic) as you embarking on a strike. I am aware that some of you are sitting with final written warning and you must know [that] if you are found guilty when you are sitting with a final written warning, then [the] next stage then becomes [a] dismissal."* He did

¹ Also referred to on the record as a mess room- A facility where the employees had their meals and would normally assemble while waiting for instruction on where they would have to execute their duties.

not issue a written ultimatum as it would not have been fair to do so while he was engaging the employees in a quest to comprehend their concerns.

- [4] Mr Motlohi explained that he and the two managers were requested to step outside to afford the employees the opportunity to caucus on the proposal he made to them to choose representatives. Later on, Captain Rufus Lekala, the chief harbour master, joined Mr Motlohi and other managers who all returned to the mess hall. Mr Motlohi says that, in voicing their dissatisfaction, the employees retorted that they were *“all in this together.”* This was confirmed by Capt. Lekala who added that the employees, both the tug crew and berthing staff, *“went into rapture and said they were all in this together, they said everyone was there for a common cause.”* Mr Motlohi pleaded for calm, continued to persuade the employees to return to work, and once more reminded them that some of them were already on final warnings, and that what they were perpetrating could have devastating consequences. Around 10h00 he told the employees that they were viewed by management as having embarked on an unprotected work stoppage and left for his office.
- [5] At approximately 11h00 the employees' representatives approached Mr Motlohi and informed him that the employees refused to work until their demands were met. Mr Motlohi intimated having gathered, in the course of the discussions, that the employees were not happy with what he referred to as the quard shift,² salary disparities, and the treatment accorded to them at the marine by management.
- [6] Mr Motlohi and the employees' representatives returned to the mess hall around 15h00 to give feedback to the employees. The employees urged that he plead with TNPA not to subject them to discipline. However, he replied that TNPA would take formal disciplinary steps against them as they had been on strike.
- [7] Ms Bhekiswa's evidence largely corroborated that of Mr Motlohi and Capt Lekala. She instructed a certain Mr Shange, the senior berthing master and the employees'

² (06h00 to 18h00 and from 18h00 to 06h00 shift).

supervisor, to notify the “tug crews” to return to work. Mr Shange claimed to have been scared to do so. She told him to convey the instruction through the PA (public address) system. She further says that during the course of her interaction with the employees, at the mess hall in that morning, one berthing employee, whom she could not identify, stood up and said that they were not on strike but it was “the tugs people.” The employee in question further said that they went to service a vessel at berth 108, however, the tug crew did not arrive and therefore they returned to the mess hall. When she requested that only the tug crews remain in the hall, as they appeared to have had issues with TNPA, the other employees declined to leave the room saying that the tugs were their colleagues and therefore wanted to be part of the discussions.

- [8] On that eventful day TNPA had planned to have 17 ships moving between 06h00 and 18h00, during the day shift. Only four ships were moved following contingency measures that were put in place. The unprotected strike endured for almost 10 hours and ended around 16h00 when it was already late for the employees to resume their duties because the last movement of ship would have been at approximately 16h30.
- [9] The individual appellants’ case is that they did not participate in any form of industrial action on 24 April 2015 and attribute the unprotected strike of the date in question to the tug crews. Ms Thobile Mpungose, one of the appellants, was engaged in crew one of the berthing staff. She reported for duty as usual on 24 April 2015 and was unaware that there would be problems at the workplace. She intimated that the tug crew withdrew their labour. It was therefore not possible for the land-based berthing crews to execute their task if the tugs did not perform their part. She explained that the berthing crew did not receive any instruction on that morning to perform any duties. Crew four and five³ were dispatched to Berth 108 whereas the other crews remained behind at the berthing mess where they were later joined by the tug crew. She did not know why the tugs were joining them. She

³ Not all the individual appellants were part of crew four and five.

left for the female changing room, where she usually rests, to wait for an instruction which was given at approximately 13h00 by Mr Shange through the PA system that crew one and two execute their task. She and her co-workers approached Mr Shange and enquired how safe it was for them to resume their duties in light of the meeting that was in progress. He allowed them to return to their rest rooms and would revert to them but never did. She was never part of any meeting on the day in issue.

[10] Mr Dumezweni Mbatha was in crew five. Just like Ms Mpungose, he was unaware that 24 April 2015 would be any different from any other day at work. On the morning of the unprotected strike there was an announcement through the PA system by Mr Shange for Mr Mbatha's crew and crew 4 to report at Berth 108. They did as instructed and waited in the vehicle. The tug crew never arrived. Mr Shange advised them to keep waiting while he made enquiries at the Port Control. Later on, Mr Shange passed on a message from the Port Control to the effect that they were unaware that the tugs were having a meeting. The berthing crews were requested to return to their mess where they found the tug crew and other berthing staff. Mr Mbatha says it was unusual to find the tug crew at their mess. He was not part of any plan to engage in the work stoppage and was not part of the meeting of 24 April 2015. He stood outside, when the meeting was afoot, awaiting further instructions from TNPA. No one instructed them to return to their work stations.

[11] On 09 March 2015, following a period of almost one month of continuous service from date of the work stoppage, the individual appellants were issued with a "Notice of intention to apply collective discipline". The notice informed them that: the strike of 24 April 2015 was unprotected; TNPA intended to apply collective disciplinary measures to all employees who participated in the unprotected strike; the sanction proposed for the misconduct was a final written warning valid for 12 months for those employees with clean disciplinary records and dismissal for those who were already on final written warnings for participating in an unprotected strike action. The employees were invited to make representations regarding TNPA's intention to apply collective discipline and on the sanction proposed. They

submitted a joint representation to this effect: "*As Workers of Marine Services (TNPA), we want to state categorically clear that there was no industrial action that transpired on 24/04/15. Attached kindly find letter for your attention.*" The attachment is a statement dated 10 May 2015 by Mr Shange, their supervisor, which came to be frequently referred to during the trial. It reads in part:

'I, Shange, the senior berthing master of C-shift would like to state that on the 24th of April at 06h30 I sent two gangs at 108 to cast off the vessels. Two gangs waited at 108 until they called me on a radio asking what's happening at 108 because there is no sign of a pilot and the tugs... "The meeting was held at the Berthing Staff, since the meeting was at the Berthing Staff, so they were part and parcel of the meeting when they came back. But after the first job that was given, no job was refused by the Berthing Staff because they were at the meeting.'

In another statement dated 18 May 2015, which sought to correct the previous one, Mr Shange states:

'...I, shange, would like to make correction of the attached statement I made on the 10/05/15

1. The Acting Marine Manager wasn't aware about the stoppage that took place on the 24th of April until she intervened.
2. I'm correcting also about these: two gangs were called to sail E-shed and the gangs said they are scared to go to the vehicles because all people were watching them. So by that they called on the unprotected strike because they never go to that Job.'

[12] On 22 May 2015 TNPA issued a further notice headed "Notice of disciplinary action for collective misconduct" which informed the employees that they would receive a final written warning for the alleged misconduct of 24 April 2015 and that those who were already on final written warning would be dismissed. The individual appellants fell into the latter category and were dismissed with immediate effect as a consequence of their alleged participation in the unprotected strike. According to TNPA the sanction of dismissal was motivated by: the serious consequences of

the unprotected strike for its business and for the community it serves; the response of the employees who made representations to avert the dismissal including their untrue denial that there had been a strike on 24 April 2015; the fact that the strike was unprotected and had not been preceded by any dispute resolution process; and that it persisted for a period of approximately 10 hours.

- [13] Mr Elton Gordon, the NUMSA's organiser based in Kwa-Zulu Natal, says NUMSA had not been alerted to the industrial action of 24 April 2015 albeit on 31 March 2015 it resubmitted 135 union membership forms to TNPA. He explained that pursuant to an earlier unprotected strike of January 2015, NUMSA addressed its members on the consequences of an unprotected strike. Following this strike a number of employees, which included the appellants, received final written warnings. Mr Gordon explained that had NUMSA been informed of the unprotected strike, which gave rise to this dispute, it would have intervened. NUMSA was shocked to learn, around 22 May 2015, that their members were dismissed. Following the dismissals it referred the individual appellants' dispute to the Labour Court for adjudication.

The Judgment of the Labour Court

- [14] The Court *a quo* identified that the enquiry turned, *inter alia*, on the question whether the 17 individual appellants took part in the unprotected strike of 24 April 2015. The Court was of the view that the evidence of the two appellants, Ms Mpungose and Mr Mbatha, was confined to their personal experiences and had failed to give account of the whereabouts of each of the other 15 appellants. In particular, it found the evidence of Mr Mbatha, upon his return to berthing mess from Berth 108, to have been inconsistent because he failed to explain where he had been until 13h00 on that day. The Court was of the view that Ms Mpungose's version, like that of Mbatha, was an "*unexplained loneliness in the multitude.*" It held that "*For no apparent or explained reason she leaves her colleagues to go and be alone in some rest room at a time she did not know why others were joining her. It was work time yet she chooses to go and rest. Surely she did not travel from*

her home to come to the workplace to rest for no apparent reason.” It found the evidence of the TNPA, insofar as Ms Bhekiswa testified that the gathering was constituted by both the berthing and tug crews and that the two groups made common cause, to be more probable than that of the individual appellants. It rejected the individual appellants’ version and concluded that all of them participated in the unprotected strike.

- [15] The Court determined that failure to issue an ultimatum, persuading the employees to resume their duties, did not amount to procedural unfairness of the dismissal because its issuing was not an invariable requirement. It was of the view that TNPA expended considerable effort throughout the strike to negotiate with the employees and convince them to return to work. While TNPA did not issue ultimata, in a formal sense, the individual appellants benefited from the engagements they had with TNPA and chose to disregard them.
- [16] The Court found that there was no obligation in law to subject the individual appellants to a formal disciplinary hearing. The appellants chose to deliberately and collectively deny that there had been an unprotected strike. TNPA complied with the *audi* principle when it issued a notice dated 09 May 2015 and thereafter acted against the appellants on 22 May 2015. It concluded that the procedure followed by TNPA, leading up to the dismissal of the 17 individual appellants, was fair and so was the imposition of the sanction of dismissal. On the basis of the aforesaid, it dismissed the appellants’ claim.

The analysis

- [17] The individual appellants’ main argument is that they did not participate in or associate themselves with the work stoppage of 24 April 2015 and therefore the Court *a quo* erred in its finding to the contrary. The unprotected strike was fuelled by other employees of TNPA. It was further contended that the individual appellants did not refuse to carry out any instruction during the work stoppage and that the Labour Court was incorrect in holding otherwise.

- [18] Mr Purdon, for the appellants, further argued that in the event it is found by this Court that the individual appellants participated in the unprotected strike their dismissal would be unfair in that TNPA never made contact with NUMSA during the strike. He pressed that TNPA's denial that the individual appellants were members of NUMSA proved to be false and therefore the sanction of a dismissal was in all the circumstances unfair.
- [19] To meet the individual appellants' contention, TNPA presented a two-pronged argument. First, is that the individual appellants were present at the berthing mess during the meeting of 24 April 2015 and therefore participated in the unprotected industrial action. Second, is that the individual appellants did not dissociate themselves from the actions of the tug crews or those that took part in the illegal strike in that, during the illegal gathering, certain unnamed persons professed to speak on their behalf.
- [20] Apparent from the arguments sketched the question arising for determination in this appeal is whether the individual appellants participated in the unprotected strike of 24 April 2015. Put differently, whether TNPA properly identified the appellants as the culprits who brought its business to its knees on 24 April 2015.
- [21] A difficult task to undertake, in a collective action such as the present, is identifying the wrongdoers. However, the distinctive feature of this case, which should be kept in mind in determining the question, is that the land-based berthing crew, who were mostly the individual appellants, would ordinarily not be in apposition to perform their duties unless the tug crews and seaside employees executed theirs. In other words, attendance to their work was very much dependent on the tug crews discharging their obligations.
- [22] TNPA's evidence that the individual appellants participated in the unprotected strike is a bit sparse. What the undisputed evidence points to is that crews four and five of the berthing staff, which included some of the appellants, for example Mr Mbatha, did in fact report for their duties on 24 April 2015 but were turned away to their mess hall because the tug crews were not present at Berth 108 and had

congregated at mess hall to voice their dissatisfaction. Mr Motlohi could not say if the appellants had also withdrawn their labour on 24 April 2015. When asked whether any of the 17 appellants took part in the strike his response was *that "Well, if I were to see them I would recognise them."* He went on to say that there were faces of some of the participants he could recognise in the Court room. He explained that TNPA relied mainly on the roster to identify the employees who were on strike and that Ms Bhekiswa could identify them. Ms Bhekiswa could not identify the appellants. She too relied on the attendance register that was compiled by the supervisors and said that everyone that clocked in that morning was present at the illegal gathering. She did not mark who was present but said the supervisors did so. None of the supervisors was called to testify on this score.

- [23] The individual appellants' stance that they did not participate in the strike was largely corroborated by Mr Shange's statement, which was attached to their joint representations submitted pursuant to TNPA's call that they reply to its Notice of intention to apply collective discipline. Mr Shange was not called to testify and his statement is not a model of clarity. Nevertheless, its authenticity was not questioned by TNPA. As already alluded to, the statement confirms that crew four and five of the berthing staff attended to their work at Berth 108. It further states that *"after the first job that was given, **no job was refused** by the Berthing Staff because they were at the meeting."* The case of the appellants, who were instructed to execute their duties at 13h00 on that eventful day, is that they approached Shange to enquire how safe it was for them to resume their duties in light of the gathering of the tug crews. He promised to revert to them but never did. This evidence is similarly supported by a statement made by Mr Shange to the effect that two crews were instructed to sail E-Shed [Berth E] but had responded that they were scared to execute their task because the strike participants were watching them. There is an obligation on the employer to provide a safe working environment for its employees particularly in the circumstances where there appears to have been tumultuous engagement between TNPA and its tug crews over the latter's demands. In my view, TNPA could not have expected the

appellants to carry out their duties in an environment that was unsafe as a result of the illegal strike.

[24] There are other overriding considerations inimical to the question of identification of the appellants as the perpetrators.

24.1 Firstly, and chief amongst them is Ms Bhekiswa's evidence to effect that one of the berthing staff employees, during the meeting of 24 April 2015, said that the berthing crew were not on strike but it was "the tugs people".

24.2 Secondly, the evidence is overwhelming that it was the tug crews who had a grievance with TNPA and not the individual appellants.

24.3 Thirdly, the work stoppage was precipitated by the same grievance which did not concern the individual appellants.

24.4 Fourthly, there is no evidence that any of the appellants articulated a demand to TNPA.

24.5 Fifthly, none of the appellants was positively identified as having participated in the strike.

24.6 Sixthly, according to Mr Motlohi, the individuals who spoke at the meeting intimated that they were not unionised. At that stage, the appellants had already submitted their union membership forms to TNPA.

Although these issues were not articulated in the collective representation, that the appellants forwarded to TNPA, they were issues that should reside within its knowledge.

[25] What is clear from the evidence is that the individual appellants were present at the mess hall on 24 April 2015. After all, this is where they had their meals and would receive instructions from TNPA. Whether they withdrew their labour, thus participating in the illegal strike is entirely a different question. In my view, the Court *a quo* wrongly concluded that the appellants did not give account of their

whereabouts. They did. For example, Mr Mbatha's evidence was that after they were turned away from Berth 108 he went to the mess hall and waited outside for further instruction. Ms Mpungose says she was in the rest room awaiting further instructions which were given at 13h00 but could not be executed for fear of the safety of her crew.

- [26] It is so that the appellants' evidence is not without blemish. Both Ms Mpungose and Mr Mbatha prevaricated and were less than frank when asked whether they were aware that their crews faced serious disciplinary action because of the events of 24 April 2015 and that they collectively signed written representation denying participation in the unprotected strike. Be that as it may, it does not follow that because of these imperfections their evidence ought to have been rejected in its entirety, particularly where it was largely undisputed or corroborated.
- [27] It bears repeating that the individual appellants could not have executed their part of the work in the absence of the tug crews. On the basis of the foregoing analysis, I am of the view that TNPA failed to demonstrate that the individual appellants refused to work or obstructed work for approximately 10 hours on 24 April 2015. The Court *a quo* erred in concluding that the dismissal was substantively fair. The opposite prevails, the dismissal was substantively unfair.
- [28] In light of my conclusion that the individual appellants did not participate in the strike, it is not necessary to traverse the aspect whether TNPA's numerous verbal ultimata were sufficient in persuading them to resume their duties. By parity of reason, this also applies to NUMSA's contention that TNPA ought to have sought its intervention during the April 2015 unprotected strike.
- [29] It is common cause that TNPA did not hold a disciplinary enquiry against the individual appellants in accordance with the procedure laid down in its own disciplinary code. It is trite that the purpose of a disciplinary inquiry is to determine guilt and the appropriate sanction to be meted out to an employee. I hasten to state that nothing bars an employer in case of alleged collective misconduct to deal with the employees involved as part of a collective as opposed to individuals. Relying

on *Avril Elizabeth Home for the mentally handicapped v CCMA and Others*,⁴ Mr Todd, for TNPA, correctly contended that there is no obligation in law to conduct a formal tribunal-style hearing, as the appellants sought to suggest. There is no reason why the employer cannot comply with the *audi* rule by calling for collective representations why the strikers should not be dismissed.⁵ I am satisfied that the Court *a quo* cannot be faulted in concluding that the procedure followed by TNPA, leading up to the dismissal of the 17 individual appellants, was fair.

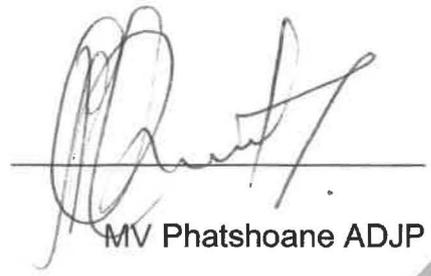
[30] Even though the individual appellants achieved substantial success, having had regard to the requirements of law and fairness, this is not a case where a costs order ought to be made. I make the following order.

Order

1. The appeal is upheld in part.
2. The Order of the Court *a quo* is set aside and substituted with the following:
 - (a) *The dismissal of the 17 individual applicants is found to be substantively unfair;*
 - (b) *Transnet National Ports Authority, the respondent, is ordered to reinstate the individual applicants retrospectively to the date of dismissal;*
 - (c) *The respondent is ordered to pay the individual applicants' back-pay retrospective to the date of dismissal; and*
 - (d) *No order is made as to costs.'*

⁴ [2006] 9 BLLR833 (LC),

⁵ *Modise and Others v Steve's Spar Blackheath (fn 4 Supra)* at para 76.


MV Phatshoane ADJP

I agree


Waglay JP

I agree


Hlophe AJA

APPEARANCES:

FOR THE APPELLANTS:

Mr B Purdon
Instructed by Brett Purdon Attorneys

FOR THE RESPONDENT:

Mr C Todd
Instructed by Bowman Gilfillan

LABOUR APPEAL COURT