

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT DURBAN)**

CASE NO: DA 39\97

IN THE MATTER BETWEEN:

SUNCRUSH LIMITED

APPELLANT

AND

SICELO BRIAN NKOSI

RESPONDENT

JUDGMENT

KROON JA:

[1] During September 1994 a large section of the appellant company's workforce engaged in a strike. Towards the end of October the striking workers returned to work, but pursuant to their refusal to work overtime under a certain supervisor, the company excluded the workers from its premises.

[2] The striking workers blockaded the company's premises in order to prevent non-striking workers from working. The company increased its security arrangements by enlisting the services of a firm styled Green Force Security.

- [3] The atmosphere was tense and the relationship between the company and the workers excluded was strained.
- [4] On 28 October a rumour circulating amongst the striking workers came to the ears of the respondent, one of the strikers. It was to the effect that Mr Gould, the general manager of the company, and Mr Mkhize, a supervisor who did not participate in the strike, had paid Green Force Security the sum of R7 000,00 to kill the shop stewards at the plant and a number of the other employees. In the court **a quo** the respondent was unable to recall from which other workers he had heard the rumour.
- [5] The respondent approached Mr Ngwenya, a shop steward, in connection with the rumour. The latter advised him that the source of the rumour was a particular person, but Ngwenya refused to disclose the name of the person.
- [6] A series of meetings were held with the striking workers to discuss what should be done concerning the fact of the rumour. The upshot was that Ngwenya and the respondent were mandated to report the matter to the police.
- [7] Ngwenya and the respondent duly attended on the police on 1 November and conveyed the existence of the rumour to them. Ngwenya did not, however, reveal the name of his informant to the police. According to the respondent he regarded the threat to workers' lives as serious and felt that his life was in danger.

[8] On 2 November, the day on which the shut-out was terminated and the striking employees returned to work, Ngwenya and the respondent approached Gould and handed him a piece of paper received from the police. It would seem that this paper recorded that a report had been made to the police. Gould was advised simply that the workers' lives had been endangered and that they, i.e., Ngwenya and the respondent, had gone to the police. Gould was not advised that he or Mkhize were implicated in the matter.

[9] A few days later Gould and Mkhize were contacted by the police and advised of the allegation against them and that a docket relating to a charge of conspiracy to commit murder had been opened. Both of them made statements denying the charge.

[10] On 12 November Gould addressed a letter to the shop stewards at the company's premises reading as follows:

“I wish to bring the following important points to your attention;

- (i) There is a Grievance procedure within Suncrush.
- (ii) I have been informed by you and by the Police, that a docket was opened against me on 1 November 1994.
- (iii) The contents of the allegation [constitute] Malicious Prosecution.
- (iv) As a member of the Management, I wish to inform you that we reserve all of our Rights.
- (v) We will challenge this Malicious Prosecution.
- (vi) If found to be malicious, you are given notice that management will consider our relationship irreparably damaged.”

A copy thereof was sent to the relevant trade union. A notice to the same effect, also addressed to the shop stewards, had earlier been placed on the notice board at the company's premises.

[11] It was the evidence of the respondent in the court **a quo** that he and Ngwenya did not lay a charge against Gould and Mkhize when they went to the police, nor had it been their intention that the police should undertake any investigation at that stage. The respondent claimed that they had merely reported the matter to the police so that if something did in fact happen later the police could utilise the report in the investigations they then undertook. The claim, if true, would speak of a marked degree of naïveté on the part of the respondent. The acceptable inference is that he must have realised that the police would act on the information received and investigate the matter.

[12] At a further meeting between Ngwenya and the police the former persisted in his refusal to name his informant.

[13] The police conducted their investigation and referred the matter to the Attorney-General for his decision. During May 1995 the police advised Gould that the Attorney-General had decided that no prosecution should be instituted.

[14] During June or July a Mr Marillier, an employee of the company, conducted an internal investigation on behalf of the company into the matter. During his questioning of the respondent the following was recorded:

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Q. Did Mr Gould pay for you to be shot?

A. I don't know, but its possible

Q. Do you believe Mr Gould would kill his employees?

A. Yes, it is possible.”

[15] During August Ngwenya and the respondent appeared at a joint disciplinary inquiry, chaired by Mr Reynor, the Human Resources Manager of the company. The charge was: “Malicious discrediting of the General Manager and a Supervisor (Jameson Mkhize) by reporting them to the SAP on the grounds of conspiracy to murder.”

[16] During the inquiry Ngwenya confirmed that the name of the informant had been withheld from the police on the grounds that he was “an informer”. In response to a comment by Reynor that the issue could have been resolved if the name of the informant had been revealed and the law allowed to take its course, Ngwenya, after having been afforded an opportunity to caucus with the respondent, stated that they wanted to go back to the workers, but that a guarantee was required that both he and the informant would be safe if the name of the latter was revealed. Ngwenya added that the name of the informant could not be revealed without an instruction to that effect by the workers. He would not even say whether or not the person was employed by the company. The request for a guarantee of safety was repeated later. Reynor's response was that it was not possible for the company to issue such a guarantee. Ngwenya's statement that it was desired to revert to the workers for instructions did not receive further attention.

[17] During the exchange between Reynor and Ngwenya the former put on record “that any person was entitled to go to the SAP and in fact [he] had been supporting this when he said that the case could have been handled properly if the name had been revealed.”

[18] The inquiry was adjourned for nine days to allow Reynor to consider his verdict. In the interim Ngwenya resigned from his employment with the company.

[19] On 17 August the respondent was found guilty as charged and the sanction imposed was dismissal together with one month’s notice pay, i.e., until 30 September 1995.

[20] In a confirmatory letter to the respondent, dated 18 August 1995, Reynor stated as follows:

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I stated that my decision regarding whether the alleged offence had occurred or not was taken against the background of acknowledging that:

1. Citizens have a right to report issues to the South African Police particularly such serious issues as conspiracy to murder.
2. Shop stewards have a right to represent workers (in this case you stood in for a Shop Steward).

However it is also reasonable to expect that responsibility be taken when exercising these rights.

Conspiracy to murder is an extremely serious issue. When it is the General Manager and a Supervisor who are alleged to have conspired to have some employees murdered, it is then also an extremely serious issue from an Employee, Company and Industrial Relations point of view.

I believe you (and Vusi Ngwenya) are guilty of the alleged offence as you

knowingly initiated an issue which you knew could never be satisfactorily finalised as long as the name of the informer was withheld.

I do not find it acceptable that the name of the informer could not be released without the consent of the workers or that it had to be withheld for security reasons.

The mitigating circumstances which I took into account were the following:-

1. You stated you would have problems with your bond repayments and supporting your children if you were dismissed.
2. You stated that I should adopt the same approach as President Mandela in forgiving people.
3. Your length of service was 18 years.
4. Your disciplinary record on your personal file was clear.

In considering an appropriate sanction I mentioned the following points:-

1. The Company wrote to the Trade Union in November 1994 saying that if the report to the SAP was found to be malicious then the Company would regard the relationship as irreparably damaged. I confirm that I was not mentioning this because of the intended sanction but to indicate that the Company had clearly stated that they would regard the issue as serious and you therefore had plenty of time to reconsider your approach.
2. Apart from the SAP investigation a further investigation in June 1995 by Eian Marillier provided a further opportunity for you to give information so that the matter could be dealt with properly - possibly by referring the matter back to the SAP. Once again you refused to give relevant information.
3. As mentioned previously the malicious discrediting of the General Manager and a Supervisor in the context of this case is serious and has an impact on all parties concerned. The company cannot afford to have individuals in our employ who engage in such matters.
4. Taking into account your long service of 18 years and your good disciplinary record I believe an appropriate sanction would be your dismissal with one months notice pay, i.e. until 30 September 1995.”

[21] It may be noted that during the investigation undertaken by Marillier there was only

one question that the respondent “refused” to answer. In answer to the question what the informer was wearing he replied that that was “police information”.

[22] The respondent thereafter instituted proceedings in the industrial court in terms of section 46(9) of the Labour Relations Act 28 of 1956. He contended that his dismissal had been unfair and he claimed an order for his reinstatement plus his wages from the date of his dismissal to the date of his reinstatement.

[23] The determination of the industrial court was that the respondent’s dismissal constituted an unfair labour practice and that the respondent was, with effect from the date of the judgment, reinstated in his employment with the company on terms and conditions no less favourable than those which governed his employment prior to the date of his dismissal.

[24] It is that determination that is the subject of this appeal.

[25] In essence it was the view of the industrial court that in reporting the fact of the rumour to the police the respondent had acted reasonably and that in all the circumstances the employment relationship between the parties had not broken down irreparably.

[26] During argument counsel for the company sought on a number of grounds to question the genuineness of the respondent’s version. The submission was in fact that the respondent’s evidence of the existence of the rumour was to be doubted. The

corollary thereof was that the report made to the police was a made up one and was therefore malicious. The submission is without substance. The existence of the rumour was clearly established.

[27] It was not contended that if the rumour did exist it was unreasonable for the employees to cause same to be reported to the police or that they did not have the right to do so. That stance was clearly correct. So much was in fact conceded, correctly, by both Reynor and Gould.

[28] What was contended was that if the name of the informant was not revealed it would be impossible for the police or the company to investigate the allegations or for the truthfulness thereof to be tested and, accordingly, the **bona fides** of the respondent in making the report to the police without the name of the informant being disclosed, fell to be questioned. It would seem that the argument was recasting the view of Reynor that the right to make the report was qualified by the rider that the right had to be exercised responsibly; **in casu** that rider required allegations not to be made unless information enabling the allegations to be followed up was also disclosed; otherwise the making of the allegations was to be stamped as malicious.

[29] The submission cannot be upheld. The evidence was that it was only Ngwenya, and not the respondent, who knew the identity of the informant. Notwithstanding that in their discussion Ngwenya kept the name of the informant to himself, there was no evidence that the respondent was aware that Ngwenya would not play open cards with the police. Even if the respondent was so aware he could legitimately have adopted

the attitude that that was a matter between the police and Ngwenya and that it was for the former to take steps to obtain the information from the latter. In any event, given the circumstances then obtaining, i.e., the factual existence of the rumour, the tense situation that obtained, the **bona fide** apprehension that the rumour had sufficient basis and the mandate from the workers, it cannot be said that the respondent acted maliciously in reporting the matter to the police, even if Ngwenya intended to keep the identity of the informant to himself. As Reynor himself acknowledged, and as the industrial court held, serious matters such as an alleged conspiracy to commit murder are deserving of being reported to the police. The **bona fides** of the respondent was further demonstrated by the fact that he and Ngwenya advised Gould that they had made a report to the police.

[30] Accordingly, the charge against the respondent at the disciplinary enquiry, the subject of which was a **malicious report to the police**, was not established.

[31] The play that was made on behalf of the company at the disciplinary inquiry of the alleged fact that during the company's internal investigation and at the inquiry itself the respondent persisted in refusing to disclose the informant's name, was sought to be repeated in the company's statement of defence in the court **a quo**. The short answer thereto is that the refusal in question was that of Ngwenya, the one who had the information in question, and not the respondent who remained ignorant of the identity of the informant. In any event, if the report was otherwise not maliciously made to the police a failure subsequently to disclose the source of the information on which the report was based would not render the making of the report malicious.

[32] Further, during the inquiry Ngwenya sought an opportunity to consult with the workers and obtain their instructions as to whether the identity of the informant could be revealed. The request was a reasonable one. It was in effect turned down.

[33] The making of the report to the police could in the circumstances, where the respondent acted reasonably in going to the police, as was conceded by Gould, not be found to be an event that affected the relationship between the Company and the respondent such as to justify the latter's dismissal.

[34] In argument, however, counsel for the company, invoking authority to the effect that an employee owes a duty to his employer to accord respect to those whom the employer places in authority over him, sought to rely on the fact that the respondent had not subsequently approached the company to say that reliance had been placed on a rumour and that, the matter having been investigated, he was happy that there was no substance in the allegation.

[35] It may be noted that there was no evidence that the respondent was aware of the result of the police investigation. Be that as it may, while it might have been served some good purpose, had the respondent approached Gould and said what counsel suggested he should have, the respondent was under no obligation to do so. It is to be emphasised that this was not a case, as counsel sought to urge upon us, of an employee making unfounded allegations against a superior knowing that they are unfounded.

[36] Counsel finally sought to place reliance on the two statements made by the respondent to Marillier during the investigation conducted by the latter, which have been quoted earlier in this judgment. It was contended that such statements inevitably had the result of destroying the employment relationship between the respondent and the company. It was pointed out that Gould had repeatedly stated that in the light of those statements it was not possible for him to work with the respondent.

[37] The difficulty with the submission is two-fold. In the first place it is not clear whether, in the context of the investigation the statements, although then couched in the present tense, were not intended to refer to the time when the report was made to the police - in which event they would have been acceptable.

[38] In the second place, and more importantly, a reliance on the statements was not embraced in the appellant's statement of defence in the court **a quo** and the respondent was at no stage during the hearing in the court **a quo**, taxed with these statements and asked to deal with the effect which the company intended to ascribe to them. In the absence of that having been done it did not lie in the company's mouth thereafter to seek to make capital out of the statements. Had it intended to do so, it ought to have sought the recall of the respondent as a witness and subjected him to the necessary cross-examination.

[39] In the result I am unpersuaded that the industrial court erred in making the decision referred to above.

[40] The appeal is dismissed with costs.

KROON JA

I agree

MYBURGH JP

I agree

FRONEMAN DJP

DATE OF HEARING: 24 February 1998

DATE JUDGMENT DELIVERED: 04 March 1998

FOR APPELLANT: M.G. MAESO of Shepstone and Wylie.

FOR RESPONDENT: P.H.SCHUMANN instructed by M B Gumede
and Associates.

This judgment is available on the Internet at Website: <http://www.law.wits.ac.za/labourcrt>.