

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

Case no: DA 2/97

In the matter between

ALLROUND TOOLING (PTY) LTD

Appellant

and

NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA

Respondent

JUDGMENT

Introductory

[1] The appellant, Allround Tooling (Pty) Ltd, manufactures 'Okapi' knives, pangas, machetes and agricultural tools in its factory at Isithebe in Kwazulu-Natal.

- [2] At the time of the dismissal of the second and further respondents, the first respondent, the National Union of Metal Workers of South Africa ('the union'), represented slightly more than half of the appellant's employees.
- [3] The second and further respondents were employees of the appellant who were dismissed on 24 March 1995 for participating in an illegal and unprocedural strike. The appellant dismissed one hundred and twenty-nine of its workforce of two hundred and seven. One hundred and seventeen of the dismissed employees are respondents in this appeal. They are referred to in this judgment as 'the respondents'.
- [4] Following on the dismissals, the union and the respondents instituted proceedings in the industrial court initially in terms of s 43, and subsequently in terms of s 46(9), of the Labour Relations Act, 28 of 1956 ('the Act'). In the s 46(9) proceedings, the industrial court found that the dismissals were unfair and ordered the appellant to reinstate the respondents. Compensation was not touched on in the judgment. The appellant appealed against that determination. The parties subsequently agreed to refer the issue of compensation to private arbitration.

Condonation

- [5] On 10 December 1997 the respondent's attorney, Mr C J Tanner, was informed by the Registrar of this Court that the respondent's heads of

argument had to be served and filed on or before 30 March 1998. The heads of argument were filed on 21 April 1998, three weeks late. The appeal was set down on 5 June 1998. On that day an application for condonation for the late filing of the heads of argument was filed. The explanation for the delay was contained in one paragraph in these terms:

‘Subsequent to receipt of the Appellant’s heads of argument and the commencement by me of the process of reading the record and preparing heads of argument, it became apparent to me that I would not be able to finalise adequate heads of argument before 10 March 1998. ‘

Tanner went on to say in the affidavit that the appellant’s attorney had no objection to the late filing of the heads of argument; that, rather than filing short, inadequate heads of argument, he decided to provide detailed heads of argument; and that it was impractical to instruct someone else to do the work at that late stage.

- [6] When the application for condonation was argued on 5 June it was pointed out to Tanner by the Court that he should have filed the application for condonation by no later than 21 April, that there was no explanation for his failure to do so, and that there was no explanation at all for his failure to prepare the heads of argument in the period of more than three and a half months that he was given to do so. After Tanner had given an oral explanation from the bar, the Court ruled that the appeal would proceed on the merits and that Tanner would be given an opportunity to file a

supplementary affidavit on or before 10 June.

- [7] One 10 June a supplementary affidavit was filed. The explanation for the failure to file the application for condonation with the heads of argument on 21 April was that Tanner forgot to do so. The explanation for not commencing work on the

appeal timeously was that from 23 December 1997 to 22 January 1998 Tanner was on holiday; thereafter he was intimately involved in litigation in the industrial court until 10 February due to the illness of the advocate he had originally briefed to appear on his client's behalf; in late February and March he commenced reading the record in this matter; he decided to draw the heads of argument after receipt of the appellant's heads of argument which were due on 16 March; after receipt of the appellant's heads of argument he found that he did not have sufficient time to file the heads of argument timeously due to a 'substantial work load'; and that, in the result, it took five weeks to prepare the heads of argument.

- [8] Tanner was obliged to apply for condonation, without delay, as soon as he realised that the respondent's heads of argument were late: c.f. Croeser v Standard Bank 1934 AD 77 at 79; R v Mkize 1940 AD 211 at 213; Reeders v Jacobsz 1942 AD 395 at 397; Commissioner of Inland Revenue v Burger 1956 (4) SA 446 (A) at 449G; Meintjies v H D Combrinck (Edms) Bpk 1961 (1)

SA 662 (A) at 264B;Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129G; Napier v Tsaperas 1995 (2) SA 665 (A) at 671B-D. Tanner knew by no later than 21 April that the respondent's heads of argument were three weeks late. He should have filed the application for condonation no later than on that day. Instead the application was filed six weeks later on the day of the appeal. The only explanation for his failure to make timeous application for condonation is that he forgot to do so. It goes without saying that that is not a reasonable nor acceptable explanation. It is an explanation which borders on contempt for the Court and is manifest of an unprofessional and irresponsible attitude towards the interests of the respondents, of which more later.

[9] It is accepted that Tanner was able to commence working on the heads of argument only after disposal of the industrial court case on 10 February 1998. He then had six weeks in which to prepare the heads of argument. Instead, he took nine weeks to do so.

[10] What Tanner failed to do was to allocate time to the preparation of the heads of argument. Instead work on the heads of argument competed - unsuccessfully - with the other demands of his practice. The respondents' interests were ranked below those of other clients. It is not an acceptable explanation for delay that a practitioner is too busy. If the nature or size of a practitioner's practice renders it impossible for him to render a professional service and to comply with the provisions of the Labour Appeal Court rules he

must not take on the work: Sennet & Wessels (Pietersburg) BK v Prins, LAC judgment JA 72/97 para 18. In the absence of an acceptable explanation for non-compliance with the rules of Court, condonation will not be granted: Classiclean (Pty) Ltd v CWIU a.o., LAC judgment JA 60/97 para 5; Joerning & Sons (Pty) Ltd t/a Joernings Pharmacy a. o. v Coetzee, LAC judgment CA 14/97 para 22. Tanner did not provide an acceptable explanation for not timeously filing the heads of argument. In the result, the application for condonation is refused.

Background to the dismissals

- [11] By the beginning of 1995 it had become apparent to the appellant that costs should be cut. Partly due to the drought in the province demand for pangas by the sugar cane industry had dropped. As sales declined, stock piling occurred, with a concomitant decline in productivity. The appellant's banker demanded that the overdraft of R 1,3 million be reduced.
- [12] On Monday, 13 February, Mr W P J Voss, the managing director, and Mrs R A Voss, his wife and the financial director, met with union shopstewards and supervisors to discuss working short time. Management's proposal was to work a shorter day from Monday to Thursday. Discussions continued during the course of the week. The employees preferred to take a Monday off, and to be paid only for the days worked. Management agreed to the proposal.

[13] On Monday, 20 February, the weekly paid workers did not work. The appellant found the experiment impractical. It needed all its employees in order to deal with its customers and clients.

[14] On the following day Voss met with the shopstewards to explain to them that the factory had to operate with its full compliment of employees each working day. He proposed that the factory open at 07H00 (normal time) and close at 14H30. The shopsteward's objection to that proposal was that night shift was not affected by the proposal and the transport costs of the employees would increase as they would be required to use taxi's out of peak time, and so pay more for taxi fares. Following on further meetings, by the end of the week Voss had agreed to meet both concerns: the night shift would work only four nights a week and the appellant would meet the extra costs of transport.

[15] On Monday, 27 February, the appellant implemented short time. At 14H30 non union members, including supervisors, knocked off work. Union members, however, remained behind in the factory. They could not work productively because their supervisors and co-workers had left. On Tuesday, 28 February, the appellant sent the union a telefax in which it stressed that short time was essential to avoid retrenchments. A meeting was called for Monday, 6 March, to consult on retrenchments.

[16] On 1 March the appellant and its industrial relations consultants, Bannerman

Bush Dickinson and Associates ('the consultants') communicated with the workers and the union respectively. The appellant informed its employees that it intended to commence with retrenchments as soon as possible in view of the lack of co-operation of the employees, which had taken the following form:

- '1. Employees are working slow!
2. Employees are not leaving the premises at 2:30pm and by doing so wasting electricity.
3. Wasting petrol for forklifts.
4. Some employees are deliberately switching off the heating elements so that the machines are cold the next morning and by so doing g delaying production.
5. Working without permission (Accidents may occur!).
6. Producing a lot of scrap!'

In its telefax to the union the consultants requested the union to advise its members to desist from their conduct and short time was described as '...a measure designed to try and avoid retrenchments.'

- [17] On 2 March, the union, represented by its local organiser, Mr B V Simelane, responded in two telefaxes sent to the appellant. In the one he proposed a later date for the proposed meeting and requested the number of people who would be affected by a retrenchment. In the second telefax, he expressed his concern about discussing retrenchments 'whereas we got an issue on the

table which is short time.’ The consultants responded to the second telefax by making the allegation that the refusal to meet on 6 March was viewed as a delaying tactic and insisted that a meeting be held on that day. It was again stressed that the union members were engaging in actions calculated to disrupt the effort to minimise the possibility of retrenchment.

[18] During the course of the week, 27 February to 3 March, union members refused to work short time. On Friday, 3 March, the appellant stopped the short time regime.

[19] The meeting proposed for 6 March did not take place. On that day the consultants gave the union particulars of the number of persons whom the company intended to retrench, namely, forty, and the departments in which the retrenchments would take place. It was proposed that a meeting take place in 9 March. On the following day Simelane responded by averring that he was not available on 9 March and proposing 13 March as the date of the meeting. On 8 March, the consultants again alleged that he was engaging in delaying tactics and insisted that the meeting take place in 9 March. Simelane refused to meet on 9 March.

[20] On 8 March the consultants informed the union that its client was not willing to discuss the issue of short time anymore and that in future the parties would meet to discuss the possibility of retrenchments.

[21] On 16 March, the meeting which the appellant had been trying to arrange since 28 February, took place. The appellant was represented by Voss, the consultants by Mr J Hagglund, and the union by Simelane and shopstewards. The appellant explained why it was not willing to discuss short time anymore and insisted that a process of consultations on retrenchments begin. The parties agreed to meet on Monday, 20 March.

[22] On Monday, 20 March, the parties met. The appellant was represented by Voss, the consultants by Bush, and the union by Simelane and shopstewards. During the discourse of the discussions, Simelane proposed lay-offs as an alternative to retrenchment. The appellant expressed its willingness to lay-off employees but no agreement could be reached on how lay-offs would be effected. A meeting was arranged for 08H00 on Friday, 24 March, to continue the discussions. The meeting ended in an acrimonious exchange between Simelane and Bush. According to Simelane, Bush attacked him personally as a union official. Bush was very abusive towards him and shouted at him. Simelane thought that Bush was treating him as his subordinate. Bush's evidence was that Simelane pointed a finger at him and said: 'You better change your attitude....and you must watch out because if you don't watch we will close your company down in Isithebe'.

[23] After the meeting the appellant gave its employees an 'internal briefing'. It was said that the meeting was held on the question of 'retrenchment'. The briefing was in these terms:

- '1. Management met today with Mr Simelane and Shop Stewards to discuss the question of retrenchment.
2. Management reminded Mr Simelane and Shop Stewards that these discussions began on the 13th February 1995.
3. These discussions resulted in the implementation of Short Time.
4. The Short Time failed due to the lack of co-operation by Workers to save costs.
5. The Union and Shop Stewards have now suggested a Lay Off.
6. Management has stated that it is prepared to consider Lay Offs for a period of 10 Months.
7. This Short Time will not be revolving. That means that the group selected will be the only ones to be Laid Off.
8. Those Laid Off will be assisted with claiming Unemployment Insurance.
9. A further meeting has been arranged for Friday, 24th March 1995.'

[24] On the afternoon of Thursday, 23 March, Simelane, the shopstewards, and union members held a meeting. Simelane reported to the members what had transpired at the meeting of 20 March. As a result of what they were told, the employees decided that they would demand from the appellant that Bush no longer represent the appellant in discussions with the union. It is not clear

from the evidence of Simelane and other witnesses for the union precisely what the decision entailed. There is a suggestion that the decision was that demonstrations would take place during the morning tea break at about 09H00.

[25] On Friday, 24 March, the factory opened at the usual time of 07H00 and commenced operating. At 08H00 Simelane did not arrive for the meeting which had been arranged on Monday, 20 March. After waiting for half an hour, Hagglund telephoned the union offices and reminded Simelane of the meeting. Simelane undertook to leave immediately.

[26] At 09H00 members of the union left their work stations and congregated, singing, toyi-toying and waving placards. The placards called for the removal of Bush from the appellant's negotiating team.

[27] Mrs Voss, on seeing that one of the trucks was not being allowed to leave the premises, went to assist the truck driver. In the course of attempting to persuade the employees to allow the truck to leave, she was pushed around by the employees. She was concerned that she would be squashed by the gathering of people. She managed to get back to the offices, very upset by the way she had been treated.

[28] Simelane arrived at the premises at about 10H00. At about 10H10

management issued an ultimatum calling for a return to work by 11H30 or face dismissal. Simelane conveyed the ultimatum to the employees and, on his version, advised the workers to return to work. Simelane again met with members of management. The appellant's representatives made it clear to Simelane that under no circumstances would they agree to the demand that Bush or any other member of the firm of labour consultants would be removed as a member of the negotiating team. Simelane was advised to persuade his members to return to work.

[29] At about 11H40 the company issued a second ultimatum, calling for a return to work at 13H00. Simelane and the shopstewards were asked to convey the ultimatum to the striking workers. Simelane's evidence was that he did so; that he strongly advised a return to work; that the workers refused to heed his advice and accused him of being a 'sell-out'.

[30] At about 12H20, Mrs Voss, accompanied by Mr E Mleya, spoke to the workers in the change room. She tried to persuade them to return to work before the expiry of the ultimatum. The workers refused to do so.

[31] After speaking to the employees, Simelane and the shopstewards returned to the appellant's offices. Simelane informed management that he had telephoned office bearers of the union and that he wished to fetch them in order to meet with the workers. Mr and Mrs Voss and Hagglund testified that Simelane did not tell them in clear terms that he had lost the confidence of the

workers and that he wished office bearers to intervene to persuade the workers to return to work. Nevertheless, it is common cause, and the transcription of that meeting reveals, that Simelane did say that he wished to fetch the office bearers and to take them to the factory.

[32] Before the ultimatum expired, Simelane left to fetch Mr S T Makhanya, the chairperson and Mr B Makhathini, the vice chairperson, of the union in that area. Before his motor vehicle could leave the premises, Hagglund asked him where he was going. In Voss's affidavit in the s 43 application, he stated that Simelane informed Hagglund 'that he was leaving to fetch a more senior union official who could intervene in the strike'. Hagglund must have conveyed that to Voss on his return to Voss's office.

[33] The striking workers did not return to work at 13H00. At 13H45 they were dismissed.

[34] Later that afternoon Simelane returned to the factory with Makhanya and Makhathini. They spoke to the workers who were still on the premises. The evidence of Simelane and Makhanya was that the workers agreed to return to work on Monday, 27 March. The evidence of the witnesses for the appellant was that an undertaking in those terms was not conveyed to them that afternoon.

[35] On Monday, 27 March, the factory opened at the usual time. The employees

who had not been on strike on the Friday were allowed on to the premises. The dismissed employees were refused entry. From amongst the ranks of the dismissed employees stones were thrown onto the premises and at motor vehicles. Abuse was shouted at those employees who had returned to work. The appellant decided to advise the employees who were at work to return home. For all practical purposes, the factory closed down that week.

The fairness of the dismissals

[36] The appellant moved its factory from Johannesburg to Isithebe in 1983. Some of the respondents commenced employment with the appellant then. A majority of the respondents commenced employment during the 1980's.

[37] Prior to the events described earlier in this judgment, the relationship between the appellant and its employees, including the respondents, was cordial, fairly constructive, and characterised by mutual respect.

[38] Faced with reduced sales and lower productivity, the appellant was entitled to take remedial steps. One of the steps it was entitled to take was to reduce the wage bill by working shorter hours. By the time the shorter hours were introduced on Monday, 27 February, the appellants had consulted with the employee's representatives, tried the employee's suggestion of closing one day a week - without success, and met the employee's concerns about the night shift and the additional transport costs. In those circumstances, the

appellant cannot be criticised for implementing short time on 27 February.

[39] At that time the employees had not been told that short time was an alternative to retrenchment. That is not, however, a justification for their refusal to work short time. Voss had explained to the employees' representatives the need to reduce costs. During the week that the short time regime was in place the respondents were told on the Wednesday of the week that as they had refused to work short time, retrenchments would be effected. In spite of knowing that their refusal to work short time would result in retrenchments, they persisted in their refusal to co-operate.

[40] By 3 March, when short time was stopped, there was no further obligation on the appellant to continue to consider short time as an alternative to retrenchment.

[41] By the time discussions began in earnest on retrenchments at the meeting of Monday, 20 March, management and its advisors had formed the view, not unreasonably, that Simelane was not co-operating in meeting with them to consult. Despite that perception, fruitful discussions did take place at the meeting. A further alternative to retrenchment, lay offs, was discussed. A meeting was arranged for Friday, 24 March, to continue the discussions.

[42] What went wrong at the meeting of 20 March was the altercation between Simelane and Bush. The industrial court listened to the tape recording of the

meeting and formed the opinion that ‘...Bush did lay down the law to Simelane and would not give him any real opportunity of putting the short time proposal’. Despite Bush’s denial that he had done so, Simelane and the shopstewards believed that Simelane had been badly treated by Bush.

[43] Instead of taking the matter up with the appellant, Simelane did nothing until Thursday, 23 March. What he did then was not to inform the company of his grievance but the members of the union. Not surprisingly, the members reacted adversely to what they were told and emotionally took the decision to call for the dismissal of Bush as the appellant’s agent the next day. What further exacerbated matters was that the members’ representative was badly treated during the course of discussing retrenchments - always an emotional issue.

[44] What should have happened on Friday, 24 March, was that the members’ representatives, Simelane and the shopstewards, should have been mandated to raise the issue of the treatment of Simelane by Bush with the company. Instead, the decision was taken to hold a demonstration during the tea break.

[45] Friday, 24 March, started disastrously when Simelane did not arrive for the 08H00 meeting. He subsequently explained that he had diarised the meeting incorrectly for 10H00. I agree with the finding of the industrial court that it is

‘rather more likely that Simelane found it convenient not to be around when [the demonstration] happened so that he could disassociate himself and seek to establish himself with management by going on to diffuse the situation.’ The demonstration which commenced at 09H00, and turned into a strike, put an end to discussions on lay offs or retrenchment. When Hagglund spoke to Simelane before 09H00, Simelane did not warn Hagglund that a demonstration was about to take place. It came as a complete surprise and shock to the appellant when the demonstration commenced. Not only had it had no warning of the demonstration, the appellant was not even aware of the grievance.

[46] The demonstration was converted into a strike. The union led no evidence to explain how that happened. The strike was illegal for want of compliance with any of the provisions of s 65 of the Act. The strike was illegitimate in that it commenced without a prior demand having been made on the appellant and the demand was one which the employees were not entitled to make. The employees had no more right to determine who should represent the appellant than the appellant had to determine who should represent the employees in negotiations.

[47] The intense annoyance of the appellant with what had occurred is entirely understandable. It does not follow, however, that the appellant’s response of issuing the first ultimatum was fair. On the contrary, despite the provocation

under which the appellant was acting, it acted over hastily in issuing the first ultimatum. The ultimatum was drafted at 10H10, a little more than an hour after the strike had commenced. The strike was noisy and threatening, but not violent. The appellant had no clear idea of why the employees were striking. The slogans on the placards gave an indication of what the grievances were, but those grievances had not been conveyed to management by any representative of the employees. At the time the decision to issue the ultimatum was taken, therefore, no attempt had been made by the company to establish contact with the employees, to identify their grievances, and to attempt to meet those grievances. The evidence of Voss, on a number of occasions during his evidence, was that he did not want to dismiss the strikers. His intention in issuing the ultimatum was to obtain a return to work. He went so far as to say that he did not intend to give effect to the first ultimatum. Unfortunately, the striking employees were unaware of Voss's intention. What was conveyed to them, in unequivocal terms, in the ultimatum was:

'You are advised that if you do not return to work by 11H30 today you will be summarily dismissed.' The threat of summary dismissal must have heightened emotions at a time when the aim should have been to reduce tension. It did not help matters that the ultimatum was to expire little more than an hour after it was read out to the strikers.

[48] At 11H30, when the strikers did not return to work, the decision was taken to

issue a second ultimatum. Voss's intention, according to his evidence was that he was 'trying to get them back to work'. He did not explain why, the first ultimatum having failed to achieve the object of a return to work, Voss thought a second ultimatum would achieve that result. The ultimatum called for a return to work by 13H00. Simelane and the shopstewards left Voss's office at about noon in order to communicate it to the employees. The period of an hour was too short. See: Plaschem (Pty) Ltd v Chemical Workers Industrial Union (1993) 14 ILJ 1000 (LAC) at 1006H-I; Performing Arts Council of Transvaal v Paper Printing Wood and Allied Workers Union a o (1994) 15 ILJ 65 (A) at 75A-E; 76B-D. The employees were due to be paid in the normal course, and to knock off work, at 14H00. There was no compelling reason why the employees should be given an ultimatum of an hour when two hours later they were to stop work anyway. Had the ultimatum expired at 07H00 on Monday, 27 February, after the striking employees had had a weekend to cool down and to calmly reflect on the consequences of their conduct and having obtained the advice of the local union leadership, the probabilities are that they would have returned to work.

[49] At 13H00, when there was no return to work, the appellant faced the decision whether to carry out its threat or not. At 11H30, when the first ultimatum had expired, the appellant had not carried out the threat. At 13H00 there was an additional factor to be taken into account. Before Simelane left the premises, he had indicated in the meeting and at his car to Hagglund that he intended to

fetch union leaders and to take them to the appellant's premises. The witnesses for the appellant testified that they did not appreciate that Simelane intended to use the union leaders to persuade the workers to return to work. A reading of the transcript of the meetings of 24 March reveals that Simelane's statement of intention to fetch the union leaders was brushed off. For example, Hagglund said to him that he was the union leader and he should tell the workers to return to work. It should have been clear to management and to Hagglund by 13H00 that Simelane had not succeeded in persuading the strikers to return to work and that is precisely why he was calling in the help of union leaders. Bearing in mind that the strikers were due to stop work, in any event, at 14H00, the appellant had nothing to lose by waiting for the return of Simelane and the union leaders to continue discussions on a return to work.

[50] A factor which distinguishes this strike from most wildcat strikes is that the loss of production of the day could not, and did not, cause the appellant significant financial harm. Due to a drop in demand for its products, stockpiling had occurred. A month before the strike, on 20 February, the respondents had not worked for the day when the first version of short time was tested by the appellant.

[51] The dismissal of the respondents constituted an unfair labour practice.

[52] Reinstatement was the proper remedy, despite the misconduct of some of the respondents on the Monday after the dismissals. Had the appellant not acted with such haste, the dismissals might have been avoided. While Voss was of the view that it would be time consuming and costly to retrain the dismissed employees, the managers of the two factories of the appellant, Messrs Shabalala and Magqabi, were much more sanguine.

[53] The appeal is dismissed, with costs.

[54] The order of the industrial court dated 20 December 1996 is amended by the deletion of the date '20 January 1997' in paragraph 3 and the substitution thereof of the date '30 June 1998'.

Myburgh J P

I agree

Froneman D J P

I agree

Nicholson J A

Date of Hearing: 5 June 1998

Date of Judgment: 15 June 1998

Appearance for Appellant: Mr R Haslop of Woodhead Bigby & Irving

Appearance for Respondent: Mr C Tanner of Chennells Albertyn & Tanner

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