

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: DA 7/2000

In the matter between:

CROWN FOOTWEAR (PTY) LTD

Appellant

and

NATIONAL UNION OF LEATHER WORKERS
SECOND TO 25TH RESPONDENTS

First Respondent

Further Respondents

JUDGMENT

MOGOENG JA

INTRODUCTION

[1] This is an appeal against a judgment of the Labour Court in a dispute between the Appellant and the Respondents about the fairness or otherwise of the dismissal of the 2nd and Further Respondents (“the individual Respondents”). The Labour Court found the dismissal to be unfair and ordered reinstatement with a final warning. This appeal is directed against the order of reinstatement with a warning.

BACKGROUND

[2] The individual Respondents are members of the National Union of Leather Workers (“the union”). They were employed by the Appellant as charge hands or supervisors. On 06 July 1998 members of the union employed by various employers countrywide commenced a protected national strike in support of a demand for an increase in wages and the improvement of the terms and conditions of service. Members of the union employed by the Appellant, including the individual Respondents, participated in the strike. At the time when the strike ballot was conducted and when the strike began, the union demanded a 12% wage increase across the board. The employers’ organisation, of which the Appellant was a member, had made an offer of a 7.5% wage increase across the board.

[3] On the morning of the commencement of the strike, the Appellant’s production manager, Mr Ashworth, enquired from the individual Respondents why they were participating in the strike. He had to ask them, he said, because as supervisors they formed part of management and they were not supposed to go on strike. He was also of the opinion that the strike was ‘illegal’. The individual Respondents then informed him that they would be willing to return to work if the Appellant granted them a wage increase of 10% across the board.

[4] Pursuant to this discussion, the Appellant issued an ultimatum to the individual Respondents to resume their duties on 07 July 1998 failing which they could be dismissed. The Appellant also reported the matter to the union which expressed the view that the individual Respondents should return to work forthwith and that their strike was illegal.

[5] On 08 July 1998 a meeting was held to discuss the individual Respondents’ continued participation in the strike action. It was attended by the individual Respondents, their union representative, some members of the Appellant’s management, including Mr Ashworth, the Appellant’s labour consultant and the Appellant’s attorney. At the meeting Mr Ashworth again stated that the strike was unprotected on the basis that the individual Respondents were on strike for a 10% wage increase which was a different demand from that of the union. He again asked them to return to work but indicated that even if they did return to work the Appellant reserved the right to take disciplinary action against them. The individual Respondents refused to go back to work and remained on strike until it ended on 13 July 1998.

[6] A disciplinary enquiry was held. The charge preferred against the individual Respondents was that they had participated in an unprotected strike. That charge was based solely on their demand for a 10% wage increase. They were found guilty and a sanction of dismissal was imposed on all of them. They lodged an appeal but the decision of the disciplinary hearing was confirmed.

[7] The individual Respondents then instituted an unfair dismissal claim in the Labour Court to challenge both the finding that they had participated in an unprotected strike and the sanction of dismissal. The finding of guilt, of participating in an unprotected strike, was upheld whereas the sanction was reduced from dismissal to a final written warning. The Appellant now appeals only against the sanction imposed by the Labour Court.

Should the supervisors have been dismissed?

[8] The Court *a quo* found that the dismissal of the individual Respondents was unfair and reinstated them. The sanction of dismissal was changed to a final warning. There are two reasons advanced in support of the reduction of sanction and I deal with them below.

The confusion

[9] The Court *a quo* found that the individual Respondents were confused and that it was as a result of that confusion that they demanded a 10% wage increase. What led to the confusion was, according to the Court *a quo*, Mr Ashworth's statement that their withdrawal of labour was unprotected because as managers they were outside the bargaining unit. Had he not done this, so says the Court *a quo*, the individual Respondents would not have made a separate demand from that of the union.

[10] I find it difficult to understand this statement. The individual Respondents knew why they took part in the strike action. They participated in the balloting process, the ballot papers spelt out what the envisaged strike would be all about, and they knew that the majority of employees voted in favour of the strike. All they needed to tell Mr Ashworth was that their union was demanding a 12% wage increase across the board and that the strike was protected. I cannot understand how an allegation that their strike was unprotected could confuse them to the point where they had to make a demand for a 10% wage increase. The individual Respondents failed to explain how a simple allegation that the strike was unprotected could confuse them.

[11] In any event, according to the individual Respondents they called a union official as soon as Mr Ashworth alleged that their strike was unprotected. That official assured them that their strike was protected. To the extent that they may have been confused, their confusion must have been cleared up by that assurance from one of their own. If they had

not yet made the 10% demand, then it could not have been made as the result of the confusion. If the demand had already been made, then it was not made as a result of Mr Ashworth alleging that the strike was unprotected.

[12] Counsel for the Respondents submitted that the confusion was caused by the ultimatum. This cannot be correct. The ultimatum was issued long after the 10% demand was made. It cannot therefore be the excuse for the demand which preceded it.

[13] I am satisfied that the finding of the Court *a quo* that the demand for a 10% wage increase was the result of the confusion caused by the Appellant is wrong. Accordingly, the decision of the Court *a quo* cannot be justified on the basis of the alleged confusion.

The ultimatum

[14] The ultimatum issued by the Appellant was also relied on by the Court *a quo* as the basis for reducing the sanction. According to the Court *a quo*, the Appellant should not have issued the ultimatum that required of the individual Respondents to return to work while reserving the Appellant's right to take disciplinary action against them. The Court found that this amounted to approbating and reprobating. For this the Court *a quo* relied on ADMINISTRATOR, ORANGE FREE STATE AND OTHERS v MOKOPANELE AND ANOTHER 1990 (3) SA 780 (A) ("Mokopanele").

[15] The Mokopanele case is distinguishable from this case. In the Mokopanele case, the employer issued an ultimatum to striking employees the effect of which was that if they returned to work on the stipulated date, the employer would waive its right of dismissal. The employees returned to work on that date but they were nonetheless dismissed. It was for that reason that the Appellate Division found that on the doctrine of election, the employer had approbated and reprobated which it could not do. In this case, the employer never gave any intimation that the individual Respondents would not be dismissed if they returned to work immediately. It specifically reserved its right to take disciplinary action against them, with the possibility of a dismissal. In any event, unlike in the Mokopanele case, the individual Respondents did not comply with the ultimatum. I therefore find that

this basis for reducing the sanction is also wrong.

[16] The fact that all the grounds for the reduction of the sanction of dismissal, relied on by the Court *a quo*, have been rejected does not necessarily mean that this Court must reinstate that sanction. I will now consider the appropriateness of dismissal as a sanction with reference to other relevant factors.

Other considerations relevant to sanction

[17] In considering whether or not the dismissal of the individual Respondents is fair I must take into account the relevant provisions of the code of good practice (“the code”). (s 188 of the Labour Relations Act No. 66 of 1995 (“the LRA”)). Item 6(1) of the code deals with dismissals for participating in an industrial action in the following terms:

- “(i) Participation in a strike that does not comply with the provisions of chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-
 - (a) the seriousness of the contravention of this Act;
- (b) attempts made to comply with this Act; and
 - (c) whether or not the strike was in response to unjustified conduct by the employer.”

I will now consider the circumstances relating to the strike which are relevant to the sanction.

[18] It is not disputed that the individual Respondents were members of the union, that they participated in the balloting process and even voted in favour of the industrial action. These are the steps they took to comply with the LRA. It is also common cause that the strike which followed this process was protected. However, the individual Respondents did not fall within the bargaining unit and the Appellant partly relied on this point, from the outset, for suggesting that the individual Respondents were participating in an unprotected

strike. This issue is settled as appears in CWIU v PLASCON DECORATIVE (INLAND) (PTY) LTD (1998) 12 BLLR 1191 (LAC) at 1199 at paragraph (29):

“[29] The issue in the present case is whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, could embark on an otherwise protected strike. That parallels the question Zondo AJ dealt with in *Afrox Ltd v SA Chemical Workers Union and others* (1) (*supra*), where workers employed by the same employer at different plants embarked on strike action. Zondo AJ concluded (at 403I) that ‘once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire the right to strike’. It follows that in my view this conclusion was correct.”

Clearly, the fact that the individual Respondents were non-bargaining unit members cannot on its own render the strike unprotected in so far as they participated in it whereas it remains protected for the participating employees who fall within the bargaining unit.

[19] In considering the question of whether dismissal was an appropriate sanction, certain factors of this case need to be taken into account. The one is the factor that drove the Court *a quo* to the conclusion that the second and further Respondents’ participation in the strike was illegal. That is that the second and further Respondents had made a demand that the Appellant pay them a 10% increase before they return to work. This occurred in circumstances where the rest of the strikers were demanding a 12% increase. On the reasoning of the Court *a quo*, this turned what was a legal participation by the second and further Respondents in the strike into an illegal participation. I refrain from expressing a view on the correctness or otherwise of this conclusion by the Court *a quo* because there was no cross-appeal. Accordingly I have to approach the matter on the basis that that finding by the Court *a quo* stands. In my view, assuming that the making of that demand by the second and further Respondents was a breach of the provisions of the Act, such

breach was of a minor nature.

[20] Another factor which must be taken into account is that the period during which the second and further Respondents did not work was a period during which they were entitled to withhold their labour by participating in the country-wide strike anyway. There can simply be no doubt that the second and further Respondents would have participated in the country-wide strike even if they had not made the demand for a 10% increase. They had participated in the ballot the result of which was that the majority of the workers voted in favour of a strike. Their participation in the strike only ended when the country-wide strike ended. When the country-wide strike ended, they did not continue striking for purposes of achieving their own demand for a wage increase.

[21] There is something illogical about the Appellant's approach to this matter. That is that it had a workforce whose members withheld their labour from it for the same period demanding a wage increase. One section of the workforce demanded a 12% wage increase before they could return to work while the other section demanded a lower increase, namely 10% increase, before they could return to work. The two sections of the workforce returned to work on the same day. Apart from this difference in the wage increase demanded, the conduct of the two sections of the strikers cannot be distinguished. The Appellant now seeks to visit that section of the workforce that demanded a lower increase with dismissal whereas that section of the workforce that demanded a higher increase is not being visited with any disciplinary action.

[22] In the light of all the above circumstances I am of the opinion that the sanction of dismissal was inappropriate and that it rendered the dismissal unfair. For the above reasons, I can see no basis for interfering with the decision of the Court *a quo*. Accordingly, the appeal is dismissed with costs.

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APPEAL

**M.T.R. MOGOENG
JUDGE OF**

I agree

R.M.M. ZONDO
JUDGE PRESIDENT

I agree

M.M. JOFFE
ACTING JUDGE OF APPEAL

Appearances

Appearing for the Appellant : Adv G.O. van Niekerk SC *instructed by* Millar & Reardon Attorneys

Appearing for the Respondent : Adv S.M. Govender *instructed by* Jay Reddy Attorneys

Date of hearing : 24 August 2000

Date of judgment :