

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: PA6/01

In the matter between

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

FIRST APPELLANT

EMPLOYEES LISTED

IN ANNEXURE “A”

FURTHER APPELLANTS

SECOND AND

and

DELTA MOTOR CORPORATION

RESPONDENT

JUDGMENT

COMRIE AJA:

1. On Thursday 1 July 1999, in the morning, a work stoppage occurred at the respondent's Kempston Road, Port Elizabeth manufacturing plant known as the TF production line. This where Isuzu vehicles were assembled on a conveyor belt system. Seven employees (the second to eighth appellants) were suspended for failure to work, more specifically for failing to heed an ultimatum from management to resume work. In due course, following upon disciplinary enquiries and appeals therefrom, they were dismissed. Those dismissals were challenged by them and by the first appellant union in the Labour Court. The relief sought, as

amended, was reinstatement on terms and conditions no less favourable than prevailed at the time of dismissal, compensation and costs. The bases for the challenge were: (a) that the seven appellants were entitled to stop work, and that their dismissals were accordingly unfair and unlawful (not argued on appeal); alternatively, (b) inconsistency in punishment, in that other employees who stopped work were not disciplined.

2. At the conclusion of the trial Jammy AJ made the following order:

“1 The dismissal by the Respondent of Mr M Langley, Mr B Van Wyk, Mr H Mantoor and Mr S Tarentaal, was fair and justified and their applications are dismissed

2 The dismissal of Mr E. Cedras, Mr M. Brainers (sic) and Mr. M. Padayachee was not warranted and each of them is reinstated in his employment with the Respondent. By reason of their unlawful and unreasonable conduct to the point of the resumption of their duties however, that reinstatement is not retrospective and is without compensation in any respect relating to employment benefits lost by them since their dismissal.”

3. With leave granted by the Court a quo: the union and the seven employees appeal against the whole of the above order; the respondent employer cross - appeals on the basis that the Court should have found that the dismissals of Cedras, Bruiners and Padayachee were also fair and justified. The parties have reached an accord regarding the trial costs.
4. The judgment is reported as NUMSA and Others v. Delta Motor

Corporation (Pty) Ltd [2001] 8 BLLR 941 (LC), where the evidence is summarised in detail. The background to the matter is follows. The employees were paid weekly in arrears. They were entitled to receive their wages on a Friday, there being no legal obligation on the employer to pay earlier. A contrary contention was not pursued on appeal. Wages were transferred electronically into the bank accounts of employees. Invariably this was done at one minute after midnight (ie at 00h01) on Thursday mornings. Employees came to rely on this. Some of them would draw on their accounts through automatic teller machines on their way to work on Thursday mornings or on their arrival at work (there were ATM's at the plant). On Wednesday 30 June 1999 the electronic transfer system failed through no fault of the employer, with the consequence that wages were not transferred at the expected time and were not available to employees first thing on Thursday morning, 1July, but only become available at around 12 noon. This caused disappointment to, and dissatisfaction among some of the employees. There was talk of no pay, no work.

5. The TF production line works on a conveyor belt system and needs about 70 workers to operate it. The shift was supposed to start at 7.00am, but it did not function properly because some of the employees withdrew their labour. Towards 8.30am, after the intervention of management and shop stewards, another attempt was made to start the line, but the outcome was the same. Management eventually sent word to the employees that a final attempt would be made to start the line at 10.30am; that if this failed the plant or line would be closed for the day; and (partly disputed in evidence) that employees who failed or refused to resume their duties would be subject to disciplinary action. When the line was re - started at 10.30am the seven appellant employees were absent from their work

stations. Bruiners was the only one of the seven to claim in evidence that he (and Cedras and Padayachee) actually complied with the ultimatum and returned to work shortly before 10.30am. His version was rejected by the trial Court, and with good reason. The seven were orally suspended by Phillips, a supervisor, who issued written suspension notices to four of them. Phillips was called away. Later in the day he noticed that the other three appellants (Cedras, Bruiners and Padayachee) had resumed work. He issued them with notices and sent them home. The plant was not closed; the remaining workforce on the line was supplemented. The evidence showed, however, that the work stoppage from 7.00am led to a substantial loss in production.

6. The trial Court held that whoever may have refused to work earlier, it was the seven appellant employees, and only they, who at 10.30am persisted in a refusal to work in the face of a threat of disciplinary action. This was an unlawful work stoppage and the appellants by their conduct had participated in a strike which was unprotected. Only two of the appellants testified, Langley and Bruiners. I have dealt with the latter. The thrust of Langley's version was that he and some others had misunderstood the management's message; that they thought that the plant was to be closed at 10.30am; and that they were preparing to clock - out when the deadline expired. Their failure to comply was, therefore, at that critical stage not deliberate or wilful. I will deal with this version later.
7. Jammy AJ held further that there was no inconsistency on the part of the employer in disciplining only the seven appellants and not other employees who earlier that morning may have refused to work. The ultimatum had intervened; the refusal of the appellants to return to their posts at 10.30 am “ *was a studied and wilful one, not supported by the*

balance of the assembly line workforce". The learned Judge took the view, however, that there was a "*legitimate basis for differentiation*" between the four appellants who did not resume their duties at all (para.1 of the order) and the three appellants who went back to their posts after they were orally suspended (para. 2 of the order).

8. Mr Van der Riet, who appeared for the appellants on appeal, submitted that other employees on the line, besides the seven, had refused to work earlier that morning. This was so despite the evidence of Phillips that there were only eight non - workers (the seven plus Boggenpoel). Because this was a conveyor belt system, it was difficult for management to determine who would or would not work. When the line was stopped, soon after 7.00am and again at about 8.30am, everything came to a halt; all 70 employees were affected. Some of them, according to the evidence, prepared their work ahead of time. One of the reasons for the ultimatum was to achieve certainty about which employees refused to work. I am prepared to accept on the evidence as a whole that substantially more employees earlier withdrew their labour ,even though their precise number and identities cannot be fixed with certainty.
9. This brings me to the second reason for the ultimatum which, it seems to me, was to put the employees on terms. Time had been taken up since 7.00am explaining to the employees why the salaries had not been transferred at the usual time, and why this did not entitle them to stage a work stoppage. Mr Van der Riet was critical of the fact that these explanations were not commenced the previous day, in the late afternoon or evening. I do not think that would have helped much, because the shift ended before Hattingh, the paymaster, learned that the wages would not be transferred on time. Be that as it may, the explanation/advice stage in

fact only commenced in the morning. The employees were afforded a reasonable opportunity to absorb and consider those explanations and to decide, in consultation with their shop stewards, what they should do. It might have proved precipitate to suspend employees prior to 10.30am. I do not regard it as inconsistent, in the circumstances, for the discipline to have been limited to those employees who at 10.30am persisted in their refusal to work.

10. But why, asked Mr Van der Riet, punish only the seven for the whole of the work stoppage, with its consequent loss of production and profit? It does not appear from the evidence that the financial consequences of the whole stoppage constituted the overwhelming factor in the disciplinary process. Furthermore, the withdrawal by the seven appellants of their labour prior to 10.30am was sufficient to bring production to a halt, even though the conduct of Boggenpoel and others may have had the same effect. I can discern no material inconsistency in this regard, given the serious potential consequences to production of the appellants' persistence.
11. It was also submitted by Mr Van der Riet that confusion reigned from 7.00am onwards and that employees could readily have misinterpreted the threat to close the plant (as Langley claimed). I would first observe that the submission is in general terms overstated. It is apparent that the position was clarified to the employees with the result that all but seven of them returned to their posts at 10.30am. Secondly, it is quite clear that a threat of disciplinary action was included in the ultimatum. Both Bruiners and Bongani, another employee, testified to this effect. The contrary evidence of Dolly, a shop steward, cannot in this respect be accepted. At best then individual employees could claim (as did

Langley) that they misunderstood the position and that the disciplinary threat was not part of what was conveyed to them. Any such claim has to be assessed on its merits in relation to the employees(s) concerned.

12. Langley was an unsatisfactory witness and it is my impression that his version was not accepted by the trial Court where it conflicted with other evidence. On the point now in issue, it is evident that he knew that employees (including himself) had to be back at their posts by 10.30am otherwise the plant would be closed. He was unable to explain why he and a few others so misunderstood that message that they started the process of clocking out several minutes earlier. To the extent that this version was put to Phillips, it was put belatedly (in “*further*” cross - examination); and it was at odds with Phillips’ evidence, unchallenged in cross - examination, that he warned the seven and Boggenpoel of disciplinary action prior to 10.30am. The proper finding in my view is that all seven employees, including Langley, were made aware that a refusal to resume their duties

would be visited with disciplinary steps.

13. My conclusion thus far is that the respondent did not act inconsistently in disciplining only the seven appellants. The next question is whether a distinction should be drawn in favour of the employees who returned to work after their oral suspensions. It will be recalled that the respondent dismissed all seven, and that the Court a quo reversed the dismissals in respect of Cedras, Bruiners and Padayachee. This is the subject matter of the respondent’s cross - appeal. Jammy AJ reasoned as follows :

“ 49 There does however appear to me to be a legitimate basis for differentiation between the sanctions imposed on the four

Applicants who did not resume their duties at all, namely Messrs Langely, Van Wyk, Mantoor and Tarentaal, and the three who subsequently went back to their posts, Messrs Cedras, Bruiners and Padayechee. As I have remarked earlier in this judgment, whether those three did so having considered the error of their ways and the unreasonableness of their conduct, or to avoid the disciplinary action of which they had at that stage been given informal notice, is immaterial. The fact is that they resumed their duties and would presumably have continued to perform them, had they not been removed from the line as a consequence of their earlier suspension”.

14. Later in his judgement (at para 51) the learned Judge said that of the appellants “*three at least attempted to salvage their position*”, At para 52 he concluded:

“ Whilst the remaining three cannot, notwithstanding their apparent contrition, escape some form of sanction for their post - ultimatum conduct, their summary withdrawal from the assembly line when they were found to be working, constitutes to my mind an unreasonable intransigence on the part of management in the context of the suspensions which had been imposed upon them. I am of the opinion, in their specific cases, that for those reasons they should not have been dismissed”.

15. In my opinion it was entirely fortuitous that Phillips was called away, to attend unsurprisingly to problems on the production line, midway through the suspension process. All seven appellants had been orally suspended. Four had been issued with written notification when Phillips was

interrupted. The remaining three took advantage of this break to return to their posts, notwithstanding their oral suspensions. There is no evidence to suggest that they acted out of contrition (the only witness on the point, Bruiners, falsely claimed that he complied with ultimatum).The inference is that Cedras, Bruiners and Padayachee realised at that stage that management really was taking the matter seriously and was intent upon disciplinary prosecution. In the hope of avoiding that fate, or of ameliorating it, they stole back to their posts without the knowledge or consent of Phillips. To characterise this conduct as a “*legitimate basis for differentiation*” seems to me with respect to be putting form before substance, and to be attaching unwarranted effect to the chance difference between oral and written suspension. The fact of the matter is that the seven appellants were the only employees who at 10.30am persisted in a refusal to work, well aware that they faced disciplinary action for such refusal. They were all suspended for the same “*offence*” pending disciplinary enquiry.

16. Mr Van der Riet submitted that Cedras, Bruiners and Padayachee were not intransigent post suspension; they returned to their posts, where they worked for several hours, and the production line operated. Dismissal in their cases, it was submitted, would be very harsh and we should accordingly defer to the view taken by the learned trial Judge. It appears to me, however, that there is substance in the respondent’s counter - argument, namely that to differentiate between the appellants in the present circumstances would itself amount to inconsistency. There would be no basis for the distinction if the three had been issued with written notices of suspension and then gone back to work without permission. That their suspensions were only oral was, as I have pointed out , a chance event and affords no valid basis for differentiation in regard to the

appropriate sanction. See generally. South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd 2002(3) SA 250 (LAC) from par 29. In my opinion, therefore, the trial Court erred on this part for the case and the cross - appeal should succeed.

17. The costs. We were informed by counsel that the respondent has waived its entitlement to the costs order made in its favour, and against the first appellant, by the Court a quo. As to the costs of appeal it seems to me that they should follow the result notwithstanding the ongoing relationship between the first appellant union and the respondent. Mr Acker SC, who led for the respondent on appeal, asked for the costs of two counsel. The respondent was represented at first instance by Mr Wade, who also drew the respondent's heads of argument on appeal. The appellants were represented on appeal by Mr Van der Riet SC alone. It may well be that the appearance of senior counsel for the appellants prompted the respondent to engage senior counsel as well for the hearing of the appeal. I would not say that the matter does not merit senior counsel. I would say that the facts and the law are not of sufficient intricacy or difficulty as to merit two counsel. Mr Acker's request must therefore be declined.

18. The order is as follows:

1. The appeal is dismissed and the cross-appeal is upheld, the first appellant to pay the costs.
2. The order granted by the Court a quo is replaced by the following:

“The dismissal by the Respondent of the Second to Eighth Applicants was fair and justified and their applications are

dismissed.”

R.G. COMRIE
Acting Judge of Appeal

I agree.

C.R. NICHOLSON
Judge of Appeal

I agree.

M.T.R. MOGOENG
Judge of Appeal

Appearances:

For the appellants:

Instructed by:

For the respondent:

Instructed by:

Date of Hearing:

Date of Judgement:

Adv J G Van der Reit SC

Ruth Edmonds Attorneys, Johannesburg

Adv. B. Acker SC and Adv R. Wade

Chris Baker & Associates, Port Elizabeth

28 May 2002

11 July 2002