

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

Case No. JA12/03

In the matter between

MM & G ENGINEERING (PTY) LTD

Appellant

And

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA.
PHILLIP GODI AND 28 OTHERS**

First Respondent

**Second and further
Respondents.**

JUDGMENT

DAVIS AJA

Introduction.

[1] On 19 April 2000 the second and further respondents (“the individual respondents”) were dismissed from their employment. They approached the Labour Court where they contended that the dismissals were procedurally and substantively unfair. They sought an order of reinstatement together with payment of past wages retrospectively to the date of dismissal or such other financial compensation as the Court deemed just and fair.

[2] The *Court a quo* upheld the respondents’ case, and declared that the dismissal of the individual respondents constituted an ‘unfair labour practice’. By the use of this term I assume that the learned Judge meant that the dismissal was unfair. The Court ordered the appellant to reinstate the individual respondents on conditions of employment no less

favourable to them than those which applied to them at the time of their dismissal. The appellant was also ordered to pay wages due to each of the individual respondents for a period of twelve months calculated from the date of their dismissal. It is against this order that the appellant has appealed, with the leave of this Court.

Condonation Application

[3] The appellant applied for leave to appeal against the judgment of the court *a quo*, which application was dismissed. The appellant thereafter petitioned the Judge President for leave to appeal which application was duly granted on 8 August 2003. The order was received by the parties on 11 August 2003. Had there been compliance with the Rules of this Court, the appellant would have served and filed its notice of appeal by no later than 29 August 2003. The notice of appeal was served on the offices of the respondents' attorneys of record on 12 November 2003, seventy five ordinary days and 52 court days out of time.

[4] The order of 8 August 2003 required that the record of appeal be delivered within sixty court days from the date of receipt of the order. The appellant was obliged to deliver the record of appeal by no later than 5 November 2003. The record in the correct form was delivered on 3 December 2003, twenty eight ordinary days and 21 court days out of time.

[5] The only reason given by appellant for this lengthy delay was the incompetence of its attorney, Mr Bruton, who explained that -

'Upon receipt of the order granting leave to appeal, I instructed a candidate attorney in my firm, Mr Anthony Crane, to contact counsel and to instruct counsel to prepare the notice of appeal. For reasons unknown to me, Mr Crane failed to carry out my instruction. However, I do not wish to put the blame on Mr Crane, since it was my sole responsibility to monitor the progress of the matter. I have unfortunately failed to do so. All I can say in my defence for my failure in this regard is that I was exceptionally busy at the time and the matter unfortunately did not received the attention it deserved. I laboured under the impression that the matter had been dealt with'. Mr Bruton accepted full responsibility 'for my oversight and undertake to pay the cost of this application **de bonis propriis** save for costs of opposition'.

[6] Mr Hiemstra, who appeared on behalf of the appellant, was unable to advance any

reason as to the cause of the two delays. He was also unable to explain why no affidavit from Mr Crane had been provided which may have thrown some light upon the cause of the delay.

[7] The delay and explanation are, therefore, clearly unacceptable. It showed a marked disregard for the Rules of Court. Delays of this nature should not be lightly countenanced. For this reason, an order in terms of which Mr Bruton must pay the costs of the condonation application and its opposition **de bonis propriis** will be made. However, the application for condonation in this matter cannot be decided without a consideration of the prospect of success on the merits of the dispute. Accordingly, I turn to deal with the merits.

The Merits.

[8] The material facts in this matter are largely common cause.

On 23 February 2000 the appellant issued letters advising all the individual respondents that on 29 February 2000 they should not report for work as there was to be a stocktaking exercise. Within an hour of the announcement, members of first respondent held a meeting to discuss the matter and resolved that it was unfair for them to be laid off because of a stocktaking exercise. The appellant then informed the shop stewards, who had been mandated to represent the individual respondents that there would be no payment for the lay off and that the gates would be locked on 29 February 2000 as no one was required to work. Only the employees asked by appellant to work on that day reported for work. On 2 March 2000 the individual respondents assembled in a meeting to discuss the appellant's action of 29 February 2000. The main concern was the failure of the appellant to pay individual respondents for the 'stocktaking' day when this had always been the practice.

[9] On 6 March 2000 the individual respondents gathered at their work station to discuss the issue of the compulsory lay off on 29 February 2000, that is the day of the stocktaking. The shop stewards were mandated to approach Mr Tex Williams, the managing director of the appellant, to convey their dissatisfaction. Mr Williams confirmed that he was not prepared to pay employees for 29 February 2000. The shop stewards informed Williams that all employees would embark on industrial action in the event that payment was not made for that day.

[10] The individual respondents employed in the 'M Props' section of the appellant's business refused to proceed with the execution of their normal duties. A meeting took place on 9 March between the shop stewards and Mr Williams concerning possible payment as well as the industrial action. The appellant responded that it was not 'prepared to accede to the request for payment on this day'. The respondents then resumed their duties.

[11] On 13 March 2000 the individual respondents received letters from the appellant that no payment would be made for 29 February because the stocktaking was on a week-end, whereas in the past, stocktaking had taken place on a working day.

[12] On 14 March 2000, at approximately 07h00, the individual respondents came together to ask the shop stewards to accompany them to the appellant to enquire as to the real reason why they had not been paid for 29 February 2000. They arrived at the office block where they discovered that all doors were locked. By 07h30 the shop stewards had received a letter from the appellant requiring employees to return to work by 08h45.

[13] At 09h00 a letter from Mr Williams was provided to 'all employees participating in unlawful industrial action' in which he stated:

"Your participation in the industrial action is unlawful and unprotected.

Your participation in the industrial action is contrary to the Labour Relations Act and should you persist with this participation you will be dismissed.

You are instructed

1) To return to your work stations and continue with your normal duties required output levels before 12:45 on 14 March 2000

2) To fulfill all your duties and obligations in terms of your contract of employment at all times.

3) To comply with all relevant Labour Legislation.

Should you fail to heed this ultimatum you will be dismissed."

[14] Prior to the expiry of the ultimatum, a meeting took place between the appellant and representatives of first respondent. The meeting was chaired by Mr Gerhart

van Rensburg. At this meeting the issue of payment for 29 February 2000 was discussed. The appellant refused to make any payment and reiterated that the final ultimatum was effective the cut-off time being 12h45. It is common cause that the workers returned to work before the cut-off time.

[15] During oral argument before this Court, Mr Hiemstra was asked why the present dispute should not be disposed of in the same manner as was done in **Administrator, Orange Free State v Mokopanele and Another** (1990) 11 ILJ 963 (A).

[16] In **Mokopanele**, cleaners at a provincial hospital participated in an illegal work stoppage. A representative of the employer who had been duly authorized to negotiate with these employees informed them that if they failed to return to work on a specific date they would be dismissed. The employees responded positively to this ultimatum but were subsequently dismissed for their participation in the work stoppage.

[17] The employee's version of the events leading up to the ultimatum, was set out by the court at 968 A thus:

“Mr Rossouw stated that, unless we return to work the following day, we would face dismissal. In the light of this ultimatum I and a large number of fellow employees elected to return to work the following day. This I did and I continued to work in accordance with my duties until 17 September when the administration purportedly dismissed me.” This version was accepted by the Court. at 968A

[18] In dealing with the question of the legality of the dismissal, **Hoexter JA**, on behalf of a unanimous court, applied the principle that... ‘a contracting party who has once approbated cannot thereafter reprobate’. (At 968-969). Applying this principle to the facts of the case, he concluded:- ‘In the light of what had happened at the hospital on 26 and 27 August 1987 the administration was not legally entitled to change its mind as it sought to do when it purported to dismiss respondents on 17 September 1987. Moreover, such change of mind involved a rank injustice to the respondents; and as they were entitled to do, they raised objection to it. Simple justice between employer and employee demands that their objection should be sustained.’ at 970

[19] In the present case, the workers were dismissed for participation in what was described as an ‘unprocedural strike action on 14 March 2000’. This dismissal took place despite the fact that, after they had been given an ultimatum to return to work by a certain time failing which they would be dismissed, they had returned to work before the expiry of the ultimatum.

[20] The only basis upon Mr Hiemstra sought to distinguish **Mokopanele**, from the facts of the present case was to contend that the individual respondents had embarked on a second procedural strike in little more than a week over the same issue and that they knew that they were on final warnings for the same form of misconduct.

[21] In my view, this submission ignores the fundamental difficulty which confronts

appellant. The ultimatum issued by the appellant on 14 March 2000 was issued in the full awareness of the events which had preceded the stoppage. It stated clearly that ‘should you fail to heed this ultimatum you will be dismissed’. There is nothing in the text of the ultimatum of 14 March 2000 which differs from that issued by the employer in **Mokopanele**. Had the appellant in **Mokopanele** wanted to reserve to itself the right to dismiss the workers, even if they returned to work, it could have done so by an appropriately worded ultimatum. Similarly, in the present case, the appellant could have reserved the right to dismiss the individual respondents. It could have warned them that, if they returned to work by a given time, disciplinary charges would be brought against them, which, depending on the evidence led at the disciplinary hearing, could result in warnings or in dismissals. The appellant did not do so. Its statement constituted a waiver of any right to dismiss the individual respondent if they returned to work within the required time.

[22] There is, in my view, no justifiable basis for a distinction to be drawn between these two cases. Mr Hiemstra, correctly, did not attempt to contend that the principle upon which the **Mokopanele** judgment was predicated was in any way incorrect. On the contrary, it is manifestly correct.

[23] In this matter both parties approached the dispute on the basis that the conduct in which the individual respondents engaged on 14 March 2000 was a strike and an unprotected or illegal strike for that matter. In view of the conclusion to which I have come, it is not necessary to decide upon the further question as to whether the individual respondents’ conduct constituted a strike and, if it did, whether it was an unprotected one.

[24] I conclude that there are no reasonable prospect of success of the appeal. It would therefore serve no purpose to grant condonation.

[25] For the reasons given, the following order is made:

1. The application for condonation is dismissed with costs.
2. Appellant’s attorney, Mr Bruton, is ordered to pay these costs **de bonis**

propriis on an attorney and client basis.

DAVIS AJA

I agree

ZONDO JP

I agree

NKABINDE AJA

Appearances

For the appellant Adv J. Hiemstra

Instructed by : STRB Attorneys

For the respondent : Ms Ruth Edmonds

Instructed by : Ruth Edmonds Attorneys

Date of Judgment: 31 May 2005