

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NUMBER: CA23/2012

DATE: 10 MARCH 2013

In the matter between:

5 **MARTIN AND EAST (PTY) LIMITED** Applicant

and

NATIONAL UNION MINeworkERS

AND 7 OTHERS Respondents

10

J U D G M E N T

DAVIS, JA:

This is an appeal against judgment of the court *a quo* of 2 August 2012, a date which I emphasise as I wish to return to
15 its significance presently in this judgment.

The court *a quo* found that the dismissals of the second and further respondents were automatically unfair and ordered that they be reinstated with retroactive effect as to the date of their
20 dismissals, on the terms applicable to these employees, at the appellant in their positions, and further appellant was to pay their costs.

Much of the factual matrix is common cause, the details of

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which are comprehensibly set out by the court *a quo*; hence I will merely summarise the key elements thereof. On 23 August 2010 some 124 employees gathered at Borchards Quarry (“BQ”) from 06:30. At least four of the five elected shop
5 stewards were present. Once the work force had assembled it appears that they refused to board the trucks which would have taken them to work at various sites. They had agreed, apparently amongst themselves, that no one will board the trucks and proceed to work.

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At approximately 07:00 Mr Megan Adolus from the appellant telephoned one of the respondents, Mr Nelson Ngqisha, to enquire as to the reason for the refusal of employees to board the trucks. Adolus was told by Ngqisha that the employees
15 demanded a meeting with the appellant’s human resources manager, Mr Chris Escreet, at BQ to address certain grievances. Adolus proposed to the shop stewards that they proceed to head office for a meeting but Ngqisha explained that the employees had insisted that Escreet should meet them
20 at BQ.

A series of telephone conversations then took place. It appears that between 7:00 to 9:00 employees and the shop stewards remained steadfast in their refusal to return to work
25 and for the shop stewards not to proceed to head office. The
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demand continued to be made that Escreet come to the BQ site to meet the employees and the shop stewards. At 9:00 Escreet telephoned Ngqisha and repeated the demand to which I have made reference. Escreet advised that he had contacted
5 an official of the first respondent whom he had informed that he was willing to meet with the shop stewards but at appellant's head office. Transport would be made available to take the delegation to head office so that a meeting could take place.

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Various ultimatums then were raised. Of relevance is that eventually a meeting did take place at head office, in the afternoon, to discuss the grievances. The delegation of four shop stewards and three observers proceeded to head office
15 and a meeting took place with Escreet and other members of the appellant. Various issues were discussed. The delegation indicated that the workforce was unhappy that monthly meetings between managers and the shop stewards were not held regularly. The last monthly meeting had been held in
20 April 2010.

Appellant denied that communication was a problem but agreed, nonetheless, to hold monthly meetings with the shop stewards in the future. A further issue which was raised
25 concerned the employees' request, which apparently had been

raised previously, to adjust their working hours on Fridays on which date they were paid, to allow them to complete work two hours early and to “work” in the two hours lost during the course of the week. Appellant indicated that it maintained the position not to adjust working hours in accordance with this request, alleging it was not viable to so do.

A previous practice in terms of which the appellant would reimburse shop stewards for travel expenses incurred in attending meetings had been abolished in 2010. This issue was also raised. There was a complaint that the shop stewards had not been receiving faxes sent to them by the appellant. Appellant denied this but undertook to ensure that all correspondence which was generated between it and the first respondent would now be forwarded to the shop stewards.

According to the delegation, a long standing practice whereby the company had provided transport enabling employees to attend memorial services of colleagues had been discontinued in April 2010. This was denied by the appellant. A further concern was that according to the employees the appellant did not do enough towards training, whereas the appellant responded that all training was done in terms of a proper skills plan.

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At the end of the meeting, Escreet advised the delegation that disciplinary action would be taken against all those involved in the events of the day, notwithstanding that they returned to work in the afternoon. According to Escreet, this particular
5 decision was justified because in 2007 and 2009 some employees had participated, in what he had referred to as a wildcat strike.

The delegation reported the contents of the meeting to the
10 workforce and conveyed to Escreet that this report back had taken place. The second and further respondents, together with Alfred Mlonyeni and Elvis Lukheleni, was issued with notices to attend a disciplinary hearing initially scheduled for 8 September 2010 but which was eventually held on 15
15 September 2010. The charges against them were; 1) unprotected strike action on 23 August 2010; in that they refused to render service to the company as instructed; 2) gross insubordination in that they refused to render services after being instructed to do so by the company; 3)
20 unacceptable conduct in that they disrupted the business of the company and caused the company to suffer losses due to their unprotected strike action.

They were all found guilty as charged. The parties were then
25 invited to submit mitigating and aggravating evidence which
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was duly done on 28 September 2010. On 14 October 2010 the chairperson of the hearing recommended that they be dismissed but in the light of the appellant's attitude in this respect also recommended that the second and further
5 respondents be given a written warning, coupled with 3 months unpaid suspension as an alternative to dismissal.

In terms of this alternative, they were given until 15 October 2010 to revert to the management of appellant to submit that
10 they accepted the alternative sanction. On 15 October 2010 the appellant imposed a sanction of three months unpaid suspension, coupled with a final warning, effective as at 15 October 2010. On 28 October the first respondent referred an unfair labour practice dispute to the Commission of
15 Conciliation, Mediation and Arbitration ("CCMA") challenging the final written warning and the suspension to which I have made reference.

The matter was set down for conciliation on 23 November 2010
20 but could not be resolved. A certificate of outcome was issued. On 24 November 2011 appellant addressed a letter to the first respondent expressing the view that it was not open to the applicants to challenge the sanction imposed (pursuant to the alternative punishment) as it had been concluded by an
25 agreement.

Appellants recorded that should any employee protest the alternative sanction, to which I have already made reference, which was the case in light of the referral to the CCMA, the
5 appellant would consider the offer to have been rejected and would then proceed to impose a sanction of dismissal. The appellant invited the first respondent on behalf of its members to agree to the three month unpaid suspension coupled with a final written warning instituted on 5 October 2010.

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It recorded that, as an agreement was not forthcoming, the alternative sanction would be considered to have been refused and the sanction of dismissal would be implemented.

15 On 29 November 2010 the CCMA issued a notice setting down the case of unfair labour practices for arbitration on 28 January 2011. The following day appellant addressed a letter to the first respondent advising, in the light of the earlier correspondence, that it would now assume that the alternative
20 sanction had not been accepted and it would therefore implement the sanction of dismissal.

Dismissal notices were issued on 30 November 2010 and, as a result of these events, the matter came before the court *a quo*,
25 the result of which I have already set out above. I should add
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that Mr Mlonyeni was also issued with a dismissal notice, but as at 11 January 2011 he had withdrawn from the CCMA dispute. Mr Lukheleni was subsequently reinstated.

5 A range of legal issues were raised on appeal but the critical question which was put to counsel was whether the second and third respondents' dismissal was automatically unfair as contemplated in section 187(1) read together with section 4 and 5 of the Labour Relations Act 66 of 1995 ("LRA") in that
10 the respondents had been dismissed for carrying out the functions of a trade union or employees who acted as representatives (i.e. the delegation).

There were further questions relating to the acceptance or
15 non-acceptance of the alternative sanction but, as I have indicated, the primary issue which had to be determined in the first place was whether there had been an automatically unfair dismissal affected upon the respondents, pursuant to their capacity as shop stewards/representatives. The debate turned
20 on the initial question relating to the onus which applies in cases where there has been an allegation that a dismissal should be regarded automatically unfair.

In *Kroukam v SA Airlink (Pty) Ltd* 2005 (26) ILJ 2153 (LAC)
25 para 28 this court found that parties in the position of the
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respondents bear an evidential burden to produce evidence which is:

5 “Sufficient to raise a credible possibility that an
automatically unfair dismissal has taken place,
after which the company is required to produce
evidence to show that the reason for the
dismissal did not fall within the circumstance is
envisaged in s187 for constituting an
10 automatically unfair dismissal”.

If this Court drills down into the *dictum* in the *Kroukam* case, what must be borne in mind is that there is an overall onus placed on an employer to justify the dismissal. There is an
15 initial evidential burden which is borne by the employees, in this case the respondents, to raise the inference that the dismissal falls within the scope of unfair dismissals. See also
Ngoza & Others v Scorpions Legal Protection 2008 (29) ILJ
1039 (LC) at 1045 where it was held that the only onus upon
20 the employee in a s187 case is to prove that the dismissal falls within s187 of the Act.

In this case, the question which arises is the following: all of the employees were charged with participating in an
25 unprotected strike. Only the second and further respondents
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received the specific sanction of dismissal coupled to the alternative of three months unpaid suspension. That in itself must raise a question as to the reason for a difference between the treatment which was meted out to the
5 overwhelming number of participants in the unprotected strike as opposed to those who are before this court as respondents.

Framed in this fashion, a reasonable inference can be drawn that raises a credible possibility that the respondents were
10 discriminated against because they were the shop stewards or representatives of the employees. The appellant is required to rebut this inference and hence discharge the overall onus which rests upon it. In this case, the appellant must produce evidence to show that the reason for the dismissal was
15 because they instigated or promoted the strike, not because they acted in their capacity as shop stewards or representatives communicating the grievances of employees to management.

20 Mr Snyman, who tenaciously appeared on behalf of the appellant, contended that there was no other reason as to why a strike would have taken place with hitherto contented workers or, at the very least, workers who had never previously raised the kind of concerns which were now claimed
25 to be the cause of the strike. He submitted as evidence of

appellant's case that the concerns expressed at the meeting were those which affected the shop stewards and not the overwhelming number of participants in the strike.

5 It is unfortunate that an appeal should be based upon so incorrect a submission. The inaccuracy is evident from my summation of the facts. There were at least three aspects raised with Escreet which concerned the workers directly: The issue of the Friday work; the ability of employees to attend
10 funerals of colleagues; concerns in the relation to training. Contrary to Mr Snyman's submissions, these concerns were articulated, they were on the record and they were not exclusive to the shop stewards. It was patently incorrect to characterise the entire fabric of demands as falling within the
15 sole and exclusive concern of the interests of the shop stewards/representatives.

Mr Snyman also made, what I can only describe as a somewhat novel proposition. In his view, it is sufficient for the
20 employer to believe that it was the workers, faced with dismissal, who commenced and instigated the strike. No matter that this particular perception is then shown to be incorrect, it remained sufficient to justify the dismissals. This legally unsubstantiated submission runs counter to the very
25 culture of rationality and justification which was introduced by
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way of the Labour Relations Act into workplace governance.

In a case such as the present, if a decision is made to dismiss the group of workers, it is not sufficient for the employer to
5 rely on a figment of his imagination, however much that imagination has been conceived in good faith. The decision must be linked to a reasonable inference which a reasonable employer could draw from the evidence read as a whole. When Mr Snyman was invited by this court to provide clear
10 evidence, in effect all he could produce was an assertion by Mr Escreet that the latter believed that the only reason that the strike had taken place was due to the actions of the respondents.

15 It may well be that Mr Escreet, proudly holding to a record which had shown little by way of industrial turbulence under his watch, could not bring himself to accept that there were justifiable and plausible reasons as to why the employees were sufficiently angry to have ceased working and thus demanded
20 a meeting. To the argument which was raised that, after a few hours, everyone returned to work and that therefore those who ended the strike by informing the workforce of the contents of the meeting were the same who started it, the answer is that this again is based solely on a belief of Escreet, which has no
25 justification on the evidence read as a whole.

I am inclined to agree with Mr Kahnowitz, who appeared on behalf of the respondents, that when the evidence is read as a whole, it appears that what the appellants argued was that
5 somehow one morning a 120 generally happy but gullible workers were herded like sheep by a handful of agitators who incited them to down tools for no inconceivable reason.

Accordingly, on this ground alone, and given appellant's
10 concessions that there was no direct evidence to support its decision, the respondents were subjected to more severe treatment. Mr Kahnowitz said that the justification which does not rest on evidence amounts to the following; the event could not have happened without leaders; the respondents'
15 witnesses were poor and their denials could not be believed; it must therefore follow that Escreet's opinion that those who came to the meeting were instigators.

As I have indicated, this is not sufficient evidential basis to
20 discharge the onus which rests on appellant in circumstances where at least *prima facie*, the respondents have raised the point that there is no credible reason as to why there should be discrimination between one group and the other. The facts appear to describe a situation whereby workers were
25 disgruntled, shop stewards/representatives communicated this
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to the appellant's representatives. A meeting was held, the workers, after a report from the delegation, returned to work. Respondents were then handed a sanction which was entirely different from that imposed upon the balance of the
5 participants in the strike.

There is no credible reason for this differentiation on the evidence other than as shop stewards/representatives they were singled out for special treatment. It is correct that the
10 Act does not provide blanket protection for shop stewards. They have an obligation to their employers to conduct themselves responsibly and in a manner which is conducive to industrial peace.

15 As was held in *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd* 2010 (31) ILJ 387 at para 42 if worker representatives –

20 “...engage in disorderly or disrespectful conduct (although it was acknowledged that it is not always clear to what extent such behaviour should be tolerated by an employer), they can be disciplined. I agree with the submission that the test would seem to be whether a shop steward's conduct can be said to fall within the
25 realms of fair and acceptable bargaining conduct and

whether it can be said to be reasonably related to the performance by the shop stewards of their functions as such. I am further in agreement that if a shop steward's behaviour does not satisfy this test and the employer takes disciplinary action they cannot rely on the privileges that are otherwise attached to their position".

This approach is an accurate reflection of the law. It is also correct to say that one of the reasons for s187 is that it protects those who represent workers when they conduct themselves in terms of the mandate given to them and the roles which they have, in this case as shop steward/representative or part of a worker delegation. If they are to be discriminated against, the notion of industrial democracy and of meaningful representation which is fair and fearless would be guttered by the kind of conduct which was evident from the appellant in this case.

There is no plausible basis by which, in this case, on the available evidence, a court could come to any other conclusion, in my view, than that these respondents had communicated complaints to the appellant, that they performed their designated tasks and that there was no evidence of a credible nature other than the belief of Escreet, to conclude that they had engaged in disorderly, disrespectful, /RG /...

irresponsible conduct beyond that which was within the scope of their mandate as shop stewards/representatives.

It is clear that the initial argument raised, namely whether the dismissals were automatically unfair as contemplated in section 187(1) read together with sections 4 and 5 of the LRA, was correctly upheld, albeit that there were further findings by the court *a quo*. On its own this particular conclusion is sufficient to dismiss the appeal.

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Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo*, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.

There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal “no-man’s-land” and have to wait years for an appeal (or two) to be prosecuted.

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This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be
5 determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.

10 I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law,
15 that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.

20 **IN THE RESULT THE APPEAL IS DISMISSED WITH COSTS.**

DAVIS, JA

25 **MOLEMELA & SUTHERLAND AJA AGREED**

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