

REPORTABLE

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO: D235/03

In the matter between:

**THE SOUTH AFRICAN TRANSPORT
AND ALLIED WORKERS UNION**

First Applicant

NDLOVU AND 11 OTHERS

Second and further Applicants

and

IKHWEZI BUS SERVICE (PTY) LIMITED

Respondent.

JUDGMENT

CORAM : A VAN NIEKERK AJ

Introduction

- 1 The first applicant is a trade union. The second and further applicants ('the individual applicants') were members of the union, employed by the respondent as bus drivers. The respondent operates a bus service in northern KwaZulu Natal, in the Empangeni and Richard's Bay districts.

- 2 The individual applicants were all dismissed by the respondent on 3 December 2002. Consequent on their dismissal, the union and the individual applicants referred an unfair dismissal dispute to the CCMA. A certificate of non-resolution of the dispute was issued on 9 January 2003. For reasons that are not apparent, the union pursued this matter with a degree of vigour less than that which its members were entitled to expect. The matter was ultimately enrolled for hearing in March 2008, more than 5 years after the date of dismissal.
- 3 At the commencement of the trial, Mr Schumann, who appeared for the applicants, advised the court that no relief was sought in respect of the 5th and 7th applicants. The trial proceeded in respect of the remaining applicants. The applicants do not challenge the procedural fairness of their dismissals, nor do they pursue the allegation raised in the papers that they were selected for dismissal in circumstances where members of another union were not.
- 4 The evidence led at the trial canvasses numerous aspects of the case, but also raises a crisp legal point which in my view, is decisive of the applicants' contentions. I intend therefore to proceed, as far as is practicable, based on the facts that are common cause, dealing with disputed areas of evidence when necessary.

- 5 The company operated a parking area at Esikhaweni, where drivers parked their buses at the end of a shift. After incidents of arson and the theft of diesel that occurred at Esikhawini, the company did not renew its lease of the parking ground and required bus drivers to drive their buses to the Alton depot on completion of their shifts. The union contends that in consideration for the requirement that buses be parked at the Alton Depot, they would be paid overtime. The company contends that what was promised was payment for overtime if and only if drivers exceeded the maximum ordinary hours of work prescribed by the applicable wage regulating measure. This issue was raised as early as April 2002, in discussion between the company's management and union representatives, following a work stoppage during that month.
- 6 On 15 October 2002, the union addressed a letter to the company, raising issues relating to the role of a disciplinary officer and the need for drivers' uniforms. The company responded by agreeing to meet on 22 October 2002.
- 7 On the afternoon of 15 October, 28 of the company's bus drivers failed to return their buses to the Alton Depot, and instead parked them at the old parking ground at Esikhaweni. On 16 and 17 October, an additional 29 drivers refused to return their buses to the Alton Depot as required and parked the buses at Esikhaweni.

- 8 The buses were returned to the Alton depot on 18, 19 and 20 October 2002. On 21 and 22 October, buses were again left overnight at Esikhaweni. The company then applied to this Court for an order declaring that the refusal to complete shifts and leaving buses at Esikhaweni constituted an unprotected strike, and for an interdict restraining the respondents from participating in the strike.
- 9 On 23 October 2002, this Court granted a rule nisi in terms of which the respondents were *inter alia* interdicted, pending the return day, from participating in the strike
- 10 The company and the union held a meeting on 24 October 2002 at which issues arising from the application for the interdict were discussed. The company's version is that after a caucus, the union representatives present made a commitment that the buses would be parked at the Alton depot, with effect from the same afternoon. A statement to this effect is recorded in the minutes of the meeting.
- 11 On the afternoon of 24 October 2002, the drivers again parked their buses at the Esikhaweni parking ground. On 25 October 2002, the company's attorneys addressed a letter to the union alleging the existence of the unequivocal undertaking given at the meeting, the breach of that undertaking and giving notice of an application to

hold the drivers concerned in contempt of Court.

12 On 28 October 2002, this Court granted a *rule nisi* calling on the respondents to show cause why their failure to comply with the order granted on 23 October should not constitute contempt, and why they should not be sentenced to 30 days imprisonment.

13 On 30 October 2002, three drivers participating in the strike were charged with various acts of misconduct. Disciplinary enquiries were duly convened, chaired by an independent person, Mr Robinson Manzi. On 22 November 2002, the employees were found guilty of the charges against them. The chairperson recommended that they be dismissed.

14 On 30 November 2002, the eleven individual applicants were suspended, and on 3 December 2002, they were dismissed. An appeal against the dismissal was unsuccessful.

15 On 4 December 2002, by consent, the *rule nisi* issued by this Court on 28 October 2002 was confirmed in respect of the individual respondents, subject to the deletion of paragraph 2(b) of the order i.e. that part of the order which committed the individual respondents to prison for their contempt.

16 The basis on which the individual applicants were selected for

dismissal is central to these proceedings. The company's case is that despite the chairperson's recommendation, it did not wish to dismiss all the drivers. Mr Myburgh, who testified for the company, stated that there was a shortage of drivers in the transport and freight sectors, and that the company had to consider the losses it would suffer if it were to implement the recommendation that all of the drivers who participated in the strike be dismissed. The company's management elected to review the disciplinary records of those employees who had been found guilty of misconduct, and to dismiss only those whose records reflected final warnings for prior misconduct. The company also decided to dismiss the shop stewards, none of whose records disclosed final warnings. It did so on the basis that they had made a commitment in the meeting held on 24 October, and that the breach of their commitment had compromised the relationship of trust between them and the company.

- 17 The applicants argued that the dismissal of all of the individual applicants was unfair since it had been effected in breach of what has become known as the 'parity principle' This principle, expressed broadly, requires that workers who engage in the same misconduct should be treated alike. Expressed more narrowly, the applicants argued, it means that it is not justifiable for an employer to refuse or fail to distinguish between individual and collective

misconduct when administering discipline. In other words, it is not legitimate for an employer to draw distinctions between employees, as the company did, on the basis of warnings issued in respect of prior individual misconduct when a sanction for collective misconduct is under consideration.

- 18 The applicable legal principles have evolved over the last 15 or so years. In *National Union of Mineworkers & others v Amcoal Collieries & Industrial Operations Ltd* (1992) 13 ILJ 1449 (LAC) the employer had dismissed approximately 1000 workers on account of their participation in an illegal strike. All of the employees were subjected to disciplinary action on a charge of absence from work, but not all of them were dismissed. Each case was considered on its merits, and a decision made on whether dismissal was appropriate. All of the dismissed employees had final warnings, but not all employees with final warnings were dismissed. The majority of the Labour Appeal Court, as it was constituted under the 1956 Labour Relations Act, held that the employer's conduct was not unfair. In doing so, the Court rejected the argument that the dismissals were unfair on account on any inconsistency, or because the employer had categorised participation in collective action as an act of individual misconduct for the purposes of its disciplinary code. What is immediately apparent from the terms of this judgment (and what distinguishes it from the judgments referred to below) is the

fact that the employer charged employees who had participated in collection action, on an individual basis, with the offence of absence from work, without either referring to or otherwise bringing into account the fact that the absence was collective in nature.

- 19 In *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd* (1995) 16 ILJ 1371 (A), what was formerly known as the Appellate Division of the Supreme Court held that a dismissal effected in similar circumstances was unfair. The Court held that the misconduct of those employees who had been dismissed was of substantially the same kind and degree as those who had been issued with warnings, and on that basis, the dismissals were held to be unfair.
- 20 In *SACTWU & others v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC), this Court held that that it was inappropriate for an employer to take into account warnings given for individual action when it considers an appropriate sanction in respect of collective action (see para [45] of the judgment). (Although the reported judgment reflects that Mlambo J was the presiding judge, Zondo AJP notes in *NUM & another v Amcoal Colliery t/a Arnot Colliery & another* [2000] 8 BLLR 869 (LC), that he gave judgment in the matter). The Court stated:

'For the above and many other reasons which have

been stated in some of the various judgments referred to above, I conclude that it is inappropriate for an employer to take into account warnings given for individual action when he considers an appropriate sanction in respect of collective action. Accordingly in this case the respondent acted unfairly in taking into account warnings given for individual misconduct as this ultimately resulted in workers who were guilty of exactly the same conduct being disciplined on a differential basis. In my view, the dismissals were, therefore, unfair.'

- 21 In *NUM & another v Amcoal Colliery t/a Arnot Colliery & another* [2000] 8 BLLR 869 (LAC), the Labour Appeal Court considered the fairness of the dismissal of a group of employees who had been dismissed for failure to comply with an instruction. The employees had been found guilty of the charge. Two of the employees in the group were dismissed, based on final warnings issued for prior misconduct. The Court dismissed an appeal against a finding by the industrial court that the dismissal was fair. Mogoeng AJA noted:

'The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence. a disciplinary record may justify differentiating between employees guilty of the same offence'.

- 22 Zondo AJP records, in a separate judgment, that his agreement with the judgment of Mogoeng AJA should not be construed being in conflict with his judgment in *SACTWU & others v Novel Spinners*. He said:

‘What was argued by the appellants in this case about previous warnings is not the same point as the one that was argued by the applicants in the Novel Spinners case. In Novel Spinners, it was argued that an employer is not entitled to take into account previous warnings which were in respect of individual misconduct when considering what sanction to impose in respect of collective action. In this case, the appellant’s case, upon a proper analysis of the statement of claim and the heads of argument, was that, by virtue of the fact that the conduct for which the previous final warnings had been issued was not related to the conduct in respect of which the respondent had to decide an appropriate sanction, the employer was not entitled to take such previous warnings into account. These are different points. In my view the former has merit, the latter none.’

- 23 In *Coca Cola Bottling East London v Commission for Conciliation, Mediation and Arbitration & others* (2003) 24 ILJ 823 (LC), this Court referred both to the *Free State Consolidated Gold Mines* and *Novel Spinners* judgments and refused to review and set aside an arbitration award finding a dismissal unfair in circumstances where the employer had dismissed employees on final warnings for acts of individual misconduct for their participation in collective misconduct.
- 24 Mr Schumann submitted that this Court was bound by the *Free State Consolidated Mines* judgment, since it was a judgment of the Appellate Division of the Supreme Court, renamed the Suppressor Court of Appeal. I agree with that submission, and I fail to appreciate any basis on which that case, as Mr Seggie (who appeared for the company) submitted, is distinguishable from the

present. Any doubt as to whether or not the *Free State Consolidated Mines* judgment rests on the principle at stake in these proceedings (ie whether prior disciplinary action for individual misconduct can be taken into account in determining an appropriate sanction for later misconduct of a collective nature), has been removed by the later judgments of the Labour Appeal Court and of this Court, all of which I have referred to above.

- 25 In summary: an employer is entitled in general terms to impose different penalties on different employees for the same act of misconduct, provided there is a fair and objective basis for doing so. When an existing disciplinary record is the differentiating factor, prior disciplinary action short of dismissal (in particular, warnings) can be relevant in two ways. If the disciplinary record of one employee discloses prior disciplinary action short of dismissal this can (I would suggest must) be taken into account when the employer decides on an appropriate sanction. Thus, in general terms, the nature and extent of prior sanctions can legitimately form the basis of a differentiation in penalty, even when the nature of the misconduct differs. An exception applies when the employer considers an appropriate sanction for misconduct that is collective in nature. In this instance, prior disciplinary sanctions for individual misconduct cannot be used to justify a differentiation in penalty. The employer has no choice but to impose the same sanction in

respect of all employees engaged in the collective misconduct. However commercially compelling the considerations to which Mr Myburgh referred in his evidence may have been at the time, they were not a legitimate basis on which to select for dismissal only those employees whose disciplinary records disclosed final warnings for acts of misconduct.

26 The evidence of certain of the individual applicants who testified suggested that the final warnings on which the company relied in selecting those who were to be dismissed were questionable, and that some of them at least, testified that they had no knowledge of the warnings in question. Since I intend to decide this issue on the applicable principle, I need make no finding in this regard. I would note though, in passing, that the disciplinary records on which the company relied and the basis on which warnings appear to have been issued, leaves much to be desired.

27 It follows from the applicable legal principles that on the company's own version, the dismissal of the individual applicants who were selected for dismissal on account of final warnings issued in respect of individual acts of misconduct, was unfair.

28 I turn now to the shop stewards. Shop stewards occupy an ambiguous position since they are subject to the employer's

disciplinary authority while they act as intermediaries between the employer and union members. While shop stewards cannot claim special privileges arising out of their role as employees, the performance of their duties as such cannot in itself constitute a disciplinary offence, and they must have committed an act normally categorised as misconduct for any disciplinary action against them to be justified. (See Grogan *Dismissal, Discrimination and Unfair Labour Practices* at 390-1).

- 29 The basis of the selection of the shop stewards for dismissal, as I noted above, is an alleged breach of a commitment made to management representatives in the meeting held on 24 October 2002. None of them had final warnings on record. Mr Myburgh's evidence was that the shop stewards had been dismissed because they had breached the relationship of trust placed in them by the company. The fact that the buses were not returned to the Alton depot that afternoon, and the fact that shop stewards had failed to return their own buses, underpinned this breach. I have little hesitation in accepting the company's version of events in relation to the meeting held on 24 October 2002. The version proffered by the individual applicants is inconsistent with the minute of the meeting (admittedly taken by management), the company's version of events on 24 October 2002 is consistent with the affidavits filed in the application to this Court during October 2002, and none of the

averments in these affidavits relating to the events of 24 October 2002 were then contested or denied by the applicants. However, I fail to appreciate how, given the principle established by the Appellate Division in *Free State Consolidated Mines* and applied by this Court since, the shop stewards' conduct at the meeting or afterward is a legitimate basis on which to select them for dismissal. If, as a matter of principle, prior individual misconduct may not form a legitimate basis for the selection for dismissal of some employees from a group guilty of the same misconduct, I fail to appreciate how it is legitimate to select employees for dismissal on the basis of their contemporaneous conduct. If there was any breakdown of trust (as the company alleges) that breakdown must necessarily have extended to all of the employees who participated in the unprotected strike. The selection of the shop stewards for dismissal from a group of employees all found guilty of the same collective misconduct was not justifiable. Further, the shop stewards had never been charged with any offence relating to a breach of trust or confidence in them; the disciplinary enquiry was conducted only in respect of charges relating to the strike and its aftermath. Selecting the shop stewards for dismissal on charges that were never the subject of any investigation against them or any opportunity for them to state a case in response to the allegations that ultimately formed the reason of their dismissal, was internally unfair. If the company's contention was that the shop stewards had at the time

been guilty of offences in addition to those which related directly to participation in the strike, these offences ought to have been included in the charges levied against them at the enquiry conducted by Mr Manzi. In short, I am not persuaded that at the meeting the shop stewards gave personal undertakings of a nature and extent that justified their selection for dismissal.

30 In summary, the basis employed by the Company to select the individual applicants for dismissal was not legitimate, and their dismissals were substantively unfair.

31 I turn now to the proceedings concluded in this Court on 3 December 2002. The applicants conceded that the order to the effect that the individual applicants were in contempt of Court had been granted by consent. Mr Schumman submitted that the finding of contempt was nevertheless of no force and effect, since it was in effect a finding that the individual applicants concerned were criminally liable, made in circumstances where they were not present and where their representative, in law, was not entitled to consent to the order. There is no merit in this submission. Criminal contempt is constituted by conduct that is disrespectful to the Court, for example, the interruption of court proceedings, or wilful insult. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. Committal to prison for civil contempt is a

mode of procedure aimed at enforcing court orders in civil proceedings (See Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th Edition at 815). The proceedings instituted in this Court were in the nature of contempt in the form of civil contempt. Although civil contempt may also bear the character of a criminal offence, this was not the form of contempt that formed the subject of the application. It was entirely competent therefore for the union official concerned to consent to the order, as he did, on behalf of the individual applicants. The individual applicants themselves testified in these proceedings as to the collective nature of decision-making in trade union structures, and this Court has on numerous occasions held union members bound by the decisions of union officials.

- 32 In regard to remedy, Adv Schumman conceded that in view of the time taken to prosecute this matter, the principle established by *Republican Press (Pty) Ltd v CEPPWAWU & Gumede & others* [2007] 11 BLLR 1001 (SCA) applies, and confirmed that the applicants sought only compensation for their unfair dismissal. The individual applicants gave evidence as to their attempts to obtain employment after the date of their dismissal. The majority of them found no employment, or employment of only a temporary nature. Ordinarily, the applicants would have been entitled to claim the maximum compensation permitted by the Act i.e. the equivalent of

12 months' remuneration. In the present circumstances however, given the individual applicants' contempt of this Court prior to their dismissals, I consider that a lesser amount of compensation is justified. An amount of six (6) months' compensation is equitable and appropriate.

33 I accordingly make the following order:

1. The dismissal of the individual applicants was substantively unfair.
2. The individual applicants (with the exception of the 5th and 7th applicants) are each awarded compensation in a sum equivalent to their remuneration for a period of 6 months, calculated at the rate payable to them on the date of dismissal.
3. There is no order as to costs.

ANDRE VAN NIEKERK,
Acting Judge of the Labour Court

Date of Hearing: 17 – 20 March 2008

Date of Judgment: 11 July 2008

APPEARANCES

Advocate for the Applicants: Advocate Paul Schumann

Attorneys for the Applicants: Von Klemperers

Advocate for the Respondent: Advocate Rob Seggie

Attorneys for the Respondent: Tomlinson Mnguni James