



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS468/09

In the matter between:

NEHAWU

Applicant

and

AIRPORTS COMPANY SOUTH AFRICA

Respondent

Heard: 21-25 November 2011, 05-08 December 2011 and 21-24 February 2012

Delivered: 06 December 2012

Summary: Unfair dismissal. Applicant accused of having participated in a go-slow. The respondent failing to adduce evidence to show that the applicants committed offences they were charged with.

JUDGMENT

MOLAHLEHI, J

- [1] This matter concerns the alleged unfair dismissal of four shop-stewards who were dismissed arising from the incidents that occurred on 26, 27 and 28 August 2008. The applicants contend that their dismissal was automatically unfair

because they were dismissed for doing their work as shop-stewards. They also, in the alternative, contend the dismissals of each one of them were substantively unfair.

- [2] The respondent contends that the dismissal which arose out of an unprotected strike action in the form of a go-slow was for a fair reason. The respondent further contends that the alleged unprotected strike lasted for an hour on each of the days. The reason for the dismissal of the shop-stewards was mainly because they were accused of inciting the other employees to engage in the unprotected go-slow. The respondent further contends that the employees had previously during 2007 embarked on an unprotected industrial action and were issued with final written warnings.
- [3] The respondent operates a shift system and it was group 3 shift that the respondent alleges participated in the go-slow on both days. The respondent provides security services which have been declared essential service at OR Tambo International Airport, which is also the national key point.
- [4] The employees, as appears below, were dismissed on different dates and accordingly referred their alleged automatically unfair dismissal to the CCMA. The four cases as were referred to the CCMA were consolidated into one case by this court.
- [5] The dismissed employees were prior to their dismissal employed as security officers and one of them as a surveillance analyst, by the respondent. As indicated above, they were dismissed on different dates. Below is a schedule that indicates the different dates of dismissal, the wage rates of each as at the date of the dismissal.

Name of applicant	Date of dismissal	Monthly salary
5.1 Mr Tiro	28 January 2009	R5 364.00

5.2	Ms Mguye	30 October 2008	R5 715.00
5.3	Mr Sithole	19 February 2009	R8 198.00
5.4	Mr Nompuku	20 March 2009;	R6 605.00
5.5	Mr Magugu	22 December 2008	R8 652.00

- [6] The case of Ms Mguye, no longer forms part of these proceedings the parties having reached a settlement agreement regarding that matter.
- [7] The applicants' case is that their dismissal was automatically unfair as the respondent acted contrary to section 5 of the Labour Relations Act of 1995 (the LRA)¹ by victimising and discriminating against them in contravention of section 187 (1) of the LRA². In the alternative, the applicants contend that the dismissals

¹ The relevant provisions of Section 5 (1) of the LRA reads as follows: (1) No person may discriminate against an employee for exercising any right conferred by this Act.

² Section 187 of the LRA reads as follows: 187. Automatically unfair dismissals

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5⁴⁹ or, if the reason for the dismissal is- that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;⁵⁰
- (a) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
 - (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
 - (d) that the employee took action, or indicated an intention to take action, against the employer by-
 - (i) exercising any right conferred by this Act; or
 - (ii) participating in any proceedings in terms of this Act;

were unfair in terms of section 188 of the LRA. Each of the applicants has prayed for reinstatement if they were to be successful in their claims.

Background facts in general

[8] The tension that led to the dispute between the parties seems to have arisen on the 4 August 2008, when Mr Tiro addressed an email to the respondent's managing director, raising a number of issues which were referred to as "long outstanding employment issues." The issues raised in the email includes; salary disparity, employee empowerment, the "mushrooming of contractors," transformation, management leadership style, lack of union involvement in key decision-making, hostility towards employees and further that the employees have been worse off since the managing director joined the respondent. It was further indicated in that e-mail that the union was intent on not honouring the road-show which had been arranged by management for 27 August 2008, unless these issues were resolved. The managing director, Ms Hlahla, responded on the same day and indicated that the road-show was a business imperative which was critical in relation to the operational plans for the 2010 Soccer World Cup.

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- (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
 - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
 - (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
 - (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.
- (2) Despite subsection (1)(f)-
- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
 - (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

[9] The respondent regarded the refusal to participate in the road-show as a business risk because that had a potential to impact negative on the business plan. The respondent is required to regularly submit business plans in terms of the Airports Company Act, 44 of 1993 (the Act) as failure to do so could result in the Regulating Committee suspending or withdrawing the respondent's licence. According to the respondent, it was necessary for the employees to attend the road-show in case the committee was to require information in terms section 12(4) of the Act.

[10] The managing director advised the shop-stewards to raise the employment issues they had through the established employment forums. According to the respondent, it experienced long passenger queues following the refusal by the shop-stewards to join the road-show. The respondent says it received complaints from both the airlines and passengers about the long queues. The respondent relying on the video clippings which were shown in the court says the following are facts that support their averment that the employee embarked on a go-slow:

- 5.1 'Equipment placed deliberately so as to block the flow of passengers;
- 5.2 Passengers waiting and not being processed;
- 5.3 Staff "standing around", as Mr Serobe commented "nothing is happening,"
- 5.4 Passenger queues snaking all the way to check-in counters;
- 5.5 Buckets piling up and not being sent back for passengers to use;
- 5.6 An employee (Hlengiwe) hiding buckets underneath the roller belt; and
- 5.7 "Very soon" after replacement labour (G4) arrived, operations normalise.'

[11] It is common cause that the employees of group 3 who were charged with participating in the go-slow were issued with final written warnings and not dismissed.

[12] As indicated earlier, the applicants contend that their dismissal by the respondent was automatically unfair or alternatively substantively and procedurally unfair.

[13] The applicants were charged individually and separately. Their charges were, however, very similar. In the case of Mr Magugu, he was charged with an additional charge of deserting his post by leaving the control room to attend at the terminals. The charges which were proffered against the individual applicants are essentially the same and were formulated along the following lines:

- '1 Incitement in that you incited, promoted that employees should participate in unprotected industrial action at the domestic and international terminals on the 27th August 2008;
- 2 Promotion of unprotected industrial action in that you congratulated employees who participated in unprotected industrial action on the 27th August 2008 at the parade room;
- 3 Gross insubordination in that you refused the Head of Security to address employees who participated in industrial action on the 27th August 2008;
- 4 Breach of essential service exemption in that you were fully aware that Security Services cannot embark on unprotected industrial action as per the Department of Labour Government Gazette: Notice 304 of 2008;
- 5 Breach of Recognition Agreement in that you breached the recognition agreement in terms of clause 8.
- 6 Breach of Recognition Agreement in that you breached the recognition agreement in terms of clause 17.1.'

The case of Mr Tiro

[14] In support of its case that the dismissal of Mr Tiro was for a fair reason, the respondent relied on real evidence in the form of video clippings of what happened on the days in question including the testimony of several witnesses.

Mr Tshabalala was the first to testify relating to the dismissal of Mr Tiro. He testified firstly about the email which Mr Tiro addressed to Ms Hlahla and copied to the management team.

[15] Paragraph 6 of the email which was read into the record reads as follows:

‘On 21 July 2008 the union held a general meeting and a resolution was passed to refrain from participation in the 2010 road show organised by the employer. The union took this resolution because it was of the view that the employer either did not want to or refused to commit itself to resolving long outstanding employment issues.’

[16] The managing director responded to the email and stated the following:

‘There are adequate forums for you to deal with the issues you have raised, and you must utilise them fully to the benefit of everyone in the company. The ACSA labour-management process also provides you with avenues to deal with disagreements and disputes. Please use them fully and avoid situations that will make it impossible for ACSA to deliver its licence to operate its obligation to the country.’

[17] The procedure which the managing director was referring to in her email is clause 17 of the recognition agreement which reads as follows:

“Either party may declare a dispute within five working days of the dispute arising by presenting a written notice to the other party, which notice shall set out the nature of the dispute and the comment the resolution to the dispute.”

[18] In relation to the events of 26 August 2008, Mr Tshabalala, testified that Mr Serobe reported to him that there was a problem at international north in that there were long queues of passengers. He then instructed him to go there to check what was happening. The details regarding the checking process and the time it took to conduct the checking of passengers, which has been referred to briefly above, is not relevant for the purpose of this judgment as the existence of the long queues was not seriously challenged by the applicants.

- [19] Mr Tshabalala testified that whilst at the checking point he was confronted by Mr Mabena, the chairperson of the union. He stated that he took him aside and enquired from him whether he was aware of the chaos that was going on. Concerning the possible cause of the go-slow, Mr Tshabalala says he was informed by Mr Serobe that it was possibly because of the issue of the payment of overtime. The respondent did not dispute the problem of the overtime payment. The cause of the non-payment of the overtime was because of the change in the salary payment system that the respondent had introduced.
- [20] The discussion between the two ended with Mr Mabana undertaking to speak to the employee about their alleged conduct. The situation returned to normality after Mr Mabena spoke to the employees and that took about 20 minutes.
- [21] On 27 August 2008 and on his return from the road show, Mr Tshabalala received a report from Mr Serobe that there were long queues at domestic terminals. He then instructed Mr Serobe to deploy the G4S security who had been placed on standby the previous day as a contingency plan in case the alleged industrial action was to continue the following day. He then moved from international departure where he was based and preceded to domestic terminals. On arrival there, he was approached by Mr Sithole and Mr Nompuku who said that they wanted to engage with him on what was happening. He refused to engage with them and told them that if they had an issue they should have phoned him. He further told them to get their members into the rest room so that he could address them. They both according to him told him that he could not address their members. They persisted with the attitude even after he told them that they had no right to stop him from addressing the employee and persisted with their attitude even after he told them that what they were doing was gross insubordination.
- [22] According to Mr Tshabalala, Mr Sithole and Mr Nompuku informed him that they wanted to address their members. He permitted them to do so and after 15

minutes, the employees came out of the rest room and handed over their identity cards and left.

- [23] During cross examination, Mr Tshabalala conceded that Mr Tiro was not on duty on the 26 and 27 August 2008. He also conceded that the employees who participated in the go-slow on those days were not dismissed but were given final written warnings. It took some effort to have Mr Tshabalala to concede that it took 20 minutes to resolve the problem of the long queues. He further stated under cross examination that the go-slow went on for about 45 minutes.
- [24] Another concession which Mr Tshabalala made was that his evidence was in conflict with some aspects of what was shown on the video clip, in particular as concerning the arrival of Mr Mabena at the domestic terminals. He also conceded after a lengthy cross examination that he could not provide an explanation why the evidence that he gave the previous day and during the morning of 22 November 2011 was in conflict with what was shown on the video clip in particular about the arrival of Mr Mabena and his testimony that the employees checked every passenger's bags.
- [25] In relation to the video clip that showed one employee removing the bucket, Mr Tshabalala presented a version that did not only sought to say that what the employee was doing was wrong but also that it was indicative of a go-slow. It was however more than an effort to get him to explain as to why if that was wrong what that employee was doing, was she not confronted by a supervisor about it.
- [26] Mr Tshabalala says that he was not there when the two shop stewards approached Mr Serobe. He later says he was with Serobe when the two shop stewards arrived and in fact told the employees to go into the rest room. He in this respect disputed the applicants' version that he was not there when they arrived at the domestic terminal.

[27] As concerning the allegation that the employee handed in the cards as they were leaving the rest room, he conceded that management stood outside the door leading into the rest room and collected the cards from the employees.

[28] The conversation between Mr Tshabalala and the two shop stewards, in relation to the allegation of insubordination arising from the shop-stewards refusing him to speak to the employees, is quite telling when assessing the fairness of the dismissal. Contrary to the picture he sought to present with his version, there is very little, if any, evidence that support that version. The picture that comes out of the analysis of the conversation between the three as presented by Mr Tshabalala reveals nothing but a fabrication. That together with other aspects of his testimony projects him as a very subjective and unreliable witness. The conversation between them as presented by Mr Tshabalala, and which is quite telling, is recorded as follows in the transcript of the proceedings:

‘Mr Tshabalala, you cannot speak to our members.’ The response from Mr Tshabalala was: “You do not have any right to tell me when to address the staff members. I am the manager of security, I need to go and discuss with the members.”

[29] At that stage the shop stewards were according to him standing in front of him. He then said to them:

‘You are shop stewards, you cannot dictate to me when I must address the staff members.’

[30] On his version, after being told that he could not speak to employees and after some altercation with the shop-steward he then surprisingly says to them:

‘You can go ahead and address your members.’

[31] It would seem, following on the chronology of his testimony, that after giving the two shop stewards permission to speak to their members he then said the following to them:

'I am warning you, what you are doing is gross insubordination . . . it totally unacceptable.'

- [32] At some point during cross examination, Mr Tshabalala said that he gave the employees five minutes within which the shop stewards were to address their members. A simple point like this took some effort for him to concede that this point was not made earlier in his evidence in chief. He also evaded the question as to why did he not mention this point earlier. It was also apparent that whenever he was confronted during cross examination with the stark contrast in his earlier version he would seek refuge in the lapse of time since the incident took place. This, in my view, did not assist him because this applied even to a version which was set out in the respondent's pleadings.
- [33] The strange thing about the case of the respondent is that it is pitched on the high note of the sensitivity of risk to security because of the environment within which it operates but at the same time Mr Tshabalala says he did not want to solicit the assistance of the police who were present at the time, in bringing order to a situation which was both a threat to the respondent's business operations and conduct that was not only criminal but contravened the principles that locates the respondent within the national key point.
- [34] The other witness who testified in support of the respondent's case that the dismissal was for a fair reason was Mr Munengwana, who was at the time head of security for Group 3. He testified that after the employees went into the rest room on the day in question, Mr Tshabalala proceeded to the rest room but was denied access to the restroom by Mr Sithole and Mr Nompuku.
- [35] As concerning what transpired at the parade Mr Munengwana testified that he arrived at the parade at about 13:30 and five minutes after his arrival, the shop stewards requested that they be allowed to address their members at the parade. The shop stewards that addressed the parade were Mr Sithole, Mr Nompuku, Mr Sadike and Mr Prince Mabena.

- [36] According to Mr Munengwane the first person to address the parade was Mr Sithole who told the employees that there was nothing wrong with what they did the previous day and that he was “encouraging you to go and comply as you did yesterday.” This statement was according to him repeated by Mr Nompuku. Mr Mabena also spoke and essentially repeated what was said by Mr Sithole. The other person who spoke at the parade was Mr Magugu who according to Mr Munengwane, told the parade that he had checked the cameras as to what happened the previous day and found that there was no deviation from the standard of working.
- [37] Mr Munengwana conceded when asked about the possibility that the slow processing of passengers and development of the long queues could have been that there were no supervisors at the time of the changeover of the shifts, and also that he was not there at the time. He conceded that if the changeover of the shifts were not going smoothly then the role of the supervisor becomes crucial. He also conceded that the long queues could on that particular day have been caused by uncooperative passengers, by for instance failing to remove their cellular phones resulting in delaying the others in the queue. This he accepted as a variable that even with the best plan cannot be anticipated and be controlled.
- [38] In contrast to what Mr Tshabalala said in relation to what transpired between him and the shop steward, Mr Munengwana said that the shop steward physically blocked Mr Tshabalala from entering the rest room.
- [39] Mr Munengwane further conceded that he did contact Mr Sadiki who was on duty on 26 August 2008 to inform him that management had a problem because employees were on a go-slow. When questioned why did he not speak to a shop steward about the problem of a go-slow he stated that he spoke to the employees and that the respondent did not have a procedure that directed that management should speak to shop-stewards whenever there was a go-slow. However he did not disagree when it was put to him that if the employees were involved in an procedural action, he needed to deal with the union. He also

conceded that there was no entry in the occurrence book (OB) regarding the alleged go-slow on the 26 August 2008.

- [40] The other concession made by Mr Munengwane is that he never confronted the shop stewards when they allegedly told the employee to continue working as they did the previous day i.e. continue with the go- slow.
- [41] The third witness of the respondent was Mr Serobe who at the time of the incident was assistant aviation security officer. He testified that on 26 August 2008 whilst attending a meeting he received a call at about 16h00 from Mr Munengwane informing him that the employees had embark on a go-slow. He relayed the same message to Mr Tshabalala and Mr Anton. Mr Tshabalala instructed him to go and check what was happening and report back to him. On arrival at the international terminal, he found long queues of passengers. He testified further that he went to each machine to observe what was causing the long queues.
- [42] Mr Serobe testified that the cause of the long queues was because the x-ray operators were screening each and every bag of passengers. According to him when he checked from one of the x-ray operator why he was checking the bags even when there was no thread. The response according to him was that he was doing his job. The same process was according to him applied by the body searchers also. The person's name was not disclosed neither was she or he called to testify. After observing what was happening he then called the private security service provider, BOSASA. The BOSASA security members were deployed amongst the employees and after their deployment there was a significant improvement in the movement of the queues.
- [43] Soon after the arrival of the BOSASA members, Mr Mabena arrived at the scene. Mr Serobe says he told him to see Mr Tshabalala. In the supervisor's office, Mr Tshabalala is said to have told Mr Mabane to speak to his members about their go-slow.

- [44] The problem of the previous day repeated itself after about 20 minutes on the 27 August 2008 according to Mr Serobe. He testified that he phoned Mr Munengwane and informed him that he was picking a problem similar to the one of the previous day. Mr Munengwane informed him that he was still having a meeting with the supervisors.
- [45] Mr Serobe testified that he went to each of the employees and gave them an ultimatum, telling them that they would be suspended if they continued operating as they did. The employees did not respond but continued with their attitude according to him. The Group 4S which was on stand-by were then called in to assist. Mr Serobe was then joined by Mr Tshabalala and both observed how as soon as Group 4S had taken over the queues started moving much faster. Whilst observing how Group 4S was working, Mr Tshabalala was approached by Mr Nompuku and Mr Sithole.
- [46] As concerning the 28 August 2008, Mr Serobe testified that Mr Tiro and Mr Motloun were observed talking to employees who are responsible for operating the X-ray machines. Mr Motloun and Mr Tiro were then summoned to Mr Serobe's office. In the office, the two were asked as to why they were talking to people who are busy with their duties. According to Mr Serobe, the answer was 'You know you have suspended our people yesterday, so we want to engage with our members...' The two were then told to go back to their respective posts which were domestic and international terminals respectively. They left the office but because Mr Makhondo was suspicious as to whether they would comply with the instruction he is said to have followed them. He found them repeating the same thing they were told not to do. Mr Makhondo phoned Mr Serobe and told him about the fact the two were repeating what they were told not to do. Mr Sorobe advised him to take their identification cards and suspend them immediately.
- [47] Mr Serobe disputed that the processing of the passengers had anything to do with the fact that the supervisors remained behind after the parade and were

therefore not available to assist with the changeover of the shifts. He stated that that could never have been the cause of the delay because the morning shift supervisors were still present when the afternoon shift came on board.

- [48] It is important to note that in evidence in-chief Mr Serobe never mentioned that the morning shift supervisors were still present when the applicants' shift came on board. It is also important to note that he initially said that all the seven machines were open when the group3 shift came on board but later during cross examination changed to say that he was referring to the stage at which G4S had taken over the operation.
- [49] As concerning the events of 27 August, Mr Serobe testified that, after observing the repeat of the go slow of 26 August, he gave the employees an ultimatum. In contrast to the case pleaded by the respondent which is that things improve, after the ultimatum was issued, Mr Serobe stated that because the employees did not respond when he issued the ultimatum he had to bring in additional people to assist. He later, however, when questioned further in this regard stated that the employees complied with the ultimatum. Mr Serobe could not explain why his testimony was at odds with the case pleaded by the respondent.
- [50] As concerning the case against Mr Tiro, Mr Serobe testified that he was called to the screening section by Mr Makhondo who told him that Mr Tiro and Mr Motloun are talking to employees whilst busy at the x-ray machine. He further stated that after looking through the window from where he was and observing what was happening, he requested Mr Makhondo to call the two to his office. However, he conceded during cross examination that the video clip, which was shown, did not support the version that the two spoke to a number of employees. He stated that the video clip showed them talking to two people operating the AMD machine. The changed version that the two spoke to other employees, was not sustained during cross examination because when asked as to whether he insisted that he spoke to employees, he responded by saying 'even if he spoke to one the other one was also concentrating.'

- [51] Mr Serobe, disputes that Mr Sithole and Mr Nompuku could have addressed the employees at the car park after the parade. According to him, they could not have spoken to the employees at the car park because, at that stage, the HR had already sent letters to the employees about the problem regarding overtime payment. He could not explain why this was not pleaded and why it was not included in the bundle. He also could not explain why the version about the letter of the HR was not mentioned in Mr Tshabalala's version.
- [52] Whilst the respondent's pleaded case is that the police went into the rest room and told the employees that they had two minutes to leave the room, this is disputed by Mr Serobe. According to him, for the first time and towards the end of his cross examination, he indicated that the employment identity cards of the employees were collected by the police officers as the employees were leaving the rest room.
- [53] The other witness who testified about Mr Tiro and Mr Motloun, regarding the incident of the 28 August 2010, is Mr Makhondo. He testified that on that day he observed Mr Tiro and Mr Motloun speaking to "the staff and some people." He then in accordance with the instructions from Mr Serobe went and called the two of them to an office. In the office, Mr Serobe told them according Mr Makhonto not to disturb employees with their duties.
- [54] The two employees were told to go back to their work stations. After they had left the office, Mr Serobe and Makhondo followed them to check whether they had gone to their working stations. According to Mr Makhondo, the two were found at the international terminal again talking to machine operators. During cross examination, when asked what he meant by saying that they spoke to "the staff", he responded by saying: 'there were two or three people there.' He conceded that they spoke to the employees for not more than 50 seconds.
- [55] Mr Makhondo had difficulties during cross examination with dealing with a simple matter of what is recorded by the chairperson of the disciplinary hearing. The recording made by the chairperson of the disciplinary hearing reads as follows:

'Mr Tiro does not dispute this account. However, he does claim that he and Mr Mkhonto had a discussion... where he requested to speak to Doller. Mr Mkhonto does not recall this conversation, but did not dispute that it either.'

- [56] He initially said that he could not recall but later said that, 'it should be correct.' He then changed later to say, 'no, but I think on the hearing I told them that he did not speak to me.' This is in total contrast to the finding of the chairperson of the disciplinary hearing.

Mr Tiro's version

- [57] At the time of the dismissal, Mr Tiro was a security officer and a deputy secretary of the shop steward committee. In testifying about the e-mail he sent to the managing director, he stated that the e-mail was consequent to the resolution taken by the union branch that the union should not participate in any management activity.
- [58] He does not deny speaking to Doller on the day in question but stated that he was granted permission to do so by Mr Mkhonto.
- [59] It was not disputed that there is a rule that prohibits shop stewards from speaking to employees whilst they are on duty. It seems to follow that if there is a need for the shop stewards to speak to members on duty they would need permission from their managers to do that. The case of Mr Tiro is that he did seek permission and was granted the same by Mr Makhondo. On the other hand Mr Makhondo, disputes having giving him permission.

The case of Mr Sithole

- [60] The case of the respondent against Mr Sithole is that he was off duty on 26 August 2008. On 27 August 2008, he arrived at work at 11h00 even though his shift with group 3 was only to start at 13h30. Before assuming their duties, the employees in group 3 had to attend a parade which was held at 13h30. At the parade, Mr Sithole addressed the parade after Mr Munengwana had addressed it

about the issues of the go-slow the previous day and overtime payment. According to Mr Munengwana, in addressing the parade Mr Sithole said something along the following lines:

‘Comrades, I just want you to know that with regard to the incident of yesterday there was nothing wrong about it because all you did you complied and we are hereby encouraging you to go and comply as you did yesterday.’

- [61] The other shop stewards who spoke after him echoed his sentiments about what happened on 26 August 2008. The other aspect of the case of Mr Sithole is discussed under the case against him earlier and is therefore not discussed further.

The case of Mr Nompuku

- [62] The facts which the respondent relied upon in the case of Mr Nompuku are similar to those of Mr Sithole. He was not on duty on 26 August 2008. On 27 August 2008, even though he was to start his shift at 13h30, he arrived very early at work. He was accused in particular of refusing Mr Tshabalala the opportunity to address the employees once they were removed from their work stations. He also one of those who spoke at the parade and prefixed his statement by saying:

‘I just want to cement whet the comrade is saying.’

Mr Nompuku's version

- [63] Mr Nompuku testified that he spoke at the parade and told those present that he met with Mr Hlongwane of HR who told him that the issue of overtime has been resolved, and letters of apology would in that regard would be sent to employees. The respondent contended that the evidence about what Mr Hlongwane told him was hearsay and should for that reason be discarded. In my view the objection is highly technical and does not take the matter any further because all what it indicates is he was telling employees that he has been informed that their problem is receiving attention. The crux of his statement that goes to the issue of

whether he incited employees was not seriously challenged in cross examination. The essence of what he said, leaving out what he says Mr Hlongwane told him, is that he told the employee that the problem of overtime has been resolved and therefore there was in a sense no need to be aggrieved. This in my view is far from someone who is seeking to have the employee excited about partaking in an industrial action.

- [64] As concerning the allegations that he prevented Mr Tshabalala from addressing the employees, he testified that he met him the first time when they went into the rest room and denied ever refusing to allow him to address the employees.

The case of Mr Magugu

- [65] The main witness in the case of Mr Magugu was Ms Monyeke who at the time was employed as the head of compliance and surveillance. She testified that, on the 26 August, she was part of the budget meeting when at about 15:00 they received information that there was a problem at international departure. On arrival at the international departure, she enquired from one of the supervisors as to what the problem was and was told that the staff was not paid over time. That seemed to her to have been the cause of the long queues that had developed.
- [66] After observing what was happening at international departure, Ms Monyeke proceeded to her department where she addressed her subordinates about what she had observed at international departure. She also enquired from them whether they were also affected by the problem of overtime and they answered in the affirmative. After addressing them and requesting that they should focus their surveillance also on the baggage area, she then address Mr Magugu directly and said:

‘Wena Magugu, please make sure that you do not leave this area. I know my brother, that you are a comrade and you would want to go out there and try to talk to the guys or do whatever. Please do not get involved, let the managers sort the problem that is downstairs and will make sure that I resolve the issue here.’

- [67] After speaking to Mr Magugu, Ms Monyeke then left. She later, according to her received a call from Mr Kekana requesting to leave the surveillance room to go downstairs to speak to someone there who had reported a problem. He was granted permission to go downstairs. It is important however to note that on his version by the time he requested permission he had already left the control room.
- [68] The following day, 27 August 2010, Ms Monyeke was confronted by Mr Serobe who informed her that Mr Magugu and Mr Kekana were walking up and down at the screening area the previous day. It was arising from this that Mr Magugu was charged with deserting his post.
- [69] Ms Monyeke conceded during cross examination that her version before this court was different to what she is stated to have said during the disciplinary hearing. In terms of the disciplinary report, it is recorded that on the day in question Ms Monyeke was informed that Mr Magugu was at the terminal. She confirmed at the disciplinary hearing that she looked at the cameras and she saw him at the terminals.
- [70] The version that Mr Serobe contacted her the following day was initially changed to say that she never in court said that Mr Serobe confronted her the following day about Mr Magugu being at the terminals. She also during cross examination sought to avoid the question of whether Mr Serobe confronted her the following day or the same day by seeking to limit her answer to saying that she was confronted by Mr Serobe, however on further questioning she conceded and said, 'yes, Mr Serobe confronted me the next day.'
- [71] Another concession made by Ms Monyeke was that on numerous occasions previously, Mr Kekana and Mr Magugu left the control room and went to the terminals to investigate whatever they may have observed on the cameras.
- [72] The leaving of the control room to go to the site by the surveillance was not regarded as irregular by the respondent. In fact, in response to an email which Mr Magugu send to management regarding this issue management a month before

the incident in question informed him that he was doing a good job with his walkabout and informed him that he had 150% support from them in that regard. Although the response came from Mr Magugu's immediate supervisor, Ms Monyeke was also copied on the email. She never responded to the email but sought during cross examination to distance management's responsibility in the assurance given by the supervisor by saying that it was the supervisor's view. It is quite strange and difficult to accept that Ms Monyeke would fail to respond to an email which on her version indicated that an employee was doing something that she says she had ruled was no longer permissible. In any case, she says that in her directive stopping the practice she told the employees that they could only do walkabouts with her permission or that of their immediate supervisors. In the case of Magugu, he had approval and support from his supervisor and for that matter in writing.

- [73] The version of Monyeke does not assist the case of the respondent even if it was accepted that she did direct that the employees should no longer do the walkabouts. If she did in fact regard the offence as serious enough to warrant termination of the employment, the question is why did she not take prompt action against Mr Magugu as soon as the alleged misconduct came to her attention. If she regarded the conduct as a serious offence, why did she not summon him immediately to the office and reprimand him or inform him that he would be disciplined for what he had done. It is apparent that nothing was said to Mr Magugu regarding the alleged offence he was alleged to have committed in full view of management until he knocked off on 26 August 2010. In fact nothing was done or said to Mr Magugu about the offence he was alleged to have committed for over a week, from 26 August to 3 September 2010.
- [74] The other witness who testified on behalf of the respondent in the case of Mr Magugu is Mr Kekana who confirmed that Ms Monyeke had told them to focus to focus their cameras at the terminals because there was a go slow.

- [75] In relation to the issue of Mr Magugu leaving the control room he testified that he told other employees in the control room, including the immediate supervisors Mafudi and Gladys that he wanted to go and do the patrol on the ground floor.
- [76] Mr Kekana testified further that after he and Mr Magugu had left the control room he phoned Ms Moyeki and informed her that he wanted to go and find out from Estelle what was happening downstairs. The version of Mr Kekana does not assist the respondent because the essence of what he says is that the immediate supervisors who had the power to authorise the walkabouts in line with the directive made Ms Monyeki, did not say anything when he told them in the presence of other employees that he was going downstairs.
- [77] As concerning the charge of inciting the industrial action Mr Munengwana testified that Mr Magugu encouraged the employees during his address at the parade to continue with what they did the previous. In this regard, he is accused of having said the following:

‘Comrades, indeed there is nothing improper about what happened yesterday. I have checked the cameras and there was no deviation to standard. What you have done is in compliance. But I am talking as a surveillance analyst, but not on behalf of a Department...’

Mr Magugu's version

- [78] At the time of the dismissal, Mr Magugu was employed as a surveillance analyst. He testified how on the day in question Ms Monyeki told them to focus their cameras on the security points.
- [79] As concerning the allegation, that he incited employees to engage in industrial action Mr Magugu deny the allegation and stated that all what he said was that from his observation from the cameras he did not see any industrial action all what is so was free from him in the work.

Evaluation/ Analysis

- [80] The applicants have pleaded that they had been victimised and discriminated against by the respondent in contravention of the provisions of section 187 (1) of the LRA.
- [81] It is trite that in the case of an automatically unfair dismissal, the evidentiary burden rests with the applicant to raise credible possibility that an automatically unfair dismissal has taken place. In the present case, there is some evidence that points towards the fact that the applicants were dismissed because of doing their work as shop stewards. This is particularly so in the case of Mr Tiro and Mr Nompuku. There is however some doubt in my mind as to whether the evidence is sufficient to establish a credible basis upon which it can be said that the dismissal was automatically unfairly.
- [82] It would however appear to me that the real issue in this case which stands out clearly and provides an appropriate basis upon which the dispute between the parties can effectively be resolved concerns the fairness or otherwise of the dismissal. In this regard, there is overwhelming evidence that the dismissals of the individual applicants were substantively unfair.
- [83] It is apparent from the above discussion that there are several dispute of facts in almost every aspect of this matter. Accordingly, the technique to apply in this regard is that which was set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martel and Cie SA and Others*.³ The essence of the technique to apply

³ 2003 (1) SA 11 (SCA) at para 5. The SCA stated that the technique to apply in the following terms:

On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the

when confronted with versions that are mutually destructive of each other is to consider the credibility of the witnesses that testified and to weigh the balance of probabilities.

[84] The respondent in support of its case that the dismissal was substantively fair rely on the testimony of five witnesses. The other witnesses who testified in support of the case of the respondent were chairpersons of the disciplinary hearings who testified mainly about the procedural fairness of the dismissals.

[85] It is apparent from the above discussion that the evidence of the managers who testified about the substantive fairness of the dismissal left much to be desired and without any doubt was unsatisfactory. Each one of them with no exception was highly subjective and seems to have adopted an attitude that they would not accept anything that may seem to support the cases of the applicants. In this respect, I agree with the submissions made on behalf of the applicants and as the above discussion also indicates that, the respondents witnesses in a material way contradicted each other, contradicted each other's evidence in a number of

witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

respects and contradicted in certain respects the respondents own pleaded case. It is for this reason that I am of the view that the testimony of the respondent's witnesses who testified about the substantive fairness of the dismissal should be rejected.

- [86] I further found that the respondent has failed to discharge its burden of showing on the balance of probabilities that the dismissal of the applicants were substantively fair.
- [87] In support of the contention that the dismissal was unfair, each of the applicants testified in general about their case and specifically as concerning their own individual cases. I do not agree with the respondent's counsel in the heads of argument when he says that applicants' witnesses were not credible. I have found each one of the applicant's witnesses to have been consistent in the versions about their respective cases and came across as being honest and objective about their cases.
- [86] Turning to the cases of each of the applicants, I make the following findings: In relation to the case of Mr Tiro, he was found guilty of disrupting operations at the terminals in that he is alleged to have had discussions with employee who were busy at the x-ray machine. He was also found guilty of insubordination because he ignored the instructions to return to his post on three occasions.
- [87] The substantive fairness of the dismissal of Mr Tiro in the first instance turns around whether he had permission to approach Mr Letshaba and speak to him whilst he was busy at the x-ray machine. The evidence of Mr Makhondo, who was the main witness in relation to the charge of speaking to employees during working hours, was the most unreliable. The evidence he presented before this court was in conflict with his testimony at the disciplinary hearing. He failed to provide any satisfactory explanation as to the conflict between the two versions. It would seem to me that the balance of probabilities support the version that Mr Mkhonto did grant permission to Mr Tiro to speak to Mr Letshaba particular when

regard is had to the fact he ultimately during cross examination conceded that he did speak aside with Mr Tiro on the day in question.

- [88] The dismissal would still have been unfair, even if it was to be concluded that Mr Tiro did not have the permission to speak to Mr Letshaba, if the totality of the evidence and the circumstances of this case are taken into account. On the version of the respondent, Mr Tiro spoke to the person in question, for not more than a minute. It has also not been disputed that he did not speak to him about private matters but spoke to him regarding employee issues and that Mr Tiro, did that in his capacity as a shop-steward.

The cases of Mr Sithole and Mr Nompuku

- [89] The two applicants were dismissed because they were accused of encouraging employees who had participated in the alleged go-slow on 26 and 27 August. They were also dismissed for insubordination in that it is alleged that they refused to allow Mr Tshabalala the opportunity to address the employees after they had been removed from their workstations.
- [90] The version of Mr Munengwane about what happened at the parade is both strange and illogical. He firstly, say the shop stewards requested to address the parade, which is a meeting convened by management to deal with operational issues. After granting them the permission, he stood by and did nothing after listening to each one of them, according to him, encouraging employees to continue with an unlawful activity in an environment of high security and in an area declared national key point. It is also surprising that Mr Munengwana did not find it important to inform both Mr Tshabalala and Mr Serobe about such a serious matter involving security risks in particular those relating to the allegations that employees were encouraged to embark on an illegal strike.
- [91] The same applies to the version that the two applicants denied Mr Tshabalala the opportunity to speak to employees. The probabilities do not, even on the version of the respondent, support the allegation that Mr Tshabalala was denied the

opportunity to address the employees. It is not clear why Mr Tshabalala needed permission from the shop-stewards to speak to employees. What is even more surprising is that Mr Tshabalala granted the shop-steward permission to speak to their members after they refused him that opportunity.

- [92] In my view, Mr Tshabalala came to testify determined not to give away anything that may be seen to support the case of the applicants even if the objective facts may to contrary show that they had a case. He was asked as to whether it has ever happened that the long queues had gone beyond the maze. He initially projected a picture that says that that could never happen because the respondent has systems in plays that would deal with that eventuality. It was after some effort that he finally said that it could happen particularly when supervisors had not opened enough machines.

The case of M Magugu

- [93] Mr Magugu, was also strangely not confronted by management at the parade when he is alleged to have incited employees to continue with the strike action which they embarked upon the previous day. The issue of him deserting his post is dealt with earlier in the judgement. It is clear from the discussion that, if at all there was in rule that prohibited security analysts from leaving the control room to do walkabout on the ground floor, that was not consistently applied such that the breach thereof could not in the circumstances be regarded as serious enough to warrant a dismissal. In any case, in the particular circumstances of the case of Mr Magugu, was encouraged to do what he did on the day in question by management. The charge of breach of trust was not substantiated neither was there evidence as to, how serious was it to have warranted a dismissal. There was also no evidence as to what impact it had on the trust relationship between the parties.
- [94] In relation to the charge of the breach of the recognition agreement and non compliance with its provisions, it needs to point out that there are no merits in this charge. A collective agreement creates a relationship between a union and the

employer. If any breach occurs in that regard the employer shall have recourse against the union and not the individual employees. There are also no merits in the charge relating to breach of essential service exemption.

The relief

[95] The applicants have each pleaded for reinstatement. The respondent on the other hand has argued that reinstatement is an inappropriate remedy because each of the applicants accused their managers of not telling the truth in their testimony.

[96] The remedies for unfair dismissal is dealt with in terms of section 193 (2) of the LRA. It is trite that in terms of this section that the primary remedy when the dismissal is found to be unfairly is reinstatement unless:

- ‘(a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee or;
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.’

[97] The essence of the respondent's case is that reinstatement would be inappropriate where the employee simply presents a version different to that of the employer. This approach, in my view is untenable because if it was to be adopted it would then mean that anything provided for in section 193 would be in effectual. Any dismissed employee is in law entitled to challenge whatever version of the employer puts before the court to justify the dismissal. In other words, the relationship between the parties cannot be said to have broken down simply because the employee presented a different version to that of the employer.

[98] The onus is on the employer to establish a factual and legal basis for holding that it is not reasonably practicable to reinstate a dismissed employee. In the present instance, there is no basis in facts and law to conclude that it is not reasonably practicable to reinstate the individual applicants.

[99] It was suggested that in the case of Mr Tiro, account should be taken of his correspondence. I have already stated earlier that Mr Tiro acted in his capacity as a shop-steward, and therefore any wrong doing in that regard should be attributed to the union.

[100] In my view, the respondent has failed to discharge its onus of showing that the individual applicants are in fact guilty of misconduct and as indicated earlier why reinstatement is not an appropriate remedy. I am, accordingly, satisfied that the applicants stand to succeed in their claims that they were unfairly dismissed.

[101] In light of the above, I do not deem it necessary to deal with the issue of procedural fairness.

[102] I see no reason, in the circumstances of this case, why costs should not follow the results.

Order

[103] In the premises, the following order is made:

1. The dismissals of each of the applicants, Mr Tiro, Mr Sithole, Mr Nompuku and Mr Magugu were unfair.
2. The respondent is ordered to reinstate the individual applicants retrospective from the date of their respective dismissals without loss of any benefits that may have accrued.
3. The respondent is ordered to pay the costs of the applicants.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv H.Van der Riet

instructed by Cheadle Thompson Haysom Attorneys

For the Respondent: Adv Ngalwana Instructed by Mkhabela Huntley Adekeye
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