



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

Not Reportable

CASE NO. D694/15

In the matter between:

**NATIONAL UNION OF METAL WORKERS
SOUTH AFRICA (“NUMSA”)**

First Applicant

PHAKAMANI KHANYILE & 28 OTHERS

Second & Further Applicants

and

TRANSNET NATIONAL PORTS AUTHORITY

Respondent

Heard: 4 November 2016

Delivered: 31 January 2017

Summary: claim of unfair dismissal - due to alleged participation in an unprotected strike – strike participation in dispute - version of the applicants rejected as being improbable against the credible version of the respondent – collective disciplinary action - no obligation in law to conduct a formal disciplinary enquiry - what is required is an opportunity for the individual applicants to state their case – such opportunity granted – dismissal fair.

JUDGMENT

Cele J

Introduction

- [1] This is a claim of unfair dismissal of the second to further Applicants by the Respondent due to their alleged participation in an unprotected strike. The Applicants deny such participation but also aver that even if they are found to have taken part, dismissal was too harsh a sanction in the circumstances. The claim is opposed by the respondent on the basis that the second to further applicants took part in an unprotected strike while they were on a final written warning.

Factual Background

- [2] The respondent is responsible for the management and administration of South Africa's ports. The second to further applicants, hereafter referred to as employees, are employed as Marine Shore Hands at the Berthing Services Department of the Marine Services. Their functions were essentially to tie up the vessel when it was alongside the quay. Their role was part of a chain of events that took place in the piloting of cargo vessels.
- [3] On 24 April 2015 at about 06h00 the C – shift was due to commence duties. It comprised of employees from the “tug pool” and employees from the “berthing services”, amongst whose number all the individual Applicants were employed. The Marine Resources Manager, Ms Bekiswa received a telephone call when she had landed at Durban airport at approximately 07h00 on that morning from the Tug Masters who was reporting that, the tug crews were not reporting for duty. At the time that, she originally spoke to the Tug Masters, the tug crews were “at the turn stiles”, to the tug basin. It later transpired that the tug crews had

later made their way to the building which is referred to in these proceedings as the “berthing mass”. This is a purpose built structure for the berthing crews. It is a double storey structure, the bottom floor comprises of a kitchen and mass room with chairs and tables, outside seating, and on the top floor, male and female rest rooms. The office of the Berthing Supervisor, Mr Shange is located at that top floor. It appears that the actions of the tug pool were unannounced.

[4] Ms Bekiswa made her way to the berthing mass with an HR officer, Mr Mark Olmesdahi where they found a number of people, including the tug crew. She addressed these individuals. Messrs Lekala and Motlohi also came to the premises and addressed the workers. Together they attempted to ascertain why the employees were not working. They informed the employees that they could not just stop working. They were told by the assembled employees that two letters had been sent to the company. One of them was a letter which the company was aware of and was busy responding to. The company said it was not aware of a second letter having been sent. The employees could not produce a copy of this second letter. The employees said that the second letter had given an ultimatum for the company to respond within three days, which expired on the previous day. That was why they had stopped working. The approach of Ms Bekiswa and Mr Olmesdahl at that stage was to request the employees to provide them with a copy of the second letter and to give them three days from that day, 24 April 2015, to respond to it. The employees were to go back to work in the interim. The employees refused to co-operate, and said that company management should in any event be aware of what the issues were that had been raised in the second letter, even if no copy of it could be produced.

[5] Also at approximately 06h00, the Senior Berthing Supervisor, Mr Shange dispatched two work gangs (Gangs Four and Five) amongst whom are five of the Individual Applicants to Berth 108 to perform duties. When these work gangs arrived at the berth, there was no sign of the tugs which meant that they could

not perform their duties. It is indeed a feature of these proceedings that without the tug crews performing their duties, the land based crew, amongst whom are all the Individual Applicants, cannot perform their duties. Contact was established with Mr Shange who undertook to establish from Port Control what the issue was. He reported back to them that there was a meeting with the tug crew and that they were reluctant to return.

- [6] All workers on the shift gathered at the berth centre, collectively, communicated to management their refusal to work, and they persisted with this stance until 16h00 on that day, when they finally agreed to return to work. By then it was too late for them to move any ships before the end of the shift. Some seventeen ships should have been moved, in or out of the port, on that day. Only four ships were moved, and this was due to contingency arrangements made by Ms Bekiswa at around 13h00, after the management team had failed to procure a return to work. The commercial implications of the strike action for Transnet, the broader shipping community, and the economy as a whole were very serious.

Evidence

Respondent's version

- [7] Three witnesses were called by the respondent, being Mr Motlohi, Captain Lekala and Ms Bekiswa. Ms Bekiswa testified saying that at her arrival at the berthing centre, the gathering comprised both tug staff and berthing staff. She said that one of the berthing staff present initially stated to them that the berthing employees were not on strike, but that it was the tug crews that were on strike. That employee referred to the fact that he had been among those who had gone to the vessel at berth 108, and when tugs had not arrived they came back. In response to that, Ms Bekiswa asked the berthing staff to leave the room. She said to the employees gathered

“can we then remain in the mass room with the tugs people who seemed to have a problem and we can have a discussion with them?”

[8] The request was declined as employees said that they wanted to be there as others were their colleagues and they wanted to be part of the discussions. Mr Motlohi, the Port Manager, arrived at this meeting sometime after 8 o'clock and he attempted to persuade the employees to nominate four representatives to speak to management while the rest returned to work. The employees' response was that management was well aware of the issues raised by employees. Their response was that management should go and discuss the issues and revert to the employees. In the meanwhile, they were going nowhere. Management there present then decided to give workers 15 minutes to caucus and decide whether or not they would accept the proposal made by Mr Motlohi. During the 15 minutes caucus Captain Lekala, the Chief Harbour Master, arrived and joined the management team.

[9] When management went back into the meeting, the employees communicated to them that it was unnecessary for them to appoint representatives to explain what the issues were because as far as the employees were concerned management knew what the issues were. Captain Lekala asked the employees assembled whether everyone in the room shared the same sentiments, that they were not going to work, and that they were all together in the work stoppage. He stated that nobody should say afterwards that he or she was not party to the work stoppage but was not asked. Captain Lekala asked them “is everyone saying here they are not going to work?” In fact, Captain Lekala asked this question two or three times. Workers responded through one representative that they were used to threats. He said that if Captain Lekala wanted to fire them, he could:

“fire all of them and they will go sit at home and [Captain Lekala] can then go and employ the people that he wants to sort of exploit them because they are not

going to work like the way the company's saying they must work".

- [10] Mr Motlohi begged and pleaded with the workers, encouraging them to go back to work. He emphasised the fact that most of them were sitting with final writing warnings, and pleaded with them to say "can they please think of their families; can they please think of their kids because the decisions that might have to be taken afterwards will not be favourable". Mr Motlohi also explained the economic situation and the relationship that Transnet was having with clients, and how clients are feeling towards the Port because this was not the first stoppage it had had. In response, employees simply said that they were not going to provide the representatives as proposed by Mr Motlohi. When asked whether there was any indication that they were prepared to go back to work, Ms Bekiswa gave evidence that all in one voice, said none of them was prepared to return to work. She reiterated that in response to Captain Lekala asking a similar question, the employees had collectively responded:

"We're a part of this. We are all in this together".

Applicants' version

- [11] Three witnesses testified for the Applicants. Mr Elton Gordon, the First Applicant's (Numsa's) Organiser was the first of Applicants' witnesses. He said that Numsa began organizing in Transnet after the 2013 Special National Congress took a decision to extend the registered scope of the Union. He testified that the Individual Applicants amongst other Transnet employees joined Numsa in 2014. He testified about the difficulties that Numsa had in acquiring organizational rights within the Respondent. He said that it was dishonest of the Respondent to contend that there were only four Numsa members when one hundred and thirty five forms had been submitted. During the previous work stoppage of January 2015 Numsa received a letter from the Respondent asking

for Numsa's intervention. He then contacted the Regional Secretary of Numsa and asked him to intervene. There was such intervention. Mr Gordon testified that Numsa did not condone an unprocedural strike and had it been brought to their attention that their members were involved in same they would have intervened.

- [12] Ms Thobile Mpungose testified that she was Applicant number 11 in these proceedings. They worked in groups called gangs with numbers. She was in gang one and her work duties were to physically tie up a ship alongside when they moored it at the Durban Harbour.
- [13] On 24 April 2015, she started work at 06h00. The work-gangs would go to the Berthing Masters who would instruct them where they would be working. She was not called to perform any duties in the morning. Gang Four and Five were instructed to go to Berth 108. The rest of the gangs remained behind in the resting rooms. Before the gang returned from Berth 108, they were joined by employees of the Tug Department. She did not know why those employees were joining them. She then left and went to the female rest area until approximately 13h00. She was not part of any meeting on that day.
- [14] She testified that later in the day around 13h00 to 13h30 Gangs one and two were called by Mr Shange to report at his office. She and her colleagues went to Mr Shange and asked him how safe it was for them to resume their duties taking into account that there were still other people who were holding a meeting. He instructed them to return to their rest room and he would come back to them once the problem had been resolved. He never came back to them. She further testified that it was not possible for any of the land crews to do their work if the tugs were not working. When it was put to her that she was on strike together with the tug crew, she said that she was not at the meeting at all. She accepted that no ships had moved that morning because no tug crews were working, but

then insisted that there was no work stoppage. She agreed that the tug crews had stopped working but stated that the berthing staff had not stopped working.

- [15] Ms Mpungose denied that she had been presented with disciplinary documents. When asked why she had signed the collective representations at page 7 of the bundle, in which a statement was made by all signatories that all workers categorically state that there was no industrial action on 24 April 2015, Ms Mpungose testified that she had not read the document and did not recall the circumstances in which she had signed it. She also stated that she had not talked to anybody else who had signed the document, stated that she was not aware that any disciplinary action was pending or that any of those involved in the work stoppage on 24 April 2015 were facing disciplinary action, and when asked why she had signed the document said

“Some things at work we sign because we are asked to sign; not because we know what exactly we are signing for”.

- [16] Ms Mpungose was asked in specific terms whether her contention was that she should be dealt with differently from the collective because, whereas others had been involved in a work stoppage, she personally had not been involved. Her response was unequivocal and clear, that she should be treated in the same way as all other workers in the group.

- [17] Mr Dumezweni Mbatha testified as the last witness for the Applicants, saying that he had twenty six years of service with the Respondent and was applicant number 5 in the Court list. He was in Gang Five of the berthing crew. He had not been aware that 24 April 2015 would be any different from any other day and was not a part of any plan to stop work. He arrived at work at 05h45, changed and went to the kitchen area where the Berthing Master came to check if all were present. There was announcement on the PA system by Mr Shange for the crew

to go to Berth 108. He went to the vehicle that departed to the area. They arrived at Berth 108 and waited in the vehicle. No tug crew arrived. Mr Shange told them to wait and would ask Port Control as to what was going on. Mr Shange passed on a message that Port Control had apologized as they did not know that the tug crew were having a meeting and the berthing crew were requested to go back. He did not notice what time it was then. When they came back they found that the tug crew and other berthing staff were present at the Berthing Staff Mass. It was unusual to see the tug crew there. Nobody instructed him to go back to work. He insisted that he was not part of the meeting as he was outside.

[18] When written documents and representations concerning disciplinary matters that he had signed were presented to him, Mr Mbatha said that he was illiterate and had been unable to read any of them. He denied that anybody had even spoken to him about the meaning of those documents, and he could not explain why he had agreed in those circumstances to sign the collective representations. He did not know what that document meant and he denied any knowledge either of industrial action or of the consequences of the representations that he had made. When asked whether he wished to be dealt with differently from the collective, Mr Mbatha similarly answered that he did not.

[19] In the course of conducting an investigation on the events of 24 April 2015, Mr Shange submitted two written statements dated 10 May 2015 and 18 May 2015. He confirmed the convergence of two gangs at Berth 108 to cast off a vessel but that it could not be done as the Pilot and the tug crew were not present at the working station. He concluded the first statement by saying:

“The meeting was held at the Berthing Staff, since the meeting was at Berthing Staff, so they were part and parcel of the meeting when they came back. But after the first job that was given, no job was refused by the berthing staff because they were at the meeting.”

- [20] The second statement purport to be a correction of some of things said in the first statement and it concludes by saying:

“In correcting also about these, two gang was called to sail E –Shad, and the gangs said they are scared to go to vehicles because all people was watching them. So By that they called on the unprotected strike because they never go to that job.” (Sic)

- [21] Neither the Respondent, by whom Mr Shange was employed as its Senior Berthing Master, nor the Applicant employees for whom he was a Supervisor, called Mr Shange as a witness in the trial. Whatever he said in the two statements could not be clarified further or tested by cross-examination. For instance, it remains unclear if he ever attended at the Berthing Staff Mass so as to know who was and who was not present there. When he said that the gangs said that they were scared to go to vehicles because all people were watching them, again, one cannot tell who exactly he is talking about. This could mean one or two berthing crew members, a larger part of that crew or all members of gangs four and five. The only evidential value to give to these statements must therefore be limited to facts which are common cause. For any party to rely on the contents of the statements when such suit that party and to reject those contents that are incriminatory, would be self-serving, improper and against the Law of Evidence dealing with the admissibility of evidential material.

Evaluation

- [22] The dismissal of the second and further Applicants by the Respondent on allegations of taking part in an unprotected strike was common cause. Therefore the Respondent had to prove, on a balance of probabilities, the fairness of such dismissal. The Applicants not only denied the second and further Applicants having taken part in the strike, they also challenged the fairness of the procedure

leading up to their *en masse* dismissal.

- [23] It remained common cause that on 24 April 2015 the usual work that was supposed to be done by the birthing and the tug crews at the Durban Harbour was not done or was not timeously executed. A group of employees gathered at the Birthing Staff Mass for the better part of that day. Management asked them to identify at least four representatives who were to discuss the concerns of the employees with management while the rest of the employees continued with their normal jobs. The suggestion did not meet a favourable response from the employees for the better part of that day. The employees accordingly refused to tender their services while they were making some demands which they wanted management to meet. The employees were accordingly on strike.
- [24] The next probe turns on whether the 17 remaining applicant employees took part in that strike. Mr Gordon, the Numsa Organiser, was not present on 24 April 2015 at Respondent's workplace and was unable to deal with any of the evidence given by the Respondent's witnesses in relation to what transpired on that day. The two other applicant employees who testified spoke about their personal experiences on the day. Their evidence failed to give an account of the whereabouts of each of the other 15 applicant employees. Yet Mr Mbatha did say that when they came back from berth 108 they found that the tug crew and other berthing staff were present at the Berthing Staff Mass. That was the evidence led by Ms Bekiswa. She said that at her arrival at the birthing centre, the gathering comprised both tug staff and berthing staff when one of the berthing staff present initially stated that the berthing employees were not on strike, but that it was the tug crews that were on strike. She asked for a meeting with the tugs people who seemed to have a problem but her request was declined as employees said that they wanted to be there as others were their colleagues and they wanted to be part of the discussions. When the evidence of the 15 applicant employees is pitted against that of the Respondent, the latter version is found to be

overwhelmingly probable as the former amounts to basically nothing.

- [25] The evidence of the whereabouts of Mr Mbatha after he came back to the Berthing Staff Mass is riddled with inconsistencies as it fails to explain exactly where he was and what he was doing for that long period until 13h00. His is a version of unexplained loneliness in the multitude. Ms Mpungose said that before the group four and five gangs returned from Berth 108, she together with those she was with, were joined by employees of the Tug Department. She did not know why those employees were joining them. She then left and went to the female rest area until approximately 13h00. She was not part of any meeting on that day.
- [26] Ms Mpungose's version is yet another story of unexplained loneliness in the multitude. For no apparent or explained reason she leaves her colleagues to go and be alone in some rest room at a time she did not know why others were joining her. It was work time and yet she chooses to go and rest. Surely she did not travel from her home to come to the work place to rest, for no apparent reason. The version of the Respondent was clearly much more probable than that of the two employees who testified. The version of the Applicants is accordingly rejected as being improbable against the credible version of the Respondent. I accept that it has been proved on a balance of probabilities that all 17 applicant employees took part in the strike of 24 April 2015 at the workplace of the Respondent.
- [27] It remained common cause that on 24 April 2015 the respondent did not interpose the strike with the issuance of any ultimatum. Neither was the union, Numsa contacted, as it had been done in January 2015. Admittedly, Numsa had recently submitted applications for union membership to the Respondent, nationally and locally at the beginning of April 2015. The Respondent had elicited the intervention of Numsa with positive results in the January 2015 unprotected

strike.

[28] I am in agreement with submissions of Mr Todd for the Respondent in finding that, the issuing of an ultimatum was not an invariable requirement in itself as was held in. *Mndebele and others v Xstrata*¹. A failure to issue an ultimatum did not in itself constitute procedural unfairness. The facts of this case demonstrate, in any event, that the Respondent expended considerable efforts throughout the duration of the unprotected strike to engage with the strike participants and convince them to return to work, failing which it would be left with no option but to take disciplinary action against them. The evidence led clearly establishes that:

- Management made concerted attempts to explain the consequences of their conduct to the individual applicants. It was made clear that their conduct constituted an unprotected strike.
- They were requested and instructed, on numerous occasions, to return to work.
- In a display of reasonableness, management proposed that the employees elect four representatives to engage with them whilst the others returned to work.
- Even though representatives were later elected and engaged with management, the individual applicants refused to return to work.
- The repeated refrain from the collective was that they were all in it together.

[29] It is true indeed that even though the Respondent did not issue an ultimatum in the formal sense, the individual applicants received the full benefit of management's engagements with them, which they elected to disregard. Mr

¹ *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (JA57/12) [2016] ZALAC 28 (unreported)

Motlohi begged and pleaded with the workers, encouraging them to go back to work. He emphasised the fact that most of them were sitting with final writing warnings, and pleaded with them saying that they were to think of their families and their children because the decision that might be taken was not likely to be favourable. The employees did not want to take heed of that advice.

- [30] In *Mndebele and others v Xtrata*², the LAC held that regardless of its form, an ultimatum, when required, would suffice if it served the purpose for which the law required an ultimatum to be issued. In that respect it held that:

“[T]he appellants were issued with an ultimatum that served the purpose for which the law requires an ultimatum to be issued. The appellants were cautioned in clear language and were specifically informed of the consequences of their failure to heed the warning. They were accordingly given an opportunity to reflect on their conduct and to desist from it”.³

- [31] On Saturday, 9 May 2015, the Respondent issued the individual employees with disciplinary notices under the heading: Notice of intention to apply collective discipline. The notice indicated, inter alia, that:

“The sanction proposed for the misconduct was (i) a final written warning valid for 12 months for those employees who had a clear disciplinary record and, (ii) dismissal for those employees who were already on a final written warning for participation in an unprotected strike” (of January 2015).

- [32] The notice invited all employees who participated in the strike to make representations regarding the intention to apply collective discipline and the

² *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (JA57/12) [2016] ZALAC 28 (unreported)

³ At paragraph [28].

sanction imposed. There are employees who made individual representations. A number of them elected to submit a collective response, without the assistance of any union. Then on 22 May 2015 the individual applicants were issued with notices of disciplinary action for collective misconduct. This certainly constituted an inherently fair procedure as all of the individual applicants were afforded an opportunity to be heard by means of written representations. From 9 May 2015 to 22 May 2015 the employees had enough time to reflect on the proposed disciplinary action. In *Modise & others v Steve's Spar Blackheath*⁴, Court was explicit in holding that the *audi alteram partem* rule must be observed but that its form should vary depending on the context. The key enquiry is whether the strikers or their representatives were given a fair opportunity to address two essential questions: whether they were engaging in an illegal strike and whether dismissal is an appropriate sanction.

- [33] Again and as correctly pointed out by Mr Todd, there is no obligation in law to conduct a formal disciplinary enquiry, as the Applicants wrongly suggests. What is required is an opportunity for the individual applicants to state their case. The principle has been clearly established, in the context of individual discipline. In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*⁵, the point is made clearly as follows:

“When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.”⁶

- [34] This is precisely the opportunity that was given to the individual applicants. They

⁴ [2000] 5 BLLR 496 (LAC).

⁵ [2006] 9 BLLR 833 (LC).

⁶ At page 841.

dealt with the question by choosing, deliberately and collectively, to deny that any strike action had taken place at all. Even on their version at the trial, this was false. They cannot complain that they were denied a fair opportunity to state their case collectively. In *Modise & others v Steve's Spar Blackheath* ⁷ the LAC held that

"It has also been said that, because strikers act collectively when they go on strike, an employer is entitled to respond collectively...That an employer is entitled to respond collectively means nothing more than that he can deal with the strikers as a group and not as individuals. The employees' collective action does not give the employer a licence to disregard the audi rule altogether. There is no reason why the employer cannot comply with the audi rule by calling for collective representations why the strikers should not be dismissed."⁸

[35] In the present matter the Respondent complied with the audi rule when it issued a notice of 9 May 2015 and only thereafter acted on 22 May 2015. In my view, the procedure followed by the Respondent was fair. Even when the employees had an opportunity to consult with their union they chose not to. They were properly found guilty. The progress sanction imposed on them was similarly fair in the circumstances.

[36] I accordingly issue the following order, having reflected on the law and fairness in relation to costs:

1. The dismissal of the 17 Applicant employees by the Respondent was substantively and procedurally fair.
2. The claim of the Applicants is dismissed.

⁷ [2000] 5 BLLR 496 (LAC).

⁸ At paragraph [76].

3. No costs order is made.

Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANTS: Mr B Purdon

Instructed by: Brett Purdon Attorneys.

FOR THE RESPONDENT: Mr C Todd

Instructed by: Bowman Gilfillan Inc.