



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
CASE NO: JS907/2020

In the matter between:

**VOICE OF WORKERS OF SOUTH AFRICA
CIVIL RIGHTS UNION**

First Applicant

LINDIWE MAHLANGU

Second Applicant

and

MEGABUS COACH (PTY) LTD

RESPONDENT

Heard: 29 May 2024

Delivered: (This judgment was handed down electronically by emailing a copy to the parties. The 28th of July 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

KUMALO AJ

[1] This matter concerns the alleged unfair dismissal of the Second Applicant, Ms Lindiwe Mahlangu (“Mahlangu”) by the Respondent.

[2] The Respondent employed the Second Applicant from 1 March 2010 until her dismissal on 21 August 2020, following a disciplinary action held around July/August 2020. She occupied the position of an inspector before her dismissal.

[3] It is a common cause that the Respondent provides transportation to workers and school children in the Secunda area, and that it has contracts with Sasol and the Mpumalanga Provincial Government.

[4] Mahlangu was employed as an inspector, and as such, her duties included ensuring that the buses were on time and checking that all passengers had tickets. Inspectors are required to be at their various inspection points in the mornings and afternoons.

[5] Buses would all return to the depot around 08:00 in the morning, and the drivers would be transported to their homes to return when it is time for the afternoon buses to leave the depot.

[6] Inspectors are not required to come to the depot for the morning break unless they are called upon to report to the office or to service the cars allocated to them.

[7] On Friday, 17 July 2022, and during the morning break periods, drivers gathered at the depot and held a meeting. Mahlangu joined them. She was tasked with visiting Ms. Ntombi Skhosana's office to discuss the drivers' concerns with her. The concerns raised related to COVID-19, and the drivers wanted their problems to be addressed by Mr. Carel Coetzee, the General Manager.

[8] The drivers' concern was that, in their understanding, the employer had undertaken to treat those who contracted COVID-19 as if they had suffered an injury on duty. However, one driver who contracted COVID-19 was treated at a public hospital contrary to the employer's undertaking.

[9] At 12h00, the drivers again congregated at the depot, and Mahlangu joined them. The buses only left the depot at approximately 14h00. It is alleged that Mahlangu was supposed to be on station at Shapeve School sometime between 12:30 and 12:45. She allegedly left the depot at 14h00.

[10] Following the incident mentioned above, Mahlangu was charged with gross misconduct for instigating, embarking on, and participating in an illegal, unlawful, and unprotected strike on the specified day. This strike delayed the operation for almost an hour and put the company's name to disrepute.

[11] On 20 August 2020, Mahlangu was found guilty of gross misconduct and dismissed. She appealed the findings, and the chairperson of the appeal hearing confirmed the initial disciplinary hearing's findings, despite the evidence of four witnesses who testified to the contrary on behalf of Mahlangu.

[12] Facts in dispute are whether

12.1 The conduct of the drivers and Mahlangu on 17 July 2020 amounted to a strike;

12.2 Mahlangu was supposed to be at the depot at all on 17 July 2020;

12.3 Mahlangu was an elected driver representative and had been elected and recognised before 17 July 2020;

12.4 The extent of the role played by Mahlangu in the events of 17 July 2020, and

12.5 Mahlangu was the only inspector at the depot on 17 July 2020.

[13] Perhaps the easiest to address is the issue of whether the conduct of the drivers and Mahlangu on 17 July 2020 constituted a strike. Section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995) (the “LRA”) defines a strike as a partial or complete concerted refusal to work, or retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, to remedy a grievance or resolve a dispute of any matter of mutual interest between the employer and employee, and this includes overtime work.

[14] I must agree with the Respondent’s submission that the conduct of the drivers fell squarely within the definition of a strike. A concerted refusal to work was observed, aimed at resolving the drivers’ concerns about their work conditions during the COVID-19 pandemic. This refusal culminated in a demand by the drivers for Coetzee to address them, which resulted in a delay of operations for almost an hour and tarnished the employer’s reputation.

[15] This, however, does not resolve the issue of Mahlangu’s role in the saga of 17 July 2020 and the fairness of her dismissal.

[16] It is trite that in dismissal cases, the employer bears the burden of proving that it had a valid reason to dismiss the employee. In this case, the employee was charged with gross misconduct. The employer alleged that on 17 July 2020, Mahlangu instigated, embarked on, and participated in an illegal, unlawful and unprotected strike.

[17] Mr Moses Mnguni, the Assistant Operations Manager at Megabus, and Ms Ntombi Sikhosana, the Human Resources Assistant at Megabus, testified on behalf of the Respondent.

[18] Mnguni had no personal knowledge of the events of 17 July 2020 but was the initiator of the disciplinary hearing against Mahlangu and sought her dismissal.

[19] The greater part of his testimony related to the operations of the Respondent and what the duties of an inspector entail. He confirmed that he is the person who initiated the disciplinary proceedings against Mahlangu. When asked why he did that, he explained that upon reviewing their investigations, he discovered that Mahlangu was the one who had said the buses must not go out. This was confirmed to him by Ms. Skhosana, who noted that Mahlangu stated the buses would not go out until they had spoken to Coetzee. He confirmed under cross-examination that he did not interview any other persons or drivers regarding the matter.

[20] Ms. Skhosana confirmed in her evidence that Mahlangu told her that the buses would not leave the depot unless Coetzee came to address the drivers. It is on this basis that it is alleged she instigated the illegal strike.

[21] Mnguni confirmed under cross-examination that witnesses for Mahlangu testified that Mahlangu did not instigate the illegal strike or tell Ms. Skhosana that buses would not leave the depot unless Coetzee addressed them. I will address this aspect further when I consider the evidence of Mahlangu and her witnesses before this court.

[22] Mahlangu testified that she was one of the two representatives chosen by the drivers. She explained that during the COVID-19 pandemic, Coetzee had requested the employees to nominate two representatives who would liaise with management on any problems they may have. The other representative chosen by the drivers was Mr. Moses Kubheka.

[23] On the day in question, during her morning break, she was approached by Mrs. Kubheka, the wife of Mr. Kubheka, the other chosen representative of the drivers. Mrs. Kubheka informed her that Kubheka was ill and had not been at work. The drivers had

requested his presence, but since he was not there, he asked her to attend to the drivers' issues.

[24] She went to the depot and found the drivers in a group, and they approached her, told her about a fellow employee who had contracted COVID-19 and who was hospitalised in a government hospital. The understanding of the workers was that COVID-19 would be treated as an injury in the workplace, and they would be entitled to be hospitalised in a private hospital.

[25] They asked her to call management because she did not have answers to some of their concerns. She went to the Human Resources offices to relay the message from the drivers, but the HR officer was unavailable, and she found the assistant, Ms. Skhosana. She informed her about the driver's concerns, and they went out to meet with them.

[26] Ms. Skhosana was unable to address the drivers' concerns, prompting them to request Coetzee. Coetzee was not available, and they were told he would return at noon.

[27] The drivers congregated again at the depot at 12h00 with the expectation that Coetzee would address them. He was again not available. This prompted a negative response from the drivers, who refused to commence their duties until Coetzee addressed them.

[28] Mahlangu denied that she told Skhosana that the buses would not leave the depot before being addressed by Coetzee or that she uttered the words to the effect that the drivers lacked courage and should wear dresses, and she should wear trousers.

[29] Mr. Norman Moses Kubheka was the following witness called on behalf of the Applicants. Kubheka confirmed Mahlangu's evidence that the two of them were the

chosen representatives of the workers. He explained that on the day in question, he was booked off sick by his doctor due to high blood pressure.

[30] On the morning of 17 July 2020, he received a message from his wife stating that the drivers had sent her to call him because there was an urgent matter to attend to at the depot. He then requested that she inform Mahlangu to participate, as she was the other representative chosen by the workers.

[31] The other witness called to the stand was Mr. Mavela Enoch Tshabalala. He testified about the issue of COVID-19 and what had transpired regarding one of the drivers who had contracted the virus. Upon arrival at the depot, he informed the drivers that he had seen Kubheka's wife and told her to inform Kubheka that they had issues that needed his attention.

[32] Whilst waiting for Kubheka, Mahlangu arrived and informed them that Kubheka had delegated her to attend on his behalf, as she was the other chosen representative, and Kubheka was unavailable due to illness.

[33] He explained what transpired on that day. Notably, he stated that Mahlangu said nothing. They were the ones making demands. He testified that, after Mahlangu's statement, which must have been after 13:00, they had to return to work since the employer was unavailable to address their concerns. They informed her that they would not leave. He confirmed that he was one of the drivers who said he would not leave the depot until Coetzee addressed them.

[34] I am of the view that this Court need not go into detail about the evidence of Tshabalala, noting that he confirmed he was one of those who insisted they would not leave the depot until Coetzee had addressed their issue. Furthermore, he collaborated with Mahlangu's evidence, which showed how she became involved in the matter and was chosen as their representative.

[35] It is clear from the evidence that the drivers embarked on a work stoppage, which was tied to their demand that Coetzee, whom they regarded as their employer, address them. It falls within the classic definition of a strike, and in this situation, it was unlawful and unprotected.

[36] The question that arises then is whether Mahlangu instigated the work stoppage as alleged by the Respondent. The allegation is based on what Skhosana informed Mnguni, who was tasked to investigate the matter.

[37] Mnguni did not know what transpired on 17 July 2020. He relied on what Skhosana told him during his investigation. He did not enquire from any of the other employees, including the drivers and Mahlangu. The decision to charge Mahlangu was based solely on the information he received from Skhosana.

[38] It further appears that the decision was motivated by the fact that Mahlangu was held to a higher standard, as she occupied a supervisory position over the drivers. She was expected to exercise leadership by ensuring that the drivers complied with the employer's operational requirements and resumed their duties.

[39] The courts have consistently held that a higher degree of accountability may rest with supervisory personnel, provided that their role and influence over the misconduct are established¹.

[40] The Respondent's reliance on Mahlangu's alleged supervisory role is not supported by sufficient evidence. Whilst her title may suggest a higher status than the drivers, there was no indication that she had adequate authority over their conduct in that context or that she failed to discharge any formal obligation of leadership.

[41] Mahlangu testified that she was one of the two chosen representatives of the drivers, whose evidence was corroborated by the Kubheka, the other representative

¹ See *National Union of Mineworkers v Amcoal Colliery* [2000] 4 BLLR 409 (LAC)

and Tshabalala. Kubheka was the person who requested that Mahlangu attend to the drivers' issues on the day, as he was ill-disposed.

[42] More significantly, Mahlangu was the only employee disciplined for conduct that was collective in nature. The Respondent failed to justify the unequal treatment or demonstrate why Mahlangu's conduct warranted dismissal, while the rest of the drivers escaped any disciplinary action and/or sanction.

[43] Section 188(1)(a) of the Labour Relations Act ("the LRA") outlines the requirements for a fair dismissal. It states that a dismissal is unfair if the employer fails to prove that the dismissal was for a fair reason and was conducted in accordance with fair procedures. Specifically, the fair reason must relate to the employee's conduct, capacity, or the employer's operational requirements.

[44] Item 3 (6) of Schedule 8, LRA, stipulates that the employer should apply the penalty of dismissal consistently with how it has been used to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

[45] The courts have distinguished between historical inconsistency and contemporaneous inconsistency. Historical inconsistency occurs when an employer, in the past, has not, as a matter of practice, dismissed employees or imposed a specific sanction for contravention of a particular disciplinary rule.

[46] Contemporaneous inconsistency occurs when two or more employees engage in the same or similar conduct at roughly the same time. Still, only one or some of them are disciplined, or where different penalties are imposed.

[47] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*² The court held that the inconsistency claim will fail where the Employer can differentiate between Employees who committed similar transgressions based on, inter alia, differences in personal circumstances, the severity of the misconduct, or other material factors.

[48] The basis for the principle governing the need for consistency in discipline was stated by the Labour Appeal Court in *Gcwensha v CCMA & Others*³ In the following terms:

“Disciplinary consistency is the hallmark of progressive labour relations, and the same standards must measure every employee.” The Court went further to say “when comparing employees, care should be taken to ensure that the gravity of the misconduct is evaluated ...”

[49] In *NUM and another v Amcoal Colliery t/a Arnot Colliery and another*⁴ In determining the fairness of the dismissal of sixteen employees who had been dismissed for failing to comply with an instruction, the court said the following:

“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.”

[50] In *SACCAWU and Others v Irvin & Johnson*⁵. The court found that;

“The best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises their discretion in a particular case, it would not mean that there is unfairness towards other employees. It would mean no more than that

² [2009] 11 BLLR 1128 (LC)

³ (2006) 3 BLLR 234 (LAC)

⁴ [2000] 8 BLLR 869(LAC)

⁵ (1999) 20 ILJ 1957(LAC)

his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision...a wrong decision can only be unfair if it is capricious, or induced by improper motives, or worse, by a discriminating management policy.”

[51] The LAC continued:

“It must be so that an employer cannot be expected to continue repeating a wrong decision in obedience to a principle of consistency...While the proper course of action in such cases is to clearly and in advance inform employees that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment to be determined in the circumstances of the particular case. For that reason, there is necessarily room for flexibility. Still, where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.

[52] In *Cape Town City Council v Masitho & others*⁶ The court held that “Employer is required by considerations of fairness to act consistently in the application and enforcement of its disciplinary rules and management policies designed to instil discipline”.

[53] As a result, I am satisfied that the dismissal was substantively unfair.

[54] Mahlangu seeks reinstatement. In terms of section 193(1)(a) of the LRA, reinstatement is the primary remedy unless one of the exceptions under section 193(2) applies.

⁶ (2000) 21 ILJ 1957 (LAC)

[55] No evidence was led to suggest that reinstatement would be impracticable, nor that the trust relationship has been irreparably damaged.

[56] Accordingly, Mahlangu is entitled to retrospective reinstatement.

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

1. The dismissal of the Second Applicant is declared substantively unfair;
2. The Respondent is ordered to reinstate the Second Applicant to her previous position on terms and conditions no less favourable than those which applied before her dismissal;
3. The reinstatement is to be retrospective to the date of dismissal, and the Second Applicant is entitled to pay back calculated from the date of dismissal to the date of reinstatement; and
4. There is no order as to costs.

Kumalo MP AJ
Judge of the Labour Court
Braamfontein