IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case Number:J 550/97

In the matter between

NUMSA First Applicant

BENEDICT PHIHLELA & OTHERS Second to further Applicants

and

FIBRE FLAIR CC T/A KANGO CANOPIES Respondent

JUDGMENT

BENJAMIN A J

[1] In March 1996, the Respondent took over a existing fibre glass manufacturing business. In terms of an agreement to which the first applicant was a party, the Respondent took over the employment of the staff of 13 of that business. These employees retained their service with their previous employer for the purpose of the payment of severance benefits. Almost a year to the day later on 5 March 1997, the Respondent dismissed eight employees for participating in a 35 minute unprotected work stoppage. I am required to determine the fairness of this dismissal.

[2] Mr Jacobus Venter, the managing member of the respondent, gave evidence of the year's events that led up to these dismissals. It was the Respondent's contention that the difficulties it had experienced with their employees and their union, the first applicant, was a major factor justifying the dismissals. He said the fibre glass business was highly competitive - there were seven other manufacturers located in the same vicinity as the respondent. During the course of the year, the Respondent lost the business of several motor dealers as a result of the unreliability of its workforce.

[3] A few months after the respondent took over the business there was a decrease in the productivity of workers. One employee was dismissed for poor productivity. As a result the official of the first applicant who dealt with the respondent, Mr Gopalong Cibi, threatened to make the respondent's life a misery. From then on, according to Venter, matters became more difficult - there was a continued decline in productivity and in the quality of work. Employees were unco-operative. They refused to agree to work and quality standards that Venter prepared. They also refused to discuss issues with the respondent without a NUMSA official being present but the official frequently broke appointments and failed to attend arranged meetings. This caused the Respondent extreme frustration.

[4] In December 1996 there was a work stoppage of some 30 minutes as a result of

confusion over the way in which the Christmas bonus was reflected on the pay slips. Employees were warned verbally but this was not recorded in their personnel files.

[5] On 17th February, the Respondent gave 48 hours notice to six employees (three laminators and three assemblers) that they were to work short time. The reason for short time was two fold-what Venter described as "spiteful" poor performance by the three laminators and that business was slow. As a result of advice by the local representative of the bargaining council, the Respondent did not consult with NUMSA over the introduction of short time.

[6] On 19th February the three laminators ceased work at 12h30 in terms of the short time regime while the three assemblers (who are applicants in this matter) continued to work. At about 15h20 all of the factory workers stopped work. At the request of management, they then formulated their demands in writing. They indicated that while the workers did not oppose short time, they wanted the issue to be negotiated with NUMSA.

[7] The following morning the employees commenced work at their normal time. Employees were issued with written final warnings for "misconduct due to witholding labour collectively and unprocedurally". The warning included the statement " any further displays of unacceptable performance will result in

disciplinary action being taken against you".

[8] On 4th March 1997 the Respondent was advised that its workers would take part in a one hour protest action the following day. The Respondent issued a notice to its staff :

"This protest action has not been approved by management. Any witholding of labour during working hours will result in severe disciplinary action. Some of you have already been issued with final warnings for witholding labour collectively. Take note that this protest will be illegal and unprocedural".

[9] On 5th March Venter attended a dispute meeting at the bargaining council together with Mr William Raboloy, a shop steward, and Cibi of NUMSA. They were not present at the factory when the work stoppage took place.

[10] The other member of the Respondent, Mr Simon Du Toit gave evidence of events at the factory on that day. He had recorded the events in contemporaneous notes which were placed before the court. At 10h00 the workers clocked out as usual for their 20 minute tea break. At10h25 they left the premises and went on a brief march through the surrounding industrial area and returned to the factory. At 10h47 and 10h52 Du Toit gave a verbal instruction to return to work. He also reminded the employees that certain of them had received final warnings and referred to the warning letter of the previous evening. The employees returned to

work at 11h00.

[11] Venter arrived back at the factory at around 12h00 and was advised by Du Toit of the events of the morning. At 12h15 the shop stewards handed Venter a notice circulated by COSATU's regional office calling upon workers to form picket lines and demonstrations in all industrial areas for one hour on 4 and 5 March 1997 in support of its demands on the Employment Standards Bill. Venter states he discussed the "dismissal issue" with the shop- stewards but did not give a detailed account of these discussions.

[12] In the course of the day the nine workers who had participated in the protest action and who had been issued with final written warnings on the 19th February were dismissed. No disciplinary enquiry was held before the dismissal. In their dismissal letter, they were advised that they could apply for the vacancies which had arisen due to their dismissal by 7th March 1997. The union was advised by fax of the dismissals and informed that members who wished to bring reasons for mitigation to the Respondent could lodge an appeal. Cibi arrived at the premises at 14h30 to attend to another matter and was then informed by Venter of the dismissal. On 11th March Cibi telephoned Venter advising that he wished to lodge an appeal on behalf of the dismissed workers. Venter refused to entertain any appeal because the 48 hour limit for appeals in the disciplinary code of procedure had expired.

[13] Venter testified that he had been advised that he was legally required to offer dismissed employees re-employment. The new contract of employment was in substance the same as the old contract that the employees had refused to sign except that the probation clause had been omitted. However the wages offered were substantially lower than their previous wages. One of the dismissed workers applied for re-employment. The eight individual applicants did not.

[14] The Applicants closed their case without leading any evidence. They did however place before the court COSATU's letter of 18 February 1997 referring a dispute concerning the draft Employment Standards Bill to NEDLAC. To the extent that this issue was dealt with by the Labour Court in Business SA v COSATU & another [1997] 5 BLLR 511 (LAC) it was agreed that I could take judicial notice of the referral. Ms Edmonds, for the Applicants, submitted that this letter established in terms of the individual Applicants belief that their action would be protected in terms of s 77of the LRA. It is worth pointing out that these issues occurred two months before the interdict granted by the Labour Appeal Court in the Business SA case.

PROCEDURAL FAIRNESS

[15] There was no disciplinary enquiry before the dismissal. Venter's evidence was that he met with the two shop-stewards at which he discussed the "dismissal

issue", but he did not give a detailed account of what was discussed. It was at this meeting that the shop- stewards handed Venter the document circulated by COSATU calling on members of its affiliates to participate in demonstrations.

[16] Mr la Grange, for the Respondent, contended that the report that Venter received from Du Toit coupled with the meeting with the shop- stewards constituted an adequate pre - dismissal investigation. Venter generally kept a detailed record of his dealings with the union, including tape recordings. Transcripts of many meetings and telephone calls were contained in the bundle of documents before the court. His inability to give any detail of this meeting tends to indicate that the meeting consisted of no more than the shop - stewards handing over the document to him and his acknowledging receipt of it.

[17] The employees returned to work at 11h00. At the time of their dismissal, they were working. There were no exceptional circumstances present that made it impossible or impractical for an enquiry or investigation to be held before the dismissal. Mr la Grange contended that an enquiry would serve no purpose as there was no dispute about the nature of the misconduct. In the circumstances, he argued the Respondent's offer that the employees could raise issues of mitigation on appeal constitutes sufficient compliance with the requirements of procedural fairness. Doubtless, there are situations in which such a case can be made. Particularly in the case of small employers, a properly considered 'appeal' may

often satisfy the requirements of procedural fairness. However, in this case the Respondent was unreasonable in not allowing an appeal to be lodged when the union sought to do so six days after the dismissal.

[18] For this reason, I find that the dismissal was procedurally unfair.

SUBSTANTIVE FAIRNESS

[19] This is a dismissal for misconduct. The evaluation of the fairness of the dismissals is to be approached in terms of the guidelines in item 7 of the Code of Good Practice : Dismissal. The applicants admit they had been guilty of misconduct. Nor do they deny that they were aware of the rule they violated or that this rule was valid and reasonable.

[20] The applicants did suggest that the rule was not consistently applied because only some of the employees who participated in the work stoppage were dismissed on the 5 March. However, the application of progressive discipline to collective misconduct can lead to a situation in which some employees are dismissed for participation in a particular event while others are not (National Union of Mineworkers and others v Free State Consolidated Gold Mines (Operations) Ltd (1995) 16 ILJ 1371 (A) at 1378 A-B).

[21] Ms Edmonds also argued that, as the threat of dismissal was not part of the

ultimatum issued during the work stoppage, the Respondent was prevented from dismissing the employees who returned to work in response to the ultimatum. Again, this argument is incorrect as the employees were aware from the notice of the previous evening that they were running the risk of disciplinary action.

[22] The issue that needs to be determined therefore is whether the sanction of dismissal was appropriate for the misconduct. This requires an evaluation of the circumstances surrounding the dismissal and in particular, the seriousness of the misconduct.

[23] The Respondent stressed the following factors as supporting its view that the dismissal was justified-

1) the employees had been warned by the employer the previous day that participation in the demonstration would be "illegal and unprocedural" and proceeded to do so despite the warning. This amounted to a challenge to the employer's authority;

2) the difficulties of the last year had created a fragile relationship between the respondents and its employees and had placed the respondent in a precarious financial position. In this context, even a short work stoppage could cause further financial harm to the respondent if it resulted in the loss of a further dealership;

3) the protest action was staged before there had been compliance with s77 of the Labour Relations Act;

4) the individual Applicants had received final written warnings for participating in an unprotected strike less than three weeks before the demonstration and their dismissals were accordingly justified in terms of the principles of corrective discipline.

[24] The Applicants stressed the following factors as mitigating the seriousness of the conduct -

1) the absence from work was of a comparatively short duration - only 35 minutes;
2) the employer was aware the previous day that the demonstration would only endure for an hour;
3) the dispute giving rise to the demonstration had been referred to NEDLAC in terms of s 77 of the LRA. While there had not yet been compliance with the procedures in s77, the protest action had been called by their trade union and their federation, as a result at the time of the protest action, the individual Applicants reasonably believed that their action would be protected under s 77;
4) the respondent offered the individual applicants re-employment, although at a lower wage.

[25] In the absence of evidence by the individual Applicants, I am not able to make any finding concerning their state of mind. Nevertheless, it is common cause that the stoppage was of a short duration. The application of progressive discipline does

not have the inevitable consequence that employees on a final warning must be dismissed if they repeat the misconduct. That this conduct must still be evaluated is implicit in the wording of the final warning. In balancing the parties' contentions, particular consideration must be given to the offer of re-employment that formed part of the dismissal notice.

[26] As is indicated above, Venter gave evidence that the offer of re-employment was made because he had been advised that it was a legal requirement. Mr la Grange, for the respondent, argued that, because the advice was clearly incorrect the offer of re- employment should be disregarded. I do not believe that this is appropriate. Whatever advice the respondent may have received, the fact that an offer of re-employment was made, is indicative of the employer's assessment of the seriousness of the offence at the time. His evidence was that he hoped that the combined effect of the dismissal and the re-employment would improve the relationship between the Respondent and its employees. It was the respondent's decision to reduce wages that led the employees to reject the offer. This conduct gives rise to a strong inference that he wished to make use of the stay-away to continue the relationship on terms more favourable to it. This is a significant indication that dismissal was not the appropriate sanction.

I therefore find that the dismissal is substantively unfair.

RELIEF

[27] As I have found that the dismissal is substantively unfair, I am empowered to order the employer to reinstate or re-employ the employees or to order the employer to pay compensation to the employees.

[28] In terms of 193 (2), I must order reinstatement or re-employment unless -

a) the employee does not wish to be reinstated or re-employed;

b) the circumstances surrounding the dismissal are such that a continued relationship would be intolerable; or

c) it is not reasonably practicable for the employer to reinstate or re-employ the employee.

[29] The individual applicants persisted with their claim for reinstatement at the hearing. I therefore have to consider the impact of the misconduct and the events surrounding it on the continued employment relationship. That participating in the demonstration was an act of misconduct is not in itself a reason not to order reinstatement. In Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union and others 1994 15 ILJ 65 (A), Goldstone J A (at 79 G-H) held that the industrial court should mark its disapproval of the misconduct of employees engaged in an unlawful strike by refusing back pay rather then by refusing reinstatement. The 1956 LRA, with which the Apellate Division was dealing in the PACT case, did not deal expressly with the manner in which the industrial court should exercise its discretion as to whether or not to

order reinstatement. As the 1995 LRA regards reinstatement as the preferred remedy for dismissals without good cause, a stronger case must be made out before this approach is deviated from.

[30] The offer of re-employment and Venter's concession that he believed at the time that the relationship could improve indicate that a continued relationship would not be intolerable. It also indicates that reinstatement or re-employment would be reasonably practicable. That two years have elapsed since the dismissal does not mean that an order involving a restoration of the employment relationship is not reasonably practicable. Nor does the fact that the Respondent is a small employer with a workforce of thirteen. The possible need for the employer to retrench employees engaged since the strike can be accommodated by a delay in the order coming into effect. Despite the two year period between the dismissal and the hearing of the case, no circumstances were placed before me in evidence which persuade me to depart from the approach of the Apellate Division in the PACT case and the Labour Appeal Court in the case such as NUMSA and others v the Benicon Group (1997) 18 ILJ 123 (LAC) at 147I - 148B and make the order of reinstatement retrospective.

[31] I accordingly make the following order -

(a) the Respondent is ordered to reinstate the eight individual applicants with effect from 1 April 1999 on the terms and conditions that prevailed prior to their

dismissal;

(b) the employees' remuneration must be adjusted to reflect any increase that they would have received in the intervening period;

(c) the employees will retain their service for purposes of severance pay in accordance with the agreement of 14 February 1996

(d) the Respondent is to pay costs.

P BENJAMIN
Acting Judge of the Labour Court

SIGNED AND DATED THIS 10th DAY OF March 1999

DATE OF HEARING:	1st and 2nd March 1999
DATE OF JUDGMENT:	10th March 1999
For the Applicant:	Ruth Edmonds
For the Respondent:	Advocate W la Grange instructed by Hofmeyr Herbsteins Gihwala & Cluver Inc