



24/97

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Case No 573/95

In the matter between

**CHEMICAL WORKERS'
INDUSTRIAL UNION**

First Appellant / First Respondent
in Cross-appeal (First Respondent
in Labour Appeal Court)

C GOQOZA

Second Appellant / Second Respondent
in Cross-appeal (Second Respondent
in Labour Appeal Court)

and

**ALGORAX (PROPRIETARY)
LIMITED**

Respondent / Appellant in
Cross-appeal (Appellant in
Labour Appeal Court)

CORAM: Van Heerden, Vivier, Olivier, Scott et Zulman
JJA.

HEARD: 18 March 1997

DELIVERED: 26 March 1997

JUDGMENT

VIVIER JA:

The first appellant is the Chemical Workers Industrial Union, a registered trade union ("the union"). The second appellant is Mr Christopher Goqoza ("Goqoza") who was at all material times a member of the union and who was until 1 June 1993, when he was summarily dismissed, employed by the respondent, Algorax (Pty) Ltd ("the company") as an assistant storeman. On 5 April 1993 five or six new zinc sheets ("the stolen sheets") were without authority removed from a store at the company's premises at Port Elizabeth by some of its employees and placed on the back of a delivery truck where they were hidden under a pile of used zinc sheets which were due for delivery. The stolen sheets were discovered before the truck could leave the company's premises. A disciplinary inquiry into the incident was held by the company and four employees, including Goqoza, were found guilty of the

charges of misconduct against them and were summarily dismissed with effect from 1 June 1993. Two employees were found not guilty. The charges on which Goqoza was found guilty were the following : "(i) misappropriation of company property/theft/ attempted theft; (ii) intentional possession of company property; (iii) accomplice to theft". The union and Goqoza contended that his dismissal constituted an unfair labour practice and, after a conciliation board had been unable to resolve the dispute, they referred it to the Industrial Court for a determination in terms of sec 46(9) of the Labour Relations Act 28 of 1956 ("the Act"). The Industrial Court found that Goqoza's dismissal constituted an unfair labour practice in that it was in substance and procedurally unfair. It accordingly granted an order reinstating Goqoza in the company's employ on terms and conditions not less favourable than those upon which he was employed at the time of his dismissal. In addition

the company was ordered to pay Goqoza a sum equivalent to six times his monthly wages at the time of his dismissal. No order was made as to costs.

In terms of sec 17(21A)(a) of the Act the company appealed to the Labour Appeal Court ("the LAC"). The appeal succeeded in part. The Industrial Court's determination that Goqoza's dismissal constituted an unfair labour practice was confirmed but the reinstatement order was set aside and it was ordered instead that the company pay to Goqoza as compensation an amount equal to one month's salary as at the date of his dismissal. The union and Goqoza were ordered to pay the costs of the appeal. In terms of sec 17C(1)(a) of the Act the union and Goqoza now appeal to this Court against the order of the LAC setting aside the reinstatement order and its order as to costs, and the company cross-appeals against the whole of the LAC's judgment and order, the requisite

leave having been granted by the LAC.

I must first deal with an application by the company for condonation of the late lodging of its power of attorney to prosecute the cross-appeal which was opposed by the union and Goqoza. In terms of AD Rule 5(3)(b) the power of attorney to prosecute the cross-appeal had to be lodged within 20 days of the noting of the cross-appeal. The cross-appeal was noted on 17 November 1995. Although the power of attorney was signed on 25 January 1996 it was only lodged, together with a petition for condonation, on 10 February 1997. No explanation whatever for the delay was furnished in the petition and no case was therefore made out for granting the condonation sought. For the reasons which follow there are, in any event, no prospects of success in the cross-appeal. The application for condonation must accordingly be refused.

At the hearing before the Industrial Court it was common

cause that on the day in question Gogoza received instructions from his supervisor, Mr Naidoo, to deliver the used zinc sheets, which had at that stage already been loaded on the delivery truck, to the homes of two employees who had bought the sheets from the company. He was given the necessary documentation relating to these sheets and he was the driver of the truck when it was stopped at the security gate and the stolen sheets discovered. It was also common cause that Gogoza was not present when earlier that day the stolen sheets had been removed from their rack in the store and placed on the floor of the store by Messrs Ngethu and Bidla from where it was later taken from the store and loaded on the delivery truck by Messrs Balothi and Lama.

The company's case against Gogoza was that the stolen sheets were removed from the store and loaded on the truck at his instigation and for his own use. Two witnesses, Ngethu and a co-

worker Mr Mngazi, were called to support the company's allegations.

Ngethu's evidence before the Industrial Court was that he was in charge of the store where the stolen sheets were kept and that he had the keys to this store. Before ten o'clock that morning Goqoza asked him for the stolen sheets which he said he needed to build a garage. Goqoza asked him to put the sheets inside the store and said that he himself would arrange to get the sheets past the security gate. He initially refused but was eventually persuaded to do as he was asked. Goqoza then left and a little later Ngethu, with the assistance of Bidla, took the stolen sheets from the shelf and placed them on the floor of the store. Ngethu later left the store and as he went out he saw the delivery truck outside the store and Balothi and Lama loading the stolen sheets on the truck. He knew that Lama was one of the drivers and assumed that he had driven the truck to

the store. He also assumed that Lama and Balothi had been sent by Goqoza to pick up the stolen sheets. Ngethu pleaded guilty to his involvement in the theft at the disciplinary inquiry and was summarily dismissed.

Mngazi's evidence was that on the day in question he saw Lama and a temporary worker loading used as well as new zinc sheets on a truck parked outside the store. He did not see Goqoza there. Lama told him that he was loading the sheets for Goqoza. Mngazi said that some weeks earlier Goqoza had told him that he was going to build a garage for his car.

In his evidence before the Industrial Court Goqoza said that at about ten o'clock on the morning in question his supervisor, Mr Naidoo, instructed him to deliver a load of used zinc sheets. He was given a gate pass for the load. Before getting into the truck he saw a stack of used zinc sheets in the back of the truck and did

not think it necessary to count them as the two people who had bought the sheets and had loaded them on the truck, were accompanying him in the cab of the truck. It was common cause that thirty used zinc sheets were on the truck. Gogoza said that he was unaware of the stolen sheets. At the security gate he was instructed to return to the store where the truck was off-loaded and the stolen sheets discovered. Gogoza denied speaking to Ngethu that morning.

Lama testified on Gogoza's behalf and denied that he had said to Mngazi that the stolen sheets were being loaded for Gogoza. Lama said that he was walking past the store when he saw Ngethu, Bidla and one Poswa loading the stolen sheets on the truck. At Ngethu's request he assisted in the loading. Nobody told him who the sheets were for and he did not ask.

The supervisor Naidoo was not called to testify in the

Industrial Court.

It is clear from the above summary of the evidence adduced in the Industrial Court that there was an irreconcilable conflict on critical aspects between the evidence led on behalf of the company and that led on behalf of the union and Gogoza. The Industrial Court, after a careful and thorough analysis of all the evidence, concluded that it was unable to find on a balance of probabilities that Gogoza had in any way been involved in the theft of the stolen sheets.

On the question of whether to grant a reinstatement order the Industrial Court referred to the evidence given by Mr Lane, the company's general manager in charge of finance and administration, to the effect that the employer-employee relationship had been destroyed and that Gogoza could no longer be trusted. The Industrial Court pointed out that this belief was based on the

premise that Goqoza was guilty of misconduct. The Industrial Court further pointed out that Goqoza had worked for the company for 14 years, that he had a clean service record and that at the disciplinary hearing Naidoo had described him as a hard worker, reliable and responsible. The Industrial Court concluded that in all the circumstances the dismissal was unjustified and substantively unfair and that an order for reinstatement was the appropriate remedy.

The LAC, after again analysing and assessing the evidence, concluded that it had not been established on a balance of probabilities that Goqoza was guilty of misconduct. This, in my view, was clearly a finding of fact and in terms of sec 17C(1)(a) of the Act this Court is bound by it. (*National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A) at 583H-584C.) The cross-appeal, which has as its basis an

attack on this finding, therefore cannot succeed. The LAC held in its judgment that the circumstances of the case were such that the company should not have summarily dismissed Goqoza without proof of his guilt on a balance of probabilities. His summary dismissal without such proof thus constituted an unfair labour practice as found by the Industrial Court. On behalf of the company it was submitted before us that the LAC should have held that the union and Goqoza bore the onus of proving the latter's innocence in view of the fact that Goqoza had failed in his duty not to check the load for which he was responsible. There is no merit in the submission. I agree with the LAC that in the circumstances of this case Goqoza should not have been dismissed without proof of his misconduct on a balance of probabilities.

Despite its finding that Goqoza was not guilty of the alleged misconduct, the LAC nevertheless found that his dismissal was

justified as there was at the least a reasonable suspicion that he had been involved in the theft and the company could no longer be satisfied that he was trustworthy and accordingly from the company's point of view the employer-employee relationship was no longer sustainable. For this finding the LAC relied solely on Lane's evidence. As the Industrial Court had pointed out, Lane's evidence about a lack of trust was based on the premise that Goqoza was guilty of the alleged misconduct. Lane's evidence contains no indication that had Goqoza been acquitted of the charges of misconduct the company would have considered summarily dismissing him on the ground of suspicion. This possible ground for dismissal was first raised by the LAC. It had never been required of Goqoza to meet a case for dismissal based on suspicion only. He had simply been charged with misconduct, found guilty and dismissed for misconduct. The issues relevant to

a dismissal on the ground of suspicion only were neither raised nor canvassed at the disciplinary hearing. Goqoza was never alerted to such a possibility. It was never raised before the Industrial Court where Lane justified the dismissal on the ground that Goqoza was guilty of misconduct. The issue on which the LAC justified the dismissal was fundamentally different from the issues with which Goqoza was charged and found guilty at the disciplinary enquiry. Although the LAC's finding that the company had reason for no longer trusting Goqoza must be accepted by this Court as a finding of fact, it is immaterial to the essential issue in this case, namely whether Goqoza's dismissal for misconduct was an unfair labour practice. And on that issue the finding of the LAC that the summary dismissal was not justified and constituted an unfair labour practice must stand.

The Industrial Court considered reinstatement to be the

appropriate relief. Goqoza had long service with the company, an unblemished disciplinary record and his immediate superior spoke highly of him. In my view the LAC's interference with the exercise of that discretion was vitiated by the fact that it was based on the lack of trust found by it, something with which Goqoza had never been confronted, which had never been investigated and which he had never been given the opportunity to refute. There was, in my view, no good reason to have interfered with the remedy of reinstatement ordered by the Industrial Court and the LAC ought to have upheld that order.

In the result the following order is made:

1. The company's application for condonation of the late lodging of the power of attorney to prosecute the cross-appeal is refused with costs.
2. The appeal is upheld with costs.
3. The order of the LAC is set aside and replaced by an

order dismissing the appeal with costs.

W VIVIER JA.

VAN HEERDEN JA)

OLIVIER JA)

SCOTT JA)

ZULMAN JA)

Concurred.