REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 308/13

In the matter between:

ICHAWU	**First Applicant**
MANQUNYANA, Zimakhaya	**Second and further applicants**
and 8 others	
and	
CCMA	**First Respondent**
COMMISIONER ANELE MGUBASI	**Second Respondent**
SUID-KAAP STENE ELECTROPLATING AND POWDERCOATING CC	**Third Respondent**

Heard: **17 June 2015**

Delivered: **29 July 2015**

Summary: Review – dismissal for gross insubordination. Employer imposed unilateral change to terms and conditions of employment. Union referred dispute to CCMA in terms of LRA s 64(4). Employer did not restore status quo in terms of s 64(5). Employees refused to work in terms of new conditions. Such refusal not gross insubordination. Award that dismissal was fair reviewed and set aside.

JUDGMENT

STEENKAMP J

Introduction

[1] An employer imposes unilateral changes to terms and conditions of employment on its workers. The workers refuse to comply. Does that constitute gross insubordination?

[2] The Court had to consider this question in the context of a review application. The arbitrator had decided that the workers refused a valid instruction; that it constituted misconduct; and that their dismissal was fair. The trade union, ICHAWU[1], seeks to have that award reviewed and set aside.

Condonation

[3] The applicants seek condonation for the late filing of their review application and supplementary affidavit delivered in terms of rule 7A(8).

[4] The review application was served, but not filed, in time. It was one day late. It is an inconsequential delay and the explanation is satisfactory. And given my view on the merits, it is in the interests of justice that condonation be granted. There is also no prejudice to the respondents occasioned by the late delivery of the supplementary affidavit.

Background facts

[5] The nine individual applicants worked for the third respondent, Suid-Kaap Stene cc, in Mossel Bay. The company experienced financial difficulties. It wanted to introduce short time.

[6] The union consulted with the workers and the trade union. (It refused to consult with the union organiser, Mr Dale Fish, but nothing much turns on this). The arbitrator notes in her award that “no agreement was reached”.

[1] The first applicant, representing its members (the second and further applicants.

The company introduced a new roster unilaterally. The union referred a dispute to the CCMA in terms of s 64(4) of the LRA[2], requiring the employer to restore its members' terms and conditions of employment. The company did not comply. Instead, it instructed the workers to report for duty in terms of the new roster. They refused. The employer issued them with three written warnings over the period of a week for "disrespect" and "failure to follow a reasonable instruction". It then dismissed eight of the workers on 13 November 2012 and the ninth, Zamikhaya Manqunyana, a shopsteward, on 12 December 2012.

[7] The applicants referred an unfair dismissal dispute to the CCMA. The arbitrator (the second respondent) found that their dismissal was fair.

The arbitration award

[8] The arbitrator set out the background as summarised above. She noted that, in terms of the new roster, the workers would work four days a week instead of five.

[9] The employer was represented by Mr Willem Stephanus Conradie, an official of an employers' organisation, NEASA. He emphasised that the employer did not intend to retrench anyone but only to introduce short-time.

[10] The chairperson of the disciplinary hearing, André de Jager, testified that the workers were dismissed for "gross disrespect" and "refusal to work". According to him, Zamikhaya Manqunyana, the shop steward, "made it clear that they would not comply with the instruction to work according to the new roster and allocated teams."

[11] The owner or managing member of the company, Louis Welman, testified that he informed the applicants of his intention to introduce short-time as an alternative to retrenchment, given the company's financial difficulties. He drew up a roster and divided the workforce into two teams. The workers were meant to work four days per week instead of five. They did not report for duty in accordance with the new timetable. He issued written

[2] Labour Relations Act 66 of 1995.

warnings on 25 October 2013; and final written warnings on 26 October and 9 November respectively. A disciplinary hearing followed and eight of the applicants were dismissed on 13 November. The shop steward, Manqunyana, was dismissed on 12 December.

[12] Manqunyana testified for the applicants. He represented the other eight applicants at the disciplinary hearing. Two of the individual applicants also testified. They confirmed that they refused to work short-time.

[13] The arbitrator summarised the definition of "insubordination" as the wilful refusal to obey a reasonable and lawful instruction. She concluded:

> "Every employee not only has the duty to come to work and be on time and otherwise, to do what he/she is told, within the parameters of what is accepted as being a reasonable and lawful instruction, because this really is at the heart of insubordination."

[14] The arbitrator accepted that there were "unresolved mutual interest matters" between the union and the company – apparently a reference to the dispute that the union had referred to the CCMA in terms of s 64(4) of the LRA. She also noted that "the union did not agree with the implementation of short-time and new operative changes [in] the employees' respective rosters / time table". Yet she concluded that Welman gave a "valid instruction" to work in accordance with the new roster; that the workers refused to do so; and that "such refusal constitutes misconduct." She also accepted that the company had followed a corrective approach to discipline, having issued a written warning and two final written warnings for refusal to obey a reasonable instruction. She further found that "consultation was done" prior to the disciplinary process; that the applicants "did not learn from the consultations and the warnings which were issued for failure to work / comply with an instruction"; and that the fact that the parties did not agree on matters discussed "does not mean consultation had not taken place".

[15] The arbitrator concluded:

> "Having found the applicants guilty of the allegation, I must determine whether the dismissal was justified."

After having referred to the "rule that had been breached" and the reasons the employer dismissed the workers, the arbitrator concluded:

> "I see no reason to interfere with the sanction of dismissal."

Review grounds

[16] The union contends that the arbitrator misconceived the enquiry by not considering whether the instruction was reasonable, given her acceptance that the parties had not agreed to a change in their terms and conditions of employment.

Evaluation / Analysis

[17] The pertinent question is whether the workers wilfully refused to obey a reasonable and lawful instruction. It is common cause that they refused to work in terms of the new roster; but was the instruction to do so a reasonable one?

[18] Although neither party raised it at arbitration or in these proceedings, I asked the legal representatives to present me with further argument on the question whether the fact that the legislature provides specific remedies for workers faced with a unilateral change to terms and conditions of employment, was relevant to the facts of this case.

[19] It must be borne in mind that the union did refer a dispute to the CCMA in terms of s 64(4) of the LRA; yet, when the employer refused to comply in terms of s 64(5), the union did not call its members out on strike. Neither did the applicants approach this Court for an interdict in terms of s 64(3)(e).

[20] Sections 64 (4) and (5) state that:

> "(4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a Council or the Commission in terms of sub-section (1) (a) may, in the referral, and for the period referred to in sub-section (1)(a) –
>
> (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with the requirement in terms of sub-section (4) within 48 hours of service of the referral on the employer."

[21] The learned authors of *Labour Relations Law: a Comprehensive Guide*[3] have the following to say:

> "An employee or trade union referring a dispute concerning a unilateral change to terms and conditions of employment to conciliation may, in the referral notice, require the employer not to implement the change, or if it has already done so, to restore the previous terms and conditions of employment for the period of the conciliation proceedings [s64(4)]. If the employer fails to comply within 48 hours, the employees concerned may strike without observing the statutory conciliation and notice requirements [s64(3)(e)]. In addition they, or their trade union, may seek an interdict in the Labour Court to enforce compliance with the notice [s158(1)(b) read with s64(5)]."

[22] The trade union in this case did not strike, nor did they seek an interdict. But are those the only options available to it and its members?

[23] Faced with a refusal to accept a change in terms and conditions of employment, the employer has other remedies available to it. The most obvious one is a lock-out. But it could also implement the change unilaterally. As the Constitutional Court pointed out in the *Certification* case:[4]

> "A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers

[3] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6ed 2015, LexisNexis) at 347.

[4] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 66 (my emphasis).

> enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout).The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent".

[24] Should the employer use its weapon to implement changes unilaterally, the legislature has provided a shield for workers "to provide them collectively with sufficient power to bargain effectively with employers". It appears from the wording of section 64 that, if the employer does not comply with restoring conditions, the employees may strike or, alternatively, they may seek an interdict in the Labour Court. Those are the primary remedies legislated for, given the power imbalance between workers and employer. But it does not indicate that these are the only options available.

[25] It seems to me that there remains another option available to the employees should they not agree to the unilateral change to their terms and conditions, and that is to simply resist the change and to tender their services in terms of their existing terms. The employer's recourse is to lock them out until they agree to the change. Alternatively, should the company require the change for operational reasons (as in this case), the employer could embark on a consultation process in terms of s 189 of the LRA and offer short-time as an alternative to retrenchment. Absent agreement, the employer would in these circumstances be entitled to dismiss, and the

dismissal will probably be for a fair reason.[5] But the employer in this case did neither.

[26] The applicants did in fact refer a dispute in terms of s 64(4) to the CCMA on 2 November 2012 regarding a unilateral change to terms and conditions of employment. And they required the employer to "restore the conditions to its original position with retrospective effect" in compliance with section 64(4)(b) of the Act. In terms of section 64(5) the employer had to comply with the requirement to restore the terms and conditions of employment that applied before the change within 48 hours of the service of the referral. It did not do so. Instructing the employees to work in accordance with the new terms and conditions in those circumstances could not be a reasonable instruction; and conversely, the workers' refusal to comply could not amount to insubordination.

Conclusion

[27] The arbitrator misconceived the nature of the inquiry. She mistakenly found that, even though the parties had not agreed to a change to terms and conditions of employment, the fact that the employer had consulted the employees was sufficient. She disregarded the fact that the employer unilaterally imposed new terms and conditions of employment, thus making the instruction to comply unreasonable.

[28] The arbitrator also used the wrong test with regard to sanction. She merely found "no reason to interfere with the sanction of dismissal", thus showing undue deference to the employer, rather than applying her own sense of fairness.

[29] These misdirections led to a conclusion that was, in my view, so unreasonable that no other arbitrator could have come to the same conclusion, given the same set of factual circumstances. The award must be reviewed and set aside.

[5] *NUMSA v Fry's Metals (Pty) Ltd* [2005] 5 BLLR 430 (SCA); *Mazista Tiles (Pty) Ltd v NUMSA* (2004) 25 *ILJ* 2156 (LAC) para 48; *NUM v Mazista Tiles (Pty) Ltd* (2006) 27 *ILJ* 471 (SCA).

Appropriate relief

[30] It would lead to unnecessary costs and further delays for the matter to be remitted to the CCMA for a fresh arbitration. All the facts are before the Court in the form of a transcript of the arbitration proceedings. The Court is in a position to substitute its findings for that of the commissioner.

[31] In my view, the dismissal of the applicants was not for a fair reason. The primary remedy is reinstatement. But the applicants no longer of 12 seek reinstatement. Instead, they have asked for the maximum compensation permissible in terms of s 194(1), i.e. the equivalent of 12 months' remuneration.

[32] The workers were dismissed and the arbitration award was handed down more than two years ago. I deem it just and equitable to award them compensation equivalent to 12 months' remuneration.

Costs

[33] The employer had an arbitration award in its favour. It had little choice but to defend it. There is no evidence before the Court as to whether there is an ongoing relationship between the trade union and the employer. It appears that that relationship has not always been a happy one. They may have to foster a new and better relationship. It is common cause that the employer was in financial difficulty. In all these circumstances, taking into account the requirements of law and fairness, I do not consider a costs award to be appropriate.

Order

[34] The arbitration award is reviewed and set aside. It is replaced with an order in the following terms:

34.1 The arbitration award of 11 February 2013 under case number WEGE 2616-12 is reviewed and set aside.

34.2 The award is replaced with one in the following terms:

34.2.1 "The dismissal of the individual applicants was not for a fair reason.

34.2.2 The respondent, Suid-Kaap Stene cc, is ordered to pay each of the individual applicants compensation equivalent to 12 months' remuneration calculated at their rate of remuneration on the date of dismissal."

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Steenkamp J

APPEARANCES

APPLICANTS:	Glen Kirby-Hirst of MacGregor Erasmus, Durban.
THIRD RESPONDENT:	Rize Claassen of Maserumule Inc, Cape Town.