IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Case no. C 168/98

In the matter between:

Thembile Mark Masitho & 7 Others **Applicant**

AND

Cape Town City Council **Respondent**

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JUDGMENT

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MLAMBO J.

1. On 22 January 1997 and at 19h00 all the individual applicants employed as ambulance men by the Respondent timeously commenced their night duty at the Khayelitsha Sector Station. According to standing practice the order in which the individual applicants and their vehicles were to follow as well as the order in which they would take calls was to come from the control room. Jakobus Van Zyl ("Van Zyl") was in charge of the control room on that

day.

2. It is common cause that there was confusion at the Khayelitsha Sector Station at the start of the shift on 22 January 1997. The confusion related to the order in which vehicles would leave in response to calls. Van Zyl testified that he confirmed the order after 20 minutes of realizing that there was confusion in Khayelitsha. Van Zyl also confirmed that two calls were relayed to the Khayelitsha sector station for attention. One call related to an incomplete abortion where the patient had to be taken to a tertiary hospital, the other call related to an abdominal complaint. Both calls were apparently outside Khayelitsha.

3. It is common cause that the first car to respond to a call is usually the overtime car. On that day car 57 was the overtime car but was not immediately available. For that reason Van Zyl wanted car 79 to take the first call. As a result of this standing practice the applicants attached to car 79 i.e Jamela and Nongqokwana objected to being required to respond to the first call as they were not the overtime shift that evening. According to Van Zyl the overtime shift who were to use car 57 were to be given a lift to fetch their car (57) from Pinelands.

4. Mncedisi Mkhubukeli ("Mkhubukeli") who was the assistant station officer

(ASO) on duty at the Khayelitsha sector station on the evening of 22 January 1997, confirmed that the overtime crew did not have a car hence the second crew who had a car (79), had to respond to the first call. He also confirmed that there was another crew that also did not have a car. This situation gave rise to unhappiness, i.e second crew objected to responding to first call, that there was a shortage of cars. It is not disputed however that the underlying cause of the unhappiness was the fact that the crews were required to respond to calls outside of Khayelitsha.

5. As a result of this unhappiness the first crew did not respond to the calls relayed to them. All the crews then met that evening and after about an hour after reporting for work they all signed sick leave forms and went home. Mkhubukeli confirmed that he, as ASO on duty, authorised the applications for such leave.

6. The individual applicants were charged and appeared before a disciplinary tribunal. They were all charged with the offence of: "left the workplace without permission alternatively refused to do duty." Those individual applicants who had received a direct call were charged with: "Left the workplace without permission/alternatively refused to do duty after receiving an instruction..."

They were all found guilty and dismissed on 26 June 1997 save for Nongqokwana who was also with the other applicants on 22 January 1997. He was found guilty of abscondment from work after deciding that an instruction given by the control room officer was not to his liking. He was however given a recorded verbal warning.

7. In these proceedings the applicants dispute the fairness of their dismissal on several bases: it was submitted:

7.1 that no evidence was led during the internal disciplinary enquiry to justify a finding that the applicants had refused to do duty.

7.2 that no evidence was tendered during the enquiry and in this court to prove that the applicants had refused to obey a specific instruction.

7.3 the charge of refusing to do duty amounts to splitting of charges and therefore unfair;

7.4 that the ASO on duty, Mkhubukeli, had permitted the applicants to leave and that at no stage did he instruct the applicants to perform work which they refused.

7.5 that in any way Macembe and Nyama (the overtime crew) were voluntary overtime workers and could not be fairly dismissed for refusing to do duty by

virtue of being voluntary overtime workers.

7.6 the Respondent in dismissing the applicants had acted inconsistently as in another unrelated case other employees (in Mitchells Plain) who were found guilty on a similar charge were not dismissed but were given a final written warning.

8. Having considered the evidence led it is this court's view that the claims that might have merit and are worthy of consideration by this court are those relating to the alleged permission by Mkhubukeli, the inconsistent application of discipline and splitting of charges.

9. There is no merit to the submission that voluntary overtime employees are immune to normal disciplinary measures for infractions committed during the overtime shift. Once an employee commences overtime duty he remains susceptible to the normal rules and regulations applicable in the enterprise. If he commits any disciplinary offence during the overtime shift he must be disciplined in the normal course.

10. In my view the charge of leaving the workplace without permission and that of refusing to do duty related to the same incident. The charge of refusing to do duty should not have been added as an independent charge. It would have been fair to make it an alternative charge. It was therefore unfair to add it as a second charge.

It was not unfair to add the alternative charge of refusing to do duty after receiving an instruction as regards Nongqokwana, Jamela, Mazwi and Swartbooi. As far as these applicants are concerned they received instructions to attend to calls but objected thereto. In their case therefore they refused to attend to calls and also left the workstation.

11. I do not agree that the charge of refusing to do duty after receiving a instruction related in any way to Pietersen. If this were so all the applicants would have been charged for this incident. In my view this charge related to the instruction given by Van Zyl relating to the two calls about an abdominal complaint and an incomplete abortion. In any case no one of the applicants could be found guilty relating to anything involving Pietersen because he did not testify at the internal disciplinary enquiry.

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<u>Left the workplace without permission</u>

12. Mkhubukeli confirmed in his testimony, in this court as he did during the internal disciplinary enquiry, that he permitted the applicants to leave the workplace. It can however be established from his testimony that the idea of applying for sick leave originated from him. He explained that he thought of the sick leave route because he realized there was no way he could get the applicants to perform their work that night.

13. That the applicants were unhappy at the order given by Van Zyl is undisputed. None of the applicants testified to deny this fact. They were therefore given permission to go home because of an illegitimate reason i.e. not wanting to perform work. The reason advanced in the applicant's statement of claim i.e. for their sick leave is that they all ate a cows' head and thereafter felt nauseous and started vomiting.

14. There is no merit to the nauseous and vomiting story. None of the applicants testified in this court about this condition. Furthermore Mkhubukeli and Nongqokwana did not testify as to this condition being the reason for the sick leave application forms completed by the applicants. If anything it is clear that the sick leave was permitted by Mkhubukeli not because the applicants were sick but because they were unhappy at the order given by Van Zyl and as a result they did not want to perform their work.

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15. In my view the applicants cannot hide behind the fact that Mkhubukeli permitted their sick leave applications. They were not genuinely sick nor were their leave application genuine. Mkhubukeli's conduct is completely unacceptable especially because he was in charge at the time. As the ASO on duty at the time his responsibility was to ensure that work is performed normally and not to use his authority to assist the applicants to desert their posts. This, to me, raises serious

questions about his fitness to manage.

16. The applicants had no basis for being unhappy with the instruction to attend to calls outside Khayelitsha. Undisputed evidence was led in this court that they had attended calls outside Khayelitsha in the past. In fact this court accepts the Respondent's evidence that employees are expected to work in all areas. If the applicants were aggrieved by anything nothing prevented them from taking it up through a proper grievance procedure.

Inconsistent application of discipline

17. It is correct that other employees of the Respondent in Mitchells Plain, who also, unhappy with an instruction, filled in sick leave forms, were disciplined but not dismissed. They were given a final written warning. The difference in the two cases relate to the fact that in the prior case the employees did not leave at the same time and that some of them produced doctor's notes.

18. The issue of Nongqokwana is also relevant. For all intents and purposes he was guilty of the same offence as the other applicants. It was found in his favour that, as opposed to the others, he was prepared to work but did not because the situation was tense. It is common cause that he was not intimidated or coerced by the others into joining them in their

action. I can find no justification for giving him a less harsher sentence than the others. It cannot count in his favour that he was prepared to work but didn't because the situation was tense. The fact that his state of mind was more positive than the others is not sufficient. If he was loyal he could have demonstrated this by performing his work. The fact that he didn't perform his work makes him as guilty as everyone else.

19. What the applicants did was unacceptable and must be condemned. Their conduct demonstrates a complete lack of appreciation of the importance of their service to the community in general. Death could easily have occurred as a result of their action. It is a tragedy that in a country confronted by unacceptable high levels of unemployment one still encounters employees who carelessly put their employment in jeopardy. It is high time that employees started to appreciate how fortunate they are to be in employment and earning income to maintain themselves and their families.

20. I cannot however ignore the fact that employers are entitled to set their own standards as regards discipline and punishment. It is not for this court to second guess the standards set by employers for their employees. In this case the Respondent's standard for a similar transgression is a final written warning. Were it not for this situation this court would have no hesitation in confirming the dismissals of the applicants. The punishment meted out to Nongqokwana is also

relevant. There is no basis for the differentiation in punishment because he was as guilty as the others who were dismissed. Under the circumstances the dismissal of the applicants was not fair.

21. In view of the fact that Nongqokwana, who was as guilty as the applicants, is still in employment as well as the fact that the Mitchells Plain employees were also not dismissed means that in all fairness the applicants must be reinstated with a final written warning which was imposed on the Mitchells Plain employees.

22. In so far as compensation is concerned the court takes into account the seriousness of the offence committed by the applicants as well as the fact that they attempted to mislead this court as to the reason for booking off sick. This court also notes that the allegations in their statement of claim were disingenuous to say the least . They dreamt up a story that they became sick after eating a cow's head which caused them to feel nauseous and to vomit. There is not a shred of truth to these allegations. The court must demonstrate its displeasure at this conduct. Having considered all the aforegoing I am of the view that it would be fair and equitable if no compensation is paid to the applicants.

23. The order of the court is therefore:

7. The applicants are reinstated on terms that would apply to them had they not been dismissed.

8. The applicants must tender their services within 5 days of this order.
9. The applicants are to be given a final written warning effective from the date of this order.
10. There is no order as to costs.

MLAMBO J.

For the applicants: Mr Steenkamp instructed by Hofmeyer Herbstein Gihwala Cluver & Walker Inc.

For the Respondent: Mr Rautenbach instructed by Mallinicks Inc.

Date of judgment: 22 June 1999.