

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO. D548/07

IN THE MATTER BETWEEN:

**NATIONAL UNION OF METALWORKER'S OF
SOUTH AFRICA (NUMSA)**

1ST APPLICANT

NJAKAZI, J AND FOURTEEN OTHERS

**2ND to 15th
APPLICANTS**

AND

MOTOR INDUSTRY BARGAINING COUNCIL

1ST RESPONDENT

P SHABANGU NO

2ND RESPONDENT

JACK'S TYRES CC

3RD RESPONDENT

JUDGMENT

GUSH, AJ

1. The Applicant in this matter seeks to review the award dated the 12th July 2007 handed down by the Second Respondent in which award the Second Respondent found that the Second to 15th Applicants had not been dismissed by the Third Respondent.
2. The dispute involved an allegation by the Applicants' that they had been unfairly dismissed by the Third Respondent following a work stoppage which had

occurred after the Third Respondent had given the Applicants, who were employed by the Applicant, new contracts of employment to sign. The Applicants averred that they had been dismissed as a result of their refusal to sign the new contracts. The Applicants sought reinstatement.

3. At the commencement of the Arbitration the Third Respondent denied that the Applicants had been a dismissed and the Applicants accordingly bore the onus to establish their dismissal.
4. The background to the matter was that on the 27th September when the Applicants received their wages for the month of September the Third Respondent's Chief Executive Officer, Colbert Timothy, handed the Applicants new contracts of employment and advised them that they were required to sign the contracts. There was some confusion as to whether the new contract of employment was a fixed term contract or an indefinite period contract and which of the contracts the Applicants were required to sign. What is clear is that some of the Applicants were given fixed term contracts and some received indefinite period contracts and that the Third Respondent was adamant that the contracts be signed.
5. It was common cause that at the time the Applicants were asked too sign the new contracts they were all already employed by the Third Respondent on a permanent basis.
6. The Third Respondent's Timothy attempts to explain the reason for requiring the Applicants to sign the new contracts is set out in his opposing affidavit. His explanation is that the reason for the contracts was to protect the both the Applicants and the Third Respondent. What remains unexplained, in his affidavit and his evidence before the arbitration, is quiet how the fixed term contract or for that matter the new indefinite period would benefit the Applicants who were already permanent employees.

7. There is some dispute as to whether or not Timothy explained the contents of the fixed term contracts to the Applicants. Most certainly neither the benefits nor the differences between the existing and proposed contracts were explained during the arbitration and if one regard is had to the evidence lead on behalf of the Third Respondent, the difference between the contracts was not explained to the employees. The Applicants maintained at all times that they were advised by the Third Respondent that if they did sign the new contracts their services would be terminated. It was, as far as the evidence reveals not the Third Respondents case that the contracts contained the same terms and conditions of employment the Applicants enjoyed at the time of the incident. The Applicants persistently denied that the contracts were explained to them and averred that they were advised that if they did not sign he contracts they would be dismissed.
8. The evidence of Timothy at the Arbitration regarding the handing out of the contracts and the initial response of the Applicants was as follows:
 - 8.1 He had *"utilised the entire day having to go round to each of the employees and explain to them the nature of the conditions of service they are expected to sign"* and that he had *"utilised much of the day explaining to Bheki ... a senior worker and tried to explain to him the object, to explain to the others in case they didn't understand what I was saying"*. (Neither of these versions was put to the Applicants during cross examination.)
 - 8.2 That on the evening of the 27th he gave the employees two contracts with their payslips, one an indefinite period contract and the other a fixed term contract, and told them to take them home, read them and if they had any queries they were to ask and the detail would be explained.

- 8.3 The following morning the Applicants handed their contracts to three representatives who in turn approached the owner of the Third Respondent "Sanjay" to tell him that the Applicants were not prepared to sign the new contracts. Sanjay had advised them that he was too busy to discuss the matter and that the Applicants should change and start work.
- 8.4 The Representatives went to the change room where the other Applicants were and that they refused to change into their work clothes and work.
- 9 After having indicated that they were not prepared to sign the contracts and the Applicants had remained in the change room for some time before leaving the premises. When they left the then left the premises some two or three hours later they proceeded to the First Respondent's offices. An official from the offices contacted the Applicant's Sanjay who advised the official to tell the Third Respondents that they were to return to the Applicant's premises.
10. On their return to work there was some dispute as to whether or not the Police were present and whether they were prevented from working. What is clear is that the respondents did return to work that day but did not start work. They were ultimately advised that if they were not prepared to sign the agreement then they should leave the premises.
11. Colbert denied that at any stage he told them they were required to sign the contracts otherwise they would be dismissed but did in fact give evidence to the effect that when he approached the Applicants in the change room he asked them what part of the contract they were unhappy with and that they were unable to explain.

12. However it seems that he did have some inkling of the concerns in that he indicated that the question of the fixed term contract was raised. Incidentally his explanation was that "*most of them did not complete it because the 12 month probation had expired*"(sic). It remains unclear as to exactly what that meant. As has been pointed out the Third Respondents evidence at the arbitration did not at any stage provide any clear indication as to why the new contract was required in respect of existing employees.
13. What is clear is that the Applicants did not return to work. Like wise there was no indication from the Third Respondent that the matter of the contract was either abandoned or that any effort was made to resolve the impasse which had resulted from the demand to sign the new contract other than insisting that it be signed.
14. What happened next appears to be that the Applicant was contacted by the Applicant's Union official, Shezi, who asked Timothy why he had fired the Applicants. Timothy's evidence was that he had not fired them and that despite the situation he told Shezi that he should make an appointment to come and see him.
15. After the phone call with Shezi, Timothy gave evidence that the following day he went to the change room to invite two representatives of the Applicants to come up to his office to discuss the matter. Three of the Applicants came to his office and where he attempted to explain the contract and told them to go back to the change room and explain the contract.
16. The representatives returned to the Timothy and told him that the Applicants were not prepared to sign the contracts. Timothy then advised them that if they were not interested in signing the documents they were to leave the premises.

17. The record of Timothy's evidence reflects that thereafter Shezi phoned (one must assume for the second time) and Timothy made an appointment to see him on the Wednesday at 16H00.
18. For the purposes of clarity regarding the sequence of events I set out below, in order, extracts from Timothy's evidence in chief:

"...towards the afternoon I received a phone call from ... Sydney from NUMSA...asked me why I fired all his members ... I informed him ... firstly he should not be phoning me ... he doesn't expect me to fire all the workers at one time ... he should make an appointment to ... discuss the problem. Thereafter the following day I went to the change room ... I asked them to nominate two spokespersons ... to my office so we can discuss the problem. ... they came back to me and said none of them ... signing the document none of them are interested in working. ... I informed him if that is the case then they must please leave the premises ... Later in the day I received a call from Mr Shezi from NUMSA and I set up an appointment for Wednesday 4th for three o'clock."
19. On Shezi's arrival at the premises of the Third Respondent stated specifically in his evidence that he:

"informed him that it is an exercise in futility to discuss any resolution to the problem, as at this stage I have received a notice ... to attend a con arb as I've been accused of dismissing all of them"
20. It is apparent that after the Applicants had been asked to leave by Timothy they had reported to the First Respondent and had filed a dispute regarding their dismissal. This was the con arb referred to by Timothy.

21. Timothy went on to explain that he then nevertheless requested Shezi to give him the opportunity to *"conduct a disciplinary enquiry and prepared a notice for a disciplinary hearing to be held"*. It is this notice of a disciplinary enquiry that leads the Second Respondent to conclude that the Applicants were not dismissed. The Second Respondent held that *"Considering the evidence in its totality I am not convinced on a balance of probabilities that the Applicants were dismissed."* The Second Respondent however then held *"The fact that Timothy wanted to serve the Applicants with notices to attend disciplinary hearings on the 4th June 2007 is an indication that the Respondent had not dismissed the Applicants"*
22. It is clear though from his evidence that Timothy had not prepared the notice of a disciplinary enquiry prior to the visit by Shezi. The disciplinary enquiry he had proposed and the notice he then drafted was simply an after thought and was premised on what Timothy described therein as an unprotected strike.
23. What isn't clear is why Timothy's first response to Shezi or his response to the receipt of the referral of the dismissal to the First Respondent and the notice of the con arb was not to at that stage deny that the Applicants had been dismissed. It is certainly not unreasonable to assume that in such a situation where the Third Respondent is so adamant that there has not been a dismissal and that he needed the Applicants to run the business that the first and most reasonable response to both Shezi and the con arb notice would be to simply deny the dismissal and insist on the Applicants returning to work.
24. The award of the Second respondent records the evidence lead at the Arbitration in detail. His recording however provides no clues as to the veracity of the witnesses and/or the probability of their versions. Whilst in general the circumstances surrounding the incident are common cause there are distinct nuances in the parties interpretation of the events. Put simply both parties could not be correct in their interpretation and/or understanding of what

transpired and therefore the recordal of the Second Respondents findings must be an indication of the reasonableness or otherwise of the award bearing in mind the material placed before him.

25. The Second Respondent does not deal with the fact that Timothy's own evidence was that that in response to Shezi's visit some days after the Applicants had been told to leave, discussions to resolve the matter would be an exercise in futility. This was so despite his insistence that the Applicants had not been dismissed and that the Third Respondent clearly required the Applicants to sign the contracts or they were not going to be employed.
26. Taking into account the following findings the Second Respondent makes, it is difficult to understand the conclusion reached by the Second Respondent. viz. That the Applicants were not dismissed as a consequence of their refusal to sign the contracts or their refusal to sign the notices of the proposed disciplinary hearing.
27. The Second Respondent finds:
 - 27.1 That the "whole fiasco' was sparked off by the Manager, Timothy requiring the Applicants to sign contracts";
 - 27.2 That Timothy gave the Applicants two documents, one being an indefinite contract of service the other being a fixed term contract and that Timothy changed his evidence at a later stage to say that no one Applicant was given both contracts;

- 27.3 That despite this he accepts that all Applicants were given a contracts of employment to sign and to return to the Respondent and that these were given to them individually as they came to collect their payslips;
- 27.4 And that at best there was a work stoppage caused by a misunderstanding which occurred around the signing of new contracts which in turn had resulted from Timothy's failure to handle the matter properly;
- 27.5 That sight should not be lost of the fact that Timothy locked out the Applicants as it were at some stage; and in particular
- 27.6 That the Third Respondent would be advised to consider to re-employing the Applicants.
28. This last conclusion is particularly startling if one has regard to the finding that the Third Respondent had not dismissed the Applicants.
29. In the circumstances the only and irresistible conclusion is, to paraphrase the finding in **Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)**, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could reach.
30. At the commencement of this matter the question of the Applicants current position was raised given that it was still the Third Respondent position that the Applicants had not been dismissed and in the absence of any agreement as to their current status the parties were given an opportunity to submit supplementary head of argument dealing with issue. Mr Forster in his supplementary heads correctly points out that the matter concerns a review of

the Second Respondents award and that the court should confine it self to that matter only.

31. In the circumstances I am of the view that the award of the Second Respondent should be reviewed and set aside. Given the nature of the matter it is appropriate that the matter be referred back to be heard afresh. In the circumstances I make the following order.

31.1 The award of the Second respondent is reviewed and set aside;

31.2 The matter is referred back to the First Respondent to be heard de novo before a different commissioner;

31.3 The Third Respondent is ordered to pay the costs of the application.

Gush A. J.

DATE OF HEARING : 24 FEBRUARY 2010

DATE OF JUDGMENT : 01 APRIL 2010

APPEARANCES

FOR APPLICANT : J P HARRIES OF BRETT
PURDON ATTORNEYS

FOR RESPONDENT : J FORSTER OF FORSTER
ATTORNEYS