



CONSTITUTIONAL COURT OF SOUTH AFRICA

Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited

CCT 131/15

**Date of hearing: 23 February 2016
Date of judgment: 01 September 2016**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 1 September 2016, the Constitutional Court upheld an appeal by the Transport and Allied Workers Union of South Africa (TAWUSA) and 94 of its members against a judgment of the Labour Appeal Court which had dismissed their appeal against an earlier decision of the Labour Court. The dispute was whether the dismissal of TAWUSA's members, by their employer Unitrans Fuel and Chemical (Pty) Limited (Unitrans) on 2 November 2010 following a strike, was fair and whether they should be reinstated. Both the Labour Court and the Labour Appeal Court had held that the dismissal was fair because the strike had been unprotected. The Constitutional Court has held that their strike was protected and their dismissal was automatically unfair. It has accordingly ordered their reinstatement with back-pay.

Unitrans entered into contracts with clients in terms of which it transported its clients' dangerous goods, such as petroleum products, oxygen and liquefied petroleum gas (LPG). Unitrans remunerated its heavy-duty truck drivers who transported its clients' products commensurately in accordance with how lucrative the contracts they serviced were. Unitrans had a lucrative contract with the Shell Company of South Africa. After this contract terminated, Unitrans transferred its drivers who had been attached to the Shell contract to various other contracts it had with other clients. It then required them to sign new contracts of employment in terms of which their wage rates were reduced. The majority of the drivers signed the new contracts but seven (Shell 7) refused to do so. Unitrans reduced the Shell 7's wage rates even without their consent. This and other complaints led TAWUSA to make four demands to Unitrans.

One of those demands was that Unitrans should restore the Shell 7 to their agreed wage rates and pay them back-pay for the period during which it had paid them at reduced rates. This was referred to as the “wage cut” demand. Another demand was that Unitrans should pay all drivers equally irrespective of the contract to which they were attached. This was referred to as the “wage discrepancy” demand. There were two other demands. Unitrans rejected these demands. It said that the scope of the demands impermissibly exceeded the bounds of the Main Collective Agreement for the Road Freight and Logistics Industry (Collective Agreement) as those demands could not be dealt with at plant level. Rather, TAWUSA should have taken them up at the bargaining council. A dispute then arose concerning the refusal by Unitrans to meet the demands.

TAWUSA and the employees followed the dispute resolution procedures of the Labour Relations Act (LRA) and in due course issued a strike notice. The Labour Appeal Court held that the workers could only strike in respect of the wage cut demand and the wage discrepancy demand, but not in respect of the other two demands (LAC judgment). More than 200 employees went on strike on 28 October 2010. The strike continued until 1 November 2010. Unitrans regarded the strike as unprotected for exceeding the scope of the LAC judgment. TAWUSA and its members regarded the strike as protected as to them the demands fell within the ambit of the LAC judgment. After issuing a number of ultimata calling upon the workers to return to work, Unitrans issued a final ultimatum at 14h00 on 1 November 2010. Unitrans said that, as a gesture of its goodwill and in order to end the strike, it would restore the Shell 7 to their agreed wage rates and pay them the back-pay. This related to the wage cut demand. It refused to do anything about the wage discrepancy demand. It called upon the workers to return to work at 06h00 on 2 November 2010 failing which they would be summarily dismissed. The workers did not return to work and were dismissed. A few days later many were re-employed without any disciplinary action but on reduced pay. The 94 workers in this case were not prepared to be re-employed on reduced pay.

In subsequent litigation the Labour Court held that the strike had been unprotected and dismissed the workers’ unfair dismissal claim. Their appeal to the Labour Appeal Court also failed.

The first judgment by Mhlantla J (Moseneke DCJ, Cameron J, Froneman J and Nkabinde J concurring) held that the strike remained protected until Unitrans issued its final ultimatum, in which it capitulated to TAWUSA’s wage cut demand, insofar as it related to the Shell 7. The strike was permissible up to this point because it sought to resolve a permissible demand, being the wage cut demand in relation to the Shell 7, as authorised by the then binding LAC judgment. That employees other than the Shell 7 could also strike in furtherance of that demand was permissible by virtue of the principle established in *Afrox Ltd v SA Chemical Workers Union and Others (1)*. However, once Unitrans gave in on this demand, the continued strike action sought to remedy demands that exceeded the bounds permitted by the LAC judgment and was unprotected.

Mhlantla J further held that Unitrans’ dismissal of the workers was substantively fair as, at the time of dismissal, the workers had withheld their labour impermissibly. However,

the period of time given to TAWUSA and the employees to consider the final ultimatum was inadequate given: the complexity of the matter; the fact that the strike action had initially been protected; and that Unitrans only capitulated in respect of the Shell 7 demand in that same ultimatum. Mhlantla J accordingly found the dismissal of the workers to be procedurally unfair. As the Court had insufficient evidence on issues relevant to granting relief based on a finding of procedural unfairness, Mhantla J would have remitted the matter to the Labour Court to determine an appropriate remedy.

The second judgment by Zondo J (Moegoeng CJ, Khampepe J, Madlanga J and Bosielo AJ concurring) disagreed with the first judgment that the strike ceased to be protected after 14h00 on 1 November 2010. He held that the strike was protected from beginning to end and that, therefore, the dismissal was automatically unfair.

Zondo J took the view that Unitrans' promise on 1 November 2010 to put the Shell 7 on their correct wage rates and to pay them the back-pay did not constitute compliance with the wage cut demand. This was so as the wage cut demand required Unitrans to *actually* place the Shell 7 on their correct wage rates and to *actually* pay them their back-pay. Unitrans did not actually put the Shell 7 on their correct wage rates nor did it actually pay them their back-pay. Zondo J also held that in any event, the basis upon which the promise was made – namely, as a gesture of goodwill and to end the strike – meant that, if the employees accepted Unitrans' promise, they would have foregone contractual rights enforceable in a court of law. Those are the contractual rights to remain on their correct wage rates, including payment of back-pay, unless they consented to lower wage rates.

He also held that, even assuming that the strike had ceased to be protected after 14h00 on 1 November 2010, the dismissal of the workers would still have been predominantly automatically unfair. The workers would still have been dismissed for taking part in a strike that was protected for most of its duration. The period during which the strike would have been unprotected would have been less than a day whereas for the previous four days it had been protected. Zondo J also held that there was no evidence that from about 16h00 on 1 November 2010 to 08h00 on 2 November 2010 the employees, who were shift workers, were supposed to be working. In the absence of that evidence the workers could not be said to have been on strike during those hours.

Zondo J upheld the appeal, set aside the decisions of the Labour Court and Labour Appeal Court and ordered that the 94 workers be reinstated with effect from 2 November 2010. This means that they will get full back-pay. Zondo J also ordered Unitrans to pay costs.

For different reasons, Jafta J supports the order proposed by Zondo J.