



CONSTITUTIONAL COURT OF SOUTH AFRICA

National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board

CCT 75/13

Date of hearing: 19 November 2013

Date of judgment: 10 April 2014

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.

Today the Constitutional Court handed down a judgment upholding an application for leave to appeal against a judgment of the Supreme Court of Appeal. The case concerned the dismissal of ten employees of the National Lotteries Board (Board) who are members of the National Union of Public Service and Allied Workers (NUPSAW). NUPSAW, on behalf of the dismissed employees, challenged the dismissals on the ground that they were automatically unfair under the Labour Relations Act (Act), because the employees' conduct constituted participation in the lawful activities of the union. In the alternative, NUPSAW submitted that even if the dismissals were not automatically unfair, they were nevertheless substantively unfair under the Act.

During 2008, the employees, through their shop stewards, addressed a letter to the Board raising grievances about the leadership of the Board's Chief Executive Officer (CEO). Unsatisfied with the Board's response, they referred the matter to the Commission for Conciliation Mediation and Arbitration. During the conciliation processes, the employees wrote a letter containing various allegations against the CEO. This letter was leaked to a national newspaper. Subsequently, the employees addressed a petition to the Board making further allegations against the CEO also passing a vote of "no confidence" in him. The conciliation process was not resolved. The employer warned that if the petition was not withdrawn it would institute disciplinary proceedings. When some employees refused to withdraw the petition, the employer instituted disciplinary proceedings. During this process, the employees were offered another opportunity to

withdraw their names from the petition and be issued with written warnings. The employees chose not to withdraw their names and were subsequently dismissed.

The employees unsuccessfully challenged their dismissals in the Labour Court. The Court found that, although a union may vigorously pursue the rights of its members, the right to freedom of expression does not afford a union and its members the right to engage, without consequences, in acts of gross insubordination. The employees were also unsuccessful in their appeal to the Supreme Court of Appeal, which unanimously found that the cause of their dismissal was the offensive content they had communicated in the petition, not the act of petitioning itself.

The Constitutional Court overturned the judgment of the Supreme Court of Appeal. The majority judgment, written by Zondo J and concurred in by Moseneke ACJ, Jafta J, Madlanga J, Mhlantla AJ, and Nkabinde J, held that the statements made by the employees were in pursuit of the ongoing statutory-conciliation process, and in the exercise of their rights to participate in collective bargaining. Zondo J found that the employees' conduct constituted lawful activities of a union. Their dismissals were accordingly automatically unfair. Further, the failure to utilise the statutory dispute-resolution mechanisms in the Act or to table their grievances internally did not render them guilty of insubordination. In the result, leave to appeal was granted, the appeal was upheld and the Board was ordered to reinstate the employees.

In a separate judgment, Dambuzo AJ concurred in the order of Zondo J but for different reasons. Whilst she agreed that the dismissals were unfair, she disagreed that they were automatically unfair. She held that petitioning the employer to dismiss another employee was not a lawful union activity protected under the Act. Nevertheless, viewed in the context of the Board's unwillingness to engage in good faith negotiations, coupled with its disregard for the conciliation process that was underway, the employees' threat to defy authority did not constitute insubordination and disrespectful behaviour. The dismissals were accordingly substantively unfair under the Act.

The minority judgment written by Froneman J, and concurred in by Skweyiya ADCJ and Cameron J, held that the employees' petition and the publication of the union letter objectively amounted to insubordination and bringing the CEO and the Board into disrepute. The dismissals were therefore not automatically unfair. Regarding the alternative claim, the minority held that although unions and employees may exercise their rights to petition and freedom of expression parallel to processes under the Act, these rights cannot be exercised in a way that undermines the Act's processes. Froneman J would have granted leave to appeal but dismissed the appeal.