Rob. 241/91

case no 304/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter of:

B ZONDI	1st Appellant
M B NKOMO..............................	2nd Appellant
M S GUMEDE............................	3rd Appellant
B M NZIMANDE.........................	4th Appellant
J M MKHIZE............................	5th Appellant
N T HLOPHE............................	6th Appellant
B L NZIMANDE.........................	7th Appellant
M M KWEYAMA..........................	8th Appellant

and

THE ADMINISTRATOR OF NATAL...........	1st Respondent
CHIEF SUPERINTENDENT OF ROADS, MEREBANK..............................	2nd Respondent
THE PROVINCIAL SECRETARY, NATAL......	3rd Respondent

CORAM: CORBETT, CJ, JOUBERT, SMALBERGER, F H GROSSKOPF, et GOLDSTONE JJA.

DATE OF HEARING: 18 March 1991

DATE OF JUDGMENT: 26 March 1991

JUDGMENT

CORBETT CJ

The facts upon which this appeal must be decided, as they appear from the affidavits filed, are as follows:-

The eight appellants were all formerly employed in various capacities in the Roads Department of the Natal Provincial Administration ("the Administration"). In the case of each appellant the terms of his appointment were set forth in a standard letter which contained the following provisions:

> "Notwithstanding the fact that your salary is paid monthly your employment is terminable on the giving of twenty-four hours notice on either side (to expire on a day other than a Saturday, Sunday or public holiday) and such notice may take effect at any time either during or at the end of a month.
>
> Accommodation may be provided as an act of

> grace. This is a privilege and not a right, and the Department reserves the right to withdraw the privilege at any time, and to make such charges for it as it thinks fit."

In terms of sec 21(4)(a) of the Provincial Government Act 69 of 1986, read with secs 14(1) and 3(2)(d) of the Public Service Act 111 of 1984, and as from 1 August 1986 the appellants were transferred and appointed to the Public Service and became subject to the provisions of the Public Service Act. All the appellants received letters advising them of their transfer and appointment to the Public Service. It is common cause that after their transfer to the Public Service the appellants' employment continued to be subject to the contractual provisions quoted above. By reason of the fact that such employment was terminable on twenty-four hours' notice they were classed as temporary employees. Nevertheless most of the appellants were employees of long standing, their individual periods of

employment, as at November 1988, ranging from five to twenty-four years.

At the relevant times the appellants were all members of the National Education, Health and Allied Workers Union ("NEHAWU"), an unregistered trade union, said to be representative of the majority of the employees engaged by the Administration. The latter did not recognize NEHAWU as a collective bargaining agent on behalf of employees and refused to negotiate with it with regard to the conditions of employment of its members. The attitude of the Administration was that employees' grievances should be aired at meetings of Workers' Committees, held once every three months, the minutes of which were forwarded to the Provincial Secretary.

On 27 October 1988 certain officials of NEHAWU, acting on its behalf, wrote a letter to the Provincial Secretary informing him of a series of resolutions which

were taken at a general meeting of the Union held on 15 October 1988 and which articulated workers' grievances. On 3 November 1988 the Provincial Secretary replied stating, inter alia, that inasmuch as NEHAWU was not recognized by the Commission for Administration he was not in a position to enter into any form of negotiation with it. At the same time he assured the Union that the Administration recognized the need for the improvement of the conditions of service of workers, where feasible, and in this connection referred to the established channels of communication between the Administration and its employees.

On 15 November 1988 the appellants, together with many other workers in the Roads Department and in other Administration institutions (altogether over 3 000 in number, and 8 per cent of the Administration's total work force) went on strike. They cited dissatisfaction with the Provincial Secretary's response to NEHAWU's letter of 27 October 1988 as the reason for the strike.

On the same day that the strike commenced a meeting of workers in the Roads Department was called and addressed by the Roads Superintendent, Mr E de Klerk. He advised them that the way to resolve their grievances was through the Workers' Committee meetings. He further told them that they should return to work, failing which they would face dismissal, and that they had three hours in which to decide whether they wished to resume work. After three hours the workers indicated that they intended continuing with the strike. Each of them was then handed what was termed in the papers "a letter of ultimatum", reading as follows:

> "Please take notice that you are participating in an illegal strike.
>
> Your notice of employment provides for the giving of 24 hours' notice on either side.
>
> As you are participating in an illegal strike, the Provincial Administration of

> Natal is entitled to give you 24 hours' notice of the termination of your services. If your services are so terminated you will, if you are a member of the Temporary Employees' Pension Fund, forfeit certain pension rights.
>
> You are directed to resume your official duties failing which steps will be taken to secure your dismissal. You are hereby invited to make representations to the Roads Superintendent of Merebank by 17 November 1988 stating why you should not be dismissed for participating in the illegal strike.
>
> Unless such representations are made in writing, within the above period, it shall be assumed that you do not wish to make such representations in which event your services will be terminated."

The letter was also read out by Mr De Klerk and translated by an interpreter. One of the workers instructed the others to throw the letters back at Mr De Klerk and the majority of them did so. It appeared that the first

appellant (B Zondi) was not present at the meeting and that he and the eighth appellant (M M Kweyama) were not there when the letters were handed out. Accordingly, on 21 November 1988 there were sent to them by certified mail copies of the letter of ultimatum giving them until 28 November 1988 to make their representations, if any.

In the meanwhile on Sunday 20 November 1988 a meeting was held between representatives of the Administration, the State Attorney and a Mr Zondo, a member of the firm of attorneys representing NEHAWU. By that stage none of the workers who had been handed letters of ultimatum had either made representations or returned to work. Mr Zondo was informed that a decision had been taken to dismiss all striking workers by sending them letters terminating their services as from 30 November 1988. Mr Zondo was further advised that should workers return to work before 30 November 1988 they would be given the opportunity

of applying for re-appointment, which applications would be considered on their merits. Mr Zondo told the meeting that he would speak to the workers and recommend that they return to work as soon as possible; he would tell them about the letters of dismissal and the fact that they would have to apply for re-employment.

On 21 and 22 November 1988 each of the workers who had been handed letters of ultimatum was sent by certified mail a letter emanating from the Provincial Secretary and stating:

> "By direction of the Provincial Secretary, Natal Provincial Administration, you are hereby given 24 hours' notice of termination of your services from close of duty on 30 November 1988."

Similar letters of termination were sent to first and eighth appellants on 28 November 1988, neither of them having made representations or returned to work by that date.

Termination of the employment of the striking workers would have meant that they forfeited accumulated employment benefits, including pension rights and leave benefits. It was thus calculated to cause them substantial prejudice and affect existing rights.

In an attempt to persuade the striking workers to return to work the Administrator of Natal issued a press statement on Thursday, 24 November 1988. This statement was published in the daily newspapers circulating in Natal and was broadcast over the radio. In this statement the Administrator, after reviewing the course of events to date, made the following announcement:

> "Workers who have returned to official duty and those who do so not later than Friday, 25 November 1988 may have their letters terminating their employment withdrawn and in doing so retain their pension and leave benefits."

This deadline for returning to work was extended in terms of a notice released to the Press by the Provincial Secretary and published on 26 November 1988. It read:

> "Although Friday, 25 November 1988 was fixed as the last day for staff members illegally on strike to resume duty and to be considered for the withdrawal of their notices of termination of service, the Administration, recognising that many of its staff may have been misled, will as a gesture of goodwill consider withdrawing notices of termination of service to staff members who have been on strike and report for duty at their normal time on Monday, 28 November 1988. Thereafter all notices will be enforced and those affected will lose their pension benefits, housing subsidies and leave benefits."

Although this notice speaks of striking workers reporting for duty "at the normal time on Monday, 28 November 1988", it would seem that this deadline was further extended to the

"close of business", i e 16h30, on 28 November 1988.

A substantial number of striking workers returned to work by the extended deadline and had their letters of dismissal withdrawn. A number of others, including the appellants, did not meet the extended deadline, but reported for duty at starting time, i e 06h30, on Tuesday, 29 November 1988. At their place of work they were told by Mr De Klerk that they had been dismissed with effect from close of duty on 30 November 1988; and that they were to report to collect their pay on the following day and thereafter to vacate the accommodation provided for them by the Administration.

On 29 November 1988 the Provincial Secretary issued a further press statement, which included the following:

> "The Administrator-in-Executive Committee has carefully considered the present circum-

> stances regarding the strike of certain NPA workers and has decided to abide by the previous announcements which set the close of duty on 28 November 1988 as the deadline for workers to return to work.
>
> ....
>
> A further approximately 800 workers today arrived at the various institutions involved, but in terms of the deadline set the termination of their services was confirmed and they have been advised to re-apply for employment if they so wish with effect from 1 December 1988."

On 6 December 1988 NEHAWU, as first applicant, and some 87 workers (including the appellants), all being employed by the Administration at its Merebank section, launched an urgent application in the Durban and Coast Local Division, citing as respondents the Administrator of Natal (first respondent), the Chief Superintendent of Roads, Merebank (second respondent) and the Provincial Secretary, Natal (third respondent) and claiming a rule *nisi* calling

upon the respondents to show cause why an order should not be granted (a) declaring that the purported dismissals of the worker applicants were unlawful and null and void; (b) interdicting the respondents from evicting the worker applicants from the accommodation allocated to them in terms of their conditions of employment; and (c) ordering respondents who opposed the application to pay the costs thereof. The application also asked that the relief sought under (b) be ordered to operate with immediate effect as an interim order.

The matter came before Hugo J on 8 December 1988 and by consent he granted the orders sought. On the return day, which was 2 February 1989, all three respondents appeared to oppose the application; and they made a counter-application for the ejectment of the worker applicants from their accommodation. At this stage it transpired that in the interim a number of the applicants

had been re-employed and that the confirmation of the rule was sought only on behalf of NEHAWU and fourteen worker applicants (including the appellants).

In the founding affidavit, which was deposed to by first appellant, it was averred that shop stewards of NEHAWU had attempted to notify all striking workers of the extended deadline (viz 16h30 on Monday, 28 November 1988), but that in the case of the worker applicants they were only able to do so during the evening of Monday 28 November, i e after the deadline had expired. Nevertheless, all individual worker applicants reported for work at the earliest opportunity, that is at starting time the next morning. It is alleged by the worker applicants that they did not know of the deadline before being told of it on the Monday evening.

In par. 17 of the founding affidavit the following averment is made:

> "As indicated above, the First Applicant's shop stewards were unable to communicate with the individual employees until late on the 28th November, after which the employees reported for work at the very next starting time. I submit that in those circumstances, having regard to the fact that the First Respondent's ultimatum was not timeously furnished to the employees, and also having regard to the fact that the rules of natural justice were not followed in that none of the employees was given an opportunity to furnish an explanation for his arrival at work after the deadline on 28th November, the First Respondent's decision to terminate the employment contracts of the individual Applicants is grossly unreasonable."

Respondents' answering affidavit, in addition to canvassing the general merits of the application, raises the special defence that in terms of sec 34(2) of the Public Service Act the applicants were obliged to give one calendar month's written notification to the respondents of their

intention to bring the application and that since the applicants had failed to do so their application should be dismissed on this ground.

This special defence was argued _in limine_ before Hugo J on the return day. Counsel for the applicants submitted, on the authority of the decision of Goldstone J in the case of _Traube and Others v Administrator, Transvaal, and Others_ 1989 (1) SA 397 (W), at 404 I - 405 E, that sec 34 did not apply. Hugo J, while expressing misgivings about the correctness of this decision, accepted its correctness and the non-applicability of sec 34 to the facts of the case under consideration.

It was conceded before Hugo J by counsel appearing on behalf of the respondents that the _audi alteram partem_ rule ("the _audi_ rule") applied to the dismissal of the worker applicants and that a failure to give effect to the rule would render the dismissals void. The learned Judge

pointed out that this concession had been made in the light of the decision in the case of Mokoena and Others v Administrator, Transvaal 1988 (4) SA 912 (W) and stated that he had no doubt that it had been properly made. He, nevertheless, held that on the facts there had been due compliance with the *audi* rule. He accordingly discharged the rule *nisi* with costs and granted the counter-application for ejectment.

All the applicants applied for and obtained (from Hugo J) leave to appeal to this Court; and in due course a notice of appeal in all their names was filed. In the end, however, the appeal was pursued only by the eight appellants. The reasons for NEHAWU and the other worker applicants dropping out of the appeal do not appear from the record.

Before us it was again common cause that the *audi* rule applied in this case; the point of dispute being

whether respondents had complied with the rule. Having regard to the reasons stated in _Mokoena_'s case, _supra_ (see particularly pages 916 D - 918 B) and in view of the evidence in this case that the appellants were substantially prejudiced in their pension, leave and other benefits by being dismissed, it may be accepted that the respondents' concession regarding the _audi_ rule was correctly made.

The argument of appellants' counsel as to why respondents should be held not to have complied with the _audi_ rule may, I think, be fairly summed up as follows:

(1) The opportunity for striking workers to make representations, tendered in the letter of ultimatum (issued on 15 November 1988), constituted compliance with the _audi_ rule; and had the appellants merely been given twenty-four hours' notice of dismissal after 17 November 1988, there would have been no ground of complaint. (This, I may say, was also conceded by

appellants' counsel in the Court *a quo*.)

(2) There were, however, developments after 17 November, viz the inducement held out to striking workers by the first respondent on Thursday, 24 November to the effect that those who returned to duty by Friday, 25 November might have the letters terminating their employment withdrawn; and the extensions of this deadline, firstly to the normal time for reporting for duty on Monday, 28 November, and then later to the close of business at 16h30 on that day.

(3) Those striking workers who reported for duty by 16h30 on Monday, 28 November had their letters of dismissal withdrawn, whereas those who reported for duty at starting time on Tuesday, 29 November did not. (In the case of the latter their dismissals were confirmed and they were told to collect their wages and vacate their accommodation on the following day.)

(4) In the circumstances there were in effect two decisions by the respondents: the original decision to terminate on notice the contracts of workers who participated in the strike; and a subsequent decision to refuse to withdraw letters of termination in cases of striking workers who had failed to meet the deadline for return to work on 28 November.

(5) The victims of this latter decision, who included the appellants and who as a result thereof lost their jobs, were not given any opportunity to be heard before the decision was taken. Had they been given such an opportunity they could have explained that they did not know of the deadline until after it had passed and that had they gained timeous knowledge of the deadline they would have complied with it. Such representations might well have induced the respondents to withdraw their letters of termination as well.

(6) The opportunity to make representations between 15 and 17 November 1988 did not suffice because by reason of subsequent developments a new criterion for dismissal had arisen, viz reporting for duty prior to the expiry of the deadline, and representations relevant to this criterion could not have been made between 15 and 17 November.

I should here interpolate that as far as the first appellant and the eighth appellant are concerned the time for making representations, fixed in their letters of ultimatum, terminated on 28 November 1988, but this would not seem to affect the substance of appellants' argument and I shall ignore this difference.

The counter-argument presented by respondents' counsel was to the following effect:

(a) There was only one decision, viz the decision taken on

about 20 November 1988 to give all striking workers notice of termination of their contracts as from 30 November 1988.

(b) The opportunity given to striking workers to make representations as between 15 and 17 November 1988 constituted compliance with the audi rule.

(c) The subsequent developments merely amounted to respondents making a concession to the effect that those who returned to work by the extended deadline might have their letters of termination withdrawn.

(d) The concession was thus conditional upon individual workers meeting the deadline; if a worker did not meet the deadline, whatever the reason might be, he did not qualify for the concession.

The arguments and the issue which they highlight are finely balanced, but in my judgment the general

contention of the appellants must prevail. It is true that the Administrator's announcement on 24 November 1988 merely indicated that those workers who complied with the deadline for return to work <u>might</u> have their letters of termination withdrawn (and that the same non-committal attitude on the part of the Administration is evinced in the Provincial Secretary's announcement on 26 November 1988), but in practice those complying with the deadline appear in fact to have had their letters of termination withdrawn; and those not so complying had their dismissals confirmed. It is to be inferred that the Administration, as a matter of policy, decided upon this course of action. There is thus good ground for the view that in substance there were two decisions and that those who did not have their letters of termination withdrawn lost their employment partly because of their initial participation in the strike and partly because they failed to return to work by the stipulated

deadline. As far as the latter decision was concerned the workers adversely affected by it did not have an opportunity of explaining why they failed to comply with the deadline. One can conceive of various reasons for non-compliance which would exonerate an individual worker of all blame and which consequently, if given, might well have moved the Administration to withdraw his letter of termination, despite non-compliance. In such circumstances the absence of an opportunity to explain would bring about inequity and an inequality of treatment as between those who complied with the deadline and those who did not.

Having regard to the aforegoing and to the consideration that the audi rule is founded upon a general duty to act fairly, i e to observe the principles of natural justice, I am of the view that the workers (including the appellants) who reported for work on the Tuesday morning ought to have been given an opportunity to explain why they

did not meet the deadline before their dismissals were confirmed. Respondent's failure to afford them such an opportunity accordingly invalidates their dismissals.

As to the applicability of sec 34 of the Public Service Act, the point is now covered by the decision of this Court in Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A), at 764 B-H, which establishes that the section does not constitute a bar to these proceedings (cf also Administrator, Orange Free State, and Others v Mokopanele and Another 1990 (3) SA 780 (A), at 789 A-C).

Appellants' counsel indicated that the relief sought in par (b) of the rule *nisi* was no longer apposite and was not being pursued. And, of course, the counter-application falls away.

Respondents' counsel raised the position of NEHAWU

which was a party to the appliction in the Court a quo, but did not in the end figure as an appellant, and argued that it was not entitled to a reversal of the order as to costs made against it in the Court a quo. Although counsel did not mention them, the same point would apply to those workers who were applicants in the Court below, but did not appeal.

The appellants, as succesful parties, will become entitled to the costs of the application in the Court a quo and I have difficulty in visualizing any separate costs for which NEHAWU should be held responsible to the respondents. However, in case respondents should have incurred additional costs attributable to NEHAWU's participation in the application, an appropriate rider will be added in regard to costs. I do not consider it necessary to make any such provision with reference to the other applicants who did not appeal.

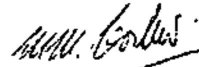
There is a certain amount of confusion about who was the first applicant in the Court below and consequently for the sake of clarity I shall name the successful applicants in the Court's order.

The appeal is accordingly allowed with costs, such costs to include the costs of two counsel. The order of the Court *a quo* is altered to read:

> "The rule *nisi* is in part confirmed and a final order is issued:-
>
> (a) declaring the purported dismissals of applicants B Zondi, M B Nkomo, M S Gumede, B M Nzimande, J M Mkhize, N T Hlophe, B L Nzimande and M M Kweyama to have been unlawful and null and void; and
>
> (b) ordering respondents to pay the aforesaid applicants' costs in regard to the application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel."

It is further ordered that such additional costs as respondents may have incurred by reason of the

participation of NEHAWU in the application be paid by NEHAWU.



M M CORBETT

JOUBERT JA)
SMALBERGER JA) CONCUR
F H GROSSKOPF JA)
GOLDSTONE JA