

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case No PA08/18

In the matter between:

ROBERTS BROTHERS CONSTRUCTION (PTY) LTD

First Appellant

MPUMALANGA CONSTRUCTION (PTY) LTD

Second Appellant

and

NATIONAL UNION OF MINE WORKERS

First Respondent

UNATHI STIMELE

Second Respondent

W TWALO & 10 OTHERS

**Third and Further
Respondents**

Heard: 18 February 2020

Delivered: 18 May 2020

Summary: Dismissal ---Strike – Unprotected industrial action ---Employer dismissed employees for not heeding to ultimate without engaging with union --- in terms of Item 6(2) of the Code of Good Practice: Dismissal (Schedule 8 to the LRA 1995)---Duty of employer to contact a trade union in terms of Item 6(2) of the Code is restricted to trade union enjoying organisational rights and or is sufficiently represented ---Union not enjoying organisational rights and insufficiently represented --- Labour Court's judgment set aside and Appeal upheld.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

- [1] The appellants appeal against the judgment of the Labour Court (Lagrange J) holding that the dismissal of the second and further respondents (“the employees”) arising from their participation in unprotected strike action in August 2013 was procedurally unfair and awarding them compensation in the amount equivalent of six months remuneration.
- [2] The transcribed record of the Labour Court proceedings is incomplete because the evidence of some witnesses was not recorded. However, the narrow grounds of appeal are restricted to: i) determining the nature and extent of the duty in Item 6(2) of the Code of Good Practice: Dismissals (“the Code”) in Schedule 8 to the Labour Relations Act¹ (“the LRA”) which obliges an employer to contact a trade union to discuss the course of action it intends to adopt in relation to dismissal of striking employees; and ii) whether the compensation granted by the trial court was just and equitable in the circumstance of this case. The parties agree that the judgment of the Labour Court accurately records the facts of the matter, that there are no factual disputes on appeal and that the incomplete record is sufficient for deciding the appeal.
- [3] The appellants are construction companies. The second respondent was employed by the second appellant (‘Mpumalanga Construction’). The remaining respondents were employed by the first appellant (‘Roberts’). The employees are represented by the first respondent, the National Union of Mineworkers (“NUM”).
- [4] The appellants were jointly engaged in a rural bridge construction project in a rural area in the Lady Frere District in the Eastern Cape. The employees were

¹ Act 66 of 1996.

all construction workers who resided in huts on site. They embarked on a strike from 21 August 2013 to 23 August 2013. The strike was unprotected because the employees did not give the appellants the required notice in terms of section 64(l)(b) of the LRA. The employees were given three ultimata on 21 August 2013 at 8:30 am, 11:00 am, and 13:50 pm, respectively, in terms whereof they were instructed to report for duty at 10:00am, 13:30 pm and 15:00 pm respectively. All the ultimata informed the employees that they had embarked on an unprotected strike contrary to the provisions of the LRA causing severe prejudice to the company, and instructed them to cease immediately and to resume their normal duties, failing which they would be dismissed. The employees were 'called upon to seriously consider the consequences of (their) actions and the effect of (their) actions on their continued employment with the company.'

- [5] The strike occurred because the employees were aggrieved about their living conditions on-site, in particular the intermittent and inadequate supply of electricity resulting in their not having heating, lighting and the means to prepare food.
- [6] The employees did not comply with the ultimata and were eventually dismissed on 25 September 2013 for embarking on the unprotected strike. NUM referred an unfair dismissal dispute to the CCMA for and on behalf of the second respondent against Mpumalanga Construction. NUM also referred an unfair dismissal dispute against Roberts for and on behalf of remaining respondents against the first appellant. The unfair dismissal disputes were referred to the Labour Court for adjudication against the two appellants respectively under different case numbers. The referrals were later consolidated by agreement.
- [7] The Labour Court held that over the course of the three ultimata being issued, the employees had time to consider their decision to persist with strike action and understood the implications of the ultimata or threat of dismissal contained in the last one. They thus had sufficient time to reflect on their actions, but decided to risk the consequences of continuing with the strike

action, despite the ultimata and the site manager pleading with them to return to work.

- [8] The Labour Court accepted that the strike was in response to a legitimate demand for the provision of better electrical supply for heating, lighting and cooking needs. It held though that the strike was not provoked by unreasonable management conduct. The appellants' ability to provide the kind of electricity supply sought by the employees was constrained by factors not entirely within its control. The appellants were unable to provide the kind of electricity power sought by the employees and there was no obligation on them to do so. Moreover, the strike was also not in response to management implacability. The employees had failed to engage senior managers on the issue despite having had the opportunity to do so the day before the strike when the managers visited the site. The strike, hence, was not a spontaneous response to any conduct on the part of management but rather carefully timed action to cause maximum inconvenience to the appellants by interrupting the pouring of concrete on the day of its delivery to the site.
- [9] Furthermore, the employees were aware that similar grievances had been resolved at a different site by employees invoking a grievance procedure with the union's assistance. The employees moreover did not invoke the grievance procedure and neither did they obtain the union's assistance or advice before embarking on unprotected strike action. They also did not seek the union's assistance or advice after they were issued with ultimata despite the fact that they were given reasonable opportunity to reconsider their actions.
- [10] Despite the substantive fairness of the employers' response to the strike, the Labour Court was critical of their failure to 'take the simple precaution of phoning a union official to try and make the strikers see reason even if the union did not have a majority presence in the workplace and was not a recognised representative of the employees.' It noted that the reason for the appellants' failure to contact the union before dismissing the employees was most probably that they 'did not regard it as obligatory because the union was only representative of a small percentage of the workforce (approximately 7%)'. However, Ms Sihlalha, a director of Mpumalanga Construction, testified

that the appellants did not contact the union because there was no recognition agreement with it. Notwithstanding the union's lack of representivity, the Labour Court held:

'The prospect of union intervention might have resulted in some resolution being found to address the underlying disgruntlement which fuelled the strike. At least in this respect the company was seriously remiss in not seeking to communicate with the union once the strike was in progress, which affects the procedural fairness of the dismissals.'

- [11] The Labour Court, as discussed, accepted that the strike was serious because it had lasted for two days, without any heed being paid to the ultimata despite a reasonable opportunity being afforded to the employees to reconsider their actions, and the strike was calculated and not a spontaneous event. It concluded as follows:

'In light of the above, I am not persuaded that the applicants' dismissals were substantively unfair but I agree they were procedurally unfair to the extent that the respondents did not take the necessary and sensible step of contacting the union to try and end the strike other than issuing the ultimatums and pleading with the strikers.'

- [12] The Labour Court thus held that the dismissal of the employees was substantively fair but procedurally unfair and ordered the appellants to pay the employees compensation equivalent to six months salary each.

- [13] The respondents on appeal (the employees and NUM) accept the findings of the Labour Court and that the only substantive issue on appeal is the finding that Item 6(2) of the Code required the appellants to contact the union prior to issuing ultimata or dismissing the employees, to allow the union to intervene at an early stage, and that this requirement is an element of the employees' rights to procedural fairness.

- [14] Item 6(2) of the Code reads as follows:

'Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that

should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it either by complying with it or rejecting.'

- [15] In finding that the dismissal of the employees was procedurally unfair because the appellants failed to contact the union to discuss the course of action it intended to adopt, the Labour Court relied on the decision of this court in *National Union of Metalworkers of SA & others v CBI Electric African Cables*² which held:

'[T]he respondent did not follow a proper procedure in issuing the ultimatum. In terms of the code,.... it was incumbent on the respondent to engage with the union before issuing the ultimatum on 25 June 2007. This, the respondent failed to do. Item 6(2) of the code makes it clear that prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. This is necessary for two reasons. Firstly, it affords the union an opportunity to persuade the strikers to resume work and secondly, it provides a safeguard against possible rash action by the employer.'

- [16] The issue that arises in the present appeal is whether an employer is obliged in terms of Item 6(2) of the Code to contact a trade union official of any trade union regardless of its representative status at the workplace. Although the representative status of the union is not discussed in the judgment in the *CBI Electric African Cables* case, it is evident that the employer and the union had been engaged in ongoing negotiations about a shift system, thus suggesting that the union, in that case, enjoyed representative status. That is not the case in this appeal. Here the union had only a handful of members, making up about 7% of the workforce, and did not enjoy recognition or organisational rights granted in terms of Chapter III of the LRA.

- [17] Item 6(2) of the Code is a guideline which ought to be followed, but is not strictly binding in that Schedule 8 is not a legislative part of the LRA.³ Nevertheless, in its application, it should be interpreted to give effect to the

² [2014] 1 BLLR 31 (LAC).

³ See the definition of "this Act" in section 213 of the LRA.

primary object of the LRA to promote orderly collective bargaining. The LRA provides for industrial pluralism but favours majoritarianism in collective bargaining and does not compel employers to bargain with trade unions in good faith; instead, in addition to protecting procedural industrial action, Chapter III of the LRA grants representative trade unions organisational rights such as access to the employer's premises, stop-order facilities and relevant information. These rights are conferred only upon unions that represent a majority of members or which are "sufficiently representative". Unions who have minimal membership can act on behalf of their members in other capacities, but will be denied an organisational presence or role as a bargaining agent until they become sufficiently representative.

[18] The concept of "sufficiently representative" is not defined in the LRA. In determining representivity and the concomitant rights that follow, regard must be had to the history of the bargaining relationship in the workplace, the growth potential of the union and whether the union can make a meaningful impact on collective bargaining in the workplace. A minority union with significant representation thus may be entitled to organisational rights. The trade union contemplated in Item 6(2) of the Code is a union of this kind. The duty of the employer to contact a trade union in terms of Item 6(2) of the Code is restricted to contacting a trade union that has been granted organisational rights under Chapter III of the LRA or enjoys contractual rights under a recognition agreement concluded with the employer. The duty obliges the employer to contact an appropriately recognised bargaining agent.

[19] In this case, the union did not enjoy any organisational rights under Chapter III of the LRA, and it is likely that it was not entitled to them on grounds of it not being sufficiently representative, nor was it party to a recognition agreement with the employer. In the premises, there was no duty on the appellants to contact the union in terms of Item 6(2) of the Code before issuing the ultimata or dismissing the employees. It follows that the dismissal was not procedurally unfair. The appeal must succeed for that reason. This is not a case in which equity demands an award of costs.

[20] The appeal is upheld and the order of the Labour Court is set aside and substituted with an order dismissing the application.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

I agree

K Savage

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

R Orton

Instructed by: Snymans Attorneys

FOR THE RESPONDENTS: Adv BL Boswell

Instructed by Wesley Pretorius Attorneys

LABOUR APPEAL COURT