

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1367/23

In the matter between:

WORLDWIDE STAFFING (PTY) LTD

Applicant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

1st Respondent

COMMISSIONER THEMBILE MDALI

2nd Respondent

HEAVYMAN VUKEA

3rd Respondent

TERRENCE CHAUKE

4th Respondent

Heard: 7 December 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for the hand-down is deemed to be 12 February 2024.

JUDGMENT

WEHNCKE, AJ

Introduction

[1] This judgment concerns an application for the review and setting aside of an arbitration award in terms of section 145 of the Labour Relations Act.¹

[2] In what follows, I set out the background to the dispute, a summary of the evidence before the arbitrator, the arbitrator's findings, an analysis of the applicable legal principles and a conclusion on whether the arbitration award ought to be reviewed and set aside.

Background

[3] The Applicant carries on business as a Temporary Employment Service Provider (TES). For the reward, it procured the services of the Third and Fourth Respondents to work at its client, Zest Weg Electric (Pty) Ltd (Zest).

[4] In August 2022, the latter's staff embarked on a protected strike.

[5] Meanwhile, the Third and Fourth Respondent's trade union, Dynamic Peoples Union of South Africa (DYPUSA), gave notice of a secondary strike in support of the demands that Zest permanently employ all TES employees and that Medical Aid and a 13th cheque be afforded to them.

[6] Picketing rules, however, prohibited participants from displaying placards, posters, banners, or similar items containing words or pictures that are defamatory of any director, agent or employee of the Applicant or its client. They were also prohibited from engaging in inciteful, provocative or intimidating behaviour and could only picket within a designated area, some forty metres from a private entrance.

[7] On the morning of 7 September 2022, the Third and Fourth Respondents attended a picket at Zest's premises. Notwithstanding the aforesaid picketing rules, they joined a group carrying offensive placards with slogans such as "*cruel corrupt Zest*", "*abuse at Zest*", "*one must die*", and "*wafa wafa*" - which loosely translated means "*whoever dies, dies*".

¹ Act 66 of 1995, as amended.

[8] It was undisputed that these utterances were grossly unacceptable. In further contravention of the picketing rules, the group marched around the premises as opposed to peacefully picketing in the designated area. Chaos erupted when the protesters started blocking roads and damaging property.

[9] Along with others, the Third and Fourth Respondents were subsequently called to account for their actions at a disciplinary inquiry. Thereafter, they were dismissed for associating with the offensive placards and picketing outside the designated area in violation of the picketing rules.

[10] Aggrieved by this outcome, the Third and Fourth Respondents approached the First Respondent (Bargaining Council) to challenge the fairness of their dismissal. The Second Respondent (Arbitrator) concluded that their dismissal was substantively unfair and awarded retrospective reinstatement.

[11] On review to this court, the Applicant attacked the reasoning process in making the award on an array of alleged gross irregularities; essentially, that the Arbitrator misconceived the issues, undertook the enquiry in the wrong manner and failed to properly evaluate the evidence presented at arbitration, culminating in an unreasonable result.

[12] In *Quest Flexible Staffing Solutions (Pty) Ltd (a division of ADCORP Fulfilment Services (Pty) Ltd) v Lebogate*,² the Labour Appeal Court appropriately summarised the test as follows:

‘[12] ... Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator...’

² (2015) 36 ILJ 968 (LAC); [2014] ZALAC 136 at para 12.

Evidence before the arbitrator

[13] At arbitration, the Third and Fourth Respondents claimed that their dismissal was unfair because they were not the ones holding the offensive placards. According to them, they did nothing wrong and suspected the Applicant wanted them out to minimise the influence of union membership in the workplace. The Applicant countered that they were dismissed solely for their misconduct during the picket.

[14] The Third Respondent was appointed as a marshal to uphold the picketing rules. He and the Fourth Respondent were fully acquainted therewith. Both were photographed with a group of protesters carrying offensive placards with slogans in breach of the picketing rules. Reasonably construed, these slogans sought to defame, intimidate and incite violence during the strike. Protestors also did not heed the picketing lines. Eventually, the strike turned violent.

[15] The Third and Fourth Respondents said they disagreed with the placards and reported the offensive material to a shop steward or marshal. Exactly when and how they did so was unclear. No witnesses were called to corroborate their version in this regard. Other than referring to someone called "Vincent", they could not identify the individuals to whom they allegedly reported.

[16] Initially, the Third Respondent stated that he resigned from the union when his colleagues started throwing stones. However, during cross-examination, he conceded that he resigned long after the strike and not in response to the violence. Before joining the protest on the day in question, he knew some group members intended to display signage in contravention of the picketing rules. Though he could not read the wording on the placards, he was convinced something was amiss. Yet, he had no problem reading the wording from the photographs presented to him at arbitration.

[17] The Fourth Respondent testified that he joined the group because he was so ordered by the marshals. He admitted they were demonstrating and singing for the same purpose. When he noticed the offensive placards, he went to report the

violation of the picketing rules to a marshal. Yet, he immediately returned to the same group to continue the protest. The placards remained on full display for at least another thirty minutes thereafter.

[18] He conceded that he could have left at any time but elected to associate with the group despite their offensive displays.

[19] The Applicant argued that continuous employment was intolerable due to the seriousness of their actions and its adverse impact on the employment relationship. Conversely, the Third and Fourth Respondents contended that they could not be blamed for the missteps of others; hence, they ought to be reinstated.

Arbitrator's findings

[20] The Second Respondent found the Applicant dismissed the Third and Fourth Respondents for witnessing others holding the offensive placards. To him, it mattered not whether they joined the picket outside the designated area. Their failure to call witnesses to substantiate claims that they reported the violations was also of no consequence. Because the offending placards were eventually taken down, it must have been due to them reporting it to the conveners.

[21] Despite being a marshal, the Third Respondent had no control over the picket. Therefore, the Second Respondent deemed it sufficient that he and the Fourth Respondent reported the offending materials to the conveners of the strike.

[22] In applying principles of collective misconduct, the Third and Fourth Respondents were found unblameworthy because they were not directly implicated in the ensuing violence. According to the Second Respondent, their actions were not destructive of the employment relationship, so dismissal was substantively unfair.

Analysis

[23] An employee's common law obligations of promoting the employer's interests and refraining from misconduct encompass a specific duty to disassociate from

misconduct perpetrated by others.³ In this case, the Third and Fourth Respondent's association with the group did not require inferential reasoning. They admitted to joining the picket, where some carried offensive placards in violation of the picketing rules. They admittedly also crossed the relevant picketing lines with the group. Thus, to escape complicity in this context, they had to actively distance themselves from the primary misconduct committed by the others.⁴ They failed to do so.

[24] It was grossly irrational for the Arbitrator to find that the Third and Fourth Respondents were dismissed for merely witnessing the misconduct of others.

[25] Because he proceeded from the wrong premise, the Arbitrator misconstrued the nature of the enquiry. Had the Arbitrator properly applied his mind, he would have at least considered that a protected picket is meant to be an extension of collective bargaining, not a licence to intimidate or to simply tarnish an employer's reputation. The slogans written on the placards were undoubtedly defamatory and aimed at creating a hostile and intimidating atmosphere. Upon contravention of the picketing rules, the picket lost its protected status.⁵ These offensive slogans most probably contributed to the ensuing violence. So did crossing of the picketing lines.

[26] The Third and Fourth Respondents voluntarily aligned with the group. The sole basis of their defence was that they did not physically carry the offensive materials. For reasons already stated, this was irrelevant.

[27] It has been held that fairness rests at the equilibrium between competing rights and interests. An enterprise's viability depends very much on the trustworthiness of its staff. Conduct destructive of this trust would render continuous employment untenable or at least undesirable.⁶

³ *Association of Mineworkers and Construction Union and Another v Metal and Engineering Bargaining Council and Others* (2019) 40 ILJ 1262 (LC).

⁴ *Commercial Stevedoring Agricultural and Allied Workers' Union and others v Oak Valley Estates (Pty) Ltd and another* [2022] 6 BLLR 487 CC; [2022] 6 BLLR 487 (CC).

⁵ *National Union of Metalworkers of South Africa and others v Dunlop Mixing and Technical Services (Pty) Ltd and others* [2021] 3 BLLR 221 (SCA); [2020] ZASCA 161.

⁶ *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC); [2000] ZALAC 10.

[28] Despite overwhelming evidence against them, the Third and Fourth Respondents denied any wrongdoing and showed no remorse for their actions. Conceivably, this cemented the intolerable notion that they cannot be entrusted with refraining from committing the same misconduct in future.

[29] Accordingly, their dismissal was a sensible operational response to risk management, as it would also send an unequivocal message to others that individual misconduct in a collective setting will not be tolerated.

[30] Under these circumstances, dismissal was proportionate and fair.

Conclusion

[31] Ultimately, the decision by the Arbitrator was one that a reasonable decision-maker could not reach. For this reason, the application for review must succeed. In the premises, the following order is made:

Order

[32] The arbitration award rendered by the Second Respondent under the auspices of the First Respondent in MEGA59553 is reviewed, set aside, and replaced with the following:

1. The dismissal of Heavyman Vukea and Terrence Chauke was substantively fair.
2. Their claim is dismissed.

[33] No order as to costs.

J.A. Wehncke

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Ephraim Kungwimba

Instructed by:

Hunts (Inc. Borkums) Attorneys

For the Respondents: No Appearance

LABOUR COURT