Republic of South Africa

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Not Reportable

Case no: CA7/2010

In the appeal between:

FOOD AND ALLIED WORKERS UNION

ON BEHALF OF M KAPESI AND 31 OTHERS **Appellant**

and

PREMIER FOODS LTD t/a BLUE RIBBON SALT RIVER **Respondent**

and in the cross-appeal between:

PREMIER FOODS LTD t/a BLUE RIBBON SALT RIVER **Cross-appellant**

and

FOOD AND ALLIED WORKERS UNION

ON BEHALF OF M KAPESI

AND 31 OTHERS **Cross-respondent**

Heard: **17 November 2011**

Delivered: **16 March 2012**

Summary: Retrenchment in terms of s 189 of labour Relations Act 66 of 1995 of selected employees following violent strike – no proof that the selected employees committed acts of violence or intimidation – selection unfair – order for compensation replaced with order of reinstatement

CORAM: WAGLAY DJP, HLOPHE AJA and LANDMAN AJA

JUDGMENT

Landman AJA

Introduction

[1] The Food and Allied Workers Union, the applicant in the court *a quo*, appeals, and Premier Foods Ltd, the respondent in the court *a quo*, cross-appeals against the judgment of the Labour Court (A Basson J) to this Court with leave of the court *a quo*. The court *a quo* found that the dismissal of 31 employees was substantively and procedurally unfair and granted them compensation. I shall refer to the parties for convenience as FAWU and Premier respectively.

[2] Premier trades, *inter alia*, as Blue Ribbon Bakery at Salt River in the Western Cape. Its business consists of milling wheat and baking of bread and the distribution and sales of its products particularly in the Cape Peninsula. After the failure of wage negotiations, FAWU, a registered trade union, and most of its members engaged on a protected national strike. The strike commenced on 5 March 2007. The demand was for centralised bargaining and its purpose was to raise the wage levels of employees employed in rural areas to the levels of employees employed in urban areas.

[3] Some employees belonging to FAWU chose not to participate in the strike but to continue working at Premier's Blue Ribbon Bakery at Salt River (the bakery) as did some non-unionised and temporary staff supplied to the bakery through the offices of Staffgro and other labour brokers.

[4] It is common cause that the strike was a particularly violent one. Non-strikers were harassed and intimidated. Employees were visited at their homes by persons who threatened them with physical harm and death. Relatives of non-strikers were also visited in this manner and informed of what would be done to the family members working at the bakery. One female non-striker was dragged from her home at night and assaulted with pangas and sjamboks.

[5] The vehicle of a non-striker was set alight and destroyed. Shots were fired on this occasion. A neighbour of the non-striker was able to identify the perpetrators. He was subsequently shot and killed near his home. Houses were petrol bombed. Threats to kill senior management were made. Some employees and the senior management group were provided with security guards. A shot was fired through the security guard's vehicle parked outside of the home of Lavery, the regional manager.

[6] Delivery vans were held up and the daily takings were robbed as were personal possessions and money of the drivers and staff. A state of lawlessness prevailed. The cost of increased private security escalated and non-strikers went about their business knowing that they, their families, property and possessions were in a state of danger.

[7] Criminal charges were laid with the police. The police were unable to be of much assistance and the crimes went unpunished. An interdict was sought and obtained in the Labour Court.

[8] Statements were obtained from non-strikers as well as from the family members who had experienced these crimes. Various communications were addressed to the union.

[9] A commencement was made with an application for contempt of court. But it was not finalised.

[10] The strike was eventually settled about two months later on 9 May 2007.

[11] On their return some employees were suspended pending disciplinary action. Disciplinary action, it is alleged, could not be instituted because some

witnesses were not prepared to testify on account of fear. Premier's key witness, one Mr. Xhongo who was secluded for the sake of his security, disappeared and till today, some five years later, has yet to be found.

[12] After the disappearance of their witness, Premier decided to abandon the holding of disciplinary enquiries. Premier was advised to retrench certain employees on the grounds of operational requirements because these employees were linked to strike violence and intimidation. A retrenchment process was initiated. The CCMA was requested to facilitate consultations which it did. Six sessions were held. Suggestions and counter suggestions were made. Threats and intimidation continued to be made.

[13] On 1 October 2007, certain employees were given notice that there their services would be terminated. Their services were terminated on 31 October 2007.

[14] FAWU launched an application in the Labour Court on behalf of the retrenched employees all of whom were its members, complaining that the dismissals of these 31 employees were substantively and procedurally unfair. FAWU sought the retrospective reinstatement of the 34 members concerned (the applicants) in their employment with Premier.

Order of the court *a quo*

[15] On 4 May 2010 the court *a quo* delivered its judgment and made the following order:

> '(1) The dismissal of the applicants was substantively and procedurally unfair.
> (2) The respondent must pay each of the individual applicants compensation equal to 12 month's salary.
> (3)The respondent [are] to pay the costs, including the costs of two counsel as well as the qualifying expenses of expert witness Professor Tredoux.'

Synopsis of the judgment

[16] The court *a quo* delivered a comprehensive judgment. In the light of the view I take regarding the issue on which this appeal turns, I shall only briefly

summarise its judgment. The court *a quo* was not persuaded that it was impossible for Premier to hold the disciplinary hearings and advanced several reasons for coming to this conclusion. The court *a quo* considered whether an employer could resort to the procedure in section 189 of the Labour Relations Act (the LRA)[1] where it is the employer's case that it is unable to hold disciplinary enquiries as a result of violence, disappearance of crucial witnesses and where witnesses are being intimidated and were afraid to testify, and held that Premier could not do this.

[17] The court *a quo* also noted that Premier pleaded that the dismissals were for a fair reason based on its operational requirements; more specifically the operational impact of strike-related misconduct on the workplace in circumstances where, according to Premier, it was impossible to take disciplinary action against the suspected perpetrators. The court *a quo* decided that this avenue was not open to Premier as the reason for the dismissal was on account of misconduct and was not related to financial considerations. The court *a quo* accepted that the reason for the dismissal must ultimately be the economic viability of the enterprise. The reasons for dismissal must relate to or bear some resemblance to the economic, technological or structural needs of the business. The court *a quo* was prepared to accept that there may be situations where an employer can opt for the section 189 –route where misconduct triggered the operational rationale but not simply because the employer cannot prove the charges against the employees.

[18] The court *a quo* was not persuaded that the conduct of the applicants threatened or affected the economic viability of Premier's Blue Ribbon Bakery. In any event, not to the extent that Premier had an economic rationale to implement section 189 procedures and therefore able to circumvent the disciplinary route. The dismissal of the applicants on the basis of operational requirements was therefore unfair.

[19] The court *a quo* noted that FAWU did not complain that the consultations were inadequate, that they were not afforded an opportunity of tabling any

[1] 66 of 1995.

suggestions at the consultation process, or that such suggestions as were put forward were not properly considered. The court *a quo* set out the various alternatives. The primary one being that the only fair course of action was for Premier to hold disciplinary hearings on an individual basis. The court noted that during the consultation process Premier suggested, as a further alternative, that the persons identified as potential retrenchees submit themselves to a polygraph test.

[20] The court noted that in the particular circumstances of the case, the question was whether the proposal put forward by Premier was a reasonable suggestion aimed at minimising the number of dismissals, as envisaged by section 189(2)(a)(ii) of the LRA, or whether the raising of such a proposal was so unreasonable that it vitiated or fundamentally affected the fairness of the entire process. The question before the court, it said, was not one of admissibility but of the *weight* which a court should attach to polygraph test results.

[21] The court considered the expert evidence and the concession made by Premier's expert, Dr Barland, that the polygraph test would be useful or valuable to eliminate the innocent and then to focus the investigation on those people who did not pass the polygraph test. The court *a quo* held that in light of this and the controversy surrounding the accuracy and reliability of polygraph tests, it was not persuaded that the results of polygraph tests are reasonable or fair alternatives to minimise retrenchment.

[22] The court a quo declined to reinstate the applicants saying that enough evidence was placed before the court to show that an employment relationship would not be able to exist between the applicants and Premier. Each applicant was awarded compensation equal to 12 month's salary.

<u>The cross-appeal</u>

[23] It will be convenient to deal with the cross-appeal before proceeding to deal with the appeal.

[24] The cross-appeal is based on the following grounds:

‘1. The court erred in not finding that respondent’s decision not to proceed with disciplinary enquiries after the disappearance of Mr Xhongo was, in the circumstances prevailing, a reasonable, fair and justifiable decision.

2. The court *a quo* erred in holding that disciplinary enquiries could have been held utilising the statements that had been obtained in brackets albeit that they would have constituted hearsay evidence in brackets.

3. The court *a quo* erred in holding that the dismissals of the 31 former employees could not constitute dismissal based on the operational requirements of the business.

4. The court *a quo* erred in finding that the dismissals of the said employees were not for reasons based on the operational requirements of the business because the reasons for the dismissals were ‘clearly misconduct and not financial’.

5. The court erred in finding that an operational requirements based dismissal required that the dominant purpose of the retrenchment route had to be the economic viability of the enterprise.

6. The court erred in finding that, in the circumstances of the case, respondents' is offer of the use of polygraph testing was not a fair and objective selection criteria, or a reasonable or fair proposal to minimise the number of retrenchees.

7. The court erred in not dismissing the application.’

Evaluation

Assumptions

[25] In my view, this cross-appeal turns on a narrow compass namely did Premier apply the selection criteria fairly and objectively? It is for this reason that I am prepared to assume, in favour of Premier, without deciding, that:

(a) Premier’s decision not to proceed with disciplinary enquiries after the disappearance of Mr Xhongo was, in the circumstances prevailing, a reasonable, fair and justifiable decision.

(b) Disciplinary enquiries could not have been held utilising the statements that had been obtained albeit that they would have constituted hearsay evidence.

(c) The dismissals of the 31 applicants could constitute dismissal based on the operational requirements of the business.

(d) The dismissals of the employees were for reasons based on the operational requirements of the business even though the dismissals were for misconduct.[2]

(e) Operational requirements based dismissals do not require that the dominant purpose of the retrenchment had to be the economic viability of the enterprise.

(f) The selection of strikers who have committed acts of violence and intimidation constitutes fair and objective criteria for purposes of section 198 of the LRA.

(g) It is competent, fair and reasonable to further reduce the selected persons referred to above by accepting the results of a polygraph test for deception.

The selection criteria

[26] I have assumed above that the selection of strikers who have committed acts of violence and intimidation constitutes fair and objective criteria for purposes of section 189 of the LRA. Before turning to consider whether Premier applied the selection criteria, which I have assume to be fair and objective, it is necessary to make a few observations about this assumption:

(a) Mr C A Oosthuizen SC, who appeared for Premier in the court below and this Court, submitted in his heads that after discussions and a review of the documentary and video evidence, Premier compiled a list of 31 persons who played 'identifiable roles in violence and intimidation' and made this list available to FAWU.

[2] The assumption is made for the purpose of isolating the point in issue. It may be permissible to retrench employees for misconduct in certain circumstances. See for instance *SA Commercial Catering and Allied Workers Union and others v Pep Stores* (1998) 19 ILJ 1226 (LC), *Makgabo and others v Premier Food Industries Ltd* (2000) 21 ILJ 2667 (LC) and *NUMSA and Others v Genlux Lighting (Pty) Ltd* (2009) 30 ILJ 654 (LC).

(b) The court *a quo* captured the selection criteria as it was pleaded; one which perhaps emphasised the evidence or proof more than the substantive reason for choosing the 31 persons viz: 'The Respondent's case was that the Applicants were selected for retrenchment 'on the basis of affidavits linking them to acts of serious criminal conduct'.

(c) I am of the view that it is clear that the potential retrenchees were selected on account of their conduct. The affidavits or statements made by various persons constituted the evidence which Premier had to hand when it proceeded to identify these applicants for retrenchment.

Application of the selection criteria

[27] Did Premier apply the selection criteria fairly and objectively? Premier bore the *onus* of not only proving that the selection criteria were fair and reasonable but that they were applied fairly and objectively. The use of selection criteria that are not fairly and objectively applied renders a dismissal procedurally and substantively unfair. In *CWIU and Others v Latex Surgical Products*[3]) Zondo JP had occasion to remark that:

> 'If the respondent was to prove that there was a fair reason for its selection of the individual appellants, it was required to place before the court evidence that would show what qualifications all the employees, including the individual appellants had, what years of service they all had, what multi-skills they all had and what answers they gave to questions as part of the evaluation. This would have placed the court in a good position to determine whether or not there was a fair reason for the selection of the individual appellants as opposed to the selection of other employees for dismissal.'

Zondo JP went on to say that absent this evidence:

> '… the court is left to conclude on the basis of the respondent's ipse dixit that there was a fair reason for the selection of the individual appellants for dismissal. That cannot be accepted.'[4]

Proof of fairness and objective criteria

[3] (2006) 27 ILJ 292 (LAC) at para 94.
[4] At para 96.

[28] This brings me to a consideration of the evidence, presented at the trial, which Premier submitted proves, on a balance of probabilities, that the selection criteria were fairly and objectively applied. This issue was squarely placed in dispute. The pre-trial minute focuses attention on the application of the selection criteria. It records, *inter alia*, the following issue for decision:

> '… whether the employees were selected on the basis of their union affiliation and/or race. Further, and in the alternative, whether the Respondent acted fairly in selecting employees for retrenchment based on untested allegations of misconduct under the relevant circumstances and where they had allegedly been linked to serious misconduct by affidavits and had declined to undergo polygraph tests'. (My emphasis.)

[29] I think it is fair to say that if the complainants, who had made affidavits or statements, testified at the trial in the court *a quo* and if the court accepted their evidence regarding the identity of their assailants (where this was possible) and rejected the evidence to the contrary, then it could be said that the selection criteria (participation in violence and intimidation) would have been proven satisfactorily.

[30] So what evidence did Premier present in the court *a quo*? It is convenient to observe that Premier did not present all the evidence at its disposal that the 31 dismissed employees took part in violence and intimidation. Premier's failure to do so was for the reasons that have been canvassed extensively in the judgment of the court *a quo*, namely the lack of willing witnesses, justified concerns for the safety of the witnesses and the disappearance of Premier's key witness Xhongo. Kruger, a security officer, who could identify two employees, was also not called as a witness.

[31] The evidence that was presented consisted of hearsay affidavits or statements produced in evidence mainly by Ms Elliot. Makeleni, Mdleleni and Smuts testified in the court *a quo* but they were unable to identify their assailants. In addition there is photographic evidence and the testimony of Lavery and Badenhorst who do not personally identify any of the retrenchees as those who committed acts of violence and intimidation. The court *a quo*

summed up the evidence regarding the application of the criteria, very succinctly, in the following way:

> 'In this regard Lavery testified that he had discussions with Badenhorst, who had identified particular individuals who were going to be subjected to disciplinary hearings. During this process of selection the statements of all the persons who made them were reviewed in consultation with Elliott, Rodney Lambert and John May. The available video evidence were also considered in compiling the list. Lavery made the final decision in respect of who would be selected after he had consulted with various other people. Lavery also stated that he had accepted that the persons to whom the statements were made were considered to be credible. He, however, conceded that it was the credibility of the person who made the statement and not the person who took the statements down that was important. He did not, however, deem it necessary to send the witnesses of the respondent for a polygraph test.'

[32] What is of importance is that the affidavits and statements were not tendered to prove that the persons mentioned in them, in so far as they were identified, committed acts of arson or violence or intimidation. As the court *a quo* remarked, Mr Oosthuizen SC submitted them to prove that the selection was related to operational requirements[5].

[33] The result is that Premier refrained from proving that the persons selected for retrenchment on the criteria chosen by it committed acts of violence and intimidation. By so doing Premier failed to prove that its selection criteria were fairly and objectively applied. Premier proved nothing more than that the selection was made subjectively by Lavey after reading the statements, discussing the matter, and viewing the video footage. This is simply not sufficient to discharge the *onus* resting on Premier.

[34] In the result, the cross-appeal must fail.

[5] See para 13 of the judgment at page 2009 of the record.

The appeal

[35] I have mentioned that the court *a quo* declined to reinstate the applicants on the grounds that the employment relationship between the parties would not be able to exist between them. This approach is not based on the evidence. There is no evidence that the applicants committed acts of violence or intimidation. This being so it would seem that the court *a quo* made this finding on the evidence of violence and intimidation which was not linked to the applicants. Without a link between the applicants and the acts of violence and intimidation there is no evidence that the employment relationship between the parties cannot be sustained. Cf *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA). It follows then that the general rule, which gives primacy to reinstatement as the preferred remedy for unfair dismissal, must prevail.

[36] In the premises the appeal must be upheld and the order of the court *a quo* altered to read: 'The respondent is to reinstate the applicant employees retrospectively to the date of their dismissal'.

Costs

[37] Costs should follow the result.

The order

[38] In the result, I make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is altered to read: 'The respondent is to reinstate the applicant employees retrospectively to the date of their dismissal'.
3. The cross-appeal is dismissed with costs.

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Landman AJA

I agree

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Waglay DJP

I agree

Hlophe AJA

APPEARANCES:

FOR APPELLANT:	Adv C S Kahanovitz SC
	Adv M L Norton

	Adv L J Arnott
	Instructed by Cheadle Thompson Haysom
FOR CROSS-APPELLANT:	Adv C A Oosthuizen SC
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