



**INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not reportable

Case no: PA14/16

In the matter between:

**MTO FORESTRY (PTY) LTD**

**First Appellant**

**BOSKOR RIPPLANT (PTY) LTD**

**Second Appellant**

**BOSKOR SAAGMEULE (PTY) LTD**

**Third Appellant**

and

**CHEMICAL, ENERGY, PAPER, PRINTING,**

**WOOD AND ALLIED WORKERS UNION (CEPPWAWU)**

**Respondent**

**Heard: 13 March 2018**

**Delivered: 19 July 2018**

**Summary: Strike action – employees dismissed for participating in an unlawful strike – whether the employer’s conduct amounted to lockout justifying employee embarking on strike – court finding the locking of the gate was caused by a miscommunication on the part of the employer as it could not conceive that employer would ferry employees from their homes to work just to lock them out – Court finding that employees used the opportunity to strike in support of the national strike – court further finding that employees’ case different to that of the Stellenbosch employees in that unlike these employees, the Stellenbosch employees indicated their willingness to return to work after being served with the court order. The employees did not budge notwithstanding management and union’s effort to persuade them to cease the**

strike- they, by their conduct, refused to obey lawful instructions and their dismissal was consequently fair. Labour Court's judgment set aside and appeal upheld.

**Coram: Phatshoane ADJP, Musi JA and Savage AJA**

---

## JUDGMENT

---

MUSI JA

- [1] The first appellant (the employer) owned a timber plantation at Stellenbosch and it also owned sawmills in the Eastern Cape (Boskor). It employed members of the respondent (The Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (the union)). The first appellant was bought by and transferred to the second and third appellants as a going concern with effect from 1 July 2012.
- [2] The employer was a member of the Employers' Association of the Sawmilling Industry of South Africa (EASISA). The union and the EASISA were members of the National Bargaining Council for the Paper and Wood Sector (bargaining council). From time to time the EASISA and trade unions who were members of the bargaining council concluded collective agreements which, *inter alia*, regulated the conditions of employment of employees of the employers represented by the EASISA.
- [3] On 30 November 2009, the employer resigned from the EASISA, effective from 20 March 2010. As a result of the resignation, the employer was no longer represented at the bargaining council. It was not a party to collective agreements reached at the bargaining council.
- [4] During 2011, the unions and the employer associations represented at the bargaining council could not reach agreement on a wage increase. On 18 July 2011, the union issued a strike notice, which was served on the employer,

wherein it indicated that it intended to commence with strike action on, 21 July 2011, at 06h00.

[5] The employer responded to this strike notice on 19 July 2011. It indicated that it understood that its employees intended to join the intended strike action. It pointed out that should its employees embark on such action it would be unprotected because it is not a member of the EASISA; there was no wage dispute between it and the union and that no dispute involving it had been referred to the bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA). It requested the union to furnish it with a written undertaking, by 15h00 on 20 July 2011, that its employees, who were members of the union, would not embark on the intended strike action.

[6] A meeting was held between the employer and the union on 20 July 2011. Ms Mkoto, the union's organiser at the Port Elizabeth office, issued a notice to the union members and shop stewards which read as follows:

'this notice serves to inform our members not to embark on the strike on Thursday, 21 July 2011 as MTO Forestry is not part of the Bargaining Council.

Therefore, there is no deadlock between CEPPWAWU and MTO Forestry. The union is handling this matter very urgently.'

[7] Mr Jean Joubert, a senior manager of the employer, held a meeting with the shop stewards. During this meeting, he explained to the shop stewards that the employer had a contingency plan which it intended implementing should the employees embark on the anticipated unprotected strike. The contingency plan included cancelling the bus service between the employees' homes and work, blocking the entrances to the employer's premises and deactivating striking employees' clock cards.

[8] The shop stewards gave an undertaking that the workers would not embark on a strike on 21 July 2011. As a result of this undertaking, Joubert informed his colleague, Mr Visser, who was responsible for security at Boskor, not to implement the contingency plan. The shop stewards proceeded to put up notices informing union members not to participate in the strike.

[9] The next morning, at 05H30 the employees arrived for the 06h00 shift. They found the access gates and turnstiles locked. They gathered at the parking area. The gates and turnstiles were locked due to a misunderstanding, in that Visser did not communicate to the security officers that the contingency plan had been called off. When Joubert arrived at 06h15 he requested the security personnel to open the gates and turnstiles. Joubert endeavoured to get hold of the shop stewards so that they could have a meeting; they refused to join him for fear of intimidation.

[10] At 07h00, the employer issued an ultimatum to the employees. The ultimatum read as follows:

‘You are hereby notified that your refusal to enter and continue with your normal duties on Thursday, 21 July 2011 from 6h45 constitute an **unprotected strike action**. The following arrangements will therefore apply.

1. The principle of “no work - no pay”(sic) will apply.
2. Formal disciplinary action would be instituted against all employees who participated in the unprotected action on Thursday, 21 July 2011.

Please note that you (sic) should you not adhere to this ultimatum by 07h15 on Thursday, 21 July 2011, you would be locked out and not allowed to enter the company’s premises at Boskor sawmill.’

[11] The ultimatum was distributed amongst the employees who were singing and chanting in the parking area. Some of the employees tore up the ultimatum.

[12] At approximately 07h34, management and the shop stewards held a meeting during which management explained to the shop stewards that the gates were locked as a result of a misunderstanding. They undertook not to penalise any of the workers who refused to enter the premises and further undertook to pay them their normal daily wage as if there was no work stoppage caused by the closure of the gate or the refusal to work. The shop stewards left to convey the message to the employees. At 8h40 the shop stewards reverted and conveyed to management that the employees are unwilling to accept the apology and offer. Furthermore, they indicated that they would be continuing with the industrial action.

- [13] The second ultimatum was drafted and distributed, at 09h00. In this ultimatum the employer informed the employees about the meeting between it and the shop stewards and, reiterated its apology and offer to compensate the employees. It recorded that the employees refused the offer. It reiterated that the strike was unprotected and that the principle of no-work no-pay would be applied and that formal disciplinary action might be taken against employees which might result in dismissal.
- [14] When the second ultimatum yielded no positive results, Ms Mkoto was contacted telephonically. She advised the shop stewards, in the presence of management, that the strike is unprotected and that the employees must return to work. The shop stewards informed the employees about the telephone conversation. The employees would not budge. After some persuasion during further phone calls, Ms Mkoto travelled to Boskor from Port Elizabeth in an endeavour to persuade the employees to return to work. Her efforts were unsuccessful.
- [15] The employer had launched an application for interdictory relief in the Labour Court on 20 July 2011, because its workers at the Stellenbosch plant also went on strike. The matter was set down for 22 July 2011.
- [16] On 22 July 2011, the employees arrived at Boskor, at 5h30, with company transport. They refused to work although their clock cards and the clocking system were activated. At 10h00, management met with the shop stewards and the employees and handed them a copy of the employer's Notice of Motion and supporting documents in support of the relief sought in the Labour Court. The nature and purpose of the application were explained to the employees. Still, the employees would not budge. The interim order was issued late on 22 July 2011, returnable on 10 August 2011. It interdicted the employees from participating in the strike. The employees left their workplace at 13h30 before the interim order could be served on them.
- [17] On 25 July 2011, the employees arrived at their workplace at 05h30, with the buses provided for by the employer. The sheriff explained and served the court order on them. Copies were given to some employees and others were affixed

to the gate. The employees still refused to return to work. At approximately 10h00 the employer issued and distributed the third ultimatum which read as follows:

‘Despite previous ultimatum you persist with your actions by refusing to report for duty and to continue with your normal duties.

You are reminded that your actions are unprotected and unlawful and in contempt of an order issued by the Labour Court on Friday 22<sup>nd</sup> of July 2012(sic).

You are hereby finally instructed to report for duty by no later than 12:30 today 25 July 2011...’

[18] The employees did not return to work. They had a meeting with Ms Mkoto and decided to suspend the strike until the return date of the interim order.

[19] The interim order was confirmed. 193 employees were charged with participating in an unprotected and unlawful strike, non-compliance with a Labour Court order and refusal to follow a reasonable instruction by management to return to work. They were all found guilty at a disciplinary hearing and dismissed on 22 August 2011. They appealed. The appeal of 15 employees was successful and they were reinstated. The rest, 178, were unsuccessful on appeal and their appeal was dismissed on 13 September 2011. They approached the Labour Court, seeking an order that their dismissals were unfair and that they should be reinstated.

[20] In the Labour Court, the employees contended that:

[20.1] the strike was protected in terms of section 64(3)(c) of the Labour Relations Act<sup>1</sup> (the Act).

---

<sup>1</sup> Section 64(3)(c) of the Labour Relation Act 66 of 1995 (the Act) states that: ‘the requirements of subsection (1) do not apply to a *strike* or a *lock-out* if...the *employees* strike in response to a *lock-out* by their employer that does not comply with the provisions of this Chapter’

[20.2] they had a material interest in the demands levelled at the bargaining Council and therefore did not have to comply with the requirements of a secondary strike in terms of section 66(1) of the Act;<sup>2</sup>

[20.3] their dismissals were unfair because the employer did not comply with the provisions of item 6 of schedule 8 of the Act<sup>3</sup> and

[20.4] they were treated differently from the Stellenbosch employees who also embarked on strike action.

[21] The Labour Court dismissed the argument that the strike action was in response to an unlawful lockout. It correctly pointed out that the employees failed to establish that there was an unlawful lockout.

[22] The Labour Court found that the employees led no evidence to gainsay the employer's explanation that the gates were locked owing to a misunderstanding on the morning of 21 July 2011. It found the employer's explanation to be reasonable and pointed out that it would be senseless for the employer to arrange transport to collect the employees from their homes and bus them to work only to prevent them from gaining access to the workplace and perform their duties.

---

<sup>2</sup> Section 66(1) of the Act provides:

'(1) In this section —secondary strike<sup>1</sup> means a *strike*, or conduct in contemplation or furtherance of a *strike*, that is in support of a *strike* by other *employees* against their employer but does not include a *strike* in pursuit of a demand that has been referred to a *council* if the striking *employees*, employed within the *registered scope* of that *council*, have a material interest in that demand.'

<sup>3</sup> Item 6 of Schedule 8 of the Act reads as follows:

**'6. Dismissals and industrial action**

(1) Participation in a *strike* that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve *dismissal*. The substantive fairness of *dismissal* in these circumstances must be determined in the light of the facts of the case, including -

- (a) the seriousness of the contravention of *this Act*;
- (b) attempts made to comply with *this Act*; and
- (c) whether or not the *strike* was in response to unjustified conduct by the employer.

(2) 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 it. If the employer cannot reasonably be expected to extend these steps to the *employees* in question, the employer may dispense with them.'

- [23] It found that section 66(2)(b)<sup>4</sup> of the Act is clear, in that it requires employees who wish to embark on a protected strike as envisaged in section 66(1) of the Act to give the employer at least seven days' notice prior to the commencement of the strike. No such notice was given to the employer in this matter.
- [24] The Labour Court found that the strike was in response to the unjustified conduct of the employer, in that after the employees had given a guarantee that they would not participate in the strike which was to commence on 21 July 2011 and the employer undertook not to implement the contingency plan which involved locking its gates, the employees found the gates locked when they reported for duty on 21 July 2011. It found that the employer failed to comply with the provisions of item 6 of Schedule 8 of the Act because the employees were provoked by the employer.
- [25] The Labour Court was of the view that the ultimata were not eloquently drafted and did not give the employees sufficient time to heed them.
- [26] The Labour Court found that the employees at Boskor were treated differently from the Stellenbosch employees and that there was no justification for such differentiation. The Stellenbosch employees were not dismissed whereas the Boskor employees were dismissed. This rendered the dismissal of the employees unfair.
- [27] The Labour Court therefore found that the dismissal of the employees for participating in an unprotected strike was substantially and procedurally unfair. It ordered their reinstatement from the date of their dismissal.
- [28] The employer challenged all the adverse findings made against it, by the Labour Court. Mr Oosthuizen, on behalf of the employer, pointed out that the Labour Court made a finding that the dismissal of the employees was

---

<sup>4</sup> Section 66(2)(b) of the Act states:

'(2) No person may take part in a secondary *strike* unless -

...

(b) the employer of the *employees* taking part in the secondary *strike* or, where appropriate the *employers' organisation* of which that employer is a member has received written notice of the proposed secondary *strike* at least seven days prior to its commencement... '

substantively and procedurally unfair but did not point out in what respect the dismissals were procedurally unfair. The procedural fairness of the dismissals was never in dispute. He contended that, given the context of this matter, the ultimata given were fair.

- [29] Mr Euijen, on behalf of the employees, contended that the Labour Court did not err in its findings and that the arguments of the employer are without merit.
- [30] The issues to decide are firstly, whether the locking of the gates amounted to provocation, secondly, whether the ultimata were sufficient in the context of this case, thirdly, whether there was inconsistency in disciplining the employees at Boskor in light of the sanctions imposed on the Stellenbosch employees and lastly whether the dismissal of the employees was, given the totality of the facts and circumstances of this case, fair.
- [31] I agree with the employer's contention that the procedural fairness of the dismissals was not disputed. The court *a quo* did not give any reason for its conclusion that the dismissals were procedurally unfair. I could not find any reason to impugn the procedural fairness of the dismissals. The court *a quo* erred in this regard.
- [32] I agree with the Labour Court that the contention of the employees that their strike was protected because it was in response to an unlawful lockout should be rejected out of hand. There was simply no lockout. The gates were locked due to a genuine misunderstanding or miscommunication. This was explained to the employees and an offer was made to pay them for the time lost whilst waiting for the gates to be opened. The Labour Court correctly found that the explanation in relation to the locking of gates was reasonable. Strangely though, the Labour Court subsequently found that the strike was in response to the unjustified conduct of the employer. It found that the conduct of the employees was a knee-jerk reaction after the respondent had breached the agreement between the parties.
- [33] The conduct of the employees can hardly be described as a knee-jerk reaction. They rather opportunistically pounced on a genuine misunderstanding and harnessed it to further their unlawful aim. I say this because at 06h15 the gates

and the turnstiles were opened. The employees were requested to go to their workstations but they refused. They did not, at that stage, indicate that the reason why they did not want to go to their workstations was because they were locked out. If their reaction was a genuine knee-jerk reaction, one would have expected them to go to their workstations when the situation was explained to them - not only by management - but also by their shop stewards. It is unfathomable that the locking of the gates for 45 minutes can provoke employees into embarking on a two-day strike against the advice of their union and shop stewards.

[34] When the first ultimatum was issued they should have appreciated the seriousness of the situation. They ignored the ultimatum. They did not complain that the 15 minutes given to them to reflect on their conduct and its consequences was insufficient. Further ultimata, interventions by the shop stewards and interventions by Ms Mkoto followed but the employees would not budge.

[35] The Labour Court was pedantic about the contents of the ultimata. A defective ultimatum which does not set out in chapter and verse what is stated in item 6(2) does not become *pro non scripto*. The court must look at the content of the ultimatum, the extent of non-compliance with item 6, if any, the impact of the non-compliance as well as the surrounding circumstances and other measures which were taken in the endeavour to entice the workers to go back to their workstations. If it is clear from all these circumstances that, in substance, the ultimatum served the purpose envisaged by item 6(2) then it ought to suffice.

[36] In *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*<sup>5</sup> this Court said the following:

‘The Code does not suggest how the ultimatum should be distributed or required that it must be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them

---

<sup>5</sup>*Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC).

an opportunity to reflect on their conduct, digest issues and, if need to be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the *audi* rule must be observed both before the ultimatum is issued and after it has expired. In each instance, the hearing may be collective in nature and need not be formal.<sup>6</sup>

- [37] In this matter, the employer issued three ultimata, the union requested the employees to return to work and a court order was served on the employees, but they would not return to work. I am convinced that the reason why the employees did not report for duty was because they were supporting the National strike which was called in the bargaining council after a deadlock at that forum. It is not a mere coincidence that the employees at Stellenbosch also embarked on an unprotected strike. The locked gates were like manna from heaven which they used for their deliberate subversive aims.
- [38] It is common cause that when the Stellenbosch workers were served with the interdict on Friday, 22 July 2011, they immediately and unconditionally indicated their willingness to return to work. They were, however, advised that due to the lateness of the hour that they should return on Monday, 25 July 2011. They duly returned to work on 25 July 2011.
- [39] The employees at Boskor were served with the interdict on Monday, 25 July 2011 at 06h30. They did not return to work immediately or indicate that they are prepared to return to work immediately. On the contrary, they refused to return to work for most of the day and in the afternoon decided to suspend the strike pending the return date. Ms Mkoto had to intervene during the afternoon to persuade them to return to work. Their stance of suspending the strike belies the fact that they were provoked. They knew that they were engaged in an

---

<sup>6</sup> Ibid para 27.

unprotected strike. It is for that reason that Ms Mkoto wrote the following to the employer, on 26 July 2011:

‘this serves to inform you that several meetings have been held with our members that are on strike, the last meeting was on 25 July 2011 and resolved the following:

1. Workers agreed to suspend the strike and go back to work on 26 July 2011.
2. They will wait for the court order of 10 August 2011 and take their decision regarding the strike.
3. Workers are willing to accept the 8% of the bargaining council although the union is on 9.8%.
4. Workers would not accept to be subjected to disciplinary action because of the strike (sic)...’

[40] In my view, the differentiation was fair, rational and justified. The Stellenbosch employees indicated their desire to return to work immediately and unconditionally when the court order was served on them. That was not the case with these employees. These employees returned to work at their own time and on the basis that they are suspending a strike which at that stage was declared unprotected by a court of law. They did not return to work immediately upon the court order being served on them. Ms Mkoto had to intervene to persuade them to adhere to the court order and return to work. It has been said that some “inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case”.<sup>7</sup>

[41] In my judgment, the employees were guilty of the misconduct with which they were charged.

[42] The imposition of a fair sanction is always a difficult task. Fairness in this context means fairness towards both parties; the employee and the employer. The employer tried various options to get the employees to desist from their unlawful conduct. The employees, on the other hand, were steadfast in their

---

<sup>7</sup> *SACCAWU and Others v Irvin & Johnson* [1999] 8 BLLR 741 (LAC).

resolve to continue with their unlawful action. In their quest to proceed with their unlawful conduct they not only defied several ultimata, but also instructions and requests from their own union and a court order.

[43] In *Transport & Allied Workers Union of South Africa on behalf of Ngedle and Others v Unitrans Fuel and Chemical (Pty) Limited*<sup>8</sup> (Ngedle) it was said:

‘Therefore, where striking workers engaged in unprotected strike action, the onus rests on the workers to tender an explanation for their unlawful conduct, failing which the dismissal would be regarded as substantively fair, provided dismissal was an appropriate sanction. In this matter, no reasons were provided to the employer by the striking workers that expend the ability to return to work following the strike becoming unprotected.’<sup>9</sup>

[44] In this case, the workers did not tender any evidence whatsoever during the proceedings in the Labour Court. In fact, they tried to blame the employer for their conduct. They deliberately lied about the reason for their unlawful action.

[45] In *Ngedle* it was also pointed out that:

‘In determining the appropriateness of a dismissal as a sanction for the striking workers’ conduct, consideration must be given to whether a less severe form of discipline would have been more appropriate, as dismissal is the most severe sanction available... An illegal strike constitutes serious and unacceptable misconduct by workers. This was exacerbated in that the workers also acted outside the bounds of both a court order and a collective agreement. In instances such as this, where an employee has issued an unequivocal ultimatum informing workers engaged in an impermissible strike that that misconduct will result in dismissal, subsequent dismissal has been found to be an appropriate sanction for non-compliance. I am satisfied the dismissal was the appropriate sanction.’<sup>10</sup>

---

<sup>8</sup> *Transport & Allied Workers Union of SA on behalf of Ngedle and Others v Unitrans Fuel & Chemical (Pty) Ltd* (2016) 37 ILJ 2485 (CC).

<sup>9</sup> Ibid at para 46.

<sup>10</sup> Ibid at para 50.

[46] Each case must obviously be viewed on its own facts and circumstances. I have already pointed out that the employees in this matter did not allow themselves to be deterred from their unlawful strike by any legal means. In my view, the sanction of dismissal, in light of the totality of the circumstances, imposed by the employer was fair.

[47] I accordingly make the following order:

[47.1] The appeal is upheld with no order as to costs.

[47.2] The order of the Labour Court is set aside and replaced with the following:

‘The application is dismissed.’

---

C.J. Musi JA

Phatshoane ADJP and Savage AJA concur with Musi JA

APPEARANCES:

FOR THE APPELLANTS: Adv Oosthuizen S.C. and Adv C Kahanovitz S.C

Instructed by Werkmans Attorneys

Cape Town

FOR THE RESPONDENTS: Adv Euijen

Instructed by Cheadle Thompson & Haysom

Cape Town