

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS572/05

2008-08-21

REPORTABLE

In the matter between

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION (SATAWU)

First Applicant

10 **MAKOLA S. AND 48 OTHERS**

Second & Further Applicants

and

MAXI STRATEGIC ALLIANCE (PTY) LTD

Respondent

J U D G M E N T

PILLAY D, J:

The respondent employer, MAXI STRATEGIC ALLIANCES (Pty) Limited (Maxi), dismissed the individual applicant employees for participating in an
20 illegal strike.

The first applicant trade union, SATAWU, had raised certain pay queries with the human resources officer, Mrs Angela Avis on 4 April 2005. SATAWU requested a response by 6 April. Avis complied with the request. However, by the evening of 6 April, some employees were already

planning to embark on a strike.

The area manager persuaded them to get back to work. On the morning of 7 April, workers started assembling at Maxi's offices. Avis received a message to come to the offices. Mr Tim Allan, the human resources executive, tried unsuccessfully to persuade the workers to return to work. He contacted the SATAWU offices. The organiser, Thomas Ntobejane came to Maxi at about 09:30.

- 10 Ntobejane was not able to persuade the workers to comply with the ultimatum to return to work by 10:00. He met with the shop stewards and later the workers; eventually he left Maxi's premises to continue discussions with the workers at SATAWU's offices.

After close of business, Ntobejane faxed an undertaking that the workers would return to work the following morning. On the morning of 8 April 2005, a few workers gathered at Maxi's offices. At about 08:00 more workers arrived, many of them were not in uniform.

- 20 The gathering was as hostile as they were the previous day, making it clear to Maxi that they were not prepared to work. Maxi issued letters of suspension of their services and notices to hold disciplinary hearings on various dates from 13 April 2005.

After interacting with SATAWU, Maxi agreed to hold the hearings on 20 April 2005. SATAWU agreed with Maxi to categorise the workers into three groups. These groups were those workers who participated in the alleged strike voluntarily, those workers who were mainly nightshift who were forced to participate in the strike and the shopstewards who had participated in the alleged strike.

SATAWU subsequently also agreed to Maxi issuing final written warnings to the second category of workers.

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None of the workers attended their disciplinary hearings; SATAWU sent a letter after business hours at 20 April 2005 stating that the workers would not attend the disciplinary enquiries whilst a court order against them was pending because they feared that they may violate its terms.

The court order that SATAWU referred to was an interdict that Maxi had obtained against the union members who had intimidated other workers and prevented them from working.

20 SATAWU had not requested a change of venue for the disciplinary enquiries, nor had it raised this as a bar to attending the hearings before they commenced, despite SATAWU being in regular contact with Maxi to arrange the disciplinary hearings. SATAWU's members believed, so it was alleged, that the court order prevented them from attending at Maxi's premises, even for the purpose of attending the disciplinary enquiry.

That understanding, if it was genuine at all, is highly inconsistent with a proper construction of the court order. Furthermore, if there was any risk at all of Maxi enticing the workers to its premises to have them arrested for breach of the court order, SATAWU and its members would have had a clear right to challenge any action arising from a complaint that the workers had breached the court order, provided, of course, that they did not obstruct or interfere in Maxi's operations.

- 10 The court is of the view that SATAWU's understanding and interpretation of the court order, and the reason for its members not attending the disciplinary hearings are contrived and disingenuous. Its complaint about the venue for the enquiries had never been raised until after the first round of disciplinary hearings had been concluded.

Appeals for those who had been dismissed and who had lodged appeals were scheduled for 5 May 2005. None of them turned up for the appeals. Their dismissals were upheld.

- 20 At the end of the cross-examination of Avis, the court raised with Mr Baloyi, the attorney for the applicants, certain questions and allowed him to revert with his response the following day.

The questions related to the manifest discord between that applicants' case as pleaded and the version that was put to Avis under cross-

examination. Under cross examination Avis learned for the first time that the applicants' version was that she had agreed to meet workers at 5:00 on 7 April to give them feedback on the pay queries. That version was inherently improbable *inter alia* because Avis understood that she had resolved the queries by 6 April. More importantly, a gathering of all the workers meant that the sites to which they were posted would have been left unguarded.

10 The applicants failed to prove that the night shift was to remain on duty until the day shift took over after the meeting. Maxi's witnesses testified that the night shift left before the day shift arrived. In addition to these improbabilities, the applicants had conceded in their response to questions for pre-trial that they had not received permission to gather at the offices.

Also Avis and later Allan were not cross examined about their evidence that workers had gathered at the offices because they had no intention of working on 7 and 8 April. Their evidence that the workers were hostile and that on 8 April most of them had not arrived at 06:00, that most of them
20 who did arrive did so at 08:00 and many were not in uniform went unchallenged. Furthermore, neither Avis nor any of Maxi's witnesses were cross examined about the aggressive attitude of workers and the intimidation of non-strikers.

Baloyi, in his address, asked the court to disregard the evidence of intimidation. However, he had failed to object when this evidence was adduced. Evidence of intimidation is relevant to Maxi's decision to dismiss the individual applicants. It is also relevant to this court's determination of the appropriate penalty to be imposed if the court were to find that the individual applicants had committed misconduct.

The applicants also failed to offer any explanation for allowing the interdict to be confirmed unopposed.

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Despite these obvious weaknesses in their cases, the applicants persisted in denying that they were on strike and that the strike was illegal. It was common cause that the applicants had not complied with any pre-strike procedure. Their case was that they did not strike.

After three days of evidence, Baloyi had to concede, on the basis of Ntobejane's evidence that the only issue in dispute was that the penalty of dismissal was unfair because it was too harsh and inconsistent. Implicit from Baloyi's concession that the only issue was the appropriateness of
20 the penalty of dismissal, is the inference that the individual applicants had committed misconduct.

Ntobejane had raised the inconsistency complaint because the second category of workers received final written warnings whereas the first and third categories were dismissed.

The submission is manifestly disingenuous because SATAWU agreed to the sanction for the second category. Furthermore, the conduct of the second category workers was less culpable because they did not want to strike.

As regards the first category and third category workers, their dismissal was not harsh because they had a reasonable opportunity to return to work. They had an opportunity to get advice from SATAWU. They were
10 belligerent and unco-operative. They abandoned their right to the disciplinary hearings and to the appeal. The court sees no reason to interfere in Maxi's decision to dismiss them.

Costs: Assuming that the workers had genuine grievances, they damaged their cause, firstly by their aggressive, unco-operative behaviour and by participating in an illegal strike. Most of all, they damaged their cause by the dishonest manner in which they prosecuted their claim through this court.

20 They can hardly hope to earn the sympathy of the court by their dishonesty. Instead, the court intends to impose an adverse cost order.

The claim is **dismissed with costs**, such costs to be costs as between attorney and client and to be paid jointly and severally by all the applicants, the one paying the others to be absolved.

PILLAY D, J

Judge of the Labour Court

Date of Hearing: 18/08/08-20/08/08

Date of Judgment: 21/08/08

Date of Editing: 24/09/08

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APPEARANCES

For the applicant : Mr Baloyi

For the respondent: Adv Erasmus instructed by Attorney Jean du Randt