



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 1150/09

In the matter between:

SOUTH AFRICAN TRANSPORT

AND ALLIED WORKERS UNION

First Applicant

HLAHLA, M W

Second Applicant

and

THREE FLAMES INVESTMENTS CC

Respondent

Heard: 16 and 17 August 2012

Delivered: 20 December 2012

Summary: Automatically unfair dismissal for participating in a protected strike – jurisdictional challenge that second applicant was not an employee of the respondent - respondent found to be the employer – dismissal automatically unfair as employee was entitled to participate in a protected strike.

JUDGMENT

BOQWANA AJ

Introduction

- [1] The issue before this court is whether the dismissal of the second applicant ('Hlahla') was automatically unfair in terms of section 187(1)(a) of the Labour Relations Act¹ ('the LRA') because he was dismissed for participating in a protected strike and whether the dismissal was effected in accordance with a fair procedure.
- [2] The respondent denies that the dismissal was automatically unfair. It alleges that Hlahla was not a member of the first applicant ('the union') and neither was he an employee of the respondent. He was employed as gardener by Motifprops 1092 CC ('Motifprops') and therefore the National Bargaining Council Freight Industry had no jurisdiction to conciliate this dispute and therefore the conciliation certificate of outcome was null and void.
- [3] Hlahla gave evidence to prove his case, whilst the respondent called Wayne Michael Thompson (Thompson snr'). Hlahla gave his own evidence through an interpreter.
- [4] The respondent sought to apply for absolution from the instance at the end of the applicants' case. I indicated to the parties that my *prima facie* view was that the applicant had placed a version that warranted response from the respondent and that I would be inclined to refuse the absolution from the instance application. The respondent did not persist with its application.
- [5] The respondent is cited as a (Pty) Ltd in the statement of claim, and the respondent did not correct this in its statement of defence nor take issue with it. It transpired during evidence that the respondent was a close corporation ('CC') when the registration papers were produced. Reference to the respondent as a CC also appears on the affidavit filed in support of the condonation application for the late filing of the statement of defence. I will

¹ Act No. 66 of 1995

not take issue with this defect as the citation is not challenged and in my view the defect is not material.

Facts

- [6] The respondent's business falls within the jurisdiction of the National Bargaining Council for the Road Freight Industry ('the bargaining council').
- [7] In December 2008, parties to the bargaining council engaged in negotiations regarding amendments and additions to the collective agreements for the implementation in 2009 and 2010.
- [8] Parties reached a deadlock in October 2008 and referred a dispute to the bargaining council.
- [9] On 22 January 2009, the bargaining council issued a certificate that the matter remained unresolved and on 26 March 2009 the CCMA issued an advisory award.
- [10] On 27 March 2009, the union gave notice to the bargaining council and the Road Freight Employer's Association that a strike in support of the union's demand would commence on 07 April 2009.
- [11] On 07 April 2009, Hlahla together with employees of the respondent participated in a strike in support of the union's demands that had been tabled at the bargaining council.
- [12] On 15 April 2009, after issues the union were striking about were resolved, it terminated the strike and called on its members to resume duties on 16 April 2009.
- [13] Hlahla went back work on 16 April 2009 together with other employees who participated in the strike.
- [14] On 17 April 2009, Hlahla was issued with a notice to attend a disciplinary hearing for being absent from work from 07 April 2009 to 15 April 2009, and for gross misconduct in that he disobeyed a direct instruction from the

respondent's management to report to work before the strike was terminated. The respondent states that reference to it in the notice to attend the disciplinary inquiry was an error and is regretted.

- [15] The disciplinary hearing was held at the respondent's premises on 05 May 2009 and Thompson snr gave evidence to the effect that Hlahla was not a union member and that Motifs Prop had nothing to do with transport. Therefore his refusal to come to work when instructed to do so, amounted to misconduct.
- [16] The inquiry was chaired by a representative from employer's association, NEOSA. The chairperson referred to the respondent as the employer in her notes.
- [17] Further, the recommendation of the chairperson to have Hlahla summarily dismissed was signed with the respondent being referred to as the employer.
- [18] Hlahla was informed on 19 May 2009 that his services were terminated summarily. The respondent denies that it dismissed him. A dispute was referred to the bargaining council. At the bargaining council, a *point in limine* was raised on behalf of the respondent that the bargaining council did not have jurisdiction to conciliate the dispute as a wrong employer had been cited. The commissioner at the bargaining council issued a ruling on 29 July 2009 and ruled against the respondent as follows:
- 'The applicant did not cite an incorrect employer. I make the finding that the applicant was employed by Three Flames investment. He was never employed by Motis Pros CC (sic). The employer failed dismally to prove that the applicant was dismissed by Three Flame Investment not Motis Prop CC (sic) as evidenced by the outcome of the disciplinary hearing. I make a finding that the applicant was employed by Three Flames Investment and therefore the NBCRFI has jurisdiction to hear this case'.
- [19] The respondent never challenged this ruling and submits that this ruling is not binding to the court. The fact that it was not reviewed and set aside does not give the bargaining council jurisdiction that it did not have in the first place.

The court may independently consider the issue objectively whether or not the ruling and a certificate of outcome was issued.

Applicant's case

Hlahla's evidence

- [20] Hlahla testified that he was employed by the respondent on 26 September 2005. At the date of his dismissal, he was earning R1550.00 a month. His duties included working in the garden, warehouse, assisting the drivers to load and offload the parcels and deliver them, and also on the water tanks project, in and outside the country.
- [21] He joined the union on 18 April 2008. He referred to a membership application form to join a union dated 18 April 2008, which he alleges was completed by his shop steward and signed by him. The important features from this form is that it referred to Motifprops 1092 CC as an employer, sector as cleaning and station or depot as Three Flames and department as general worker. Hlahla claims that he never gave information about Motifprops as an employer to the shop steward and does not know why the shop steward would put Motifprops as employer. He presumed that the shop steward filled in the information based on his payslip. The said shop steward was apparently the employee of the respondent. Notwithstanding the information in the union membership form, he maintained that he knew nothing about Motifprops, since his employment he had always known himself to be employed by the respondent. Bruce Thompson ('Thompson jnr') was a manager at the respondent.
- [22] Under cross examination, his version was that he gave the information in relation to his name and other personal particulars to the shop steward but he did not give the name Motifprops and that the shop steward must have obtained it from his payslip.

- [23] Before a strike action of 07 May 2009, a shop steward called a general meeting and explained that a dispute that was referred at the bargaining was unresolved.
- [24] On 07 May 2009, employees gathered at the SABC parking in Polokwane to commence with the strike action.
- [25] At about 07:45, when he checked the phone, he noticed a missed call from Thompson snr, a father to Thompson jnr. Thompson snr asked him where he was. Hlahla told him that he was at the strike. Thompson snr told him that he was not allowed to participate in the strike, because he was not a member of a union. Hlahla disagreed with Thompson snr and advised him that he was at the strike because he was a member of the union.
- [26] Thompson snr called again at about 16.00 still insisting that Hlahla must report to work but Hlahla refused to do so, on the basis that he was a union member.
- [27] The following day Hlahla informed his shop steward what Thompson snr had said. The shop steward pulled a second membership form and completed it. This form is dated 14 April 2009. The key difference between this form and the first one is that it reflected the respondent's name next to company name.
- [28] On 16 April 2009, when the strike had ended he went back to work with other employees but was called in to the office by the shop steward. Thompson jnr asked the shop steward to read him documents for the disciplinary enquiry.
- [29] The notice to attend the inquiry that was given to him reflected the respondent as the employer.
- [30] The notes of the chairperson for the disciplinary hearing also reflected the respondent as an employer.

[31] A copy of a payslip reflecting Motifprops was put to Hlahla during cross examination. He confirmed that he had seen the payslip before and received it. He noted that it showed Motifs prop as an employer but he has never taken time to read that before.

[32] It was put to Hlahla, under cross examination, that his payslip contained no deductions from the union to show that he was not a member of the union.

Respondent's case

Thompson snr's evidence

[33] Wayne Thompson testified on behalf of the respondent that the respondent is involved in transportation of goods on behalf of customers, including courier work.

[34] He is the founding and an executive member of the respondent and one of the two current members. The other member being Thompson jnr.

[35] Both members are also members of Motifprops CC respectively and Thompson snr is also an executive member of Motifprops. Notably, both entities share the same information on the CIPRO's certificate of confirmation except start date. They have the same address, registered office.

[36] The respondent's business activities are stated as 'Investment in movable and immovable property and courier activities'.

[37] Motifprop's business activities are stated as 'real estate activities'. Motifprops were not involved in transportation and logistics, courier work, anything relating to transportation.

[38] He denied that Hlahla was employed by the respondent but rather employed by Motifprops.

[39] Motifprops are the landlord of the respondent which hires or rents

property from Motifprops.

- [40] The relationship of property maintenance in respect of properties owned by Motifprops existed.
- [41] Hlahla was employed as a general worker. In effect, he was a grounds man responsible for various grounds duties and duties relating to the maintenance of the property, such as cleaning dust in certain of the warehouses that Motifprops owned. He had been used in the cleaning of those pieces of territory.
- [42] As a general worker, it was their prerogative to apply Hlahla to such work as they needed him to do in the overall course of the day's proceedings. He may have been called upon to assist in unloading a vehicle or loading a vehicle as there is another close corporation which occupies part of the grounds they are now referring to. It is conceivable that he may be called upon to load or unload vehicles but there should not have been any reason for anybody to believe that he was employed by either of those entities. His employment clearly was by Motifprops.
- [43] During the strike, he contacted Hlahla and told him to report to the office immediately, because he was not part of the organisation that was involved in the dispute that had given rise to the strike and he had no business to participate in the strike, and he ought to report to work immediately. Under cross examination, he testified that he was not sure whether he told Hlahla to come back to work because he was a union member or that he did not belong to the organisation that had gone on strike.
- [44] Reference to the respondent as the employer in the notice to attend the disciplinary hearing was a typographical error and regrettable. It should not have been there. He, however, did not issue the notice. It might have been issued by Thompson jnr who was in charge of these issues.
- [45] He could not comment on what Hlahla's defence to the charges levelled

against him as he was only called to testify as a witness at the disciplinary hearing.

[46] He is not sure if the membership form to deduct union subscription on behalf of Hlahla was received.

[47] It is conceivable that Hlahla was asked to work at the respondent from time to time if an extra muscle is needed but Thompson snr was a bit removed from day to day running of the operations.

[48] Employees of Motifprops and the respondent operate in the same environment.

Analysis

[49] It is common cause that the strike action that employees of the respondent participated in was protected. The entire defence of the respondent is that Hlahla was employed by Motifprops as a gardener and not the respondent, and accordingly the bargaining council had no jurisdiction to conciliate this matter. Secondly, Hlahla was not a paid up member of the union.

Union membership

[50] Before I deal with the employment relationship issue, I need to dispose of the issue of union membership. A big part of evidence was led on whether or not Hlahla was union member. The respondent denied that he was. It seems to me the attack on whether or not he was a member of the union did not go to the authority of the union in bringing this application as a co-applicant, but rather it went to his participation in a strike action when he was not a member of the union. However, even if authority had been challenged which does not seem to be the case, Hlahla is also cited as party independently of the union.

[51] I will, therefore, deal with the issue of whether union membership was a prerequisite to participating in the strike action and if it was, whether or

not Hlahla was actually a member of the union.

[52] In my view, the recent judgment of the Constitutional Court in the case of *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*², the court had to determine whether or not the dismissed strikers who were not members were covered by the SATAWU strike notice. This court (per Ngcamu AJ) had found that non-membership would not have excluded non-members of SATAWU from the protection of the strike notice and declared their dismissal automatically unfair. The majority of the Labour Appeal Court, upheld Ngcamu AJ's decision holding that all employees in the bargaining unit whether unionised or not were entitled to participate in the strike action if the majority union had referred the dispute for conciliation and subsequently issued a strike notice in terms of section 64(1)(a) and (b) of the LRA. As we know in this case, it is not disputed that the union had followed those processes. The Supreme Court of Appeal overturned the LAC decision. The Constitutional Court overturned the Supreme Court of Appeal's decision by concluding as follows:

'In the context of this case this means that the union, which represented the dismissed strikers in the wage negotiations and in the referral for attempted conciliation under section 64(1)(a) before embarking on strike action, was competent also to give single notice required under section 64(1)(b). Our concluding observation is this: to hold otherwise would place a greater restriction on the right to strike of non-unionised employees and minority union employees than on majority union employees. It is these employees, much more than those who are unionised or represented by a majority union, who will feel the lash of a more onerous requirement. There is no warrant for that where they were already denied the right to bargain collectively on their own behalf in the preceding process.'³

² (2012) (6) SA 249 (CC).

³ Id at para 92.

- [53] Although this decision dealt with whether non-unionised members were covered by a strike notice issued by the union in a strike action (in that case employees were seemingly all from the same bargaining unit), I am of the view that the principles espoused in that judgment would cover a situation where all employees of the employer (whether or not in the same bargaining unit) go on a protected strike in support of the demands made by their union against the employer(s). I hold a view that once Hlahla is able to show that he was an employee of the respondent, whether or not he belonged to the union when he participated in the protected strike action with other employees of the respondent will become irrelevant. I, therefore, do not need to deal with whether or not Hlahla was a member of the union.
- [54] I will not go into the wording of the notice in this case as that was not the issue placed before this court. Even if it was, the Moloto case is binding as the CC held: 'The contrast with the minimal express requirements of section 64(1) (b) is stark. All that is expressly required in terms of section 64(1)(b) is a single notice stating when the strike will start....That requiring more than this will lead to uncertainty and a further chilling effect on workers reliance on their right to strike is illustrated by the facts of this case.'⁴
- [55] In any event, I cannot accept a view that despite a membership form that was completed and signed, which authorised subscriptions by the employer, which membership form was completed with a shop steward and a shop steward later being allowed to represent Hlahla at the disciplinary enquiry, in all that Hlahla was still required to provide proof that the union accepted his application as a member. Further, I do not agree that the fact that subscriptions were not deducted would mean that Hlahla was not a union member. Be that as it may the principles of the CC in the case of Moloto stand. Hlahla did not need to be a member of the union to participate in the strike action. The issue then that remains was whether he was an employee of the respondent.

⁴ Moloto CC case supra at para 83 and 84

Employment relationship

[56] It is common cause that the jurisdictional ruling of the commissioner was not challenged by the respondent by way of review. The applicants propose that when a ruling has been made on a jurisdictional point, that ruling stands until it is set aside and accordingly the respondent is precluded from raising the jurisdictional point again after three years.

[57] In as much as I would criticise the respondent for not challenging the ruling of the commissioner in review proceedings, I do not agree that the respondent is barred from raising the issue in these proceedings. The court does have powers to determine whether or not the bargaining council had the necessary jurisdiction, whether or not the certificate was issued. Put differently, the issuance of the certificate does not validate jurisdiction or bar the court from determining the issue on its own in the current proceedings. This is in keeping with the well established principles set out in the Labour Appeal Court's decision of *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another*⁵ where the court held that the CCMA being a creature of statute did not have the power to determine its jurisdiction but may do so for convenience. Therefore the bargaining council may not grant itself jurisdiction it does not have. The question of whether the bargaining council had jurisdiction is a matter to be determined by the Labour Court based on objective facts before it.

[58] I am satisfied, therefore, that the issue of jurisdiction can be raised and determined at this stage of the proceedings even in the face of the jurisdictional ruling made by the bargaining council.

[59] Turning to the facts before me, the respondent raises a technical point that Hlahla was in fact employed by Motifprops CC and not by the respondent. In support of its assertion, the respondent submitted CIPRO documents showing the two entities registered separately, as well as a payslip (representing one of

⁵ (2008) 29 ILJ 2218 (LAC); (2008) 9 BLLR 845 (LAC) at para 40.

many monthly payslips) sent to Hlahla and timesheets. Both these entities were owned and managed by the Thompsons. Their employees operated in the same environment.

- [60] The payslip indicates the company name as Motifprops. Hlahla does not dispute that he had seen such payslips before but he avers that he never paid any attention to the name 'Motifprops in the payslip. He maintained that all he knew in all his employment life was that he was employed by the respondent.
- [61] In my view, Hlahla's evidence is stronger than that of the respondent. It is supported by disciplinary documentation filed by the respondent and Thompson's non-committal statements where he could not conclusively rule out the possibility of Hlahla conducting certain duties for the respondent and his evidence that as a general worker, the respondent had a prerogative to utilise Hlahla anywhere they deemed fit, at any point in time.
- [62] Hlahla's evidence was that he worked in the garden but also worked in the warehouse, assisting the driver to load and offload the parcels and deliver them, and also on the water tanks project, in and outside the country. Under cross examination, he alleged that he was initially employed as a cleaner but as time progressed he was called to the cars to load and to work in the warehouse and to deliver parcels and some duties were to go outside to make water tanks.
- [63] In his evidence, Thompson suggested that Hlahla was employed as a general worker and it was their prerogative to apply him to such work as they needed him to do in the overall course of their day's proceedings. He may have been called upon to assist in unloading a vehicle or loading a vehicle but there should not have been any reason for anybody to believe that he was employed by either of those entities.
- [64] Under cross examination Thompson snr conceded that it was conceivable that Hlahla had during the course of his employment done various things, that included loading and off loading in the warehouse, accompanying drivers and deliveries and building water tanks in the country and outside but Thompson

snr was a bit removed from day to day activities and so could neither confirm nor rule out that possibility. Thompson jnr, who was more in touch with day to day activities, was not called to testify. Mr Geldenhuys argued that there could have been times that Hlahla was asked to help but that could not make him an employee, i.e. if someone on occasion is asked to help with the loading of a vehicle he does not all of a sudden become an employee.

[65] I do not understand Hlahla's version to be that he was asked on occasion to help the respondent. I understand him to be saying he was a general worker applied in any manner by the respondent and that included cleaning, loading or unloading of vehicles, assisting the driver, delivering parcels and other activities. Mr Geldenhuys' submission does not seem to accord with Thompson snr's evidence that they had a prerogative to apply Hlahla wherever he was needed by virtue of being a general worker. Thompson snr's evidence shows that Hlahla may have been used to also do work for the respondent. Hlahla's evidence in this regard should carry more weight in my view because he was directly involved unlike Thompson snr who was admittedly removed from day to day activities and therefore could not give conclusive evidence as to the substance and the frequency of the activities that Hlahla was asked to do for the respondent.

[66] Apart from Hlahla being asked to assist at the respondent, the two entities were owned and managed by the two Thompsons. It was not indicated to Hlahla when he received instructions whether those instructions were given by the management in their capacity as the respondent or as Motifprops. Further, the respondent itself referred to the respondent as the employer in disciplinary documents. This cannot be dismissed as a simple typographical error. The respondent represented itself as Hlahla's employer to the extent that even the chairperson of the disciplinary hearing referred to the respondent as the employer in her notes and the outcome of the disciplinary hearing, which outcome was signed by a representative of the employer Thompson jnr, who was not called to testify in these proceedings. No attempt was made to correct this alleged 'error' up until a dispute was referred to the bargaining council where for the first time the respondent formally raised a

point *in limine*. It does not help for Thompson snr to claim that he told those involved that there was an error when he became aware of it. The fact remains the documents filed as disciplinary documents were not rectified. The respondent cannot have its cake and eat it. Disciplinary papers went to the bargaining council citing the respondent as the employer. Further, the author of the disciplinary notice, and signee of the outcome, Thompson jnr, who was also the manager who apparently interfaced with and would have given daily instructions and work activities to Hlahla was not called to give evidence. In so far as the disciplinary papers are concerned Hlahla was dismissed by the respondent. Why should Hlahla be blamed for citing the respondent as his employer and for referring a dispute to the bargaining council with the respondent's name as the employer.

[67] Mr Naidoo, applicants' attorney argued that this juggling around of the two entities amounts to abuse of juristic personalities. If there be any confusion as to who the correct employer is, it was created by the respondent and its managing members themselves. It, therefore, must be estopped from denying that it is Hlahla's employer.

[68] In *Footware Trading CC v Mdlalose*,⁶ the LAC found that:

'The abuse of juristic personality occurs too frequently for comfort and many epithets have been used to describe the abuse against which the courts have tried to protect third parties, namely puppets, shams, masks and alter ego. However the general principle underlying this aspect of the law of lifting the veil is that when the corporation is the mere alter ego of business conduit of a person, it may be disregarded. The lifting of the veil is normally reserved for instances where the shareholders or individuals hiding behind the corporate veil are sought to be made responsible. I do not see why it should not also apply where companies and closed corporations are juggled around like puppets to the bidding of the puppet master.'

⁶ (2005) 26 ILJ 443 (LAC) at para 34-39.

....

I therefore conclude that Fila and Footwear were separate legal personalities, but the effect of the mechanisation of Kotkin and his staff were such that they were in effect joint or co-employers. To the extent that the appellant would like it otherwise, it is estopped from denying that fact by virtue of the numerous representations that were made that either Footwear was the employer or Footwear and Fila were the joined employers. The principles of estoppel are well established in our law. In *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1977(4) SA 310 (T) the court at 335A said that estoppel arises where there has been some representation of fact upon the faith of which the other party acted to his prejudice or detriment.'

- [69] There is also no basis to argue that the duties of Hlahla did not fall within the jurisdiction of the bargaining council. Part of his work fell within transportation within the respondent and in any event, the respondent falls within the jurisdiction of the bargaining council.
- [70] I, therefore, find that the bargaining council had the necessary jurisdiction to conciliate this dispute and since it is not disputed that the strike was protected, the dismissal of Hlahla was automatically unfair.
- [71] Although the applicants had asked for reinstatement in their statement of claim, Hlahla in his evidence testified that he did not wish to be re-instated, he has asked the court to grant him maximum compensation. Therefore, although re-instatement is primary remedy, the court will grant him appropriate compensation. He testified that he has had no employment since his dismissal. He however conceded during cross examination of having worked as a gardener on two specific dates in May and in August 2012. Hlahla has been out of employment since May 2009. The two days that he worked after his dismissal do not constitute substantial employment that should affect any compensation order by the court. I, therefore, see no reason why the court should not award the maximum compensation of 24 months against the respondent.

[72] There is also no reason why costs should not follow the result.

[73] I, therefore, make the following order:

1. The second applicant has proven that there was an employment relationship between him and the respondent.
2. The dismissal of the second applicant was automatically unfair in terms of section 187(1)(a) of the LRA because he was dismissed for participating in a protected strike;
3. The respondent is ordered to pay compensation equivalent to twenty four months' remuneration in the amount of R36 000 calculated as R1500 x 24 within 30 days of this judgement;
4. The respondent is ordered to pay costs to the applicants.

BOQWANA AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicants: Mr K Naidoo, Cheadle Thompson and Haysom, Braamfontein

For the Respondent: Mr C J Geldenhuys, Geldenhuys CJ @ Law Inc., Pretoria