



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

CASE NO JS 119/13

In the matter between:

NATIONAL UNION OF METALWORKERS

1ST APPLICANT

FENYANE, AMOS & 16 OTHERS

**2ND TO FURTHER
APPLICANTS**

and

LECTROPOWER (PTY) LTD

RESPONDENT

Trial 13, 14 and 18 February 2014

Judgment delivered: 20 February 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The second and further applicants ('the employees'), represented by their union, the first applicant, contend that they were unfairly dismissed after participation in a day-long unprotected strike at the respondent's premises during October 2012. The employees' decision to embark on an unprotected strike and the respondent's decision to dismiss them has left some 17 individuals without work and their employer deprived of what it concedes to be their scarce and specialist skills. This outcome has benefitted neither party – the employees and those who are economically dependent on them have been deprived of income for some 16 months; the respondent has incurred significant costs to engage suitably-skilled replacement labour to maintain production.
- [2] The applicants do not dispute that they went on strike on the afternoon of 16 October 2012 and that the strike continued the next day, until their dismissal at approximately 14:00 that afternoon. They also do not dispute that the strike was unprotected, in the sense that none of the procedural requirements established by the Labour Relations Act were followed before they decided to embark on industrial action.
- [3] The issue to be decided is whether despite the unprotected nature of the strike, the employees' dismissal was substantively and procedurally fair and if so, the appropriate remedy to be afforded.
- [4] There is a preliminary matter relates to the identity of the employees who are party to these proceedings. Attached to the statement of claim, there is a list of 17 names, all persons dismissed for participation in the strike. The supplementary pre-trial minutes contain an annexure identifying 20 persons as

individual applicants. The three additional names are those of the union shop stewards - Messers Abraham Tau, William Mhlatsi and Solly Nkosi. Mr. Masutha, a union official who represented the applicants, clarified matters during the trial and confirmed that these proceedings concern only those employees dismissed for striking on 17 October 2012 and listed in the annexure to the statement of claim. As will appear from the factual background recorded below, the shop stewards were dismissed on 16 October 2012 but for different reasons, none of which are the subject of the pleadings filed in these proceedings.

Material facts

- [5] The material facts are by and large a matter of common cause. The dispute between the parties has its roots in a list of grievances signed by the employees and sent to the respondent on 4 October 2012, and requesting a response by 15 October. The heading to the letter, written on a union letterhead, reads “Grievance against Ivan Lines.” Mr. Lines is a shareholder and the managing director of the respondent. The letter lists some 18 specific grievances, ranging from discrimination, the format of pay slips and various demands for increases in remuneration, that the grievants sought to have addressed. The grievance that caused all the trouble is contained in the penultimate paragraph of the letter. It reads as follows: “The workers further request that Mr. Iven (sic) Lines be removed as a manager at Witbank Branch.”
- [6] On 12 October 2012, the union’s legal department addressed a letter to the respondent referring to the grievance letter and declaring a dispute. It is common cause that on the same date, the union formally referred a dispute to the bargaining council. In that part of the referral that required the union to indicate the desired result of conciliation, the union stated “The removal of Mr. Ivan Lines”.
- [7] The respondent had instructed its attorneys in relation to the grievance. They in turn had instructed Adv. OJ Lagrange, a practising advocate, to chair a grievance hearing, to be held at the respondent’s premises on the morning of 16 October

2010. Lagrange had initially formed the view that the grievance would “die down”, an assessment that he revised after receipt of the union’s letter on 12 October 2012. Present at the meeting were Lagrange and Lines, and the three shop stewards, Tau, Mahlatsi and Nkosi. In his evidence, Tau stated that he and his colleagues had been instructed that morning to attend a meeting in the boardroom – they had been given no advance notice of the meeting or of its purpose. Lagrange’s evidence was that he questioned the shop stewards regarding the format of the letter, and in particular, the fact that it was not signed by a union official. The shop stewards explained that the matter had been drafted with the union’s assistance. Lagrange says that he then explained to the shop stewards that the respondent was a corporate entity, that Lines was a shareholder and director and that he could not be dismissed from the respondent’s employ. Lagrange told the shop stewards considered the grievance is it related to Lines to be an act of “irresponsible trade unionism” and a demonstration of *mala fides*, and asked the shop stewards what they would do if Lines were not removed. Tau replied that they would strike. For reasons that remain unclear, Lagrange then took the view that the shop stewards were the ringleaders of what was certain to be a wildcat strike in support of a demand that he considered unjust and unreasonable, and that in the circumstances, the employment of the shop stewards should be terminated with immediate effect. The shop stewards were then told as much, and instructed to leave the premises. A short while later, they were presented with letters of dismissal.

- [8] In their evidence, Tau and Mahlatsi disputed that they had said that there would be a strike should the demand in respect of Lines not be met. They also disputed that the terms of the grievance were such that what was being demanded was the dismissal of Lines – the letter referred only to his removal from the Witbank plant. Tau testified that “no-one wanted to strike – we were surprised when we were fired.” Surprised as they were, the shop stewards left the boardroom, and were later handed letters of dismissal.

- [9] Tau and Mahlatsi testified that they left the boardroom and went to the change room where other employees asked them what had happened in the meeting. They told the employees that they had been dismissed. The employees then said that they would seek an explanation from the respondent as to why the shop stewards had been dismissed. It is not disputed that on the afternoon of 12 October 2012, the employees refused to work or to leave the premises until the usual time of 16:00. The respondent's operational manager, Mr. Jaco Claasens, testified that as the workers were leaving, Tau said to him "You will see" and that Fenyane threatened a co-employee by the name of Connie. This was not disputed.
- [10] Claasens decided that the next morning, initially at least, no-one should be allowed into the respondent's premises and that he should speak to the workforce outside. The shop stewards who had been dismissed the previous day were present. At approximately 7:30 the next morning, Claasens told the assembled workforce that they should proceed to work, but for the three shop stewards who had been dismissed. The majority of the workforce refused to enter the premises, saying that they would not work if the three shop stewards were not allowed into the building.
- [11] At approximately 9:00, Claasens compiled an ultimatum which reads as follows:
- 'NOTICE TO ALL EMPLOYEES
- You are participating in an illegal strike. You must return to work by 12 o'clock today,
- FAILING COMPLIANCE HEREWITH WILL LEAD TO YOUR AUTOMATIC DISMISSAL.
- Workers are reminded that times are tough and they must think CAREFULLY ON THEIR ACTIONS
- Jaco Claasens

17th October 2012

08:47am”

- [12] The ultimatum was displayed on the outside of the respondent's premises, and a copy telefaxed to the union office. The union responded by addressing a telefax to the respondent, written by Ms. Cecilia Mpofu, the local organiser. In the letter, she acknowledged receipt of the copy of the ultimatum and asked to meet with the respondent at 11:45 in order to resolve the matter. Mpofu arrived at the respondent's premises as she had undertaken to do, and asked to speak to Claasen. Claasen testified that when he attempted to admit Mpofu to the premises, the people standing outside stormed the gate. He requested Mpofu to calm the workers down and bring them under control. This happened a number of times, with the result that Mpofu never gained entry to the premises. At 13:45, Claasen decided that the employees had had enough time to consider the ultimatum and drafted letters dismissal. The decision to dismiss was his, made on the basis that the ultimatum to return to work had gone unheeded. He distributed the letters at 14:10. The letters record the reason for dismissal as a failure to comply with a demand to return to work by 12:00 hours and participation in unlawful and illegal strike.
- [13] The employees then stated that they wished to collect their personal belongings. Claasen agreed provided that employees entered the premises two at a time. When he opened the gate, the gate was stormed and all of the employees entered the premises, which they left by 14:30.
- [14] Evidence was led in relation to events that occurred outside of the respondent's premises after the dismissal of the employees on 17 October 2012. These are relevant not to the merits of any dismissal but to remedy, at least to the extent that they concern incidents of misconduct committed by identified employees. On 18 October, Claasen testified that he went to work where he witnessed Tau and Fenyane threaten two employees who had reported for work, specifically, they threatened to burn an employee's bakkie if he did not join the strike. Events that

followed on 19 and 20 October and on 22 October assumed a pattern – the dismissed employees, including the shop stewards, gathered outside the premises where they played cards and drank beer. Claasen testified that on 22 October 2012, an employee identified as Ali (Bahle Mchobukhozi) took a screwdriver and punctured the tyres of vehicles belonging to members of staff. The police were called and Ali was arrested. It is not disputed that he was later convicted of malicious damage to property.

Applicable legal principles

[15] The legal principles to be applied to a dispute concerning a dismissal for participation in an unprotected strike are well established. Item 6 (1) of the code of good practice contained in schedule 8 to the Labour Relations Act reads as follows:

‘6 (1) Dismissal 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 the 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 are 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 intend 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 employee should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it all rejecting it. If the employer cannot reasonably be expected to extend the steps to the employees in question, the employer may dispense with them.’

- [16] The Labour Appeal Court recently observed that it is clear from the provisions of s 68(5) of the LRA that a Judge called upon to determine the fairness of a dismissal effected on the ground of participation in an unprotected strike should consider, in addition to item 6 of the code, the provisions of item 7. That provision regulates dismissals for misconduct more generally, and requires the determination of whether dismissal was inappropriate sanction for the contravention of a relevant rule or standard. (See *NUMSA v CBI Electric African Cables* [2014] 1 BLLR 31 (LAC)). The determination of the substantive fairness of a strike-related dismissal must therefore take place in two stages – first, under item 6 when the strike related enquiry takes place and secondly, under item 7. In other words, a strike-related dismissal which may meet the requirements of item 6 may nonetheless fail to pass the substantive fairness requirements under item 7, particularly when dismissal is adjudged not to be a fair sanction in the circumstances (see paragraph [29] of the *CBI* judgment).
- [17] The LAC referred (with approval) to Grogan: *Dismissal, Discrimination and Unfair Labour Practices* (Juta 2005), where the author expresses the view that item 6 is neither exhaustive nor rigid, and that other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers demands, the timing of the strike, the conduct of the strikers and the parity principle are all relevant.
- [18] The requirement in item 6 of the Code that an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt affords the union an opportunity to persuade the strikers to resume work and secondly, provides a safeguard against possible rash action by the employer. If an employer decides to issue an ultimatum, it should meet the requirements of the Code, and the employer must ensure that it allows employee sufficient time to reflect on the ultimatum and to respond to it (paragraph [35] of the *CBI* judgment).

Analysis

- [19] In the present instance, as I have indicated, it is not disputed that the strike that commenced at the respondent's premises on 17 October 2012 constituted an unprotected strike, and that the individual applicants were dismissed for that reason. Turning first to substantive fairness, the employees do not dispute that they committed an act of misconduct – what is in issue from a substantive perspective is the fairness of the sanction of dismissal.
- [20] A paramount consideration in the present instance is the cause of the strike and in particular, the union's contention that the strike was provoked by the respondent. It is clear to me from the evidence that the strike was not orchestrated by the union or the shop stewards in support of any of the grievances that had been tabled – the inescapable conclusion is that the strike was triggered by events that occurred on 16 October 2012 and in particular, the dismissal of the three shop stewards. The employees obviously felt aggrieved at the manner in which the shop stewards had been treated and the lack of any explanation from the respondent's management, and decided in response to withdraw their labour. Mr. Swanepoel, who appeared for the respondent, submitted that this was an unjustified response, since it remained open to the union to refer a dispute concerning the dismissal of the shop stewards to the bargaining council. At one level, it might be suggested that participation in an unprotected strike is never justifiable, since the Act provides avenues for the resolution of all disputes, whatever their nature. However, justifiability in relation to an assessment of substantive fairness is a rather different concept. First, as it appears from the principles discussed above, the code specifically acknowledges that participation in an unprotected strike is not an act that *per se* justifies dismissal. The relevant enquiry is a multi-factoral one, in which the cause of the strike must necessarily be considered.
- [21] In the present instance, the shop stewards were called to a meeting of which they say they had no advance notice. This was not disputed. The primary purpose of the meeting was to discuss the list of grievances that they had previously tabled. The chair of the meeting, Lagrange, took exception to the

demand relating to the removal of Lines from his position, and to Tau's response to the effect that should Lines not be removed, the workers would strike. Even if I reject the applicant's version that no mention was made of a strike during the course of the meeting, on the respondent's version, Tau did not state that the workers would strike that afternoon, or the next day, or that any strike that might be called would not comply with the provisions of the LRA. Lagrange conceded that he had instructions to effect the dismissal of the shop stewards – the irresistible conclusion is that this was a decision taken prior to the commencement of the meeting and that the real purpose of the meeting, absent a retraction by the shop stewards of the grievance concerning Lines, was to pre-empt any industrial action by removing the shop stewards. The respondent did not seriously dispute this proposition – its defence was to justify its conduct on the basis that the shop stewards were, to use the words put to the applicant's witnesses under cross-examination, 'trouble-makers'.

- [22] It is not disputed that in dismissing the shop stewards, the respondent failed to comply with the Code, and in particular, the provisions of item 4(2) which requires an employer, prior to instituting disciplinary action against a shop steward, to inform and consult with the trade union. On its own version, the respondent complied with none of the provisions reflected in item 4(1) of the Code - the shop stewards were not notified prior to the meeting of the allegations against them, nor were they permitted a proper opportunity to state a case or afforded reasonable time to prepare a response to the allegations made against them.
- [23] There was no history of unprotected industrial action directed against the respondent, nor was there any evidence that the disciplinary records of the employees disclosed warnings for misconduct of that nature. In my view, the decision to dismiss the shop stewards during the course of the grievance hearing held on the morning of 16 October 2012 was precipitate and ill-considered. Absent the dismissal, it is highly unlikely that the employees would have become as upset as they did, prompting their refusal to work. In my view, the

respondent's decision to dismiss the shop stewards, egregious as it was in the circumstances, serves strongly to mitigate the employees' conduct.

- [24] Insofar as procedural requirements are concerned, it is common cause that on the morning of 17 October, a copy of the ultimatum issued by Claasens was telefaxed to the union's offices. It is also not disputed that Mpofu addressed a letter to the respondent stating that she would arrive at the respondent's premises later the same morning, to attempt to resolve the matter. Mpofu was not called to give evidence. On the respondent's own version however, Mpofu presented herself at the gate at the time she indicated she would be present but her access to the premises was frustrated on account of the conduct of the group assembled at the gate. Mpofu clearly wished to gain admittance to the respondent's premises in order to discuss the situation. Claasens did not seek to engage with her at the gate, nor did it occur to him that a meeting with Mpofu might be possible at some other suitable venue. Claasen was content to leave Mpofu outside the premises and simply wait for the ultimatum to expire. In these circumstances, it cannot seriously be suggested that there was any attempt on the part of the respondent to discuss with the union the course of action that it intended to adopt or, more fundamentally, to attempt to resolve the dispute that had arisen. The procedure adopted by Claasen was mechanical - as far as he was concerned, a three-hour ultimatum had been issued and a failure to comply with that ultimatum would necessarily and automatically result in dismissal. He had notified the union of the ultimatum and in his view, that was the extent of the respondent's obligation. The situation was one that cried out for a commonsense approach – the employees were clearly upset by the dismissal of their leadership, and they sought an explanation for the respondent's conduct. A union official who had indicated a willingness to intervene to resolve the dispute was standing (literally) at the respondent's gates. The employees were willing to enter the premises provided that the shop stewards were admitted and there was a discussion on the previous day's events. Sage intervention would no doubt have brought reason to bear. Instead, the clock was allowed to tick toward the magical hour when the respondent considered that the employees would be dismissed

automatically and without further consequence. In these circumstances, in my view, the respondent's conduct was the cause of the strike, it failed to engage in any meaningful endeavor to resolve the crisis that it had brought about and its decision to dismiss was precipitate. It follows that the employees' dismissal was substantively unfair.

- [25] In relation to procedural fairness, the respondent (on its own version) failed to afford the employees the right to be heard after issuing the ultimatum but before dismissing them. The respondent appears simply to have regarded the expiry of the ultimatum as in itself a sufficient basis to dismiss. While at one stage the issuing of a fair ultimatum was considered to be sufficient to satisfy the requirement of procedural fairness in a strike-related dismissal, some 15 years ago, in *Modise v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC), the Labour Appeal Court placed a construction on item 6(2) of the Code that requires an employer to provide workers who participate in an unprotected strike with both an ultimatum as well as a right to be heard before any dismissal is effected. The court stated that the hearing may be of a collective nature and that its form and formality would largely be dictated by the context. This reading of the Code was discussed and applied in *NUM v Billard Contractors CC* [2006] BLLR 1191 (LC), where this court held that the purpose of an ultimatum is to provide a cooling-off period before a final decision to dismiss is taken, and that there is a discrete right to be heard after the ultimatum has expired. The court was not specific on the nature, form and extent of this right but it is clear from that decision that an employer cannot simply issue an ultimatum and thereafter, without more, effect a dismissal. These decisions were recently affirmed by the LAC in the *CBI* judgment referred to above. In the present instance, as I have indicated, the respondent regarded dismissal as the automatic consequence of a failure to heed the ultimatum. It did no more after the expiry of the ultimatum than prepare letters of dismissal and distribute them to the striking employees. In doing so, it failed to afford the employees the hearing to which they were entitled. It follows that the dismissal of the employees was procedurally unfair.

- [26] To the extent that the respondent seeks to rely on misconduct committed by employees during the course of the strike and afterward, the spectre of scenes of large scale intimidation and violence raised during the course of the cross-examination of the applicant's witnesses largely failed to materialise. It was not disputed however that during the course 16 and 17 October, Tau made threatening remarks as he left the premises on 16 October, as did Fenyane. There was also evidence that on 18 October 2012 Tau and Fenyane threatened to burn vehicle belonging to a non-striking employee. Evidence was also led that Ali (or Bahle) Mchobukhozi was convicted of malicious damage to property after having been arrested in front of the factory gate after he had damaged motor vehicles.
- [27] Once this court comes to the conclusion that a dismissal was both substantively and procedurally unfair, the provisions of s 193(2) of the LRA require the court to order reinstatement unless continued employment would be intolerable, the employees do not want reinstatement, or the remedy of reinstatement is not reasonably practicable in the circumstances. The respondent presented no evidence to support the contention that continued employment would be intolerable, or that reinstatement would not be reasonably practicable. The applicants specifically sought the reinstatement of the employees. In these circumstances, the employees are entitled to the relief they seek. I intend to make two exceptions. As I have indicated, it was not disputed that Ali (or Bahle) Mchobukhozi was convicted of malicious damage to property after having been arrested outside the respondents premises during the course of the strike, nor was it disputed that Tau and Fenyane had twice made threatening remarks directed to the respondent and non-striking employees respectively. Employees who misconduct themselves during a strike, protected or unprotected, ought not to expect this court to come to their assistance in any subsequent litigation, let alone order their reinstatement. Regrettably, intimidation, assault and damage to property have come to characterise strikes to the extent that they appear to be considered an inevitable consequence and an integral component of the exercise of the right to strike. This court should express its disapproval of any acts of

misconduct committed during the course of a strike and which impact materially and negatively on the rights of the employer and those employees who elect not to participate in the strike. Tau is not one of the individual applicants, but for the above reasons, I intend to make no order of reinstatement or compensation in respect of Fenyane and Mchobukhozi. Their remedy will be limited to an order declaring that their dismissal was unfair.

I make the following order:

1. The dismissal of the employees listed in annexure 1 to the statement of claim was substantively and procedurally unfair.
2. Those employees whose names appear in the annexure, with the exception of Amos Fenyane and Bahle Mchobukhozi, are reinstated into the respondent's employ on the same terms and conditions of employment that prevailed on the date of the dismissal.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Union official

For the respondent: Adv. Swanepoel instructed by Messina Inc.