REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 681/2010

NATIONAL UNION OF MINEWORKERS	**First Applicant**
B. GLADILE & 7 OTHERS	**Second to Further Applicants**
and	
MCC GROUP OF COMPANIES	**Respondent**

Heard: **Stated case.**

Delivered: **27 February 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction and background:

[1] This matter as agreed upon between the parties is determined by way of a stated case. The parties had further agreed that the bundle of documents constituted agreed evidence. The common cause facts as gleaned from the parties' pre-trial minute and the agreed stated case are as follows:

1.1 The National Union of Mineworkers (NUM) represents eight of its members listed in annexure "A" to the applicants' statement of case, who are the former employees of the respondent. The respondent conducts business in the mining industry, and at the time of the dispute, the individual applicants were employed on a Marikana contract that the respondent had at the time.

1.2 At all relevant times, a closed shop agreement existed between the respondent and another union, Federated Mining Union (FMU). This agreement had existed since December 2008.

1.3 On 15 February 2010, the majority of the respondent's employees including the second to further applicants participated in an unprotected strike action. The strike action followed upon NUM's demand to be recognized and be afforded organizational rights by the respondent. The respondent had refused to recognize NUM on the basis that a closed shop agreement existed with FMU.

1.4 During the work stoppage, the employees including the individual applicants did not adhere to two sets of ultimatums issued by the respondent to return to work. These were issued on 15 February 2010 in respect of the morning and afternoon shifts.

1.5 On the same date that the employees embarked on a work stoppage, the respondent brought an urgent application before this Court under case number J 334/10. An order was granted on 17 February 2010 in terms of which the conduct of the employees on 15 February 2010 was declared to constitute an unprotected strike action. Furthermore, a parameter of the premises was created and the employees' unlawful conduct was interdicted. This order was confirmed as final on 3 March 2010.

1.6 When the employees refused to respond to the ultimatums, they were immediately notified of disciplinary proceedings scheduled for 18 February 2010. The respondent did not notify NUM of those proceedings. The majority of the employees attended the disciplinary proceedings where they were represented Mr Mashego, a FMU shop steward. The individual applicants had however refused to attend those disciplinary proceedings.

1.7 At the disciplinary hearing, Mr Mashego had entered a guilty plea on behalf of the employees that were present. A finding was made on 22 February 2010 by the chairperson of the enquiry in terms of which a total of 112 employees were summarily dismissed including the individual applicants. A total of 46 employees were however issued with final written warnings.

1.8 Following the dismissals, NUM and the respondent had entered into discussions to resolve the dispute. This had resulted with an agreement on 4 March 2010 in terms of which the dismissal of the 112 employees was resolved on the following terms;

1.8.1 The industrial action was called off and the employees would return to work on 5 March 2010.

1.8.2 The parties would conduct a verification process in respect of the membership of NUM.

1.8.3 If NUM's membership were to be verified to be 50+1% at the Marikana Site, the parties would engage to conclude a recognition agreement.

1.8.4 The dismissed employees, *except* for the second to further applicants were to receive final written warnings.

1.8.5 The second to further applicants would remain dismissed, and NUM retained the right to challenge the fairness of the dismissal. Pending the finalisation of litigation, the individual applicants would not be allowed back on the mine.

1.9 The dispute in respect of the second to further applicants was referred to the CCMA on 5 March 2010. The matter was conciliated on 23 in March 2010 and remained unresolved.

1.10 On 5 March 2010 following the conclusion of the agreement, the respondent had brought an application for contempt of court against a number of employees including the individual applicants for failing to comply with the court order of 16 February 2010 under case number J344/10.

1.11 On 16 March 2010 an order was granted in terms of which certain employees including the individual applicants were called upon to appear before the court on 4 May 2010 show cause why they should not be held to be in contempt of court. Since these events, the Respondent has ceased conducting operations at the Marikana site since 2011.

The issues for determination:

[2] As agreed between the parties, the issues for determination are as follows;

(a) Whether the dismissal of the individual applicants was substantively fair on the basis that they had committed the same misconduct as all the other striking employees that were dismissed, but the respondent reinstated or re-employed others but not the individual applicants.

(b) Whether the dismissal of the individual applicants was substantively unfair because there was no further disciplinary hearing other than the disciplinary hearing of 18 February 2010, to substantiate the dismissals.

(c) Whether the dismissal of the individual applicants was procedurally unfair because NUM was not notified of the disciplinary hearing of 18 February 2010.

The submissions:

(i) Substantive fairness:

[3] In regards to the substantive fairness of the dismissal, the respondent submitted the following;

3.1 From the agreed issues for determination, the Applicants did not take issue with or challenge the fairness or otherwise of the original dismissals of 22 February 2010, and to that end, those dismissals must stand;

3.2 Since the applicants' case was that they should also have been reinstated subject to a final warning as the other employees, their case was based on the provisions of section 186 (1) (d) of the LRA. A dismissal as contemplated in this section is a statutory defined dismissal that was distinct and separate from the dismissal in section 186 (1)(a).

3.3 NUM and the respondent had concluded a collective agreement on 4 March 2010 with the purpose of resolving the dismissal of 112 employees, and the only issue for determination is the fairness of the dismissal resulting from that agreement.

3.4 The dismissal of the employees on 4 March 2010 however was effected by agreement with NUM as evident from the provision that the individual applicants as identified in annexure "A" of the agreement would remain dismissed, with NUM retaining the right to challenge the fairness of the original dismissal of 22 February 2010. The dismissals of 04 March 2010 therefore cannot be unfair as they were in terms of an agreement.

3.5 It would only be if the respondent had on its own accord and unilaterally applied selective reinstatement of some employees it dismissed but not others that it would amount to selective reinstatement as contemplated in section 186 (1) (d) of the LRA.

3.6 If the applicants wished to challenge the fairness of the dismissals, they were compelled to challenge the fairness of their original dismissal on 22 February 2010. They could therefore not challenge the selective reinstatement on 4 March 2010, which came by way of agreement that was binding on the individual applicants.

3.7 The applicants have not challenged the substantive fairness of their dismissals of 22 February 2010 as they could have done in terms of the agreement of 4 March 2010. They had initially done so when they referred a dispute to the CCMA and even in their statement of case before the Court. They had however abandoned that case and all that remained in respect of the challenge to the dismissals of 22 February 2010 was a procedural fairness challenge. Thus since there was no dismissal in respect of the agreement of 4 March 2010, there could be no substantive unfairness.

3.8 Where however the Court were to consider it appropriate to enquire into the basis of the selection which took place on 4 March 2010, then the normal principles regarding inconsistency, or the so-called 'parity principle' should find application in determining the issue before it.

3.9 It was however not disputed that the basis of the selection was simply and firmly founded on a list of names actually agreed to by NUM and the respondent, and this agreement was binding on the individual applicants. There could therefore no issue of inconsistency in the light of the agreement, and it could not be said that the respondent had acted arbitrarily.

[4] The applicants' response to the substantive fairness of the dismissal was as follows;

4.1 The issue for determination was whether selective non re-employment of the individual applicants by the respondent was fair.

4.2 The respondent failed to justify the selective re-employment, and instead sought to rely on a collective agreement, which it had entered into with NUM. Clause 10 of that agreement however stipulated that NUM retained the right to challenge the fairness of the exclusion of the applicants from re-employment or reinstatement.

4.3 The applicants never agreed with the respondent that they should be excluded hence the insertion of clause 10. When NUM said it reserved its rights to challenge the exclusion of the applicants, it was not in reference to the fairness or otherwise of the dismissal due to their participation in the unprotected strike.

4.4 The respondent's conduct of excluding the applicants from re-employment had the effect of breaking the chain of events as they were originally (i.e. the dismissals due participation in strike action). Because of this break in the chain of events, NUM could no longer challenge the fairness or otherwise of the dismissal based on the original reason for such dismissal but rather on the new reason, which comes in the intervening cause.

4.5 In agreeing to re-employ the other dismissed employees, the respondent in fact abandoned the previous dismissal as it no longer viewed the offences for which the employees has been dismissed as serious enough to warrant a dismissal.

4.6 The respondent therefore must have had other charges in respect of the applicants over and above the ones for which everyone had been dismissed and this could be the only rationale for excluding them. It was contended that this was evident from the wording of clause 9 of the agreement which provided that; *"The following people in addendum 'A' will remain dismissed and will not be allowed back on the minded Marikana site pending the outcome of litigation which will be accepted by both parties and MCC will provide relevant information regarding charges, minutes of hearings etc"*. It was argued that this wording clearly postulates that the respondent was to bring new charges against the applicants and convene disciplinary hearings, which would justify the exclusion of the applicants.

4.7 Since the respondent never put new charges nor convened fresh hearings in respect of the individual applicants, it therefore had no justification for excluding them. Since further the respondent elected to re-employ other employees dismissed on account of their participation in the illegal strike, it was unfair to re-employ some of them, and to exclude others unless the differential treatment could be justified on the basis of fair rationale and objective criteria.

4.8 The selective treatment of the individual applicants was arbitrary and capricious, rendering their selective non re-employment unfair. What the respondent did when it embarked on the selective treatment exercise, was to condone the participation of the dismissed employees in the illegal strike, other acts of intimidation and gross insubordination. In the absence of additional acts of misconduct committed by the applicants to justify their exclusion from re-employment, the conclusion to be reached was that the respondent wanted to sift out troublemakers from its employ, given the history of the relations between the respondent and the applicants in relation to the mobilisation of the workforce to join NUM.

Evaluation:

[5] As per the agreement on issues to be determined, the first is whether the dismissal of the individual applicants was substantively fair on the basis that they had committed the same misconduct as all the other striking employees that were dismissed, but the respondent had reinstated or re-employed others but not the individual applicants.

[6] As it was correctly pointed out on behalf of the respondents, the dismissal as identified above can only be as contemplated in section 186 (1) (d)[1] of the LRA. This form of dismissal is a statutory defined dismissal that is distinct and separate from the original dismissal in terms of section 186 (1) (a) of the LRA. The elements of selective non-re-employment include a previous dismissal; employees dismissed for the same or similar reasons; an offer of re-employment made to some of them; and a refusal to re-employ other employees. All of these factors are present in this case. It is further accepted that the date of a dismissal contemplated in section 186 (1) (d) is the date on

[1] *“dismissal” means that -…… an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another’*

which the employer refused to reinstate or re-employ other dismissed employees[2].

[6] From the wording of s186 (1) (d) of the LRA it is further accepted that this form of dismissal is distinguishable from a form of an unfair labour practice as contemplated in section 186 (2) (c) of the LRA, which pertains to an act or omission on the part of the employer involving a failure or refusal to reinstate or re-employ a former employee in terms of any agreement. To this end, it should be accepted that a dismissal contemplated in section 186 (1) (d) does not require an express agreement that the employer will re-employ the dismissed employees. The employer may act unilaterally.

[7] Since a dismissal contemplated in s186 (1) (d) does not require an express agreement on the part of the employer to re-employ a dismissed employee, it then follows that the next issue for determination is whether there was any basis for distinguishing between those employees that were re-employed and those that were not. In this regard, it is further accepted that selective re-employment is not *per se* unfair, and that the circumstances of each case would determine whether it was fair or not[3].

[8] The respondent's contention was that the individual applicants remained dismissed as a consequence of clause 9[4] of an agreement between the parties. The argument as I understand it is that as a consequence of this agreement, the original dismissals of 22 February 2010 stood, and the fairness thereof would be determined by subsequent litigation.

[9] NUM for the purposes of these proceedings does not however pursue the substantive fairness of the dismissals of 22 February 2010. This in my view is at odds with the right it had reserved in that regard as per clause 9 of the agreement. It is further my view that NUM's position in this regard is clearly

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[2] Section 190 (2) (c) of the Labour Relations Act

[3] *Food & General Workers Union & others v Design Contract Cleaners (Pty) Ltd*(1996) 17 ILJ 1157 (LAC) at p1167

[4] Which provides that: *"The following people in addendum "A" will remain dismissed and will not be allowed back on the mine at Marikana site pending outcome of litigation which will be accepted by both parties and MCC will provide relevant information regarding charges, minutes of hearings etc."*

informed by an incorrect interpretation of what dispute it had reserved its rights to pursue as per clause 9 of the agreement.

[10] In my view, there is no logic in NUM's contentions that what it had expected was for the respondent to proffer fresh charges in respect of the individual applicants in order to justify their non re-employment. There was clearly no basis for the respondent to formulate new charges against the individual applicants after the agreement was concluded. The dispute surrounding the non-selection or non re-employment of the individual applicants arose from that agreement, whilst the main dispute however came about as a consequence of the dismissals of 22 February 2010, which remained in place after the agreement of 4 March 2010.

[11] There is further no merit in the contention that in agreeing to re-employ other employees, the respondent had effectively abandoned the dismissal of 22 February 2010. With the agreement, what took place was in effect, the reversal of the dismissal of other employees, and the sanction being replaced with a final written warning, whilst the dismissal of the individual applicants stood pending litigation.

[12] This matter being dealt with as a stated case, the court is bound to determine the issues as placed before it and pleaded by the parties. It being apparent that the substantive fairness of the dismissals of 22 February 2010 is not challenged either as gleaned from the agreed issues for determination or from the heads of argument as filed on behalf of the applicants, what has to be determined is whether the non re-employment of the individual applicants on 4 March 2010 was substantively fair.

[13] NUM in placing reliance on *Food & General Workers Union & others v Design Contract Cleaners (Pty) Ltd*[5] had submitted that it would be unfair not to re-employ the individual applicants unless the differential treatment could be justified, based on fair, rational or objective criteria. In this case, the respondent had according to NUM failed to justify the selective treatment and it could only be concluded that the exclusion was arbitrary and capricious.

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[5] at para 1166

[14] As already indicated, the respondent on the other hand relied on the agreement concluded by the parties for the contention that the selective non-re-employment was agreed to. In regards to the agreement in question, it is common cause that its validity is not an issue before the court. Had this been the issue, one would have sought guidance from various authorities where the view is held that notwithstanding the voluntary nature of a collective bargaining process and the need to respect the primacy of collective bargaining arrangements, there might be instances where the Court may interfere with such arrangements where they infringe on fundamental constitutional values, particularly the right to fair labour practices[6].

[15] In contending that the selective non-re-employment of the individual applicants was agreed upon, the respondent further placed reliance on *Fakude and others v Kwikot (Pty) Ltd*[7] where Molahlehi J had held that a trade union was entitled to take decisions on behalf of its members without necessarily having obtained their consent even if such decisions would adversely affect those members.

[16] As already indicated, selective re-employment would not *per se* be unfair, and this is one of those instances where it should be concluded that there is no basis for a conclusion to be reached that it was unfair. The difficulty the applicants are faced with in this case is that where an agreement was reached on the issue of selective non-re-employment, it would always be an insurmountable task to show how the respondent in this case had acted arbitrarily or capriciously in not selecting employees for re-employment. An agreement comes about as a result of consensus reached between the parties.

[17] The second difficulty is that is that even if the onus is on the employer to show fairness in the non-selection of the individual applicants, if the only way of discharging that onus is by production of an agreement, a rebuttal by NUM

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[6] See *Larbi-Odam v MEC for Education (North West Province)* (1998) 3 LDD 102 (CC) (See also *Janse van Vuuren v South African Airways (Pty) Ltd and Another* (2013) 34 ILJ 1749 (LC), where this Court held that a collective agreement is subject to the Constitution and the Employment Equity Act and is not exempt from its provisions. Parties may not contract out of the fundamental rights and protections set out in the Bill of Rights

[7] (2013) 34 ILJ 2024 (LC)

becomes even more onerous where the validity of that agreement is not placed in dispute.

[18] The third difficulty is that in the absence of the validity of the agreement being challenged, it becomes even more onerous for the applicants to extricate themselves from its terms. In this case, it was not seriously disputed that the list of those employees to be re-employed and those to be excluded was agreed upon. The individual applicants were identified for exclusion in the agreement, and are thus bound by it. By virtue of that agreement, it becomes incomprehensible as to how it could be argued that the exclusion of the individual applicants from re-employment was arbitrary or capricious.

[19] As is apparent from the agreement, the dismissal of the individual applicants remained an issue which NUM was entitled to pursue. I however fail to appreciate how NUM could have incorrectly come to the conclusion that the only dismissal it could challenge was that emanating from the non-re-employment. Even if on NUM's reading of Clause 10 of that agreement that it retained the right to challenge the fairness of the exclusion of the Applicants from re-employment or reinstatement, there is however no basis to do so in the light of the constraints pointed out above.

[20] The intervening factor, i.e. the agreement, only applied insofar as the other employees who were re-employed are concerned, as their status had changed. The status of the individual applicants had however remained unchanged after the agreement, and their dismissal could only be as a consequence of their participation in the unprotected strike action and nothing else.

[21] NUM's reading and reference to the provision of *'relevant information regarding the charges, minutes of hearings* etc" as per clause 9 of the agreement is equally incorrect as such relevant information could only be in relation to the dismissal of 22 February 2010, which substantive fairness NUM was entitled to challenge. It was common cause that no other hearings were held leading to dismissals other than on 22 February 2010 and I fail to appreciate how it could have been expected of the respondent to either hold

fresh hearings or proffer fresh charges against the individual applicants when there was an agreement that they remained dismissed.

[22] In the light of the above conclusions, it follows that any arguments pertaining to issues surrounding inconsistency in respect of selective non re-employment equally find no application in this case in the light of the agreement. To this end, there is no basis for a finding to be made that the selective non-re-employment of the individual applicants was substantively unfair.

[23] The second issue for determination was whether the dismissal of the individual applicants was substantively unfair because there was no further disciplinary hearing other than that of 18 February 2010 to substantiate the dismissal. For reasons that remain unclear, NUM chose to deal with this issue as part of its attack on the procedural fairness of the dismissals.

[24] NUM's contention was that when it was decided not to re-employ the individual applicants, they were not afforded an opportunity to counter any additional allegations of misconduct which the respondent might have had against them. This argument has already been dealt with. To however reiterate, it could not have been expected of the respondent to have proffered new charges or held further disciplinary hearings to justify the individual applicant's non re-employment simply on the basis that they remained dismissed in accordance with the agreement of 4 March 2010. Those dismissals emanated from the events of 18 February 2010, and it was up to NUM to pursue and challenge the fairness thereof.

(ii) *Procedural unfairness:*

[25] NUM's main contention in this regard was that the respondent had failed to notify it of the disciplinary proceedings to be held on 18 February 2010. In this regard, it was submitted that the individual applicants were not afforded a fair hearing as they had demonstrated unequivocally that they no longer wished to be associated with FMU (referred to as the 'enemy') hence the very cause of the strike action.

[26] The respondent's response to allegations of procedural unfairness was that as at February 2010 NUM was not a recognized union and that at the time, the respondent still had a closed shop agreement with FMU. Furthermore, it was submitted that the FMU and the individual applicants were notified of the disciplinary proceedings. The individual applicants had elected not to attend those proceedings where they could have raised the issue of their representation.

[27] In terms of Item 4 (2) of Schedule 8 – Code of Good Practice: Dismissal, an employer is required to inform a trade union of discipline to be instituted against a trade union representative or an employee who is an office bearer or official of a trade union. It was common cause that FMU, which enjoyed recognition and the individual employees themselves were notified of the disciplinary proceedings scheduled for 18 February 2010. I am in agreement with the respondent's contentions that there was no obligation on it to inform NUM as it did not have a recognition agreement with it. Since clearly the provisions of Item 4 (2) as indicated above would not have been applicable to NUM, there would have been no basis for it to demand to be notified of the disciplinary proceedings.

[28] A further difficulty with NUM's arguments in regards to procedural unfairness is that it is not uncommon for applicants to allege that their dismissals were unfair in circumstances where they have failed to respond to a call to attend disciplinary enquiries. It is trite that employees who refuse to attend disciplinary enquiries having been properly notified do so at their own peril[8]. This principle was re-emphasized in *The Foschini Group v Maidi and Others*[9] where the Labour Appeal Court held as follows;

> *"On the evidence accepted by the arbitrator, the respondents' refusal to attend the disciplinary hearing was unreasonable. Assuming the objection to a material witness, being the enquiry initiator, to be a valid one, the respondents should nonetheless have participated in the hearing and placed*

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[8] See *CEPPWAWU and others v Metrolife* (Pty) Ltd (2000) 25 ILJ 231 (LAC); *Fidelity Cash Management Service v CCMA and others* (2008) 29 ILJ 964 (LAC)

[9] (2010) 31 ILJ 1787 (LAC) at para 58

their objections on record. It is a trite principle in our law that a party, who chooses not to attend a hearing, does so at his or her own peril, and is precluded from later complaining about the outcome of the hearing"

[29] From the above principles, it is apparent that an employee once properly notified of disciplinary proceedings, must attend those proceedings, and lodge whatever objections he or she may have formally at those proceedings. The employee must however participate in those proceedings even if they may be construed to be unfair and a farce. This does not imply that the farce would be condoned or given legitimacy. However, a noting of an objection on record in such proceedings and participation under protest is important for a future determination of the fairness of that process at a later stage. An employee cannot claim a hearing to be procedurally unfair where he or she had failed to attend that enquiry. An allegation of procedural unfairness cannot be made in a vacuum. In effect, one may even go as far as concluding that an employee who refuses to attend a formal disciplinary enquiry waives his or her rights in that regard.

[30] In this case, there is no evidence to indicate that NUM had in fact made a request to represent the employees. Secondly, there is further no evidence to indicate that the individual applicants had themselves made a request to be represented by NUM in the disciplinary enquiry. In any event they could not have since they had failed to attend that enquiry. The respondent cannot be accused of procedural unfairness in circumstances where the individual employees out of a total of 112 other employees had attended the enquiry and were represented by a FMU shop steward whom NUM regarded as an enemy.

[31] It being accepted that the 112 employees were disciplined and dismissed for their participation in the unprotected strike action in furtherance of NUM's demands, it should equally be accepted that these employees, despite being aligned to NUM, had acquiesced to being represented by FMU in the disciplinary enquiry. The reason that the individual applicants however declined to even attend that disciplinary enquiry remains unknown.

[32] Nothing further can be read into the fact that the respondent had ultimately held discussions with NUM and partly resolved the matter. It may have been convenient for the respondent to hold these discussions with NUM even if it was not recognized at the time. It cannot however be read from this that the respondent was therefore obliged to invite NUM to the disciplinary hearings. In the light of these factors, there is no basis for a finding of procedural unfairness to be made.

[33] I have had regard to the question of costs. However, given the history of this matter, I can find no basis in law or fairness to make a cost order.

Order:

i. The applicants' claim is dismissed.

ii. There is no order as to costs.

Tlhotlhalemaje

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

ATTORNEYS OF RECORD:

On behalf of the Applicants:	Finger Phukubje Inc Attorneys
On behalf of the Respondent:	Snyman Attorneys