



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 394/09

In the matter between

SATAWU OBO L SELAOLE

AND 31 OTHERS

Applicant

and

RENO CARRIERS (PTY) LTD

Respondent

Heard: 29 April 2014

Delivered: 1 October 2015

Summary: Participation in an unprotected strike does not necessarily justify dismissal. The respondent has to prove the substantive and procedural fairness of the individual applicants' dismissal for participating in an unprotected strike.

JUDGMENT

LALLIE J

- [1] The respondent employed the individual applicants in different positions. In 2008, it informed them of its intention to downsize. In December of the same year it allowed the drivers' red ticket fitness certificates to expire thus rendering them incapable of being utilised as drivers before undergoing the necessary tests. Most drivers had to work at the workshop. The respondent changed the shift roster affecting the earnings of the individual applicants substantially. It was the respondent's practice to notify drivers of the need to be tested before their fitness certificates expired. In January 2009, it ceased to ferry the individual applicants to and from work, conduct which was met with a work stoppage by the latter. The referral of a dispute to the bargaining council and a threat of a protected strike persuaded the respondent to desist from its conduct. The parties agreed that no further unilateral changes would be effected to the individual applicants' terms and conditions of employment.
- [2] On 18 February 2009, the applicants' transport to work arrived late leaving them with the impression that the respondent had once more withheld it unilaterally. They refused to perform their duties and sought an audience with Mr Kruger ("Kruger"), the respondent's owner as they wished to air their complaints. He did not avail himself but issued an ultimatum for the individual applicants to return to work within 45 minutes or face disciplinary action. They failed to heed the ultimatum prompting the respondent to issue them with disciplinary notices through their shop stewards. The respondent informed the union of its intention to take disciplinary action against the individual applicants. It further gave the applicant union notice of its intention to take disciplinary action against shop stewards for failure to carry out lawful instructions and contravening rules and regulations. The individual applicants other than the shop stewards were subjected to a disciplinary enquiry on 23 February 2009 and dismissed. They were unrepresented as their union's request for a postponement was unreasonably refused. The shop stewards' disciplinary enquiry was held on 12 March 2009 in the absence of their trade union official whose request for a postponement to seek legal advice had been refused. They were dismissed.

- [3] The applicant submitted that the respondent failed to notify an official of the applicant union of the work stoppage of 18 February 2009 thus denying the union of the opportunity to persuade the individual applicants to attend to work. The applicant attacked the manner in which the ultimatum was issued and submitted that the respondent's conduct provoked the strike which endured for no longer than one shift. It sought an order reinstating the individual applicants on the basis that the dismissal was substantively and procedurally unfair. The respondent responded to the applicant's statement of claim by filing an answering affidavit.
- [4] When this matter was set down for trial on 24 February 2014, the following agreement between the parties was made an order of court:
- '1 The matter is postponement *sine die*.
 - 2 The respondent, through Mr Rudi Kruger, is ordered to serve with the applicant's attorneys and file with this Court, an original or certified copies of the Court Order in terms of which the respondent was placed under final liquidation, within 30 days of this court order, that is, on or before 31 March 2014.
 - 3 In the event of the respondent, through Mr Rudi Kruger, failing to deliver the final liquidation Order on or before 31 March 2014, the matter may proceed in default and default judgement may be granted against the respondent in Chambers.
 - 4 The respondent is ordered to pay the wasted costs only in the event that it fails to submit proof of liquidation by 31 March 2004'.
- [5] The respondent failed to comply with the court order and the applicant filed the individual applicants' affidavits confirming the correctness of the statement of case as well as their remuneration on dismissal. Item 6 of schedule 8 to the Labour Relations Act 66 of 1995, as amended ("the LRA") provides guidelines for dismissal for participating in unprotected strikes. It makes it clear that participation in an unprotected strike constitutes misconduct which does not always deserve dismissal. Substantive fairness of dismissals for this kind of misconduct must be determined on the facts of each case which include the

seriousness of the contravention of the LRA, attempts made to comply with the LRA and whether the strike was in response to an employer's unjustified conduct. Item 6 (2) requires an employer, before dismissing employees for participating in an unprotected strike to contact a trade union official at the earliest opportunity in order to discuss action it intends adopting. It should issue an ultimatum that should state what is required of the striking employees and what sanction would be imposed for failure to comply with the ultimatum. Employees should be allowed sufficient time to reflect on the ultimatum, respond to it by either complying with it or rejecting it.

- [6] The determination of the substantive fairness of a dismissal for participating in a strike involves a two-staged enquiry which is based on item 6 and 7 of schedule 8 to the LRA. *NUMSA v CBI electric African Cables*¹. The applicant made no attempt to comply with provisions of section 64 of the LRA. The strike was triggered by the respondent's unjustified conduct which manifested itself in Kruger's refusal to listen to the individual applicants' concerns. The concerns were serious and consisted of conduct by the respondent which affected their remuneration and job security. Contrary to its practice, the respondent failed to notify drivers to be tested for fitness leading them to qualify for jobs which paid less. By changing the roster system the respondent reduced the income of the individual applicants who it even threatened with dismissal. The refusal to address such concerns constituted unjustified conduct by the respondent. The applicant's failure to comply with section 64 of the LRA is not serious in the circumstances of this matter.
- [7] The respondent failed to contact an official of the applicant union to discuss the course of action it intended to adopt when the unprotected strike broke out. Scheduling a disciplinary enquiry for the individual applicants before their dismissal did not exonerate the respondent from consequences of the omission because the purpose of the discussion is to afford the union an opportunity to prevent dismissal by persuading employees to stop the unprotected strike.

¹ [2014] 1 BLLR 31 (LAC) at para 29.

- [8] The following *dictum* in *Plaschem (Pty) Ltd v Chemical Workers Industrial Union*² is still relevant in determining whether the individual applicants were afforded sufficient time to react to the ultimatum: “He must give a fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited.” The 45 minutes’ ultimatum the respondent gave the individual applicants was insufficient for them to reflect and decide whether to comply with it or to seek advice from their union. There were no valid reasons for the respondent’s failure to comply with item 6 (2) of schedule 8 to the LRA.
- [9] The individual applicants other than shop stewards were charged with and dismissed for gross negligence for participating in an illegal work stoppage on 18 February 2009 and refusal to return to work. When the misconduct is considered against the guidelines in item 7 of Schedule 8 it becomes clear that they breached the rule against participating in an unprotected strike and refusal to resume their duties when ordered by the respondent. Dismissal is not necessarily the appropriate sanction for breaching the rules. The breach is justified when cognizance of the respondent’s conduct which triggered the misconduct is taken into account. The applicant unions’ request for the postponement of the disciplinary enquires was unreasonably refused. For these reasons the dismissal of the individual applicants was both substantively and procedurally unfair.
- [10] The applicant sought an order reinstating the individual applicants.
- [11] There are no reasons both in law and fairness for the respondent not to pay the applicant’s costs and protect the applicant from being out of pocket as a result of the respondent’s unfair conduct.
- [12] In the premises the following order is made:

² (1993_ 14 ILJ 1000 (LAC)

- 12.1 The dismissal of the individual applicants was substantively and procedurally unfair.
- 12.2 The respondent is ordered to reinstate the individual applicants retrospectively from the date of their dismissal.
- 12.3 The respondent pay the applicant's costs including the wasted costs 24 February 2014.

Lallie J

Judge of the Labour Court of South Africa

Matter considered in Chambers

For the Applicant: Ruth Edmonds Attorneys

LABOUR COURT