

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA

PORT ELIZABETH

Not Reportable

Case no: P 486 /2012

In the matter between:

POPCRU obo Z D NOXUNGWANA

Applicant

and

SOUTH AFRICAN POLICE SERVICES

Respondent

Heard: 18 and 19 May 2015

Delivered: 22 May 2015

Summary: Automatically unfair dismissal for participation in union activities. Re-instatement granted. Limited back pay due to Applicant's incorrect referral to arbitration and consequential delay.

JUDGMENT

PRINSLOO, AJ

Introduction

[1] The Applicant on behalf of its member, Z D Noxungwana (the employee) approached this Court for relief in terms of the provisions of section 187(1) and

187(1)(d) of the Labour Relations Act¹ (the Act) as they claim that the employee's dismissal was automatically unfair.

[2] The Respondent opposed the matter.

The pleadings and evidence adduced

[3] After due consideration of the pleadings and the testimony adduced, I accept the following as common cause and relevant to the issues this Court has to determine:

[4] The Respondent employed the employee since January 1995. Since March 2006 he was employed as a warrant officer (trainer) at the Bhisho Service Training Institution (the institution).

[5] The employee was a member of POPCRU and a duly elected POPCRU shop steward at the institution.

[6] The Respondent's new recruits are trained at the institution where they receive basic training on all aspects relevant to police work on an almost full time basis. The police trainees are lectured and receive practical training in accordance with a training schedule and have study time every day from 19:00 – 21:00.

[7] The Respondent has issued "Institutional Orders SAPS Training Institutions: Basic Training" (institutional orders) that applies nationwide to all training institutions. Clause 11.3 of the institutional orders provided that: "*union activities with police trainees is strictly prohibited.*" The police trainees also sign a memorandum of understanding wherein it was stipulated that they would not participate in union activities.

[8] The Applicant pleaded that the police trainees are employees of the Respondent and in cross-examination Brigadier Thambo, who testified for the Respondent, confirmed that they were indeed employees.

[9] Section 23 of the Constitution of South Africa and section 4 of the Act grant every employee the right to join a trade union, subject to its constitution and every member of a trade union to participate in its lawful activities.

¹ Act 66 of 1995.

- [10] The police trainees became members of POPCRU and the Respondent deducted their union subscriptions from their salaries and paid it over to POPCRU. This was done by the Respondent's head office.
- [11] On Saturday 6 December 2008 Captain Peteni was on duty at the institution when she noticed that police trainees were wearing POPCRU t-shirts. She enquired from the trainees why they were wearing POPCRU t-shirts and they told her that the employee gave them the t-shirts and that he had recruited them as POPCRU members. Captain Peteni warned the trainees that they could be charged for that because they were contravening the institutional orders by joining a trade union.
- [12] On Monday 8 December 2008 a meeting took place in the office of Brigadier Thambo, the commander of the institution. The testimony in respect of the events that transpired at this meeting was contradictory but I accept that the meeting took place on 8 December 2008 and that there were two issues raised. The one issue was the employee's complaint against Captain Peteni and the other issue was the complaint against the employee. The employee's complaint was that Captain Peteni threatened and victimised the trainees on 6 December 2008 because they were not supposed to join a trade union. Captain Peteni and in fact the Respondent complained that the employee recruited the police trainees as POPCRU members whereas the institutional orders specifically prohibited union activities for the police trainees.
- [13] At the meeting the employee confirmed that he had been recruiting the police trainees as POPCRU members and that he would continue to do so as he held the view that every employee has a constitutional right to belong to a trade union and the institutional orders were therefore invalid. He saw nothing wrong with what he had done and insisted that nothing prohibited him from doing what he did.
- [14] Brigadier Thambo and Captain Peteni testified that the employee's conduct on 8 December 2008 was unbecoming and disrespectful. He disrespected his seniors and he contravened the institutional orders and the matter was reported to the Respondent's head office for investigation and disciplinary action. A letter was sent to POPCRU to inform the union that disciplinary action would be taken against the employee.

- [15] On 16 March 2009 three charges of misconduct were levelled against the employee. The charges all related to the fact that the employee recruited police trainees as POPCRU members at the institution between July to December 2008. The charges differed in the sense that charge 1 was the contravention of institutional order 11.3, charge 2 was the failure to carry out a lawful order or routine instruction without just or reasonable cause by recruiting police trainees and charge 3 was that the employee caused prejudice to the administration, discipline or efficiency of the Respondent by recruiting police trainees while undergoing basic training.
- [16] It is evident that despite the testimony that the employee was disrespectful, no such charge was levelled against him.
- [17] In her testimony Captain Peteni could not explain what the prejudice for the Respondent was, as per charge 3. She explained that it was prejudicial to the other trade unions if one was allowed to recruit members and the others not, but she could not mention any prejudice to the Respondent.
- [18] On 14 April 2009 the Respondent and POPCRU and SAPU entered into an agreement that regulates the granting of organisational rights and in terms of this agreement a police trainee has the right to join a trade union, subject to its constitution. This agreement effectively terminated the existence of clause 11.3 of the institutional regulations.
- [19] The disciplinary hearing was scheduled for 16 March 2009 but was postponed to 18 and 19 April 2009. The chairperson of the disciplinary hearing, Superintendent Shubane, found the employee guilty of misconduct and dismissed him on 21 April 2009. Superintendent Shubane testified and it was put to him that by the time he dismissed the employee (21 April 2009) an agreement was signed (14 April 2009) that effectively abolished the misconduct the employee was charged for and his conduct could no longer be regarded as misconduct. The response tendered was that he was not informed about the existence of the agreement at the time and the misconduct the employee was dismissed for was committed during July to December 2008, prior to the existence of the agreement.

- [20] It was not disputed that the agreement was entered into prior to the employee's dismissal. The employee's case is that by the time he was dismissed, his conduct no longer constituted misconduct hence his dismissal was substantively unfair.
- [21] The employee was dismissed on 21 April 2009 and appealed against the finding of the chairperson. The appeal was only finalised in on 24 February 2011 when it was dismissed. The employee referred an unfair dismissal dispute to the bargaining council and after the matter was arbitrated on several occasions over the period October 2011 to June 2012 the arbitrator on 3 July 2012 requested the parties to make submissions on jurisdiction.
- [22] A final ruling was issued on 24 July 2012 and held that the bargaining council did not have jurisdiction to adjudicate the dispute. The Applicant subsequently and on 23 October 2013 filed a statement of case. Condonation for the late filing of the statement of case was sought and granted on 8 November 2013.

Closing arguments

- [23] In closing argument Mr Grobler on behalf of the Applicant narrowed the issues to be decided by this Court and submitted that the Applicant's case is vested in section 5(2)(c)(3) of the Act, read with section 187 of the Act. The employee's dismissal was automatically unfair as he was dismissed for participation in the lawful activities of a trade union.
- [24] Mr Grobler submitted that although the dismissal is premised on misconduct, the rule the employee contravened stood in contrast to the provisions of the Act and the Constitution. The institutional orders prohibiting union activities were in violation of legislation. At the centre of all the charges levelled against the employee is only one issue namely the recruitment of police trainees as union members.
- [25] On the issue of sanction Mr Grobler submitted that it was impossible to dismiss an employee when the actual misconduct is no longer regarded as misconduct and by the time the employee was dismissed, the rule no longer existed.

- [26] The employee is seeking retrospective reinstatement and the Respondent did not adduce any evidence to show why reinstatement was not possible or appropriate relief.
- [27] In his argument Mr Grobler abandoned the challenge to procedural fairness and submitted that the employee's dismissal was substantively unfair as no reason existed to dismiss him, but having regard to the reason for dismissal, it was automatically unfair.
- [28] Ms Ah-Shene for the Respondent submitted that this is a misconduct dismissal. The rule was valid at the time and the evidence shows that misconduct was indeed committed that justified dismissal. Ms Ah-Shene could not make any submissions on the fact that the rule was no longer valid at the time the employee was dismissed and she submitted that it was indeed the factual position.
- [29] On the appropriate remedy Ms Ah-Shene submitted that the matter has a long history and the time period should be considered not to burden the Respondent unreasonably. She submitted that the employee was dismissed in 2009 and his appeal was finalised in 2011. Mr Grobler conceded that there was no prejudice for the employee until his appeal was finalised as he was still paid his salary. POPCRU referred the matter to the bargaining council and the jurisdictional ruling was issued in July 2012. The statement of case was only filed in October 2012 and condonation granted in November 2013. POPCRU delayed the matter by first referring it to the bargaining council, where after it had to apply for condonation and the Respondent should not be burdened and prejudiced for these delays caused by the manner in which POPCRU chose to deal with the matter.
- [30] Neither of the representatives insisted on costs and correctly so. I am of the view that this is a matter where a cost order would not be appropriate, more so in view of the fact that there is an ongoing relationship between POPCRU and the Respondent that is worthy of protection and costs may affect the relationship negatively.

The issues this Court has to decide:

- [31] The fundamental question this Court has to decide is whether the employee's dismissal was automatically unfair and if so, the appropriate relief to be awarded.
- [32] The Applicant's case is pursued in terms of the provisions of section 5(2)(c)(3) of the Act, read with section 187 of the Act.
- [33] Section 5 of the Act affords protection to employees when exercising rights conferred by the Act. Section 5(2)(c)(3) reads as follows:
- (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-
 - (c) prejudice an *employee* or a person seeking employment because of past, present or anticipated-
 - (iii) participation in the lawful activities of a *trade union*, federation of *trade unions* or *workplace forum*;
- [34] The protection is reinforced in the provisions of section 187 of the Act and the portions thereof relevant to this matter are as follows:
- (1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is-
 - (d) that the *employee* took action, or indicated an intention to take action, against the employer by-
 - (i) exercising any right conferred by *this Act*; or
 - (ii) participating in any proceedings in terms of *this Act*.

Analysis:

The reason for the dismissal:

- [35] In deciding the question whether the employee's dismissal was automatically unfair, the first consideration should be the reason for the dismissal.
- [36] In the Respondent's statement of defence it is stated that at the time of the employee's dismissal there was a workplace rule that stipulated that trainees were not to participate in union activities and the employee, contrary to the rule, was actively involved in the recruitment of trainees as members of POPCRU. The employee was dismissed for misconduct.

- [37] The evidence however has shown that at the time of the employee's dismissal, the rule was no longer in place as trainees were allowed to join a trade union as from 14 April 2009.
- [38] It was further pleaded that the employee acted contrary to the provisions of section 12 of the Act as he was a shop steward and not a union official or office bearer therefore he had no right of access as afforded to union officials and office bearers in section 12. Secondly 'access' is subject to conditions as to time and place that are reasonable and not unduly interrupting work. The employee unduly interrupted trainees during their work and training schedules and recruited them whilst they were on training.
- [39] Furthermore it was pleaded that the employee failed to secure permission of the commander to undertake the recruitment of trainees within the parameters of section 12(4) of the Act.
- [40] In my view the plea put forward by the Respondent is problematic in the sense that it constitutes two mutually destructive versions. This is so for the following reason: On the one hand the Respondent's case is that Clause 11.3 of the institutional orders provides that: "*union activities with police trainees is strictly prohibited.*" On this version the employee was not allowed to recruit members or be involved in any union activities as such activities were strictly prohibited. Contravention of Clause 11.3 would constitute misconduct as a breach of a workplace rule or institutional order.
- [41] On the other hand the Respondent stated that the employee contravened section 12 of the Act in that he was not an office bearer or official of the trade union and therefore he was not entitled to enter the Respondent's premises to recruit members, he had not required permission from the commander and he disrupted training when he recruited members.
- [42] Section 12 of the Act forms part of the chapter affording organisational rights to representative trade unions. Reference to and reliance on the provisions of section 12 of the Act presupposes that the representative trade union was afforded organisational rights in the workplace, being the institution. This is inconsistent with the version that union activities were strictly prohibited.

- [43] The Respondent cannot claim that the employee contravened a workplace rule that prohibits union activities and in the same breath complains that he contravened section 12 of the Act, that affords organisational rights, in a number of respects.
- [44] The Respondent called the chairperson of the disciplinary hearing as a witness and the evidence before me, both in the pleaded case as well as the oral evidence, shows that the reason for the employee's dismissal was misconduct, as per the charges levelled against him and that all related to the fact that he recruited police trainees as POPCRU members at the institution between July to December 2008, when union activities were prohibited. I accept that the employee was dismissed for reasons related to misconduct.
- [45] When one has regard to the fact that the Respondent dismissed the employee for reasons related to misconduct, it all sounds very legitimate and innocuous. However, it is necessary to delve deeper into it in order to understand the precise nature of the misconduct and the rule the employee contravened.
- [46] The evidence before me shows that there was a rule, the employee contravened the rule and that he was disciplined and dismissed for contravention of the rule. The rule however calls for a closer assessment.
- [47] The rule the employee contravened was Clause 11.3 of the institutional orders that prohibited union activities with police trainees. The misconduct the employee was dismissed for related to the fact that he recruited police trainees as members for POPCRU, in contravention of the rule prohibiting such activities.
- [48] Having conceded that the trainees are employees of the Respondent, it is inconceivable that a rule prohibiting union activities ever seen the light of day. The existence of the rule disregarded the constitutional right of every employee to join a trade union and participate in the activities of such trade union and it undermined the provisions of the Act. The rights afforded in sections 4 and 5 of the Act are absolute rights and give employees the right to join trade unions and to participate in their activities. The recruitment of members is no doubt part of the activities of a trade union.

[49] In *Kroukam v SA Airlink (Pty) Ltd*² the Labour Appeal Court held that:

“In my view a court should be slow to infer that the reason why an employer has brought disciplinary charges against an employee or the reason why an employer has dismissed an employee is or are illegitimate reason(s) such as union activities unless there is sufficient evidence to justify such a conclusion. A court should be even slower to come to that conclusion in a case where it does seem that the employer may have had a basis to bring disciplinary charges against an employee even if the court would not have done the same had it been in the employer's shoes. Obviously, in a case where a proper basis exists for a court to make such an inference, the court should not hesitate to make it.”

[50] I cannot but find that the rule the employee contravened and was dismissed for, was illegal in the sense that it took away rights afforded in the Constitution and the Act. No wonder that the Respondent entered into an agreement with the trade unions on 14 April 2009 that allows trainees to join trade unions. The rule the employee contravened no longer existed at the time he was dismissed, a pertinent and material factor never considered by the Respondent.

[51] In *SA Chemical Workers Union and others v Afrox Ltd*³ the test to be applied in determining whether a dismissal was automatically unfair was formulated as:

‘The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare *S v Mokgethi & others* 1990 (1) SA 32 (A) at 39-41A; *BMinister of Police v Skosana* 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not

² (2005) 26 ILJ 2153 (LAC).

³ (1999) 20 ILJ 1718 (LAC).

immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'

- [52] Applying the two-fold test for causation the first question is: would the dismissal have occurred if the employee did not recruit trainees as members for POPCRU? The answer to this question is no, especially in view of the content and nature of the charges the employee were found guilty on and dismissed for. The next question is then: was the recruitment of members the main or dominant cause of the dismissal? When all the circumstances are taken into account and despite the claim that this is purely a misconduct dismissal, the principal or dominant reason for the employee's dismissal was his participation in union activities in that he recruited members for POPCRU.
- [53] Having established factual and legal causation, I cannot but find that the employee's dismissal was automatically unfair.
- [54] Ms Ah-Shene for the Respondent submitted that the Court only has the version of the Respondent as the employee did not testify and the onus was on the employee to lay the basis for his claim. This is a dismissal for misconduct and not an automatically unfair dismissal as claimed by the employee, so she submitted. However, in the view I take of this matter and the fact that the overall onus remains on the Respondent, there is sufficient evidence proving that the employee's dismissal was because of the fact that he, as a POPCRU shop steward, recruited police trainees as members of the trade union and this argument does not assist the Respondent at all.

Relief:

- [55] Having found that the employee's dismissal was automatically unfair, the next question that needs to be dealt with is the relief that should be granted to the employee.
- [56] The employee seeks retrospective reinstatement.
- [57] Reinstatement is the preferred and primary remedy where there has been an unfair dismissal. In terms of section 193(2) of the Act the Labour Court 'must require the employer to reinstate or re-employ the employee' unless one or more of the situations set out in paragraphs (a)-(d) of section 193(2) exists. Those situations are where:
- (a) the employee does not wish to be reinstated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.
- [58] Paragraph (a) does not apply because the employee seeks to be reinstated nor does paragraph (d) apply because procedural fairness was not an issue in this matter after Mr Grobler effectively abandoned the challenge to procedural fairness.
- [59] In my view paragraphs (b) and (c) also do not apply because there is no evidence upon which it could be said that a continued employment relationship between the employee and the Respondent would be intolerable or that it is not reasonably practicable to reinstate the employee.
- [60] Ms Ah-Shene urged the Court to consider the long history of this matter in deciding the appropriate relief and she submitted that in the event of reinstatement, the Respondent should not be burdened with back pay for the entire period since the employee's dismissal. Ms Ah-Shene submitted that the employee, assisted by POPCRU, referred the unfair dismissal dispute to the bargaining council, a jurisdictional ruling was issued in July 2012 and the statement of case was only filed in October 2012, which gave rise to an

application for condonation that was considered as an interlocutory application. Condonation was granted on 8 November 2013, where after the parties held a pre-trial conference and the matter was thereafter set down for trial.

[61] I agree that the Respondent should not be burdened where the delay in finalizing the matter was caused by an incorrect referral to the bargaining council and subsequent arbitration proceedings. The Applicant should have been aware that the nature of the case was automatically unfair dismissal and should not have wasted time on an arbitration process.

[62] In the premises, I make the following order:

Order

1. The dismissal of Mr Noxungwana was automatically unfair.
2. Mr Noxungwana is reinstated retrospectively to the same or similar position he held prior to his dismissal.
3. Mr Noxumgwana is to report for duty by no later than 29 May 2015.
4. The Respondent is ordered to pay Mr Noxungwana back pay from the date condonation was granted (8 November 2013) until the date he reports for duty.
5. No order as to costs.

Connie Prinsloo

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv Grobler

Instructed by: Schoeman Oosthuizen Inc Attorneys

For the Respondent: Advocate Ah-Shene

Instructed by State Attorney

LABOUR COURT