



**IN THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Reportable/Not Reportable

Case No: JS644/15

In the matter between:

FOOD AND ALLIED WORKERS UNION

Applicant

NCONGWANE, D & OTHERS

Second and Further Applicants

and

AMALGAMATED BEVERAGE INDUSTRIES (PTY) LTD

Respondent

Heard: 30, 31 January 2017, 3 February 2017

Judgment: 20 April 2017

Summary: Unfair dismissal action in terms of section 191(5)(b)(iii), alternatively, section 191(5)(a)(i) of the LRA – applicants dismissed for participating in unprotected strike action – respondent employer failing to take any steps to contact union and failing to issue ultimatum – moreover applicants' demands not unreasonable in the circumstances – dismissals accordingly substantively and procedurally unfair and

maximum compensation awarded. Applicants unreasonably refusing with prejudice settlement offer equivalent to maximum compensation – applicants therefore not entitled to costs.

JUDGMENT

BARNES AJ

Introduction

- [1] This is an unfair dismissal action in terms of section 191(5)(b)(iii), alternatively, section 191(5)(a)(i) of the Labour Relations Act¹ (“the LRA”).
- [2] The first applicant is the Food and Allied Workers’ Union (“FAWU”). The second and further applicants are 11 FAWU members who were employed by the respondent until their dismissals on 22 October 2012.
- [3] The second and further applicants initially numbered 15 but 3 individuals have withdrawn from the action. In addition, Mr Jacob Ralejoe, the third applicant, passed away after the institution of the action. At the commencement of the trial, an application was brought for the substitution of Ms Emily Ralejoe, Mr Ralejoe’s wife and the executor of his estate, as the third applicant. This application was unopposed and was duly granted.
- [4] The second and further applicants are accordingly:
1. Mr Donald Ncongwane
 2. Ms Emily Ralejoe
 3. Mr Waited Adoons

¹ Act 66 of 1995.

4. Mr Phillimon Mahlatji
5. Mr Vusimuzi Makumbene
6. Mr Samuel Ndlovu
7. Mr Joseph Baloyi
8. Mr Raymond Ntombela
9. Mr Ben Motloun
10. Mr Moses Masondo
11. Mr Caipus Mdlalose

- [5] For convenience, I will refer to them simply as “the applicants.”
- [6] The applicants were employed by the respondent as truck drivers. They were dismissed during the notoriously violent South African Transport and Allied Workers Union (“SATAWU”) strike which took place from 25 September 2012 to 12 October 2012. The applicants did not participate in the SATAWU strike. They did however raise concerns about their ability to perform their duties safely in the context of the violence that accompanied the strike.
- [7] On 9 and 10 October 2012 the applicants demanded adequate security from the respondent and refused to perform their duties. On 10 and 11 October 2012, the respondent suspended the applicants and charged them with gross insubordination and gross negligence. Following a disciplinary enquiry, the respondent dismissed the applicants on 22 October 2012.
- [8] The applicants plead that they were dismissed for participating in an unprotected strike and that their dismissals were unfair for *inter alia* the following reasons:
- 8.1 the respondent failed to contact a FAWU official at the earliest opportunity, or at all, to discuss the course of action it intended to adopt;

8.2 the respondent failed to issue an ultimatum to the applicants; and

8.3 the strike was in response to unjustified conduct on the part of the respondent in failing to provide adequate security for the applicants.

[9] In the alternative, in the event that it is found that the applicants were not dismissed for participating in an unprotected strike, the applicants plead that their dismissals were nevertheless substantively and procedurally unfair for the following reasons:

9.1 the applicants did not commit the misconduct alleged;

9.2 the respondent's instruction to the applicants to perform their duties in circumstances where widespread violence and intimidation had been reported was unreasonable and unfair.

9.3 the respondent failed to ensure a working environment which was safe and without risk to the applicants; and

9.4 the sanction of dismissal was too harsh given that the duration of the alleged misconduct was only one shift.

[10] The respondent denies that it dismissed the applicants for participating in an unprotected strike and pleads that "neither the individual applicants nor the respondent regarded the individuals' conduct as a strike at the time." The respondent pleads that the applicants were dismissed for gross insubordination and gross negligence and that their dismissals were fair.

The Evidence

[11] The respondent led the evidence of Mr Muzi Shilenge, the distribution manager at its Devland depot where the applicants were based prior to their dismissals.

- [12] The applicants led the evidence of two of their number: Mr Donald Ncongwane and Mr Vusimuzi Makumbene.
- [13] All the applicants, except Mr Makumbene, were suspended and charged on 10 October 2012. Mr Makumbene was suspended and charged on 11 October 2012. The reasons for this will become apparent below.
- [14] I set out the relevant evidence below. As will be apparent, much of it was common cause or not seriously disputed between the parties.
- [15] From 25 September 2012 to 12 October 2012 SATAWU embarked on a nation-wide strike involving truck drivers. The strike was marred by serious violence, with a number of incidents involving the torching of trucks and the assault of truck drivers taking place.
- [16] The applicants did not participate in the strike and continued performing their duties as truck drivers for the respondent.
- [17] The respondent accepted that the violence which accompanied the SATAWU strike placed its drivers at risk and put security measures in place in an effort to mitigate this. These included morning meetings at which hotspots were identified and the daily route amended where necessary as well as the provision of armed escorts for drivers.
- [18] During the course of the strike, the respondent sent messages to its drivers, including the applicants, in which it acknowledged the difficult circumstances under which they were working and thanked them for their efforts.
- [19] During the course of the strike, the applicants complained to the respondent that where armed escorts were provided, they failed to accompany the trucks on their full route and tended to turn back half way or even earlier. The applicants were told by the escorts that they did this because they were not being reimbursed for petrol and toll fees and were out of pocket as a result.

- [20] On 8 October 2012, one of the respondent's trucks was attacked in Orange Farm. The applicants testified that the truck was shot at and this is recorded as a common cause fact. Mr Shilenge testified, however, that it was not clear whether the damage to the truck was the result of bullets or rocks. It does not matter.
- [21] This was the first time during the course of the SATAWU strike that one of the respondent's trucks had been attacked.
- [22] Mr Ncongwane testified that when the applicants (with the exception of Mr Makumbene) arrived at work on 9 October 2012 they asked to speak to Mr Shilenge. They told him that they feared for their lives. They told him that they had had a problem during the entire course of the strike with their escorts leaving them half way and that this had not been resolved. They said that now that one of the respondent's trucks had been attacked they felt that the strike would affect them, that they would be targeted. They said that they would not perform their duties until the respondent provided them with adequate security.
- [23] Mr Shilenge, in his evidence, did not deny that the applicants had complained about the escorts prior to and during this meeting. Mr Shilenge testified that previous complaints in this regard had been addressed. He did not however explain how this had been done. Notably, when Mr Shilenge was asked under cross examination whether his response to the applicants on 9 October 2012 was that their complaints in this regard had been addressed, his answer was no.
- [24] Also important in this regard are the following common cause facts:

"The 14 individuals raised a number of issues regarding security, which were, inter alia, as follows:

there were not enough security escorts;

security escorts were leaving trucks unaccompanied on the freeways;

security vehicles were unmarked;

some security escorts indicated that they were not provided with petrol and toll fees.

Shilenge acknowledged the issues raised and indicated that he would take up the issues with the Risk Management Unit who would address the issues with the relevant security company.”

- [25] Mr Shilenge confirmed in his evidence that after hearing the applicants on 9 October 2012 he had told them that he would take their security concerns to the respondent's senior management and revert to them. It is common cause that he asked the applicants, in the interim, to deliver in Devland only. The applicants refused.
- [26] Mr Shilenge then called his supervisor and the Depot Manager for Devland, Mr Tshepo Ramonyalioa to speak to the applicants. Mr Ramonyalioa arrived and asked what the problem was. Mr Ncongwane said this surprised the applicants because they had been complaining about the escorts for several weeks and had been told that their complaints had been escalated, yet Mr Ramonyalioa did not seem to know what the problem was. Mr Ncongwane stated that the applicants proceeded to explain their security concerns to Mr Ramonyalioa “from the beginning.”
- [27] Mr Ramonyalioa told the applicants that he and Mr Shilenge would take their security concerns to the respondent's senior management and revert to them. Like Mr Shilenge, Mr Ramonyalioa asked the applicants, in the interim, to make deliveries in Devland only. The applicants refused.
- [28] Mr Shilenge testified that he regarded the applicants' refusal to make deliveries in Devland only as unreasonable because Devland had never been identified as a hotspot and there was therefore no safety risk associated with making deliveries there.
- [29] The applicants' pleaded case was that they refused to deliver in Devland

because they considered that their lives may be in danger there too. In his testimony however, Mr Ncongwane said that the applicants did not refuse to deliver in Devland because of safety concerns but because there were only a few wholesalers in Devland and because their trip sheets did not stipulate that they should deliver in Devland.

[30] Whatever the true reason for the applicants' refusal to deliver in Devland, the fact remains that they refused to perform their normal duties until they were provided with adequate security.

[31] It is therefore clear that, notwithstanding this discrepancy, the following evidence is undisputed:

31.1 the applicants refused to perform their normal duties until the respondent provided them with adequate security; and

31.2 Mr Ramonyalioa and Mr Shilenge undertook to take the applicants' security concerns to the respondent's senior management and to revert to them.

[32] Mr Ncongwane testified that the applicants were in the canteen at the Devland depot around lunchtime on 9 October 2012. They had received no feedback from the respondent's management at this stage. While in the canteen, the applicants were approached by a number of so-called "owner-drivers" (drivers engaged by the respondent as independent contractors) who said that since the applicants were refusing to work, they intended to perform their deliveries. The owner-drivers took the applicants' hand held terminals (HHT's) from them and left the depot

[33] Mr Ncongwane testified that at this stage the applicants felt that they needed advice from their union. Since their shop steward was not present at the depot on that day, they took a decision to go to FAWU's office in Johannesburg and obtain advice. They travelled to the FAWU office in two cars. Mr Ncongwane

testified that Mr Shilenge phoned him and asked where the applicants were. Mr Ncongwane answered that they were at FAWU's office in Johannesburg. There was no further discussion between the two. Mr Shilenge, in his evidence, did not deny this account and in fact confirmed that he had heard from one of the applicants that they were at the FAWU office at around lunchtime on 9 October 2012.

- [34] At 13:05pm on 9 October 2012 Mr Shilenge sent SMS messages to all the applicants instructing them to attend a meeting at the Devland depot at 13:30pm.
- [35] It is common cause that the applicants did not attend this meeting.
- [36] Mr Ncongwane confirmed that the applicants received the SMS messages. He testified that the applicants left the FAWU office and travelled back to the Devland depot but arrived there some time after 13:30pm. Mr Ncongwane testified that on arrival, the applicants met one of their team leaders who advised them that their issues would be dealt with the following day. The applicants accordingly left the depot.
- [37] Mr Ncongwane testified that on 10 October 2012, Mr Mohlalo, FAWU's legal officer went to the Devland depot in an attempt to intervene in the matter but was refused entry. It was put to Mr Shilenge in cross examination that he gave the instruction to refuse Mr Mohlalo entry. Mr Shilenge denied this and testified that he did not recall FAWU's legal officer coming to the depot on 10 October 2012.
- [38] Shortly after their arrival at the Devland depot on 10 October 2012, the applicants, with the exception of Mr Makumbene, were suspended and charged with misconduct in the following terms:

"Gross insubordination in that you refused to obey a lawful and reasonable instruction to resume your normal delivery duties on Tuesday, 9 October 2012 as per your contract of employment and thereby adversely affecting customer

services, sales volumes and your relationship with the company; and

Gross negligence, in that you left your work station without permission and purposely left the delivery loads undelivered to customers on Tuesday 9 October 2012.

- [39] On 10 October 2012, Mr Makumbene and two other FAWU members who had not been present at work on 9 October 2012, clocked in at the Devland depot. Mr Shilenge testified that these employees indicated to him that they would not perform their duties as they did not feel that it was safe to do so and demanded adequate security. Mr Shilenge's testimony in this regard accords with the following common cause fact:

"On 10 October 2012, Norman Mogashoa, Vusimuzi Makumbene and Zacharia Thamage informed the respondent that they could not perform their duties as they did not feel it was safe to do so given that the SATAWU strike was still ongoing and allegedly intensifying."

- [40] In his testimony however, Mr Makumbene denied that he refused to work on 10 October 2012. He testified that he asked Mr Shilenge to provide him with security and that Mr Shilenge did not answer him and simply took his HHT from him, rendering him unable to work.

- [41] There are a number of difficulties with Mr Makumbene's evidence in this regard. Firstly, it contradicts what is recorded by the parties as a common cause fact. Secondly, it was never put to Mr Shilenge for him to answer to. Thirdly, it is in my view highly improbable that Mr Shilenge would have prevented Mr Makumbene from making his deliveries on 10 October 2012 if he was willing to do so. For all these reasons I reject this evidence and find that Mr Makumbene, together with Mr Mogashoa and Mr Thamage, refused to perform their duties on 10 October 2012 until they were provided with adequate security. In so doing, they acted in solidarity with the applicants who had refused to perform their duties on 9 October 2012.

- [42] On 11 October 2012, Mr Makumbene was suspended and charged with misconduct in the following terms:

“Gross misconduct – refusing to obey a lawful and reasonable instruction on Wednesday 10 October 2012 to continue with your normal driver duties and therefore you are in breach of your contract of employment.”

- [43] A single disciplinary enquiry was held at which the applicants were found guilty of all the charges against them.
- [44] The applicants were dismissed on 22 October 2012.
- [45] On the question of relief, it became common cause during the trial that reinstatement is not reasonably practicable, the respondent having outsourced its delivery function in its entirety.
- [46] It also emerged during the trial that, on 9 May 2016, the respondent made a without prejudice settlement offer in terms of which it offered to pay each of the applicants an amount equivalent to 12 months salary in full and final settlement of their claim. The applicants rejected this offer. In their evidence, the applicants stated that they did so because the offer did not include the value of shares which they believed they were entitled to in terms of a share scheme which they had participated in during their employment with the respondent.

Applying the Law to the Facts

- [47] The respondent contends that the applicants were not dismissed for participating in an unprotected strike but for gross insubordination and gross negligence. However, it is evident from the charges which have been quoted above that the substance of the misconduct with which the applicants were charged and found guilty was refusing to perform their duties. If the applicants' refusal to perform their duties amounted to strike action then they were dismissed for participating in an unprotected strike (there of course being no suggestion of any protected strike in this case).
- [48] Whether the applicants were engaged in a strike action is a question which

must be determined objectively with reference to the LRA's definition of strike.

[49] "Strike" is defined in section 213 of the LRA as follows:

"The partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory."

[50] It is well established that this definition entails four elements:

50.1 Firstly, there must be a stoppage of work. The duration or extent of the stoppage is irrelevant.

50.2 Secondly, there must be joint action, in the sense that the employees must down tools with a common purpose.

50.3 Thirdly, the action must be aimed at inducing the employer, as opposed to another third party, to comply with a demand.

50.4 Fourthly, the refusal to work must be *"for the purpose of remedying a grievance or resolving a dispute in respect of a matter of mutual interest between employer and employee."*

46 The first three elements of the definition are clearly established in this case.

47 The fourth element has been described in the following terms:

"Either a grievance or a dispute must therefore exist before workers can be deemed to be on strike and the strikers must intend their action to remedy or resolve that grievance or dispute. Workers that mutually resolve to stay away from work to, say, watch a rugby match will therefore not be on strike. (Although if they down tools in support of a demand that the employer give them time off to watch rugby, then they will be on strike). However, employees who stop work in support of a demand that the employer discuss a grievance with them will be deemed on strike. Even a demand that

management attend a meeting is sufficient.”²

- [51] In this case, the evidence established that the applicants were aggrieved with regard to the security measures put in place by the respondent to protect them during the SATAWU strike, demanded that the respondent provide them with adequate security and refused to perform their normal duties until the respondent had complied with their demand. The applicants’ refusal to work was therefore *“for the purpose of remedying a grievance in respect of a matter of mutual interest between employer and employee.”*
- [52] This applies to the action by the applicants on 9 October 2012 as well as to the action by Mr Makumbene on 10 October 2012. I am therefore satisfied that the applicants’ refusal to work on 9 and 10 October 2012 amounted to unprotected strike action.
- [53] That being the case, the respondent was required to follow certain mandatory procedures prior to dismissing the applicants. Of application in this regard is item 6 of the Code of Good Practice which provides as follows:
- “(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 these 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 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 intends 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 employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.” (emphasis added)

² Grogan *Workplace Law* (Juta, 11th ed) at p 371.

[54] The requirements highlighted above are not mere formalities. On the contrary, the purpose of requiring the employer to make contact with the union is to give the union an opportunity to dissuade the employer from dismissing the strikers and to persuade the strikers to return to work. The Labour Appeal Court has held that consultation with the union serves the function of a pre-dismissal hearing.³ A mere notice to the union that the employer intends to issue an ultimatum is therefore insufficient. Some form of discussion must precede the ultimatum to the strikers.⁴

[55] On the rationale behind the need to issue an ultimatum, the following has been said:

“The final requirement set out in the Code is that the employer must give the employees an ultimatum before dismissing them. The reason is obvious: workers embark on strike action to compel their employer to comply with their demands. An ultimatum informs the workers that an employer would rather dispense with their services than yield. Both logic and fairness therefore require that the striking workers be afforded an opportunity to reconsider their positions before the employer pulls the trigger.”⁵

[56] In this case, the respondent did not comply with either of these requirements. There was no attempt whatsoever by the respondent to contact FAWU to discuss the matter. This was despite the fact that Mr Shilenge established that the applicants were at FAWU’s office at around lunchtime on 9 October 2012.

[57] The applicants contend that FAWU’s legal officer arrived at the Devland depot on the morning of 10 October 2012 in an effort to intervene in the matter and was denied entry. As stated above, Mr Shilenge denied this. Even however if I accept the respondent’s version in this regard, Mr Shilenge confirmed, in response to a question from the Court, that between the time that he spoke to Mr Ncongwane on 9 October 2012 and the time that he suspended and charged the applicants on 10 October 2012 no attempt was made by the

³ See *Modise and Others v Steve’s Spar Blackheath* (2000) 21 ILJ 519 (LAC)

⁴ Grogan *Workplace Law* (Juta, 11th ed) at p 470.

⁵ Grogan *Workplace Law* (Juta, 11th ed) at p 471.

respondent to contact FAWU. This failure, on its own, means that this legal requirement was flouted. In my view, the law, as well as common sense, dictated that the respondent contact FAWU to discuss the matter and its failure to do so was unreasonable in the circumstances.

[58] This is particularly so having regard to the nature of the demands made by the applicants and the context in which they were made. The evidence established that the applicants had previously raised the issue of armed escorts failing to accompany them on their full routes and that this issue had not been resolved by 9 October 2012. This was a serious issue that deserved to be engaged with seriously by the respondent. It was also understandable that the incident at Orange Farm that took place on 8 October 2012 would have heightened the applicants' sense of insecurity and added impetus to their demands to have their security concerns urgently addressed. The respondent ought to have appreciated this, particularly given its earlier acknowledgement of the difficult circumstances in which the applicants were working.

[59] In my view, the applicants' demands were not unreasonable in the circumstances and the respondent ought to have engaged with them sympathetically and constructively with the involvement of FAWU. Had the respondent done so, it is in my view probable that the dismissals could have been avoided. At the very least, in the event that it was not possible to resolve the matter in discussion with FAWU, the respondent ought to have issued the applicants with an ultimatum, placing them on terms and giving them an opportunity to resume their duties, prior to taking action against them as it did.

[60] All the applicants, including Mr Makumbene, were entitled to the legal protections referred to above.

[61] The respondent's failure to make any attempt to contact the applicants' union or give the applicants an ultimatum prior to dismissing them for participating in an unprotected strike rendered the applicants' dismissals substantively and

procedurally unfair.

[62] As stated above, it became common cause during the trial that reinstatement is not reasonably practicable. Having regard to the above findings and particularly to the finding that the applicants' demands were not unreasonable in the circumstances, I am of the view that they are entitled to the maximum compensation permitted by law.

[63] The applicants were offered the equivalent of 12 months salary each as compensation and refused it. As stated above, the reason given for this was that the offer did not include the value of shares to which the applicants considered they were entitled. If the applicants believe they have a claim against the respondent for the value of shares, they are at liberty to pursue that in the appropriate forum. The respondent's failure to make a tender in relation to the shares was not, however, in my view, a reasonable basis on which to refuse an offer of settlement in respect of the applicants' unfair dismissal dispute. The respondent's offer was equivalent to the maximum compensation permissible in law in respect of this dispute. For these reasons, the applicants' rejection of the offer was unreasonable and they shall not be entitled to their costs as a consequence.

[64] The applicants filed their statement of case late which necessitated an application for condonation. That application was granted by Gush J on 4 April 2015 and costs were reserved. The applicants filed their statement of case late despite a clear order from Cele J requiring them to refer the matter to Court within 14 days. I am of the view that, in these circumstances, it would not be fair to require the respondent to pay these costs either.

[65] I accordingly make the following order:

Order

1. The dismissals of the second and further applicants (being the persons

referred to in paragraph 4 above) are declared to be substantively and procedurally unfair.

2. The respondent is ordered to pay each of the second and further applicants an amount equivalent to 12 (twelve) month's remuneration calculated at the individual's rate of pay on the date of dismissal, within one month of the date of this judgment.
3. There is no order as to costs.

Heidi Barnes
Acting Judge of the Labour Court

Appearances:

For the Applicants: Mr S Kuane (FAWU official)

For the Respondent: Adv S Khumalo instructed by Bowman Gilfillan Inc