



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

**Case no: JS 2015/14 &
JS 406/14**

In the matter between

AMCU OBO L.S. RANTHO & 158 OTHERS

First Applicant

TEBOGO MOSES MATHIBA

Second Applicant

and

SAMANCOR WESTERN CHROME MINES

Respondent

Heard: 6 November 2017

Delivered: 8 November 2017

JUDGMENT: POINT *IN LIMINE*

TLHOTLHALEMAJE, J:

Introduction:

- [1] The first applicant, the Association of Mineworkers and Construction Union (AMCU) approached this Court by way of a statement of claim to seek an order declaring the dismissal of its members (the individual applicants) by the respondent following upon their participation in an unprotected strike action by to be procedurally and substantively unfair.

- [2] In the signed pre-trial minutes, the respondent had indicated its intention to raise a preliminary point in respect of the procedural attack on the dismissal of the individual applicants. It contended that AMCU, by entering into a settlement agreement with it, waived its right to challenge the procedural aspect of the individual employees' dismissal.
- [3] The second applicant, Mr Tebogo Moses Mathiba was also dismissed together with the individual applicants and had referred a separate claim. That claim under case number JS406/14 was subsequently consolidated in terms of an order issued on 17 April 2015. Despite his substantial interest in the matter arising from the preliminary issues raised, his counsel Mr. Saljee had declined to make any submissions in that regard.

Background:

- [4] AMCU is a registered trade union in terms of the relevant provisions of the Labour Relations Act (LRA).¹ It approached this Court on its own behalf and on behalf of its members who were before their dismissal, employed by the respondent at its' Mooinooi mining operations. The individual applicants were dismissed on 13 December 2013 for participating in an unprotected industrial action.
- [5] During the period of the industrial action, there were three (3) recognised trade unions within the Western Chrome, namely, AMCU, the Union of Mineworkers (NUM) and the United Association of South Africa (UASA). On 25 November 2013, the individual applicants employed by the respondent embarked on an unprotected industrial action. Upon the commencement of the industrial action, the members of AMCU approached the management of the respondent at both its Mooinooi and Millsell operations with a list of demands.
- [6] During the course of that day, the representative of the respondent met with AMCU officials to discuss the list of demands. It is common cause that AMCU

¹ Act 66 of 1995, as amended

members failed to tender their services on that day, and were issued with at least two ultimatums to return to work.

[7] The normal working shift ordinarily commences at 06:00 hours every morning. On 26 November 2013, the members of AMCU returned to work at about 06:30. The respondent thereafter elected to prefer charges of misconduct for *inter alia* participating in an unprotected industrial action against all its employees, including the members of AMCU who had not rendered their services on 25 and 26 November 2013.

[8] A written notice was forwarded to AMCU and other unions officials informing them of the charges preferred against the employees. The notice was also placed on the respondent's notice boards on 6 December 2013. The notice *inter alia* recorded the following:

“...

All employees who are members of a union will be represented by their appointed union representative at the hearing and are accordingly not required to attend the hearing

Those employees who are not members of a recognised union may amongst themselves elect not more than 4 (four) employees to represent them at the hearing. Management must be advised on or before 12h00 on 10 December 2013 whose representative will be”

[9] The employees were not suspended pending the commencement of the internal disciplinary hearing and the outcome thereof. On 10 December 2013, the Secretary General of AMCU, Mr J. Mphahlele, requested a meeting to be held on 12 December 2013, in order to discuss the industrial action. On the same day, Mr Phillip Mntombi a representative of the local branch of AMCU communicated with the respondent's Human Resource Manager, Ms Anele Janse van Rensburg informing the respondent that the representatives of AMCU were not going to be available to attend the disciplinary hearing scheduled for 11 December 2013. He had provided two alternative dates for the hearing. In a response to Mr Mntombi's communication, Ms Janse van Rensburg indicated that all the unions were issued with a 48 hours' notice of

the disciplinary hearing and as such, the disciplinary hearing would continue in the absence of AMCU.

- [10] On 11 December 2013, AMCU representatives were not present at the hearing, the internal disciplinary hearing accordingly proceeded in their absence. On the same day, the Chairperson of the hearing sent correspondence to Mr Mphahlele of AMCU, and advised him that due to the fact that no application for postponement was made and that no apologies were received for the non-attendance by AMCU, the hearing had proceeded in its absence. Moreover, AMCU was advised that the outcome of the hearing was to be made available at the same venue on 13 December 2013 and further that the parties would have an opportunity to make representation in respect of mitigating and aggravating circumstances.
- [11] On 13 December 2013, AMCU again did not attend the hearing on the outcome and the sanction. At the conclusion of the process, all members of AMCU were found guilty of misconduct and a sanction of dismissal was imposed. However, the rest of the other employees, including members of other unions and non-unionised employees were found not guilty of misconduct.
- [12] In terms of the respondent's disciplinary code and procedure, an employee who is aggrieved by an outcome of an internal disciplinary hearing, may lodge an appeal within two (2) business days from the date she/he becomes aware of the disciplinary outcome. On 13 December 2013, correspondence was forwarded to AMCU with a list of members of AMCU who were dismissed as a result of the internal disciplinary hearing. AMCU was also advised that due to the impending Christmas break, the period in which to lodge an appeal will begin on 6 January 2014 and the deadline for lodging the appeal would be the 8 of January 2014.
- [13] The representatives of the respondent and AMCU met on 7 January 2014 to discuss the processes of lodging and conducting the appeal. It was agreed that the appeal would be held on 22 January 2014 and 23 January 2014. Before the commencement of the appeal, the parties commenced settlement

discussions surrounding the dismissed employees, and this had culminated in a settlement agreement being entered into.

[14] In terms of the settlement agreement, it was agreed under clause 2 that;

- 1) 127 Employees who were on leave on 25 November 2013 would be reinstated with retrospective effect from the date of dismissal; (clause 2.1.1)
- 2) 134 Employees who had reported for work but did not proceed to their workstations would be reinstated with retrospective effect from the date of dismissal; (clause 2.1.2)
- 3) 365 Employees who did not report for work on 25 November 2013 but were not a valid final written warning as at 25 November 2013 would be reinstated with retrospective effect; (clause 2.1.3)
- 4) 159 Employees who were dismissed and had valid final written warnings for similar misconduct were not to be reinstated, and their dismissal was effective from 13 December 2013. (clause 2.1.4)
- 5) The Union reserved its rights to refer a dispute as provided for in terms of the LRA, and the employer would have the same right to challenge such a referral in terms of the LRA.

[15] On 31 January 2014, AMCU referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Conciliation having failed, the matter was referred to this Court for adjudication.

[16] The final written warnings referred to in the settlement agreement were those issued to employees following upon another industrial action that took place on 28 and 29 May 2013 at the Moonooi Shaft² In the parties' signed pre-trial minutes, and other than the preliminary issues to be raised, the applicants disputed that;

- i. they were properly issued with the final written warnings;

² Page 23 of Vol 1 of Trial Bundle

- ii. that AMCU was not properly and timeously informed of the respondent's intention to issue its members with final written warnings
- iii. that AMCU was advised that it was entitled to appeal the final written warnings
- iv. that neither AMCU nor the individual applicants appealed the final written warnings
- v. that the final written warnings were properly served on the individual applicants
- vi. that the final written warnings were still valid at the time of the conclusion of the settlement agreement.

[17] In these preliminary proceedings the Court is called upon to determine:

- 17.1. Whether the applicants are bound, in terms of clause 2.1.4.1 of settlement agreement from challenging the validity of the final written warnings which were issued to the individual applicants and other former employees during July 2013;
- 17.2. Whether the individual applicants are precluded, in terms clause 3.2 of the settlement agreement from challenging the procedural fairness of their dismissal on 13 December 2013;
- 17.3. Whether this Court should hear evidence of the individual applicants in order to determine the preliminary point, whether the individual applicants are the 159 employees to whom reference is made in clause 2.1.4.1 of the settlement agreement.

[18] In regard to the first issue, clause 2.1.4.1 of the Settlement Agreement states that;

'2.1.4.1 By the time the 159 employees where dismissed, as listed in terms of Annexure 'E', the employees referred to had a valid final written warning for similar misconduct' (sic)

- [19] It was submitted on behalf of the respondent that properly interpreted, clause 2.1.4.1 of the Settlement agreement constituted an admission by AMCU that the final written warnings related to the 28 and 29 May 2013 industrial action were issued for valid reasons and were still effective as at the date of their application in a further industrial action of 25 November 2016.
- [20] From the documentation before the Court, I did not understand the applicants' case to be that they denied the events of 28 and 29 May 2013. Correspondence was sent to all the Unions on 7 June 2013 advising them that as a result of the illegal strike activities that took place on 28 and 29 May 2013, all employees who had participated in those activities were to be issued with Final Written Warnings. Copies of these warnings issued to the individual employees are contained in the trial bundle³. NUM appears to have lodged an appeal on behalf of its members on the same date that it was informed of the final written warnings⁴.
- [21] In determining whether the applicants are bound in terms of the provisions of clause 2.1.4.1 of the settlement agreement, it should be taken into account that the agreement came about as a result of the unprotected industrial action embarked upon by the employees, the disciplinary process that had led to their dismissal, and the parties' intention to resolve disputes surrounding the dismissals. It is trite that the court should unless the words in the agreement are ambiguous, give them their plain, ordinary and popular meaning. In certain circumstances, extrinsic evidence may be permitted to show the intention of the parties.
- [22] I am of the view that upon a full consideration of the context of the agreement, and the background as illustrated in this judgment, there can be no reason to doubt that various considerations were taken into account by the parties when negotiating that agreement, including the employees' disciplinary records. It was further not in dispute that a final written warning issued to an employee remain valid, *i.e.* live, and on the employee's employment record for a period of 12 months. Clause 2.1.4.1 properly construed therefore in line with the

³ Pages 24 – 182 of Trial Bundle. Vol 1

⁴ Page 182 (c) of the Trial Bundle Vol 1

factors taken into account by the parties entails an acknowledgement on their part that at the time of their dismissal, the employees had valid final written warnings for similar misconduct. That similar misconduct in the absence of a denial can only be in reference to the strike action of 28 and 29 May 2013.

- [23] Mr Redding on behalf of the applicants had submitted that the issue of previous final warnings was central to the decision to dismiss the employees, and that it could not be divorced from the other issues to be determined in trial proceedings for the purposes of convenience. In this regard, reference was made to *Changula v Bell Equipment*⁵ for the proposition that an employer in dismissing the employee on the strength of a prior warning was wrong in concluding that, because the employee had acquiesced in the final warning, there was no need to have regard to the circumstances which gave rise to that previous warning. In the same judgment however, the then LAC had added that;

“...it must be emphasised that it is not intended in this judgment to lay down a general rule that employers when disciplining employees must reopen and reconsider previous disciplinary cases against the employee”⁶

- [24] A further difficulty with the applicants’ defence to the preliminary point pertains to the application of the provisions of section 186 (2) of the LRA⁷. The dispute resolution scheme in respect of any alleged unfair labour practice, including the challenge to final written warnings is contained in sections 135 and 191 of the LRA. A long line of authorities in this court hold the view that it is trite law that disciplinary steps which are not challenged timeously cannot be

⁵ (1992) 13 ILJ 101 (LAC)

⁶ At page 10

⁷ Which provides that;

- (2) Unfair labour practice’ means an unfair act or omission that arises between an employer and an employee involving-
- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
 - (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
 - (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
 - (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.’

challenged belatedly when the final step of dismissal is taken⁸. In my view, to therefore allow the applicant to challenge the previous final warnings issued in June/July 2013 at this stage of the trial proceedings would be to countenance the circumvention of the dispute resolution scheme as contained in sections 135 and 191 of the LRA.

[25] Clause 2.1.4.3 of the settlement agreement to the extent that it permitted the applicants to reserve their rights and refer any further disputes to this Court cannot be read to include that they are entitled to approach the Court with a belated challenge to the previous final written warnings. It is therefore not correct as submitted on their behalf that they can challenge anything to do with their dismissal in this Court at this stage. To this end, the applicants are precluded from mounting any challenge to the validity or fairness of the previous final warnings issued in respect of the industrial action of 28 and 29 May 2013.

[26] In respect of the second preliminary point, clause 3.2 of the settlement agreement provides that;

'The Union has elected not to exercise the right of the dismissed employees to appeal their dismissal, and the appeal on behalf of the dismissed employees is hereby withdrawn.'

[27] Mr. Van As' contention on behalf of the respondent was that by withdrawing their appeal, the applicants deprived the respondent of the opportunity of remedying any defect or even holding a *de novo* disciplinary hearing. Thus, to the extent that the applicants had failed to attend their disciplinary enquiry and thereafter withdrawing their appeal, it was submitted that they had waived or abandoned their right to challenge the procedural fairness of their dismissals, or alternatively, their procedural challenge should be confined to the reasons for not attending the disciplinary hearings as scheduled.

⁸ *Cliff Choene v Mitsui & Company Southern Africa (Pty) Ltd* Case No: J185/06. See also *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* [2001] 9 BLLR 1011 (LAC); *NUM & Another vs. Amcoal Colliery* [2000] 8 BLLR 869 (LAC); *Builders Trade Depot v CCMA & Others* [2012] 4 BLLR 343 (LC)

- [28] Two central complaints were raised in regard to the procedural fairness of the dismissal. The first pertained to whether the respondent had convened the appeal proceedings within the time frames stipulated in the disciplinary code and procedure. This issue can however be disposed of on the basis that it was common cause that the appeal proceedings were to take place over the Christmas period and the respondent had sent correspondence to the Union advising it of the postponements. I further fail to appreciate the vigour with which this issue is pursued in view of little or no prejudice having been suffered by the individual applicants⁹. If there is indeed any prejudice suffered by the individual applicants, that is an issue that can be determined within the conclusions to be made in respect of the second preliminary issue raised.
- [29] The question as to whether by withdrawing the appeals, the applicants had waived their rights to challenge the procedural fairness of their dismissal in its entirety must be determined within the context within which the settlement agreement was concluded. Clause 1.3 of the agreement states that the parties met on 22 and 23 January 2014, in an attempt to narrow the issues to be addressed at the appeal hearing. Having reached settlement, the Union had elected not to exercise the employees' right to appeal, and had withdrawn those appeals.
- [30] In the light of the above, it would in my view be iniquitous to conclude that the withdrawal of the appeals should amount to a waiver to challenge the procedural fairness of the dismissal without affording the applicants or the Union an opportunity to explain the circumstances which led to it not attending the disciplinary hearings, and its intention in regard to the withdrawal of the appeals in the light of the reservation of its rights under clause 2.1.4.3. It is further trite that the provisions of any agreement, whether collective or otherwise, cannot trump an employee's constitutional rights to fair labour practices.
- [31] The third and last preliminary point essentially boils down to whether the 159 employees identified under clause 2.1.4.1 were so correctly identified for the purposes of their dismissal on the basis that they had valid final written

⁹ *Rand Water Board v CCMA (2005) 26 ILJ 2028 (LC)* at 2032

warnings on their records. To require this Court to go through an elaborate exercise in this regard is a big ask, as it would require of it to hear evidence from each employee as to why they allege that they were not properly identified.

[32] I am further of the view that the issue of the identification of the employees was a matter which should have been dealt with by the parties at the time that the settlement agreement was concluded. In any event, this exercise would negate the conclusions reached in regard to the first preliminary issue raised, which was that a valid final written warning was live at the time of their dismissal in respect of all of them. In my view, once the Union had conceded at the time of the conclusion of the agreement that indeed these individual applicants had previous final written warnings, it is not for this Court in the light of the other numbers consented to in reaching settlement to re-look at those numbers.

Order:

[33] In the premises, the order of the court is as follows;

1. The respondent's first preliminary point is upheld, and the applicants are accordingly precluded from challenging the validity of the final written warnings which were issued to them and other employees in June and July 2013.
2. The second preliminary issue is dismissed, and the applicants are permitted to challenge the procedural fairness of their dismissals on 13 December 2013.
3. The third preliminary point is upheld, and the applicants are barred from leading evidence to determine whether they are the 159 employees identified in clause 2.1.4.1 of the Settlement Agreement
4. Costs associated with the preliminary points are to be costs in the cause.

E Tlhotlhemaje
Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the First Applicant: Adv. A. Redding SC with Adv D. Greyling-Coetzer

Instructed by: Harry Dave Attorneys

For the Second Applicant: Adv Y.F Saloojee

Instructed by: Scholtz Attorneys

For the Respondent: Adv. M.J Van As

Instructed by: Solomon Holmes Attorneys

LABOUR COURT