IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable - of interest to other Judges

CASE NO.: JS 599/2015

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA First Applicant

MASEKO & 17 OTHERS Second to further Applicants

and

SGB TEDOC CAPE Respondent

Trial: 26-28 February 2018

Judgment: 2 March 2018

JUDGMENT

VAN NIEKERK J

Introduction

[1] The respondent is a sub-contractor on Eskom's Kusile site and employed the second to further applicants (the employees) in that capacity. The employees are all members of the first applicant (the union). They were dismissed by the respondent for unlawfully refusing to work.

[2] The applicants initially contended that the employees' dismissal was substantively and procedurally unfair. During argument, Mr Masutha, who represented the applicants, abandoned that part of the claim which relates to substantive fairness. The only issue for decision then is whether the employees' dismissal was procedurally fair.

[3] The applicants' case is recorded in paragraph 6 of their statement of claim. They contend that the respondent failed to comply with items 6 (1) and (2) of the Code of Good Practice, that the respondent failed to engage with the union after it issued an ultimatum to return to work, that it chose to institute disciplinary proceedings against the employees, that the respondent failed to engage with or involve union officials who had availed themselves for discussion, and that 'other applicants' were not present on the day that the strike occurred.

[4] The applicants seek an order of compensation.

Material facts

[5] The relevant factual background, to a large extent, is a matter of common cause. The employees were housed at what is described as the Boslapa residence, where board and lodging was provided by Eskom. During December 2014, the employees complained about the actions of one of Boslapa's employees, one Stella. Matters came to a head on 5 February 2015, when a committee representing the employees addressed a letter to the manager of the establishment, a Mr Kruger, requesting that Stella be removed from the premises. Mr Letsebe, the respondent's industrial relations officer, testified that he attended at Boslapa on the evening of 9 February 2015, where he met with

representatives of the owners, the employees, and the catering company. Letsebe pointed out to the employees' representatives that Stella was not employed by the respondent but he undertook to address the issue through the appropriate channels. I accept Letsebe's evidence that he had sight of the latter dated 5 February 2015 only on the evening of 9 February 2015. The letter was addressed and delivered to Kruger on 5 February 2015, and Mr Hlatswayo, the author of the letter, could do no more than offer an assumption that Letsebe had been furnished with a copy of the letter earlier than 9 February 2015.

[6] Be that as it may, despite the undertaking given by Letsebe, on the morning of 10 February 2015, the employees refused to work, demanding that Stella be removed. Hlatswayo, the only one of the employees to testify, acknowledged that the decision to refuse to work was deliberate and premeditated, and that no formal grievance concerning Stella's conduct had been lodged in accordance with the applicable procedure.

[7] The respondent became aware of the employees' refusal to work early on the morning of 10 February 2015. Letsebe testified that he attended at Boslapa on 9 February 2015 at 7h10. The employees refused to go to work. Letsebe advised them to do so, and again undertook to take up their grievance with the respondent's principal contractor, since Stella was employed by Eskom. He explained to the employees that the respondent had no direct relationship with Stella and that he would need to resolve the matter with her employer. Letsebe testified that he remained at Boslapa for most of the day.

[8] It is not disputed that at 10h36, the respondent addressed an email to the union's shop stewards. The email reads as follows:

> Attached receive a notice about the unprotected strike. Note the urgency of this matter as we need to resolve this issue today.
>
> Awaiting your respond (sic).

[9] The attached notice reads as follows:

> UNPROTECTED/ILLEGAL STRIKE ACTION

1. Employees at the KUSILE POWER STATION site have embarked on unprotected/illegal strike action that does not comply with the provisions of S 64 of the Labour Relations Act, and the dispute procedures contained in the Project Agreement.
2. Contractor/employer issued an ultimatum (copy attached) to employees participating in this unprotected strike action. It is requested that as a matter of urgency, management, the union and employees representative meet to address workers reasons/concerns that give rise to the erection.
3. Management intends to protect its interests in the "Ultimatum" issued clearly indicates the course of action contractors/employers intends to take should the dispute not be resolved by 10 February 2015 and (sic) 13h00.
4. Management are available to meet with you on 10 February 2015 and (sic) 12h30 at its premises TEDOC SGB-CAPE JV at KUSILE POWER STATION.

…'

[10] The ultimatum reads as follows:

TO: TEDOC SGB CAPE EMPLOYEES RESIDING AT BOSLAP

Management of TEDOC / SGB- CAPE would like to confirm that employees engaged on illegal strike or in breach of the employment contract entered into between individual employees and TEDOC/SGB-CAPE.

Employees engaged in an illegal strike will lose will forfeit all the accumulated bonuses and the 'no work no pay 'principle will be fully applied

Resistance to the above notice will give no options to management on taking decision for disciplinary action is being taken against employees embarked on an illegal strike. You are required to report for duty not later than 13:00 hours today, 10 February 2015. Your cool off time period has lapsed.

Your cooperation in this regard will deviate undue disciplinary actions against your bad forms and aberrant behavior (sic).

[11] The 'cooling off' period referred to in the ultimatum is a reference to a clause contained in what is known as the 'site-specific agreement' (SSA). The SSA is a collective agreement that regulates conditions of work at the Kusile site and

binds all contractor, sub-contractors and their employees... Clause 4.8 of the agreement reads as follows

> 4.8 Cooling off period:
>
> 4.8.1 The Contractor affected will allow the Trade Unions 4 hours' time to resolve the issue. Should the dispute not be resolved within the above time period the Contractor shall be entitled to issue an ultimatum and take appropriate action.
>
> 4.8.2 All forms of industrial action will be treated as 'No Work-No Pay'.

[12] The preceding clause, 4.7, regulates industrial action. That clause reads as follows:

> 4.7 Unprotected industrial action:
>
> 4.7.1 Should any Party promote or participate in the industrial action not in compliance with the provisions of this Agreement, the LRA, Industry Agreements and the PA, that (sic) Parties shall immediately stop such promotion and participation and shall take all necessary steps to persuade its constituents to cease such action and to comply with the conditions of employment….
>
> 4.7.2 In the event of unprotected industrial action occurring, the Parties shall take all necessary steps to bring such action to an end.

[13] Letsebe testified that at 12h40, he had sight of the ultimatum issued by the respondent, which he showed to the employees. He also distributed a few copies to employees present. Letsebe testified that despite the ultimatum, the employees did not return to work.

[14] It is not disputed that the meeting scheduled for 12h30 did not take place. Letsebe could not offer any direct evidence of the circumstances, other than to say that he had been informed by Mr Tinus Ramagopotse, the human resource manager, that the union did not arrive. This version of events was disputed by Mr Nkonyane, a full-time shop steward. He testified that he arrived at the meeting venue at approximately 12h15 and that Ramagopotse left the premises, saying that he was going to a meeting at Eskom. Ms. Cecilia Mpofu, who was present representing the respondent, was asked about any ultimatum that had been

issued. Nkonyane testified that the meeting was advised that an ultimatum had been issued at 9h00 that morning. In the absence of the human resources manager, the meeting was rescheduled for later that afternoon, and later, for the following day, 11 February 2015. That meeting did not take place. Nkonyane's evidence regarding this exchange was not challenged under cross-examination, and I accept his version of events.

[15] On 11 February 2015, it is not disputed that the employees were excluded from the workplace by Eskom and that they were later suspended pending a disciplinary hearing.

[16] A disciplinary hearing was scheduled for 13 February 2015, on charges of an illegal work stoppage alternatively, an unlawful refusal to work.

[17] On 13 February 2015, the disciplinary hearing involving 117 employees was convened in the boardroom of the Bronkhorstspruit library. The hearing was chaired by a labour consultant, Mr Leslie Ntuli. There is a dispute about what transpired at the hearing. Letsebe testified that the unions requested that the matters be dealt with on an individual basis, since some of the employees had individually-based reasons for not attending at work on 10 February 2015. The unions also wished the matter to be dealt with in terms of what was referred to as the "CDR process", a procedure equivalent to that contemplated by s188 of the LRA, and which would have bypassed internal disciplinary processes in favour of an immediate referral to arbitration. Nkonyane's evidence was that such an agreement was, in principle, reached between the unions and the respondent, and for that reason, the unions left the hearing. Hlatswayo's testimony, consistent with the applicants' statement of case, was that a postponement was sought on the basis of employees' personal circumstances, and the fact that some of the employees who had been excluded from work were not present. Neither of these versions was put to Letsebe in cross-examination, and Letsebe's evidence regarding the disciplinary hearings was not challenged.

[18] In the absence of any indication afforded to Letsebe that his evidence would be the subject of challenge, and given the internal inconsistency in the evidence

proffered by the union, I accordingly accept that the unions sought to postpone the disciplinary hearing on the basis that individual hearings be held, and that when this was refused, the unions left the enquiry, refusing to further participate in it. I should mention that Letsebe's version is consistent with a document referred to by him, which appears to be summary of the proceedings of the disciplinary hearing, prepared by Ntuli. Ntuli records that after NUMSA and UASA had requested a list of their members, NUMSA requested that its members would like to be represented individually, and UASA requested that the matter be referred to CDR. Ntuli records that these requests were opposed by the respondent. He also records his ruling that the matter proceed as scheduled, and that both UASA and NUMSA thereafter 'opted not to participate'.

[19] Letsebe further testified that the respondent convened appeal hearings, and that 3 of the employees appealed against their dismissals. It is not disputed that the union elected not to participate in the appeal hearings, and that by the time that they were convened, the union had already referred a dispute to the bargaining council.

<u>Applicable legal principles</u>

[20] The legal principles to be applied to a dispute concerning a dismissal for participation in an unprotected strike are well established. Item 6 (1) of the Code of Good Practice contained in Schedule 8 to the Labour Relations Act reads as follows:

> 6 (1) Dismissal and industrial action. (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 the 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 are 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 intend 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 employee should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it all rejecting it. If the employer cannot reasonably be expected to extend the steps to the employees in question, the employer may dispense with them.'

[21] The requirement in Item 6 of the Code that an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt, affords the union an opportunity to persuade the strikers to resume work and secondly, provides a safeguard against possible rash action by the employer. When an employer issues an ultimatum, it should meet the requirements of the Code, and in particular, must ensure that it allows employees sufficient time to reflect on the ultimatum and to respond to it. This court has long held that the requirements of procedural fairness incorporated in Item 6 do not constitute a series of steps with which the employer must comply for the sake only of compliance. The purpose of contacting a trade union regarding an unprotected strike is not a formal requirement of notice – it is to afford the union an opportunity to intervene and bring its influence to bear on the situation before any dismissal is effected, and to afford the union the opportunity to make representations to the employer.

[22] Further, the courts have for some years made clear that the *audi alteram partem* principle applies in the case of a dismissal for participation in an unprotected strike, irrespective of whether there has been a failure to comply with an ultimatum. In *Modise v & others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC), the LAC held that an ultimatum and a hearing serve two separate and distinct purposes. A hearing serves the purpose ultimately of affording employees or a union acting on their behalf the opportunity of stating why they should not be dismissed, notwithstanding their failure to comply with an ultimatum. In short, the requirements of procedural fairness relevant to dismissal

for participation in an unprotected strike are not discharged only by the issuing of an ultimatum. When an ultimatum has gone unheeded, an employer must initiate further steps to afford the right to be heard in a manner that is appropriate to the circumstances.

Analysis

[23] As I have indicated, the only issue in dispute is whether the employees' dismissal was procedurally fair. The two primary submissions by the applicants are that the employees were not afforded an opportunity to state their case prior to their dismissal, and that their dismissals were procedurally unfair because the respondent acted in breach of its obligations in terms of clause 4.8.1 of the SSA.

[24] There is manifestly no merit in the first submission. The respondent convened a disciplinary hearing, before an independent chair, to consider the charges brought against the employees. The request for individual hearings was clearly a ploy to delay the disciplinary process – a total of 117 employees had been charged with the same offence, all alleged to have been committed in the same factual circumstances. To the extent that a minimal number of employees wished to raise individual exculpatory circumstances, they could have done so in a collective hearing. There was nothing unreasonable in the chair's decision to refuse to conduct individual hearings.

[25] To the extent that the applicants' submission relies on a version to the effect that there was an agreement (at least an agreement in principle) to effect that the issue would be referred to arbitration and the disciplinary hearing bypassed, this version, for the reasons outlined above, is not credible. The union elected to leave the enquiry for reasons that are not defensible, and having done so, it cannot now be heard to say that its members were denied an opportunity to state their case.

[26] In regard to the second of the applicants' submissions, and despite Letsebe's assertion that the 'cool off period' had expired before the ultimatum was issued, this cannot be so. The wording of clause 4.8.1 of the SSA is clear. The purpose

of the cool off period is to afford a trade union the opportunity to intervene and resolve the issue in dispute, before an ultimatum is issued. The interpretation contended for by the respondent (i.e. that the four-hour period commences from the time of commencement of the industrial action in question) is not sustainable, having regard to the plain meaning of the clause and its purpose.

[27] The respondent accepts that the time at which the union was advised of the unprotected strike was at 10h36, when the email was sent to the shop stewards. The four hour period expired at 14h36 that afternoon. The ultimatum was issued, it would appear, simultaneously with the email, if not before. On the respondent's own version therefore, the ultimatum was premature.

[28] Further, the evidence supports the conclusion that after the ultimatum was issued, the respondent made no attempt to meet with the shop stewards to resolve the issue giving rise to the strike. The respondent called for a meeting at 12h30, and for reasons that are not apparent, failed to attend the meeting. Again, Ramagopotse was not available to give evidence, and his intentions remain unknown. But objectively, the deferment of the meeting until 16h00 the same afternoon and then to the next day is a clear indication that the respondent did not place any premium on an engagement with the shop stewards, and indeed, its conduct is indicative of an intention to avoid a meeting.

[29] In summary – the respondent acted in breach of the SSA by issuing an ultimatum prior to the expiry of four hours. The ultimatum was premature. Further, the respondent failed to meet with the union shop stewards as it initially agreed to do, and effected the dismissals of the employees without any meaningful attempt to engage with them. For these reasons, I find that the employees' dismissal was procedurally unfair.

<u>Remedy</u>

[30] If a dismissal is found to be only procedurally unfair, the court may not order reinstatement. Any amount of compensation to be awarded for a dismissal that is

procedurally unfair is the subject of a discretion to be exercised by the court. The LRA requires that any award of compensation be reasonable.

[31] The most recent precedent concerning compensation for a procedurally unfair dismissal in the context of an unprotected strike is *National Union of Metalworkers of SA v CBI Electric African Cables* [2013] ZALAC 25. In that case, the LAC increased the sum awarded by the court *a quo* to an amount equivalent to 12 months' remuneration. I am not persuaded that a similar amount, or anywhere near it, is appropriate in the present circumstances. First, the issue over which the strike was called (unlike the situation in *CBI*) was one over which the respondent had no control. Secondly, the union chose not to participate in the disciplinary hearing and the subsequent appeal process for reasons that are less than persuasive. It must bear responsibility for that election, and for the prospect that matters may have turned out differently had it presented a case at that early stage. However, I must also necessarily take into account what amounts to a serious breach by the respondent of the requirements of fair procedure. Had the respondent permitted the union to intervene prior to issuing an ultimatum and had it met with union officials when it convened a meeting ostensibly for that purpose and genuinely sought a resolution to the dispute, the dispute may well have been resolved. Instead, the respondent chose the route of disciplinary action over any prior attempt at dispute resolution.

[32] Mr Whittington, who appeared for the respondent, urged me to take into account the fact that union took no steps on the morning of 10 February 2015 to secure a return to work. There is merit in this submission. The SSA makes clear that the union was obliged to intervene and take all necessary steps to secure a return to work. There is no evidence that the union took any steps to secure a return to work or even attempt to persuade its members to return to work. The provisions of the SSA acknowledge the disruptive effect of unprotected industrial action on work at the Kusile site. Letsebe gave evidence that the refusal of the respondent's workers to perform their jobs impacted on the work of other sub-contractors and the project as

a whole. That is no doubt why the SSA places a high premium on compliance with dispute resolution procedures and swift intervention by trade unions to ensure compliance with the agreement. In addition to the union's failure to act, the employees' conduct, in deciding to strike in support of an issue over which their employer had no direct control and which they had been assured would receive attention, without following any of the prescribed procedures, must also count against them.

[33] In my view, having regard to all of the relevant factors, compensation in a sum equivalent to six months' remuneration for each of the employees is just and equitable.

Costs

[34] Costs are an issue that in terms of s 162 of the LRA is the subject of a discretion to be exercised by the court, having regard to the requirements of the law and fairness. In so far as the result is concerned, the applicants have been only partially successful in their claim. I was advised that a collective bargaining relationship between the parties remains in existence. Given that the applicants have been only partially successful and that an order for costs has the potential at least to prejudice the relationship between the parties, in my view, the interests of fairness are best served by making no order as to costs.

For these reasons, I make the following order:

`1. The dismissal of the second to further applicants was substantively fair, but procedurally unfair.

2. Each of the second to further respondents is awarded compensation in a sum equivalent to 6 (six) months' salary, to be calculated at their rate of remuneration on the date of dismissal.

André van Niekerk

Judge

REPRESENTATION

For the applicants: Union official

For the respondent: Adv. D Whittington, instructed by Fluxmans Inc.