



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

Not Reportable

Not of interest to other judges

Case No: JS 79/11

In the matter between:

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION**

First Applicant

NYOBANGOSANA, S AND 38 OTHERS

Second and Further Applicants

and

SIHLANGENE SECURITY & CLEANING CC

First Respondent

ENLIGHTENED SECURITY FORCE (PTY) LTD

Second Respondent

Heard: 26 and 27 October 2017

Delivered: 27 March 2018

Summary: Unfair dismissal action – first respondent following no procedure prior to dismissing second to further applicants and failing to prove that it dismissed them for a fair reason based on operational requirements. Second to

further applicants' dismissals declared procedurally and substantively unfair and maximum compensation awarded together with notice pay, severance pay and costs.

JUDGMENT

BARNES AJ

Introduction

- [1.] The second to further applicants were employed by the first respondent as security officers until their dismissals on 31 August 2010. They are members of the first applicant, the South African Transport Workers Union ("SATAWU"). They will, in this judgment, be referred to as "the applicants".
- [2.] The first respondent was contracted to provide security services to the Johannesburg Metropolitan Police Department ("JMPD"). The applicants were employed as security officers at the JMPD's Region C in Roodepoort.
- [3.] In August 2010, the JMPD terminated its contract with the first respondent and contracted the second respondent to provide the security services

previously provided by the first respondent. The applicants were dismissed, pursuant thereto, on 31 August 2010.

- [4.] In their Statement of Claim, the applicants sought an order declaring that their contracts of employment with the first respondent were transferred to the second respondent in terms of section 197 of the Labour Relations Act 66 of 1995 ("the LRA") with effect from 1 September 2010. In the alternative, they sought an order declaring that their dismissals by the first respondent were substantively and procedurally unfair and awarding them just and equitable compensation as well as notice pay.
- [5.] At the commencement of the trial, Mr Makhura, who appeared for the applicants, stated that they abandoned their primary relief and pursued their alternative relief only, viz an order declaring their dismissals unfair together with the award of compensation and an order for the payment of notice pay. In addition, Mr Makhura moved for an amendment to the Statement of Claim to include a prayer for severance pay. The amendment was granted.
- [6.] There was initially a dispute between the parties as to whether the applicants' employment contracts contained a provision linking the duration of their employment to the first respondent's contract with the JMPD. The contracts of employment which formed part of the discovered documentation contained no such provision and Mr Mngoma, who gave evidence on behalf

of the first respondent, ultimately could not dispute that the applicants were employed on a permanent, indefinite basis. This judgment will accordingly proceed on the basis that the applicants were permanent employees.

The Evidence

[7.] The second respondent did not participate in the trial.

[8.] The first respondent and the applicants each led one witness. The first respondent led the evidence of Mr Mngoma, its financial manager. The applicants led the evidence of one of their number, Mr Molose, a SATAWU shop steward at the time of the dismissals.

[9.] It is convenient to begin with the evidence of Mr Molose.

Mr Molose

[10.] Mr Molose commenced employment with the first respondent on 27 July 2008.

[11.] He became a SATAWU shop steward, and together with others, raised a number of worker grievances with the first respondent's management. These pertained *inter alia* to alleged illegal deductions from workers' salaries and

alleged non-payment of annual leave pay, sick leave pay and bonuses.

[12.] On 10 June 2017, SATAWU shop stewards held a meeting with the first respondent's management in order to discuss the above grievances. Mr Molose was present.

[13.] At the meeting, the first respondent stated, in passing, that its contract with the JMPD had been terminated in April 2010 and was running on a month to month basis.

[14.] On 17 June 2017, a further meeting was held between SATAWU and the management of the first respondent to discuss the grievances. Mr Molose was present.

[15.] On 27 August 2010, a written agreement was concluded between SATAWU and the first respondent which provided as follows:

"We hereby declare that on 27 August 2010 a meeting was held at Sihlangene Security & Cleaning Offices no. 50 Douglas Street, Horizon View, Roodepoort, 1725 which started at 09H00 between the Sihlangene Security and Cleaning management and SATAWU union officials.

The following issues were discussed:

1. Illegal deductions from employees.

2. Annual leave pay.
3. Sick leave payment.
4. Bonuses.

During the discussion it was agreed that the company will comply with the demand raised by the Union that all the above mentioned will be rectified including payment of 75% of bonuses, sick leave and annual leave to those who will be leaving the company and the rest will be paid at the end of September 2010.”

- [16.] On Monday, 31 August 2010, Mr Molose and the other applicants reported for parade as they did at the beginning of every shift. They were greeted by new personnel wearing new uniforms who informed them that they were employees of Enlightened Security (Pty) Ltd, the second respondent, which had taken over the first respondent's contract with the JMPD.
- [17.] Mr Molose approached one of the supervisors, Mr Moletsane, to find out what was going on. Mr Moletsane stated that he had been given a list of the first respondent's employees who were to be escorted to work at a new site in Randburg. Mr Moletsane stated that the applicants were not on the list.
- [18.] Mr Molose then approached Mr Pheeha and Mr Mudua in the first respondent's human resources department. They informed Mr Molose that the first respondent's contract with the JMPD had been terminated. They informed Mr Molose, as Mr Moletsane had done, that there was a list of the

first respondent's employees who were to work at the new sites and that the applicants were not on the list.

[19.] The applicants were not permitted to provide their services to the first respondent on 31 August 2010 and were effectively dismissed on that day.

[20.] The applicants received no written notice of the termination of their services. Nor did they receive notice pay or severance pay.

[21.] The first respondent failed to honour the settlement agreement concluded with SATAWU on 27 August 2010.

[22.] In cross examination, it was put to Mr Molose that the termination of the JMPD contract had been discussed with SATAWU at the meeting of 10 June 2010. Mr Molose repeated his evidence that the first respondent had stated in passing at that meeting that the contract had been terminated in April 2010 and was running on a month to month basis. The applicants were not, however, informed of the implications of this for them. The first indication the applicants had that the contract had been terminated and that they were to be dismissed was when they reported for parade on 31 August 2010.

[23.] I turn now to consider the evidence of Mr Mngoma, on behalf of the first respondent.

Mr Mngoma

[24.] Mr Mngoma commenced employment with the first respondent as its financial manager in January 2010.

[25.] He was aware that the JMPD terminated its contract with the first respondent. He could not say however when notice of such termination was given.

[26.] He was not present at the meetings held between SATAWU and the first respondent's management on 10 or 17 June 2010. He accepted, based on the reports received from his managers and the minutes of those meetings, that their purpose was to discuss the grievances raised by SATAWU.

[27.] He was not party to the conclusion of the agreement between SATAWU and the first respondent on 27 August 2010. He could not say whether the first respondent had honoured the agreement.

[28.] He testified that as a result of the termination of the JMPD contract, the applicants were dismissed "for financial reasons."

[29.] He testified that the applicants were given notice of the termination of their employment but could not say when. When it was put to him in cross

examination that the applicants had received no notice of the termination of their employment, he stated that he could not dispute this.

[30.] The applicants' version of what transpired on 31 August 2010 was put to Mr Mngoma in cross examination. He stated that he could not dispute it as he had not been there.

[31.] He testified that he could not say whether the applicants had received termination letters. Nor could he say whether they had received notice pay or severance pay.

[32.] Mr Mngoma was questioned in cross examination about the first respondent's staff complement after the applicants' dismissal. He confirmed that the first respondent retained employees after 1 September 2010. When asked how many, he answered that he could not give a figure and could only say that it was less than it had been during the currency of the JMPD contract.

[33.] Mr Mngoma also testified that on 31 August 2010 some of the first respondent's employees were transferred to Sihlangene Business Enterprises CC to work as security officers. He confirmed under cross examination that this is a close corporation which has the same members as the first respondent, shares the first respondent's human resources function

and operates from the same premises as the first respondent.

[34.] When asked to explain the basis for some of the first respondent's employees being transferred to Sihlangene Business Enterprises and others not, Mr Mngoma stated that some sites were high risk and required security officers to carry firearms and some employees were not licensed to do so. He did not elaborate further.

Assessment of Evidence

[35.] It is trite that in dismissal proceedings, the onus is on the employer to show that the dismissal was fair.¹

[36.] It is apparent from the evidence set out above that Mr Mngoma had no knowledge of key facts and did not present a clear version on behalf of the first respondent. Furthermore, and importantly, Mr Mngoma did not dispute Mr Molose's version as to what transpired on 31 August 2010.

[37.] As far as procedure is concerned, the first respondent sought to suggest that the termination of the JMPD contract was discussed with SATAWU at the meetings held on 10 and 17 June 2010. Mr Mngoma was however not present at either of those meetings. Mr Molose, who was present at the

¹ Section 192 of the Labour Relations Act 66 of 1995.

meetings, testified that their purpose was to discuss the grievances raised by SATAWU and that the first respondent merely mentioned in passing that the JMPD contract had been terminated in April 2010 and was running on a month to month basis. Mr Molose's evidence in this regard is borne out by the minutes of those meetings.

[38.] Mr Mngoma testified that the applicants received notice of the termination of their employment but could not say when. It was put to Mr Mngoma in cross examination that the applicants received no such notice and that they learnt of the termination of their services for the first time when they reported for parade on 31 August 2010. Ultimately, Mr Mngoma conceded that he could not dispute this version. It must therefore be accepted.

[39.] In the result no procedure whatsoever was followed by the first respondent prior to dismissing the applicants. The first respondent did not even give the applicants reasonable notice of the fact that it intended to terminate their services. The dismissals of the applicants were manifestly procedurally unfair.

[40.] As far as substance is concerned, Mr Mngoma testified that as a consequence of the termination of the JMPD contract, the applicants were dismissed "for financial reasons." He failed, however, to substantiate this. In the light of Mr Mngoma's evidence that the first respondent retained

employees after 1 September 2010 and that some of the first respondent's employees were transferred to Sihlangene Business Enterprises CC to work as security officers, it is by no means clear that the applicants could not have been accommodated, notwithstanding the termination of the JMPD contract. The first respondent failed to lead evidence to demonstrate, why, despite these facts, the applicants' dismissals were necessary for operational reasons. In the circumstances, the first respondent failed to discharge its onus of proving that the applicants' dismissals were substantively fair.

[41.] The first respondent's conduct towards the applicants in this matter was egregious. Despite seeking to justify the applicants' dismissals on operational grounds, it followed no procedure and gave the applicants no notice whatsoever of its intention to terminate their services.

[42.] Mr Molose's testimony that the first respondent implemented a pre-determined list of those who were to stay and those who were to go was undisputed by Mr Mngoma. While Mr Mngoma testified that security officers at certain sites were required to carry fire arms, his evidence in this regard was vague and not explicitly linked to the list. In presenting its case in Court the first respondent made no real attempt to explain or justify the list. In the absence thereof, the list smacks of arbitrariness.

[43.] In these circumstances, the applicants are entitled to the maximum

compensation permitted by law.

[44.] The applicants contend that they were not paid notice pay or severance pay. The first respondent did not dispute this either.

[45.] There is no on-going relationship between the parties. I do not see any other reason in law or fairness why costs should not follow the result and none was suggested in argument.

[46.] I accordingly make the following order:

Order

1. The dismissals of the second and further applicants are declared to be substantively and procedurally unfair.
2. The first 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. The first respondent is ordered to pay each of the second and further applicants notice pay and severance pay as prescribed by law.

4. The first respondent is to pay the applicants' costs.

Heidi Barnes
Acting Judge of the Labour Court

Appearances:

For the Applicants: Mr M Makhura of Cheadle Thompson and Haysom Inc

For the First Respondent: Mr T Serage of TM Serage Attorneys

LABOUR COURT