

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 417/17

In the matter between:

SAMUEL NEMUFULWI

First Applicant

KARABO MASWANGANYE

Second Applicant

STEPHEN TSHABALALA

Third Applicant

ROBERT MAKGOBA

Fourth Applicant

IVAN MOJELA

Fifth Applicant

THABISO MOKONDO

Sixth Applicant

POLITE KOLA

Seventh Applicant

BAITO ONKONA

Eighth Applicant

ISSAC KOTLOLO MOTSELA

Ninth Applicant

FRANS SHIKA

Tenth Applicant

JIM THLONGWANI

Eleventh Applicant

and

UNICA IRON & STEEL (PTY) LIMITED

Respondent

Heard: 29 to 31 October 2018, 03 and 07 December 2018, 25 and 26 March 2019

Delivered: 13 September 2019

JUDGMENT

MABASO, AJ

Introduction

- [1] The applicants approached this Court in terms of Section 191(5)(b)(iii)¹ of the Labour Relations Act² (LRA), disputing the fairness of their dismissals by the Respondent. They ask this Court to declare that their dismissals were both procedurally and substantively unfair and be reinstated. They also sought condonation for the late filing of their statement of case. The Respondent opposed both applications. On 31 October 2018, this Court made the ruling in respect of condonation, and its reasons are as set out below.
- [2] The practice in this Court is that a condonation application is brought in the form of a notice of motion, which is not what the applicants did. On the first day of the trial, 29 October 2018, I directed the applicants to file a formal condonation application which complies with Rule 7 of the Rules of this Court and set shorter time frames for the matter not to be delayed as it had been set down for three successive days. Parties complied with this directive.
- [3] The condonation application was argued before this Court on 31 October 2018. I proceeded to grant condonation for the late filing of the referral in respect of applicants 1, 2, 4, 5 and 6, and this was after being satisfied with the explanation that was preferred for the period of delay. Condonation in respect of applicant 3 was not granted, as he *inter alia*, could not explain the period of delay between 18 May 2016 March 2017. Applicants 7, 8, 9, 10, and 11 the court could not entertain their claim as it had no jurisdiction, and Mr Ondendaal correctly conceded this.
- [4] Initially, the applicants were represented by an attorney Mr Odendaal, who withdrew as their attorney. This happened after the Respondent had presented evidence of five witnesses.

The evidence and applicable principles

- [5] I propose to start with the authoritative Code of Good Practice on misconduct, which has to be observed by this Court in deciding the fairness of a dismissal, which states that:

¹ LRA.

“Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) ***whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace***; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) **the rule or standard has been consistently applied by the employer**; and
 - (iv) dismissal was an **appropriate sanction** for the contravention of the rule or standard.”³

- [6] The charges against the applicants, in summary, are: that from 01 February 2016 to 05 February 2016, the applicants participated in an unprotected strike, committed acts of misconduct in that they willfully and negligently caused damages to the property of the Respondent and displayed conduct which is not expected of an employee. The applicants were dismissed following a verdict of guilty on these charges.
- [7] In the pre-trial minutes, it is common cause between parties that the applicants embarked on an unprotected strike. But the applicants’ defence is that the Respondent is inconsistently applying discipline as they were not the only employees of the Respondent who were involved in the unprotected strike. In a misconduct dismissal dispute, the onus of proof is on the employer but a burden to present evidence about inconsistency is on the employee concerned who is claiming such.
- [8] Mr Ondedaal briefly cross-examined the witnesses that were called by the Respondent. Therefore, most of the evidence of the following witnesses were undisputed: Mr James Mahumbe, Mr Jacob Mutudi Chauke, Mr Omar Mohammed, Mr Eric Chauke, Mr Qasim Mohammed, Mr Isaac Mojela, Mr Abel Njatuna, and Mr David Motshegoa. I now proceed to summarize relevant evidence hereinafter.

Mr Mahumbe

³ Court underlining and bolding.

- [9] He was employed as a Training and Development Manager by the Respondent. At the time of the illegal strike, he was working as a Human Resource Officer. On 01 February 2016 before 6:00 am he got a tip-off that there would be a possible illegal strike scheduled to take place that day. He then proceeded to the Respondent's premises from his house, as he was approaching the premises of the Respondent, he saw some people outside the premises of the Respondent. He realized that they were chanting, singing, and the security had blocked them from entering the premises. He confirmed that there was violence committed but was not in the position to identify the implicated individuals.
- [10] As a result of the violence that was taking place, he had to escape through the back wall, he testified that a security officer identified the applicants as the perpetrators of the misconduct.
- [11] He confirmed that the applicants were dismissed following the guilty verdict on the charges levelled against them by the Respondent. Following their dismissal, the First Applicant(Mr Samuel Nemufulwi) intimidated him while in the company of his children. Another incident of intimidation occurred at Jubilee Mall in Hamaanskraal, whereby he was approached by (Mr Samuel Nemufulwi), who was accompanied by his wife and he "stepped on his foot". When he looked at him, he gave him a gesture of saying "Come here, I'll show you" .He ignored him, but proceeded to laid criminal charges against him.

Mr Kusam

- [12] He confirmed that there was an unprotected strike. He asked the employees who were on strike to send their representatives to ascertain as to why they were withholding their services and what their demands were. The security allowed those representatives to enter the premises, and the fifth applicant was one of the representatives who attended the meeting wherein Mr Kusam wanted to ascertain their concerns. Their demand was that they do not want "*foreign management*" and one local person, namely Mr Jimmy Matibula, was the one in a position of management. Mr Kusam advised them that it would be unfair to dismiss the middle management because the Respondent would face litigation.

- [13] Mr Kusam further requested the representatives to provide reasons as to why they wanted the management dismissed, and upon receipt of such reasons, he made an undertaking to investigate and give a response within 24 hours after the investigations.
- [14] The second meeting was held wherein feedback from the employees was communicated. However, he was not present. He insisted that even on the third meeting, the employees did not give any other demand except that of the dismissal of the foreign nationals and the local person as previously stated. Mr Kusam advised them that their demand was unreasonable.
- [15] As a result of what he said, they further advised that they must go home and come back the following day. Some employees started to break the clock machine, throw stones at the security guard and the foreign nationals compound. He explained that the geyser, windows, clocking systems, unit clocks and bio-metrics machine were damaged as a result of this conduct.
- [16] He stated that he could not identify the perpetrators as could not properly see from where he was standing. He denied that the demands that were put forth by the employees, who were on strike, were a failure to comply with the Occupations Health and Safety Act⁴, foreign management employed by the Respondent to govern the employees' general health and safety or the lack of provident fund for the employees, as suggested by the Applicants in the pre-trial minutes.

Mr Jacob Mutudi Chauke

- [17] He was employed as a security officer. He was present at the Respondent's premises between 01 to 04 February 2016. He identified Applicants 1,2,4, and 5 as those who were throwing stones. Despite numerous questions being asked about the perpetrators, he repeatedly mentioned these applicants. At the tail end of examination in chief, he mentioned that Applicant 6 was one of *"those ones who were breaking the fence"* at

⁴ Act 85 of 1993.

UNICA 2. It was common cause between the parties that one group was at UNICA 1 and the other at UNICA 2.

- [18] When a question was posed to this witness about the Applicant's involvement, he confirmed that indeed, he knows them and even by their names. During cross-examination, this witness stated that during the strike, the 1st, 2nd, 3rd, and 4th and 11th Applicants were throwing stones, pushing the gate and causing havoc. And no version was put to this witness, no re-examination followed.

Masimane Erick Chauke

- [19] Works as the Respondent's Health and Safety Officer. He was one of the delegates that met the management of the Respondent. He stated that there was only one demand that was put forth by the employees who had withheld their services to the Respondent, which is "*foreign management must go*". He confirmed that the strike was violent.
- [20] Mr Odendaal put to this witness that as he was part of the strike why was he not charged as the Applicants were. He answered that he neither damaged property nor intimidated anyone. Further, it was put to him that the 2nd, 4th and 5th Applicants' version was that they were part of negotiations and they "just hang around" but were charged and dismissed. He answered by saying the violence did not happen during the negotiations stage. He conceded that he was not charged despite being part of the strike. And was one of the employees who participated in the strike.

Mr Mohammed Aseef Kusam

- [21] He is the Managing Director of the Respondent. He confirmed that a meeting was held on 01 February 2016 and the demand that had been placed by the previous witnesses of the Respondent. An ultimatum was issued, the management decided that they should not set a wrong precedent, action had to be taken against the perpetrators of violence and those who damaged the company property.

[22] He testified that the cameras, in the guard room were severely damaged, printers were stolen and, about 18 to 20 employees were dismissed. Those employees who were identified as perpetrators were dismissed. He confirmed that those who were charged included those who complied with the ultimatum of going back to work. The reason for the Applicants to be charged is because they were involved in acts violence, damaging company property and intimidation. He stated that some employees were not part of the people who committed misconduct and were sending him messages as they wanted to return to work.

Mr Abel Njatuna

[23] When this witness testified, Mr Ordendaal had withdrawn as the Applicants legal representative. This Court explained to the Applicants the process that had to be followed and the importance of cross-examination. Mr Njatuna stated that Applicants 1, 2, 5 and 6 were preventing others from going to work and saw them smashing windows with stones. The 5th Applicant cross-examined this witness on behalf of all Applicants. No version was put, specifically about the identification of those who had been accused of acts of violence.

Mr David Motshegoa

[24] He presented the following evidence: He chaired the disciplinary hearing of Applicants 4, 5, and 6. The applicants were informed that they have a right to lead their evidence and being represented by a union official of their choice, they were provided with an opportunity to cross-examine the Respondent's witnesses. The version that was put to him is that a witness for the Applicants was arrested. Therefore they regarded this to being deprived of a fair hearing.

The Applicant's evidence

[25] Applicant 5: denied committing acts of violence during the strike.

[26] Applicant 4: confirmed that there were acts of violence during the strike but denied being one of the perpetrators. According to him, the dismissal was also procedurally unfair because he advised the Respondent that he intended to call Applicant 5, as his witness, but the Respondent said he had been suspended, therefore, cannot be allowed within its premises. He testified he was not even given a chance to lead evidence.

[27] Applicant 4 further stated that: he was challenging both the procedural and substantive fairness of their dismissal. He explained that on 01 February 2016 he was supposed to work the morning shift, but arrived late at work on that day and found workers outside the Respondent's premises. He asked them why they were outside, they then raised the issue of safety, especially coming from the foreign nationals, confirmed that he was one of those people who were elected by the employees to approach management, which they did, and their intention was to discuss and attempt to reach consensus, but they failed. He confirmed that 18 employees were dismissed. He denied that he was part of the people who committed violence by damaging the property of the Respondent. During cross-examination, he confirmed that there were acts of violence that were committed during the strike, but he said he was not part of it as he was not there. He denied that the chairperson, Ipeleng Motsogai, allowed him to present evidence.

[28] Applicant 1: Testified that he thinks the dismissal was unfair because he went back to work on Monday and that means he complied with the ultimatum.

Applicable legal principles

[29] I have to be guided by the principle as expounded in *Small v Smith* [1954]⁵ and underpinned by the Constitutional Court in *President of the RSA and others v South African Rugby Football Union and Others*⁶ where the Court held thus:

⁵ 3 All SA 62 (SWA).

⁶ [1999] 10 BCLR 1059 (CC),

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness’s evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness’s evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness’s testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.”

[30] The Applicants are challenging both procedural and substantive fairness of their dismissal. Before this Court, evidence was presented that the Applicants 1,2,4, 5 and 6 were involved in acts of violence during the strike, and this was not disputed during cross-examination by the Applicants representatives, as Mr Jacob Chauke explicitly stated as to what role was played by each of Applicants 1, 2, 4 and 5. Mr Abel Njatuna identified applicant 6 as one of those who were preventing others from going to work and smashing windows with stones. Further Mr Jacob Chauke said applicant 6 was breaking the fence. Therefore, I cannot reject this evidence following the authority mentioned in the preceding paragraph. On a balance of probabilities, I accept Mr Chauke’s evidence in respect of this aspect. I conclude that the applicants committed acts of violence during the unprotected strike.

[31] I further conclude that Applicant 1, 2, 4, 5, and 6 committed misconduct by being involved in the unprotected strike. In terms of Schedule 8 Items 6(1) of the Code of Good Practice, provides that *‘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.’* Each case has to be determined based on its own facts and circumstances. In such cases, the guidelines, as outlined in item 7 above, have to be

taken into account. The Applicants in respect of substantive fairness of dismissal are not only denying committing offences but contending that the Respondent did not apply discipline consistently, as per item 7(b)(iii). The evidence before this Court by Mr Masimane Chauke is that he took part in the unprotected strike, like the applicants, but was not summoned before the disciplinary hearing to answer to this charge. And he was not the only one who was not charged. Therefore, I conclude that the Respondent in disciplining the Applicants for being part of the unprotected strike acted inconsistently.

- [32] Considering that the Managing Director's evidence regarding who was going to be charged said: *"...we have to take serious actions against the perpetrators, we have to take the serious actions against the people who conducted this violence, have damaged company property, damaged the computers, they risked our lives"*. He further said if this was not dealt with, it was going to happen again, and he also stated that his life was at risk as he was not feeling safe at work.
- [33] Now clearly the Respondent did investigate as to who was involved in the acts of violence, further taking into account that there was violence and having said that there were other employees who were not part of this group, the Managing Director also indicated that those employees that were not part of this group *"...they were even sending me the messages, Boss when is the company starting? When are we coming back to work? They must have known after that ultimatum was given they started coming back to work the same day for night shift"*.
- [34] The Respondent, through its evidence, was not primarily disciplining the Applicants for the unprotected strike but for the acts of violence that were committed during the strike. The testimony by Mr Jacob Chauke, as stated in paragraph 17 above, that he identified all the Applicants as perpetrators of misconduct during the strike, and supported by Mr Abel Njatuna. Considering that such evidence remained unchallenged, I conclude that applicants 1,2,4,5, and 6 did commit violence during the unprotected strike therefore are guilty of those charges. As concluded that the Respondent did investigate as to who committed the acts of violence during the strike, the issue of inconsistency does not arise

as the Applicants presented no evidence indicating that there were other employees who committed acts of violence during the strike, and the Respondent was aware of such but opted not to charge them.

[35] Mr David Motshegoa (Mr Motshegoa), for the Respondent, presented evidence in respect of the procedure that was followed by the Respondent during the disciplinary hearing for applicants 4,5, and 6. His testimony was not disputed as he stated the procedure that was followed. His evidence is accepted. And I do not see any procedural unfairness thereof as these Applicants contention was that their witness was arrested, by members of SAPS, before the start of the disciplinary hearing. My view is that the Respondent had no control over the arrest of their witness.

[36] In respect of the procedural fairness of the dismissal, the Respondent insisted that they did comply with a fair procedure, the notices that were given to the employees clearly indicate that they had the right to call their witnesses and to cross-examine the witnesses, this Court accepts the evidence of the chairperson of the disciplinary hearing, Mr Motshegoa, in respect of applicants 4, 5 and 6 therefore on the balance of probability the Respondent did follow a fair procedure in their case. However, in respect of the remaining applicants, Applicants 1 and 2, no evidence was presented by the Respondent regarding the procedural aspect, taking into account that these applicants have no onus of proof, therefore, I rule in their favour that the procedural aspect of dismissal was unfair.

[37] There is no principle in our law that dismissal automatically follows a finding of guilt on misconduct committed during a strike. In *Sidumo & another v Rustenburg Platinum Mines Ltd and Others*⁷), the Constitutional Court held that,

"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must, of course, consider the

⁷ [2007] 12 BLLR 1097 (CC).

reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. Other factors will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.⁸

[38] In this matter, the applicants have been found to have committed acts of violence during the strike, and the Managing Director explained about safety concerns in working with the Applicants. The Applicants, committing acts of violence, have shown no remorse, and no reasons have been provided as to why they threw stones towards the residents of the foreign nations working for the Respondent. And how would the foreign nationals work with the applicants anymore. Acts of violence are serious misconduct, especially in the workplace. No mitigating factors presented by the applicants. Based on the evidence before this Court, it is concluded that dismissal was an appropriate sanction.

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

Order

1. The dismissal of the applicants 1,2,4,5 and 6 by the Respondent was substantively fair.
2. The dismissal of the applicants 4,5, and 6 was procedurally fair.
3. The dismissal of applicant 1 and 2 was procedurally unfair.
4. The Respondent is ordered to pay applicants 1 and 2 each compensation equivalent to 2 months of their respective monthly salaries as a result of order 3 above.
5. There is no order as to costs.

S. Mabaso

⁸ Para 78.

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants Isaac Mojela

For the Respondent: Bridgette Mokoetle

Instructed by: SEIFSA