



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 1566/16

In the matter between:

ISAAC MATUBATUBA

Applicant

and

ELECTRO HYDRO WORLD CC

Respondent

Heard: 22, 23 August 2019 and 13 September 2019

Delivered: 18 December 2019

JUDGMENT

MABASO, AJ

Introduction:

- [1] The Applicant has approached this Court challenging the fairness of his dismissal by the Respondent following a guilty verdict entered against him on the charges relating to participation in a strike action that does not comply with the provisions of the Labour Relations Act 66 of 1995 (the Act). It is not in dispute that there was an unprotected strike on 30 and 31 March 2016, which

employees of the Respondent were involved in. The facts of this case are straightforward, as is set out below that most of facts are common cause. Parties in the pre-trial minutes agreed that this Court has to decide both procedural and substantive fairness of the dismissal based on the following disputed facts:

(a) whether the Applicant participated in the unprotected strike?

(b) whether the Applicant had any previous warnings?

Question (b) will only be relevant if the answer in question (a) is in the affirmative. This Court has to be guided by items 6 and 7 of the Code of Good Practice, on dismissals, of the Act.

Evidence and analysis

[2] It is common cause that a number of employees of the Respondent embarked on an unprotected strike on 30 March 2016 and their demand was the payment of a portion of the production bonus that had been withheld by the Respondent. After the commencement of the strike a meeting was held between the shaft committee members, shop stewards and management of the Respondent to resolve the strike. The meeting was successful because parties agreed that the bonus was to be paid and that the employees were to resume their duties immediately. However, the employees did not resume their duties as agreed. On 30 March 2016 two ultimatums were issued against the employees to return to work, but they did not.

[3] It is not disputed that on 31 March 2016 around 7:00 AM, Mr Moleko Motaung (Mr Motaung) issued another ultimatum to direct the employees to return to work by 8:00 AM but still they did not comply with the instruction. He then around 10 AM, directed those employees to leave the premises of the

Respondent because they were not willing to tender services. The Applicant was supposed to tender services to the Respondent on both dates (30 and 31 March 2016), but he did not, and evidence shows that on both dates, he was at the premises of the Respondent.

- [4] Following the strike, the Applicant, along with those employees who were on unprotected strike, were issued with a notice to attend a disciplinary hearing. These charges emanate from the allegations of being involved in the unprotected strike. At all relevant times, the Applicant was a member of a trade union, AMCU, which was consulted during the strike and it also represented him during the internal hearings.
- [5] Following the disciplinary hearing the Applicant was dismissed on 7 April 2016, however, he proceeded to lodge an appeal wherein he produced a doctor's note indicating that he had been booked off sick from 31 March 2016 to 04 April 2016. It was further common cause that the Applicant despite being at the premises of the Respondent on 31 March 2016, he did not notify the Respondent that he was not well and had to go to see a medical practitioner.
- [6] The upshot of this matter is that, since it is common cause that the Applicant was required to render services to the Respondent on 30 and 31 March 2016 and he did not do that, despite evidence being presented that he was in the premises of the Respondent on both occasions, it is therefore up to the Applicant to explain the failure to tender services which he was employed to do. Despite this burden to present evidence, it is still up to the Respondent to show that the dismissal was both procedurally and substantively fair and this Court has to be guided by items 6 and 7 of Schedule 8 of the LRA.

- [7] Both in the statement of claim and the opening statement, the Applicant disputes that he was on strike on 30 March 2016 as he states that when he arrived at work he found that fellow employees were not working as per the policy, therefore, he was not supposed to work alone meaning the circumstances prevented him to do his job.
- [8] In summary, the evidence of the Respondent, through Mr Motaung was thus: he was advised in the morning of 30 March 2016 that there was an unprotected strike, he then proceeded to the boardroom where employees had gathered, including the Applicant. He inquired as to why they were not working, and they stated their demand being the issue of the production bonus. The manager, Mr Kobus Van den Berg (Mr Van den Berg), then arrived and tried to persuade them to go to work, however, they refused. He then proceeded to issue the first ultimatum which he broadcasted in the boardroom and outside the buildings so that everyone can see. At that time, all employees were in the boardroom. However, they still did not comply with the instruction of going to work. He stated that the Applicant did not come to him and say he wanted to tender his services despite the ultimatums being issued, directing all employees to work.
- [9] It was confirmed that the supervisors were also on strike, which the Applicant was working under one of them. It was put to Mr Motaung that since the Applicant was an assistant to a supervisor "he could not have gone on strike". Mr Motaung confirmed that prior to starting work, the procedure is to have a safety meeting first, thereafter, an employee goes to his supervisor for guidance. He stressed that on 30 March 2016 there was no safety meeting, and the supervisors did not give instructions for the daily tasks.

[10] Mr Jansen Van Vuuren (Mr Van Vuuren) stated that employees do not get instruction daily as they know their job descriptions and the Applicant, as he worked as a batch controller operator, is the one that starts the plant. Therefore, the Applicant is the first person that should be busy in the morning, starting to mix cement for underground workplaces.

[11] Mr Van Der Berg stated that no meetings were held both on the 30 and 31 March 2016, however, sometimes no such meetings are necessary as the employees can continue with their work. He gave an example that the Applicant has been working for the Respondent for about 10 years doing the same job, and he knows his duties and responsibilities. Therefore whether a safety meeting has been held or not, the Applicant was expected to do his work.

[12] The Applicant testified as follows: he denied that he was part of the strike. He denied that he was in the boardroom, where instruction was given for all employees to resume duties. He insisted that the policy of the Respondent is that you cannot work before a safety meeting is held. In the examination in chief, when Mr Bai asked him about the incident of 30 March 2016, he *inter alia* stated that,

"management arrived roundabout 10, they had a meeting with AMCU. At three I was still seated there, and they finished, and I was with the other employees, so after three the management told us that they have agreed that our bonuses were going to be paid to us. So the strike was over, and I was supposed to have started work, on the 31st."

[13] Later in his evidence, the Applicant stated that he could not have been on strike because he had no query about the bonus.

[14] At this juncture, I deem it appropriate to highlight that an employee may be on strike even if he/she is not directly affected by the demands of fellow employees who are directly affected. Therefore, an employee may withhold services in support of those employees. *In casu*, despite the contradictions on the evidence of the Applicant as to whether the Respondent had withheld his bonus or not, this fact is not important taking into account that he can act in common purpose with other employees by *“for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee”*.

[15] The Applicant was required to work on 30 March 2016, which he did not. Messrs Motaung and Van den Berg presented undisputed evidence that they were at the boardroom where they addressed the employees to go to work, but employees refused. Some ultimatums were issued and placed inside and outside the boardroom persuading the employees to return to work, but they still did not. The Applicant denies that he was at the boardroom and alleges that he was seated outside. The question that has to be asked is: if the Applicant was not in the boardroom then why upon realising that both Mr Motaung or Mr Van den Berg were in the premises of the Respondent on the date in question why did he not approach them and indicate his intention that he wanted to work. Subsequent to the ultimatums that were issued on 30 March 2016, if the Applicant were seated outside, he would have seen those ultimatums and then approach the Respondent and explained that he could not work because there were no meetings that were supposed to have taken place.

[16] It is improbable that the Applicant would continue to sit outside despite that most workers were in the boardroom being addressed by both Messrs Motaung and Van den Berg. Regarding credibility of the witnesses, I accept the evidence of the Respondent that the Applicant was in the boardroom, as I have indicated that it is highly improbable that a meeting would be held and an employee who claimed that had been prevented from working would continue to sit outside without wanting to know what was being discussed in that meeting. I therefore reject the testimony of the Applicant and conclude that the Applicant was part of the meeting.

[17] Therefore, the evidence of the Applicant that on the date in question, he was prevented by the circumstances to tender services cannot succeed. Also taking into account that the Applicant confirms that he was a member of the union and that the meeting was held with the union whereby it was agreed that the workers should resume work, he should have advised his union officials that he wanted to work. Based on this I conclude that the Applicant was on unprotected strike on 30 March 2016.

[18] Can an inference be drawn that the Applicant was on strike on 31 March 2016? The SCA¹ has held that, in deciding an issue based on inferences in a civil matter, the following has to be a guide,

" in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. ...If the facts permit of more than one inference, the Court must select the most "plausible" or probable

¹ Cooper and Another v Merchant Trade Finance Ltd (474/97) [1999] ZASCA 97 (1 December 1999)

inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand, an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof”.

- [19] It is not in dispute that the Applicant attended the medical practitioners' rooms on 31 March 2016. The Applicant presented evidence that on that day he reported at the Respondent, according to the statement of claim, he immediately left so that he could attend at the medical practitioners' rooms. However, during the cross-examination, it transpired that the Applicant left the premises of the Respondent around 10 AM. It is improbable that the Applicant will arrive around 8:00 AM and then leave around 10: AM, just to collect a medical card, as he alleges. I say this is because the 10:00 AM time coincides with what Mr Motaung said, that he issued the final ultimatum earlier, around 8:AM then around 10:00 AM when he realised that workers were not returning to work as per his instruction then he asked them to leave the premises.
- [20] The only inference to be drawn is that the Applicant arrived on 31 March 2016 and left the premises of the Respondent when he was asked, together with others, to leave the premises because they were on unprotected strike as they refused to go back to work despite the final ultimatum being issued. I say this, in addition, taking into account that the strike had already started on the previous day. I, therefore, conclude that the Applicant was part of the unprotected strike on both dates. Therefore, he was guilty of the offences that led to his dismissal. The evidence that the Applicant went to the premises of the Respondent on 31 March 2016 to collect a medical card, clearly based on the totality of the evidence presented such evidence cannot stand. The only inference that can be drawn is that the Applicant decided to visit a medical practitioner to try to justify his conduct as he stated that he saw a doctor around 1 PM.

- [21] Was dismissal an appropriate sanction? Mr Motaung testified as follows: on 18 March 2016, he issued the Applicant with a final written warning in respect of being involved in an unprotected strike action that took place during the period of 18 and 23 February 2016. Mr Motaung testified that this final written warning ended up being signed by Mr Junior Zibila. This warning was valid for the period of 12 months. The Applicant refused to acknowledge receipt of this warning.
- [22] Despite this, the Applicant denied that he was ever involved in an unprotected strike before and the knowledge of final written warning.
- [23] Mr Zibila evidence was very brief, as he stated that he signed the final written warning on behalf of of the Applicant as he had refused to accept it. The warning was issued following all the workers being involved in the strike. I accept the evidence of the Respondent that indeed the Applicant had a final written warning, which was valid at the time when the unprotected strike took place on 30 and 31 March 2016.
- [24] In respect of procedural fairness, the Applicant was represented by his union during the disciplinary hearing and the appeal hearing. The union decided not to call the Applicant to testify during these processes, which is understandable because the circumstances of the charges emanated from the same unprotected strike. Further, the issue of the medical certificate I have dealt with it above. I conclude that nothing much that revolved around the procedural aspect of dismissal.
- [25] I have taken into account, among other things, that the strike lasted for two days, the issue in demand was resolved on the first day, the number of years that the Applicant has worked for the Respondent and that at the time when

the offences were committed the Applicant was on a final written warning, therefore, I conclude that the dismissal was an appropriate sanction.

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

Order

- 1.. The dismissal of the Applicant was both procedurally and substantively fair.
2. There is no order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Bayi

Instructed by: Bayi Attorneys

For the: Respondent: Mr R J C Orton

Instructed by: Snyman Attorneys

LABOUR COURT