



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1161/21

In the matter between:

SAMWU OBO 157 MEMBERS

Applicant

and

PIOTRANS (PTY) LTD

First Respondent

PRINCE KEKANA N.O.

Second Respondent

**SOUT AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

Third Respondent

Heard: **05 JULY 2024**

Delivered: 28 JANUARY 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 28 January 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

MPHAHLELE AJ**INTRODUCTION:**

[1] The Applicant in this matter is the South African Municipal Workers Union ('SAMWU'), a registered trade union in terms of the provisions of the Labour Relations Act No. 55 of 1996 ("LRA").

[2] SAMWU on 23 June 2021 instituted a review application on its own behalf and on behalf of 157 of its members who were bus drivers of the First Respondent.

[3] The review application is against the Arbitration Award of the Second Respondent dated 02 May 2021, which found that the dismissal of the 157 members of SAMWU, who were bus drivers, was substantively and procedurally fair.

[4] The First Respondent is PioTrans Proprietary Limited ('PioTrans'), a private company which manages and operates the Rea Vaya Bus Rapid Transit (BRT) service on behalf of the City of Johannesburg, for a fee and at the time of the dismissals of the 157 bus drivers, PioTrans also administered the affairs of Litsamaiso Proprietary Limited, a bus operating company providing the Rea Vaya BRT service to the City of Johannesburg, on different routes.

BRIEF BACKGROUND OF THE MATTER.

[5] This matter has a long and protracted history but due to reasons which will be more apparent below, I only deal with facts that are pertinent to the order I intend to make.

[6] On 02 February 2015 bus drivers employed by both PioTrans and Litsamayiso withdrew their labour. SAMWU contended that many of PioTrans bus drivers stayed away from work on that day and that many of the bus drivers

who were rostered simply left their buses at the depots at Ellis Park and Dobsonville.

[7] It is, however, common cause that buses were used to block intersections in the Johannesburg CBD and all of the bus drivers after assembling at the Library Gardens, proceeded to the JRA offices to speak to the MMC for Transport.

[8] PioTrans later sent notices to attend of disciplinary inquiries to the employees scheduled for 10 February 2015 in respect of various allegations of gross misconduct committed on 02 February 2015 relating to:

8.1 Failure and/or refusal to drive on the route that were issued to them by dispatch in accordance with their waybills; and/or

8.2 Failure and/or refusal to park the buses in the prescribed authorised area at the end of their route in accordance with the waybill. In this regard it was alleged that they parked the buses in an unauthorised area in the Johannesburg CBD in contravention of the Company's policies, rules and procedures and municipal laws; and/or

8.3 They purposely attempted to sabotage the Company's services by conspiring with other drivers to bring the Company busses to a halt.

8.4 They left the bus unattended in an unauthorised area in contravention of the Company's policies, rules and procedures; and/or

8.5 Disrupted the operations of the Company and brought the services to a halt in breach of clause 4.4 / 3.5 of their employment contract; and/or

8.6 Failure to act in the best interests of the Company in breach of clause 4.2.13 / 3.3.3 of their employment contract.

[9] Only nine (9) of PioTrans drivers attended their hearings and all of the 157 bus drivers were dismissed. An appeal was unsuccessful and the Applicant on 18 February 2015 referred an unfair dismissal dispute to the Third Respondent.

[10] Conciliation meeting was held on 23 March 2015 at which the parties agreed to separate the conciliation proceedings for PioTrans and that of Litsamayiso drivers

[11] PioTrans on 21 April 2015 contended the Third Respondent should dismiss the Applicant's referral because the official who signed the Referral Form was no longer a union official. On 29 April 2015, SAMWU withdrew the referral in response to PioTrans' objection and referred a new unfair dismissal dispute. PioTrans, together with a new referral, brought an application for condonation of the late referral of the dispute as the referral was 27 days late.

[12] Commissioner Cecilia Brummer in May 2015 refused SAMWU's application for condonation but SAMWU referred the ruling to the Labour Court. Mr. Justice Molahlehi (as he then was) on 06 January 2016 reviewed and set aside the condonation ruling and remitted it to the Third Respondent for consideration afresh.

[13] Commissioner Ebrahim Patelia on 17 March 2016 granted SAMWU condonation for the late referral of the unfair dismissal dispute.

[14] On 12 April 2016 PioTrans contended that the matter be referred to the Labour Court because it concerns an unprotected strike and on 3 May 2016 at con-arb hearing, PioTrans challenged the bargaining council's jurisdiction on grounds that the matter concerns an unprotected strike.

[15] Commissioner Mark Hawyes on 05 May 2016 made a ruling that the bargaining council lacks jurisdiction and the matter should be referred to the Labour Court, as it concerns an unprotected strike.

[16] SAMWU took the matter on review and on 30 May 2017 and Mr Justice Moshoana of the Labour Court reviewed and set aside the jurisdictional ruling and held that the Third Respondent had jurisdiction to determine the fairness of the dismissals for misconduct.

[17] The arbitration proceedings commenced on 20 November 2017 before Commissioner Prince Kekana ("Second Respondent").

[18] SAMWU allegedly on 13 May 2021 received the Arbitration Award dated 02 May 2021 and as stated above it was to the effect that the dismissal of the 157 members of SAMWU was substantively and procedurally fair and on 23 June 2021 the SAMWU filed their review application.

[19] The Applicant submitted that the primary ground for review is the alleged misapplication of the doctrine of common purpose to the facts in this matter. The Applicant further contended that the Second Respondent should not have found them guilty by association for the misconduct of abandoning buses. Instead, he should have identified individual acts of misconduct committed by all of the 157 members of SAMWU.

[20] Piotrans opposes the review on the following grounds:

20.1 The review application cannot proceed as 21 members were deceased and there is no mandate from their respective executors or notices of substitution. A Rule 7(1) notice has been delivered, challenging *locus standi* of SAMWU;

20.2 Approximately 150 members ceased to work and failed to attend on the same day (02 Feb 2015), causing Piotrans operations to become completely non-operational. The misconduct extends beyond the mere abandonment of buses; it includes failing to drive their routes, sabotaging the company by halting its operations, disrupting services, and breaching their employment contracts. These gross misconducts rendered Piotrans, a key transport provider in Johannesburg, non-operational, thereby

harming the public who relied on its consistent and reliable services, justifying the dismissal.

20.3 Regarding common purpose, 150 members planned the misconduct on 30 January 2015 and, through a group effort and association with each other, committed the aforementioned misconducts. The evidence is both direct and circumstantial.

20.4 The Applicants failed to call sufficient reliable and credible witnesses to suggest any other plausible conclusion.

20.5 Reinstatement is impractical as Piotrans is under business rescue and it would lead to the company's final liquidation. Furthermore, the relationship between the parties has become intolerable and has broken down.

[21] The Applicant seeks reinstatement and back pay, alternatively compensation.

[22] Piotrans seeks the dismissal of the review application. Alternatively, should the matter be removed due to the deceased employees' *locus standi*, Piotrans seeks costs.

THE AUTHORITY OF SAMWU TO ACT ON BEHALF OF 157 DISMISSED EMPLOYEES.

[23] SAMWU alleges that the application for review is in respect of 157 members.¹ This is disputed by Piotrans which alleges that it was apparent at the arbitration proceedings that SAMWU was acting on behalf of 150 members.²

¹ Applicants' Founding Affidavit, paginated page 2, para. 4.

² First Respondent's Answering Affidavit, paginated page 138, para.71.

[24] It contended that the number of members is actually 150 because certain employees have settled with Piotrans or their dismissals were found to be fair by the CCMA when they pursued separate disputes in that forum (Messrs Richard Maluleka, Alphas Chauke and Clement Zondo)

[25] In Reply SAMWU submitted that:

“The award under review is in respect of 157 members. This clearly contradicts the deponent’s repeated assertion that the review application is in respect of 150 members, which is accordingly denied”.

[26] It is for SAMWU to provide evidence the members it is representing and their number more so in the light of the challenge by Piotrans. SAMWU has failed to do so save to state that it represents those employees referred to in the arbitration award which in my view is insufficient proof in the light of the challenge to their authority in this review application.

[27] This Court in *CEPPWAWU & others v Express Payroll CC*³ said the following:

“The Court noted that, of the 205 applicant employees, only 83 had signed powers of attorney signifying their assent to be represented by the applicants’ attorneys. There was no proof before the court that the employees were union members at the time of their dismissal. The Court found it difficult to understand why, since the matter had been dragging on for more than a year, the applicant’s attorneys had not simply filed powers of attorney when asked to do so. While registered unions and appointed attorneys are entitled to represent employees, the respondent was not seeking to prevent the union or the attorneys from appearing. The respondent was merely asking for proof of their authority to represent the employees, as it was entitled to do. The obstinacy of the applicants’ attorneys had caused the matter to drag on unnecessarily.

³ [2011] 11 BLLR 1061 (LC).

The sensible solution was, therefore, to invoke rule 7 of the High Court Rules and direct the applicants' attorneys to prove their authority to act on behalf of those employees who had not signed powers of attorney. The Court ruled that the applicants' attorneys were not entitled to represent the employees until they had filed the necessary powers of attorney, and the applicants were ordered to pay the costs of the interlocutory application."⁴

[28] I am the view that even in this matter, all what Piotrans seeks is proof of who amongst the Applicants is represented by SAMWU.

[29] At the time SAMWU instituted the review application on 24 June 2021, it was aware that some of its members were deceased.

[30] In its Founding Affidavit, the Applicants states the following:⁵

"The 157 SAMWU members on whose behalf we bring this application were employed by PioTrans as bus drivers. Some of them are now deceased and the necessary applications to substitute their executors for them will be brought indue course."

[31] This never happened and on 05 July 2024, Mr Paul Moeketsi Tati, Applicant's attorney of record deposed to an affidavit to the effect that on 03 July 2024, two days before the hearing of the matter, he received from SAMWU a list of its members who were part of the 157 Applicants who has since passed on.

[32] They were the following: Mashudu Modau, Sipho J Makhoba, Sevha R Nkuna, Lungile Ngubane, Thabo I Sekatane, Mcwayizeni E Mdumbe, Jacob Sebolai, Sydwell B Mungwe, Mfusi H Sapepa, Mzondwana T Shivuri, Mathews Mogodi, Siboniso Gcaba, Abner M Plati, Sipho S Nomkonko, Makhosonke V

⁴ Page 1062 – [2011] 11 BLLR 1061 (LC).

⁵ Applicants' Founding Affidavit, paginated page 6, para. 8.

Khumalo, Shadrack M Van Rooyen, Mbekezeli Zikote, Mahlebe (surname unknown), Ramotso, Christopher Mbele and Mahatshi Ndlovu.

[33] No death certificates were attached to the Affidavit.

[34] As in the case of *Dlwati v King Sabata Dalindyebo FET College* there is no evidence as to what steps, if any, have been taken to date by the Applicant's legal representatives with a view to engaging the Executors or Executrixes since the passing of the above members of SAMWU. More importantly, no evidence has been placed before this Court as to whether an Executors or Executrixes have been appointed and, if so, their identities and the dates of appointment. This is so despite the Applicant having being aware when the review application was instituted that there is a need to bring an application for substitution of some of the Applicants by their executors or executrixes.

[35] I agree with the decision of *Dlwati v King Sabata Dalindyebo FET College*⁶ that “*it will nonetheless be impermissible for the Court to allow a further step to be taken in the proceedings until the appointment of an Executor.*”

[36] The Court further said:

“Whilst the Court will naturally still possess the inherent jurisdiction to grant a stay of proceedings if it is demonstrated that an Executor is yet to be appointed (in most cases that would be the obvious order to make if there was an issue as to the status of the proceedings), nothing prevents the Court from granting a different order such as the postponement of the matter if the interests of justice so require.⁷ Given the peculiar facts of this matter and in particular the undertaking by the Applicant's legal

⁶ (P50/15) [2021] ZALCPE 6; (2021) 42 ILJ 2427 (LC) (18 August 2021) at para. 21.

⁷ Cf. *Wie obo G v MEC for Health and Social Development of the Gauteng Provincial Government* (05715/2013) [2016] ZAGPJHC 113 (19 May 2016) and *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd* 2011 (5) SA 14 (WCC).

representatives to engage with the Executor or the prospective Executor, the appropriate order, in the event of the application not being dismissed, would be to postpone it.”

[37] Nothing is further than the truth that “*it would be grossly unfair if an opposing party could take steps during the hiatus between the death of a party and the appointment of an Executor. During that period the deceased estate is defenceless. There is no Executor to protect it. A deceased estate is not a legal persona and consists of an aggregate of assets and obligations*⁸. *It acts through its Executor*⁹. *An injustice would thus occur if the heirs and beneficiaries of the deceased estate were to be prejudiced or penalised because of a delay in the appointment of an Executor.*”¹⁰

[38] The High Court also in *Eskom v Soweto City Council*¹¹ held that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported Applicant, is provided for in rule 7(1). This was confirmed by the Supreme Court of Appeal in *Unlawful Occupiers of the School Site v City of Johannesburg*.¹²

[39] A reading of the Rule 7(1) conveys that a person’s authority to act on behalf of a party may be challenged within ten days after it has come to the notice of a party that such person is so acting.

[40] The current review application has been instituted on 24 June 2024 and by July 2024, no steps have been taken to bring the substitution application despite earlier undertaking to so by the Applicant and there is no explanation as to why such steps were not been taken. All what the Applicant submitted in

⁸ *Commissioner for Inland Revenue v Emary* NO 1961 (2) SA 621 (A) at 624-625.

⁹ *Gross and Others v Pentz* 1996 (4) SA 617 (SCA) 625 A – B. “*In my view, it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have locus standi to do so.*”

¹⁰ *Ibid*, para 29.

¹¹ 1992 (2) SA 703 (W).

¹² [2005] 2 All SA 108 (SCA)

during the hearing of the review application was that the review can be dealt with and finalised and the Applicants be order to bring such an application thereafter. I do not agree with this approach more so in the light of the Rule 7 (1) of Piotrans.

[41] Since the proper person to act in legal proceedings on behalf of a deceased estate is the Executor of Executrix thereof; SAMWU does not have *locus standi* to act on behalf of the deceased employees and as a result the matter cannot proceed with the parties as they are before me.

[42] The fact that the Executors or Executrices might also decide to appoint their own legal representatives or deal with the matter differently than the manner in which the current representatives do, flies against the suggestion that the matter should nevertheless proceed with the parties as they are before me. I am of this firm view being conscious of the need for expeditious resolution of labour matters; but that cannot be at the cost of proper adjudication of matters.

[43] The authority of the SAMWU to act on behalf of 157 dismissed bus operators is being challenged in these proceedings. The challenge raises a question as to who amongst the 157 members is no longer part of these proceedings or represented by SAMWU? Without a clear answer to this question, I do not see why proceedings should continue with the parties as they are before me. The situation is exacerbated by the fact that some of the members are deceased and the Applicant must provide this Court with proof of whom amongst the original 157 members are still part of these proceedings more so that the matter involves a claim for reinstatement or compensation.

[44] The death of some of the employees erases the prospect of their reinstatement and the claims which an Executor or Executrix can persist with are different. The reason for this is that the Executor or Executrix of a deceased estate does not step into the shoes of the deceased. The Executor and the deceased are, in law, separate *personae*¹³.

¹³ *SA General Electric Co (Pty) Ltd v Sharfman and Others N.N.O.* 1981 (1) SA 592 (W) at 597H-598A

[45] In the notice of motion of the Applicant seeks the following orders:

“1. That the arbitration award made by the second respondent under the auspices of the third respondent under case number RPNT 2716 be reviewed, set aside and corrected;

2. That the individual applicants’ dismissals were unfair and that they be retrospectively reinstated in their employ with backpay and without any loss of benefits which accrued during the period of their unfair dismissal;”

[46] It goes without say that the deceased employees are incapable of tendering their services and accordingly cannot be reinstated in terms of an arbitration award as prayed in the notice of motion.

[47] The relief set out in the notice of motion in the review application, if I were to grant it will be of no value to the deceased employees. It is for this reason that the deceased should be substituted by their Executors or Executrixes before a decision can be made on the review application.

[48] Having expressed the view that I am not in a position to preside over the review application, what I need to determine is what should I do with the application before me.

[49] The Court always retains a discretion to grant a postponement if a failure to do so would result in an injustice¹⁴. In determining whether an injustice would occur one of the factors to be taken into account would be the consequences of a failure to grant a postponement¹⁵.

¹⁴ *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmSC) at 315H.

¹⁵ *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) at para 11.

[50] Executors or Executrixes for the deceased employees have not been appointed and if the matter is not postponed an injustice may occur because an Executors or Executrixes of the deceased employees will be denied an opportunity to decide as to whether it would be in the interests of the estate of the late of the deceased employees to pursue their pending claim.

[51] I am inclined to grant the postponement in these circumstances to obviate the injustices alluded above. This postponement could have been avoided had the Applicant brought a substitution application as the Applicant has undertaken wayback on 24 June 2021 but failed to do so. Even when the matter was heard, there was no such an application and the situation remains so to date. It is for this reason that I am of the view that the Applicant must pay the costs associated with the postponement.

[52] I am not in a position to postpone the matter to a particular date as I am not certain how long it will take to have the substitution application finalised.

[53] The Applicant's legal representatives will have to have discussions with the Executors or Executrixes of the deceased employees, take instructions and follow the requisite procedure to have the deceased employees properly before Court before the review application is re-enrolled and ripe for hearing, a period which I am unable to determine at this stage.

[54] In order for me to know who amongst the dismissed members of SAMWU is still persisting with this claim, taking into consideration the protracted history of the matter, the Applicant are required to file confirmatory affidavits of the dismissed employees who are still part of these proceedings within 60 days of the order.

[55] In the results the following order is made:

Order

1. The review application is postponed *sine die*;

2. The Applicants are ordered to pay the costs occasioned by the postponement;
3. The Applicants are ordered to institute the necessary proceedings for substitution by the Executor or Executrix of the deceased employees;
4. The Applicant must confirm by way of an affidavit deposed by each of the dismissed employee, Executor or Executrix as to whom amongst the 157 dismissed, is SAMWU still having the necessary authority to act on their behalf in these proceedings;
5. The substitution proceedings and/or confirmatory affidavits referred to in paragraph 4 above must be delivered within thirty (30) days of this order.

M S MPHAHLELE AJ

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Adv F A Boda SC and Adv S Harvey
Instructed by: Tati Attorneys Inc.

For the Respondent: Adv T Mathopo and Adv E Essa
Instructed by: Aadil Mayet Inc.