

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
INTEREST'

'OF

CASE NO: J 2325/99

In the matter between:

NUMSA

First Applicant

**TAUKUBONG, T and 31 OTHERS
Applicants**

Second And Further

And

ZEUNA – STARKER BOP (PTY) LTD

Respondent

JUDGMENT

NGCAMU, AJ

The first applicant is the Union, which has referred this dispute to this Court, on its behalf, and on behalf of the second to further applicants. The second to further applicants were all employed by the respondent until their services were terminated for the reason that the respondent termed “operational.”

The applicants challenged the dismissal on the basis that it was automatically unfair, in that, the reason for the dismissal was to compel the individual applicants to accept a demand in respect of a matter of mutual interest between the employer and the employees, within the meaning of section 187(1)(c) of the Labour

Relations Act 66 of 1995 (hereinafter referred to as the “Act”).

The applicants referred a dispute to the CCMA for conciliation on 4th March 1997.

The respondent raised a point *in limine* regarding the jurisdiction of the CCMA.

This point was upheld on 27th May 1999. This ruling was successfully challenged by the applicants in a review application. This decision was confirmed by the Labour Appeal Court.

The dispute remained unresolved. The applicants referred the dispute to this Court on 10th June 2000. The Court granted condonation for the late referral on 8th December 2000. The reply to the applicants’ statement of case was filed on 30th January 2001.

The respondent initially raised three defences to the applicants’ statement of case.

These

being:

- a) The dispute had been settled by way of an offer by the second to further applicants’ attorneys, and accepted by the respondent;
- b) That this Court has no jurisdiction because the dismissals were effected on 5th November 1996;
- c) The individual applicants were dismissed for operational reasons.

The defence in (a) above, was dismissed by this Court on 6th March 2002.

Accordingly, it does not stand. The defence in (b) was abandoned by the respondents at the commencement of the trial, as a result of the judgment of the Labour Appeal Court in Zeuna – Starker BOP (Pty) Ltd v NUMSA 1999 (20) ILJ 108 (LAC). What remains, is the defence set out in (c).

At the commencement of the trial, it was conceded on behalf of the respondent

that there was no total compliance with the requirements of the Act, regarding procedural fairness of the termination of employment for operational reasons.

The issues to be decided by this Court are set out in the pre-trial minutes filed by the parties. These issues are:

- a) Whether the dismissal was automatically unfair;
- b) Whether there was a fair substantive reason based on respondent's operational requirements;
- c) Whether there was substantial compliance with the procedural requirement in respect of the dismissal for operational requirements;
- d) The relief sought, if any should be awarded.

I must indicate that after the respondent had made a concession regarding the procedural aspect of the dismissal, a tender to settle the dispute was made. The respondent offered to pay each of the individual applicants an amount equal to one year's pay. This offer was not accepted by the applicants.

The applicants' case is that the dismissal was automatically unfair in terms of section 187(1)(c) of the Act. The respondent disputed this. Section 187(1)(c) provides that:

“ A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is... to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.”

The basis for contending that the dismissal was fair is operational reasons. The defence pleaded by the respondent appears in paragraph 8 of the statement of response. I do not need to set out the case pleaded in this judgment.

It was submitted on behalf of the respondent that the approach to be adopted by this Court, is that which is set out in S.A Chemical Workers' Union and Others v Afrox Ltd ILJ 1718 (LAC). In the Afrox case, the dismissal was in the strike context, whereas this case deals with a dismissal in the context of a lock out. It was submitted that in assessing the reason for the fairness of the dismissal in February 1997, the evidence must be weighed and assessed according to the Afrox. I was also referred to the case of NUMSA v Vetsak Co-Operative Ltd and Others(1996) 17 ILJ 455 (A) and National Union of Metal Workers v Black Mountain Mineral Development Co. (Pty) Ltd(1997) 18 ILJ 439 (A). These cases deal with a dismissal in the strike context and, in my view, they are not relevant to the question of whether the dismissal was automatically unfair in respect of a lock out.

A judgment which may be of relevance is that of Schoeman and Another v Samsung Electronics (Pty) Ltd () 20 ILJ 200 (LC). In that case, the employer locked out the applicants to get them to agree to new terms. At page 207, paragraph A – B, Landman J stated:

“ An employer needs to deploy, reasonably quickly and efficiently, the resources at the employers' disposal. Various options are open to an employer to achieve this. One of them is the lock out route which is used to compel acceptance of a demand....”

I agree with Landman J's sentiments on this. However, at paragraph 19, it was stated that:

“ An employer may not dismiss employees in order to compel acceptance of a demand but this does not prevent the employer resorting to dismissal for operational requirements in a genuine case.”

The analogy was then made that, given the circumstances of the present case, the dismissal was for a fair reason, being commercial reasons.

WAS THE DISMISSAL FOR A FAIR REASON?

The respondent pleaded that it employed sixty persons during 1996, and that forty-four of these were represented by the first applicant. The evidence disclosed that the respondent employed fifty-two wage earners and twenty-eight salaried employees. No evidence was led to prove that sixty employees were employed. It was common cause that the first applicant represented forty-nine of the fifty-two wage earners. The first applicant only bargained for its members during the wage negotiations. Offers were made by the respondent which were not acceptable to the first applicant. It is common cause, or not disputed, that some of the employees accepted the final offer.

Prior to the acceptance of the final offer by the other employees, the individual applicants embarked on a strike on 14th October 1996 until 5th November 1996. This strike was embarked on to put pressure on the respondent. On 14th October 1996, the respondent gave notice of a lock out to induce employees to accede to the respondent's wage proposal. The employees returned to work after the respondent had issued an ultimatum.

On their return, the employees were informed that their services were terminated in order to induce them to agree to the proposal. They were informed that the dismissal would remain in force if they did not accept the proposal within seven days. The deadline was extended to 20th November 1996. The employees tendered to return on the existing conditions. This was rejected by the respondent.

On 19th November 1996, the respondent agreed to a proposal that the dispute be

referred to mediation, The company's attorneys, in a letter appearing in bundle A (page 194), advised that:

“ Should the mediation fail, then our client intends to proceed in terms of the notices issued to the employees on 5th and 11th November 1996.”

Mediation proceeded on 14th January 1997, with the assistance of Advocate Sutherland as a mediator. During the mediation, it appeared that the dispute was about to be resolved. It was therefore agreed that the agreement would be signed. The first applicant wanted to take the agreement to its members before signing. It was agreed that the workers could commence working pending the signing of the agreement. The workers returned and started working as agreed.

On 21st January 1997, the company addressed correspondence, appearing in bundle A (page 232), as follows:

“ Kindly note, however, that the return of employees to the shop floor is conditional to the agreement being signed as already indicated. The company still reserves the right to resort to a lock out should signature of the document as it stands not take place.”

The agreement was not signed, as the workers did not approve it.

The company pleaded that there was tension. However, no evidence was led that there was tension between the members of the first applicant and those that accepted the final offer. It was conceded by the respondent's witnesses that there was no complaint about the manner in which NUMSA members performed their work during the period they returned to work. There is no evidence of any fight between the employees, either between NUMSA members and non-NUMSA members.

When the workers were locked out on 10th February 1997, they were working, and no problems had arisen as a result of their presence in the work place. The attorneys for the company addressed a letter (bundle A, page 245) to the Union's attorneys dated 10th February 1997, which recorded the following:

“ Our client's operational requirements are not at present being met and it is with reluctance that we inform you that the workers were informed today that they will not be allowed to enter our client's premises until this matter is resolved....”

The respondent is entitled to use the lock out in these circumstances, as was the case in the Samsung case. It is an option lawfully available to the employer. Such option is subject to the provisions of section 187(1)(c) of the Act, which prohibits dismissal based on a lock out.

On 10th February 1997, the respondent issued a document (bundle A, page 246) to the effect that:

“ If you have not accepted the company's final offer, the company has no alternative but to commence steps to terminate your employment relationship fully. It is with regret that we advise you of this decision which has been forced on the company due to the failure of the company and NUMSA to reach agreement during the mediation last month.”

The employees did not accept the company's final offer. As a result of this, a document (bundle A, page 250) dated 13th February 1997 was addressed, stating:

As stated in our notice dated 10th February 1997, the company is not in a position to continue with its operations on the present basis and has no alternative but to take steps to finally terminate the relationship. As you have not accepted the company's final offer, the company hereby terminates the employment relationship.”

The employment of the applicants was accordingly terminated. It is clear from the pleadings that the termination of employment was effected because the applicants failed to accept the offer. This is conceded in paragraph 8.10 of the respondent's response, which reads:

“ The employees failed timeously to accept the respondent's offer and their employment relationship with the respondent was accordingly terminated on 13th February 1997.”

The case made by the respondent in the pleadings, is that there was tension and uncertainty in the work place. In paragraph 8.8 of the respondent's response, the respondent stated:

“ The tension and uncertainty regarding the determination of the wage dispute rendered it impossible for the respondent to continue operating in this state indefinitely.”

The respondent, in the evidence, made attempts to establish a different justification for the dismissal. The respondent's case was that it took the decision to dismiss the applicants because it had to prepare for new projects, which became available. It then introduced new technology. To be able to expand it needed a stable work force. This case was not pleaded. The respondents did not make application to amend the pleadings in order to introduce this ground of justification. In the circumstances, in my judgment, I am going to treat this ground as a ground not appearing in the pleadings, which needs to be ignored. The respondent is bound by its pleadings.

The respondent further testified that the workers were locked out to protect the facilities. The witness, Mr. Rupp conceded that while the applicants were at work, they did not sabotage machinery. This justification for the lock out, which was

introduced in evidence, was also not pleaded. This evidence is in direct contrast with the notice of the 10th 1997. It was never mentioned in that letter that the lock out was to protect the machinery. This new case, which is being created, is rejected.

The respondent blamed the Union for the failure of the negotiations. Mr. Rupp conceded that the back pay remained the cause of the dispute, as well as the long period of the agreement.

Even if the Court were to accept the new case established by the respondent, in my view, it does not justify the dismissal. This is so because it was admitted that the employees did not sabotage the machinery and there was no complaint about the manner in which they performed their duties. Mr. Rupp admitted that there was no need to effect the dismissal on 13th February 1997.

The individual applicants were prepared to accept the final offer if the period of its duration was restricted to June 1998. In my view, this was a reasonable compromise by the employees. The respondent rejected the proposal and felt the period was too short. In my view, a stable working condition could have been established. Locking out, and ultimately dismissing the employees was not a way of maintaining peace in the work place.

Whatever the respondent's case may be, what becomes a problem in its case is that there had been a lock out on 5th November 1996, before the 13th February 1997. The employees had been without wages for five months. When they were told to return in January 1997, they gladly did so and performed their duties, leaving the negotiations with the first applicant. At the time when they were locked out on 10th February 1997, they were not on strike. They had performed their duties without complaints. The respondent locked them out and dismissed

them for failure to accept the final offer, and this is against the spirit of the Act.

Under these circumstances, the respondent's actions fell squarely within the ambit of section 187(1)(c) of the Act. The action by the respondent renders the dismissal automatically unfair because the reason for the dismissal was to compel the employees to accept a demand that they take the final offer. I have no doubt in my mind that, notwithstanding the right of the employer to implement a lock out to compel acceptance of a demand, it cannot dismiss the employees for refusing to accept the offer.

The notice to the employees dated 5th November 1996 stated:

“ Take notice that your employment with this company is hereby terminated. The purpose of this termination is in order to induce you to agree to the proposals by this company on terms and conditions of employment put forward during the 1996 annual negotiations of wages and conditions of employment, a copy of which proposal is appended hereto.”

This lock out persisted until January 1997. When the employees returned to work after the mediation, the respondent confirmed that it “ reserved the right to resort to a lock out.” This is what the respondent proceeded to do on 10th February 1997. The employees were required to accept the offer by 16h30 on 12th February 1997 to avoid dismissal.

The submission made by Counsel for the applicants, Mr. van der Riet, that the dismissal was to compel the applicants to accept the offer is supported by the evidence of Mr. Rupp. Mr. Rupp testified that the 13th February 1997 was not a cut-off point. The gates were still open for the employees to accept the final offer. He confirmed that the respondent was prepared to take the individual applicants back, on acceptance of the final offer. The position of the individual applicants

remained open until June 1997. This raises a question why the individual applicants were dismissed in February 1997 if these positions were only filled in June. In my view, there was no compelling reason to dismiss the individual applicants on 13th February 1997, if the respondent was still prepared to take them back. The dispute could have been referred to mediation again for a solution.

On the evidence presented, I am satisfied that there was no fair substantive reason for the dismissal of the individual applicants.

WHETHER THERE WAS SUBSTANTIVE AND PROCEDURAL COMPLIANCE WITH THE DISMISSAL

The respondent did not follow a fair procedure in effecting the dismissals. This has been conceded by the respondent. It was for this reason that a tender was made to the applicants, which tender was refused. Mr. van der Riet submitted that if the respondent attempted to comply with section 189, it would have become obvious that there was no need for the dismissal. I agree with this submission. I do so because there is no evidence to suggest that a two year agreement could not have brought peace in the work place.

WAS THE DISMISSAL AUTOMATICALLY UNFAIR?

The next question is whether the dismissal was automatically unfair, as contended by the applicants. The reason for the lock out and termination of employment can be traced back from the notice given to the employees on 5th November 1996, wherein they were told that their employment was being terminated to induce them to accept the terms and conditions of employment. The lock out persisted

until the mediation in January 1997. In January 1997, when the employees returned, they were again told that the company reserved the right to lock them out. This threat was put into effect on 10th February 1997, and their services were terminated on 13th February 1997.

Mr. Rupp tried to place before Court further grounds for the dismissal. What stands out clearly, is that the lock out and the dismissal was embarked upon, to compel the applicants to accept a proposal by the respondent. This action places the respondent within the ambit of section 187(1)(c) of the Act. I therefore agree with Mr. van der Riet, in that the dismissal is automatically unfair, in that it undermined the fundamental values of the Act. An automatic dismissal deserves to be dealt with in a manner that gives due weight to its seriousness.

See: CEPPWAWU and Another v Glass and Aluminium 2000 CC (5) BLLR 399 (LAC) at 409 FG

RELIEF

I have found that the dismissal was automatically unfair. What has to be decided is the relief to be granted to the applicants. The purpose of the relief is to grant redress to the employee who has been unfairly dismissed.

There were originally forty-nine applicants seeking relief. The parties have agreed that only thirty-two individual applicants seek relief. Of the thirty-two, only twenty-two seek reinstatement. The remaining ten seek compensation. I have been provided with the list containing all thirty-two applicants. The ten applicants that seek compensation have been indicated by a cross next to their names. The list also contains the gross and net salary of each of the individual applicants as at the

date of dismissal.

Both Counsel have submitted argument for, and against the reinstatement. It was common cause that as at the date of the completion of the trial, the individual applicants had completed sixty-three months without employment. It was also agreed that a period of twenty months had to be deducted because there had been a delay caused by the applicants, in failing to file the statement of case in time.

Section 193(1) allows this Court to order the reinstatement of the dismissed employee if the dismissal is substantively unfair. Mr Fabricius submitted that if the Court finds that the dismissal was for operational reasons, reinstatement would not be an appropriate relief. In support of his submissions, he referred to the matter of Mzeku and Others v Volkswagen SA (Pty)Ltd and Others(2001) 22 ILJ 1576 (LAC) at 1602 C. I agree with this submission. In the present case, I have found that the dismissal was automatically unfair. For that reason, the Court can competently make an order for reinstatement.

The respondent has pleaded that the reinstatement is not reasonably practicable. Mr van der Westhuizen testified that new technology had been introduced, and that the applicants would have to be trained to operate the new machines. He further testified that a lot of money has been invested in training the permanent employees who replaced the individual applicants. He also testified that the investors may lose confidence in the value of their investment. He further alluded to the fact that the morale of the other employees may go down if the applicants are reinstated.

Mr Fabricius submitted that the dictum in Victor v FINRO Cash and Carry(2000) 21 ILJ 2489 (LC) at 2495 I – 2496 A, should be taken into account if the Court finds that the dismissal was automatically unfair. In that case, the Court found that the dismissal was automatically unfair, and awarded six months pay, which the

Court found just and equitable.

It was conceded by Mr. van der Westhuizen, that if the individual applicants were not dismissed, they would have received the training, which ended up being given to the current permanent employees. He also confirmed that the applicants could be trained to operate the new machines. Their reinstatement cannot be refused on the grounds raised by Mr. van der Westhuizen. The individual applicants have been out of employment for sixty-three months; compensation would not be a just and equitable relief.

I accept that the reinstatement would necessitate retrenchment, which may affect the current permanent employees. This, however, is not a ground for refusing reinstatement. In terms of section 193(2), the Court “must” require the employer to reinstate, or re-employ the employee. The respondent will have to comply with section 189(7) to select those that have to be retrenched using fair criteria. The Courts have held that the fullest redress obtainable is provided by the restoration of the *status quo ante*. See National Union of Metal Workers of South Africa and Others v Henred Fruehauf Trailers (Pty) Ltd 1995 (4) SA 456 at 462 H-J. The Court can refuse to reinstate the employees if it is not reasonably practicable to do so. In my view, it is reasonably practicable to reinstate those employees who wish to be reinstated.

The Labour Appeal Court in Chevron Engineering (Pty) Ltd v Nkambule and Others (4) BLLR 395 (LAC) dealt with the question of reinstatement for a full period of four years and seven months, and came to the conclusion that it was not an unreasonable determination. To refuse the reinstatement would amount to punishing the individual applicants. I am of the view that, in the present case, the reinstatement will be a fair order.

I am satisfied that the respondent failed to justify the dismissal of the applicants.
The applicants are entitled to the order prayed.

The order I make is the following:

1. The dismissal of the individual applicants was automatically unfair;
2. The respondent is ordered to reinstate the twenty-two applicants listed in annexure “A” with retrospective effect, to a date forty-three months before the date of judgment;
3. The respondent is ordered to pay compensation equal to twenty-four months, to the ten applicants whose names have been indicated with “X” on annexure “A”
4. The respondent is ordered to pay the costs.

NGCAMU, A J

Date of Hearing : 29th May 2002

Date of Judgment :

LEGAL REPRESENTATION

For Applicants : Advocate J.G Van der Riet SC

Instructed by :

For Respondent : Advocate H.J Fabricius SC with
Advocate R.G Beaton

Instructed by :