

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

CASE NUMBER: J288/04

In the matter between :

WILLIAM JACOBUS HAVENGA

1ST APPLICANT

LUCAS JOHANNES KRIEL

2ND APPLICANT

AND

EQUITY AVIATION SERVICES (PTY) LTD

RESPONDENT

JUDGMENT

PAKADE .J

[1] The relief sought by the applicants is an order reinstating them in their respective positions in the Equity Aviation Services (Pty) Ltd (the Respondent) on conditions not less favourable than those which applied to them on 18 December 2003 pending the outcome of dispute they had referred to the Commission for Conciliation Arbitration and Mediation.

[2] The two applicants are the employees of the respondent. Both applicants have long service record with the respondent. The first applicant has been in the employ of the respondent for approximately 17 years and the second applicant has the service record of 10 years with the respondent, having joined its employment in 1987 and 1994 respectively. They both held the responsible positions of supervisors

[3] It is common cause that on 18 December 2003 members of SATAWU went on a protected strike.

The respondent locked them out. The two applicants were also locked out because the respondent believed that they were members of SATAWU and had as such participated in a protected strike. The respondent was certain that both applicants became members of SATAWU from 16 December 2003. Their membership application forms which were signed by each applicant on 16 December 2003 form part of the record as annexures SS 1 and 2 to the respondent's answering affidavit.

[4] In their founding affidavit the applicants content themselves merely by stating that the second applicant resigned from the membership of SATAWU on 11 December 2003. Indeed his letter of resignation which supports him is marked H1 to the founding affidavit. The first applicant who is the main deponent to the founding affidavit preferred to vacillate on the issue on whether he had resigned from the membership of SATAWU at the time he participated on the strike on 18 December 2003 or not. He merely stated that he attempted to resign his membership of SATAWU after joining Solidarity Union about four years ago but the respondent informed him that it would recognize his membership of that trade union. There is nowhere the applicants disclose that they rejoined membership of SATAWU on 16 December 2003, just two days before the protected strike was commenced. Even in their replying affidavit the applicants do not come out boldly and clearly that they had rejoined SATAWU two days before the strike action was commenced. They merely note the disclosure of this fact by the respondent. On this basis, Mr. Cassim Counsel for the respondent came very strongly against the applicant and argued that they are guilty of nondisclosure of a material fact. I will deal with this argument at the appropriate stage if it becomes necessary. I must at this stage set out the applicant's version.

[5] According to the applicants although they had resigned from SATAWU, the respondent still regarded them as members of SATAWU and he informed them that they were entitled to participate in the protected strike. They state that they participated in the protected strike because they were threatened with bodily harm by other members of SATAWU should they fail or refuse to participate. As the strike prolonged without resolution of the dispute they became dissatisfied with it. They then consulted their colleague and held a discussion with him about their eagerness to resume work. That colleague undertook to take their eagerness to return to work up with a member of the management. Indeed Mr. Clement Memetsa, a member of the management team of the respondent telephoned the first applicant. The first applicant informed Mr. Memetsa of his dissatisfaction with the strike action and the latter invited them to return to work. But the first applicant informed Mr. Memetsa of his reluctance to return to work for his fear of victimization but Mr. Memetsa assured him that there would be no victimization. On 5 February 2004 both applicants resumed their duties but on 06 February 2004 Mr. Petrus Du Preez forced them to sign a new contract of employment. He threatened them that should they refuse and /or fail to sign such contracts they would be locked out again. Mr. Du Preez did not explain the contents of the contracts to them and in

particular he did not tell them that they would be regarded as new employees, that they would serve 6 month's probation and that their working hours would be extended from 40 hours to 45 hours a week.

[6] They nevertheless signed the new contract of employment which embodied the 6 months probation period and new working hours. After signing it they found that it embodied material changes to their existing contract of employment. They approached Solidarity Union who advised them to refer the dispute to CCMA for conciliation. They completed the referral form (7.11) and faxed it to CCMA. On Friday afternoon the 13th February 2004 the General Operations Manager Mr. Kobus van Niekerk telephoned the second applicant and enquired from him if he had any knowledge about the aforesaid referral and about the article that had appeared in the Beeld newspaper. The 2nd Applicant admitted that he was aware of these two issues.

[7] On their return to work on Monday 16 February 2004, Mr. Van Niekerk informed the applicants that the respondent still regarded them as members of SATAWU and that they would be locked out. They were immediately escorted out of the premises of the respondent. On 17 February 2004 the applicants tendered their services but Mr. Van Niekerk did not allow them to return to work.

[8] The two applicants have now approached this court seeking, as a matter of urgency an ordered reinstating them to their respective positions with effect from 18 December 2003 pending the outcome of the dispute referred to the CCMA by them.

[9] As it appears from the respondent's answering affidavit, not much is in dispute between the parties. It is common cause that as members of SATAWU, the applicants were engaged in a protected strike with effect from 18 December 2003 and were all locked out by the respondent. The applicants became fed up with the strike and asked to return to work. The respondent invited them to sign a new contract of employment containing standard terms. Although the applicants had signed the new contract, they were not happy with two clauses, the one requiring them to undergo 6 months probation and the other one requiring them to work 45 hours instead of 40 hours per week. The clause relating to extended working hours is one of the material issues in dispute between SATAWU and the respondent which is presently the subject of the ongoing strike action.

In his response to the probation period, the respondent states that it was contained in a standard term contract and was in no way meant to apply to the applicants' employment. This concession was only made in the answering affidavit after the matter had been referred to the CCMA. The applicants stated that the

matter was adjourned to the CCMA on a dispute concerning the probation period. Mr. Cassim argued that there was no dispute between the parties which would resume referral of the matter to the CCMA. He submitted that as the new contract was fully explained to the applicants, they should have reverted to the respondent if they were not happy with the probation clause and had they done so they should have been told that it does not apply to them. To demonstrate that there was no dispute so goes the argument, the nature of the dispute on which the matter was referred is unfair dismissal. The facts on which the matter was referred as per the referral form are the following:

“ Employees participated in protective strike. On return to work their previous contracts of employment were cancelled and they were appointed as new employees ”

Mr. Cassim submitted further that except these two clauses in the new contract the original contract of employment was not changed and the applicants were not supposed to have referred the matter to CCMA.

[10] I find difficulty in accepting the argument advanced on behalf of the respondent. Firstly the applicants have long service in the employment of the respondent. They are called upon to sign a new contract containing standard terms which regards them as new employees. It is not explained to them that the clause relating to probation will not apply to them. The clause about probation was not cancelled as it should have been if it was meant not to apply to the applicants. Why was it left to the applicants to raise their concern about the probation period if it was meant not to apply to them. I can find nothing wrong in the applicants’ referral of the matter to the CCMA. Before the respondent’s answering affidavit was filed explaining that the clause the applicants were perfectly entitled to declare a dispute on this issue. Before the respondent came up with an explanation on this clause, the applicants’ contracts were altered and were regarded as new employees who had to undergo 6 months probation period.

[11] The referral of the matter as an unfair dismissal is perfectly correct. The applicants were locked out because they had referred the change of their contract to the CCMA. They regard this as unfair dismissal. The relevant section of the Labour Relations Act No. 66 of 1995 Section 186 (1)(b). It provides that;

“ Dismissal means that-

(a)

b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.”

The operative words are “less favourable terms”. The less favourable terms of the new contract of employment of the applicants is that they have although they have ten years service in the respondent’s

employment, they must again undergo 6 months probation. This constitutes dismissal in terms of Section 186(1)(b) and had to be referred for conciliation. This is what section 191(1) refers to as a dispute about the fairness of the dismissal (**National Union of Metal Workers of SA and Others v Driveline Technologies (Pty) Ltd and another (2000) 21 ILJ 142 (LAC)**). Therefore the dispute was properly referred as unfair dismissal.

[12] During argument it was conceded on behalf of the applicants that based on the Respondent's contention that the probation clause will not operate against the applicants, there is no more dispute and the applicants will withdraw their referral and abide by the new contract of employment. This is in response to paragraph 17.2 of the respondent's answering affidavit the relevant portion of which reads as follows:

"Accordingly and until such time First and Second Applicants agreed to abide by the amended terms and conditions of employment, they would be locked out together with the remaining members of SATAWU who are currently engaged in protected strike action"

[13] In view of these concessions by the parties, it is not necessary in my view to deal with the further submissions made by Mr. Cassim relating to the nondisclosures. The fact of the matter is that they were members of SATAWU and were regarded as such by the respondent.

[14] On the question of urgency the matter is urgent. It has not been contended otherwise by the respondent. The applicants were locked out on 16 February 2004. The present proceedings were launched on 18 February 2004. The respondent filed opposing affidavits on 20 February 2004. The replying affidavit was filed on 24 February 2004 and the matter was heard the same day. The applicants were in my view justified in bringing this application on an urgent basis.

[15] In the circumstances, the applicants succeed. In view of the fact that the matter was fully argued by the parties, it will serve no practical purpose to grant a *rule nisi* but to simply make a final order as prayed for in paragraphs 1, 2.1; 2.2; and 2.3 of the Notice of Motion. In the result I make the following order:

1. That this matter is urgent and the provisions relating to forms, time frames and service are dispensed with and the applicant is allowed to bring this application as a matter of urgency;
2. The respondent is interdicted and restrained from locking out the applicants or from in any way hindering or preventing the applicants from returning to work and tendering their services.
3. The respondent is ordered to reinstate the applicants in their respective

positions on terms and conditions that are not less favourable than those that applied to their employment on 16 February 2004.

4. The respondent is ordered to pay costs of this application.

PAKADE .J

JUDGE OF THE LABOUR COURT

HEARD ON 24 FEBRUARY 2004

DELIVERED ON 09 MARCH 2004

APPEARANCES

FOR THE APPLICANT :

FOR THE RESPONDENT : Adv Cassim SC_