LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS585-06

2009-3-19

REPORTABLE

In the matter between

SOUTH AFRICAN CHEMICAL WORKERS UNION Applicant

And

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD 1st Respondent
t/a Unitrans Freight and Logistics

BP SOUTH AFRICA (PTY) LIMITED 2nd Respondent

J U D G M E N T

PILLAY J: Thirteen employees claim reinstatement, alternatively compensation, for being dismissed substantively unfairly. The second respondent employer, BP South Africa (Pty) Limited (BP), transferred its warehouse and distribution business as a going concern to the first respondent employer, Unitrans Supply Chain Solutions (Pty) Limited, trading as Unitrans Freight and Logistics.

BP notified the employees on 7 December 2005 that it was negotiating the transfer of the business with Unitrans and that their contracts of employment would be transferred to Unitrans in terms of section 197 of the Labour Relations Act number 66 of 1995 (LRA). The effective date for the transfer was initially 1 February 2006. But it did not

take place on that day. On 1 April 2006, BP met with SACWU, the first applicant trade union, and informed it that the transfer would take place on 1 May 2006.

On 20 April 2006, Unitrans presented the employees with a slide show of its business and activities. On 17 May 2006, some of the employees discovered that their payslips from BP did not reflect the salaries payable to them; they also did not receive electronically generated payslips from BP. At the same time, several employees found that they were no longer covered for medical aid.

At teatime that day, the employees met in the canteen to discuss their concerns. They remained in the canteen well after tea. At 11:00, the general manager, Mr Martin, the operations manager, Mr Glass, the human resources officer, Mr Sekano and Mr Rosen of Unitrans, and Alford Ngubo, the human resources officer of BP, went to the canteen to inform the employees that BP had transferred their contracts of employment with effect from 1 May 2006 to Unitrans. Unitrans also intended to use the occasion to inform the employees of their conditions of employment with Unitrans.

There was a dispute as to whether the employees refused to talk to Unitrans staff and whether they informed Unitrans what their grievances were. SACWU's witnesses were evasive about whether they recognised Unitrans as their employer. The court prefers the evidence of Unitrans's witnesses on this issue as it is corroborated by documentary evidence.

The

letter dated 18 May 2006[1] confirms SACWU's stance that Unitrans did not have jurisdiction over its members. The employees did not recognise Unitrans as their employer that day. Spokesperson and employee, Mr Modise and the trade union official Mr Samela, who testified for SACWU, reluctantly agreed that the employees rejected their transfer. The court finds, therefore, that the employees refused to listen to the presentation. They also refused to discuss their problems with Unitrans and Alfred Ngubo. They insisted on discussing their problems with BP.

The Unitrans managers instructed the employees to return to work and take up their grievances in due course with BP. They left the canteen.

Several attempts to persuade the employees to return to work were unsuccessful. Eventually, Unitrans issued an ultimatum at 14:10 that they return to work by 14:30. When they did not comply, Unitrans issued another ultimatum at 15:00 that they return to work the following morning. The following morning, the employees reported to the workplace but they refused to work.

Unitrans issued them with notices to attend disciplinary enquiries on 22 May 2006. The employees refused to attend the enquiries. SACWU's attitude was that Unitrans had no jurisdiction to discipline the employees. Following the disciplinary enquiries, the employees were dismissed on 24 May 2006. Following an appeal, their dismissal was upheld on 6 June 2006.

[1] A26 of the bundle.

SACWU alleged that BP breached the contracts of employment by not paying the employees for April 2006 and by withdrawing their medical aid. As a result of that breach, they were entitled to withhold their services from Unitrans. Furthermore, the penalty of dismissal was too harsh.

The employees resisted the transfer to Unitrans for three reasons: Firstly, they alleged that they were not paid their salary for April; secondly, their medical aid had been suspended or terminated; thirdly, they were opposed to the transfer, in particular, the way it was implemented.

Until Mr Modise testified, SACWU's case was that the April salaries of the employees had not been paid. It transpired under cross-examination of Mr Modise that the complaint about non payment of the salary was a complaint about the employees not receiving payslips from BP for their May salary.

Mr La Grange submitted that payment of salaries fell due only on 25th of each month. As at 17 May 2006, the salaries were not due. Therefore, the reason for the work stoppage could not have been the non payment of the employees' salary for May.

As regards the medical aid, the employees were required to sign an acceptance of the medical aid options with Discovery, the company Unitrans engaged to provide medical aid. As the employees had not signed the documentation, for this reason too, the employees were not justified in withholding their services from Unitrans.

With regard to the transfer itself, Mr La Grange submitted that BP had informed the applicants that their employment with Unitrans would take effect on 1 May 2006 and that it would be in terms of section 197 of

the LRA. That meant that the employees were engaged on substantially the same terms and conditions of employment.

For all three reasons, therefore, Mr La Grange submitted that the Unitrans had not breached the contracts of employment. If the contracts were breached at all it was by BP. Therefore the employees were not entitled to strike against Unitrans. Their withholding of their services was unlawful and unjustified. Accordingly, the penalty of dismissal was also not harsh.

With regard to the non payment of salaries, the court finds that the applicants were owed a month's salary as at 17 May 2006. They instituted proceedings against BP and Unitrans on 26 May 2006. A flurry of correspondence between the legal representatives of SACWU and BP preceded an urgent application to secure payment of their salaries. From the correspondence, it emerged that the representatives of BP undertook to investigate the non payment of the salaries and urged the applicants not to proceed with the litigation. Nevertheless, SACWU instituted these proceedings against both BP and Unitrans. BP paid the employees. They settled the entire dispute with BP.

With regard to the medical aid, there was no evidence that the employees were informed before 14 June 2006 that they were required to sign any documentation to activate their medical aid. The entire transfer itself

was plagued with poor communication amongst all stakeholders: BP, Unitrans, SACWU and the employees. For instance, Mr Martin learnt only on 14 May 2006 that the employees were transferred with effect from 1

May 2006. The employees were not given their terms and conditions of employment with Unitrans before the transfer took place. Furthermore, as the transfer proposed for 1 February 2006 had not occurred, the employees were understandably unsure of the identity of their employer as at 17 May 2006. They worked in the same place doing the same jobs; ostensibly, nothing had changed.

Both BP and Unitrans had an obligation to inform the employees before 1 May 2006 who their employer would be, what their terms and conditions of employment would be, what their remuneration and benefits would be, who would pay it, and when and how it would be paid. They should also have been informed about their medical aid, who would provide medical aid and whether they were required to sign any documentation to activate the medical aid with a new company. If there was to be a three month suspension of the medical aid because of the transfer to a different medical aid company, they should also have been informed that they would be joining a new medical aid provider and of any arrangements that were made to cover their medical costs during the period of suspension and transfer from the old medical aid provider to a new medical aid provider. There is no evidence that any of that information was communicated to SACWU and the employees.

BP and Unitrans had a mutual duty to inform the employees fully. Their failure to do so brought about the impasse on 17 May 2006. The employees' refusal to communicate with Unitrans did not help the situation either. Their stance exacerbated the problems that had started with BP and Unitrans not communicating fully the information relating to the

transfer. The employees held BP accountable and wanted BP to explain the situation to them on 17 May 2006.

In a letter dated 13 April 2006[2], BP informed SACWU as follows:

> "I refer to the above matter and in particular the two engagements between BP and SACWU on Tuesday, 28th March and Wednesday, 12th April 2006 respectively, and advise the following:
>
> 1. The date of transfer of the affected employees from BP to Unitrans will transpire as at 1st May 2006;
> 2. Individual Section 197 Transfer letters will be issued to each affected employee on Wednesday, 19th April 2006;
> 3. In addition to the above letter, specific terms and conditions currently enjoyed by each employee as at April 2006, will be set out as an addendum to the letter, which will be the transferring terms and conditions;
> 4. BP has engaged Unitrans Management and their Human Resources team, and the following communication and interaction with the affected transferring employees has been scheduled:
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> A. **Roodekop**: Slide presentation by Mr Titus Sekana (HR Manager) **Tuesday 18th April at 14h00.**

[2] A11 of the bundle.

> Should you require any additional information please do not hesitate to contact either myself on the above numbers or alternatively Mr. Alfie Ngubo."

Mr Modise denied receiving the notice of the promised section 197 transfer. Copies of the notice appear in the respondent's bundle from page 20 to page 46. This denial only emerged during the trial and was not dealt with effectively at the pre-trial conference. As a result, Unitrans was not aware that it had to prove delivery of these letters.

However, the court is satisfied by the fax transmission to the trade union[3] that, at the very least, SACWU was aware of the letter dated 13 April 2006. It should therefore have notified its members, the employees, of its contents. If each employee had not received a letter informing him or her of the transfer as alleged in the second paragraph of that letter, then SACWU should have reacted. There is no evidence that it did so.

The probabilities are therefore that the employees did receive individual letters from BP notifying them of the section 197 transfer; even if they did not receive such letters, they were aware of the intended transfer. However, BP was not forthcoming about securing SACWU's full participation in resolving the grievance about the transfer. This is especially evident in the exchange of emails on 22 May 2006. BP had refused to allow SACWU to meet with the employees because it had derecognised SACWU by that stage.

[3] Pages B17 and 18 of Unitrans's Bundle

There is also no evidence that Unitrans took any steps before issuing the ultimatums or dismissing the employees to secure the intervention of SACWU to break the impasse. They left it to the employees to make their own arrangements to communicate with SACWU.

It was common cause that the employees did not use pre-strike procedures before they embarked on the work stoppage. That there was a work stoppage was not in dispute. That there was a strike was in dispute.

The first question for the court to decide is whether the employees were entitled to withhold their services. Non compliance with pre-strike procedures renders the work stoppage an unprotected strike. The purpose of the work stoppage was to remedy a grievance and resolve a dispute. The employees had grievances and disputes to resolve with BP concerning Unitrans taking transfer as the employer.

Unitrans dismissed the employees following a disciplinary enquiry on charges of “refus(ing) to obey a reasonable request or instruction and refusal to work”. The conduct complained of falls typically within the conduct for a which a strike dismissal is contemplated in section 68(5) of the LRA. For such dismissal, the court is required to have regard to the Code of Good Practice: Dismissal in Schedule 8 to the LRA to determine the fairness of the dismissal. To that end and in response to the second leg of the applicants’ case, namely that the penalty was too harsh, the court takes into account the following factors:

The 13 employees had service ranging from 8 to 31 years with BP. BP owed them better communication about the transfer to Unitrans. Unitrans also owed them a duty to communicate effectively to establish a

relationship of trust. In this tripartite relationship, the employees were the most vulnerable party. BP and Unitrans should have made a better effort to assure them of their job security.

Mr Martin began his testimony by informing the court that Unitrans valued the employees because of their product knowledge and experience. Even though this was not challenged, his conduct exposes his insincerity. Unitrans made no attempt to solicit the intervention of BP to break the impasse. Its best effort to get the employees back to work was to demand that they return to work, issue two ultimatums, hold a disciplinary enquiry, dismiss the employees and dismiss their appeals. The haste with which it accomplished all of this counteracts Mr Martin's evidence that Unitrans valued the employees.

For their part, the applicants were driven by their anticipation of securing retrenchment benefits from BP. That is one of the reasons the court finds for the employees withholding their services: they wanted a better deal with BP. Their refusal to communicate with Unitrans was unhelpful; however they were unequivocally apologetic at the appeal stage.

Their contrition would have been manifest. As employees with such long service, they were unlikely to throw away their investment in their tenure at a whim. They were unlikely to jeopardise their contracts of employment if Unitrans reinstated them.

By dismissing the employees, Unitrans wiped out a debt which it owed the employees for one year's severance pay for each year served. It would have had to pay severance pay if it had to retrench the employees.

Dismissing them and rehiring new employees was more profitable. A rough estimate of the total service of all the employees amounts to about 250 years. The remuneration of the employees averaged R1 000 per week. Effectively the dismissal of the employees resulted in a saving for Unitrans and BP of R250 000.

One of Unitrans's reasonsfor dismissing the employees was that its contract with BP was at risk; 40 percent of its business came from contracts with BP. As the party largely responsible for mismanaging the transfer, BP could hardly complain about poor service from Unitrans. Furthermore, the employees had been out of work since 17 May 2006. At the stage of the disciplinary enquiry they were out for not more than two days with a weekend before the enquiry. Once they were dismissed, they could also not have posed any risk by the time their appeals were heard. Reinstating them should not have posed a risk, especially if they were valuable as Unitrans would have the court accept.

The duration of the industrial action was short. If Unitrans had not acted so precipitously, the employees could have been at work within a few days after the impasse had occurred. Instead, Unitrans shunned concerted efforts by SACWU and its legal representatives after they received notices of the dismissal to resolve the dispute. This too leaves the court unconvinced that Unitrans valued the employees.

This entire dispute could have been avoided with minimal cost and hardship for all concerned; this trial itself could have been avoided if all the parties had communicated more effectively. The court finds that each of the parties contributed to a breakdown in the relationships.

In the circumstances, the court finds that the work stoppage was an unprotected strike and that the conduct of the employees was unlawful and unjustified. However, the court finds that the dismissal was too harsh.

SACWU has not made out any case for reinstatement. Nor did it present the court with adequate information about the status of the employees since their dismissal. In the exercise of its discretion and, taking account of the respective contributory conduct of all the parties concerned, the court elects to award an amount in compensation.

With regard to one of the employees namely Mr Bruce May, the court was informed that he had passed away. No arrangements were before the court as to what has transpired with his estate and in regard to the award in relation to him. The court directs that the Unitrans pays his claim into his estate or, with the permission of the Master of the High Court, to his beneficiaries.

Taking all of these factors into account, the court makes an order in the following terms:

The dismissal of the employees was substantively unfair. Unitrans is ordered to pay each employee the equivalent of four month's pay. Unitrans is ordered to pay the applicant's costs.

PILLAY D, J

Edited: 30 March 2009

On behalf of the Applicants:	Mr D Brown instructed by SACWU
On behalf of the Respondents:	Mr W La Grange instructed by Tabacks Corporate Law Advisors