not reportable / of interest to judges

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NUMBER: C826/2006

In the matter between:

B. KHAWUSELE	First Applicant
K. MAHO	Second Applicant
A.S. MADIKIZELA	Third Applicant
M. BENYA	Fourth Applicant
A. MAKETA	Fifth Applicant
S. HALU	Sixth Applicant
L. MAJALAZA	Seventh Applicant
Z. MKHUMBUZI	Eighth Applicant

and

FIDELITY CASH MANAGEMENT Respondent

JUDGMENT

Rabkin-Naicker A.J.

INTRODUCTION

[1] The Applicants were dismissed on the 23rd October 2006 for participating in an 'illegal work stoppage/ unprotected industrial action'. Before this court, the Applicants contended that they had not been involved in an unprotected strike but instead, after being given a lawful instruction by the senior manager of the

branch to go to the Bargaining Council regarding their grievance, they left premises on 19 October 2006 in the early morning.

umbuzi testified, they did not know if their jobs would be safe when they returned to base. They were in fact suspended pending their disciplinary hearing on the 19th October 2006,the day of the work stoppage.

s, Ms Potgieter quoted the relevant definitions of the security officers in the Main Agreement, who drive and handle the cash, but failed to include that part of the stated definition of the three types of 'security officers', which includes the words *"and who may have to carry firearms"*. It was common cause that the applicants were required to handle firearms. The description of the applicants precise function set out above makes it abundantly clear why.

[37] This court does not have jurisdiction to interpret the collective agreement and make findings as to its meaning. I have considered the agreement's terms to assist me to ascertain the issue of substantive fairness and whether it can be said that the conduct of the company was in anyway blameworthy. It was not disputed by the company that at other branches of its operations, employees working as crew on the cash and transit operations were not paid the security guard rate.

[38] Taking judicial notice of the 2007 collective agreement (Regulation Gazette No. 30041), I record that in fact the definition of a VSG was included in 2007 for the first time, and is defined as: *"an employee who is engaged to provide a protective, armed service to the security officer 11, in securing an area, guarding of cash and valuables, securities and negotiable documents in transit."* I note that in this Agreement while the Paterson grade of a VSG is category B2, the security guards grade is category A. Security officers are at category B3 and B4.

[39] There is no doubt that it is arguable that the rate of pay being earned by the applicants (ie. as security guards) was not commensurate with the dangers of the work they undertook. Whether they should have been paid according to the 'security guard' category at the time, given the need for them to carry firearms, was a matter than should have been resolved through interpretation of the collective agreement at the Bargaining Council. I can only infer that the union at national level, and the company were not overly concerned to ensure a determination take place.

[40] The question of whether the employer was involved in unfair conduct could only be answered if there had been a definitive ruling on whether the applicants should have been categorised as *'security officers'* or *'security guards'* under the applicable collective agreement. In the same

vein, whether the applicants in fact were making a lawful demand for more pay would have been settled had the matter been referred to the Council in terms of section 24(1) of the LRA.

[41] This court must decide on the fairness of the dismissals. Taking into consideration all the circumstances of this case, including the short duration of the work stoppage and the legitimate grievance of the Applicants in respect of their remuneration as tied to the category 'security guard', I find that dismissal was too harsh a penalty.

Remedy

[42] Having found that the dismissals were both procedurally and substantively unfair, I must consider whether the primary remedy of reinstatement is apposite. Generally, a court is loath to grant reinstatement in the circumstances of an unprotected strike in order to show its disapproval of the contravention of the provisions of the LRA.

[43] I do not consider that the company's conduct contributed negatively to the circumstances leading to the work stoppage in distinction to the factual matrix in **Professional Transport workers Union & Others v Fidelity Security Services (2009) 30 ILJ 1129 (LC),** where there had been no engagement with the union over the implementation of a new

roster. The company did engage with the applicants and their union representatives on their grievances and demands on at least three occasions between July and October 2006. I have stated above that I am unable to find the company's categorisation of the employees in terms of the collective agreement as unfair. This arguable case should have been taken to the bargaining council for determination. I therefore do not consider reinstatement to be appropriate. The applicants are however entitled to compensation in view of the company's scant regard for procedural fairness and imposition of too harsh a penalty in the circumstances.

[44] In as far as costs are concerned, I note that the attorneys for the applicants, who have represented them on a pro bono basis have not made submissions in this regard. I do not consider that fairness dictates that costs are awarded in this matter save for the wasted costs which were tendered by the company in respect of a postponement of the matter on the 14th February 2011.

[45] In conclusion, I make the following order:

45.1 The dismissals of the Second to Eighth Applicants were procedurally and substantively unfair;

45.2 The respondent is hereby ordered to pay Second to Eighth applicants an amount equivalent to 12 months remuneration calculated at their salary as of the date of their dismissals;

45.3 There is no order as to costs.

Rabkin-Naicker A.J.

Date of Hearing: 14/2/2011; 22-23/2/2011; 3-4/5/2011

Date of Judgment: 15 June 2011

Appearances:

For the Applicants:	Mr K. Makapane
	Edward Nathan Sonnenberg Attorneys
For the Respondent:	Ms C. Potgieter
	Blake Bester Incorporated