REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 722/2012

In the matter between:

FAWU **First applicant**

M KAPESI and 31 others **Second and further applicants**

and

PREMIER FOODS LTD **Respondent**

T/A BLUE RIBBON SALT RIVER

Heard: **4 September 2012**

Delivered: **7 September 2012**

Summary: Urgent application - rule *nisi* – workers reinstated by LAC after unfair dismissal based on operational requirements – employer barred from instituting disciplinary hearings based on same facts.

JUDGMENT

STEENKAMP J

Introduction

1] This urgent application stems from a dismissal almost five years ago, on 31 October 2007. The second and further applicants ("the applicants") were dismissed after a particularly violent (albeit protected) and prolonged strike – not for misconduct, but ostensibly for operational requirements. The Labour Court[1] found that the dismissals were unfair. The Court did not order reinstatement, though, but compensation equivalent to twelve months' remuneration.

2] On appeal[2] the finding with regard to unfair dismissal was upheld; however, the Labour Appeal Court ordered that the applicants must be reinstated. That judgment was handed down on 16 March 2012.

3] The respondent has given effect to the judgment and the applicants have been paid retrospectively. However, the respondent has now suspended the applicants and notified them of fresh disciplinary hearings. The applicants[3] (together with their trade union, the Food and Allied Workers' Union) have brought an urgent application to interdict the disciplinary hearings and to lift the suspensions. They argue, in a nutshell, that it is unfair of the employer to embark on new disciplinary hearings, five years after the alleged misconduct, when it has failed to prove an unfair dismissal for operational requirements based on the same facts.

Background facts

4] The background to the initial dismissal is summarised by Basson J.[4] The strike carried on for two months. It was marred by atrocious acts of violence. Non-strikers were harassed and intimidated. A female non-striker

1 *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2010] 9 BLLR 903 (LC); (2010) 31 *ILJ* 1654 (LC) [per Basson J].

2 *Premier Foods Ltd t/a Blue Ribbon Salt River v FAWU obo Kapesi & others* (2012) 33 *ILJ* 1779 (LAC).

3 The application was initially brought on behalf of all 32 workers who were party to the earlier proceedings. However, the applicants' attorneys have indicated that they are only proceeding on behalf of 24 of those applicants. The names are listed in the court papers.

4 *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2010] 9 BLLR 903 (LC); (2010) 31 *ILJ* 1654 (LC).

was dragged from her home at night and assaulted with pangas and sjamboks. The vehicle of a non-striker was set alight and destroyed. A neighbour of the non-striker, who was able to identify the perpetrators, was shot and killed. Houses were petrol bombed. A shot was fired through a security guard's vehicle parked outside of the home of the respondent's regional manager, Mr Lavery. As Basson J remarked:[5]

> "The individuals who perpetrated these acts clearly had no respect for human life, the property of others or the rule of law. What makes matter worse is the fact that it appears from the evidence that the police and the criminal justice system have dismally failed these defenceless non-strikers. Although criminal charges were laid against certain individuals, nothing happened to these charges. The non-strikers were completely at the mercy of vigilante elements who did as they pleased and who had no regard for the life and property of defenceless individuals. It must be pointed out that although a certain measure of rowdiness and boisterousness behaviour are expected or typical to most strike actions, the acts that marred this particular strike were particularly violent and senseless and stretched far beyond the kind of conduct that normally occurs during a strike. The witnesses who gave evidence in court were visibly traumatised by the acts of these vigilantes.
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> Strikes that are marred by this type of violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations in this country rest. The aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands. As already indicated, although a certain degree of disruptiveness is expected, it is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-striking workers to continue working, to dignity, safety and security and privacy and peace of mind."

5] After the strike ended, the employer intended to take disciplinary action against the perpetrators. However, given the background sketched by

5 Ibid paras [5] – [6].

Basson J, many witnesses were fearful to testify. The respondent's key witness, Mr Xhongo, disappeared and has not been found until this day.

6] Against this background, the respondent came to the conclusion that it could not present sufficient direct evidence in the internal disciplinary hearings. It decided – apparently on the advice of its then legal representatives and a labour consultant – to dismiss the alleged perpetrators for operational requirements. It did so on the basis that it had reason to believe that the applicants had committed acts of serious criminal conduct; that it had a profound impact on the business of the employer; and, in circumstances where it was impossible to take disciplinary action against the applicants.

7] Basson J held that the dismissals were unfair. She held that the operational requirements route was not open to the employer where the reason for dismissal was misconduct. She was not persuaded that the respondent was not able to hold disciplinary hearings. In exceptional circumstances, hearsay evidence could have been admitted. Instead, the respondent chose to embark on a retrenchment process in terms of section 189 of the Labour Relations Act.[6] The Court held that the respondent could not circumvent the misconduct route by resorting to the operational requirements route.

8] Turning to the appropriate relief, Basson J held:

> "The applicant seeks the retrospective reinstatement of all of its members to the date of the dismissal. I do not intend to dwell on this aspect in much detail suffice to point out that enough evidence was placed before this Court by the respondent to show that an employment relationship will never be able to exist between the applicants and the respondent. I therefore decide against reinstating the applicants. I do, however, award each of them compensation equal to 12 months' salary."

9] FAWU appealed and Premier cross-appealed. The Labour Appeal Court dismissed the cross-appeal and upheld the judgment of the court *a quo* that the dismissals were unfair. With regard to relief, though, it upheld the

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6 Act 66 of 1995 ("the LRA").

appeal and held:

> "There is no evidence that the applicants committed acts of violence or intimidation. This being so it would seem that the court *a quo* made this finding on the evidence of violence and intimidation which was not linked to the applicants. Without a link between the applicants and the acts of violence and intimidation there is no evidence that the employment relationship between the parties cannot be sustained. Cf *Edcon Ltd v Pillemer NO and Others* (2009) 30 *ILJ* 2642 (SCA). It follows then that the general rule, which gives primacy to reinstatement as the preferred remedy for unfair dismissal, must prevail."

10] The order of the Labour Court was therefore altered to read:

> "The respondent is to reinstate the applicant employees retrospectively to the date of their dismissal".

11] Premier applied for special leave to appeal to the Supreme Court of appeal, and on its refusal of leave, to the Constitutional Court. Both were dismissed, the latter on 1 August 2012.

12] The applicants reported for duty on 27 August 2012. On 28 August 2012 the respondent suspended them and notified them to attend a disciplinary hearing on 30 August 2012. The misconduct forming the basis of the disciplinary hearings consisted of the same instances of misconduct during the strike in 2007 that led to their dismissal for operational requirements when the respondent formed the view that it could not pursue disciplinary hearings at that stage for lack of evidence.

13] The disciplinary hearings were postponed to 5 September 2012 after unsuccessful attempts by the parties' legal representatives to resolve the issues. The applicants launched this application on 3 September 2012 for hearing on 4 September 2012.

<u>This application: the relief sought</u>

14] The applicants seek a rule *nisi* declaring the disciplinary proceedings and the employees' suspension pending those proceedings to be in breach of

the order of the Labour Court (per Basson J), as amended by the LAC, and accordingly unlawful; and/or unfair, and in contravention of the employees' rights to fair labour practices. They further seek to interdict the respondent from continuing with the disciplinary proceedings and order uplifting the suspensions.

Jurisdiction

15] It is now trite that this court does have jurisdiction to interdict incomplete disciplinary proceedings. However, as the Labour Appeal Court pointed out in *Booysen v The Minister of Safety and Security & others*[7], such an intervention should be exercised in exceptional cases only. It is left to the discretion of this court to exercise the power to intervene, having regard to the facts of each case. Among the factors to be considered would be whether failure to intervene would lead to grave injustice, or whether justice might be obtained by other means.

Urgency

16] I am satisfied that the applicants acted with due haste in bringing this application once it became clear that the respondent was intent on proceeding with the disciplinary hearings. In oral argument Ms *Savage*, for the respondent, did not pursue the argument that the application was not urgent.

Has the respondent complied with the order of the LAC?

17] The applicants have argued, firstly, that the respondent is in breach of the order of the Labour Court as amended by the LAC. The argument is based on the premise that the formal reinstatement of the employees is meaningless, given their suspension, as they have been deprived of the opportunity to work.

18] I disagree. The LAC has ordered the respondent to reinstate the

7 [2011] 1 BLLR 83 (LAC) para [54].

employees retrospectively. This Premier has done. It has formally reinstated them and paid them the back pay they are entitled to. The question whether it was fair to suspend them and to institute fresh disciplinary proceedings, is a different one; but it cannot be said that Premier is in breach of the court order.

Requirements for interim interdict

19] In order to consider whether the applicants are nevertheless entitled to the relief sought, the Court has to decide whether they have satisfied the requirements for interim relief[8], i.e.:

19.1 a *prima facie* right;

19.2 a well-founded apprehension of irreparable harm;

19.3 the absence of an adequate alternative remedy; and

19.4 a balance of convenience in their favour.

20] In view of the discretionary nature of an interim interdict these requisites are not judged in isolation and they interact.[9] Before dealing with the contentious question whether the applicants have established a *prima facie* right, though open to some doubt, I shall consider the other elements.

Apprehension of irreparable harm

21] It is so that the applicants are suffering some harm by being suspended. Even though they are being paid, the Supreme Court of Appeal[10] has noted – without going so far as to infer a 'right to work' – that:

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8 *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (A) 267 A-F.

9 *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & ano* 1973 (3) SA 685 (A) 691 E-G.

10 *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) SA 326 (SCA) para [27] (per Nugent JA). See also *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331 (LC); *Lebu v Maquassi Hills Municipality* (2012) 33 *ILJ* 642 (LC) para [35].

> "The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondent's counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."

22] Counsel for the applicants have pointed out that, if disciplinary proceedings continue and result in their dismissal, they will once again be unemployed and will have to refer a fresh dispute to the CCMA, five years after their initial dismissal that was held to be unfair.

23] Although the employees are suffering harm through their suspension and there is some apprehension of further harm, should they be dismissed, I am not convinced that it is irreparable. It is by no means clear that the disciplinary hearings will result in dismissal, given the apparent dearth of direct evidence of misconduct against them. And even if they were to be dismissed, they have the remedies under the LRA dispute resolution system available to them to repair any harm done. Unless and until they are dismissed, they are being paid; and should they be dismissed, and should those dismissals once again be held to be unfair, they will be entitled to retrospective reinstatement – even in the unlikely event that it again takes five years, as in the run-up to this application.

24] Nevertheless, this factor needs to be taken into account together with the others outlined above before the court exercises its discretion whether or not to grant interim relief.

Adequate alternative remedy

25] The remarks relating to the apprehension of irreparable harm to a great extent also relevant to the question whether the applicants have an adequate alternative remedy. Firstly, they will have an opportunity to be heard in the planned disciplinary hearings. Even if the allegations of misconduct against them were to be proven, and even if they were to be dismissed, they will have the alternative remedies prescribed by the LRA

available to them. This factor is not a strong consideration that would persuade the court to exercise its discretion to grant interim relief.

Prima facie right?

26] Perhaps the most contentious, but also the most persuasive, factor to be considered in the context of this application is whether the applicants have established a *prima facie* right, though open to some doubt.

27] I have already rejected the argument that the respondent is in breach of the court order. The question remains whether the applicants' right to fair labour practices should bar the respondent from proceeding with the envisaged disciplinary hearings.

28] The Labour Appeal Court in *Booysen*[11] accepted the principle outlined in *Nxele v Chief Commissioner, Corporate Services, Department of Correctional Services & others*[12] that the LRA imposes a general obligation on employers to treat their workers fairly. This right is also located in the constitutionally entrenched right to fair labour practices[13] given effect to be national legislation, ie the LRA.

29] The respondent previously dismissed the applicants, ostensibly for operational requirements. This Court and the LAC have held those dismissals to be unfair and the LAC ordered the respondent to reinstate the applicants. Does that preclude the respondent from holding disciplinary hearings and, should the allegations of misconduct against them be proven, from dismissing them?

30] In order to answer this question, the prior question is the real reason for the applicants' dismissal in 2007. The respondent purported to dismiss them for operational requirements; however, on the respondent's own version, it did so only because it realised that it could not establish that the individual employees could be linked to any acts of misconduct in the form

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11 *Supra* para [47].

12 [2008] 12 BLLR 1179 (LAC).

13 Constitution s 23(1).

of violence or intimidation with the available evidence. It issued a notice in terms of s 189(3) of the LRA in which it clearly stated:

> "During the recent strike at Blue Ribbon Bakeries a number of employees were [*sic*] allegedly involved in serious criminal actions, including but not limited to assault, arson, intimidation and shootings. Their conduct makes it impossible for the company to continue to employ those employees as there is a significant threat of further violence. We are unable to take disciplinary action against those employees as witnesses are too scared to give evidence."

31] The misconduct for which the respondent now wants to hold the applicants responsible, is exactly the same as that in respect of which it abandoned disciplinary hearings and opted for dismissals based on operational requirements in 2007. Basson J held that the respondent could not follow the operational requirements route simply because it could not prove misconduct. On appeal, the LAC put it bluntly:[14]

> "There is no evidence that the applicants committed acts of violence or intimidation."

32] The LAC also accepted that the applicants were selected for retrenchment based on their alleged misconduct. That misconduct could not be proven. The application of the selection criteria was unfair. And on the basis that the misconduct – *qua* selection criterion – could not be proven, the LAC ordered the respondent to reinstate the applicants.

33] It is clear that the respondent intends to pursue a course now that it abandoned five years ago. It elected at the time to follow the operational requirements route. The resultant dismissals were unfair. Nothing has changed – at least not on the affidavits before me, including the answering affidavit filed (in great haste, I acknowledge) by the respondent.

34] The scheme of the LRA is such that an employer may dismiss its employees for a number of reasons; primary among these are conduct, capacity and operational requirements, in line with the guidelines provided

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14 At para [35].

by the International Labour Organisation. The forum for resolution of the dispute about an allegedly unfair dismissal depends upon the categorisation of the dispute.[15] And section 193 of the LRA contemplates that the remedy ordered by the adjudicator who finds that a dismissal is unfair, should finally determine the entire dispute in respect of that dismissal.

35] Although one should, in my view, eschew bright lines between the various categorisations of dismissal disputes, the legislature could not have contemplated that an employer could pin its colours to the mast of one type of dismissal, and should it fail in proving that it was fair, try again to dismiss its employees for another ostensible reason but based on the same facts.

36] This is not the type of case where, in my view, a new hearing would have been permissible in the following hypothetical scenario: The employer discovers that R50 000 goes missing from its books every month. Only three employees have access to the bank accounts. The employer dismisses all three for operational requirements. While the dispute winds its way through the courts, the employer finds hard evidence on X's computer that X has been siphoning off R50 000 a month to his private account. The Labour Court (and, on appeal, the LAC) finds the dismissal for operational requirements to have been unfair and the three employees are reinstated. Upon reinstatement, the employer institutes a disciplinary hearing against X for the theft of the money.

37] The employer surely cannot be faulted for taking disciplinary steps against – and dismissing – X in that scenario. But in the present case, no new facts have apparently come to light. The employer wishes to discipline – and possibly dismiss – the applicants for the same reasons as those that pertained five years ago in 2007. It saddled the wrong horse then. Having been thrown off, it cannot start the race on a fresh horse. That would be unfair to the applicants, much as one sympathises with an employer whose non-striking employees have been subjected to atrocious and

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15 LRA s 191.

unacceptable acts of violence.

38] It is so that the respondent has never explicitly abandoned its intention to take disciplinary action against, and if necessary dismiss, the applicants; nevertheless, it elected to take one course of action and, having failed in that course, it does seem to me unfair to now embark on another course to achieve the same goal. In this context, the citation in *Administrator, Orange Free State & others v Mokopanele & another*[16] of the early judgment in *Angehrn and Piel v Federal Cold Storage Co Ltd*[17], albeit archaic in language and context, is still apposite to this election:

> "It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant ... He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. *Quod simel placuit in electionibus amplius displicere non potest."*

39] It is not necessary to attach to this course of action a label of "double jeopardy", *res iudicata* or *autrefois acquit.* Nor have the applicants relied on estoppel by waiver. The Labour Appeal Court recognized in *BMW (SA) (Pty) Ltd v Van der Walt*[18] that, in labour law, "fairness and fairness alone is the yardstick". The circumstances of the current case are not so exceptional as to warrant a second hearing: the respondent may have been badly advised at the time, but it elected to follow one route. It would be unfair to embark on a different route, with the same destination in mind, five years later and based on the same set of facts that pertained then.

40] To hold to the contrary would have the effect that multiple referrals of the same dispute to different *fora* could follow. That cannot be in accordance with the stated purpose of the effective resolution of labour disputes.[19]

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16 (1990) 11 *ILJ* 963 (A) at 969 E-I.

17 1908 TS 761 at 786.

18 (2000) 21 *ILJ* 113 (LAC) para [12].

19 LRA s 1(d)(iv).

41] Taking all of these factors into account, I am satisfied that the applicants have established at least a *prima facie* right, though open to some doubt. The respondent's intended course of action impinges, it seems to me, on the applicants' right to be treated fairly.

Balance of convenience

42] The balance of convenience favours the applicants, who will remain on suspension pending the return day. At this stage, pending the return day, there is no prejudice to the respondent other than a short delay in the possible commencement of the disciplinary hearings. That pales into insignificance against the background of a five-year delay in instituting those hearings.

Conclusion

43] Having regard to all the factors required for the granting of interim relief, I am satisfied that the applicants have made out a sufficiently strong case for the interim relief sought, even though it may be said that they will not suffer irreparable harm and that they have an alternative remedy at their disposal. The right to fair labour practices tilts the scale in favour of the court exercising its discretion to grant interim relief.

44] The conclusion I have come to leaves the court with a sense of disquiet. Although the court has exercised its discretion to grant interim relief in line with the applicable legal principles, there is no doubt that the perpetrators of heinous acts of violent misconduct will get off scot free. It may well be that some of those perpetrators are amongst the applicants – in fact, they probably are. Unacceptable as that is, though, the principles of legal certainty cannot be sacrificed. At best, the employer may have learnt from its mistakes; and one hopes that the union will attempt, in future, to instil discipline in its members when they embark on protected strike action.

45] The question of costs will only be decided, together with the question of final relief, on the return day on 18 October 2012.

Order

46] Leave is granted for this matter to be heard as one of urgency in terms of rule 8.

47] A rule *nisi* is issued calling upon the respondent to show cause on 18 October 2012 at 10h00 why an order in these terms should not be made final:

47.1 Declaring the disciplinary proceedings instituted against the second and further applicants (the listed employees) on 28 August 2012 and their suspension pending the completion of the disciplinary proceedings to be unfair;

47.2 Interdicting the respondent from continuing with the disciplinary proceedings;

47.3 Uplifting the employees' suspensions;

47.4 Ordering that the costs of the application be paid by the respondent.

48] The relief set out above shall operate as an interim interdict pending the return day of the rule *nisi.*

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPLICANTS:	Colin Kahanovitz SC (with him Michelle Norton)
	Instructed by Cheadle Thompson & Haysom.
RESPONDENT:	Kate Savage of Haffegee Roskam Savage.