REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, BLOEMFONTEIN

JUDGMENT

Case no: C 371/06

In the matter between:

FAWU **First applicant**

ANNA NTSHINTSHI & 29 OTHERS **Second to 31st applicants**

and

SUPREME POULTRY (PTY) LTD **Respondent**

(FORMERLY KNOWN AS

COUNTRY BIRD)

Heard: **7-9 November 2011; 19-20 March 2012; 23 November 2012**

Delivered: **11 December 2012**

Summary: Strike dismissal – unprotected strike – provocation, short duration, peaceful – dismissal unfair – reinstated with 12 months' backpay.

JUDGMENT

STEENKAMP J

Introduction

[1] The 29 individual applicants ("the employees") took part in an unprotected strike. They were dismissed. Was the dismissal fair?

Background facts

[2] The employees worked at the respondent's chicken farm known as Kelly's View in the Free State. They took part in an unprotected strike on 16 January 2006 and were dismissed as a result.[1] They are members of and represented by the Food and Allied Workers' Union (FAWU), the first applicant.

[3] On 16 January 2006, a delegation of shop stewards approached Mr Chris Knightley, the respondent's then manager at Kelly's View. They presented him with a list of grievances concerning the assistant farm manager, Ms Nomvula Moshebi. The letter stated: "Our suggestion is [that] either she is transferred to another farm or position or totally dismiss her as an assistant manager".

[4] Knightley testified that the workers' main concern was Ms Moshebi, whom they wanted transferred or dismissed; as well as some issues concerning incentive bonuses and overtime pay.

[5] Knightley told the shop stewards that he was not in a position to address their demands and that they should talk to his superior, Mr Armstrong. When Armstrong arrived, he told the employees to go back to work. He read the letter of grievances, crumpled it up and tossed it back at the shop stewards. Armstrong also told the employees to leave the property, otherwise he would have them removed. The employees then left the premises peacefully and boarded a bus to take them back to Bloemfontein. They were suspended and a collective disciplinary hearing, chaired by an attorney, Ms Magda Schoeman, was held on 20 January

[1] Five of the 29 individual applicants were in fact dismissed for being absent without leave for the period between the strike and the dismissal, even though they did not take part in the strike. The parties were *ad idem* that the court should not draw any distinction between the two groups of employees and that they should be treated the same for the purposes of these proceedings.

2006. The employees admitted that they had partcipated in an unprotected strike; and they were dismissed on 30 January 2006.

Evaluation / Analysis

[6] The applicants dispute the procedural and substantive fairness of their dismissal. In considering their claim, the court has to assess the evidence of the following witnesses:

6.1 Ms Magda Schoeman, chairperson of the disciplinary hearing;

6.2 Mr Chris Knightley (both of these called by the respondent);

6.3 Ms Adelina Mphoyi, one of the applicants;

6.4 Mr Kamohelo Piet Qabathi, applicant and shopsteward; and

6.5 Mr Mosiua Phillip Majara, FAWU official.

[7] When assessing the credibility of the witnesses and the probabilities[2], I shall rely strongly on the evidence of Knightley. He is no longer in the respondent's employ, and perhaps for that reason, struck me as an independent and honest witness. He recalled the events of the day as clearly as he could, assisted by a contemporaneous note he made on the day, given the lengthy time lapse between those events and this trial. He readily conceded that the strike was peaceful; that the employees had been provoked by Armstrong; and that their grievances were legitimate. In contrast to the applicant's witnesses, whose evidence in some respects contradicted the allegations in their statement of claim, Knightley made no attempt to colour his evidence to suit the respondent, nor did he divert from his evidence in cross-examination. When he could not remember the events of six years ago clearly, he said so. Wherever there is a discrepancy between the witnesses regarding the events of 16 January 2006, I shall rely on the evidence of Knightley.

In limine

[8] At the commencement of the trial in November 2011, Ms *Charoux,* for the respondent, raised various points *in limine*. The issues raised concerned

[2] *Stellenbosch Farmers' Winery Group v Distell et Cie* 2003 (1) SA 11 (SCA).

jurisdiction, prescription and condonation. I ruled on those issues and provided written reasons on 8 November 2011. I shall not repeat those, save to include a copy of those reasons with this judgement.

Procedural fairness

[9] The applicants claim that the dismissal was procedurally unfair because Ms Schoeman did not have the authority to dismiss them.

[10] Ms Schoeman was a practising attorney at the time when she chaired the disciplinary hearing. Perhaps understandably, she could not recall much of the events of six years ago. Unfortunately (and somewhat surprisingly) neither Ms Schoeman nor the respondent could provide minutes of the disciplinary hearing, even though Schoeman was adamant that minutes were kept.

[11] It is common cause that the employees admitted that they had participated in an unprotected strike. After considering mitigating and aggravating circumstances, Schoeman came to the following conclusion, set out in a letter from her to FAWU's Majara and copied to the respondent's human resources manager, Kulu Ferreira, on the 30 January 2006:

> "1. Charges 1-4 will be taken as one charge for consideration of a penalty.
>
> 2. Penalty: summary dismissal as from 30/01/2006.
>
> 3. All administration will be handled by Country Bird such as UIF, leave money, etc.
>
> 4. The employees have the right to refer the matter to the CCMA.
>
> 5. The minutes and reason for decision will be faxed to the union on 01/02/2006."

[12] On 31 January 2006, Ferreira sent the following letter to Majara:

> "<u>TERMINATION OF SERVICE: FAWU MEMBERS: KELLY'S VIEW</u>
>
> 1. The above mentioned has reference.
>
> 2. Kindly find attached the individual termination letters of the group of employees that has [*sic*] been dismissed on 30 January 2006 in respect of the disciplinary hearing that was heard on Friday, 20 January 2006."

[13] The respondent issued individual termination letters dated 30 January 2006 to each of the employees in the following terms:

> "TERMINATION OF SERVICE
>
> Resulting from a disciplinary hearing held on 20 January 2006 in Bloemfontein with Ms Magda Schoeman as chairman and in terms of our disciplinary code, we wish to inform [*sic*] your permanent dismissal from Country Bird (Pty) Ltd with effect from 30 January 2006 due to misconduct.
>
> Your termination benefits up to date and including the state will include the following:
>
> All earnings up-to-date less tax, pro rata leave payment, and pro rata holiday leave allowance."

[14] It is perhaps unfortunate that Ms Schoeman personally sent the letter reflecting the penalty of summary dismissal to FAWU on 30 January 2006 before the respondent's human resources officer, Ferreira, confirmed the termination of the employees' service by the respondent. However, it is clear that the respondent dismissed the employees after Schoeman, as the chairperson of the disciplinary hearing, had recommended dismissal as a sanction. There is no merit in the applicants' submission that the dismissal was "unlawful" because it was somehow effected by Schoeman and not by the respondent.

Substantive fairness

[15] Participation in an unprotected strike is misconduct. However, it does not always justify dismissal. The Code of Good Practice[3] spells that out:

> "(1) Participation in a strike that does not comply with the provisions of chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –
>
> (a) the seriousness of the contravention of this Act;
>
> (b) attempts made to comply with this Act;

[3] Schedule 8 to the Labour Relations Act, Act 66 of 1995 ("the LRA"): Code of Good Practice: Dismissal, Item 6.

(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employee is in question, the employer may dispense with them."

[16] In the present case, the contravention of the LRA was not particularly serious. The strike was of a short duration – less than one hour, by the respondent's own admission. Armstrong told the employees to return to work within 15 minutes. When they did not, he arranged bus transport and told them to leave the premises. They did not have a further opportunity to return to work, but were immediately suspended pending the disciplinary hearing.

[17] Knightley was at pains to stress that the strike action was peaceful. On the other hand, Armstrong shouted at the employees and, rather than attempting to attend to their grievances, crumpled up the letter containing the grievances and threw it back at them.

[18] Knightley also readily admitted that the employees had been provoked by the actions of the employer. Their grievances were legitimate and they had raised the same grievances number of times before, over a period of at least two months, to no avail.

[19] Ms *Charoux* argued that the respondent had issued more than one ultimatum in compliance with item 6 (2) of the Code of Good Practice. I do not agree. The evidence shows the following when regard is had to Knightley's testimony and the contemporaneous documentation:

19.1 Armstrong told the employees (verbally) to return to work within 15 minutes. When they did not, they were put on buses to return to Bloemfontein and suspended.

19.2 Armstrong told the employees to go back to work "otherwise they must leave the property". They were not given sufficient time to reflect and to decide whether to return to work before they were removed from the premises.

19.3 The respondent did not tell the employees "in clear and unambiguous terms" what sanction would be imposed if they did not return to work.

19.4 Although Knightley had some recollection of "a letter", the respondent could not provide any proof of a written ultimatum. Knightley testified:

"The only ultimatum that I can honestly say I saw [*sic*] was the verbal ultimatum".

19.5 At best, Ferreira sent a letter to the union organiser, Majara, after the employees had already been removed from the workplace in these terms:

"INDUSTRIAL ACTION: KELLY'S VIEW: 16 JANUARY 2006

1. The above mentioned has reference.
2. It came to the attention of management that your members at of Kelly's View breeder operation are behaving in an unruly manner and refuse to work.
3. Note that are [*sic*] dedicated and official channels available to lodge any grievances and the above mentioned behaviour is totally unacceptable. An ultimatum was given to them to return to work at 08h00 and refusing to return to their place of work within 30 minutes strict disciplinary action will be taken against them.
4. Kindly note that management will not tolerate such behaviour and serious disciplinary action will be taken against these employees and could result in a total lockout of employees.
5. We hereby request you to meet ASAP with your shop stewards concerned and to sort out the issues concerned."

[20] Even though the respondent did contact the FAWU official, it only did so after the employees had already been suspended and at a time when it was impossible for the union official to persuade them to return to work. At the time when the respondent contacted him, Majara was in Viljoenskroon and he could only attend to the matter when he returned to Bloemfontein.

[21] On the evidence before me, the respondent did not give the employees an ultimatum in clear and unambiguous terms – and certainly not in writing – giving them an opportunity to reflect, to return to work, and making it clear that they could be dismissed if they did not do so.

[22] Even though the employees participated in an unprotected strike, I do not consider dismissal to be a fair sanction, given the following factors:

22.1 the short duration of the strike;

22.2 its peaceful nature;

22.3 by the admission of the respondent's own witness, the employees were provoked by management;

22.4 the employees had legitimate grievances; and

22.5 the respondent did not issue the employees with an adequate ultimatum.

CONCLUSION

[23] Taking into account the surrounding circumstances, the dismissal of the employees was substantively unfair, even though they participated in an unprotected strike.

[24] With regard to relief, I take into account that there is no evidence that the trust relationship had broken down.[4] In terms of s 193(2) of the LRA, reinstatement is the primary remedy. However, the Court has to take into account whether the employer would be unjustly financially burdened if full retrospective reinstatement were to be ordered.[5]

[4] *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA).

[5] *Mediterranean Textile Mills (Pty) Ltd v SACTWU & others* (2012) 33 *ILJ* 160 (LAC).

[25] In this case, the matter came to trial more than five years after the dismissal. Much of the delay was due to the employer's organisation that represented the respondent company at that stage, but some of it was also due to the union and some if seems to have been caused by systemic delays in this court that have since been addressed. I also take into account that the applicants do not have clean hands – the employees took part in unprotected strike action, and even though I have found that dismissal was too harsh a sanction, such action constitutes misconduct.

[26] It would be unfair to the respondent if the Court were to order it to pay the employees backpay for some six years. It would be fair, in my view, to order it to pay the employees backpay for 12 months, i.e. to reinstate the employees retrospectively to 30 January 2012 and to order them to report for duty by 30 January 2013. That will enable both parties to prepare for the return of the employees over the festive season and it will take into account any disruptive shut-down period over December.

[27] At the Court's request, the respondent has prepared a schedule of the employees' earnings at the time of their dismissal. It was attached to Ms *Charoux*'s heads of argument and I shall refer to it as "Annexure A". Their meagre earnings ranged from R1260 to R1740 per month. Their backpay must be calculated on these figures.

[28] It may also be that some of the employees have passed away in the lengthy time period since their dismissal. If so, their families should be paid the compensation due to them.

Costs

[29] Even though the applicants have been substantially successful, I take into account that there is a continuing relationship between FAWU, the first applicant, and the respondent. The respondent will also have to forge a new relationship with the reinstated employees. I also take into account that the employees are represented by their trade union and are thus not personally out of pocket for legal fees; and that they have not come to court with clean hands, having participated in an unprotected strike. In all

of these circumstances, and taking into account the principles of law and fairness[6], I do not consider a costs order to be appropriate.

Order

[30] I therefore make the following order:

30.1 The dismissal of the individual applicants was procedurally fair but substantively unfair.

30.2 The respondent is ordered to reinstate the individual applicants retrospectively to 30 January 2012.

30.3 The applicants must report for duty by no later than 30 January 2013, failing which they will forfeit the right to reinstatement.

30.4 Should any of the applicants be deceased, and upon proof of death, the respondent must pay compensation equivalent to 12 months' remuneration, as set out in Annexure A to the respondent's heads of argument, to their estates by no later than 14 February 2013.

30.5 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANTS:	Attorney MJ Ponoane, Bloemfontein.
RESPONDENT:	Adv L Charoux
	Instructed by Yusuf Nagdee, Johannesburg.

[6] LRA s 162(1).