IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 22/2018

In the matter between**:**

SACCAWU obo RAMONTLHE AND 2 OTHERS **Appellants**

and

SUN CITY **Respondent**

Heard: **22 August 2019**

Delivered: **16 October 2019**

Summary: Employees dismissed for participating in an unprotected strike in violation of a court order prohibiting any protest – employees contending that employer's conduct justifying the unprotected strike – court held that employer attended to concern about racism and sexual harassment raised by the employees and thus there was no justification for employees to engage in an

unprotected strike. Judgment of the Labour Court upheld and appeal dismissed with costs.

Coram: Davis and Coppin JJA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

[1] It is a notorious fact that the Gupta family have featured prominently in widespread allegations of nefarious corrupt activity. They appear again in the present dispute which was sourced in a wedding of members of the Gupta family which took place at Sun City between 30 April to 01 May 2013. According to the pre-trial minute, the strike action which lies at the heart of the present appeal was provoked by the actions of members of the Gupta family who refused to be served by black members of the staff of respondent (Sun City). In turn it, in their view, prevent the humiliation caused by the racist behaviour of members of the Gupta family.

[2] The unrest caused by this egregious behaviour, which is common cause between the parties, resulted in Sun City launching an urgent application for an interdict against COSATU and appellants which was directed to prevent them from participating in the intended COSATU march/protest.

[3] On 10 May 2013, the Labour Court granted an interdict against COSATU and appellants preventing them from participating in the protest which was organised to take place on 11 May 2013. Notwithstanding this order, on 11 May 2013

employees, including the individual appellants, gathered at a bus stop outside of the entertainment area at the Sun City resort. It is common cause that Sun City provided these employees with a bus so that they could be transported to the main gate where the COSATU gathering was to take place. Many participants did not use the bus and walked to the main gate where the gathering had formed and where the protest commenced.

[4] Between 2 and 8 July 2018, Sun City served notices on individual employees to attend disciplinary enquiry. Pursuant to a decision of a disciplinary enquiry and an appeal therefrom which took place on 08 September 2013, the employees were dismissed. It was against this decision that the appellants, being SACCAWU and the individual employees dismissed, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) against Sun City.

[5] The disputed dismissals eventually reached the Labour Court. On 21 August 2017, the dispute was heard by Prinsloo J in the court *a quo*. At that point SACCAWU, on behalf of 14 of its members sought relief, claiming that they had been unfairly dismissed. A number of these employees then entered into a full and final settlement agreement and thus fell outside of the dispute which the court *a quo* was required to determine. Eventually the court *a quo* dealt with three individual employees, who were charged with inciting and intimidating employees at Sun City at 3 May 2013 by causing them to participate in work stoppages resulting in destruction and financial loss to Sun City.

[6] In the court *a quo*, Prinsloo J found that the interdict granted by the Labour Court had been deliberately breached by these employees which did not only constitute contemptuous conduct but were actions which undermined the rule of law. This could not be tolerated or condoned. After considering arguments in mitigation, Prinsloo J found that dismissal was the appropriate sanction for this misconduct and accordingly confirmed the dismissal of the three individual employees. With

the leave of the court *a quo*, the appellants contend, notwithstanding the unprotected strike, that dismissal was not the appropriate sanction.

The appeal

[7] The key evidence raised by the appellants in justification of their conduct, albeit that they accepted that they had participated in an unprotected strike was the following: On 22 April 2013, an e-mail was generated from Beatrix van der Vyver, an event manager at Sun City, which e-mail advised staff about the dress code and conduct at the Gupta wedding. Significantly the e-mail contained the following:

> 'Please also pay attention to the hygiene of staff on site, will have deodorants, soaps, toothpaste on site should you need. Blaine will manage this from our team and will issue stock to suppliers.'

Further, Ms Mofokeng, a room service waitress, testified that waitresses were prohibited from taking trolleys of food into the rooms of guests of the Gupta and that only White and Indian waitrons were allowed to take trolleys into these rooms. She further said that, when she asked her manager to explain this, he said to her that an agreement had been reached between her employer and the Gupta family. It was also contended that Sun City had unjustifiably failed to respond timeously and adequately to the concerns of COSATU, which omissions created the reasonable impression that it was not prepared to properly investigate the serious issues which had been tabled by appellants and COSATU.

[8] To the extent that Sun City referred to a meeting of 3 May 2013, it is important even at this stage of the analysis to note that the purpose thereof was to discuss the ill health of Mr Khojane and not to address these complaints raised by COSATU. It was this failure which gave rise to a notice of 7 May 2013 in which COSATU had demanded answers to the circumstances which had given rise to all of the insults, humiliation and concerns of employees of Sun City.

[9] Finally, it was contended that Sun City did not apologise to the employees notwithstanding evidence offered by Sir Richard Hawkins of Sun City, that he had issued instructions to members of the Sun City management team to apologise to the affected employees.

[10] Mr Boda, who appeared on behalf of the appellants together with Mr Peer, referred to the judgment of this Court in *Hendor Steel Supplies (a division of Argent Steel Group (Pty) Ltd Formally name Marschalk Beleggings (Pty) Ltd v National Union of Metal Workers of South Africa and others* 2009 (30) ILJ 2376 (LAC) at para 13 where employees were aggrieved by the continued presence of a supervisor who was intolerant and authoritarian, and thus argued that a dismissal for participating in an unprotected strike was unfair. In this regard, the court stated:

> 'When all these facts are taken into account, a picture emerges of employees who were understandably aggrieved by the continued presence of De Bruyn and authoritarian and of the very least an intolerant supervisor.' (emphasis added)

[11] In Mr Boda's view, given the four pieces of evidence set out above, it was understandable that employees would have been aggrieved by the egregious and/ or neglectful conduct and/or non-communication on behalf of Sun City. Accordingly, the court *a quo* had failed to take sufficient account of item 6 (1) (c) of Schedule 8 of the Labour Relations Act 1995 which provides as follows:

> '(1) Participation in a strike that does not comply with the provision 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 light of the facts of the cause including-
>
> …
>
> (c) whether or not the strike was in response to unjustified conduct by the employer.' (emphasis added)

[12] Although it was an unprotected strike, Mr Boda contended that it had been conducted peacefully, and had taken place as a result of extreme provocation which flowed from the Gupta behaviour and the acquiescence of Sun City.to manifestly egregious behaviour.

Respondent's case

[13] Mr Ngcukaitobi, who appeared together with Mr Navsa on behalf of respondent, raised what he argued was a fundamental point which was dispositive of the case. If correct, there was no necessity to interrogate all of the various complaints raised by Mr Boda on behalf of appellants. In support of this line of argument, he referred to the statement of claim in respect of the charges on 3 May 2013; that is the incitement and intimidation charges. They read thus:

> '4. The Gupta's family denied to be serviced by the employees of the respondent who were black and demanded that they must be serviced by Indians as they are also Indians.
>
> 18.1 We submit that as per our earlier submission that the applicant participates in protest as a result of the Gupta's family who display racism and discrimination by refusing to be served or serviced by the black, the protests on such a day was triggered by the behaviour of the Gupta's family whose attitude was against blacks and the respondent failed to address the issue timeously …
>
> 18.3 The applicant and other employees participated voluntarily in response or reaction to the attitude of the Gupta's…
>
> 18.8 Discrimination displayed by the Guptas was provocation.'

[14] In a further supplementary pre-trial minute, appellants alleged as follows:

> 'The applicants allege that although the strike was unprotected, they were provoked by the Gupta family who refused to be served by the black staff. The applicants considered the Gupta's family behaviour racist. The respondent did

not support the striking employees as it did not stop the humiliation of the striking employees by the Gupta family.'

[15] When Sun City sought further particulars from appellants in order to prepare for trial, that is as to which members of the Gupta family refused to be served by Black employees, the response was as follows:

> 'The Gupta family entourage refused to be served by the respondent's black employees, especially those who worked as chauffeurs and waiters and that no black chauffer served the Gupta's.' (emphasis added)

[16] Mr Ngcukaitobi contended that it was clear that the Black employees identified by appellants in their pleaded case were those who served as waiters, room attendants and chauffeurs at Sun City during the Gupta wedding. It was also apparent that the allegation was that the provocation was powered by the totally unacceptable conduct of members of the Gupta family and their guests and that the basis of the case against Sun City was that it had failed to address the issues timeously. Regarding appellants' statement of claim in respect of the charge relating to the events of 11 May 2013, that is the participation of the unprotected strike, it stated as follows:

> 'In the afternoon of 11 May 2013 the people gathered at Bridge One, scores of the people who gathered at the bridge one were already off duty as it was late in the afternoon between 80 to 100 people gathered, the intention therefore was to put more pressure on the respondent to deal adequately with the Gupta's. The respondent has failed to act after the demonstration of 03 May 2013.'

[17] Pursuant thereto Sun City sought to clarify the actions that the appellants alleged it ought to have taken after 3 May 2013, to which the response was as follows:

> 'Among others, to apologies for the abusive and racial treatment its employees were subjected to and an undertaking that it will not allow such again.'

[18] Respondent's argument was that the case made out by Mr Boda on behalf of appellants before this Court was markedly different from that which had been set

in its statement of claim and which constituted the case that respondent was required to meet. In short, there was no mention of the so called toiletry issue nor there was any mention or a disclosure of an agreement between the Gupta family and Sun City. By contrast, the statement of claim referred to the fact that:

> 'The Gupta's family will not be served by blacks but they choose not to inform the applicant or their union about the issue until the issue spiral out of control and acknowledged the problem later.'

Evaluation

[19] In evaluating the case brought by appellants, Mr Ngcukaitobi referred to a *dictum* of this Court in *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC) at para 4:

> 'The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented with only admissible evidence that is relevant to that question.
>
> Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a Court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.'

[20] It appears in the present case that, albeit that there were specific issues raised in the statement of case, as the litigation shoe began to pinch so were adjustments made which resulted in a range of issues being raised which were not contained in the case brought before the court *a quo*. This is not a case where an averment was not made in the pleadings but the point was fully canvassed in evidence. This was a case where significantly different issues were raised on appeal which had in no way constituted the case brought before the court *a quo*.

[21] From the evidence particularly of Hawkins, which testimony did not appear to be contradicted at a meeting between appellants and Sun City on 3 May 2013, appellants focussed on two essential complaints, being accusations that the Guptas were racist towards Black employees of Sun City and an allegation of sexual assault of an employee of concessionaire of Sun City. Insofar far as the latter was concerned, in his evidence Hawkins said the following:

> 'So we were made aware that there was an allegation of sexual assault which I made clear to the union that we were well aware of it. I made it clear to the union that we had requested the employee to … the guest to be removed and we offered any support to either the concessionaire or the individual concerned that may be required.'

It followed from this uncontested evidence that, as of 3 May 2013, appellants would have known that Sun City had acted decisively in respect of this complaint. In that the guest, who had been the subject of an allegation of sexual assault, had been evicted from Sun City.

[22] Turning to the question of racism on the part of the Gupta and their guests, it was also clear that this was not an issue which Sun City had ignored. Apart from the evidence of Hawkins that issues, which affected Sun City insofar as racism were concerned were in the process of being addressed. Sun City issued a press statement on 8 May 2013.To the extent relevant it read thus:

> 'Sun City management today confirmed that they had met with COSATU North West on Friday, 3 May to discuss the allegations of racism made against the property by the union following the recent Gupta family wedding. Sun City emphatically refutes these allegations …
>
> During its meeting with the Federation and Sun City shop stewards, Sun City dealt with all the issues raised by COSATU in public, and invited the union to submit any evidence to support claims that there had been any acts of racism at the Gupta family's behest. The Federation appeared to have accepted the

explanations provided by Sun City and no evidence of racism has been produced.

Responding to the allegations, Sun City pointed out that the resort was not booked out for the exclusive use of the Gupta family. There were approximately 5 000 other guests at the complex, including at the Palace. The usual staffing complement was in place to look after the needs of these guests. Regular staff were not inconvenienced or prejudiced in any way…

The Gupta family also hired their own set of supporting staff, most notably chefs specialising in Indian cuisine were flown from India and Asia, in addition private security were hired by them to act as body guards for certain VIP guests, and additional drivers were hired by then to chauffeur their guest around the property in privately hired vehicles.

The allegation of rape at the spa was not substantiated by the staff member concerned, nor was it reported to the SAPS. Sun City received reports that inappropriate advances were made towards a concessionaire's member of staff, which Sun City dealt with fully and appropriately. The staff member in question had indicated that she is satisfied with the procedures followed and would prefer the matter not be pursued further.'

[23] In addition, Sun City generated correspondence to both COSATU on 8 May 2013, the relevant portion of which read as follows:

'The Company has formally provided feedback on 3 May 2013 pertaining to allegations raised by the Federation and the Federation was further requested to furnish the company with details, proof and evidence so as to allow the Company to act accordingly. To date, the Company has not received any of the above from the Federation, SACCAWU, or the employees that were allegedly racially mistreated. The Company is therefore of the view that the reasons provided for the march by the Federation are unreasonable.'

[24] In summary, the evidence indicated that the complaints lodged by the appellants and which formed the basis of their statement of claim and thus the case brought before the Labour Court was clearly gainsaid by the evidence put before the

court *a quo*. Given that it was common cause that this was an unprotected strike the negative assessment of the evidence concerning the basis of the case so brought by appellants means that there was no justification for the unprotected strike in the manner contended for by appellants.

[25] As an alternative, appellants sought to contend that there had been inconsistency in the treatment of various employees who had participated in the unprotected strike. This Court has held that it is not an irrebuttable presumption that, if the parity principle is not applied, a sanction which is not imposed in all similar cases unequivocally supports a result in favour of the dismissed employee. See *ABSA Bank Ltd v Naidu* [2015] 1 BLLR1 (LAC) 1.

[26] The court *a quo* took account of the testimony of Mr Ramontlhe, on behalf of the appellants, that all the shop stewards who had appeared in photographs on 11 May 2013 and had been part of the unprotected strike were charged and that Sun City had taken disciplinary action against all employees it had been able to identify by means of photographic evidence available to it. The evidence indicated further that the shop stewards, being the individual appellants, knew about the court order and that Mr Peter Mojawesi, who had not been charged, at least had communicated the contents of the court order to his fellow shop stewards, for which he had been abused by Mr Ramonthle.

[27] In assessing the nature of an appropriate sanction for the misconduct committed by the individual employees, the court *a quo* correctly emphasised that in this case individuals in leadership positions, being shop stewards, flagrantly ignored a court order and participated enthusiastically in an unprotected strike. In my view, the decision of the court *a quo* appears to be the product of a careful and completely justifiable exercise of discretion as to the appropriate sanction in this case.

[28] By way of conclusion, it is important to emphasise that this case turned on the question as to whether there was justification for employees to engage in an unprotected strike. In order to assess whether any of the arguments for

justification had merit, it was necessary to examine the available evidence and the reaction of the employer, in this case, Sun City. This judgment has nothing to do with the egregious levels of racism which appears to have been common cause and which was perpetrated by the Gupta family and their guests. An assessment of their conduct is not an issue which is relevant to the determination of this case.

[29] For all of these reasons, therefore, the appeal is dismissed with costs including the costs of two counsel.

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Davis JA

Coppin JA and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANTS:	Adv F Boda SC and Adv Y Peer
	Instructed by Molebaloa Attorneys
FOR THE RESPONDENT:	Adv T Ngcukaitobi SC and Adv Z Navsa
	Instructed by Bowman Gilfillan Attorneys