REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 262/11

In the matter between:

FAWU	First applicant
Bongiwe XUZA & 119 OTHERS	Second to further applicants
and	
COUNTY FAIR FOODS (EPPING),	
a division of ASTRAL OPERATIONS LTD	Respondent

Heard: 13-17 August 2012; 7-9 November 2016

Delivered: 8 December 2016

SUMMARY: Dismissal for unprotected strike. Peaceful strike; short duration; company refusing tender of services after two and a half days. Distinction with those employees who returned to work earlier not sufficient to make dismissals (as opposed to final written warning) fair. Workers reinstated with limited retrospectivity, coupled with final written warning.

JUDGMENT

STEENKAMP J

Introduction

[1] The 120 individual applicants, represented by the Food & Allied Workers Union, were dismissed for their participation in an unprotected strike. Two other groups, comprising 64 and 58 workers respectively, returned to work earlier. They were not dismissed but received final written warnings. The applicants say that, despite the fact that the strike was unprotected and thus constituted misconduct, their dismissal was unfair. They seek reinstatement.

Background facts

[2] Some 300 employees, members of FAWU, embarked on an unprotected strike between 13:45 (the end of the P2 shift lunch) and 14:30 (the end of the P1 shift lunch) on 15 December 2010. The strike was in support of a grievance that the company had not paid the workers year-end bonuses.

[3] At about 14:45 Avril Arendse, the production manager, asked two of the strikers to meet her. The striking workers chose four colleagues to represent them, namely Mary Makakane, Mario Faas, Lydia Gwebecimela and Andile Faltien. At about 15:40 Francois Oosthuizen, the fresh processing and distribution executive, joined the meeting to explain why the company had not paid bonuses. The workers' representatives were not persuaded. Arendse and Oosthuizen read out an ultimatum to the representatives. The workers refused to return to work, even after their representatives had conveyed to them that Arendse and Oosthuizen had given them an oral ultimatum to return to work.

[4] At approximately 16:00 on Wednesday 15 December the company distributed a written ultimatum amongst the striking workers gathered in the canteen, instructing them to return to work at 07:30 on Thursday 16 December. The ultimatum was also read out to the worker representatives in Arendse's office. The ultimatum stated:

'Re: UNPROTECTED INDUSTRIAL ACTION /

ULTIMATUM TO RETURN TO WORK

Please take herewith urgent note that you are currently embarking upon illegal and thus unprotected industrial action within the company's FPD Epping bargaining unit, which is in direct contravention of *section 64* of the *Labour Relations Act, 66 of 1995* ("the Act"). Please take further note that prior to embarking upon the said unprotected strike action no dispute was referred to the CCMA, nor has the CCMA conciliated a dispute and no certificate of outcome has been issued by the CCMA.

Please take note that your illegal actions are being viewed in an extremely serious light and the company therefore instructed you to return to normal duty on the date hereof [*sic*] which ultimatum you failed to adhere to. Please take herewith note [*sic*] that you are now instructed for the second time to return to normal duty by no later than the start of your normal shift at 07h30 am on the 16th December 2010.

You are making yourself guilty of misconduct in participating in an unprotected strike.

Failing to comply with this second ultimatum will constitute further misconduct which will leave the company with no other option but to discipline all involved parties accordingly to the full extent of the company's disciplinary code.

Further note should be taken that the above-mentioned disciplinary action might inevitably result in summary dismissal of all involved employees from the employ of the company as held [*sic*] by the company's disciplinary code and procedure and you are thus urged to heed the company's ultimatum soonest [*sic*].

The company would further like to herewith inform you that your continued unprotected industrial actions might further result in your disqualification from any current or revised discretionary Incentive Bonus Scheme for the current financial year.

We trust that our employees will act accordingly and immediately return to work.'

[5] On Thursday 16 December, 64 of the striking workers did return to work. They signed a 'come-back document' undertaking not to participate in any further unprotected industrial action. They ultimately received a final written warning.

[6] Although 16 December is a public holiday, the employment contract (of Mr Daniels, who disputed that he was obliged to work on that day) confirms that, 'should the needs of the company necessitate your working on a public holiday, you shall be obliged to do so'. It is common cause that the period leading up to Christmas is the company's busiest period other than Easter; and on 7 December the company put notices up on staff notice boards informing them that 'the working of an additional shift on Thursday 16 December 2010 is compulsory and a material term and condition of employment for all employees'. And at the disciplinary hearing FAWU confirmed that it is common cause that its members participated in an unprotected strike for the period 15 to 20 December 2010.

[7] On Friday 17 December the remaining strikers returned to the premises between 07:00 and 07:30 but refused to work. The company's HR facilitator, Loyiso Mciteka, addressed them in English and in Xhosa. He told them that, if they did not sign the comeback document and return to work, the gates would be closed at 07:30 and they would not be allowed to clock in. No-one accepted the ultimatum to return to work at that stage.

[8] Mciteka phoned the company's Mr Visser at its head office. Visser told him to extend the time to 08:00. Eventually another 58 striking workers signed the comeback document and returned to work. At 08:35 the company instituted a lockout in response to the unprotected strike; read out the lockout notice to the assembled strikers; and locked the gates. The 58 returning workers also received final written warnings.

[9] There is a dispute about what happened on the rest of that day (17 December). The four worker representatives met the company's representatives, Mr Mciteka and Ms Zorah Heldsinger. The workers say they tendered a return to work; the company denies this. On a balance of probabilities, the applicants continued the strike on Friday 17 December. In their pleaded case, they confirm that they 'remained on strike for the

duration of the 17th'; that is confirmed in the pre-trial minute. FAWU accepted in the disciplinary hearing that the applicants were on strike from 15 to 20 December; and the applicants 'pleaded guilty' to the allegation of misconduct that they were on an unprotected strike from 15 to 20 December.

[10] On Monday 20 December 2010 two worker representatives did convey to management that the strikers were ready to return to work. The remaining strikers signed the comeback document. Management told them to return to work the next morning, Tuesday 21 December, as it had already engaged replacement labour and had to obtain further instructions from head office.

[11] On Tuesday 21 November the remaining strikers – i.e. the individual applicants – reported for duty, having signed the comeback document. They received letters of suspension and notices to attend a disciplinary hearing on 23 December 2010.

[12] Disciplinary hearings took place on 23 and 28 December. The hearings were chaired by S D Tshabalala. The applicants acknowledged that they had been on an unprotected strike from 15 to 20 December. They were dismissed for misconduct on 3 January 2011.

Evaluation

[13] As Mr *Marinus* pointed out, this Court[1] has recently determined that the relevant legal principles have to a large extent by clarified by case law and codified in the LRA and the Code of Good Practice: Dismissal.

[14] Participation in an unprotected strike may constitute a fair reason for dismissal. As the Constitutional Court held in *NUPSAW v National Lotteries Board*[2]:

> "Employees have a constitutional right to strike. The [Labour Relations] Act regulates the manner in which that right can be exercised. There is no obligation on employees to use the regulated dispute-resolution procedures

[1] *NUM v Power Construction (Pty) Ltd* [2016] ZALCCT 24 (27 July 2016).

[2] 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) para [69] [per Froneman J].

> under the Act, but there are consequences if they do not. If they start by using these regulated procedures, but then abandon them and simply stop working, they are not committing a crime. They are, in that sense, still acting "lawfully". But that "lawfulness" does not afford them the benefits of a protected strike under the Act. By failing to adhere to the Act the strike becomes unprotected, and an employer will be in a position to take disciplinary steps against them for not coming to work."

[15] In considering whether dismissal was a fair sanction for the misconduct, the Court must consider:[3]

15.1 the seriousness of the contravention of the LRA;

15.2 attempts made to comply with the LRA; and

15.3 the conduct of the employer.

[16] Mr *Whyte* also raised the distinction between the two groups; the ultimatum; the exclusion of FAWU; and the short duration and non-violent nature of the strike.

<u>Seriousness of the contravention and efforts made to comply with LRA</u>

[17] The strikers made no effort to comply with the LRA. But on the other side of the scale, it was of short duration. In the case of the applicants, it lasted for two and a half working days; the others went back to work after half a day and one and a half days respectively. And although I hesitate to consider this to be a factor, it must on balance be taken into account that the strike was peaceful – unhappily not a given in our labour relations environment.

[18] The strike caused significant harm to the employer. It was taken by surprise and could not make contingency plans. It calculated its resultant loss to be in the region of R2 million. And it placed its customer relations at risk when it could not meet demand.

[3] Code of Good Practice: Dismissal, Item 6.

The conduct of the employer

[19] Mr *Whyte* did not argue that the strikers had been provoked. It was the employer's action of withholding a bonus that led to the strike; but he readily conceded that the bonus was discretionary and not something that the workers had a right to. The employer's action cannot be considered as provocation that led to a legitimate, albeit unprotected, strike.

Distinction between two groups

[20] The applicants say that it was unfair of the company to distinguish between those strikers who received final written warnings and those who were dismissed.

[21] The distinction was not arbitrary. The first two groups of 64 and 58 respectively ended the strike and tendered their services on 16 and 17 December respectively. The remaining workers, on the probabilities, defied the ultimatum until they agreed to return to work on Monday 20 December.

[22] Although the distinction is not arbitrary, I do think that it was unfair. Ultimately, the applicants were dismissed because they continued their strike for one and a half days more than their comrades. The company was satisfied that it could continue working with the others; it is hard to see why the conduct of the applicants was so egregious, compared to that of the others, that the 'death penalty' of labour relations should have been imposed on them.

[23] That does not mean that some distinction would be appropriate. At the very least, the applicants must receive the same sanction of a final written warning; I will address what amounts to a further penalty under the heading of the appropriate remedy.

Ultimatum

[24] The applicants also submit that they were not issued with a clear, unambiguous and understandable ultimatum. It is trite that the purpose of an ultimatum is to put the striking workers to terms and to allow them a

reasonable period to reflect on their actions and to take advice from their trade union.[4]

[25] I disagree that the ultimatum was not clear. The first written ultimatum was issued on 15 December. it set out in detail what the misconduct was and what the possible consequences would be, should the strikers not return to work. It resulted in 64 employees returning to work the next morning. They saw the writing on the wall (and on the document); there was nothing so unclear that their comrades couldn't see it as well.

[26] On the morning of Friday 17 December, Mciteka issued a further verbal ultimatum, leading to another 58 employees returning to work. And the remaining strikers had sufficient time over the ensuing weekend to consider their actions; that is indeed what they did, leading to them tendering their return to work on Monday 20 December.

[27] What this shows, though, is that the ultimatums had their desired effect: once the applicants had reconsidered their actions over the weekend, they returned to work. Normal production could resume the next day. The company essentially lost two days' production because of the applicants holding out after their comrades had returned. In those circumstances, where the applicants did heed the final ultimatum, I consider dismissal to have been too harsh a sanction, as set out below.

Was dismissal a fair sanction?

[28] Having regard to the factors outlined above, it appears to me that dismissal was too harsh a sanction. The employer had not lost trust in the striking workers, as is evident from the fact that the other two groups of strikers kept their jobs. The applicants tendered their services and signed the comeback document, undertaking not to engage in any further unprotected industrial action. The strike was of short duration. It was peaceful. Progressive discipline could have achieved the desired effect; and, insofar as the employer understandably wanted to distinguish the applicants who 'held out' for longer than their comrades who had already

[4] *Edelweiss Glass & Aluminium (Pty) Ltd v NUMSA* [2012] 1 BLLR 10 (LAC) para 55; *Majola v D & A Timbers (Pty) Ltd* [1996] 9 BLLR 1091 (LAC).

gone back to work, it could have coupled a final written warning with a further penalty such as a period of unpaid suspension.[5]

Conclusion

[29] In my view, dismissal was not a fair sanction. The applicants wished to be reinstated. In terms of s 193(2) of the LRA, they must be reinstated. But in terms of s 193(1)(a), this Court may order the employer to reinstate them "from any date not earlier than the date of dismissal". That brings me to the appropriate remedy and the question of retrospectivity.

[30] A determination of the date of reinstatement requires the court or arbitrator to exercise a discretion judicially, with regard had to the relevant circumstances, so as determine what is fair and equitable. This requires a consideration of such factors as the nature and extent of the employee's conduct, the reasons for the finding that dismissal was unfair, the effect of the reinstatement order on the employer, the reason for and impact of delays in the determination of the dispute and the extent of the employee's loss of income.[6]

[31] And, as Mogoeng CJ pointed out last month in *SARS v CCMA*[7] with regard to the compensation contemplated by s 194(1):

> 'To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA. Zondo JP outlined the applicable factors in these terms:
>
> "There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:
>
> . . .
>
> (b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts

[5] This sanction is specifically contemplated by the County Fair disciplinary code.

[6] *Pick 'n Pay Retailers (Pty) Ltd v SACCAWU* [2016] ZALAC 56 (25 November 2016) para 32 [per Savage AJA].

[7] [2016] ZACC 38 (8 November 2016) para 50.

more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.

(c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes."[8]

The appropriate remedy

[32] In fashioning an appropriate remedy, I take into account the following factors:

[8] *Kemp t/a Centralmed v Rawlins* (2009) 30 *ILJ* 2677 (LAC) para 20.

32.1 The applicants committed misconduct by participating in an unprotected strike – thus undermining the aim of the effective resolution of disputes. Yet their misconduct did not, in my view, warrant dismissal.

32.2 They should be placed in a position similar to that of their comrades who were not dismissed. They should be reinstated, together with a final written warning.

32.3 The fact that these applicants defied the ultimatum initially, though, does distinguish them from those who were not dismissed. Although I have found their dismissal to be unfair, they should not be reinstated retrospectively.

32.4 The hearing of this matter has been delayed for more than five years.

32.5 In all these circumstances, I consider it fair to limit the backpay due to the reinstated workers to an amount equivalent to six months' wages.

32.6 All of the applicants asked to be reinstated. The company needs time to give effect to the order necessitating their reinstatement after more than five years, during which time it has reorganised its business. I consider it fair to give the company a maximum period of two months in which to do so.

32.7 It may also be that, despite them having asked for reinstatement, some of the applicants may have found other employment in the past five years. Those workers who do not report for duty will forfeit their right to reinstatement. However, they should still receive compensation in the nature of a *solatium* equivalent to six months' wages.

Costs

[33] Although the applicants have been successful, they have committed misconduct. There is an ongoing relationship between the company on the one hand and FAWU and the workers on the other hand. Upon their reinstatement, the company will also have to re-establish its relationship

with the workers. In law and fairness I do not consider a costs award to be appropriate.

Order

[34] I therefore make the following order:

34.1 The dismissal of the second and further applicants was substantively unfair.

34.2 The respondent is ordered to reinstate the individual applicants to the positions that they occupied before their dismissal on the same terms and conditions of employment, with no loss of benefits.

34.3 The respondent is ordered to pay the individual applicants backpay limited to six months' remuneration. The backpay must be paid within 30 days of the date of reinstatement.

34.4 Each of the individual applicants must be furnished with a final written warning valid for a period of 12 months from the date of reinstatement.

34.5 The respondent must communicate to the applicants when they should report for duty, but that date must be no later than 1 February 2017.

34.6 Those applicants who do not report for duty on the designated date will forfeit their right to reinstatement. They will still be entitled to six months' remuneration as compensation, to be paid no later than 30 days after the other applicants had reported for duty

34.7 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Jason Whyte of Cheadle Thompson & Haysom
RESPONDENT:	Grant Marinus of Werksmans.