

SOUTH AFRICA / JUDGMENT

Legend Logistics (Pty) Ltd v SATAWU and Others (JR1373/21) [2024] ZALCJHB 417 (24 October 2024) [2024] ZALCJHB 417

COURT

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

JR1373/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR1373/21

In the matter between:

LEGEND

LOGISTICS (PTY) LTD

Applicant

and

SATAWU

First

Respondent

CHARLES

MBATHA

Second

Respondent

SONTO

MLAMBO

Third

Respondent

JOHANNES

MAHLANGU

Fourth

Respondent

PERCY

NKAMBULE

Fifth
Respondent
SOLOMON
SIKHOSANA
Sixth
Respondent
XOLANI
NTSHAKALA
Seventh
Respondent
VAN
LEEUVEN, I N.O.
Eighth
Respondent
NATIONAL
BARGAINING COUNCIL FOR THE
ROAD
FREIGHT AND LOGISTICS INDUSTRY
Ninth
Respondent

Heard: 22 October 2024

Delivered: 24 October 2024

JUDGMENT

MAKHURA, J

- [1] On 22 April 2021, the seventh respondent, appointed in his capacity as the commissioner to arbitrate the unfair dismissal dispute between the second to seventh respondents (employees) on the one hand and the applicant (company) on the other, issued an arbitration award in terms of which he declared the dismissal of the employees to be substantively unfair, ordered the company to reinstate the employees and to pay them each an amount equivalent to eight months remuneration in backpay.
- [2] Unhappy with the decision of the commissioner, the company launched this review application.[1] It seeks an order to review and set aside the award and to refer the matter to the ninth respondent for arbitration de novo. None of the respondents opposed the matter and therefore the application is determined on an unopposed basis.
- [3] The employees were all employed by the company as Code 14 truck drivers. At approximately 21h00 on 30 December 2019, outside their working hours, the employees gathered outside the premises of the company for a meeting.

[4] Some of the employees attended the meeting after they were telephonically contacted and informed of the meeting whilst others were informed by word of mouth upon their return to the premises. The meeting was to discuss the working arrangement, in particular, whether the employees would be working the following day on Tuesday, 31 December 2019. It is common cause that Tuesday was a normal working day. Whilst at this meeting, the company manager or owner, Mr Fouche arrived and some of the employees ran away but the

employees in this case remained and later left after Fouche asked them what they were doing. The employees reported for duty on 31 December 2019. 1 January 2020 was a public holiday and not a normal holiday.

[5] On 2 January 2019, all the employees, except the seventh respondent, Xolani Ntshakala (Ntshakala), were issued with a notice to attend a disciplinary hearing on 6 January

2019. These employees were charged with:

‘Incitement and/or intimidation. Orchestrating unprotected industrial action on Monday 30 December 2019 and 31 December 2019.’

[6] Ntshakala was issued with a charge sheet on 7 January 2019 and was called to attend a disciplinary hearing on 10 January 2019. His charge was the same as the other employees, save that he was only alleged to have orchestrated the alleged unprotected strike on 30 December 2019.

[7] All the employees were found guilty and dismissed. Aggrieved, they referred an unfair dismissal dispute to the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI). They sought reinstatement and backpay.

[8] At arbitration proceedings, the company led the evidence of Kenneth Norman Coetzee (Coetzee). He testified that he was the human resources manager. Further, that the employees were not allowed to have a meeting without Fouche’s permission, even if this was after working hours and outside the company premises. He was not present at the meeting. He referred to the various summarised

statements of the employees taken by the chairperson during the disciplinary hearing. The second respondent, Charles Mbatha (Mbatha),

led evidence on behalf of the employees.

[9] In his analysis of the matter, the commissioner started with the meaning of dismissal in terms of section 188 of the Labour Relations Act (LRA). The commissioner then considered the duties of commissioners in the conduct of arbitration proceedings and the onus of proof in unfair dismissal disputes related to misconduct and considered the nature of the charge against the employees. He observed and confirmed that it was not in dispute that there was a rule against unprotected strikes and unauthorised meetings. Further, he noted that the employees did not deny that they attended the meeting. However, they denied incitement and intimidation as per the charge sheet.

[10] The commissioner found that:

‘It is common cause that a meeting was arranged by someone which took place outside of the Respondent’s premises after working hours. As the meeting occurred outside of the premises and working time of the [employees] the question which must be asked is whether this constituted misconduct, and the general answer is no it cannot and would accordingly be beyond the reach of the employer’s

disciplinary authority. To justify disciplinary action for employees’ extramural conduct, the onus rests on the employer to establish that it has sufficient and legitimate interest in the employee’s conduct outside of the workplace or after hours. The onus will only be discharged if the arbitrator is satisfied that there is some nexus between the employees’ conduct and the legitimate interest of the employer. The employer must however still discharge the onus of proving that the employees had committed the misconduct. Because the misconduct had been committed after hours and outside of the workplace the employer carries an additional burden.’

[11] The commissioner was critical of the company’s evidence that the employees required permission from Fouche to hold a meeting outside the premises and outside working hours. He found that this is a limitation of the employees’ rights to interact with one another. I understand these findings to mean that the company’s conduct in expecting the employees to seek permission to have a meeting outside of its premises and outside of working hours would be an unjustifiable limitation of the employees’ right to choose who to associate with[2], where and at what time and the right to assemble peacefully and unarmed.[3] The commissioner concluded that the attendance of the meeting by the employees did not constitute a strike and that there was no legal justification to restrict employees from meeting outside working hours.

[12] The commissioner found that telephoning another employee to inform him of and ask him to attend a meeting or informing another employee of a meeting does not amount to incitement nor does it amount to intimidation. He found further that there was no evidence of any of the employees orchestrating an unprotected strike. The commissioner correctly observed that there was no evidence about the event of 31 December 2019.

[13] The company sought to review the award on two grounds, which its submits render the award reviewable and liable to be set aside. The first is that the commissioner committed misconduct, alternatively, gross irregularity in the conduct of the proceedings in that he proceeded to deal with the matter of the fourth to seventh respondents who were not present at the arbitration proceedings and reinstated them despite the fact that the union official stated that he did not know where they were and had no mandate. I asked Ms Pillay, appearing for the company, to refer the Court to the part of the transcript where the union official said that he did not know where the four other employees were and that he had no mandate to represent them. The Court was referred to an extract of the transcript where the union official indicated that the four employees could not make it and he did not know the reason for their non-attendance. Further, the union official said that the commissioner

should apply the rules for non-attendance. This does not support the company's contention because if the commissioner applies the 'rules', which he was invited to by the union official, section 138(5)[4] of the LRA confirms what the commissioner informed the company, that all employees were before per their union official's presence.

- [14] The mandate was given to the union to complete the referral form on their behalf, to represent them and to seek retrospective reinstatement. The company did not dispute the employees' membership in the union. The commissioner clearly understood that the presence of the union official at arbitration proceedings was sufficient to comply with section 138(5) of the LRA and that he had no power to dismiss or ignore their case.
- [15] At the start of the evidence in chief of Coetzee, the commissioner corrected what appeared at that point to be the company's misapprehension that the matter before him was only in respect of Mbatha and Themba Mlambo, who were present at the proceedings. The commissioner placed on record that there were six employees before him and that the physical absence of the other four employees in the proceedings did not mean that their case was not proceeding. In other words, he indicated that because they were represented by the union official, they remained part of the case. The company correctly did not insist on this issue nor did it raise any objection. It was therefore not only reasonable but it was legally correct for the commissioner to determine the case of the employees who were not physically present at the arbitration proceedings. The company's complaint has no basis and this review ground is rejected.
- [16] The second ground is directed at the merits of the charge. The company contends that the commissioner failed to apply his mind to the evidence and that this failure resulted in him reaching an unreasonable decision. In this regard, the company relies on the disciplinary hearing statements made by the employees.
- [17] There are serious challenges adopted by the company in its attempt to prove the charges by referring to the summarised versions of the employees taken by the disciplinary chairperson at the arbitration proceedings. The arbitration is a hearing *de novo*. There was no agreement to rely on the employees' summarised versions. The statements were not made under oath and signed. This confirms that the company did not have any evidence before the disciplinary hearing to sustain the charges and now it was resorting to what the employees said at the disciplinary hearing to justify their dismissal. The company led no evidence of intimidation or incitement.
- [18] Coetzee, the only witness on behalf of the company, did not say that he was intimidated or incited to join an unprotected strike. He did not see nor did he interact with or engage with any of the employees on the night of 30 December 2019. He did not receive any message nor any form of communication from any of the employees that suggested he was required to join a strike or that there was a plan to stay away from work on 31 December 2019. The company did not lead any evidence whatsoever by anyone who was intimidated or incited to join the strike. In my view, this marked the end of the enquiry.

- [19] Coetzee's evidence was unhelpful to the proceedings and fell short of satisfying the onus that rested on the company. His alleged evidence did not come close to showing any form of intimidation or incitement by the employees. To find otherwise would have been tantamount to reversing the onus and requiring the employees to prove that the dismissal was unfair, which is not the enquiry in an unfair dismissal dispute.
- [20] The company's case was contradictory. Ms Pillay referred the Court to the summarised statement of Mbatha, who stated that he was forced to attend the meeting. The contention was that this supported the acts of intimidation or incitement on Mbatha, probably by the employees, including Mbatha. Mbatha did not say who forced him to attend the meeting, which in any event happened outside of working hours and outside the premises of the company. Inexplicably, despite the contention that Mbatha was a victim of the intimidation or incitement, the company charged him with incitement or intimidation. Mbatha, who according to the company was incited and intimidated, is alleged to have equally incited and intimidated some unknown persons.
- [21] The company failed in its duty to place a prima facie case against any of the employees. There was no duty on the employees to even take the witness stand as there was nothing to rebut. The alleged evidence amounted to gossip that Fouche had with Coetzee and was at best for the company speculative.
- [22] The review test is well-settled. To succeed, the company must show that the commissioner's decision is "one that a reasonable decision maker could not reach"[5]. This is a stringent test that will ensure interference in the awards in very limited circumstances.[6] Awards will not be interfered with simply because the Court is of the view that the commissioner should have found differently.[7] In this matter, there is no more than one possible decision that the commissioner could have reached.
- [23] There was no attack on the award of reinstatement and the limited backpay awarded to the employees. Coetzee did not lead any evidence on the breakdown of the trust relationship. In any event, the employees are not guilty of the misconduct. The company failed to make out a case on review. The award is well-reasoned and unassailable. The application stands to be dismissed.

[24] In the premises, the following order is made:

Order

1. The application is dismissed.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms. L. Pillay Instructed by: Yusuf Nagdee Attorneys

- [1] The review application is in terms of section 145 of the Labour Relations Act 66 of 1995, as amended.
- [2] Section 18 of the Constitution of the Republic of South Africa, 1996 (Constitution).
- [3] Section 17 of the Constitution.
- [4] Section 138(5)(a) of the LRA provides that if the applicant fails to appear in person or to be represented at the arbitration proceedings, the commissioner may dismiss the matter.
- [5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*
- [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
- [6] *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*
- [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.
- [7] *Duncanmec (Pty) Ltd v Gaylard NO and others* [2018] ZACC 29; (2018) 39 ILJ 2633 (CC) at paras 42 - 43.

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