

SOUTH AFRICA / JUDGMENT

Motor Transport Workers Union obo Sehularo and Others v G4 Cash Services (Pty) Ltd (JS1108/09) [2012] ZALCJHB 112; (2013) 34 ILJ 1221 (LC) (12 October 2012) [2012] ZALCJHB 112

COURT

Labour Court Johannesburg

BEFORE

Bhoola

CASE / FILE NUMBER

JS1108/09

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

judgment

case

no: JS 1108/09

In the matter between:

MOTOR TRANSPORT WORKERS' UNION OBO DAVID SEHULARO &
56 OTHERS

Applicants

and

G4 CASH SERVICES (PTY) LTD

Respondent

Heard: 29, 30, 31 August and 1, 2 September 2011

Delivered: 12 October 2012

Summary: Dismissal for unprotected strike – although
of short duration in the circumstances of respondent's business
of cash-in-transit
dismissals procedurally and substantively fair.

JUDGMENT

BHOOLA J

Introduction

This is a claim for relief arising from the alleged procedural and substantive unfairness of the dismissal of the applicants for

embarking on an unprotected strike.

Background facts

The individual applicants (“the employees”) are members of the Motor Transport Workers Union (“the union”) and were employed at the respondent’s largest branch in Gauteng, the Cleveland branch.

The respondent conducts business as a cash-in transit company for large corporate clients, including banks and petrol stations. Its

operations involve collection and distribution of large sums of money (of between 20 to 50 million per day) and are subject to

substantial risks including violent robberies. Its clients require high service levels and regular and consistent collection of cash and valuables and time is of the essence in its operations. Given this operating context the respondent requires a high level of trust from its employees.

Following a notice issued on 16 January 2009, the union intended to embark on a national strike from 19 January 2009. The proposed strike was the subject of an urgent interdict granted by this Court on Saturday 17 January and on 20 January 2009, a final order was granted declaring the strike unprotected and interdicting the union from encouraging or inciting employees to participate in it.

It is common cause that on the morning of Tuesday 20 January 2009, the applicants embarked on an unprotected strike. It is further

common cause that the respondent issued at least one ultimatum at 8:00, and it is the respondent’s version that a second

ultimatum was issued at 8:30 and expired at 9:00. At about 9:45, the applicants were suspended pending a disciplinary enquiry for their failure to comply with the second ultimatum. A disciplinary hearing was held over a number of days and was chaired by an independent chairperson who is a member of the Johannesburg Bar. On 4 February 2009 the chairperson handed down a finding recommending dismissal of the applicants and providing detailed reasons for this recommendation. This sanction was confirmed on appeal, with the appeal conducted by a senior labour attorney.

Procedural and substantive unfairness

The applicants allege that their dismissals were procedurally unfair in that they were not afforded the opportunity to state their case at the disciplinary enquiry.

In the pre-trial minute, the applicants amplified the basis for their claim by alleging that:

the procedure in the disciplinary enquiry was not followed;

the respondent did not contact the union to inform it of the work stoppage and no second ultimatum was issued;

the union defused the dispute but the suspensions had already been effected;

no notice of the disciplinary hearing was issued;

there was inconsistency in discipline in that other employees were not dismissed for embarking upon unprotected strikes.

The applicants accordingly seek an order declaring their dismissals procedurally and substantively unfair and seek reinstatement,

alternatively compensation.

The respondent's version

Carl Delport was the Operations Manager at the Cleveland branch and testified about the time-critical operations of the respondent and that it was a common provision of service contracts with corporate clients for the respondent to be liable for financial levies where services were not timeously rendered. On 20 January 2009, he reported for work at the branch at 06:00 and noticed that instead of preparing for work the employees were meeting in the recreation room. He assumed their conduct had to do with the strike interdict granted over the weekend. Jiggs De Wet, the Branch Manager, arrived at about 07:00 and Delport briefed him of the situation. De Wet asked him to fetch David Sehularo, the shop steward. He went to the recreation room where the employees were toying but they ignored him when he tried to communicate with them. Sehularo insisted that if De Wet wanted to see him he should come there and Delport then returned to the office to fetch De Wet. They were however unable to communicate with the employees on account of the noise. De Wet returned to the office and contacted head office who instructed him to issue an ultimatum. He issued the first ultimatum at 8:00 by handing it to Sehularo and the latter read it out to the employees. It required the employees to return to work by 8:30 but they failed to comply. De Wet contacted head office when the ultimatum expired and he was instructed to issue a second ultimatum requiring a return to work by 09:00.

Just after 8:30 union officials Junior Gys and Raquel Saunders arrived and after seeking permission to meet with employees, held a short meeting with them. The second ultimatum was handed to Saunders while the officials went to address the employees. Thereafter,

accompanied by Sehularo, they came to the office to meet with him and De Wet. Delport stated that the demand expressed by Sehularo

during the meeting was that “no employee will go back to work until the alleged employees that were taken by the SAPS had returned and are at the branch”. Delport confirmed that De Wet informed the union on a few occasions during the meeting that the second ultimatum was about to expire and that he would attend to their problems and the issues related to the strike once all the employees had returned to work. They could then “sit down and discuss the issues and[he] will see what he can do for them with regards to their issues”. He was willing to appoint a task team, including Charles Landman, the respondent’s head of security, to investigate their concerns. The union representatives then left to discuss the issue with the employees and only indicated at about 9:40 or 9:45 that the employees were prepared to resume their duties. De Wet’s response was that the ultimatum had already expired and that all employees had been suspended. Delport testified that the employees did not seem to genuinely want to return to work, they had handed in their firearms earlier, as reflected in the kit register, and even once they

indicated they were returning to work they seemed to be on a go slow. He issued each of them with suspension notices, which they

signed for, as they left the premises. He testified that the employees who were allegedly tortured had been taken for questioning

by the South African Police Services (“SAPS”) as part of an investigation into a R6,5million loss sustained by Capitec, a client of the respondent’s. It was put to him in cross-examination that there had been over 10 to 15 previous strikes

where no dismissals had followed a failure to comply with an ultimatum and he indicated that the decisions were taken by head

office and each situation was determined on its own particular

facts.

Richard Manthey, the industrial relations advisor to the respondent confirmed that the practice of embarking upon unprocedural strikes early in the mornings began in about 2007. These were massively disruptive and had a significant financial impact on the respondent. The management team believed that this was part of a deliberate strategy on the part of the union. In 2008 about 40 employees were dismissed by the respondent following an unprocedural strike at the Silverton branch in which a demand was made for a manager’s dismissal. The ultimatum issued also had a duration of 30 minutes. Manthey explained that it was necessary to issue ultimatums of such short duration due to the time critical nature of the respondent’s business and the union was fully aware of this. In relation to the incident at Crown Mines where employees had not been dismissed despite unprotected strike action, Manthey testified that the applicant union was not involved and another union at the branch had assisted with bringing the strike to an end

resulting in employees complying with an ultimatum 10 minutes before it expired. The apparent difference in treatment had been discussed with the union, and management had also informed Beverley Fourie, a senior union official, that they were no longer prepared to accept the disruptive effects of the early morning unprocedural strikes. Insofar as the pleadings set out 13 strikes cited as evidence of inconsistency, Manthey testified that each strike had its own dynamics and no two strikes were the same and that it followed that employees involved could not be subjected to identical treatment. In this regard, he

cited the 20 November 2008 strike where employees at 28 of the respondent's 37 branches embarked on an unprotected strike but complied with a final ultimatum and returned to work about five or 10 minutes before it expired. He indicated that the union seemed to be intent on undermining the Labour Relations Act 66 of 1995 ("the Act") by manipulating its procedures. Their conduct also made it clear that they understood the meaning and effect of an ultimatum. The 2008 strike resulted in the respondent losing a major corporate client and as a result the respondent had to set clear boundaries as to conduct that would not be tolerated so as to prevent the demise of its business and reputation.

Francois Van Wyk was previously employed as an investigator by the respondent and is currently an investigator for Coin Security. He testified that he was asked to investigate the loss suffered by Capitec which appeared to have occurred at the Cleveland branch. An investigation was being conducted by the Germiston branch of the Serious Organized Crime Unit ("SOCS"). He denied that he had kidnapped any employee as was alleged in the Sowetan article quoting S M Kunene, one of the employees allegedly abducted and tortured by police. He testified that he had consulted with the police in their investigation and had been requested to arrange for certain employees to be interviewed. He spoke to the employees at the Cleveland branch and informed them that the police wanted to take statements from them. The employees accompanied him voluntarily in preference to being picked up by the police. He took two employees to SOCS on Friday 16 January and three on Monday 19 January. He was not involved in the investigation other than to deliver the employees for questioning and testified that had he interfered with the police investigation he could have been arrested. He indicated that the criminal matter arising from the Capitec theft was still pending.

Michael Eva, the former Branch Manager of the Cleveland branch confirmed that the branch transported cash of between 20 and 50

million per day on behalf of clients. The forensic department of the respondent was responsible for investigating shortages and

inconsistencies, which often occurred. He confirmed that the Capitec contract was cancelled as a result of cash losses and unrest

experienced by the respondent and that it had to credit another client (Metrarail) with R39270.00 as a result of an illegal strike

which led to its failure to meet contractual obligations. He confirmed that there were regular meetings with shop stewards in

this regard and that there were structures in place at the branch to deal with such issues. He was not in the employ of the respondent

when the strike occurred.

Johannes Wessels is no longer employed by the respondent and was Financial Director of the respondent when the strike took place. He was at head office on the day and shortly before 8:00 he received information that the vehicles at the Cleveland branch had not left for the day and that the branch manager had issued an ultimatum to employees to return to work by 08:30 and following this a second ultimatum was issued at 8:30 requiring a return to work by 9:00. When they failed to comply with the second ultimatum De Wet telephoned the head office and was instructed by Jack Rhode, the then Operations Director, to suspend all employees pending the outcome of a disciplinary inquiry. He testified that this approach was motivated by concerns about the “ongoing problem that we had that occasionally they would go on strikes, most of the time as I can recollect, they met the ultimatums and they went back to the vehicles...we were under a fair amount of pressure from our clients, because service delivery did not take place and we were under threat to lose some of our key clients, and we had then decided that we had to take the action as prescribed, that we normally do and we have acted accordingly.” The respondent decided to take a firm approach in respect of continuing unprotected strike action.

The applicants’ version

Sehularo, a union shop steward, testified that he had called a meeting for Tuesday 20 January 2009 in order to inform members about the interdict issued on the weekend in respect of the national strike. He had not been advised of the interdict by his union but had received a copy of the interdict from management the previous afternoon, following which he sent a radio communication to members advising them that the strike scheduled for 20 January had been called off. He arrived at the branch at 7:00 and after collecting his firearms from the armoury went to the recreation room for the meeting. The first ultimatum was issued at 8:00 by being handed to him. It recorded that “[a]ny employee involved in this unprocedural and unprotected industrial action and failing to report for duty by 08h30 will be subject to disciplinary action, which may result in their dismissal. Any employee wishing to make representations prior to the expiry of this ultimatum may do so by contacting Carl Delport/Jiggs De Wet.” He confirmed that no representations were made.

As they were concluding the meeting, Nkosinathi Sithole, a fellow employee arrived and reported that he and two other colleagues

(Messrs Sithebe and Kunene) had been arrested the previous day and taken by Van Wyk for questioning by police about missing money.

Sithole also alleged that the two colleagues had been tortured and that the police had a list of other employees they intended to question. The employees were anxious and fearful and refused to return to work until their whereabouts were ascertained. Sehularo

advised them (between 8:00 and 8:30) that the respondent would consider their conduct an illegal strike and that they should hand back their firearms. He then contacted the union to request assistance. When Gys and Saunders arrived he accompanied them

to a meeting with management to discuss the situation.

He testified that when Gys arrived the applicants were furious and could not communicate with Gys so he then briefed him. They

proceeded inside the office to meet with Delport and De Wet. De Wet denied knowledge of any torture but agreed that he would approach

Charles Landman, the head of security for assistance with locating the missing employees and proposed that they should accompany him and Landman. They then returned to inform the employees of De Wet's proposal and eventually managed to persuade them to return to work. They met De Wet and informed him that the situation had been resolved and everyone was preparing to return to work. De Wet informed them that it was too late as the ultimatum had already expired and the employees were suspended in accordance with instructions from the respondent's head office. This occurred at about 9:45.

Sehularo testified that he thought De Wet was referring to the first ultimatum because he had not seen a second ultimatum. He conceded that De Wet kept reminding them about the time but he did not realise this was a reference to the second ultimatum. He testified that he had heard about the second ultimatum and in cross-examination said no second ultimatum had been issued "to him". Despite this he continued to make constant reference during cross-examination to "the ultimatum that expired at 9:00" and when it was put to him that his version was contradictory he was unable to explain.

Sehularo admitted that the procedure was for 24 hours' notice to be given of any meeting and the union had not complied with this. He said that "...it was beyond my power on that day as the peoples (sic) life were (sic) in danger because of the list which was also mentioned by Mr Sithole on his arrival." In his view, the applicants had no alternative but to stop work and demand the return of their colleagues, whom in their view had been arrested ostensibly at the request of the respondent, and where it seemed other arrests might be imminent. Sehularo admitted that he had known about employees being taken to the police for questioning that Friday and was unable to explain why the union had done nothing at the time. He conceded however that the concern of the applicants was more about the fact that their colleagues had not reported for work that day than about their arrest.

It was Sehularo's testimony that the first time the concern about the missing colleagues was communicated to De Wet was in the meeting with the union. Prior thereto when they tried to explain De Wet would not listen to them. In cross-examination, he denied that he had refused to go and meet with De Wet when he was summoned by Delpont. He also insisted that they had conveyed their concerns to De Wet and Delpont in the recreation room. This contradicted his evidence in chief and he was unable to explain this when it was put to him in cross-examination. He added that when De Wet was told of the torture concerns in the meeting with the union he said he did not care and that the respondent was losing money and they should return to work. His evidence also contradicted the evidence of Delpont that there was noise and toyi-toying and he was not able to communicate with Sehularo or the employees and was ignored. It also contradicts his own admission that Delpont was "booed" although he offered the explanation that this was because he was smoking in the recreation room which was not permitted.

In cross-examination, he denied that the demand of the applicants conveyed to management in the meeting with the union was that they would not return to work until the missing employees had returned. He insisted that the demand was for the missing colleagues to be charged before the expiry of 48 hours. When it was put to him that this implied that they would continue to strike until the following day which was when the 48 hours would end he became evasive.

In regard to procedural fairness, Sehularo admitted that the applicants had been suspended pending the outcome of a disciplinary hearing; that they had received prior notice of the disciplinary hearing that ran for almost five days; that they were represented by Fourie, who was a senior union official; and that they had sufficient time to prepare for the hearing and to present their case and to cross-examine witnesses.

Nkosinathi Sithole testified that on 19 January 2009, he was requested by Delpont to accompany Van Wyk to the police and he agreed to do so because he respected Delpont. Kunene was already in the reception area of the office he was taken to and Sithole later emerged from another office and was very upset. Kunene was taken into another office for questioning about the R13 million stolen from Capitec. He heard Kunene crying and assumed he was being tortured. He was then questioned by two detectives about the missing money. The three of them were then driven away and he was dropped off near his home. When he got to work on 20 January 2009 there was a meeting in progress in the recreation room and when it concluded he asked Sehularo if he could address the workers and then related the incident to them. Sithole confirmed that Sehularo had read aloud a document handed to him by Delpont which required them to return to work and said that the employees did not return because they had questions which needed to be answered by management. Sehularo then contacted the union and when Gys arrived Sehularo explained the situation to him and they left to speak with management. Sithole accompanied them. He confirmed that he heard De Wet repeating that time was up but he did not know that this related to the second ultimatum. His version, in contradiction to that of Sehularo, was that the concern of the applicants was solely to establish the whereabouts of their colleagues, although he knew they were in the vehicle when he was dropped off near his home.

Sibusiso Kunene testified that he was instructed by Delport to accompany Van Wyk for questioning by detectives at a civilian

office. He was subjected to extensive torture whilst being questioned about missing money and when he was released he reported

his experience to the Sowetan newspaper which published his allegations. He was of the view that the respondent was responsible

for the torture although it was apparent from his cross-examination (much of which was based on extracting concessions with a view to criminal proceedings and was irrelevant) that he knew he was being questioned by police.

Junior Gys could not recall the exact time of his arrival at the respondent but said that it was before 9:00 and said in cross-examination it could have been 8:45. He spoke to De Wet outside the premises to request access then proceeded to the recreation room. Sehularo explained to him that employees had been taken and tortured and the family of one employee could not locate him. Gys then indicated that he would meet with management to discuss the situation. Sehularo told him management had refused to engage with them to resolve the problem. He then proceeded to De Wet's office accompanied by Sehularo, Sithole and Saunders. He conveyed the concerns about the missing employee to De Wet who indicated that the employees were probably arrested in an investigation into missing money being conducted by police. Gys's version was that he made the proposal to De Wet that they should search for the missing employees and this was agreed to but De Wet reneged on this agreement by suspending the employees when they were about to return to work.

Gys testified that when he returned to inform De Wet that the employees were ready to resume work, the latter said he would contact head office but then informed him that the decision to suspend the applicants had already been made. He denied that he had testified in the disciplinary enquiry that he only became aware of the second ultimatum when he received it from Saunders. He confirmed that he had never received the second ultimatum and that the evidence at the enquiry was that Saunders had signed the suspension notice.

Gys further denied that the statement of case correctly reflected the events when it stated "De Wet kept on telling them to check the time in terms of the second ultimatum that had been issued that was due to expire at 09:00". In this regard his evidence contradicted that of Sehularo and Sithole that De Wet repeatedly said that time was running out. He confirmed that Sehularo told De Wet that "if the employees who had been taken from the company by the police were not charged they must be brought back to work in order to work". He conceded that there had been no intimation that the respondent was involved in the disappearance of the employees. He advised the employees that their strike was illegal and that they would be disciplined if they did not resume their duties, and said that if he had been aware of any ultimatums he would have definitely conveyed this to them. He confirmed that following the Silverton dismissals it was the respondent's practice to issue ultimatums of 30 minutes duration.

According to his testimony De Wet's only concern was whether he could persuade the employees to return to work. He conceded in cross-examination that he had informed De Wet that they would not go back to work because of the concern they had about Van Wyk, and that he tried to persuade the employees to return to work so that the respondent and the union could investigate the whereabouts of the missing employees.

Like Sehularo he also sought to suggest that the offer to return to work was made before 09:00. He testified that "because I did not even speak more than fifteen minutes with the employees so it was either after 09:00 before 09:30 or 09:00 exactly before 09:00".

Beverley Fourie, a retired union official, conceded that sporadic work stoppages were common and attributed this to the acrimonious

relationship between the parties. The respondent had also granted informal rights to a minority union (Hotelica) and this had further exacerbated tension between the two unions, which manifested in the Crown Mines incident where union shop stewards had been held hostage. She conceded in cross-examination that the issues at other branches of the respondent, particularly at Umtata where no dismissals followed notwithstanding a failure to comply with the ultimatum, were less serious than the issue that arose at Cleveland and at the very least management acted hastily. She provided a historical background of the strikes at other branches as well as an explanation for the fear that employees had on the day, which she attributed to the history of the union and the death of its chairperson following police interrogation more than 17 years ago. She represented the applicants in their disciplinary enquiry and conceded that a second ultimatum was prepared but denied that it had ever been issued to employees. She referred to a number of strikes as evidence of inconsistency in treatment of striking workers but conceded that all the incidents she relied on preceded the Silverton strike and that her evidence in this regard was hearsay. She also testified that an article published in the Sowetan about Kunene's arrest and torture incorrectly blamed the respondent for the torture and abductions.

Fourie testified that at the disciplinary enquiry, in which she represented the applicants, the union had taken the approach of admitting that the strike was unprotected but had relied on circumstances which justified the conduct. She said: "[t]hat

is all that we are saying I did not want to be lying and saying Oh no we never hada work stoppage, it is common cause. They were standing and the vehicles did not go out." In her view, the report from Sithole led to "extraordinary circumstances"

and justified the conduct of the applicants.

In regard to the inconsistency issue, Fourie conceded in cross-examination that the Cleveland issue did not compare to Silverton which related to a dispute concerning non-receipt of payslips and that although in Silverton the union intervened early to try to resolve the situation the employees were adamant about persisting with the strike. She admitted however that save for the

Randburg incident she had no direct knowledge of the other incidents cited as evidence of inconsistency.

Her testimony was that management then acted hastily in suspending just when Gys had communicated with the workers and they had agreed to resume work. She expressed this as follows :

‘The union official arrives, they now goes and gets the shop steward, they talk to the workers they now in the short period they go and they talk to Mr De Wet certain proposals are made. When you go and address workers that are now steamed, up they are hot, they are concerned, they are frightened, they have heard that some of their colleagues, the comrades are missing. To cool people down you now go to them and you say listen we come with a proposal, this is what management say. It is customary that they will ask questions, you need to engage them and ultimately the union will say listen guys, let us get on the road this is what we are going to do. It takes a bit of time...Mr De Wet made it clear that that decision to then suspend was not his decision. In fact I got the impression during the hearing that you know he felt that maybe it was harsh, it came from head office and as I said earlier on it is my opinion that I think head office was now fed-up, they had to engage the union at 12:00 that same day. It is

now nine o'clock, we are irritated by this let us just suspend these workers and get on with that so I think that was a spur of the moment decision from the head office I do not think that they had known all of the facts and thought it through properly that they would have acted that harshly.’

The law

Item 6(1) of the Code of Good Practice : Dismissal (“the Code”) provides as follows:

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

Item 2 provides that prior to dismissal, an employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should also 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 also be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. The compliance with the Code is subject to the proviso that if the employer cannot reasonably be expected to comply with certain of its steps it may dispense with them.

Grogan Dismissal, Discrimination and Unfair Labour Practices¹states that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers’ demands, the timing of the

strike, the conduct of the strikers and the parity principle. In regard to procedural fairness, the Code requires an employer to contact the union, issue a fair ultimatum and comply with the audi alteram partem rule before dismissal. The discussions with the union are designed to enable the parties to secure an early return to work before drastic action may be justified.²Grogan states that this requires an ultimatum to comply with the following requirements: (a) It must be communicated to the strikers in clear and unambiguous terms and in a medium understood by them; (b) it must indicate in clear terms what is demanded of the strikers, where and when they are required to comply and what sanction will be imposed if they fail to comply; and (c) sufficient time must be given for all strikers to be informed of the ultimatum and to enable them to reflect on it, and to respond to it by either compliance or rejection.³The ultimatum should in addition be a bona fide attempt to induce the strikers to return to work.

Analysis

Was the contravention of the Act serious?

Respondent's counsel submitted that the contravention of the Act was serious if regard is had to the impact of the past work stoppages and strikes and the interdicts granted in November 2008 and January 2009. The applicants were well aware that the respondent would be compelled to deal decisively with unprotected strikers to ensure that its business remained viable.

The applicants conceded that no attempt was made to comply with the Act insofar as it related to their demands on 20 January 2009.

The respondent submitted that there was no unjustified conduct on the part of the respondent as all it had done was to co-operate with the police in obtaining statements from employees who were implicated in the investigation of theft of the R6, 5 million from Capitec. The demand was moreover illegitimate as the respondent would have had no lawful grounds to interfere in the police investigation

and the version of Kunene and Sithole that the respondent was responsible for their alleged abduction and torture is simply an

attempt to justify their unacceptable conduct. Kunene and Sithole were in any event released before the 48 hours since their arrest ended.

The applicants' representative submitted that the dismissals may not have been justified as the respondent acted hastily in suspending the applicants for non-compliance with the second ultimatum and even on its own version whether a second ultimatum was issued is unclear. Moreover, the work stoppage was not convened with the purpose of discussing the alleged police brutality and torture and only for a report back on the interdict, but this became an issue when Sithole arrived and the applicants had a legitimate fear for their lives and safety and sought assurance from the respondent in this regard. He submitted that although the respondent failed to contact the union progress was made with resolving the dispute when Gys arrived and the respondent could have considered extending the ultimatum in order to assist the union to

achieve an end to the strike. He relied as support for this submission on *Doornfontein Gold Mining v National Union of Mineworkers and Others* (1994) ILJ 527 (LAC), however the judgment is more relevant to the fundamental right of a union to hold meetings and is distinguishable on these facts. I agree with his submission however that when the union arrived progress was made to resolve the issue although it would appear that no effort was made to ensure that the 9:00 deadline was met and it was only 45 minutes after it expired that the applicants indicated their willingness to return to work. They could easily have done so earlier and permitted their union to continue to address their concerns with management. Despite the submission by the applicants, there was no evidence that De Wet had agreed with Gys that he could go and address the applicants and that the union had unlimited time to do so. There is no basis therefore for a finding that he reneged on this agreement by announcing the suspensions at 9:45. A proposal had been made by him to resolve the issue and this was communicated by the union to the applicants, resulting in their eventual acknowledgement that the police would be approached to establish the whereabouts of Kunene and Sithebe. The union's version attempting to portray the situation differently cannot withstand scrutiny on the probabilities, particularly as both Sehularo and Gys tried to suggest at some point that the offer to return to work was made before 9:00.

The decision to dismiss may also have been justified by the historically acrimonious relationship and the policy of engaging

with the union on the basis that the respondent would no longer countenance the sporadic disruptions that occurred far too often and had significant financial and operational consequences. It was not disputed by Fourie that the respondent had changed its approach following the Silverton strike and that this had been discussed with the union. The strike can therefore not be seen in isolation but followed a pattern of sporadic and unprocedural work stoppages over a period of time. In regard to the parity principle, the respondent submitted that after the Silverton dismissals the applicants could have been under no misapprehension that their conduct would result in dismissal. Moreover, the unequivocal demand made to De Wet that the abducted employees should be found and brought back (despite Sehularo's attempt to suggest otherwise in cross-examination which was put to him was ludicrous), was unreasonable given that on his own admission there was a police investigation into a substantial theft and the respondent was being asked not to interfere with this. It would seem that by the time the first ultimatum had already expired the applicants had more than enough time to reflect on their conduct and make an informed decision. The first ultimatum stated in no uncertain terms that their conduct was detrimental to the respondent's operations and that they would face disciplinary action.

Were the ultimatums fair?

It is common cause that the strike was unprotected and that the employees admitted this at the disciplinary enquiry. It is further

common cause that the first ultimatum was issued at 8:00 by being handed to Sehularo who read it aloud, and that it informed employees that the work stoppage was unprocedural, unprotected and detrimental to the respondent's operations. It is common cause that no representations were made by the applicants or the union. Even if the document signed by Saunders and produced at the disciplinary enquiry was the suspension notice, in the absence of her testimony it is not conclusive proof that the union did not receive a second ultimatum at all. Fourie conceded that the second ultimatum was produced at the disciplinary enquiry and the applicants' evidence in this regard requires an assumption that since the only document bearing Saunders's signature produced at the enquiry was a notice of suspension, this was the only document that was issued. Saunders did not testify despite the union seeking a postponement in order to arrange a date for her testimony. The parties were then advised to file their written submissions which they did in April and May 2012 respectively.

Sehularo's evidence that there was no second ultimatum is improbable given that he made several references in cross-examination to the ultimatum that expired "at 9:00". He also testified, and this was corroborated by Sithole, that De Wet made constant references to "time running out". Furthermore, he conceded in cross-examination that the statement of case correctly stated that when the union left De Wet's office they understood that the strike "must be called off at 09:00."

There is no doubt from the following exchange in cross examination that whether the second ultimatum was personally given to him or not, the applicants were aware of the expiry of the second ultimatum:

'So when you left Mr De Wet's office, you and Mr Gys, Mr Sithole, knew that the demand by management was that this strike must be called off at 09:00. --- Yes, Sir.

The strike was not called off at 09:00. Is that correct? --- We went to discuss that what we spoke with Mr De Wet to the workers.

The strike was not called off at 09:00. Is that correct? --- It was called off.

At 09:00? --- Yes, Sir.

So at 09:00 the employees wanted to go back? --- Yes, Sir. It was around that time, when they wanted to go back Sir.

Not quarter to ten? --- I cannot remember, Sir, exactly, exactly the exact time.

Mr Sehularo, I am going to ask... argue to this court that you are not a truthful witness and that you adapted your evidence you went along, because this is the first anyone has ever said behalf the union that the workers wanted to go back before 09:00. That is your evidence. The workers wanted to go back before 09:00. --- I cannot remember what time did the workers want to go back, because the first ultimatum which was issued, that one was expiring at 09:00.'

The respondent conceded that an ultimatum of 30 minutes seemed unduly short but submitted that it was standard practice and understood and accepted by the applicants. In any event the evidence established that they clearly understood the consequences and were moreover not dismissed but suspended as a result of their non-compliance. There was no agreement between Gys and De Wet as suggested by the respondent's representative in his closing submissions, and the overwhelming probabilities favour the version, as confirmed by the applicants' own witnesses, that they knew they were required to return to work by 9:00 or face disciplinary action. Despite this they continued the meeting with their union for a further 45 minutes. This reflects the utmost contempt not only for their employer but for the law.

Was the audi alteram partem rule complied with?

The respondent had fully complied with the requirements of procedural fairness and this was conceded by Sehularo and Fourie.

The suspensions followed a lengthy collective disciplinary hearing and appeal, both of which were chaired by independent chairpersons

with knowledge and experience in labour law and in which the applicants were at all times represented. The disciplinary hearing

resulted in a fully reasoned finding which has in substance not been challenged although some of the applicants' witnesses sought to revisit concessions already made.

Were the dismissals substantively and procedurally fair?

I am satisfied that in the context of the respondent's operations and in applying the facts to the law, even if only the

first ultimatum was issued it was unambiguous and clearly specified the consequences of continued strike action. Irrespective of whether the issue of the missing two employees arose only after the report from Sithole (which would on the evidence have been at about 8:30), there was a clear demand to management at about 8:45 when the union arrived to the effect that the missing employees should be produced and there would be no work before then. Despite efforts by Sithole to deny that they were questioned by police it would have been clear at the time that the two employees had been arrested by police for suspected theft and at one point the evidence of the applicant was that only one of the missing employees could not be found. Delport confirmed that according to the register, the majority of employees returned their kit between 08:00 and 08:30 and he confirmed that this was a clear indication that they were not prepared to return to work. Sehularo said this was done on his instructions when he received a clear indication that the applicants persisted in seeking resolution of the issue immediately but denied that it was out of safety concerns since they were not toyi-toying but only singing. Fourie however was honest in her reflection that the reality of South African culture is that union meetings are characterised by robust singing and toyi-toying, although this evidence was tendered to indicate that management should not have interpreted it as a sign of aggression. Although it is common case that management made no attempt to contact the union when the issue first arose, despite

the evidence of Eva that there was a permanent

structure in place to deal with such problems, in the same vein the applicants and Sehularo refused to discuss the issue with management when Delport first sought to enquire why the trucks were not moving. Instead Sehularo replied that De Wet should approach them himself.

Sehularo's evidence, and in particular his version as to the purpose of the meeting and the nature of the dispute that led to the work stoppage, was replete with contradictions. He had informed the employees by radio on the Monday afternoon of the court interdict and there would have been no further need to meet the next day. His version also represented a material departure from the applicants' statement of case, which being more contemporaneous, must be accepted despite his testimony that it had been "twisted". The pleaded case is that he arrived at work at 6:30 on Tuesday and was questioned by employees about the strike scheduled for that day and he told them to meet in the recreation room to discuss it. His version in cross-examination changed when it was put to him that if he had sent out information about the interdict the day before there would have been no need to meet. He then testified, for the first time, that the meeting on the Tuesday was a normal meeting which was held from about 7:00 to 7:15 or 7:30 every week. This version was disputed. It had never been put to the respondent's witnesses or led at the disciplinary enquiry and must be rejected as a fabrication.

The conduct of the employees notwithstanding the limited duration of the strike was in the circumstances a serious contravention of section 64 and the dismissals were justified. The union advanced no explanation for its failure to make representations for the lifting of the suspensions and the dismissals only followed a lengthy disciplinary enquiry and appeal process. From the evidence of Sehularo and Gys, it can be inferred that the union was not in a position to instruct its members to return to work while they continued to pursue their concerns with management. This is unfortunate as it not only denotes lack of leadership credibility

and inexperience but undermines the centrality of the dispute resolution process on which the Act is premised. It is also unfortunate that senior union leaders like Fourie, whose evidence displayed her heartfelt commitment to the proper and lawful exercise of the rights of trade unions, are making way for inexperienced junior officials. Although her evidence linking the fears of employees to an incident that occurred in the apartheid era is not a justification for the conduct of the applicants, it cannot be disputed that violations of human rights continue to occur in our democratic society. This does not however justify spontaneous unlawful behaviour that jeopardises the business of the employer. On the applicants' own version the respondent had intervened in

the past when it was approached to secure the release of employees from police custody. Sehularo confirmed that it did so in relation to his own allegedly unlawful arrest. There was no reason why the respondent could not have been approached by Sehularo to assist expeditiously, as De Wet in fact agreed to do once the issue was communicated to him. Unfortunately Sehularo, who could easily have approached Delport or De Wet, instead adopted an arrogant approach which was also reflected in his demeanour during his testimony and set the tone for the rest of

the adversarial engagement that day and led to its unfortunate consequences. He could also have discussed the matter quietly with Sithole and then approached management instead of allowing him to address the workforce. This is what led to the widespread rumours and is conduct that one would not expect from a responsible shop steward.

The dismissal of the individual applicants was therefore substantively and procedurally fair. In regard to costs, respondent's

counsel submitted that it had difficulty seeking costs given its ongoing relationship with the union, but that the court should

exercise its discretion in this regard. It is clear that once the union arrived progress was made in resolving the dispute although

this could have been done more expeditiously without entertaining prolonged discussion, and the employees could have been ordered to return to work whilst the union pursued the issue. Gys's evidence that he was unaware of the ultimatums issued is also

improbable. Timing was imperative in the respondent's business and it had already suffered harm as a result of persistent unlawful strike action. Sehularo's conduct was also not conducive to resolving the issue expeditiously and the individual applicants understood the consequences of their continued strike action even though it was of short duration. In these circumstances I see no reason in law or fairness why the applicants should not be liable for the costs of opposing their claim.

Order

In the premises, I make the following order :

The claim is dismissed with costs.

Bhoola J

Judge of the Labour Court of South Africa

APPEARANCES: FOR THE APPLICANTS: N Nkadimeng, Union Official, Motor Transport Workers Union of South Africa
FOR THE RESPONDENT: G C Pretorius SC Instructed by Lamberti Potgieter, Johannesburg

11st ed. (2005, Juta) at 451- 454.

2Grogan supra at p 454.

3Supra at p 458.

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