
SOUTH AFRICA / JUDGMENT

National Union of Mineworkers and Others v Spiderwebb Altitudes Systems (Pty) Ltd (JS91/15) [2016] ZALCJHB 480 (4 April 2016) [2016] ZALCJHB 480

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS91/15

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JS 91/15

In the matter between:

NATIONAL UNION OF MINEWORKERS

First applicant

MASHAPA, SELLO DERICK

Second Applicant

MASHAPA, MBAVHALENLENI EMILY

Third Applicant

and

SPIDERWEBB ALTITUDE SYSTEMS (PTY) LTD

Respondent

Trial: 3 March 2016

Judgment

delivered: 4 April 2016

VAN NIEKERK J

Introduction

- [1] The second and third applicants, Mr. And Mrs. Mashapa, were dismissed by the respondent on 14 August 2014. They contend that the substantive reason for the dismissal was that they joined a trade union (the first applicant, NUM); alternatively, that they were unfairly retrenched. The respondent disputes both claims.
- [2] The pleadings disclose material disputes of fact both as to the reasons for dismissal and the events that culminated in that action. At the trial, only Mr. Mashapha testified on behalf of the applicants, and only Mr. Govender, a director of the respondent, for the respondent.
- [3] There was some suggestion during Govender's evidence that the termination of the Mashapa's employment had been effected by mutual agreement. However, this was not pleaded and the respondent did not seek to raise the absence of a dismissal by way of a special plea or otherwise. I accept therefore that the Mashapas were dismissed by the respondent. That being so, the applicants bear the onus of discharging at least some credible evidence to show that the real rather than the apparent reason for dismissal is one that is automatically unfair, i.e. that the respondent acted contrary to s 5 of the LRA by dismissing the Mashapas for joining a trade union. In respect of the alternative claim, that of unfair retrenchment, the respondent bears the onus to establish that the dismissal was substantively and procedurally fair.

Factual

background

- [4] The respondent is engaged in the business of manufacturing and supplying safety equipment used on mines. It is not disputed that Mr. and Mrs. Mashapa were employed by the respondent on 1 June 2003 and 1 July 2004 respectively, and that during the course of 2013, they both joined the NUM.
- [5] There is little else that is common cause, and the evidence discloses material disputes of fact. Mr. Mashapa testified that on 6 March 2014, a meeting took place between the respondent and a NUM official at the respondent's premises. The meeting had been requested after a number of the respondent's employees joined the NUM. There is a dispute as to what transpired at the meeting. Mashapha testified that Govender told the official that he did not recognise the union in his company and instructed him to leave the premises. The employees who remained in the boardroom (all union members) were asked by Govender whether they wished to remain union members. When they replied in the affirmative, Govender dismissed them and instructed them to leave the premises. The employees did so, and waited outside the respondent's premises for a letter of dismissal. Govender emerged some 20 to 30 minutes later with a document which did not refer to any dismissal, but which gave notice of short time.

- [6] Mashapa testified that the notice was directed to union members only and short time applied only to them. The union official was contacted about the short time. He arrived at the premises and told the employees still gathered outside that he had 'opened a case' of unfair dismissal. It is not in dispute that on 14 March 2014, the NUM referred an unfair dismissal claim to the CCMA in which it was contended that the applicants had been 'told to leave the premises' and recorded that they sought reinstatement. It is also not in dispute that on 24 April 2014, the NUM signed an agreement to withdraw the dispute, the reason being recorded as 'Incorrect citation workers not dismissed'. Mashapa's understanding of the basis of the withdrawal of the dispute was that employees had been placed on short time and not dismissed.
- [7] Govender presented a very different version and testified that at the meeting held on 6 March 2014, the union official behaved in an aggressive and threatening manner and threatened to close the company down. Govender asked him to leave. He left the meeting and called the members of staff who had been present in the meeting outside. They left the boardroom and congregated outside the respondent's premises where they remained for about an hour.
- [8] There is a dispute about whether during the period of short-time Mashapa was contactable on his cell phone but be that as it may, it is not disputed that he returned to work on 4 May 2014 and was placed in the cutting department.
- [9] Mashapa stated that after he had returned to work, he was called to the management office where a letter was read to him, alleging that he and his wife had been threatening non-union members. Mashapa denied any knowledge of the allegation. The same document was issued to Mrs. Mashapa. It is not disputed that a handwritten note of a meeting between Govender, Breedt and Emily Mashapa held on 15 May 2014, and that it records that Emily Mashapa was warned that the intimidation of non-union members would not be tolerated; that the police would be informed and disciplinary action taken. Emily Mashapa's signature appears on the hand-written minute.
- [10] It is not disputed that the Mashapas were called to the office on 7 August 2014 and each given a letter. The letter confirmed that they were members of the NUM as at that date, and was signed and witnessed. Govender testified that he had received a telefax the previous day from the NUM requesting organisational rights and that he wished to determine the union's degree of representativity.
- [11] The events leading up to the dismissal of the Mashapas are the subject of two mutually exclusive versions. Mashapa testified that on 14 August 2014 James Mhlauli approached the workers with another document saying that the company wished to determine how many employees belong to a union. In that document, workers were to indicate whether they wish to remain with a union. The format of the document provides for two boxes, the one indicating 'Yes, I want Union Representation', the other 'No, I do not want Union Representation'. Mr. and Mrs. Mashapa signed the document, indicating that they wanted

union representation. In his evidence, Govender denied any knowledge of the document, stating that he was already aware of which employees were union members, since he had completed an exercise on 7 August 2014 to determine the number of NUM members, in response to the fax from the NUM requesting organisational rights.

[12] Mashapa stated further that on the same morning, at about 11 am, Mhlauli returned and called him and his wife to Govender's

office. While seated there, Govender told them that he had heard that they were the ones who introduced the union to the company. Mashapa and his wife denied this, saying that the employees were the ones who formed a union. Govender then suggested that he should dismiss them or they should resign. He and Emily Mashapa refused to resign. Govender then sat in front of his computer and typed a document. He read the contents of the document which in effect stated that the company had no position for them and that he was terminating their employment. The document (which was not disputed) reads as follows:

Due to your position within the company becoming redundant due to the industrial action that has plagued the country and the negative

financial position that it has placed the country in, as was previously discussed with you on 6 August 2014, we unfortunately have

no option but to terminate your employment with us with immediate effect. Based on these unfortunate circumstances we will pay you in full for the remainder of the month and also pay you severance pay over two months being two full months salary: Payment will be as follows:

1: 1 September 2014 Full salary for month of August

2: 1 October 2014 Full salary 1 month severance

3. 1 November 2014 Full salary 2nd month severance

We thank you for your service and wish you well for your future

Mashapa testified that he and his wife refused to sign the document, that they left the premises and sought advice from the union office, where a dispute was lodged on their behalf.

[13] Govender's evidence presented a very different picture. On 15 May 2014, he held a meeting with Mrs Mashapa when he told her that there had been reports from employees that the Mashapas had threatened to 'bring the company down' and that further threats and intimidation would not be tolerated. The contemporaneous note of the meeting, which Mrs. Mashapa signed, recorded a warning that disciplinary action would follow should the threats and intimidation of non-union members not cease.

[14] On 11 August 2014, Ruaan Breedts, the production manager, reported to him that there was tension on the shop floor and that the Mashapas were threatening to kill non-union members. Govender went to speak to a few members of staff who indicated that they had had enough of the Mashapas and would be taking matters into their own hands. Once

Govender had satisfied himself that the threats were real and substantial, he called the Mashapas to his office. He told them that they were under threat, that he could not guarantee their safety and offered to transfer them to another company in which he had an interest, situated approximately 1 km away.

- [15] On 13 August 2014 he had a discussion with the Mashapas regarding these issues, and proposed that they be transferred to another of his businesses located nearby. The Mashapas requested that the discussion be reduced to writing which it was. The letter addressed to Derick Mashapa reads as follows:

Spiderwebb management finds themselves in the extremely unfortunate position of having to deal with staff and racism at the company based on the activity of the NUM trade unions and more specifically your actions on behalf for the union (being forced to join the union by threatening them with physical harm) which several Spiderwebb staff are against, to such an extent that many have threatened to "KILL" not just you but your wife Mbavhaleleni Emily Mashapa for inciting and threatening physical harm against them if you are not fired.

Under the circumstances it would be highly reckless and careless to leave you in a situation that may result in your murder, therefore

management has decided in the interest of safety to move you to one of our other companies (Tecublox) until the situation can be resolved with non-union staff and things settle down. We take note of your reluctance to move to Tecublox during our verbal discussions however should you be unwilling to accept this offer, you will leave us no alternative but to terminate your employment in order to ensure your safety as well as that of your husband (sic).

We sincerely hope you accept our alternative offer of employment to ensure your safety.

- [16] The letter is signed by Govender and his co-director. In his evidence, Mashapa denied having heard any discussion with Govender

regarding the issues raised in the letter. He denied ever having seen the letter, or that any discussion took place concerning his alleged conduct in relation to non-union members, or that any offer of alternative employment was made.

- [17] Govender testified that the Mashapas returned the next day and said that they wished to accept a severance package. He then typed up and gave the Mashapas the letters dated 14 August 2014 referred to above, which reflected a notice of termination of employment on the grounds of the respondent's operational requirements. He explained that he made reference in the letter to a dismissal for operational requirements since he did not want to prejudice the Mashapas' prospects of future employment.

- [18] Govender acknowledged that on 6 August 2014 employees were asked to confirm the membership of the union. This was a consequence of telefax received from the union listing the names of its members and asking for organisational rights. The purpose of the exercise was to confirm whether the person is that the union indicated when members were in fact

members and to get an exact count. He denied ever having seen the document that Mashapa said was given to him by Mhlauli on 14 August 2014 and stated, as I have indicated above, that he was aware of the identity of all NUM members consequent on his confirmation of the identity of all NUM members.

Analysis

[19] The manner in which factual disputes are to be determined is set out in *SFW Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), where the Supreme Court of Appeal said the following:

‘The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

- (b) their reliability; (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a),
- (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail’ (at 14 I -15 D).

[20] The applicants’ case is that the dismissal of the second and third applicants was automatically unfair ‘in that the reason for the dismissal was that the employees joined a union and that the respondent wished to operate with a non-unionised work force’. In my view, the applicants have failed to overcome the evidentiary hurdle that they face. It is clear from the evidence that even on his own version, Mashapa was not dismissed for joining the NUM. He had joined the NUM in 2013, the year before his dismissal. It is also clear from the evidence that Govender had known since at least early 2014 that the Mashapas were NUM

members, as were some 30 other employees in the respondent's workforce. None of them were dismissed, nor were employees who belonged to other unions, including AMCU.

- [21] To the extent that the applicants attempted to build a case of an anti-union attitude on the part of the respondent to bolster the claim that the Mashapas were dismissed for joining the NUM, they relied significantly on the assertion that the respondent made a practice of putting only union members on short time. Although the issues relating to short time are not directly relevant to a proper assessment of the reason for dismissal, the notice on which the applicants relied (the letter dated 6 March 2014) does not accord with the notices of short-time introduced into evidence referring to the introduction of short-time in January 2014 and on 28 February
2014. On the probabilities, short term was worked prior to 6 March 2014 by all employees and was not used as a mechanism to prejudice those employees who were union members.
- [22] Mashapa's evidence ultimately was not that he had been dismissed on account of joining the union – the suggestion was that his activities in relation to the recruitment of other employees had been the proximate cause of the termination of his employment. This is not a case foreshadowed by the statement of claim nor, as I have indicated, is it one sustained by the evidence. For this reason alone, the applicants' claim of an automatically unfair dismissal must fail.
- [23] Even if I were to take a more generous view of the applicants' statement of case and interpret the claim as one being a dismissal on account of engaging in the legitimate activities of a trade union, the probabilities are against Mashapa's version. First, it is remarkable that the referral to conciliation in the present matter refers only to a dismissal by reason of the respondent's operational requirements and further defines the issues in dispute only as a failure by the respondent to consult with the union and to apply LIFO. Mashapa did not dispute that he had met with the union official after his dismissal and conveyed to him his version of events during August 2014. Had the Mashapas been dismissed on account of their union membership and activities, the probabilities are that the referral to the CCMA would have read very differently. Why a union official would allege an unfair retrenchment on the basis of no consultation and the application of unfair selection criteria applied when his instructions were that the Mashapas had been dismissed effectively as an act of the grossest victimisation, is incomprehensible. Mashapa was unable to explain why it was that given his assertion that he had recounted the events recorded in his evidence to the union official concerned, that the dispute was framed in the terms that it was. The union official was not called to give evidence to explain this discrepancy.
- [24] Further, Mashapa's account is at odds with the documentation. Without having regard to the documents that are disputed to accept in his version would require me to find that the letter typed by Govender on 13 August 2014, in which the offer of alternative

employment was made, was entirely fabricated. It is not probable that Govender would have gone to such lengths to manufacture a version in response to that proffered by the Mashapas, especially when the letters contain little more than an offer of alternative employment.

[25] Thirdly, the evidence that Emily Mashapa was cautioned in writing for intimidating non-union members during May 2014 was not disputed, nor was the fact that she was warned of the consequences should she continue to engage in that misconduct. This is consistent with the respondent's version that the Mashapas had made themselves guilty of intimidating non-union members (and in particular, that Emily Mashapa had admitted the allegations), and the probability that the non-members may have decided to take matters into their own hands. In other words, there is a significant link between the undisputed minute of the meeting held with Emily Mashapa on 15 May 2014 and the letters that Govender says that he prepared at the Mashapa's request on 13 August 2014.

[26] What counts heavily against the applicants is the failure of the third applicant, Mrs Mashapa, to give evidence. In *Tshishonga v Minister of Justice and Constitutional Development and Another* (2007) 28 ILJ 195 (LC) at para 112, Pillay J held that:

But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate

the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.

Mrs Mashapa was present in court throughout the proceedings and despite being a party to the proceedings and witness to the all of the events that forms the basis of the fundamental factual dispute that unfolded at the trial, she was not called as a witness. An adverse inference must be drawn from this failure.

[27] In regard to the claim for a dismissal that is automatically unfair therefore, in my view, the applicants have failed to lead sufficient credible evidence to sustain a finding that the reason for termination of employment was one that is automatically unfair.

[28] In regard to an unfair retrenchment, Mr. van As, who appeared for the respondent fairly conceded that the respondent, in its ignorance, had failed to adopt a procedure that complied with s 189, particularly in that it did not invoke the assistance of a union official during the course of his discussions with the Mashapas. Mr. van As submitted further that the present case was unusual in that the real reason for the termination of employment was to secure the safety of the Mashapas rather than on account of any particular economic constraint, and that the respondent's conduct should be viewed in that light. I agree. A fair procedure in the circumstances would have required the union to be notified, and some form of involvement by the union in the process that preceded the Mashapas' dismissal. That departure from the established requirements, having regard to the prevailing circumstances, warrants a minimal award of compensation.

[29] Finally, in so far as costs are concerned, s162 confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. In a dispute between a union and an employer, this court is traditionally reluctant to make an order for costs since the order may have the effect of prejudicing a collective bargaining relationship. I see no reason to depart from that convention.

I make the following order:

1. The dismissal of the individual applicants for reasons related to the respondent's operational requirements was procedurally unfair.
2. Each of the individual applicants is entitled to compensation in a sum equivalent to two months' remuneration.
3. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicants: Mr. M Makhura, Cheadle Thompson and Haysom

For the respondent: Adv. M Van As, instructed by Scoonees, Belling & Georgiev

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