

SOUTH AFRICA / JUDGMENT

National Union of Mineworkers obo Members v Doornfontein Mining (Pty) Ltd (JS995/21) [2023] ZALCJHB 283 (4 October 2023)

[2023] ZALCJHB 283**COURT**

Labour Court Johannesburg

BEFORE

M. T. M. Phehane

CASE / FILE NUMBER

JS995/21

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: JS995/21****In the matter between:**

NATIONAL
UNION OF MINEWORKERS
obo
MEMBERS
Applicant
and
DOORNFONTEIN MINING
(PTY) LTD
Respondent

Heard:

28 April 2023

Decided:

4 October 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 10h00 on 4 October 2023.)

JUDGMENT**SPECIAL PLEA**

PHEHANE, J

[1] The applicant union launched a referral on behalf of its members, averring that its members were dismissed from the employ of the

respondent in 2021 for participating in an unprotected strike action. The applicant union alleges that the real reason for the dismissal of its members was their refusal to join a union, called the Blyvoor Workers Union (BWU). In the circumstances, the applicant union contends that the dismissal of its members constitutes an automatically unfair dismissal as contemplated in section 187(1) of the Labour Relations Act[1] (LRA).

[2] The respondent raised two special pleas. The first has been abandoned. The second special plea is that the applicant does not lay out a basis in its statement of claim to support the allegation that

its members' dismissal constitutes an automatically unfair dismissal as contemplated in section 187(1) of the LRA. In the premises, the respondent submits that the applicants claim should be dismissed.

[3] The applicant opposes the special plea.

Background

[4] The respondent is an entity that was contracted by Blyvoor Gold Capital (Pty) Ltd (BGC) to provide specialized mining services to the Blyvoor Gold Mine (BGM). Historically, the mine, previously called

the Blyvooruitzicht Gold Mine was brought to a halt in 2013 following an unprotected strike action involving the applicant union. BCG obtained the mining rights of the Blyvooruitzicht Gold Mine and renamed the mine the BGM.

[5] In January 2021, the respondent and the Blyvoor Workers Union (BWU) concluded a closed shop agreement as contemplated in section 26 of the LRA. In March 2021, BCG required its employees to join the BWU as a pre-condition of employment.

[6] On 19, 22 and 23 March 2021, the individual applicants partook in an unprotected strike action at the Blyvoor Mine.[2] The individual applicants were dismissed from the employ of the respondent on 23 March 2021 following a disciplinary hearing that was held in their absence on the same date.[3] BGC cancelled the contract with the respondent following the unprotected strike action.

Special plea

[7] The sum total of the special plea[4] is set out as follows:

‘2.1 NUM in esse alleges that the striking employees were dismissed for refusing to conform to a closed shop agreement by refusing to join the Blyvoor Workers Union (BWU) being the majority union in terms of the said closed shop agreement.

2.2 NUM thus fails to allege any basis upon which an automatic (sic) unfair dismissal occurred.

WHEREFOR it is paid for that NUM’s claim be dismissed with costs.’

[8] In its heads of argument, the respondent submits that the applicant contends that the closed shop agreement is invalid and that the applicant cannot make this contention in a statement of claim in circumstances where it has not taken any steps to set aside the closed shop agreement.[5]

[9] The respondent further contends that it is not unfair to dismiss an employee for refusing to join a trade union that is a party to a closed shop agreement. In this regard the respondent relies on section 26(6)(a) of the LRA.[6]

[10] The respondent attacks the applicant’s reliance (as stated in the applicant’s heads of argument), that the applicant’s case is premised on the provisions of section 187(1) of the LRA and contends that not only has the applicant failed to specify the provisions of section 5 of the LRA upon which it relies, but that section 5 of the LRA does not preclude the dismissal of employees who refuse to join a trade union party to a closed shop agreement.[7] The respondent submits that the applicant has accordingly failed to ‘demonstrate’ a dispute in terms of section 5 of the LRA and has failed to ‘demonstrate’ that a dismissal as contemplated in section 26(6)(a) of the LRA constitutes an automatically unfair dismissal.[8]

[11] As I understand the respondent’s contention, it is this:

11.1 a closed shop agreement was concluded;

11.2 it was entitled to dismiss the employees for refusing to join a trade union (BMU) as contemplated in section 26(6)(a) of the LRA;

11.3 a dismissal on this basis does not constitute an automatically unfair dismissal;

11.4 the applicant has failed to set out a legal basis for its claim and its claim should accordingly be dismissed.

[12] What the respondent loses sight of, are the provisions of section 26(7) of the LRA, which read as follows:

‘(7) Despite subsection (6) –

(a) the employees at the time a closed shop agreement takes effect may not be dismissed for refusing to join a trade union party to the agreement; and

- (b) employees may not be dismissed for refusing to join a trade union party to the agreement on the grounds of conscientious objection.’

(Emphasis added).

- [13] The applicant contends that paragraph 3.4 of its statement of claim alleges in clear terms, that the closed shop agreement was an

orchestrated attempt by the respondent to bar the applicant union from establishing its presence at the Blyvoor Mine.[9] Further, that the statement of claim contains averments that the applicant attempted to obtain organisational rights from the respondent. (The respondent’s case is that no organisational rights was sought from it, but rather from BGC - this is a matter for evidence at trial, as it concerns the main reason for the dismissal).

- [14] Considering the afore-going, in my view, the applicant’s reliance on section 187(1) of the LRA lends credence to its contention that dismissing an employee contrary to the provisions section 5 of the LRA constitutes an automatically unfair dismissal.

- [15] The applicant union alleges that the dismissal of its members is substantively unfair, as the real reason for the dismissal is that they refused to join the BMU. The applicant union contends that its members were dismissed for participation in an unprotected strike action in circumstances where they were provoked by the respondent to strike, as they were coerced to join BMU. Further the dismissal is unfair, as its members were not furnished with an ultimatum. In conclusion, the applicant union alleges that the dismissal was procedurally unfair in that the individual applicants were not furnished with proper notice of the disciplinary hearing and the hearing was held in their absence.

- [16] The applicant submits that its dispute is premised on the provisions of section 191(5)(b)(iii) and (iv) of the LRA and not solely on section 187(1) of the LRA[10] and therefore, the respondent had failed to lay out a basis for the dismissal of the applicant’s claim in its entirety.

- [17] The legal basis for the applicant’s claim in terms of section 191(5)(b)(iii) and (iv) of the LRA is clearly set out in paragraph 4 of the statement of claim.

- [18] In view of the afore-going, the applicant’s statement of claim sets out the averments necessary to sustain its claim. The special plea accordingly lacks merit and falls to be dismissed.

Costs

- [19] The respondent tendered the costs of the abandonment of the first special plea, up until the date of the filing of the heads of argument.

- [20] The second special plea lacks merit and has unnecessarily delayed the trial. In the circumstances, I do not see why the respondent should not pay the costs.

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

1. The second special plea is dismissed.
2. The respondent is to pay costs, including the costs of opposing the first special plea.

M. T. M. Phehane

Judge of the Labour Court of South Africa

[1] Act 66 of 1995, as amended.

[2] See: pre- trial minute, at para 4.4.

[3] Ibid at paras 4.5 and 4.6

[4] The respondent filed a special plea on 31 December 2021 setting out its two special pleas, as well as a chronology of the background to this matter, and the reply to the allegations contained in the statement of claim. The respondent proceeded to file a statement of response on 25 January 2022, and repeated the chronology and its response to the allegations in the statement of claim.

[5] Respondent's heads of argument at paras 6 and 11.

[6] Section 26(6)(a) of the LRA reads as follows: 'It is not unfair to dismiss an employee – (a) for refusing to join a trade union party to a closed shop agreement'.

[6] Section 26(6)(a) of the LRA reads as follows:

'It is not unfair to dismiss an employee –

(a) for refusing to join a trade union party to a closed shop agreement'.

[7] Respondent's heads of argument at para 17.

[8] Ibid at para 18.

[9] See: applicant's heads of argument at para 4.6.

[10] Applicant's heads of argument, at para 4.17.

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