

SOUTH AFRICA / JUDGMENT

SATAWU obo Mtshweni v Xinergistix Management Services Proprietary Limited (JS326/12) [2014] ZALCJHB 523 (6 November 2014)

[2014] ZALCJHB 523**COURT**

Labour Court Johannesburg

BEFORE

G Malindi

CASE / FILE NUMBER

JS326/12

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REPUBLIC
OF SOUTH AFRICA
THE LABOUR
COURT OF SOUTH AFRICA, JOHANNESBURG
CASE NO: JS
326/12
DATE: 06
NOVEMBER 2014
Not
Reportable
In the

matter between: SATAWU obo
 MOSES
 MTSHWENI.....Applicant
 And
 XINERGISTIX
 MANAGEMENT SERVICES
 PROPRIETARY
 LIMITED.....Respondent
Date of
hearing: 1, 2 and 5 August 2013
Date of
Judgment: 6 November 2014

JUDGMENT

MALINDI AJ

Introduction

[1] The Applicant, South African Transport and Allied Workers Union (SATAWU), acting on behalf of Moses Mtshweni (he being referred to as the Applicant or Mtshweni henceforth), filed its statement of case dated 14 May 2012, seeking an order in the following terms:

1.1. Declaring the dismissal of Mr Mtshweni to be both substantively and procedurally unfair; and

1.2. Ordering the Respondent to reinstate Mr Mtshweni with effect from the date of dismissal without loss of benefits.

[2] The Respondent opposes the claim and denies that the Applicant is entitled to any relief as sought.

[3] The parties held a pre-trial conference on 11 June 2012. The following common cause facts were recorded:

3.1. The Individual Applicant was permanently employed since 22 October 2007.

3.2. On 04 December 2011 the Individual Applicant and other employees of the Respondent who were truck drivers, attended a meeting at the Respondent's Alrode Depot as instructed by Mr Juan Henning (Henning), the Respondent's Fleet Manager.

3.3. At the meeting Mr Henning told the employees, including the Individual Applicant, that the Respondent had a SAB contract which required them to drive routes between Durban and Port Elizabeth. Mr Henning further told the employees that the trucks will be running 24 hours with two drivers but that the employees would be paid for the normal nine (9) hours and an extra three (3) hours will be paid as overtime.

3.4. Each driver would only be required to work a 12 hour shift, whilst the other driver has a 12 hour rest period in the truck.

3.5. The employees told Mr Henning that they wanted to consult the Applicant (the union) regarding payment of three (3) hours overtime in order to verify that the payment was in accordance with the law.

3.6. The Individual Applicant was booked off sick from 5 to 14 December 2011.

3.7. On or about 15 December 2011, the Individual Applicant phoned the Respondent and requested annual leave for that day. The Respondent granted annual leave to the Individual Applicant, for 15 December 2011.

3.8. On 20 December 2011, the Individual Applicant telephonically advised the Respondent's Human Resources Officer, Mr Xolisa Pantsi, that he was at the medical doctor's room, as he was sick. The Individual Applicant was booked off sick from 20 December 2011 to 22 December 2011, to resume duty again on 23 December 2011.

3.9. On 23 December 2011, the Individual Applicant again attended to the doctor's office and the Individual Applicant was again booked off sick on 23 December 2011, to resume duty on 24 December 2011.

3.10. On 04 January 2012 the Individual Applicant was dismissed by the Respondent.

Background

- [4] On 4 December 2011 the Respondent called all the drivers falling within the Applicant's unit to report to the Respondent's Alrode Depot. The Respondent's Mr Henning told the drivers that the Respondent has accepted a new SAB contract to deliver goods between Durban and Port Elizabeth (the SAB contract). The terms of the contract were related to the drivers and they were to undertake the deliveries with immediate effect.
- [5] Henning testified that the Applicant was taken off the Piet Retief / Bayerson route in order to carry out the SAB contract. The Applicant was to proceed to Durban on 4 December 2011 in order to start Durban to Port Elizabeth deliveries on 6 December 2011.
- [6] The Applicant was dismissed on 4 January 2012 for embarking on an unprotected strike on 4 December 2011 and continuing on the said strike when he refused to do the SAB deliveries when called upon to do so on 19 December 2011. He also failed to report for duty on 27 December 2011. The Respondent alleges that he continued on his strike on 28 December 2011 to 30 December 2011.
- [7] On 3 January 2012 the terms of the SAB contract were discussed with the Applicant again and he reiterated his stance that he will not accept to do the deliveries under the terms already conveyed to him. When he failed to attend to his duties on 4 January 2012 he was issued with a notice of dismissal for "taking part in unprotected and unlawful industrial action on or about 4 December 2011 to 4 January 2012."

Evidence

- [8] From the evidence of Henning it is common cause that the Applicant provided medical certificates that he was sick and would not go to work on 5-7; 8-9; 12-13; 14; 20-22 and 23 December 2011. He was uncertain whether he was at work on 10 and 11 December 2011. He testified that other dates such as 16-17 December fell-over a weekend when the Applicant is not expected to work and that after 23 December the Christmas period intervened. On 15 December 2011 the Applicant took leave which was approved by Henning.

- [9] The Applicant was expected to report for duty on 27 December 2011. Besides 4 December 2011, the period from 27 December 2011 to 4 January 2012 is relevant to determining whether the Applicant absented himself from work in pursuance of a strike.
- [10] Henning testified that the SAB contract was concluded on the condition that SAB would be entitled to inform the Respondent on a Friday for deliveries required in the next week for the duration of this “trial” basis contract which could be made permanent. He had received such notification on Friday 2 December 2011 for deliveries to be conducted from 5 December 2011.
- [11] As a result Henning called the Applicant to be at the Alrode Depot on 4 December 2011 where all drivers would receive instructions about the SAB requirements. At the meeting the drivers were informed that in terms of the SAB contract the trucks were required to operate 24 hours with two drivers each doing a twelve hour shift (“double manning”). The drivers would be paid 9 hours normal pay and three hours overtime. The drivers refused to go to Durban unless they received 9 hours normal pay and 6 hours overtime. He contacted Robert Fick about this and later he adjourned the meeting which was scheduled to continue on Monday, 05 December 2011. He denied that Mtshweni advised him that he was sick and that he intended to consult a medical practitioner on 05 December 2011.
- [12] On 05 December 2011, the Applicant was not at work and other drivers refused to go to Durban. An ultimatum was issued against those drivers. On 06 December 2011 the drivers, in the absence of Mtshweni, again refused to go to Durban and another ultimatum was issued against them. The drivers were dismissed on 06 December 2011 for participating in an unprotected strike.
- [13] On 19 December 2011, the Applicant reported for duty and brought with him the medical certificates for the period of his absence from 05 December 2011 until 09 December 2011 and 12 until 14 December 2011. From 10 December 2011 to 11 December 2011 was a weekend and he was not required to work and on 15 December 2011 the Respondent approved his annual leave.
- [14] On 19 December 2011 the Applicant refused to go to Durban and said there was an unsettled matter, this being the salary structure. He confirmed the minutes of the meeting on page 15 of Annexure “B” and that the minutes were prepared by the Respondent’s Human Resources Officer, Xolisa Pantsi (“Pantsi”).
- [15] On 05 December 2011 the Applicant referred an unfair labour practice dispute to the National Bargaining Council for the Road Freight and Logistic Industry (“NBCFRFI”). The dispute was about the SAB contract and it was personally referred by him.
- [16] He told the Respondent that he does not have a problem going to Durban to do the SAB contract, but “the problem was changing his overtime”.

- [17] According to the access report to the Respondent's premises, on 19 December 2011 the Applicant reported for duty at 08h24 and around 14h24 went out with one Edwin Tlali. He came back to the Human Resources Office at 16h50. He again refused to go to Durban for the SAB Contract and an ultimatum was issued and personally handed to him.
- [18] The Applicant did not report for duty from 20 December 2011 to 23 December 2011 due to the fact that he was sick.
- [19] From 27 to 31 December 2011, the Applicant did not report for duty and no reason was given for his absence. On 28 December 2011 at 14h31 Henning sent a telegram to the Applicant to report for duty on 30 December 2011.
- [20] On 29 December 2011 Henning received a call from the Applicant advising him that he had a car breakdown and could not report for duty. During the telephonic conversation Henning advised the Applicant about the telegram sent on 28 December 2011 and instructed him to report for duty on 30 December 2011.
- [21] On 03 January 2012, the Applicant reported for duty around 11h15 and did not give an explanation why he arrived so late. Henning instructed him to go to Durban for the SAB contract but the Applicant refused to go as there was an unresolved issue.
- [22] On 04 January 2011 the Applicant reported for duty and during the meeting Henning asked the Applicant if he was prepared to go to Durban for the SAB contract. He refused to go and the second ultimatum was issued against him and the meeting was adjourned until 11h00. Later during the meeting Henning asked the Applicant if he was prepared to go to Durban for the SAB contract and he refused to go and the third ultimatum was issued against him.
- [23] According to Henning, the Applicant failed to provide reasons as to why a dismissal letter should not be issued against him. At around 13h00, a letter of dismissal was issued against the Applicant.
- [24] Henning's evidence was supported by Pantsi who testified that:

24.1. He has been employed by the Respondent as Human Resources Officer since October 2011. His duties include dealing with industrial relations, paying salaries and recruitment of employees. On 05 December 2011 he was advised by Henning about the group of drivers who refused to go to Durban on 04 December 2011 to do the SAB contract. On 05 December 2011 he liaised with the Human Resources Manager and they attempted to calm the drivers down in order to understand their viewpoint and give them the opportunity to talk to their representative union.

24.2. The truck drivers were given ultimatums on 05 and 06 December 2011. He drafted the minutes of the meetings on page 13 of Bundle B, but was not present on 04 December 2011.

24.3. On 05 December 2011 the Respondent's Human Resource Manager faxed a copy of the ultimatum to the union.

24.4. On 19 December 2011 the Applicant arrived at work at 08h24. The truck drivers normally arrive around 06h00. He called the Applicant into a meeting and told him that they are continuing with the process. He prepared minutes of the meeting.

24.5. He told the Applicant that if he refuses to go to Durban for the SAB contract he will be dismissed. He gave him time to think about this and the Applicant left his office. After $\pm$ 5 minutes he went out to look for the Applicant but could not find him. He asked the Security Officers but they did not know where he was. The Applicant came back after 16h00. The Applicant refused to go to Durban and Pantsi later issued the first ultimatum around 17h10. In the ultimatum the Applicant was advised that he was participating

in an industrial action which is unprocedural, unprotected and unlawful and was asked to give reasons why he deemed the industrial

action was protected.

24.6. On 03 January 2012, the Applicant reported for duty at 11h15. He was required to report for duty at 6h00 and he did not give reasons for arriving late. During the meeting he refused to go to Durban for the SAB contract and he (Pantsi) adjourned the meeting as a result of an electric power shut down in the Alberton area.

24.7. On 04 January 2012 the Applicant refused to go to Durban for the SAB contract and he issued a second ultimatum and read it to the Applicant who took it and went out of his office. Around 11h00 the Applicant came back into his office and wanted him to sign a letter. He refused to sign the letter as he was not present during the meeting on 04 December 2011. He issued the final ultimatum

and expected him to go to the union in order “to see if they can change his mind”. The Applicant did not go back to him saying that he was not on an unprotected strike and he only said that he was sick.

[25] The Applicant testified that:

25.1. On 22 October 2007 he was employed by the Respondent as a truck driver earning a weekly salary of R1400.00.

25.2. On 03 December 2011 he loaded goods at Piet Retief, Mpumalanga Province, in order to offload at a client in Polokwane, Limpopo Province. On his way to Limpopo he received a phone call from Juan Henning who instructed him to attend a meeting on 04 December 2011 at 10h00 at the Respondent's depot in Alrode, Alberton. He was instructed to offload the goods at the depot in Alrode. He then contacted the union as he suspected that something was not going well.

25.3. On 04 December 2011, he attended the meeting as instructed and during the meeting Henning told them that the Respondent has acquired a contract with the SAB to deliver goods between Durban and the Eastern Cape. In terms of the service agreement with the SAB two drivers are required to operate a truck for 24 hours, which is 12 hours a shift per driver. The drivers will be paid 9 hours normal pay and 3 hours overtime. The drivers advised Henning that

they were prepared to go to Durban, but the issue of payment should be addressed with the union. Henning adjourned the meeting several times as he was speaking to the Respondent's Managing Director on the phone and he refused the union representative access to the premises. The union representative then left as he was not allowed to enter the premises. He advised Henning that he was sick and will be consulting the Medical Practitioner on Monday, 05 December 2011.

25.4. On 05 December 2011 he consulted a medical practitioner and was booked off from 05 December 2011 until 07 December 2011.

25.5. On 08 December 2011 he went back to the Medical Practitioner as he was not getting better and was again booked off until 09 December 2011.

25.6. On 12 December 2011 another Medical Practitioner booked him off due to ill-health until 13 December 2011. On 14 December 2011 the Medical Practitioner extended his sick days until 14 December 2011. On 15 December 2011 he contacted the Respondent's office and asked for annual leave, which was approved by the Respondent.

25.7. On 19 December 2011 he reported for duty and Henning told him to go to Pantsi. He went to Pantsi and gave him the medical certificates referred to above. In a meeting held on 19 December 2011 attended by himself, Henning and Pantsi, he was asked by Henning if he would go to Durban for the SAB contract and he responded that he was prepared to go to Durban but he was not feeling well (sick). The meeting was adjourned for lunch and he went outside to buy food and thereafter went into the Respondent's boardroom where he ate the food and waited for Pantsi in order to continue with the meeting.

25.8. After 16h00 Pantsi came to him and asked why his phone was off. He asked Pantsi for the phone number that Pantsi called and it was clear that the phone number was not his and was unknown to him. The meeting continued and Henning asked him if he was prepared to go to Durban and he said he was prepared. Henning then said he must sign a contract to the effect that he will be paid 9 hours and 3 hours overtime. He refused to sign the contract. Henning was in possession of the documents when explaining to him the terms of the said contract. Henning then said because he was refusing to sign the contract that meant that he was refusing to go to Durban

and Henning instructed Pantsi to give him an ultimatum and he was instructed to report for duty on 20 December 2011.

25.9. On 20 December 2011 he phoned and advised Pantsi that he was at the Medical Practitioner's consultation room and after being examined he was booked off until 22 December 2011. On 23 December 2011 he was again booked off by the Medical Practitioner as he was still sick.

25.10. On 27 December 2011 whilst he was on the way to work he had a breakdown and immediately contacted Henning to advise him about this predicament. Henning told him to come back to work when his vehicle has been repaired. On 30 December 2011 he received a telegram to report for duty on the same date.

25.11. On 03 January 2012 he reported for duty around 07h00 and used the main gate to enter the Respondent's premises (not the small gate with access report). The meeting was held around 11h30 and Henning again asked him if he was prepared to go to Durban to do the SAB contract. He responded that he was prepared to go to Durban to do the SAB contract. Henning once again insisted that for him to be allocated to Durban he must first sign the contract agreeing that he will be paid 9 hours and 3 hours overtime. He refused to sign the said contract and the meeting was adjourned due to an electrical power failure around the Alberton area.

25.12. On 04 January 2012 he reported for duty. Again Henning asked if he was prepared to go to Durban in order to do the SAB contract. He responded that he was prepared to do so. However, Henning told him that before he could allocate him to Durban he must sign a contract. He refused to sign the contract and advised them that the issue of payment should be addressed with the union and Henning instructed Pantsi to issue the second ultimatum. Pantsi issued the ultimatum and adjourned the meeting until 11h00. He went back after 11h00 and the meeting continued. Henning again asked him if he was ready to go to Durban for the SAB contract and he advised

them that he was sick. At around 13h00 Pantsi issued him with a final ultimatum and a letter of dismissal.

Analysis

of Evidence

- [26] Under cross examination Henning accepted that the relevant days for the Respondent's contention are 4 December 2011, 19 December 2011 and 4 January 2012. He was not dismissed on 6 December 2011 together with the other striking drivers because he was off sick from 5 December 2011 and his continued absence on the days following was accepted.
- [27] Henning conceded that the Applicant was dismissed without convening a disciplinary hearing for him. Pantsi justified this on the basis that no hearings were convened in respect of other drivers either.
- [28] Pantsi stated that the Applicant's union was not contacted in relation to his participation in the strike. However, Henning's tenor of evidence is that the Applicant is a shopsteward of SATAWU and was familiar with his rights under the circumstances. The Applicant says that he was in the position for only 5 months and had not gone for training as a shopsteward.

- [29] Nothing much turns on most of the evidence tendered by both parties save to determine whether the Applicant embarked on an unprotected strike on 4 December 2011 and continued in this conduct despite ultimatums to return to work which were later issued against him. The second issue is whether the Respondent could issue a notice of dismissal despite having not held a disciplinary hearing when the ultimatums refer to the Applicant being subjected to a hearing if he does not comply.
- [30] Mr Mphepya, for the Applicant has referred me to the definition of a strike in section 213 of the LRA which defines a “strike” as meaning:
- “... the partial or complete concerted refusal to work, or the retardation or obstruction of the work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory”.*
- [31] It is submitted on behalf of the Applicant that in terms of the principle and definition of “strike” in *Schoeman & Another v Samsung Electronics SA (Pty) Ltd*[1] when all the other strikers were dismissed on 6 December 2011 and the Applicant was the only remaining “striker”, his conduct no longer constituted a strike but a breach of his employment contract.
- [32] It is submitted further that the failure by the Respondent to hold a disciplinary action renders the dismissal both substantively and procedurally unfair.[2]
- [33] In regard to the need to hold a disciplinary hearing this was referred to in the ultimatum of 19 December 2011 where it was stated that the Respondent “may take disciplinary action against you which may result in your dismissal”. In the ultimatum of 4 January 2012 at 7h30 it was stated that the Respondent “shall institute disciplinary action against you and a sanction of dismissal may be imposed” if the Applicant does not return to work by 11h00. However, in the final ultimatum of 4 January 2012 at 11h30 it was stated that:

“Our earlier discussions and the third ultimatum refer.

We have noted that you have continued to participate in your unprotected strike action, despite receiving the ultimatums referred to above.

You have therefore refused to comply with the above ultimatums.

You are hereby given a final opportunity to return to work by 13:00 today, 04 January 2012, and to commence your duties in terms of your contracts of employment. In the event that you do not return to work, you are given the opportunity, either individually, or through your representatives, to provide the Company with reasons why your services should not be terminated at 13:00 on 04 January 2012.

In the event that you do not heed this ultimatum, and do not provide any reasons why you should not be dismissed, the Company will make a decision in this regard by 13:30 on 04 January 2012. If reasons are provided, the Company will consider such and make a decision in this regard by 13:30 on 04 January 2012.”

[34] Was the Respondent entitled to dismiss the Applicant without a hearing in terms of the final ultimatum? In *Modise & Others v Steve’s Spar (Blackheath)*[3] it was stated that:

"A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur or, at least ought to occur, at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such, representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to elicit any information or explanations from the workers but to give the workers the opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The consequence of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequence of a failure to comply with an ultimatum is usually, and is meant to be, a dismissal. In the case of a hearing the employee is expected to use the opportunity to seek to persuade the employer that he/she is not guilty and why he/she should not be dismissed. In the case of an ultimatum the employee is expected to pursue the opportunity provided by an ultimatum to reflect on the situation, before deciding whether or not he will comply with the ultimatum. In the light of all these differences between the audi rule and the rule requiring the giving of an ultimatum, there can be no proper basis, in my judgment, for the proposition that the giving of a fair ultimatum is or can ever be a substitute for the observance of the audi."

[35] The *Steve’s Spar* dicta have been followed in the cases of *Masilela & Others v Reinhardt Transport (Pty) Ltd & Others*[4], *SA Clothing and Textile Workers Unions & Others v YarnTex (Pty) Ltd t/a Bertrand Group*[5] and *South African Transport and Allied Workers Union on behalf of Langa & Others v Zebediela Bricks (Pty) Ltd & Others*[6] to the effect that a hearing is not necessary in circumstances where an employee fails to respond where the opportunity to make

representations “to seek to persuade the employer that he/she is not guilty and why he/she should not be dismissed” is not taken.

[36] The Applicant therefore acted to his detriment when he failed to heed the wording of the ultimatums, especially the final ultimatum.

[37] It remains for me to determine whether the Applicant’s conduct constituted a strike when he was the only striker remaining. The Applicant was part of a strike that commenced on 4 December 2011. Whereas the other strikers were dismissed on 6 December 2011 the same action could not be taken against him because he was not present at work from 5 December 2011 and could justify his absence on the basis of sick leave and other reasons. He was given an opportunity to contradict the Respondent’s allegation that he

was continuing with a strike that he and others embarked on on 4 December 2011 when the ultimatums were issued against him. He failed to contradict the Respondent.

[38] I find therefore that in the context of a strike which resolves itself by dismissals of all strikers but one, or by other means such as the termination of a strike by all others but one, the nature of the strike does not change from its original nature. The remaining striker remains being on strike.

Costs

[39] There is no reason why costs should not follow the result.

[40] I therefore make the following order:

1. The dismissal of the Applicant was both substantively and procedurally fair.
2. The Applicant union and the Applicant are to pay the costs, jointly and severally, the one paying and the other to be absolved..

G MALINDI

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr. K. F. Maphepya of Mabaso Attorneys

For the Respondent: Ms N. Chenia of Cliffe Dekker Hofmeyer Attorneys

[1]

[1997] 18 ILJ 1098 (LC)

[2] TGWU & Others v Coin Security Group (Pty) Ltd

[2001] 4 BLLR 458 (LC) @ [74] – [75]

[3] 2001 (2) SA 406 (LAC); (2000) 21 ILJ 519 (LAC) @ [73]

[4]

(2010) 31 ILJ 2942 (LC) @ [56]

[5]

(2010) 31 ILJ 2986 (LC) @ [91]

[6]

(2011) 32 ILJ 428 (LC) @ [18]

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